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The Revival of Impeachment as a Partisan Political Weapon

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The Revival of Impeachment as a Partisan Political Weapon

by RICHARD K. NEUMANN JR *

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I. Introduction

Impeachment—the procedure through which the House of Representatives accuses and then prosecutes a federal official in the Senate with the aim of removing him or her from office—has historically had either of two purposes. One has been to oust in a nonpartisan or bipartisan manner a corrupt official who abuses power and thereby damages the country. The other has been to inflict, for partisan reasons, a political blow on an official whose conduct the impeaching Representatives simply dislike. Because the second purpose is much less acceptable, the impeaching Representatives attempt to disguise their purpose even when voting on strictly party lines. Together, these two purposes represent the dual personality of impeachment.

Beginning soon after the formation of the federal government, impeachment was used as a partisan political weapon. After the failed impeachment of President Andrew Johnson in 1868, a long period of largely nonpartisanship and bipartisanship in impeachments ensued.¹ But since 1968, some elements in the Republican Party have been willing to use impeachment as a partisan weapon; to inflict political damage on their opponents and as part of a campaign to control the Supreme Court and the lower federal courts. For example, in 1969, Republican President Richard Nixon's Administration built a case against Justice Abe Fortas that it would have submitted to the House of Representatives for impeachment if Fortas had not made that unnecessary by resigning.² Then, in 1970, Nixon's Administration built an impeachment case against Justice William O. Douglas. Gerald Ford, then House Republican Minority Leader, introduced an impeachment resolution on the floor of the House. But House Democrats outmaneuvered Ford by creating a committee to investigate the charges, which found no grounds for impeachment.³ Abundant historical evidence demonstrates that the Nixon Administration's purpose in each instance was to create a Supreme Court vacancy for Nixon to fill.⁴

Those events were seen at the time as aberrations peculiar to the Nixon Administration. But in 1997, House Republican Majority Whip Tom DeLay began threatening to impeach judges who decided cases

1. See *infra* text accompanying notes 497-705.

2. See *infra* text accompanying notes 732-781.

3. See *infra* text accompanying notes 811-846.

4. See *infra* text accompanying notes 707-718, 740, 750-758, 823-826.

contrary to his beliefs. "I advocate impeaching judges who consistently ignore their constitutional role, violate their oath of office and breach the separation of powers," wrote DeLay in the *New York Times*. "The framers provided the tool of impeachment to keep the power of the judiciary in check."⁵ "The judges need to be intimidated," DeLay said a few months later; "[t]hey need to uphold the Constitution;" if they don't, "we're going to go after them in a big way."⁶

In 1998, House Republicans impeached President Bill Clinton. This was the second time that a president, and the first time that an elected president, had been impeached. In the trial that followed, the House impeachment managers failed to persuade even a simple majority of the Senate to convict, much less the two-thirds required by the Constitution.⁷

In 2005, former House Speaker Newt Gingrich wrote that "the Ninth Circuit judges who found the motto 'one nation under God' unconstitutional could be considered unfit to serve and be impeached."⁸ Republican Representative Tom Feeney, a co-sponsor of a House resolution that would denounce judges who cite foreign law in interpreting U.S. law, said that a judge who persisted in citing foreign sources may be subject to the "ultimate remedy" of impeachment.⁹

Later in 2005, after Congressional Republicans enacted legislation intended to cause federal courts to order the reinsertion of Terri Schiavo's feeding tube, some Republicans threatened to impeach the judges who declined to do so. DeLay, who had become House Majority Leader, cautioned that "[t]he time will come for the men responsible for this to answer for their behavior." DeLay went on to complain of what he called "an arrogant and out of control judiciary that thumbs its nose at Congress and the president."¹⁰ Senator Tom Colburn's chief of staff told a meeting of Jerry Falwell and other activists, "I'm in favor of mass impeachment if

5. Tom DeLay, Letter to the Editor, *Impeachment Is a Valid Answer to a Judiciary Run Amok*, N.Y. TIMES, April 6, 1997, at A18.

6. Joan Biskupic, *Hill Republicans Target "Judicial Activism," Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1.

7. See *infra* text accompanying notes 849-997.

8. NEWT GINGRICH, *WINNING THE FUTURE: A 21ST CENTURY CONTRACT WITH AMERICA* 78 (2005) (referring to *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)).

9. Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10.

10. *Id.*; see also Jonathan Ringel, *11th Circuit's Birch Keeps Them Guessing*, FULTON COUNTY DAILY REP., Apr. 11, 2005 (discussing how Judge Birch was "the subject of impeachment calls from angry lawmakers").

that's what it takes."¹¹ Similarly, DeLay talked of Congress removing judges who lacked "good behavior."¹²

Still later in 2005, some Republicans began to threaten to impeach Justice Anthony Kennedy.¹³ At the time, Republicans had become increasingly nervous that Kennedy, like Justices Harry Blackmun, Lewis Powell, John P. Stevens, Sandra Day O'Connor, and David Souter before him,¹⁴ was evolving from the right wing toward the center or further. This evolution had been evidenced by his opinions for the Court holding unconstitutional the imposition of the death penalty on a defendant who committed the crime while under the age of eighteen,¹⁵ the criminalization of gay or lesbian sex,¹⁶ the prohibition of local governments from enacting ordinances protecting gays and lesbians from discrimination,¹⁷ and the incorporation of prayer into a public school graduation,¹⁸ as well as his concurrence in decisions holding the execution of a mentally ill murderer to be unconstitutional¹⁹ and reaffirming a constitutional right to abortion.²⁰

This might seem like the talk of Jacobins. But the Republican use of impeachment—actual impeachment against Clinton in 1998-1999, threatened impeachment to create Supreme Court vacancies in the Nixon Administration, and threatened impeachment to intimidate judges more recently—is well supported by precedent in American history.

Historically, there have been four great confrontations between or among branches of the federal government: (1) the struggle between the Federalist-dominated judiciary on one hand, and the Jefferson

11. Ruth Marcus, *Booting the Bench: There's New Ferocity in Talk of Firing Activist Judges*, WASH. POST, Apr. 11, 2005, at A19; see also Nina J Easton, *Rift Emerges in GOP after Schiavo Case*, BOSTON GLOBE, Apr. 9, 2005, at A1.

12. Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1.

13. Ann Althouse, *Innocence Abroad*, N.Y. TIMES, Sept. 19, 2005, at A25 (noting that Kennedy "endured calls for his impeachment" because he cited foreign law); DeParle, *supra* note 12 ("[S]ome notable conservatives are calling for his impeachment."); Jesse J. Holland, *DeLay Criticizes Justice Kennedy, 'Activist' Republican Judges*, ASSOCIATED PRESS, Apr. 21, 2005, available at <http://www.law.com/jsp/article.jsp?id=1113987908498>; Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3; Marcus, *supra* note 11 ("What started as 'Impeach Earl Warren' . . . has now become 'Impeach Tony Kennedy' . . .").

14. See Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV., Jan.-Feb. 2006, available at <http://bostonreview.net/BR31.1/hansonbenforado.html>.

15. *Roper v. Simmons*, 543 U.S. 551 (2005).

16. *Lawrence v. Texas*, 539 U.S. 558 (2003).

17. *Romer v. Evans*, 517 U.S. 620 (1996).

18. *Lee v. Weisman*, 505 U.S. 577 (1992).

19. *Atkins v. Virginia*, 536 U.S. 304 (2002).

20. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Administration and Jeffersonian Congress on the other in the early years of the nineteenth century; (2), from 1865 to 1869, the confrontation between President Andrew Johnson and the Radical Republican Congress over Reconstruction; (3) the conflict, which peaked in 1937, between the Administration of Franklin D. Roosevelt and a Supreme Court that repeatedly struck down his New Deal legislation as unconstitutional; and (4) the on-going struggle, which began in 1968, in and between the two elected branches on several issues but, most particularly, over the composition of the Supreme Court. Impeachment as a highly partisan exercise of legislative power, in which one branch of government attacks another, played a central role in all of these confrontations except the struggle between Roosevelt and the Supreme Court.

This article compares the use of impeachment in each of these confrontations as well as other uses of impeachment. Part II describes how delegates at the Constitutional Convention understood English impeachment and why they drafted the constitutional impeachment provisions as they did. Part III explains how, from the first impeachment in 1797 through the trial of Andrew Johnson in 1868, impeachments, actual and threatened, were based on reasoning and rhetoric very much like those expressed and acted upon by Republicans since the Fortas episode in 1969. Part III also explains how, after 1868, a parallel tradition of impeachment evolved through mundane procedures—nonpartisan and bipartisan—for separating corrupt judges from their constitutional lifetime tenure, and how impeachment practice is now evolving further to incorporate both the partisan and the nonpartisan. Parts IV and V consider the effects of the re-emergence of partisan impeachment since 1969. Part IV explores whether the use of impeachment and impeachment threats as a partisan political strategy is likely to continue. Part V concludes that, despite its superficial strategic appeal, partisan political impeachment for the most part fails to produce the results its advocates seek.

Some of what occurred during earlier eras of partisan impeachment will seem familiar to us today. For example, during the Adams and Jefferson Administrations, attack politics like those we experience now, including accusing political opponents of treason and near-treason, dominated the political culture, and partisan impeachments were an inherent part of that culture.²¹ Some historical figures, on the other hand, behaved in surprising ways. Chief Justice John Marshall, for example, feared impeachment by Thomas Jefferson's party in Congress. Marshall routinely behaved in ways that would violate modern judicial ethics, and

21. See *infra* Parts III(A)-(B).

would have been required, under modern conflict-of-interest law, to recuse himself from some of the foundational cases in constitutional law.²² Jefferson's letters to his subordinates during the most partisan disputes of his Presidency reveal obsessions on his part similar to those expressed by President Nixon on the White House Watergate tapes (though without Nixon's dishonesty, vulgarity, and lack of imagination).²³ And during the trials of Aaron Burr, Jefferson invented transactional immunity, by plea bargaining directly with some potential witnesses and by providing the prosecutor with blank signed presidential pardons to be given to any witness the prosecutor wished separately to immunize.²⁴ Several decades later, immediately before President Andrew Johnson was impeached, he tried to form a large army unit that would bypass the ordinary chain of command and be answerable personally to him so that he could use it against his political opponents if he wished.²⁵

Some aspects of the Clinton impeachment have not commonly been understood. For example, the procedural safeguards observed by the House Judiciary Committee and the special prosecutors to prevent partisanship in the impeachment of President Nixon were ignored during the Clinton impeachment.²⁶ The evidence of a right-wing campaign to destroy the Clinton Presidency, beginning almost immediately after his inauguration in 1993 and culminating in impeachment in 1998, is abundant, though much of it became available only *after* Clinton left office.²⁷ And the evidence that Justice Clarence Thomas committed perjury during his confirmation hearings compares favorably with the perjury case against Clinton.²⁸

Compared with the past, the political context in which we live today is not quite what it appears to be. Although the Republicans controlled both Houses of Congress almost continually from 1995 to 2007, they did so through margins that are razor-thin by historical standards—thinner by far than those of any other party during any period of comparable length in American history.²⁹ For example, in the elections that produced the Senate that confirmed Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006, more votes were cast for Democratic candidates than for

22. See *infra* Part III(B).

23. See *infra* Part III(B).

24. See *infra* Part III(B).

25. See *infra* Part III(D).

26. See *infra* Parts III(E)(5), III(F)(2), and IV(B).

27. See *infra* Part III(F)(2).

28. See *infra* Parts III(F)(2) and IV(A).

29. See *infra* Part IV(C).

Republican candidates. In essence, the public voted for a Democratic Senate but got a Republican one.³⁰ Party insecurity produced by situations like this has a substantial role in encouraging partisan impeachments. The Jeffersonians who impeached Justice Chase, the Radical Republicans who impeached Andrew Johnson, and the Republicans who impeached Clinton were all new to power, insecure about their ability to hold on to it, and driven to use what power they had while they had it. In contrast, the Democrats in the constitutional confrontation of 1937 had some of the most massive congressional majorities in American history, could look toward the future with confidence that problems could be solved without assaults on individual judges, and therefore did not consider impeaching anybody.

II. The Adoption and Meaning of Constitutional Provisions on Impeachment

Historically, impeachment had a significant role in the diminution of monarchical power in England and imperial power in the American colonies. In England, impeachment was a tool through which "Parliament, after a long and bitter struggle, made ministers chosen by the King accountable to it rather than the Crown."³¹ In the struggle between monarch and legislature, "Parliament indulged in the fiction that the King could do no wrong but was misled by his ministers."³² Against that background, impeachment was understandably considered by the drafters of the Constitution to be an ordinary political device, consistent with reasonable government.

Although the House of Commons was at times eager to use impeachment as a weapon to depose officials it did not like, or even to punish private citizens who held no office, it tended not to impeach "without evidence of some wrongdoing, negligence, or betrayal of public trust."³³ If the House of Commons set the bar of impeachment any lower there was no chance of conviction in the House of Lords, where "proceedings were more often than not fair, dignified, and learned," though

30. See *infra* Part IV(C).

31. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 1 (1973); see, e.g., *id.* at 2-3, 7-53. Berger's analysis of impeachment history in general has been criticized, sometimes with sound reason. See, e.g., PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 266-70 (1984). Where his views are idiosyncratic, they are ignored here or are reported along with contrary opinions.

32. BERGER, *supra* note 31, at 2.

33. HOFFER & HULL, *supra* note 31, at 6.

there were ample instances of abuse.³⁴ For example, the House of Commons impeached an Anglican priest named Sacheverell, who held no government office but criticized the Glorious Revolution of 1689 from the pulpit.³⁵ The public reaction was so negative that the Whigs, who prosecuted Sacheverell, were turned out in favor of the Tories.³⁶

In the colonies, impeachment, like the common law jury, acquired an honorable reputation because it offered a tool for resistance to the Crown. Although not legally authorized to do so, colonial assemblies at times impeached offensive colonial officials. The impeachments might have been technically without effect, but they represented such an extreme form of protest that the impeached officials often resigned or the Crown withdrew them.³⁷ The last of the colonial impeachments occurred in 1774, the year before Lexington and Concord, when the Massachusetts General Court—a legislature, despite its name—impeached the Crown’s chief justice in the colony³⁸ for “obeying a directive from the crown,” which began the collapse of British government in Massachusetts.³⁹

During the Revolution of 1775-1783, the new state governments began to use impeachment as a vehicle to remove officials for routine abuse of their offices.⁴⁰ Having used it as a tool of rebellion, “the Revolutionaries had absorbed impeachment into a republican system” and made it an ordinary facet of government.⁴¹ At this point impeachment had already acquired its dual personality: it could be a non-partisan device for removing officials or it could be a partisan political weapon. At the time the Constitutional Convention met in Philadelphia in 1787, most of the thirteen original states had impeachment provisions in their own constitutions.⁴² The constitutional provisions spread to newly admitted states and were frequently used. “From 1776 to 1805, New Jersey had nine [impeachment] trials, Vermont six, Massachusetts and Pennsylvania four apiece, South Carolina and Kentucky three each, Tennessee two . . . , and

34. *Id.*

35. *Id.* at 7-8.

36. *Id.*

37. *Id.* at 6-56.

38. *Id.* at 49-55.

39. *Id.* at 59.

40. *Id.*

41. *Id.*

42. *Id.* at 64, 68.

Georgia one.”⁴³ Today, every state constitution except Oregon’s contains impeachment provisions.⁴⁴

When the Constitutional Convention met in Philadelphia, British impeachment abuses were on the delegates’ minds,⁴⁵ and they methodically added restrictions to prevent such abuses. For example, in England, a judgment of conviction on an impeachment could include criminal penalties, including imprisonment,⁴⁶ but at the Constitutional Convention, the delegates limited the judgment of conviction to “removal from office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States.”⁴⁷ Although in England anybody except a member of the royal family could be legislatively tried and punished through impeachment,⁴⁸ the Constitutional Convention limited the jurisdiction of impeachment to “[t]he President, Vice President and all civil Officers of the United States.”⁴⁹ And while the House of Lords could convict by a simple majority,⁵⁰ the Constitutional Convention decided to permit conviction in the Senate only by a two-thirds super-majority.⁵¹ The Constitutional Convention also rejected some other aspects of English impeachment. For example, the head of state is impeachable in the United States (the president),⁵² but was not in England (the monarch).⁵³ And

43. *Id.* at 77; *see also id.* at 78-95.

44. Keith A. Scarborough, Comment, “*The Awful Discretion*”: *The Impeachment Experience in the States*, 55 NEB. L. REV. 91, 91 n.2 (1975); *see also* N.E.H. Hull & Peter Charles Hoffer, *Historians and the Impeachment Imbrolio: In Search of a Serviceable History*, 31 RUTGERS L.J. 473, 481-82 (2000); Impeachment can still play an important role in state government. *See* Robert Jerome Glennon, *Impeachment: Lessons from the Meacham Experience*, 30 ARIZ. L. REV. 371 (1988); Scarborough, *supra* at 93.

45. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

46. HOFFER & HULL, *supra* note 31, at 97; Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 605 (1999).

47. U.S. CONST. art. I, § 3, cl. 7.

48. HOFFER & HULL, *supra* note 31, at 4-5; Gerhardt, *supra* note 46, at 605.

49. U.S. CONST. art II, § 4. It was not immediately clear what categories of persons in the pay of the United States were “civil Officers,” except that military officers were not included. The first impeachment decided whether a Senator is a “civil officer.” *See infra* text accompanying notes 91-150.

50. HOFFER & HULL, *supra* note 31, at 97; Gerhardt, *supra* note 46, at 605.

51. U.S. CONST. art. I, § 3, cl. 6.

52. U.S. CONST. art. II, § 4.

53. Gerhardt, *supra* note 46, at 605. This is different from a bill of attainder, which the U.S. Constitution forbids in Article I, Section 9. A bill of attainder punishes a specific person through a statute—for example, Congress passing a statute requiring that the artist sometimes known as Prince shall pay a fine of a million dollars unless he uses, for the rest of his life, a first and a last name. An impeachment, on the other hand, is a trial conducted by a legislature. Because the English Parliament refused to limit its jurisdiction to officeholders and to pre-defined offenses, and because English impeachments could lead legislatively to criminal penalties, the House of

although the English monarch could pardon an impeachment conviction,⁵⁴ the American president cannot.⁵⁵

Perhaps the most perplexing issue for the delegates concerned a definition of the offenses for which a "civil Officer" could be impeached. There was no limitation in English law: *anything* could be an impeachable offense.⁵⁶ The delegates vacillated on this issue. On August 20, 1787, the Committee of Five recommended that officials be removable through impeachment for "neglect of duty malversation or corruption."⁵⁷ On September 8, when it was proposed to limit impeachment to cases of treason or bribery, George Mason objected that:

Treason as defined in the Constitution^[58] will not reach many great and dangerous offences. Hastings^[59] is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined. As bills of attainder which have saved the British Constitution are forbidden,^[60] it is the more necessary to extend the power of impeachments.⁶¹

Mason moved to add "maladministration" as an impeachable offense.⁶² James Madison countered that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate."⁶³ Mason "withdrew 'maladministration' [and] substitute[d] 'other high crimes [and] misdemeanors [sic] ag[ainst] the State,'" and the amended motion was adopted by a vote of eight states to three.⁶⁴ Almost immediately, the

Commons was free to impeach, and the House of Lords to convict and imprison, an ordinary person for using only one name, even if no one had previously thought that wrong. No English impeachment had ever gone anywhere near such an extreme, but the delegates to the Constitutional Convention instinctively distrusted this kind of open-ended power in English government.

54. *Id.*

55. U.S. CONST. art. II, § 2, cl. 1.

56. Gerhard, *supra* note 46, at 605.

57. JAMES MADISON, THE WRITINGS OF JAMES MADISON, VOLUME IV 244 (Gaillard Hunt ed., 1903).

58. "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3, cl. 1. Mason spoke on the grounds for impeachment on September 8, 1787, and the definition of treason had been settled on August 20. MADISON, *supra* note 57, at 246-52, 407 (detailing the proceedings on Aug. 20 and Sept. 8, 1787).

59. Warren Hastings, Governor General of the East India Company, whose tortuously complicated impeachment trial lasted from 1788 to 1795. HOFFER & HULL, *supra* note 31, at 96-97.

60. U.S. CONST. art. I, § 9; *supra* note 53 (discussing bill of attainders).

61. MADISON, *supra* note 57, at 407 (chronicling the events of Sept. 8, 1787).

62. *Id.*

63. *Id.*

64. *Id.*

delegates voted to change “State” to “United States . . . in order to remove ambiguity.”⁶⁵ The result was the list of impeachment grounds in the Constitution today: “Treason, Bribery, or other high Crimes and Misdemeanors.”⁶⁶

The phrase “high Crimes and Misdemeanors” was not invented in Philadelphia. It had been part of English impeachment practice for centuries, having first appeared as a ground for impeachment in 1386.⁶⁷ It was the ground for the Warren Hastings impeachment,⁶⁸ which was contemporaneous with the Constitutional Convention.⁶⁹ And it accounted for twenty-six of the fifty-six⁷⁰ English impeachments from 1642 to the time of the Constitutional Convention.⁷¹

But the phrase did not come into the Constitution with its meaning clear. Part of the problem was contextual: in this new form of government, what characteristics would make a crime “high?” The English impeachment precedents provide no clear guidelines, and the words were often used as rhetoric rather than to communicate actual meaning. “Sometimes the English cases seem to prove too much, treating as ‘high Crimes and Misdemeanors’ petty acts of maladministration which no sensible person could think impeachable offenses in a president, or in anybody.”⁷² This seems nonsensical until one recalls that at that time the modern parliamentary method of dislodging an unacceptable minister—the vote of no confidence—had not yet been invented, and the English Parliament was reduced to using accusatory formats to remove appointees of the Crown.⁷³

The Constitutional delegates did not work out a definition in Philadelphia. Their drafting style, which produced by far the shortest constitution of any modern country, was to sketch out a general outline, add a few specifics about which they felt strongly, and leave it to

65. *Id.* at 409.

66. U.S. CONST. art. II, § 4.

67. CHARLES L. BLACK, JR., *IMPEACHMENT, A HANDBOOK* 49 (1974); ALEXANDER SIMPSON, JR., *A TREATISE ON FEDERAL IMPEACHMENTS* 86 (1916) (Partially published in two parts as Alex Simpson Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 803 (1916); citations here are to the book rather than to the articles, which are incomplete).

68. P.J. MARSHALL, *THE IMPEACHMENT OF WARREN HASTINGS*, at xiv (1965).

69. SIMPSON, *supra* note 67, at 167.

70. Of the remaining impeachments, eighteen were for “high treason,” and eight used a combination of the two phrases, leaving only four impeachments based on grounds that did not make their way into the Constitution. *Id.* at 117-67.

71. *Id.*

72. BLACK, *supra* note 67.

73. See BERGER, *supra* note 31, at 2.

interpretation to fill in the rest. But a consensus of scholars⁷⁴ and the federal impeachment precedents agree that, as Michael Gerhardt puts it:

The phrase "other high Crimes and Misdemeanors" consists of technical terms of art referring to "political crimes" . . . [which] were not necessarily indictable crimes. Instead, "political crimes" consisted of the kinds of abuses of power or injuries to the Republic that only could be committed by public officials by virtue of the public offices or privileges they held. Although the concept "political crimes" uses the term "crimes," the phrase did not necessarily include all indictable offenses. Nor were all indictable offenses considered "political crimes."⁷⁵

A second part of the problem is that over time words tend to acquire new meanings. The drafters did not require "high felonies or misdemeanors," although the modern ear might hear something like that when "high Crimes or Misdemeanors" is said. It was not unknown in the eighteenth century to refer to crimes less serious than felonies as misdemeanors. Blackstone did.⁷⁶ But modern criminal codes, with finely worked out differentiations among degrees of criminality, came only later, giving us today the impression that a misdemeanor could only be a crime. At the time of the Constitutional Convention, "demeanor" meant what it still means today on elementary school report cards: behavior. "Misdemeanor" was misbehavior.⁷⁷ Sound evidence that this is what the delegates meant in Article II appears in the Article III provision creating lifetime tenure for federal judges: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."⁷⁸ Even though a misdemeanor in the criminal sense would always be a low offense and never a "high" one, twentieth century folklore assumed that "high crimes and misdemeanors" was a quaint way of saying "felonies and misdemeanors"—which would limit impeachment to crimes. That, however, has never been true.

74. BLACK, *supra* note 67, at 35, 39-40; HOFFER & HULL, *supra* note 31, at 101; CHARLES E. HUGHES, THE SUPREME COURT OF THE UNITED STATES 19 (1928); JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 27-31 (1978); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 796-800 (Melville M. Bigelow ed., 1891); John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 47-58 (1970); Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719, 726-28 (1970); Gerhardt, *supra* note 46, at 609-10.

75. Gerhardt, *supra* note 46, at 610 (footnotes omitted).

76. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 n.6 (1769).

77. BERGER, *supra* note 31, at 53-102.

78. U.S. CONST. art. III, § 1.

A third part of the problem is the appearance, although not necessarily the reality, of textual inconsistency. The grounds for impeachment—"Treason, Bribery, or other high Crimes and Misdemeanors"—are set out in Article II of the Constitution,⁷⁹ which creates and governs the executive branch. The sentence begins "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of," and then the grounds are given.⁸⁰ Placement of this sentence in Article II and the manner in which officials are listed both suggest that it applies only to the executive branch, and that judges are not "civil Officers." Article III, the Judicial Article, provides that "Judges . . . shall hold their Offices during good Behaviour."⁸¹ If judges have "Offices," they might reasonably be considered "civil Officers" and subject to the same impeachment grounds as other impeachable officials, despite the placement of the Impeachment Clause in Article II. In fact, when judges have been impeached, the House of Representatives always accuses them of bribery or other high crimes and misdemeanors.⁸²

What then does the phrase "during good Behaviour" mean in Article III? The drafters intended "Misdemeanor" in the Impeachment Clause to mean the opposite of "good Behaviour,"⁸³ and treason, bribery, and high crimes are, of course, all bad behavior by any form of measurement. But, it has often been argued that judges can be impeached and removed on lesser grounds than would be needed to remove a president or a vice president.

Both structural and textual justifications have been offered to support this view. One structural justification is that the removal of a president—though not of a lesser executive official—disrupts the country, which would care less about removal of a Supreme Court Justice and hardly care at all when a lesser judge is removed. Another structural justification is that federal judges have life tenure and can be removed from office only by impeachment, while presidents and vice presidents serve four-year terms; presidents are subject to term limits under the Twenty-second Amendment; and other executive branch officers can be dismissed by the president. Gerald Ford, among others, made this argument during his unsuccessful

79. U.S. CONST. art. II, § 4.

80. *Id.*

81. U.S. CONST. art. III, § 1.

82. See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT *passim* (1999).

83. See *supra* text accompanying notes 77-78.

attempt to have Justice Douglas impeached.⁸⁴ The textual justification is that the Impeachment Clause in Article II (the Executive Branch Article) requires especially egregious misbehavior (“high . . . Misdemeanors”) and not just misbehavior, which is all Article III (the Judicial Article) requires. There is no way to know whether the Framers left a loose end or made a conscious distinction. The records of the Constitutional Convention contain no debate on the subject. It is true that two judges (Archbald and Ritter)⁸⁵ have been impeached and removed for conduct that was only partly criminal. But that proves little. It is easy to imagine noncriminal conduct that could quickly lead to impeachment of a president, such as a flat-out refusal to do the job combined with a refusal to resign from it.

Even with the limitations imposed by the Constitutional Convention, impeachment remained a partisan political weapon as well as a means of removing the unfit from office. In *The Federalist*, Alexander Hamilton described impeachment as “a method of NATIONAL INQUEST [*sic*] into the conduct of public men.”⁸⁶ Because the circumstances of such an inquest cannot be predicted in advance, impeachment “can never be tied down by . . . strict rules, either in the delineation of the offense by the prosecutors [House managers who prosecute impeachments] or in the construction of it by the judges [Senators who decide both law and fact] as in common cases serve to limit the discretion of courts in favor of personal security.”⁸⁷ This is exactly the justification Congress would offer if it were to respond to criticism over its failure, explained in Part IV(B) of this article, to adopt burdens of production and persuasion.⁸⁸

Hamilton, in fact, frankly admitted that impeachment would be seen as a partisan political weapon. Because a bill of impeachment would allege “abuse or violation of some public trust,” it would be political by nature, its prosecution, as Alexander Hamilton explained:

[W]ill seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that

84. 116 CONG. REC. 11913-14 (1970); VAN TASSEL & FINKELMAN, *supra* note 82, at 59.

85. See *infra* text accompanying notes 518-523, 612-653.

86. THE FEDERALIST NO. 65, at 381 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

87. *Id.* at 398.

88. See *infra* text accompanying notes 1071-1092.

the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.⁸⁹

III. The Evolution of Impeachment Practice

From the first impeachment in 1797 to the most recent one in 1998-1999, impeachment practice has gradually evolved, although in the process it has, in recent decades, circled back toward its starting point. The most recent impeachment (Clinton) has more in common with some of the earliest impeachments (Blount and Chase) and with the 1868 impeachment of Andrew Johnson than it does with any of the impeachments that occurred between 1868 and 1998. During those 130 years impeachments were mostly nonpartisan or bipartisan—although since 1968 some threatened impeachments and attempts at impeachment have been extremely partisan.

A. The First Two Impeachments: Blount and Pickering

In the early years of the federal government, “Congress briefly experimented with using impeachment to remove political opposition.”⁹⁰ The first three impeachment trials all fit this pattern.

Senator William Blount of Tennessee was the first person impeached by the House. Blount was elected to the Senate in 1796 and took his seat in March 1797.⁹¹ “In the fall of 1796 Blount secretly plotted with frontiersmen and Eastern speculators to wrest Louisiana”—the huge territory later purchased by Jefferson, not the modest-sized modern state—“from Spain in order to open the Mississippi Valley to settlers eager to purchase acres of his vast land holdings.”⁹² To accomplish this, Blount organized a private expedition into Spanish territory west of the Mississippi River,⁹³ and hoped for aid from the British, who at the time were fighting a war against Spain in Europe.⁹⁴ In July 1797, evidence of the plot became public, and immediately the Senate, on its own initiative,

89. THE FEDERALIST No. 65 (Alexander Hamilton), *supra* note 86, at 380-81.

90. VAN TASSEL & FINKELMAN, *supra* note 82, at 10.

91. *Id.* at 86.

92. BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 3 (1998); *see also* ELEONORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 26-27 (1992); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 275-76 (1997).

93. BUSHNELL, *supra* note 92; VAN TASSEL & FINKELMAN, *supra* note 82, at 87.

94. BUSHNELL, *supra* note 92, at 27; MELTON, *supra* note 92; VAN TASSEL & FINKELMAN, *supra* note 82, at 87.

expelled him.⁹⁵ At the same time, the House separately impeached him.⁹⁶ The impeachment trial, however, did not begin until December 1798.⁹⁷ Those managing the case against Blount lost interest in prosecuting the case until the election of 1800 approached.

Blount's conspiracy seemed to have had two purposes. First, Blount simply hoped to make money in land sales.⁹⁸ Second, many Westerners, as those who lived in Kentucky and Tennessee were called at the time, viewed such an expedition with sympathy.⁹⁹ Western ambitions looked across the Mississippi, where the vacuum of weak Spanish administration seemed to invite American infiltration.¹⁰⁰ In politics, the Jeffersonian party represented, among other groups, these Western interests, while the Federalists, who controlled all branches of the federal government, were hostile to them. At various times, the Jeffersonians were called the Anti-Federalists, the Democratic-Republicans, and the Republicans—even though they were the ancestors of what we now call the Democratic Party. All these names can be confusing to the modern reader. Here, it will be called the Jeffersonian party. What matters most in this context, and what is most easily remembered today, is that it was led by Jefferson. Blount started out as a Federalist but switched to the Jeffersonian party shortly before his election.¹⁰¹

To modern sensibilities, Blount's conspiracy seems like a fantasy, but intrigues like his were not rare in the Mississippi Valley of his time.¹⁰² It was a frontier, without settled borders.¹⁰³ The governments that claimed the land were far away, and they had few, if any, forces on site to enforce their claims.¹⁰⁴ People on the frontier were not shocked at Blount's actions; in

95. The expulsion was an exercise of the Senate's power to expel a Member for misconduct under U.S. CONST. art. I, § 5, cl. 2, and had nothing to do with impeachment.

96. HOUSE COMM. ON THE JUDICIARY, 93D CONG., IMPEACHMENT: SELECTED MATERIALS 125-28 (Comm. Print 1973) [hereinafter IMPEACHMENT: SELECTED MATERIALS]; CURRIE, *supra* note 92, at 277; VAN TASSEL & FINKELMAN, *supra* note 82, at 86.

97. IRVING BRANT, IMPEACHMENT: TRIALS AND ERRORS 27 (1972).

98. VAN TASSEL & FINKELMAN, *supra* note 82, at 87.

99. *Id.*

100. *Id.* France was the first European power to claim the Louisiana territory. MELTON, *supra* note 92, at 69. In 1763, Spain acquired it. *Id.* Westerners feared that, to get French aid in their war against England, the Spanish would redeed Louisiana back to the French. VAN TASSEL & FINKELMAN, *supra* note 82, at 87. That later happened, and when the French treasury needed replenishing to support Napoleon's wars, the French sold Louisiana to Jefferson, who by then had become President.

101. MELTON, *supra* note 92, at 76-77.

102. *Id.* at 78-93.

103. *Id.*

104. *Id.*

fact, after leaving the Senate he was popular, even revered in Tennessee.¹⁰⁵ But a Senator should not have done it: his conspiracy could be imputed internationally to the United States government, giving Spain solid grounds for grievance.

The Federalists in the House of Representatives continued to prosecute the impeachment case against Blount even though the Senate had expelled him. Their motives were not to remove him from the Senate (he was no longer there) but to disqualify him from taking any future seat in Congress or any other position in the federal government.¹⁰⁶ The Federalists also wanted to establish the principle that anybody, even someone not currently holding any office, could be so disqualified. The English House of Commons could impeach its own members and members of the House of Lords, as well as citizens holding no office at all,¹⁰⁷ but the words of the Constitution—"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment . . . and Conviction . . ."¹⁰⁸—limited that expansive concept of the impeachment power.

Short, capsule descriptions of the Blount impeachment tend to treat it as a simple, though odd, case in which Blount's conduct and status were the only issues.¹⁰⁹ The picture presented is of a somewhat confused, if not naive Senate, in the early days of the Republic, trying earnestly to resolve an ambiguity in the Constitution on the question of whether a legislator could be impeached and convicted. In-depth scholarly analysis, on the other hand, tends to treat it as an example of one party (in this case, the Federalists) using impeachment as a calculated partisan political weapon against the other party.¹¹⁰

The roll call votes in the Senate certainly support the scholarly analysis. There were a number of them in 1798 and 1799, some procedural and others substantive. Of twenty-seven Federalist Senators, twenty-five voted against Blount most of the time; eighteen of them voted against him

105. *Id.* at 37, 235.

106. CURRIE, *supra* note 92, at 280; HOFFER & HULL, *supra* note 31, at 151.

107. HOFFER & HULL, *supra* note 31, at 4-5; Gerhardt, *supra* note 46.

108. U.S. CONST. art. II, § 4.

109. See VAN TASSEL & FINKELMAN, *supra* note 82, at 86-90.

110. BRANT, *supra* note 97, at 24-45; HOFFER & HULL, *supra* note 31, at 151-63; MELTON, *supra* note 92, at 104-74.

all of the time.¹¹¹ Of eleven Senators from the Jeffersonian party, eight voted for Blount most of the time.¹¹²

Perhaps even more corroborative are the other things Congress was doing while it was impeaching Blount. In July 1798, Congress passed the Sedition Act “subjecting all Americans (but especially newspaper editors) to prison terms for libeling the President and Congress.”¹¹³ And “[t]he same two [Federalist] congressmen who actively managed the Blount impeachment trial . . . were in the forefront of the drive for the Sedition Act. In the newspaper campaign for its passage, Federalist editors concentrated on Jefferson, Madison, and Gallatin as traitorous Americans”¹¹⁴ This was an era of hardball politics not unlike our own. The Sedition Act criminalized the Federalists’ adversaries by turning criticism of the Federalists into a crime. It certainly reflected the Federalists’ “disposition to interpret political opposition as treason.”¹¹⁵ The first person convicted under the Sedition Act served a year in prison for publishing the opinion that President Adams was “swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.”¹¹⁶

There is some evidence that the Federalists tried to use the Blount impeachment for similar ends. Federalist Senator Jacob Read introduced a resolution that would end the Blount impeachment trial with a finding that a Senator is not liable to impeachment more “than any citizen of the United States not a member of either House of Congress.”¹¹⁷ In other words, every ordinary citizen (and every Senator) could be impeached¹¹⁸ and punished, on conviction, by “disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”¹¹⁹ Although that would have been unconstitutional, as the Constitution limits the reach of impeachment to “[t]he President, Vice President and all civil Officers of the United States,”¹²⁰ the Federalists had nothing to fear except popular opinion. They controlled the federal judiciary as well as Congress, and the Sedition Act—

111. MELTON, *supra* note 92, at 273-74. Congressional records were not well kept at the time, and not all tallies are included. *Id.* at 273.

112. *Id.* The total number of Senators listed exceeds the membership in the Senate during the period because of changes in personnel due to the 1798 elections.

113. BRANT, *supra* note 97, at 33.

114. *Id.*

115. BUSHNELL, *supra* note 92, at 26.

116. BRANT, *supra* note 97, at 46.

117. *Id.* at 28; HOFFER & HULL, *supra* note 31, at 158; MELTON, *supra* note 92, at 170.

118. CURRIE, *supra* note 92, at 279.

119. U.S. CONST. art. I, § 3, cl. 7.

120. U.S. CONST. art. II, § 4.

also plainly unconstitutional—was eagerly enforced by the courts. The point of impeachment would thus not be limited to removing undesirable people from office. It would be extended to preventing undesirable people from ever assuming office. Candidates for any federal office from the Jeffersonian party could be eliminated from the ballot in this way.¹²¹ Jefferson and Madison were sufficiently worried about this prospect to write anxious letters to each other immediately after the Read resolution was introduced.¹²²

The Federalists did not bring the Read resolution to a vote. “Presumably the Federalists thought it unwise to confront the American people with a declaration of the absolute immunity of senators from impeachment, coupled with the universal liability of private citizens to exclusion from office by that process.”¹²³ The Read resolution, enunciating a doctrine of universal impeachment, represents not what the Federalists succeeded in doing, but instead what at least a faction within them would have liked to have done, if they had thought they could get away with it.

In the impeachment trial, Blount’s lawyers offered several defenses: that he was no longer a Senator; that Senators are not “civil Officers”¹²⁴ subject to impeachment; that whatever he did was not done in the execution of his official duties—and that therefore he was not within the jurisdiction of an impeachment proceeding.¹²⁵ In response, the House managers made Senator Read’s argument: “That all persons, without the supposed limitation [to President, Vice President, and civil Officers of the United States], are liable to impeachment.”¹²⁶

Certainly, there was no nonpartisan reason to prosecute an impeachment, since Blount was no longer in office. One of the House managers, James A. Bayard, who was “in the forefront of the drive for the Sedition Act,”¹²⁷ made it clear in his closing argument to the Senate that the real purpose of the Blount impeachment trial was to establish the principle of universal liability to impeachment and disqualification from future office-holding:

121. HOFFER & HULL, *supra* note 31, at 158.

122. BRANT, *supra* note 97, at 30-31.

123. *Id.* at 31; accord HOFFER & HULL, *supra* note 31, at 158.

124. U.S. CONST. art. II, § 4.

125. BRANT, *supra* note 97, at 36.

126. *Id.* at 37; see also HOFFER & HULL, *supra* note 31, at 158; MELTON, *supra* note 92, at 210. The House managers also argued that a Senator is a civil Officer, but they “placed all their emphasis upon the first point” that anybody can be impeached. BRANT, *supra* note 97, at 37. The details can be found in BRANT, *supra* note 97, at 37-39, and MELTON, *supra* note 92, at 210-14.

127. BRANT, *supra* note 97, at 33.

Let us suppose that a citizen, not in office, but possessed of extensive influence, arising from popular arts [ability to speak to the people], from wealth or connexions, actuated by strong ambition, and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice [criticizing the president and Congress, which were crimes under the Sedition Act], corruption, or force, to place himself in the Presidential chair. I would ask, in such a case, what punishment would be more likely to quell a spirit of that description, than absolute and perpetual disqualification¹²⁸

John Adams, the president and a Federalist, had a year left in his term of office and was not confident of reelection. At the time these words were spoken, Madison held no federal office,¹²⁹ though, nine years later, he was elected president, succeeding Jefferson. Jefferson was in federal office, although Brant speculates that if impeached before the next election, he might have resigned to avoid a trial, and thus these words were aimed at him as well as Madison.¹³⁰ Jefferson was vice president and heard Bayard's speech in the Senate chamber, where he was presiding¹³¹ (before vice presidents became so busy that they delegated this duty¹³² to others). The Federalists controlled all three branches of government, and Jefferson was vice president only because he lost the presidential election of 1796 to John Adams. Until the Twelfth Amendment was adopted in 1803, the vice presidency went to the losing presidential candidate with the largest number of electoral votes.¹³³

According to Brant, "[h]ere was a clear revelation of Federalist party strategy to control the presidential election of 1800 by combining impeachment with the Sedition Act": prosecuting anti-Federalist editors under the Sedition Act while threatening anti-Federalist candidates with impeachment, whether or not they were currently "civil Officers."¹³⁴ Melton, who wrote the most exhaustive study of the Blount impeachment, holds a similar view, though less vividly expressed.¹³⁵ He reports that, "[d]uring the proceedings against Blount, the Federalists had never

128. *Id.* at 44; MELTON, *supra* note 92, at 211.

129. BRANT, *supra* note 97, at 44.

130. *Id.*

131. HOFFER & HULL, *supra* note 31, at 181.

132. *See generally* U.S. CONST. art. I, § 3, cl. 4.

133. *See* U.S. CONST. art. II, § 1, cl. 3; *see also* U.S. CONST. amend XIX.

134. BRANT, *supra* note 97, at 44.

135. MELTON, *supra* note 92, at 237.

concealed their desire to establish impeachment as a weapon that could reach any person, public or private, and deprive him of office; on the contrary, they were quite vocal about it.”¹³⁶ Because the Constitution does not limit impeachment to criminal acts, Congress could permanently disqualify from federal office any citizen whose politics Congress did not like.¹³⁷ “With this power a determined Congress could virtually guarantee permanent Federalist ascendancy.”¹³⁸

There is much plausibility in these theories, but perhaps one exaggeration. Universal impeachment was probably only a strategy preferred by a faction within the Federalist Party. The Federalist Party was not monolithic. Like most political parties, it had both extremist and moderate elements. The moderates tended to cluster around Adams and Alexander Hamilton.¹³⁹ The extremists—called High Federalists¹⁴⁰—were owners of substantial property, who also felt they owned the government; they considered democracy “to be *the government of the worst*,” in the words of George Cabot.¹⁴¹ Among their leaders was Justice Samuel Chase,¹⁴² whom the Jeffersonians later impeached for expressing and acting on exactly that sentiment from the bench.¹⁴³ Hoffer and Hull, who wrote the most thorough study of the uses of impeachment just before and after adoption of the Constitution, concluded that although the Federalists used the Blount impeachment as a partisan political weapon against Jefferson’s party, it was an aberration and not part of a grand strategy.¹⁴⁴ Perhaps the strongest evidence is that the Blount experience was not repeated. The House made no serious efforts to impeach Jefferson, Madison, or other prominent members of their party.

136. *Id.*; see also HOFFER & HULL, *supra* note 31, at 158.

137. Disqualification from future federal office is one of the punishments that stem from an impeachment conviction, but it is not automatic. After convicting, the Senate votes separately on collateral punishments. During this vote, a simple majority is sufficient (rather than the two-thirds needed to convict). Sometimes, a convicted official is removed from his current office but not barred from future federal offices. That happened after the convictions of Ritter and Hastings. See *infra* text accompanying notes 612-653, 671-676; see also VAN TASSEL & FINKELMAN, *supra* note 82, at 158, 173.

138. MELTON, *supra* note 92, at 211; see also HOFFER & HULL, *supra* note 31, at 151.

139. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 252 (1996).

140. RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 53-54, 57-58 (1971); SMITH, *supra* note 139, at 234.

141. ELLIS, *supra* note 140, at 53.

142. *Id.* at 54.

143. See *infra* text accompanying notes 211-246. Cabot’s family was the Boston Cabots, who, according to Massachusetts folklore, spoke only to the Lodges, who spoke only to God.

144. HOFFER & HULL, *supra* note 31, at 162-63.

At the end of Blount's impeachment trial, "[t]he plan failed, obviously because a count of heads in the strongly Federalist Senate showed that fewer than two thirds were brave enough to go through with it"¹⁴⁵—probably because of popular hostility already building up over the Sedition Act. A motion to dismiss for lack of jurisdiction was approved by a vote of fourteen to eleven.¹⁴⁶ Although scholars disagree about the exact party division in the vote,¹⁴⁷ they agree that "a composite portrait of the senator who wanted to assert Senate jurisdiction over Blount shows him to be a Federalist from the Northeast."¹⁴⁸

Blount's impeachment is remembered for establishing that a legislator is not subject to impeachment.¹⁴⁹ But it did not actually do that. The grounds in the motion to dismiss were not specified, and a Senator could have voted for it on the theory that Senators are not impeachable *or* on the theory that private citizens are not impeachable (Blount no longer being a Senator).¹⁵⁰ Nor was Blount's impeachment needed to establish the unimpeachability of legislators. The Constitution had done that already. Article II, Section 4 makes liable to impeachment the president, vice president, "and all civil Officers of the United States." Article I, Section 6, forbids appointment of a Senator or Member of the House of Representatives to "any civil Office under the Authority of the United States" while still serving in Congress. Thus, a legislator cannot be a "civil Officer" since they are prohibited from assuming "any civil Office."

In the 1800 election, Jefferson was elected president, defeating the incumbent Federalist John Adams, and Jefferson's party took over both Houses of Congress.¹⁵¹ In its last weeks in office, the lame-duck Federalist Congress created sixteen new judgeships as well as a number of justices of the peace, by passing the Judiciary Act of 1801 (sometimes called the Midnight Judges Act).¹⁵² These judgeships and other reforms in the statute,

145. BRANT, *supra* note 97, at 45.

146. CURRIE, *supra* note 92, at 280-81; MELTON, *supra* note 92, at 232; VAN TASSEL & FINKELMAN, *supra* note 82, at 86-87.

147. Compare MELTON, *supra* note 92, at 231-32, with BUSHNELL, *supra* note 92, at 36. Congressional record-keeping then was much more haphazard than it is now.

148. BUSHNELL, *supra* note 92, at 36; see also MELTON, *supra* note 92, at 231-32.

149. VAN TASSEL & FINKELMAN, *supra* note 82, at 88.

150. BUSHNELL, *supra* note 92, at 16; MELTON, *supra* note 92, at 232.

151. DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 243 (1999).

152. BRANT, *supra* note 97, at 47; NOBLE E. CUNNINGHAM, IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 248 (1987); ELLIS, *supra* note 140, at 32; ROBERT M. JOHNSTONE, JR., JEFFERSON AND THE PRESIDENCY: LEADERSHIP IN THE YOUNG REPUBLIC 171-72 (1978); 4 DUMAS MALONE, JEFFERSON AND HIS TIME 113 (1970); VAN TASSEL & FINKELMAN, *supra* note 82, at 91.

such as the elimination of circuit-riding by Supreme Court Justices, were needed, but the Federalists' dominant purpose was to appoint as many of their own people to the bench as possible before the Jefferson Administration took office.¹⁵³ This was a court-packing plan packaged as a reform to enhance judicial efficiency, a tactic that Franklin Roosevelt tried unsuccessfully in 1937. The statute was also intended to deprive Jefferson of a Supreme Court appointment; it reduced the Court from six Justices to five, effective with the next vacancy.¹⁵⁴

In his last hours in office, by candlelight on the night before Jefferson took the presidential oath, Adams signed commissions appointing Federalists to the positions created by the Judiciary Act of 1801.¹⁵⁵ Madison, Jefferson's new Secretary of State, refused to turn over these commissions to the appointees,¹⁵⁶ setting in motion the train of events that led to *Marbury v. Madison*.¹⁵⁷ Even without these appointments, the Federalists had a solid grip on the judiciary, occupying virtually every federal judgeship, although they had lost the two elected branches.¹⁵⁸

The Federalists used their grip in partisan ways. While acting as trial judges when riding circuit, Justices William Patterson and James Iredell of the Supreme Court "made partisan statements from the bench" in trials of members of Jefferson's party under the Sedition Act,¹⁵⁹ doubtless for the purpose of inflaming juries. Although every Justice on the Supreme Court was a Federalist, Samuel Chase, in particular, was "intensely partisan."¹⁶⁰ He was so partisan, in fact, that the Supreme Court's August 1800 term had to be postponed because Chase was out of town campaigning for the reelection of Adams as president.¹⁶¹ The Sedition Act expired in 1801,¹⁶² but "nearly all the men who had ruthlessly enforced [it] were still on the

153. CUNNINGHAM, *supra* note 152; ELLIS, *supra* note 140, at 15; JOHNSTONE, *supra* note 152; 4 MALONE, *supra* note 152.

154. CUNNINGHAM, *supra* note 152; JOHNSTONE, *supra* note 152; 4 MALONE, *supra* note 152.

155. BRANT, *supra* note 97, at 47; 4 MALONE, *supra* note 152, at 113-14; VAN TASSEL & FINKELMAN, *supra* note 82, at 91.

156. BRANT, *supra* note 97, at 47.

157. 5 U.S. (1 Cranch) 137 (1803).

158. 4 MALONE, *supra* note 152, at 114.

159. HOFFER & HULL, *supra* note 31, at 190.

160. VAN TASSEL & FINKELMAN, *supra* note 82, at 10.

161. William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 905 (1991).

162. MELTON, *supra* note 92, at 237.

bench.”¹⁶³ Jefferson and his party felt under attack from “an antagonistic and politically active judiciary,”¹⁶⁴ and they counter-attacked.

Just as the Federalists had used impeachment as a partisan political weapon, so, too, would Jefferson’s party—but this time to dislodge Federalists from the judicial branch.¹⁶⁵ John Randolph,¹⁶⁶ a leader among Jefferson’s party in the House of Representatives, initially “popularized the idea that the lower house could define impeachable offenses as it wished”¹⁶⁷—a concept later pushed aggressively by Gerald Ford, Bob Barr,¹⁶⁸ and Tom DeLay. When trying to get William O. Douglas impeached in 1970, Ford, then House Minority Leader, claimed that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body [the Senate] considers to be sufficiently serious to require removal of the accused from office.”¹⁶⁹ During the Clinton impeachment, DeLay, the House Majority whip, took the same position: that a high crime or misdemeanor is “whatever a majority of the House of Representatives considers it to be at a given moment in history.”¹⁷⁰

There was ambivalence in Jefferson’s party about using impeachment against the judiciary,¹⁷¹ but by 1804, Jefferson had become “the nominal leader of the most sweeping impeachment movement in American history.”¹⁷² According to Dumas Malone, the most prominent of Jefferson’s biographers:

[p]olitical enemies of Jefferson in his lifetime and numerous later writers contended that he planned a ‘campaign’ against the judiciary from the very start, but that as a cautious politician, he put this into effect only step by step lest he jeopardize the

163. BRANT, *supra* note 97, at 58.

164. BUSHNELL, *supra* note 92, at 25; *accord* 4 MALONE, *supra* note 152, at 114.

165. BUSHNELL, *supra* note 92, at 44–45.

166. John Randolph is not to be confused with Edmund Randolph, a delegate to the Constitutional Convention, and Attorney General and Secretary of State in George Washington’s Administration. Edmund Randolph was widely respected for, among other things, his nonpartisanship.

167. HOFFER & HULL, *supra* note 31, at 189.

168. Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1, 9–20 (1997).

169. 116 CONG. REC. 11913–14 (1970); VAN TASSEL & FINKELMAN, *supra* note 82, at 59. *See infra* text accompanying notes 823–846.

170. VAN TASSEL & FINKELMAN, *supra* note 82, at 9.

171. HOFFER & HULL, *supra* note 31, at 206.

172. *Id.* at 182.

popularity of his party. It seems more likely that he took one step without being sure of or necessarily committed to the next one.¹⁷³

Ten days after taking office as president, Jefferson said of the Federalists, "The principal of them have retreated into the judiciary as a stronghold, the tenure of which makes it difficult to dislodge them." But he did nothing in particular to plan a strategy of impeachment, leaving that to members of his party in Congress.¹⁷⁴ One of them, Congressmen (later Senator) William Branch Giles, wanted to abolish the entire judicial branch and create a new one, without any judges belonging to the Federalist Party. Jefferson, according to Malone, "never advocated that degree of demolition."¹⁷⁵

John Pickering was a Federalist and a district court judge in New Hampshire.¹⁷⁶ He had written New Hampshire's state constitution in 1784.¹⁷⁷ But even before Jefferson was elected president, Pickering had become undeniably incompetent due to drunkenness and insanity¹⁷⁸ and "was making a daily spectacle of himself on the bench."¹⁷⁹ The Federalists themselves had actually managed to remove him from the courthouse temporarily. Using a provision in the Judiciary Act of 1801,¹⁸⁰ the circuit court had delegated a circuit judge to substitute for Pickering on the ground that he was incapacitated. But when the Jeffersonians repealed the Act, they "inadvertently forced Pickering to resume his position."¹⁸¹ The last straw was a case in which the owner of a ship seized by the government sued for its return, which Pickering ordered. "When the district attorney reminded him that he had heard no witnesses for the Government, Pickering jeeringly replied: 'You may bring forty thousand and they will

173. 4 MALONE *supra* note 152, at 115-16.

174. *Id.* at 116.

175. *Id.*; *see also id.* at 472.

176. JOHNSTONE, *supra* note 152, at 180; MELTON, *supra* note 92, at 238.

177. ELLIS, *supra* note 140, at 69.

178. JOHNSTONE, *supra* note 152, at 180; VAN TASSEL & FINKELMAN, *supra* note 82, at 91. In 1794, when he was Chief Justice of the New Hampshire State Supreme Court, he had nearly been removed from office by the state legislature for similar reasons. HOFFER & HULL, *supra* note 31, at 207.

179. BRANT, *supra* note 97, at 48.

180. A modern replica of the statute can be found at 28 U.S.C. § 372.

181. ELLIS, *supra* note 140, at 70.

not alter the decree.”¹⁸² In 1804, the House impeached him, and the Senate convicted.¹⁸³

It was a strange impeachment, and some basic ingredients of a trial were missing. Pickering did not attend the proceedings, and nobody appeared to represent him.¹⁸⁴ Federalist Senators conducted his defense.¹⁸⁵ When Pickering was served with Senate subpoenas, he “demanded ‘trial by battle’ and challenged Jefferson to a duel.”¹⁸⁶ Pickering’s son submitted a petition arguing that his father was “insane, his mind wholly deranged,” and thus “incapable of corruption of judgment, not subject to impeachment, . . . and his disorder has baffled all medical aid.”¹⁸⁷

Pickering should have been removed from the bench. But he also fit conveniently within the agenda of the Jeffersonian party. When Jefferson became president in 1801, “the national judiciary, one hundred per cent Federalist, amounted to an arm of that party.”¹⁸⁸ If removing Federalists was the goal, Pickering seemed a good place to start because it was impossible to defend him.¹⁸⁹ There were only about two dozen federal judges at the time,¹⁹⁰ and none of them was truly obscure.

In the House and Senate, the Federalists, now a minority, fought back bitterly.¹⁹¹ The House voted to impeach by forty-five to eight, and all of the nay votes were Federalists.¹⁹² The Senate convicted nineteen to seven on a straight party-line vote and then voted twenty to six to remove Pickering.¹⁹³

182. CLAUDE G. BOWERS, *JEFFERSON IN POWER: THE DEATH STRUGGLE OF THE FEDERALISTS* 270 (1936); ELLIS, *supra* note 140, at 70.

183. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829*, at 23-31 (2001); *IMPEACHMENT: SELECTED MATERIALS*, *supra* note 96, at 129-31; VAN TASSEL & FINKELMAN, *supra* note 82, at 93-94.

184. BRANT, *supra* note 97, at 49; *accord* ELLIS, *supra* note 140, at 72; MELTON, *supra* note 92, at 238.

185. BRANT, *supra* note 97, at 49.

186. HOFFER & HULL, *supra* note 31, at 212.

187. BRANT, *supra* note 97, at 49; CURRIE, *supra* note 183, at 25; HOFFER & HULL, *supra* note 31, at 214; VAN TASSEL & FINKELMAN, *supra* note 82, at 95-96.

188. 4 MALONE, *supra* note 152, at 458; *accord* VAN TASSEL & FINKELMAN, *supra* note 82, at 91.

189. BUSHNELL, *supra* note 92, at 44-45; VAN TASSEL & FINKELMAN, *supra* note 82, at 91.

190. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 370 (1993).

191. BOWERS, *supra* note 182, at 270-71; BRANT, *supra* note 97, at 49-57; CUNNINGHAM, *supra* note 152, at 273; HOFFER & HULL, *supra* note 31, at 208-19.

192. BUSHNELL, *supra* note 92, at 45.

193. BRANT, *supra* note 97, at 56; BUSHNELL, *supra* note 92, at 52; JOHNSTONE, *supra* note 141, at 182; VAN TASSEL & FINKELMAN, *supra* note 82, at 91. On the motion to convict, all the yeas were from Jefferson’s party, and all the nays were cast by Federalists, but on the subsequent motion to remove Pickering from office, one Federalist switched and voted yea. VAN TASSEL &

What should have been nonpartisan and a sad duty was instead a vitriolic pitched battle—not because of anything peculiar to Pickering, but because of what the political parties had to gain or lose on the outcome. Jefferson “rewarded three of the principal prosecution witnesses with lucrative posts,” and appointed the local federal prosecutor—the one who initially alerted Jefferson about Pickering—to Pickering’s judgeship.¹⁹⁴ Pickering was merely a trial court judge, but both parties saw him as first blood in a campaign to oust Federalists from the judiciary. Hoffer and Hull call Pickering’s impeachment a “dress rehearsal” for the impeachment of Federalist Supreme Court Justice Chase.¹⁹⁵ In fact, in the same month Pickering was convicted (December 1804), Chase was impeached by the House.¹⁹⁶

B. The Chase Impeachment, Its Context, and Its Aftermath

By December 1804, the Jeffersonians had held the elected branches for almost four years. Why did they wait so long before convicting Pickering and impeaching Chase? There are two reasons. The simpler one is that for the first two years it would not have been possible to get a conviction in the Senate. After the elections of 1800, the Jeffersonians lacked the two-thirds majority needed to convict if the voting followed party lines. After the elections of 1802, however, the Senate could much more easily support a conviction, with twenty-five Jeffersonians and only nine Federalists (73.5%). In fact, from March 1803, when the Congress elected in 1802 was sworn in, until the end of Jefferson’s Presidency, his party’s strength in Congress was overwhelming.¹⁹⁷

FINKELMAN, *supra* note 82, at 92. Seven Senators (five of them Jeffersonians) attended the trial but declined to vote, perhaps uncomfortable convicting a person in an accusatory procedure for acts that seemed to be caused by insanity. ELLIS, *supra* note 140, at 74; JOHNSTONE, *supra* note 152, at 181-82.

194. ELLIS, *supra* note 140, at 75; JOHNSTONE, *supra* note 152, at 182.

195. HOFFER & HULL, *supra* note 31, at 206; *accord* BOWERS, *supra* note 182.

196. MELTON, *supra* note 81, at 240; VAN TASSEL & FINKELMAN, *supra* note 82, at 101. Chase and Jefferson had been two of the three members of the committee that drafted the Northwest Ordinance. CALEB PERRY PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 162 (1953).

197. *See infra* tbl. 1.

Table 1
*Congressional Party Divisions After
the Elections of 1798 Through 1808*

| | 1798 | 1800 | 1802 | 1804 | 1806 | 1808 |
|-----------------------|------|------|------|------|------|------|
| Senate ¹⁹⁸ | | | | | | |
| Jeffersonians | 10 | 17 | 25 | 27 | 28 | 27 |
| Federalists | 22 | 15 | 9 | 7 | 6 | 7 |
| Vacant | | 2 | | | | |
| House ¹⁹⁹ | | | | | | |
| Jeffersonians | 46 | 68 | 103 | 114 | 116 | 92 |
| Federalists | 60 | 38 | 39 | 28 | 26 | 50 |
| Vacant | | 1 | | | | |

The more complex reason is that the Jeffersonians, like the Federalists, were divided into extremists and moderates, and as long as the judiciary did not interfere with Jefferson's goals, he was himself instinctively a moderate.²⁰⁰ And the Supreme Court had not interfered. A good illustration would be the companion cases of *Stuart v. Laird*²⁰¹ and *Marbury*. Decided six days apart, *Stuart* and *Marbury* together constitute the Supreme Court's reaction to the Jeffersonians' treatment of the Judiciary Act of 1801. The Court held in *Stuart* that Congress could constitutionally repeal the Act and thus abolish the judgeships the Act created and terminate the appointments of the judges involved (all Federalists), despite the Constitution's guarantee²⁰² of lifetime tenure for federal judges. Although in *Marbury*, the Court postulated in dicta that as long as the Act was in effect, the executive branch was required to deliver the paperwork needed by nominated and confirmed judges so they could

198. Party Division in the Senate, 1789-Present, http://www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm (last visited Apr. 18, 2007) [hereinafter Senate Party Divisions].

199. Party Divisions of the House of Representatives (1789 to Present), http://clerk.house.gov/art_history/house_history/partyDiv.html (last visited Apr. 17, 2007) [hereinafter House Party Divisions].

200. ELLIS, *supra* note 140, at 19-35, 83-95. Hamilton, Marshall, and Adams all agreed with this assessment. *Id.* at 26-27. "[A]lmost all key appointments on the federal level during Jefferson's administrations went to people who were aligned with the moderates . . . , while the radicals were generally proscribed." *Id.* at 234. "None of the judges that Jefferson appointed to the Supreme Court did anything to weaken the independence or influence of the national judiciary or to espouse a radical brand of Jeffersonianism." *Id.* at 241.

201. 5 U.S. (1 Cranch) 299, 308 (1803).

202. U.S. CONST. art. III, § 1.

assume their offices, and that a Cabinet officer such as the Secretary of State could be compelled by mandamus to do so, the Court refused to grant a writ of mandamus because the statute providing the Court with original (as opposed to appellate) jurisdiction was unconstitutional. The Supreme Court thus surrendered to the Jeffersonians on the point of the lawsuit, even if Marshall used the occasion to enunciate judicial power to mandamus Cabinet officers and to nullify congressional statutes inconsistent with the Constitution. This was “exceptionally adroit” on Marshall’s part, “leaving no target for [Jeffersonian] retaliation beyond frustrated rhetoric.”²⁰³

Jefferson was outraged. On the day *Marbury* was decided, he wrote that the Federalists “have retired into the Judiciary as a stronghold . . . and from that battery, all the works of” his party “are to be beaten down and erased.”²⁰⁴ To some extent, this was an exaggeration. Unlike the Supreme Court of the 1930s, which struck down New Deal legislation vitally important to the Administration of Franklin D. Roosevelt,²⁰⁵ the Court had not in *Marbury* held unconstitutional a statute enacted by a Jeffersonian-dominated Congress. The statute struck down in *Marbury* was an obscure provision of the original Judiciary Act of 1789.²⁰⁶ And in earlier decisions, the Supreme Court²⁰⁷ and Justices of the Supreme Court, sitting as circuit judges,²⁰⁸ had assumed they could hold federal statutes unconstitutional. In *Marbury*, Marshall only enunciated that power more clearly and supported it with extensive arguments. There is some historical evidence that what so angered Jefferson and his party was not the assertion of a power of judicial review of legislation for constitutionality, but instead Marshall’s assertion, in dicta, that if the Court had actually had jurisdiction, it would have had the power to order a Cabinet officer, through mandamus, to take action the Court considered legally required.²⁰⁹ That might seem today to be the reaction of politicians who think of themselves as imperial and beyond objective constraints such as those embodied in law. But the Federalist judiciary had so abused its power under the Sedition Act that the mandamus discussion in *Marbury* could have been perceived as laying a foundation for future abuses. *Marbury* was thus seen by Jefferson and his

203. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMER’S CONSTITUTION 77 (1988).

204. ELLIS, *supra* note 140, at 44.

205. See *infra* text accompanying notes 556-570.

206. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73.

207. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

208. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

209. See ELLIS, *supra* note 140, at 65-66; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, at 232, 244, 248 (2d ed. 1926).

allies, and could still be seen today, as “one of the most flagrant specimens of judicial activism.”²¹⁰

Against this background, Pickering was impeached and convicted because the radical and moderate Jeffersonians came to agreement, although based on different reasoning. On ideological grounds, the radicals were willing to impeach any Federalist judge whose conduct was egregious enough to make a conviction feasible. The moderates, on the other hand, could not imagine leaving a judge as incompetent as Pickering on the bench; they might have felt the same way even if he had been a Jeffersonian. Why, then, were the radicals able to get Chase impeached?

Of the first three impeachment defendants, Blount, Pickering, and Chase, “Chase was clearly the most partisan.”²¹¹ He lectured jurors on why Jefferson and his party were evil. He helped arrange an indictment under the Sedition Act and then made out-of-court statements that the defendant should be convicted, after which he presided over the defendant’s trial.²¹² Although he signed the Declaration of Independence and was second only to John Marshall as an intellectual leader of the Supreme Court,²¹³ Chase was a generally abusive judge as well. “Essentially a bully, he loved nothing better than insulting witnesses and lawyers with sarcasm, knowing they dare not reply in kind.”²¹⁴

He acted as though virtually everyone brought before him on a criminal charge was guilty. He did not truly accept the adversarial process in criminal trials [and] was impatient with defense counsel not just because they represented radicals and democrats, but because he had not [really accepted] the idea of defense counsel conducting the defendants’ cases.²¹⁵

Because Chase’s “turbulent disposition made him an ally who often proved more of a liability than an asset,” Washington nominated him for a Supreme Court vacancy only when he could not get others to take the job—the Supreme Court had very little prestige in the 1790s—and the Senate “reluctantly confirmed his appointment.”²¹⁶ Eventually, Chase became “the most hated member of the Federal judiciary.”²¹⁷ Oddly

210. LEVY, *supra* note 203, at 75.

211. MELTON, *supra* note 92, at 240.

212. HOFFER & HULL, *supra* note 31, at 228-32.

213. ELLIS, *supra* note 140, at 76; 4 MALONE, *supra* note 152, at 464.

214. BOWERS, *supra* note 182, at 273.

215. HOFFER & HULL, *supra* note 31, at 232.

216. ELLIS, *supra* note 140, at 76-77.

217. *Id.* at 79.

enough, Chase had opposed adoption of the Constitution while a member of the Maryland Convention called to consider whether to ratify it.²¹⁸

Chase was accused of misconduct not in the Supreme Court, but instead while riding circuit and presiding as a trial judge (at the time, a significant part of a Supreme Court Justice's work).²¹⁹ The articles of impeachment alleged that in one case he tried to persuade a jury to convict and refused to allow defense counsel to argue the law. The articles alleged that in another case, he refused to excuse a juror who admitted prejudging the defendant guilty; excluded evidence illegally; harassed defense counsel; and otherwise acted improperly. In a third case, the articles alleged that he pressured a grand jury to indict and, when they did not, pressured a district attorney to prosecute anyway. In a fourth case, the articles alleged that he made a partisan political speech from the bench to a grand jury.²²⁰ The last was the immediate provocation for the impeachment.²²¹ Chase had lectured the grand jurors that, among other things, allowing all white males to vote was "mobocracy"; that the Jefferson Administration held "unfairly acquired power"; and that it was evil to repeal the Judiciary Act of 1801.²²²

On five of the eight articles of impeachment, a Senate majority voted to acquit.²²³ On the remaining three, only a simple majority voted to convict, not the two-thirds constitutionally required²²⁴—"thanks in part to a few" from Jefferson's party "who consistently sided with the Federalists. Chase thus escaped . . . , but the episode had a sobering effect on him, and

218. LEVY, *supra* note 203, at 65.

219. VAN TASSEL & FINKELMAN, *supra* note 82, at 102. "At this time, and for many years thereafter, the justices of the Supreme Court . . . performed two separate roles. For a small part of the year, they were appellate judges sitting together in [the national capital]. But for the rest of the year they were circuit justices assigned to" one or another region of the country. WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 21 (1992).

220. 1 TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS BEFORE THE SENATE OF THE UNITED STATES 5-9 (1970) (1805) [hereinafter TRIAL OF CHASE]; BUSHNELL, *supra* note 92, at 60-61; ELLIS, *supra* note 140, at 77-80; HOFFER & HULL, *supra* note 31, at 236-37; VAN TASSEL & FINKELMAN, *supra* note 82, at 103-07.

221. ELLIS, *supra* note 140, at 79-80; JOHNSTONE, *supra* note 152, at 183.

222. ELLIS, *supra* note 140, at 79-80; JOHNSTONE, *supra* note 152, at 183.

223. 2 TRIAL OF CHASE, *supra* note 220, at 485-93; BUSHNELL, *supra* note 92, at 84-85; VAN TASSEL & FINKELMAN, *supra* note 82, at 102.

224. 2 TRIAL OF CHASE, *supra* note 220, at 485-93; BUSHNELL, *supra* note 92, at 85; VAN TASSEL & FINKELMAN, *supra* note 82, at 102.

he was never the same man afterwards."²²⁵ All of the Federalist Senators voted not guilty on every impeachment article.²²⁶ On each article, at least six members of Jefferson's party—and often more—voted to acquit.²²⁷

The House managers were furious at the result. Senator John Quincy Adams (John Adams' son and a future president) wrote that he "had some conversation . . . with Mr. Madison, who appeared much diverted at the petulance of the managers on their disappointment."²²⁸ Back in the House, John Randolph introduced an amendment to the Constitution that would provide for removal of judges by a simple majority in each House of Congress; another manager introduced a Constitutional amendment that would permit a state legislature to recall and replace a Senator.²²⁹ But this was venting and came to nothing.²³⁰

What caused the defections in the Senate is not clear. Most scholars ascribe at least part of it to senatorial resentment at the conduct of the House managers—especially Randolph—both during the impeachment trial, and in another controversy involving land in Georgia and unrelated to Chase.²³¹ Randolph had bragged that this was to be his impeachment to accomplish,²³² and his "invective, his dramatic but often irrelevant harangues"²³³ unsettled the Jeffersonian moderates in the Senate. Other causes might have been sympathy for an "old and feeble" revolutionary, however obnoxious he might have been;²³⁴ uncertainty about whether what Chase had done was really illegal at the time;²³⁵ and ambivalence by Jefferson and his party as they became comfortable in power and came to

225. MELTON, *supra* note 92, at 241. "Chase . . . never again dashed off a vitriolic political charge for a grand jury or used a courtroom as a forum for his politics." HOFFER & HULL, *supra* note 31, at 254; accord BOWERS, *supra* note 182, at 292; ELLIS, *supra* note 140, at 105.

226. BUSHNELL, *supra* note 92, at 85; ELLIS, *supra* note 140, at 101.

227. BRANT, *supra* note 97, at 82; BUSHNELL, *supra* note 92, at 85-86.

228. BUSHNELL, *supra* note 92, at 86.

229. *Id.*; EDWARD CHANNING, THE JEFFERSONIAN SYSTEM, 1801-1811, at 122 (1906); ELLIS, *supra* note 140, at 106-07; HOFFER & HULL, *supra* note 31, at 254. Until the Seventeenth Amendment in 1913, Senators were elected by state legislatures, rather than by the people directly. U.S. CONST. art. I, § 3, cl. 1, amended by U.S. CONST. amend. XXI.

230. CHANNING, *supra* note 229; HOFFER & HULL, *supra* note 31, at 254.

231. BOWERS, *supra* note 182, at 291; BUSHNELL, *supra* note 92, at 87; ELLIS, *supra* note 140, at 83-95, 103-04; HOFFER & HULL, *supra* note 31, at 254; Michael J. Gerhardt, *Chancellor Kent and the Search for the Elements of Impeachable Offenses*, 74 CHI.-KENT L. REV. 91, 105 (1998). The Senate verdict "wreck[ed] the political future of John Randolph," the most visible of the House managers. CHANNING, *supra* note 229.

232. ELLIS, *supra* note 140, at 106; JOHNSTONE, *supra* note 152, at 186.

233. JOHNSTONE, *supra* note 152, at 186.

234. BOWERS, *supra* note 182, at 291.

235. ELLIS, *supra* note 140, at 102.

experience judicial opposition more as a receding nuisance than a threat, due to the judicial self-restraint (compared to the late 1790s) superintended by Marshall.²³⁶ Perhaps most importantly, Jefferson took no public position on whether Chase should be impeached or convicted, and he did nothing to persuade Senators to vote one way or the other.²³⁷

Irving Brant concluded that “Chase had made himself unfit for his position,”²³⁸ and Raoul Berger considered Chase to be “an implacably prejudiced judge” and his acquittal to be “a miscarriage of justice.”²³⁹ The evidence easily supports Berger’s opinion. If a modern judge were to behave as Chase did, it would cause a bipartisan uproar. However, the historical evidence also supports a contrary opinion. Our sensibilities today are more refined than those of Chase’s contemporaries and measured against his contemporaries, he was a severely flawed but not incompetent judge. Remembering that, as a tribunal, the Senate was hostile to Chase to begin with, one is tempted to conclude that the acquittal had little to do with the merits of the case against him. The Jeffersonian party was using impeachment as a partisan political weapon, and the real issues in Chase’s trial were not limited to his conduct. Aside from the power struggle between two political parties and the dispute about whether a party victorious at the polls could reach into the judiciary through impeachment and threaten judicial independence, perhaps the most important (and least understood) issue was whether people were tired of hyper-partisanship and wanted politics to operate in a more civilized way.²⁴⁰ Even within Jefferson’s party, there was some fear that overreaching might lead to defeat at the polls,²⁴¹ and that if the Federalists ever regained Congress, they would again use impeachment as a partisan political weapon unless some limits were observed in the meantime.²⁴²

Afterward, Jefferson grumbled that “impeachment is not even a scarecrow.”²⁴³ But despite Chase’s acquittal, Jefferson had won at least part of his point—not as much as he wanted, but probably as much as he needed.

236. *Id.* at 102-03.

237. CUNNINGHAM, *supra* note 152, at 274; ELLIS, *supra* note 140, at 104; JOHNSTONE, *supra* note 152, at 183-84.

238. BRANT, *supra* note 97, at 59.

239. BERGER, *supra* note 31, at 224.

240. HOFFER & HULL, *supra* note 31, at 260.

241. *Id.* at 254.

242. *Id.* at 262.

243. 7 THE WRITINGS OF THOMAS JEFFERSON 256 (H.A. Washington ed., 1859); 10 THE WRITINGS OF THOMAS JEFFERSON 170 (Paul Leicester Ford ed., 1905).

Jefferson had challenged [the Federalist judicial] arrogance and humbled it. Chase's lawyers had pleaded for mercy. Marshall, appearing for the defense, had seemed frightened. Not until the impeachment of Chase had Federalist politicians conceded openly that prostitution of the judiciary to the purposes of party was even questionable But when Jefferson challenged these practices in the impeachment of Chase, the defense had been forced to admit their impropriety [and the result lifted the judiciary] above the hog wallow of politics to the decent dignity it has since maintained.²⁴⁴

When Chief Justice John Marshall testified, his answers showed "a desire to please the prosecution."²⁴⁵ He had reason to be afraid. If the Senate convicted Chase, Marshall could have been the next impeached.²⁴⁶ The radical Jeffersonians thus got exactly the scene they wanted: a frightened John Marshall, currying their favor in an attempt to avoid being himself purged.

History concentrates on federal impeachment. But Hoffer and Hull collected extensive evidence showing widespread use of impeachment in state legislatures during Adams and Jefferson's time.²⁴⁷ At the time, the states were treated as the basic unit of sovereignty, and the federal government was a novel contraption to hold the states together. For that reason, state impeachments were at least as immediately significant as the federal ones. The use of state impeachments as partisan political weapons was so widespread that "[t]he same characteristics that were coming to mark major electoral campaigns—hoopla, press coverage, popular rhetoric preached to the mass of voters—appeared at the trial of [state] impeachments Conviction was rare in such carnival cases because the objective of proving a charge became less important than the objective of discrediting an entire party."²⁴⁸ And, both state legislatures and state judiciaries were getting worn out from these struggles.²⁴⁹ "No officeholder,

244. BOWERS, *supra* note 182, at 292.

245. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 434 (1974); accord HOFFER & HULL, *supra* note 31, at 260; DAVID ROBARGE, A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT 277-78 (2000). *Contra* SMITH, *supra* note 139, at 344-45.

246. BAKER, *supra* note 245 at 432. Or at least among the next impeached. HOFFER & HULL, *supra* note 31, at 190.

247. See HOFFER & HULL, *supra* note 31, at 78-95, 146, 164-77, 191-205, 219-27, 256-61; see also BRANT, *supra* note 97, at 60.

248. HOFFER & HULL, *supra* note 31, at 261.

249. *Id.*

whatever his status, was truly safe from impeachment” when the opposing party controlled the legislature.²⁵⁰

The Pennsylvania legislature’s impeachment, conviction, and removal from office of a state court judge named Alexander Addison in 1803 is often considered a rehearsal for the Pickering and Chase impeachments.²⁵¹ The same key elements were present: a Federalist judge who used his office for partisan purposes, a Jeffersonian majority in the legislature, and a Federalist minority that unanimously defended its judge.²⁵² Moreover, the Pennsylvania Jeffersonians were, like the party in Congress, split between radicals and moderates.²⁵³ And Addison, like Chase, liked to lecture juries on politics: for example calling protests against the Sedition Act “a declaration of war against the government of the United States.”²⁵⁴ Although, under Pennsylvania law, a judge could be removed by the Governor without a trial on demand of both Houses of the legislature (a procedure called a joint address),²⁵⁵ the radical Jeffersonians preferred impeachment because the joint address procedure, though simpler, was not sufficiently accusatory and did not provide the same opportunities to flail and embarrass the Federalists.²⁵⁶ Addison was convicted because even the moderates thought him incorrigible: after the state supreme court had held that Addison could not legally prevent judges over whom he presided from charging grand juries, he did so anyway.²⁵⁷

Another Pennsylvania impeachment started in the spring of 1804,²⁵⁸ about the same time that Pickering’s impeachment began in Washington, and the result in the state senate predicted the verdict in Chase’s trial. Three state supreme court judges—Edward Shippen, Jr., Thomas Smith, and Jasper Yeats—all Federalists, were impeached for imprisoning a litigant for thirty days on the ground of contempt, for reasons that were

250. *Id.* at 262.

251. JOHNSTONE, *supra* note 152, at 180; 4 MALONE, *supra* note 152, at 459.

252. 4 MALONE, *supra* note 152, at 459. Federalists cast all the votes to acquit. HOFFER & HULL, *supra* note 31, at 204.

253. HOFFER & HULL, *supra* note 31, at 192.

254. *Id.* at 196-97.

255. *Id.* at 197. Some other states provided for removal by joint address, as well as by impeachment. *Id.* at 197; 4 MALONE, *supra* note 152, at 462. The Jeffersonians in Congress liked to propose it, ELLIS, *supra* note 140, at 72, although the Federalist minority there was still large enough to prevent adoption of a constitutional amendment. 4 MALONE, *supra* note 152, at 462.

256. 4 MALONE, *supra* note 152, at 459.

257. CHANNING, *supra* note 229, at 113-14; ELLIS, *supra* note 140, at 164; HOFFER & HULL, *supra* note 31, at 196.

258. ELLIS, *supra* note 140, at 168.

arguably partisan.²⁵⁹ The remaining state supreme court judge, a Jeffersonian, specifically requested that he too be impeached because, although not involved in the contempt ruling, he agreed with it.²⁶⁰ That should have been a signal to the radicals in the legislature that they had gone too far. The Jeffersonians ignored the hint and through joint address asked the Governor to remove the Jeffersonian judge, which the Governor refused to do.²⁶¹ In January 1805—after Pickering had been convicted and Chase had been impeached, and just before Chase's trial—the state senate acquitted the three Federalists.²⁶² Just as it would happen a few weeks later in Chase's trial in Washington, a majority, but not the two-thirds needed, voted to convict.²⁶³ Moderate Jeffersonians defected, and although the reasons are not clear, the extreme positions taken by the impeachers were a factor.²⁶⁴

The Chase impeachment trial was presided over by Vice President Aaron Burr, who at the time was under indictment in two states for the murder of Alexander Hamilton,²⁶⁵ leading to contemporary jokes about the judge being tried by the murderer, rather than the other way around.²⁶⁶ Burr, a fugitive in fear of extradition, had not presided over the Senate since Hamilton's death.²⁶⁷ To induce Burr to return to Washington and preside favorably, both the extremists and the moderates in Jefferson's party flattered him with attention. The Jefferson Administration gave government jobs to Burr's relatives and friends, and Jeffersonian Senators asked New Jersey to drop the murder indictment.²⁶⁸ The motives of the extremists were obvious, but those of the Administration were not. Channing concluded that Jefferson was trying to increase the odds of conviction, while Richard Ellis thought the opposite.²⁶⁹

259. CHANNING, *supra* note 229, at 114; ELLIS, *supra* note 140, at 165-66; HOFFER & HULL, *supra* note 21, at 189, 221; 4 MALONE, *supra* note 152, at 474.

260. CHANNING, *supra* note 229, at 114; ELLIS, *supra* note 140, at 168; 4 MALONE, *supra* note 152, at 474.

261. ELLIS, *supra* note 140, at 168-69; 4 MALONE, *supra* note 152, at 474.

262. ELLIS, *supra* note 140, at 169-70; 4 MALONE, *supra* note 152, at 474.

263. CHANNING, *supra* note 229, at 114; HOFFER & HULL, *supra* note 31, at 226; 4 MALONE, *supra* note 152, at 474.

264. 4 MALONE, *supra* note 152, at 474.

265. ELLIS, *supra* note 140, at 92; VAN TASSEL & FINKELMAN, *supra* note 82, at 103; John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1437 (1999).

266. 4 MALONE, *supra* note 152, at 476; Yoo, *supra* note 265, at 1439.

267. BOWERS, *supra* note 182, at 278, 366-67; CHANNING, *supra* note 229, at 123; ELLIS, *supra* note 140, at 92.

268. CHANNING, *supra* note 229, at 123-24; ELLIS, *supra* note 140, at 92-93, 106.

269. CHANNING, *supra* note 229, at 123-24; ELLIS, *supra* note 140, at 92-93.

No one took any action to impeach Burr. He belonged to Jefferson's party, which had no intention of impeaching its own vice president.²⁷⁰ The Federalists, with only about a quarter of the seats in each House of Congress,²⁷¹ had no hope of winning anything in either chamber. Jefferson's party pointedly did not renominate Burr for vice president, although Burr's murder of Hamilton was not the only reason. The original constitutional plan for electing presidents and vice presidents called for electors to cast two votes for president; the candidate with the largest electoral vote became president, and the runner-up became vice president.²⁷² This was perhaps the only truly naive provision in the Constitution, and it was replaced in 1804, through the Twelfth Amendment, with the system used today. In the first two presidential elections, 1788 and 1792, political parties did not participate, and Washington was unanimously elected president and John Adams vice president. Both were Federalists. The 1796 election produced a president (Adams) and vice president (Jefferson) of opposing political parties because presidential and vice presidential candidates did not run together on tickets.

In 1800, to avoid this kind of result, the parties ran tickets, Jefferson's party supporting him for president and Burr for vice president. Because there was no way to vote separately for vice president, every one of Jefferson's electors voted for both him and Burr for president, producing a tie and throwing the election into the House of Representatives.²⁷³ The House that decided the election was not the newly elected one, dominated by Jeffersonians, but instead the lame-duck Federalist House, whose leaders plotted to stop Jefferson by electing Burr.²⁷⁴ The task of electing a president after the Electoral College fails to do so no longer falls on a lame-duck House because the Twentieth Amendment moved the beginning of presidential terms of office from March 4 to January 20 and the beginning of congressional terms of office from March 4 to January 3—the latter in part to prevent a lame-duck House from choosing a president.²⁷⁵ When the House elects a president, voting is tallied by states, each state having one vote. Although the Federalists had a majority of the membership of the House, they did not control a majority of state

270. VAN TASSEL & FINKELMAN, *supra* note 82, at 103.

271. See STEPHENSON, *supra* note 151, at 243-44.

272. U.S. CONST. art. II, § 1, cl. 3.

273. 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 532-33 (1916); 3 MALONE, *supra* note 152, at 492-502; ROBARGE, *supra* note 245, at 231.

274. CUNNINGHAM, *supra* note 152, at 232; 3 MALONE, *supra* note 273, at 497-504.

275. S. REP. NO. 72-26, at 5 (1932).

delegations in the House.²⁷⁶ After thirty-five ballots produced exactly the same tally—eight states for Jefferson, six for Burr, and two split and not voting, thus failing to give any candidate a majority—a few of the Federalists gave up and allowed Jefferson to be elected.²⁷⁷

Two aspects of this fiasco forever poisoned Jefferson's view of Burr. First, the flaws in the original system of electing presidents required that when a party ran presidential and vice presidential candidates as a ticket, at least one of that party's electors had to vote for someone other than the vice presidential nominee, or a tie would result. Some electors who planned to do that were dissuaded on assurances from the Burr camp that other electors would do so.²⁷⁸ The primitive communications of the time mostly accounted for this lack of coordination, but it also appeared that Burr was manipulating the situation to his own advantage. Second, once the election was thrown into the House, Burr did not take himself out of the contest, even though Jefferson was the party's nominee for president and the voters who chose Jeffersonian electors thought they were electing Jefferson.²⁷⁹ Had Burr announced that under no circumstances would he take the presidential oath of office, the Federalist effort to elect him would have been futile. Burr's refusal to make such an announcement led Jefferson to conclude that Burr had conspired with the Federalists. Jefferson never wavered from the belief that a conniving and self-dealing Burr had almost succeeded in helping the Federalists steal an election from him. We have no way of knowing whether Burr actually did what Jefferson thought he did,²⁸⁰ though Burr's later behavior as vice president seemed consistent with Jefferson's interpretation of the election fiasco. "It was common knowledge in Washington that Burr was trying to build a following loyal to him alone, and his rulings from the chair favorable to the defense in the Pickering trial gave further evidence of his lack of scruples in making overtures to the enemy for support."²⁸¹

The Chase trial ended three days before Burr's term of office expired.²⁸² Immediately afterward, Burr absconded into the frontier

276. CUNNINGHAM, *supra* note 152, at 232; 3 MALONE, *supra* note 273, at 502.

277. CUNNINGHAM, *supra* note 152, at 235-37; JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 175 (1997); 3 MALONE, *supra* note 273, at 504; ROBARGE, *supra* note 245, at 232.

278. CUNNINGHAM, *supra* note 152, at 231.

279. *Id.* at 232-33; J. ELLIS, *supra* note 277; 3 MALONE, *supra* note 273, at 498.

280. 3 MALONE, *supra* note 273, at 498.

281. JOHNSTONE, *supra* note 152, at 190; *accord* ELLIS, *supra* note 140, at 47-48.

282. 4 MALONE, *supra* note 152, at 458.

territories, apparently on a scheme not unlike Blount's.²⁸³ Burr's conspiracy was particularly far-fetched. He tried to induce the then westernmost states and territories to secede from the Union and then invade Mexico.²⁸⁴ Burr intended to take most of what Jefferson had just acquired for the United States in the Louisiana Purchase.²⁸⁵ When he was caught by federal marshals two years later, he was taken to Richmond and tried in a courtroom presided over by Chief Justice John Marshall, who was riding circuit.²⁸⁶ Burr was acquitted of treason in "one of the most spectacular trials in American history."²⁸⁷ Marshall both judged the admissibility of evidence and instructed the jury according to a controversial definition of treason "that essentially forced the jury to acquit Burr."²⁸⁸ The jury foreman—who was Marshall's brother-in-law—announced the verdict thus: "Burr is not proved guilty under this indictment *by any evidence submitted to us*. We therefore find him not guilty."²⁸⁹ Burr and his lawyers angrily protested the form of the verdict and demanded that in the record it be reduced to "Not guilty."²⁹⁰ Then a member of the jury said:

he would produce the same verdict if called upon to decide a second time. He said that every member of the jury knew that the verdict was not phrased in the usual form but that they had all wanted it that way. . . . And so the original Burr verdict entered the record: an announcement by the jury that, in effect, it considered him a guilty man but was unable to pronounce him so because the rulings by the Chief Justice.²⁹¹

Actually, there were two trials. In the second, which immediately followed the treason proceeding, Burr was acquitted of the crime of waging war against a friendly nation, Spain, which still claimed territories bordering the United States.²⁹² As in *Marbury v. Madison*, Marshall's goal

283. Yoo, *supra* note 265, at 1439-41.

284. CUNNINGHAM, *supra* note 152, at 286-88; JOHNSTONE, *supra* note 152, at 191.

285. CUNNINGHAM, *supra* note 152, at 290.

286. BAKER, *supra* note 245, at 448-518; 3 BEVERIDGE, *supra* note 273, at 274-545 (1919); ROBARGE, *supra* note 245, at 280-82; SMITH, *supra* note 139, at 348-74; FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 97-109 (1981). After the acquittal, "Burr retired to a life of exile and dissipation." STITES, *supra*, at 108.

287. STITES, *supra* note 286, at 97; *accord* Yoo, *supra* note 265, at 1439.

288. ROBARGE, *supra* note 245, at 281; *accord* CHANNING, *supra* note 229, at 167; CUNNINGHAM, *supra* note 152, at 293-94.

289. BOWERS, *supra* note 182, at 422 (emphasis added); BAKER, *supra* note 245, at 514; CUNNINGHAM, *supra* note 152, at 294; ROBARGE, *supra* note 245, at 281.

290. BAKER, *supra* note 245, at 515; BOWERS, *supra* note 182, at 422-23.

291. BAKER, *supra* note 245, at 515.

292. Yoo, *supra* note 265, at 1446.

in both trials was to craft rulings that advanced judicial power without provoking impeachments or constitutional amendments that would humble the judiciary, while. Jefferson tried to defeat what he perceived to be the partisanship of Federalists, like Marshall, secure in the judicial branch. The result set precedents that influenced the near-impeachment of Richard Nixon as well as the impeachment and trial of Bill Clinton.

This was “the last major episode in the conflict between the executive and judicial branches during Jefferson’s presidency”²⁹³—the earlier battles having included the repeal of the Judiciary Act of 1801,²⁹⁴ the *Marbury* litigation, and the Chase impeachment. In both Houses of Congress, a party-line vote brough about the repeal of the 1801 Judiciary Act.²⁹⁵ Immediately afterward, the Jeffersonian Congress restructured the Supreme Court’s schedule, delaying the Court’s next session for fourteen months so that the Court would not have an opportunity to declare the repeal unconstitutional until after it had taken effect.²⁹⁶ In the end, the Court held the repeal to be constitutional in a decision dated six days after *Marbury*.²⁹⁷ As *Marbury* itself was being litigated, the Federalists panicked, fearing that “all members of the [Supreme] Court would be impeached.”²⁹⁸ The Court’s decision to adjudicate *Marbury*—the rough equivalent of today’s granting of a writ of certiorari—infuriated the Jeffersonians and hastened the repeal of the Judiciary Act of 1801.²⁹⁹ Before the Court decided the case, Jefferson “had determined to ignore a writ of mandamus should one be issued,” and afterward he “took great pains . . . to deny that Marshall’s dictum had any force in law. It stood in his mind as a bald assertion of illegal power by an arrogant judge”³⁰⁰ It must have been obvious to Marshall that “[i]f he were to issue a mandamus, he would have no way to enforce it, and it would be ignored by the executive branch.”³⁰¹

Jefferson desperately wanted his former vice president convicted, and was convinced that the Federalists, through Marshall, were contriving to

293. 5 MALONE, *supra* note 152, at 309.

294. JOHNSTONE, *supra* note 152, at 172.

295. *Id.* at 175.

296. ELLIS, *supra* note 140, at 59; JOHNSTONE, *supra* note 152, at 175; 4 MALONE, *supra* note 152, at 145.

297. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308 (1803); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803).

298. BRANT, *supra* note 97, at 47.

299. ELLIS, *supra* note 140, at 44; JOHNSTONE, *supra* note 152, at 172-75.

300. JOHNSTONE, *supra* note 152, at 179.

301. 4 MALONE, *supra* note 152, at 148.

acquit Burr to embarrass the Administration.³⁰² “In fact, the President appears to have hoped to use any acquittal of Burr as grounds to either impeach Marshall or to introduce a constitutional amendment to allow the President and Congress to remove federal judges.”³⁰³ Jefferson also considered the Burr trial to be part of a personal struggle between himself and Marshall.³⁰⁴ “It is difficult to overstate the personal animus that Jefferson and Marshall appeared to hold for one another”³⁰⁵

We will probably never know what caused their mutual animosity. Marshall fought in Washington’s army during the Revolution and shared in its privations at Valley Forge and elsewhere, while Jefferson stayed home. Beveridge, one of Marshall’s biographers, believed that Marshall’s antipathy for Jefferson began then.³⁰⁶ But no evidence supports that.³⁰⁷ Another theory has it that Jefferson disliked Marshall because Marshall married the daughter of a woman Jefferson had once courted. But this theory, too, lacks evidence.³⁰⁸ During the 1800 election, Marshall wrote that Jefferson’s “foreign prejudices” in favor of everything French, for example, “seem to me totally to unfit him” for the Presidency.³⁰⁹ After Jefferson and Burr tied in the electoral college, Marshall, unlike other Federalists, declined to take sides between Jefferson and Burr.³¹⁰ Although Marshall wrote in a private letter that he considered Burr to be a “still greater danger than even . . . Mr. Jefferson,” he added that “I cannot bring myself to aid Mr. Jefferson.”³¹¹ When the election of 1800 was thrown into the House and stalemated there, a rumor circulated that Marshall had written an opinion to the effect that the Chief Justice (himself) should succeed to the Presidency if the stalemate were to continue.³¹² Although the effect of this rumor on Jefferson hardly needs to be imagined, Jefferson and Marshall already had low opinions of each other before 1800.

302. 3 BEVERIDGE, *supra* note 273, at 385 (1919); SMITH, *supra* note 139, at 360; Yoo, *supra* note 265, at 1441-42. “[T]he chief reason for Federalist attachment to Burr, despite the fact that he killed Hamilton, was antipathy to Jefferson.” 5 MALONE, *supra* note 152, at 302.

303. Yoo, *supra* note 265, at 1441-42.

304. BAKER, *supra* note 245, at 477; SMITH, *supra* note 139, at 365; Yoo, *supra* note 265, at 1442.

305. Yoo, *supra* note 265, at 1442.

306. 1 BEVERIDGE, *supra* note 273, at 126, 145.

307. ROBARGE, *supra* note 245, at 46 n.27; SMITH, *supra* note 139, at 63-64, 549 n.197.

308. ROBARGE, *supra* note 245, at 160-61.

309. 2 BEVERIDGE, *supra* note 273, at 537.

310. *Id.* at 537-41; ROBARGE, *supra* note 245, at 231.

311. 2 BEVERIDGE, *supra* note 273, at 538; ROBARGE, *supra* note 245, at 231.

312. 2 BEVERIDGE, *supra* note 273, at 541-43; 3 MALONE, *supra* note 152, at 496; ROBARGE, *supra* note 245, at 231-32.

The most likely explanation is that Marshall and Jefferson became political adversaries because of their differing political beliefs when parties formed in the 1790s, and that the conflicts during Jefferson's Presidency caused mutual suspicion to deepen into something close to hatred.³¹³ As president and chief justice, they were, after all, the highest government officials of antagonistic political parties, during a period in which politics was intensely personal and people assumed the worst character in their opponents. "The relatively small and closed political communities of Washington and Virginia did not keep personal secrets well, so Marshall and Jefferson certainly knew what one thought of the other."³¹⁴ The steady reporting of each insult to the insulted may have deepened the feeling of grievance on both sides. If their personal rivalry predated the 1790s, it might have come, at least in part, from over twenty years of lawsuits that grew out of a 1773 inheritance in which Jefferson had an interest and Marshall represented various parties, to Jefferson's dissatisfaction.³¹⁵ Jefferson and Marshall were in fact cousins.³¹⁶

Both Marshall and Jefferson behaved in surprising ways during this confrontation. For example, Marshall taunted Jefferson by dining with Burr and his lead defense lawyer at the latter's home immediately after releasing Burr on bail.³¹⁷ Today, that would require a judge to recuse himself under the federal judicial conflict-of-interest statute.³¹⁸ Even in the context of his era, Marshall was remarkably casual about judicial proprieties. By modern standards, Marshall would have been required to recuse himself from adjudicating *Marbury v. Madison*. Marshall was Adams's last Secretary of State.³¹⁹ "Until nine o'clock of the night before Jefferson's inauguration, Adams continued to nominate officers, including judges, and the Senate to confirm them. Marshall, as Secretary of State, signed and sealed the commissions."³²⁰ Under the modern conflict-of-

313. ROBARGE, *supra* note 245, at 160-61, 278-79.

314. *Id.* at 279.

315. 1 MALONE, *supra* note 152, at 441-45; ROBARGE, *supra* note 245, at 162.

316. JOHNSTONE, *supra* note 152, at 176; PATTERSON, *supra* note 196, at 25, 123; ROBARGE, *supra* note 245, at 160.

317. JOHNSTONE, *supra* note 152, at 206; 5 MALONE, *supra* note 152, at 302; ROBARGE, *supra* note 245, at 281; Yoo, *supra* note 265, at 1444.

318. 28 U.S.C. § 455(a) (2007) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

319. BAKER, *supra* note 245, at 331-60; 2 BEVERIDGE, *supra* note 273, at 485-564; JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 102-03 (2002); SMITH, *supra* note 139, at 268-81.

320. 2 BEVERIDGE, *supra* note 273, at 560; accord CHANNING, *supra* note 229, at 117; ELLIS, *supra* note 140, at 32.

interest statute, Marshall would be disqualified not only because of the appearance of partiality,³²¹ but also because, in the words of the modern statute, he “served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.”³²²

In fact, when Marshall signed the commissions, he was both Secretary of State and Chief Justice. The Senate confirmed his nomination for Chief Justice on January 27, 1801.³²³ On February 4, Marshall received his own commission for that position, and on the same day he took the Supreme Court bench and presided.³²⁴ Nonetheless, Adams asked Marshall to continue to serve as Secretary of State until the end of the Adams Administration, a month later.³²⁵ (The same thing had happened once before. John Jay was both Secretary of State and Chief Justice for six months during the Washington Administration.)³²⁶ After working—as Secretary of State—into the evening of March 3, 1801, to pack the judiciary with Federalists, Marshall—as Chief Justice—administered the oath of office to Jefferson at noon the next day.³²⁷ Adams had “taken the four o’clock stage out of town that morning.”³²⁸

These were the “midnight judgeships” at issue in *Marbury*. When James Madison, Jefferson’s Secretary of State, assumed office the following day, he found on his desk—which had been Marshall’s desk until midnight the evening before—four undelivered commissions for Federalists nominated and confirmed by the Senate as justices of the peace in the District of Columbia. Madison refused to turn them over to their intended recipients, and they sued to get the commissions that would have allowed them to take office.³²⁹

321. See 28 U.S.C. § 455(a).

322. *Id.* § 455(b)(3).

323. BAKER, *supra* note 245, at 354; ROBARGE, *supra* note 245, at 234.

324. BAKER, *supra* note 245, at 355.

325. 2 BEVERIDGE, *supra* note 273, at 558-59.

326. *Id.* at 559.

327. BAKER, *supra* note 245, at 359-60; 2 BEVERIDGE, *supra* note 273, at 562; CUNNINGHAM, *supra* note 152, at 239; ELLIS, *supra* note 277, at 174; SIMON, *supra* note 319, at 137, 173-75.

328. ELLIS, *supra* note 277, at 170; accord BAKER, *supra* note 245, at 359. It is not stated how a stage coach would have been navigated before dawn in an era without electric lights, although, according to the National Aeronautics and Space Administration, the moon had been full three and a half days earlier, in the afternoon on February 28. See Moon Phases: 1801 to 1900, <http://sunearth.gsfc.nasa.gov/eclipse/phase/phases1801.html> (last visited Apr. 17, 2007).

329. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137-38 (1803); CHANNING, *supra* note 229, at 117; ELLIS, *supra* note 140, at 39, 43. A justice of the peace was not an Article III judgeship with

Under modern standards, Marshall also should have recused himself in another landmark case, *Martin v. Hunter's Lessee*,³³⁰ which held that treaties entered into by the federal government supervene state law, and that state courts must obey the Supreme Court in matters of federal law. Marshall and his brother owned some of the land at issue in the litigation.³³¹ The case came before the Supreme Court twice. The first time, Marshall did recuse himself,³³² and the Supreme Court, in an opinion by Justice Story, issued an order that the Virginia courts refused to obey. Marshall then wrote a petition for a writ of error—similar to, but not the same as the modern petition for certiorari—to get the case back into the Supreme Court. The modern federal judicial conflict-of-interest statute requires a judge to recuse himself where “he served as a lawyer in the matter in controversy,”³³³ or where he, or a person within a scope of relationships that includes brothers, has “an interest that could be substantially affected by the outcome of the proceeding.”³³⁴ In the second appeal, Story again wrote the Court’s opinion. Marshall not only participated in the Court’s decision, but he wrote a memorandum on which Story relied.³³⁵

Compared to Marshall’s participation in the adjudication of *Marbury* and *Martin v. Hunter's Lessee*, Abe Fortas’s offenses³³⁶ were but a trifle. On the one hand, Fortas resigned from the Supreme Court after being threatened with impeachment for creating an appearance of impropriety, even though there was no evidence that any of his judicial decisions had been improperly influenced. Marshall, on the other, sat in judgment on the legality of his own actions as Secretary of State. In *Marbury*, he refers to himself in the third person: “Mr. Marbury, then, since his commission was signed by the President, and sealed by *the secretary of state*, was appointed”³³⁷ That he was not impeached—though the radicals in Jefferson’s party, and perhaps Jefferson, too, would have been delighted to

lifetime tenure. When the Supreme Court finally decided the case, *Marbury*’s five-year term of office was nearly half over. *Marbury*, 5 U.S. (1 Cranch) at 154, 162; 4 MALONE, *supra* note 152, at 145. The Federalists had created thirty justices of the peace for the District of Columbia, *id.*, at a time when Washington and Georgetown were villages, ELLIS, *supra* note 277, at 171-73, which suggests that these positions were sinecures to reward the party faithful.

330. 14 U.S. (1 Wheat.) 304 (1816).

331. SIMON, *supra* note 319, at 268.

332. *Id.* at 269.

333. 28 U.S.C. § 455(b)(2) (2007).

334. *Id.* § 455(b)(4), (5)(iii).

335. SIMON, *supra* note 319, at 270.

336. See *infra* text accompanying notes 733-739, 766-781.

337. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (emphasis added).

do so—speaks volumes about the casual judicial standards prevailing at the time.

For his part, Jefferson “lost control of himself for a season.”³³⁸ He sent a steady stream of correspondence to the lead prosecutor, George Hay,³³⁹ “pepper[ing] Hay with instructions,”³⁴⁰ that look like micro-management, but on closer examination seem to reflect obsession. “Stop . . . citing *Marbury v. Madison* as authority,” commanded Jefferson; “I have long wished . . . to have the gratuitous opinion in that case . . . denounced as not law.”³⁴¹ And, along the way, Jefferson seems to have invented transactional immunity as American criminal procedure now understands it—something only a head of state could have contracted for before the development of judicially enforceable plea bargaining agreements.

On the eve of the trial, Jefferson forwarded to Hay a sheaf of blank pardons he had signed. Hay was instructed to fill them out

338. CHANNING, *supra* note 217, at 166.

339. Two decades later, Hay was appointed a U.S. district court judge by John Quincy Adams, the sixth President and John Adams’s son. 5 MALONE, *supra* note 152, at 310. During the crisis over the 1800 election, when a rumor circulated that Marshall thought himself entitled to the Presidency, Hay, under a pseudonym, wrote an open letter in protest to Marshall, “which was copied far and wide” in pro-Jeffersonian newspapers. 2 BEVERIDGE, *supra* note 273, at 542-43. “I understand that you, Sir . . . have given an opinion in exact conformity with the wishes of your party,” wrote Hay, daring Marshall to “come forward and defend it.” *Id.* at 542. Marshall said nothing. *Id.* at 543.

Burr’s defense team “outnumbered and outweighed” the three prosecutors. 5 MALONE, *supra* note 152, at 310. Among Burr’s lawyers were Luther Martin, the attorney general of Maryland who also defended Chase in his impeachment trial, and Edmund Randolph, former Governor of Virginia, the first Attorney General of the United States, and a Secretary of State in the Washington Administration. BOWERS, *supra* note 182, at 275, 279, 286, 403-04; 5 MALONE, SECOND TERM, *supra* note 152, at 310; SMITH, *supra* note 139, at 90, 112. When Jefferson went into politics in 1774, he turned his law practice over to Randolph, and when Randolph was elected Governor of Virginia in 1786, he turned it over to Marshall. SMITH, *supra* note 139, at 90-91. “Bizarre as it may seem, Jefferson’s law practice ultimately became John Marshall’s.” *Id.* at 91.

340. SMITH, *supra* note 139, at 361. The letters are published at 10 THE WRITINGS OF THOMAS JEFFERSON 394-409 (Paul Leicester Ford ed., 1905).

341. SMITH, *supra* note 139, at 361. Those few of Jefferson’s letters to Hay that were intended to be read into the record in Marshall’s court appear as measured and precise position-taking by a very intelligent and careful President. The rest—the overwhelming bulk of the correspondence—are intense venting by a President focused on Burr’s trial to the point of obsession. According to Dumas Malone, Jefferson’s leading biographer, “[s]trongly partisan expressions are rare in Jefferson’s public utterances, which were characteristically measured and restrained. When he used extreme language it was nearly always in a private communication to someone of whose loyalty to the party or to him personally he had no doubt.” 5 MALONE, *supra* note 152, at 304. Given Jefferson’s historical image and his accomplishments in fields as disparate as architecture, agronomy, education, and political philosophy, the effect of these letters on the modern reader is not unlike the effect President Nixon’s obscenities and paranoia, captured on audiotapes, had on his supporters (although, throughout his correspondence with Hay, Jefferson retains a mind and character many, many times the value of Nixon’s).

“at discretion, if [he] should find a defect of evidence, and believe that this would supply it.” This was a *carte blanche* for the prosecuting attorney to grant presidential pardons in order to secure testimony against Burr.³⁴²

Jefferson also “took the extraordinary step of interrogating one of the key witnesses, of striking a plea bargain with him that exchanged a pardon for testimony, and then of instructing the prosecutor on how to examine him at trial.”³⁴³

To aid in his defense, Burr moved³⁴⁴ for an order compelling production of a letter written to Jefferson by General Wilkinson, as well as Jefferson’s response and other documents.³⁴⁵ The motion required only the documents and not Jefferson’s personal appearance in court.³⁴⁶ Although Jefferson’s appearance might have been needed to supply the evidentiary foundation for the letter’s receipt into evidence, Burr did not insist on that, as long as the papers were delivered and the Government would stipulate to their foundation.³⁴⁷ “Burr sought a subpoena *duces tecum*, not a subpoena *ad testificandum*.”³⁴⁸ Jefferson did not refuse to supply the papers,³⁴⁹ although twentieth-century advocates for what has now become the doctrine of executive privilege³⁵⁰—among them President Nixon’s

342. SMITH, *supra* note 139, at 360.

343. Yoo, *supra* note 265, at 1442.

344. Although he had assembled a team of first-class lawyers, Burr made the motion and took the lead himself in arguing it. *United States v. Burr*, 25 F. Cas. 30, 30 (C.C.D. Va. 1807) (No. 14,692d) (“Mr. Burr then addressed the court.”); *United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694) (“Colonel Burr renewed his application for the production of the two letters”; “Mr. Burr said he could not be satisfied with a copy of part of the letter.”); Yoo, *supra* note 265, at 1447.

345. BAKER, *supra* note 245, at 477; 3 BEVERIDGE, *supra* note 273, at 433, 443; CUNNINGHAM, *supra* note 152, at 291; SMITH, *supra* note 139, at 362, 638; STITES, *supra* note 286, at 105; Yoo, *supra* note 265, at 1446-47. Although the sources speak of one letter, and sometimes two, from Wilkinson to Jefferson, three such letters at issue, although not simultaneously. They are reprinted at Yoo, *supra* note 265, at 1474-77.

346. Yoo, *supra* note 265, at 1447.

347. *Burr*, 25 F. Cas. at 30-31 (No. 14,692d); *Burr*, 25 F. Cas. at 190 (No. 14,694); BAKER, *supra* note 245, at 477-78; CUNNINGHAM, *supra* note 152, at 291-92; Yoo, *supra* note 265, at 1447; 5 MALONE, *supra* note 152, at 321.

348. Yoo, *supra* note 265, at 1447.

349. CUNNINGHAM, *supra* note 152, at 292.

350. The term “executive privilege” was unknown before the Eisenhower Administration. MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* 44 (1994). George Washington was the first President to claim an embryonic form of executive privilege, although Washington did not articulate the doctrine we have now become familiar with. See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1177-85 (1999) (explaining the Washington precedents).

lawyers—later claimed otherwise.³⁵¹ Instead, Jefferson warned that the letter, in particular, could involve “state secrets,” and asked Hay to prevent disclosure of those parts of the letter not material to the issues.³⁵² In court, Hay offered to supply the entire letter to Marshall; argued that a subpoena would therefore be unnecessary; and asked Marshall to redact that which was not material in order to protect state secrets.³⁵³ Marshall, in turn, committed himself to redact anything “which it would be imprudent to disclose . . . if it be not immediately and essentially applicable to the point.”³⁵⁴ When the government produced the documents Burr wanted,³⁵⁵ “both Burr and Marshall considered the subpoena satisfied.”³⁵⁶ In the second trial, Burr made another motion regarding a different letter, and this time Jefferson’s position hardened somewhat: he submitted a redacted copy of the letter, and a certificate explaining his reasons for the redactions.³⁵⁷ Again, Burr and Marshall “appear to have let the matter drop.”³⁵⁸

In the most extreme claims of executive privilege, such as those vigorously asserted by Richard Nixon, a president refuses to submit evidence for judicial review. The Supreme Court, however, relying in part on Marshall’s rulings in the Burr trial, held in *United States v. Nixon* that generalized claims of executive privilege that do not identify specific risks to the country are overcome by, among other things, a grand jury subpoena.³⁵⁹ When, at the Supreme Court’s direction, Nixon complied with such a subpoena, the audiotapes he turned over persuaded even the leaders of his own party that he could not defend against impeachment, and he resigned.³⁶⁰

John Yoo argues that the *Nixon* Court misinterpreted both Jefferson’s positions and Marshall’s rulings.³⁶¹ In a letter to Hay, Jefferson offered to provide the documents at issue in Burr’s trial, while in principle

351. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 188-89 (1974).

352. *Burr*, 25 F. Cas. at 31 (No. 14,692d). Throughout the trial, an extensive correspondence occurred between Jefferson and Hay. To carry these letters between Washington and Richmond, Jefferson used a courier, rather than the postal system. Yoo, *supra* note 265, at 1443.

353. *United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694); STITES, *supra* note 286, at 106; Yoo, *supra* note 265, at 1448, 1457-58.

354. *Burr*, 25 F. Cas. at 37 (No. 14,692d).

355. *Id.* at 69-70.

356. Yoo, *supra* note 265, at 1453.

357. *Id.* at 1462.

358. *Id.* at 1463.

359. *United States v. Nixon*, 418 U.S. 683, 707-08, 713-15 (1974), (relying in part on *United States v. Burr*, 25 F. Cas. 187, 190-92 (C.C.D. Va. 1807) (No. 14,694)).

360. See *infra* text accompanying notes 683-690.

361. Yoo, *supra* note 265, at 1448, 1460-65.

“[r]eserving the necessary right of the president of the United States, to decide, *independently of all other authority*, what papers coming to him as president the public interest permits to be communicated.”³⁶² Jefferson sent this letter after the Government argued and submitted the issue to Marshall for decision.³⁶³ Hay then read Jefferson’s letter into the record in open court,³⁶⁴ which might have been what Jefferson wanted. Marshall decided that documents in a president’s possession could be subpoenaed, but he added a qualification ignored by the *Nixon* court. Marshall held that if a president’s “duties as chief magistrate demand his whole time for national objects . . . at the time when his attendance on a court is required, it would . . . rather constitute a reason for not obeying the process of the court than a reason against its being issued.”³⁶⁵ In other words, the judiciary has a right to issue such a subpoena, and the president has a right to ignore it. Marshall might have been looking ahead to the type of problem that supposedly later caused President Andrew Jackson to remark, after *Worcester v. Georgia*,³⁶⁶ that “John Marshall has made his decision; now let him enforce it.” Although some historians doubt that Jackson actually said that,³⁶⁷ “the evidence is that if Jackson did not say [it], he certainly meant it.”³⁶⁸ In any event, it was the State of Georgia, not Jackson, who would have to comply with the Supreme Court’s judgment, and Georgia did ignore it, which is the point of the supposed Jackson quote.³⁶⁹

At the time of the Burr trial, and for some decades afterward, the popular prestige of the Supreme Court was so low that a president would suffer little harm from ignoring a Supreme Court decision. Because Federalists initially dominated the judiciary and misused it for partisan political purposes—such as in prosecutions under the Sedition Act—much of what the judiciary did was suspect in the popular mind. Part of Marshall’s genius was that he understood this and crafted decisions so that they simultaneously claimed the largest reasonable amount of judicial power while giving his enemies the smallest objective grounds for grievance. The best known example is *Marbury*. There, Marshall claimed

362. *United States v. Burr*, 25 F. Cas. 55, 65 (C.C.D. Va. 1807) (No. 14,693) (emphasis added).

363. BAKER, *supra* note 245, at 484-85; SMITH, *supra* note 139, at 364-65; Yoo, *supra* note 265, at 1450.

364. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).

365. *Id.* at 34.

366. 31 U.S. 515 (1832).

367. ROBARGE, *supra* note 245, at 299; SMITH, *supra* note 139, at 518.

368. BAKER, *supra* note 245, at 745.

369. ROBARGE, *supra* note 245, at 299; SMITH, *supra* note 139, at 518.

the Court's power to issue binding orders to executive branch officials and the power to render statutes unenforceable if inconsistent with the Constitution, while at the same time holding that the Court lacked the jurisdiction to order Jefferson's Secretary of State to turn over a commission to one of Adams's midnight judges. And, in *Burr*, he held that a president, unlike a monarch, is subject to the process of a court, but that Jefferson need not obey that process if he did not want to. After the prestige and moral authority of the Supreme Court had grown to what it is today, the *Nixon* court labored under no such disability and held,³⁷⁰ while misciting *Burr*, that a president must obey a valid subpoena. "Marshall always managed to cloak his personal feelings toward Jefferson behind an elaborately constructed screen of impartial-sounding arguments that invariably ended up leaving him no choice but to align himself with the other side. . . . If Hamilton came at you with a saber, Marshall preferred the stiletto."³⁷¹

What Jefferson asserted more passionately was a privilege not to testify himself—a privilege similar to the one that President Clinton later claimed with as much vigor as Nixon asserted executive privilege.³⁷² "To comply with such calls," Jefferson wrote to the federal prosecutor, "would leave the nation without an executive branch" because any litigant could haul a president away to some far part of the country.³⁷³ But here, too, Jefferson claimed a right smaller than one that a later president in trouble would like to have had. Jefferson offered to testify "by way of deposition."³⁷⁴ In other words, he thought he should not have to go to Richmond, but easily volunteered to put himself under oath if the lawyers

370. *United States v. Nixon*, 418 U.S. 683, 714-16 (1974).

371. ELLIS, *supra* note 277.

372. Since 1993, the Clinton and George W. Bush Administrations have made wide claims of executive privilege—arguably wider than anything claimed by the executive branch since the Nixon Administration. Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict during the Bush Presidency*, 52 *Duke L.J.* 403 (2002); Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 *MINN. L. REV.* 1069, 1117-25 (1999); Mark J. Rozell, *A Response to Professor Johnsen*, 83 *MINN. L. REV.* 1191, 1191-94 (1999). *Contra* Dawn Johnsen, *Executive Privilege since United States v. Nixon: Issues of Motivation and Accommodation*, 83 *MINN. L. REV.* 1127, 1130-33 (1999).

373. BAKER, *supra* note 245, at 485; 5 MALONE, *supra* note 152, at 322; Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges: The Nixon and Clinton Cases*, 108 *HARV. L. REV.* 701, 718 (1995); Yoo, *supra* note 265, at 1450-53. This was a personal rivalry, as well as a difference of opinion about constitutional law. "Who was more powerful? . . . Who could command the other's presence? Since 1801, when Thomas Jefferson had become President and John Marshall had become Chief Justice, they had been heading toward this confrontation." BAKER, *supra* note 245, at 477.

374. *United States v. Burr*, 25 F. Cas. 55, 69 (C.C.D. Va. 1807) (No. 14,693). Hay put this letter into the record in open court.

and, presumably, the judge would come to him in Washington. Previously, the federal prosecutor had conceded that Jefferson could be subpoenaed to testify but had argued that he could not be subpoenaed *duces tecum* and thereby required to supply the letter.³⁷⁵ Marshall decided that Jefferson was subject to both forms of subpoena,³⁷⁶ but in a later ruling added that “[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual.”³⁷⁷ In any event, the subpoena, as issued, required only production of the documents; it specifically provided that Jefferson need not come to court himself.³⁷⁸

President Clinton asserted a right not to be required to defend a private lawsuit while in office on the ground that the burdens of a litigant, including the burden of being deposed, would interfere with the duties of the Presidency. But the Supreme Court held in *Clinton v. Jones*,³⁷⁹ relying in part on Marshall’s rulings in *Burr*,³⁸⁰ that a person can be both a president and a private litigant at the same time. As a result, the lawyers and the judge went to Washington so that Clinton could testify in a deposition—just as Jefferson had volunteered to testify—and that testimony led to Clinton’s impeachment.³⁸¹

In each of its first three uses, impeachment served as a partisan political weapon. For a time afterward, a truce seemed to make further use of that kind unnecessary. Although the judiciary remained vaguely Federalist in its outlook, it abandoned much of the partisan behavior that so incited the Jeffersonians,³⁸² and Jefferson’s presidential successors, James Madison and James Monroe, were not innately hostile to the judiciary.³⁸³ The Chase impeachment, though unsuccessful, may have had an effect on the federal judiciary similar to the one that the 1936 election and Franklin D. Roosevelt’s court-packing proposal may have had on the Supreme Court

375. *Id.* at 63.

376. *Id.*

377. *Id.* at 192.

378. The following appeared in the subpoena: “The transmission to the Clerk of this Court of the original letter of General Wilkinson and of copies duly authenticated of the other papers and documents . . . will be admitted as sufficient observance of the process, without the personal attendance of any or either of the persons therein named.” JOHNSTONE, *supra* note 152, at 203.

379. 520 U.S. 681 (1997) (relying in part on *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d)).

380. *Id.* at 693-94, 703-04. And, as in *United States v. Nixon*, the *Clinton* Court once again misinterpreted *Burr*. It is literally true, that “Chief Justice Marshall . . . ruled that a subpoena *duces tecum* could be directed to the President.” *Id.* at 703-04. However, Marshall also ruled that a President has a right to ignore such a subpoena. See Yoo, *supra* note 265, at 1466-68.

381. See *infra* text accompanying notes 917-920.

382. JOHNSTONE, *supra* note 152, at 208.

383. ROBARGE, *supra* note 245, at 284-85.

in 1937: it may have persuaded judges to avoid confrontation with the other two branches.³⁸⁴ Both the Chase impeachment and the Roosevelt court-packing plan certainly had a boomerang effect: each seemed, to a crucial body of less partisan or nonpartisan thought, to have gone too far. Moreover, Jefferson's party so dominated elections after 1800 that it controlled the executive and legislative branches for a generation. After Jefferson left office it became a consensus party and absorbed a fair amount of the Federalist thought.³⁸⁵ When Monroe ran for reelection as president in 1820, the Federalist Party had nearly disappeared, nobody was left to oppose him,³⁸⁶ and the period became known as the Era of Good Feeling. Thus, impeachment fell temporarily into disuse because the Chase trial had left an unpleasant memory on all sides, and because, for a time afterward, nobody needed impeachment as a partisan political weapon.

Chase's chief defense counsel during the Senate trial was Luther Martin, one of the leading lawyers in the country and a delegate to the Constitutional Convention—though he refused to sign the Constitution because he had come to oppose the document the Convention produced. Later, Martin became chief defense counsel in Aaron Burr's trials and argued several cases to the Supreme Court, including the losing side in *M'Culloch v. Maryland*.³⁸⁷ He was also an alcoholic. Some years after Chase's impeachment, Martin tried a case while drunk before Chase, who was riding circuit. "I am surprised that you can so prostitute your talents," Chase said from the bench. "Sir, I never prostituted my talents except when I defended you and Colonel Burr," replied Martin, who then faced the jury and said: "A couple of the greatest rascals in the world."³⁸⁸

Adams and Jefferson both died on July 4, 1826—50 years to the day after the Declaration of Independence was purportedly signed. Adams and Jefferson were not only the second and third presidents. They were also, respectively, the chair of the committee appointed by the Continental Congress to draft a document declaring independence, and the author of the first draft of that document.³⁸⁹ In 1776, Adams was considered to have had

384. See HOFFER & HULL, *supra* note 31, at 257.

385. ROBARGE, *supra* note 245, at 293. Even during Jefferson's Administrations, the radicals in his party were complaining of this tendency to co-opt the Federalists by absorbing some of their ideology. ELLIS, *supra* note 140, at 236.

386. ROBARGE, *supra* note 245, at 293. One elector in the electoral college voted against Monroe on the sole ground that only George Washington should have the honor of a unanimous election.

387. 17 U.S. (4 Wheat.) 316 (1819).

388. PAUL STEPHEN CLARKSON & R. SAMUEL JETT, LUTHER MARTIN OF MARYLAND 280 (1970).

389. ELLIS, *supra* note 277, at 48-49.

the more prestigious assignment: not only did he chair the committee, but he was also expected to steer the proposal through the Congressional debate.³⁹⁰ Jefferson was like the junior professor who gets stuck writing a faculty committee report, although he did such a good job of it that, in historical memory, his role almost completely eclipses Adams's. Adams later recalled that he insisted that Jefferson write the draft because, among other things, Jefferson was the better writer.³⁹¹

When we read the Declaration's text today, we are reading Jefferson's words, as altered by other people. Jefferson wrote the draft in a few days, and Adams and Benjamin Franklin marked it up, changing, for example, Jefferson's "sacred & undeniable truths" to "self-evident truths."³⁹² Then, the Continental Congress debated the document line-by-line and deleted about a quarter of Jefferson's draft, while he seethed.³⁹³ For decades afterward, he felt the grievance of an author who thinks his best work has been mangled through the editing of others.³⁹⁴ The great scene, where all the Members of the Continental Congress signed the Declaration, did not happen on July 4, 1776—and as it has been depicted in paintings, it probably did not happen at all. On July 2, Congress voted, in principle, to declare independence. On July 4, Congress approved, as amended, the document that would communicate that declaration, and sent it out to a printer, although approval was not unanimous until the New York delegation received instructions from home on July 15, and most Members signed it on August 2.³⁹⁵

None of this denies Jefferson the achievement of converting what could have been a mere statement of governmental separation into a profound expression of what would in later years become the American idea of a polity: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" (surely, the first time in history that the possibility of being happy became a political issue); "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

When it was learned that both men had died on the same day, and on the fiftieth anniversary of the supposed signing of the Declaration, much of the public saw in the event, in the words of John Quincy Adams—John

390. *Id.* at 49.

391. CUNNINGHAM, *supra* note 152, at 46-47.

392. *Id.* at 47; ELLIS, *supra* note 277, at 50.

393. CUNNINGHAM, *supra* note 152, at 47; ELLIS, *supra* note 277, at 50.

394. ELLIS, *supra* note 277, at 60.

395. CUNNINGHAM, *supra* note 152, at 47; ELLIS, *supra* note 277, at 50.

Adams's son, the sixth president of the United States and a member of *Jefferson's* political party—the “visible and palpable marks of Divine favor.”³⁹⁶

The Adams-Jefferson friendship, begun in 1776, had withstood Adams's defeat of Jefferson in the presidential election of 1796, but each was so offended by the conduct of the other in 1800 and 1801 that they broke it off.³⁹⁷ In 1811, after Jefferson had left politics, Benjamin Rush, who also signed the Declaration, visited Adams and provoked him into saying, “I always loved Jefferson, and still love him.”³⁹⁸ Rush made sure that Jefferson learned of this remark, and Jefferson wrote to Rush, “This is enough for me. I only needed this knowledge to revive towards him all the affections of the most cordial moments of our lives.”³⁹⁹ Adams wrote to Jefferson, “You and I ought not to die before we have explained ourselves to each other.”⁴⁰⁰ Thereafter, living 500 miles apart, Adams and Jefferson communicated often through letters that constitute “one of the most remarkable literary exchanges in American history.”⁴⁰¹ They argued as friends about philosophy, metaphysics, religion, science, political theory, and history—until they died on the same Fourth of July.⁴⁰²

C. Between Chase and Andrew Johnson

The Chase trial was such a disagreeable and convoluted affair, tying up the Senate and preventing legislation, that one Senator wrote that “[a]ll parties appear to wish it had never been commenced—I believe we shall not hear of another very soon.”⁴⁰³ Twenty-five years passed before the House impeached another federal officeholder.

James H. Peck, a district court judge in Missouri, was impeached in 1830⁴⁰⁴ after sustained lobbying by a lawyer he had held in contempt.⁴⁰⁵ A substantial part of Peck's docket was made up of lawsuits to settle ownership of individual parcels within the Louisiana Purchase. The land had been subject to three sovereignties (France, Spain, and the United

396. CUNNINGHAM, *supra* note 152, at 349.

397. *Id.* at 329.

398. *Id.* at 330.

399. *Id.*

400. SIMON, *supra* note 319, at 294.

401. CUNNINGHAM, *supra* note 152, at 331.

402. *Id.* at 331; ELLIS, *supra* note 277, at 235-51.

403. CUNNINGHAM, *supra* note 152, at 274; ELLIS, *supra* note 140, at 103.

404. IMPEACHMENT: SELECTED MATERIALS, *supra* note 96, at 136-39; VAN TASSEL & FINKELMAN, *supra* note 82, at 107-14.

405. BUSHNELL, *supra* note 92, at 93-96; VAN TASSEL & FINKELMAN, *supra* note 82, at 108.

States) as well as three different land tenure regimes, and in many cases nobody really knew who owned what.⁴⁰⁶ In the first such lawsuit to go to trial, Peck had made rulings suggesting that he was likely to decide most of these cases contrary to the interests of certain claimants, who happened to be wealthy and influential.⁴⁰⁷ The lawyer involved had represented the losing party in that lawsuit and had appeared in a third of the cases yet to be tried.⁴⁰⁸ Upset with the outcome of the first trial, the attorney published an article criticizing Peck's rulings. On the ground that the article misrepresented what Peck had decided,⁴⁰⁹ Peck held the lawyer in contempt, had him incarcerated for twenty-four hours, and suspended him from practice in his court for eighteen months.⁴¹⁰ The ostensible controversy was whether Peck had abused his power, but the subtext was the desire of influential and worried claimants to replace Peck with a judge more to their liking.⁴¹¹

For the first time in a Senate impeachment trial, the House managers were a bipartisan group—four Democrats and one Federalist.⁴¹² By this time, Jefferson's party had evolved into the Democratic Party; Andrew Jackson, considered the first Democratic president, held that office from 1829 to 1837. The Democrats dominated the Senate, with thirty-six of forty-eight seats.⁴¹³ Twenty-one Senators voted to convict: eighteen Democrats, two Whigs, and a Federalist. Twenty-two Senators voted to acquit: fifteen Democrats, three Whigs, two National-Republicans, and two Federalists.⁴¹⁴ Although powerful interests worked to oust Peck, they were economic interests and not partisan ones.

Not only were the Peck impeachment and trial nonpartisan, they were also principled. Economic interests, which considered the accused judge inconvenient, did not succeed in replacing him with someone more pliable. At the same time, Peck had vindictively abused the contempt power, and the law was immediately changed to prevent similar abuses in the future. Future President James Buchanan led the House managers in the impeachment process. Like the managers in the Chase impeachment,

406. BUSHNELL, *supra* note 92, at 91-92.

407. *Id.* at 92-93.

408. *Id.* at 92-96.

409. *Id.* at 93-95, 100.

410. BRANT, *supra* note 97, at 122; BUSHNELL, *supra* note 92, at 93; VAN TASSEL & FINKELMAN, *supra* note 82, at 108.

411. BUSHNELL, *supra* note 92, at 92, 96-97.

412. *Id.* at 14.

413. *Id.* at 14, 98.

414. *Id.* at 14.

Buchanan returned to the House upset with the result. Unlike them, he did not introduce legislation to punish the Senate or make it easier to remove judges. Instead, he introduced legislation, still in effect today, restricting federal civil contempt to conduct that more directly disrupts a court and its authority.⁴¹⁵

In 1862, West H. Humphreys was impeached and convicted.⁴¹⁶ A federal district judge in Tennessee, Humphreys joined the rebellion after the Civil War began and accepted a Confederate judgeship without bothering to resign from the federal bench.⁴¹⁷ The fourteen other federal judges who joined the Confederacy had resigned from the federal bench.⁴¹⁸ In fact, Humphreys was “the only officer of the U.S. government who failed to resign after shifting his allegiance to the Confederacy during the Civil War.”⁴¹⁹ A person in rebellion against the federal government cannot be allowed to continue to hold a federal judgeship, and when the Union armies recaptured Tennessee, Lincoln would not have been able to appoint a replacement judge unless the Senate removed Humphreys from office.⁴²⁰ He is the only impeachment defendant ever to be convicted by a unanimous vote in the Senate.⁴²¹

During the period between the Chase impeachment and President Johnson’s impeachment in 1868, at least two and perhaps four federal judges resigned to avoid impeachment trials. William Stephens, a district court judge in Georgia, resigned in 1818 after a House Judiciary Committee investigation into allegations, which are not specified in the records available today.⁴²² Thomas Irwin, a district judge in Pennsylvania, resigned in 1859 during an impeachment investigation by the House Judiciary Committee, also into allegations not specified in the records now available.⁴²³ Replacements for two other judges were appointed in the

415. 18 U.S.C. § 401 (2007); *see also* BUSHNELL, *supra* note 92, at 112.

416. BUSHNELL, *supra* note 92, at 14; IMPEACHMENT: SELECTED MATERIALS, *supra* note 96, at 140-42; VAN TASSEL & FINKELMAN, *supra* note 82, at 115.

417. BRANT, *supra* note 97, at 129.

418. Van Tassel, *supra* note 190, at 408 (Appendix Table 1).

419. VAN TASSEL & FINKELMAN, *supra* note 82, at 11.

420. *Id.* at 116.

421. On articles 1 and 5 of the impeachment, the Senate vote was thirty-nine to nothing to convict, while on other articles there were scattered votes to acquit. *Id.* at 115. Instead of simply charging Humphreys with accepting a Confederate judgeship, the articles of impeachment also alleged, as separate grounds for removal, advocating secession from the Union, opposing federal authority, failing to hold court, and so on. *Id.* at 117-19.

422. JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN FEDERAL COURTS 200, 247 (1962); 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2489; (1907-08).

423. BORKIN, *supra* note 422, at 235; 3 HINDS, *supra* note 422, § 2500.

context of impeachment investigations, but it is not clear whether the vacancies came about through death or resignation. A judge replacing Peter B. Bruin of a Mississippi territorial court was appointed after the House in 1808 authorized an investigation into allegations of drunkenness and neglect of duty.⁴²⁴ The president appointed another replacement judge in 1841, to fill the Louisiana district court judgeship held by Philip K. Lawrence, after a select House committee recommended impeachment on grounds of drunkenness, corruption, and abuse of power.⁴²⁵ During the same period, ten other judges were investigated, or referred for investigation, by House committees without resulting impeachments.⁴²⁶ In all fourteen of these proceedings, the sketchy records available do not contain any suggestion that the House utilized impeachment as a partisan political weapon.

Although the period from 1805 to 1862 might seem to be one in which the impeachment clauses in the Constitution were forgotten—with only Peck's impeachment getting to the Senate in half a century—the picture looks very different when one compares the number of House impeachment investigations of federal judges, for example, with the size of the federal judiciary at the time. Because the federal judiciary was tiny compared with today's bench, a handful of investigations could have a substantial impact. During the first decade of the nineteenth century, the House conducted impeachment investigations involving 13% of the federal

424. BORKIN, *supra* note 422, at 225; 3 HINDS, *supra* note 422, § 2487.

425. BORKIN, *supra* note 422, at 200-01, 237; 3 HINDS, *supra* note 422, § 2494.

426. Harry Innis, a district court judge in Kentucky, in 1808; Harry Toulmin, a Mississippi territorial court judge, in 1811-12; Mathias B. Tallmadge, a district court judge in New York, in 1818-19; William P. Van Ness, a district court judge in New York, in 1818-19; Charles Tait, a district court judge in Alabama, in 1822-23; Joseph L. Smith, a Florida territorial court judge, in 1825-26; Buckner Thurston, a circuit judge in the District of Columbia, in 1825 and again in 1837; Alfred Conkling, a district court judge in New York, in 1829-30; Benjamin Johnson, an Arkansas territorial court judge, in 1833; and John C. Watrous, a district court judge in Texas, after a series of investigations from 1852 to 1860. BORKIN, *supra* note 422, at 227, 234-36, 248-54; 3 HINDS, *supra* note 422, §§ 2488-99.

From the sketchy records now available, it is hard to tell which of these judges had done nothing wrong and which had behaved in troubling but not impeachment-worthy ways. Judges are in the constant business of making people unhappy—usually losing litigants but also, at times, their lawyers as well—and it takes only one Representative to introduce an impeachment resolution that the rest of the House, without any knowledge of the merits, might be persuaded to refer to a committee. In Watrous's case, we know that the House Judiciary Committee more than once recommended that he be impeached, but the House never did so, apparently on the ground that the conflicts of interest alleged did not rise to the level of impeachable offenses. 3 HINDS, *supra* note 422, §§ 2495-99.

Reminiscent of Blount in 1797 and Burr in 1807, the accusation against Innis in 1808 was of a “[p]lot with Spain to seduce Kentucky from the Union.” BORKIN, *supra* note 422, at 234-35.

judgeships, and during the 1820s, the House investigated 11% of the judgeships.⁴²⁷ Except for the 1870s, when 11% of the judgeships again were investigated, the figures for the other decades in the nineteenth century never exceed 6%.⁴²⁸ But by modern standards, that was still high. In the 1920s and 1930s, the House investigated, respectively, 4% and 3% of the judiciary.⁴²⁹ In every other decade of the twentieth century, the rate was less than 1%, and in several decades it was zero. Although it is startling to contemplate decades in which one in every eight federal judgeships was involved in an impeachment investigation, it is also startling to contemplate decades in which the House did not investigate anybody, though it is difficult to believe that corruption during those periods had become extinct. Certainly, these figures illustrate how erratically impeachment and impeachment investigations have been used—or, more accurately, overused in some periods and underused in others.

D. Johnson

Although Abraham Lincoln is universally considered the greatest president in American history,⁴³⁰ his reelection in 1864 was very much in doubt. The Civil War was marked with numbers of deaths unprecedented in warfare as technology outpaced the ability of field commanders to use new weapons decisively. Many newspapers mocked Lincoln as a tyrant for suspending the writ of habeas corpus and as an ineffectual Commander in Chief who could not find a way to end the war. Battles like Antietam, where the two sides together suffered 3,600 deaths and over 17,000 wounded in a single day, staggered the public.

Lincoln did win the 1864 election, but only because he finally found generals who could win, beginning with the capture of Atlanta in September 1864.⁴³¹ Uncertain of victory in June 1864, Lincoln and his Republican Party decided to call its national ticket Unionist, and in order to appeal to non-abolitionists in border states, nominated Andrew Johnson, a Southern Democrat with a long record favoring slavery, for vice president.⁴³² Lincoln also hoped that having a Southern Democrat as vice

427. Van Tassel, *Resignations*, *supra* note 190.

428. *Id.* at 370-71.

429. *Id.* at 371.

430. Historians poll each other on this frequently, and Lincoln is always at the top of every poll. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 373-76 (1999).

431. See T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* (1952); T. HARRY WILLIAMS, *MCCLELLAN, SHERMAN AND GRANT* (1962).

432. VAN TASSEL & FINKELMAN, *supra* note 82, at 222.

president would be useful in persuading the South to reconcile with the North. When Johnson's state, Tennessee, seceded from the Union in 1861, Johnson, then a Senator, refused to secede with it. When Union troops occupied most of Tennessee, Lincoln appointed Johnson military Governor of the state, and Johnson was most conspicuous as a Southerner loyal to the Union.⁴³³

Before the war, Johnson owned slaves.⁴³⁴ In personality, he was the opposite of Lincoln in virtually every respect. Johnson thought and spoke belligerently; could not tolerate disagreement; resented everything that could conceivably be thought of as a slight; and was unable to find common ground with or inspire others, listen with an open mind, or think in subtleties and nuances.⁴³⁵ When he and Lincoln were inaugurated in March 1865, Johnson was drunk.⁴³⁶ Five weeks later, John Wilkes Booth shot Lincoln in Ford's Theater, and Johnson became president, inheriting nearly the entirety of Lincoln's second term. "By any measure, he was truly the wrong man, in the wrong place, at the wrong time. His presidency was a catastrophe."⁴³⁷ For both political and personal reasons, Johnson was in constant conflict with Congress from the day he took the presidential oath until the day he left office. He vetoed twenty-one bills compared to thirty-six vetoes exercised by all the presidents who preceded him combined, and Congress overrode fifteen of his vetoes, more than any other president before or afterward.⁴³⁸

The Republicans were an insecure party, founded only six years before Lincoln became president. He was elected in 1860 with only 40% of the popular vote because the Democrats split and ran three separate tickets. During and shortly after the Civil War, the Republicans were a majority party only because whites in the Confederate states were not voting because their states had seceded and were not readmitted for some time after the end of the war. The party had been founded for the purpose of abolishing slavery. A natural extension of that purpose would be to make freed slaves citizens with the right to vote, and they would likely vote for the Republican Party that had freed them. If that did not happen, the Republicans would revert to a minority party because the substantial

433. BUSHNELL, *supra* note 92, at 128; VAN TASSEL & FINKELMAN, *supra* note 82, at 222.

434. VAN TASSEL & FINKELMAN, *supra* note 82, at 222.

435. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 5 (1973).

436. VAN TASSEL & FINKELMAN, *supra* note 82, at 222.

437. *Id.*

438. *Id.* at 223.

number of Northerners who were Democrats greatly exceeded the few white Southerners who considered themselves Republicans.

In two of the eleven Confederate states—South Carolina and Mississippi—African Americans had been a majority of the population in the 1860 census, although in that year they were still slaves.⁴³⁹ In five more—Virginia, Georgia, Alabama, Florida, and Louisiana—African Americans had been between 43% and 49% of the population.⁴⁴⁰ After the Confederacy surrendered in 1865 and the rebellious states began to rejoin the Union, the white vote in many of those states was depressed, as many white voters had not yet been requalified to vote. As they were requalified, the surge in Republican Congressional seats during and after the war would be drastically reversed unless African Americans in the same states were freely voting. The results of Congressional elections preceding the 1868 Johnson impeachment illustrate the point.⁴⁴¹

439. 1 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT, 1-213 (Susan B. Carter et al. eds., millennial ed. 2006) [hereinafter HISTORICAL STATISTICS].

440. *Id.*

441. *See infra* tbl 2.

Table 2
*Congressional Party Divisions After
 the Elections of 1856 Through 1866*

| | 1856 | 1858 | 1860 | 1862 | 1864 | 1866 |
|-----------------------|------|------|------|------|------|------|
| Senate ⁴⁴² | | | | | | |
| Republicans | 20 | 26 | 31 | 33 | 39 | 57 |
| Democrats | 41 | 38 | 15 | 10 | 11 | 9 |
| Unionist | | | 3 | 9 | 4 | |
| Other | 5 | 2 | | | | |
| Vacant | | | 1 | | | 2 |
| House ⁴⁴³ | | | | | | |
| Republicans | 90 | 116 | 108 | 86 | 136 | 173 |
| Democrats | 132 | 83 | 44 | 72 | 38 | 47 |
| Unionist | | | 26 | 25 | 18 | |
| Other | 15 | 39 | 5 | 2 | 1 | 4 |
| Vacant | | | | | | 2 |

For both parties, the struggle over who would vote in the South was a struggle not just for principles but also for power. Through violence, fraud, and repressive state statutes enacted soon after the war, white Southerners were preventing African Americans from voting. The Union army still occupied much of the South, and Congressional Republicans intended to use it to guarantee that African Americans could vote. Johnson, a racist, opposed this. In one message to Congress, he called African Americans unfit to be voters, "corrupt in principles and enemies of free institutions," and "inferior."⁴⁴⁴

The result was a struggle between Johnson, who was still a Democrat and who favored readmitting the rebellious states more or less unconditionally, and Congress, which was dominated by Radical Republicans determined to change the South fundamentally in order to protect newly freed slaves. Johnson frustrated congressional goals at every opportunity.⁴⁴⁵ In 1866, Johnson vetoed the Civil Rights Bill, a veto Congress overrode.⁴⁴⁶ The bill extended citizenship to freed slaves and

442. Senate Party Divisions, *supra* note 198.

443. House Party Divisions, *supra* note 199.

444. BENEDICT, *supra* note 435, at 75.

445. Gerhardt, *supra* note 231, at 103.

446. JAMES E. SEFTON, ANDREW JOHNSON AND THE USES OF CONSTITUTIONAL POWER 130-31 (1980).

guaranteed them the right to vote, make contracts, sue, and testify.⁴⁴⁷ Johnson also opposed adoption of the Fourteenth Amendment.⁴⁴⁸ He and his Democratic allies tried to demonize his opponents in Congress by calling them Radical Republicans; but they wore the phrase as a badge of honor.⁴⁴⁹

In 1866, Congress reduced the number of Supreme Court Justices to eight, apparently to deprive Johnson of an opportunity to fill a vacancy⁴⁵⁰—roughly the reverse of Franklin Roosevelt’s court-packing plan.⁴⁵¹ To prevent Johnson from replacing Radical Republican officers in the executive branch with persons more amenable to his philosophy, Congress passed the Tenure of Office Act in 1867.⁴⁵² The act provided that no executive branch official confirmed by the Senate could be dismissed during the term of the president who appointed him and for thirty days after that term ended without the consent of the Senate.⁴⁵³ If a president dismissed an official covered by the Act without the Senate’s consent, the president was guilty of a crime punishable by imprisonment for up to five years as well as a fine.⁴⁵⁴ The Act also declared that such a dismissal would be considered a “high misdemeanor”—clear warning of what Congress intended to do if Johnson removed any of his Cabinet members from office.

Johnson inherited his Cabinet from Lincoln. Congressional Republicans intended to limit Johnson’s power by restricting his ability to replace subordinates. They were most concerned about Edwin Stanton, Lincoln’s and Johnson’s secretary of war and the leading Radical in the Cabinet, whose department controlled the Union army still in the South. Stanton was a complex person who had Lincoln’s trust and Johnson’s

447. *Id.* at 130; HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS AND RECONSTRUCTION 26 (1999).

448. TREFOUSSE, *supra* note 447, at 28-29; Gerhardt, *supra* note 231, at 103.

449. BENEDICT, *supra* note 435, at 8.

450. TREFOUSSE, *supra* note 447, at 43. The Radical Republicans had some other problems with the Supreme Court. In March 1868, Congress took the extraordinary step of abolishing the Court’s jurisdiction to decide appeals growing out of the Habeas Corpus Act of 1867. *Ex parte McCordle*, 74 U.S. 506, 508 (1869); *see also* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

451. *See infra* text accompanying notes 571-578.

452. Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (amended 1869, repealed 1887).

453. *Id.*

454. *Id.* On the history of the Act, *see* JAMES HART, TENURE OF OFFICE UNDER THE CONSTITUTION: A STUDY IN LAW AND PUBLIC POLICY 230-32 (1930).

respect but did not believe he needed to take orders from Johnson.⁴⁵⁵ The Tenure of Office Act made him unsuperviseable. Because Lincoln appointed Stanton during his first term, Johnson argued, as a matter of ordinary statutory interpretation, Stanton was not protected by the Act.⁴⁵⁶

"The whole Cabinet, especially Stanton, called the act unconstitutional and advised Johnson to veto it," which he did, on the ground that a president cannot satisfy his constitutional duty to faithfully execute the law if he is prevented from dismissing unsatisfactory subordinates.⁴⁵⁷ Congress overrode his veto by very large margins in both Houses.⁴⁵⁸ The Tenure of Office Act was a large step in the direction of parliamentary government, in which the executive branch as a whole (a Cabinet) and individuals within the executive branch (a minister, for example) serve at the pleasure of the legislative branch. The Act did not give Congress the power to remove officials, although Congress could have used the power of impeachment for that purpose, as the British House of Commons did until it acquired the power of removal through a vote of no confidence.

Johnson knew the Tenure of Office Act was unconstitutional, but he made that point in a manner guaranteed to inflame Congress. First, in summer 1867, Johnson suspended Stanton, which the Act permitted him to do when Congress was not in session, and he appointed General Ulysses S. Grant as acting secretary of war.⁴⁵⁹ Both the North and Congressional Republicans viewed Grant as the general who had saved the country, but he was far less of a Radical than Stanton. The Act gave the Senate the authority to disallow a suspension when it came back into session. When the Senate reconvened on January 13, 1868, it did so.⁴⁶⁰ Grant immediately resigned as Acting Secretary, and gave the office keys back to Stanton, who barricaded himself there for weeks.⁴⁶¹

455. FLETCHER PRATT, STANTON: LINCOLN'S SECRETARY OF WAR ix (1953). *See generally* BENJAMIN P. THOMAS & HAROLD M. HYMAN, STANTON: THE LIFE AND TIMES OF LINCOLN'S SECRETARY OF WAR (1962).

456. TREFOUSSE, *supra* note 447, at 45.

457. SEFTON, *supra* note 446, at 149.

458. *Id.*

459. LABOVITZ, *supra* note 74, at 57; TREFOUSSE, *supra* note 447, at 99; VAN TASSEL & FINKELMAN, *supra* note 82, at 224.

460. BUSHNELL, *supra* note 92, at 136; LABOVITZ, *supra* note 63, at 57; TREFOUSSE, *supra* note 447, at 125.

461. TREFOUSSE, *supra* note 447, at 125-27. Though it is hard for us to imagine today, the federal government in 1868 was so small that the War Department, the predecessor to the Department of the Army, could be administered from office space with a single door.

Johnson then tried to create an army unit, located in and around Washington, that he could control directly himself. On February 6, Johnson ordered Grant, who had reverted to his role as the highest general in the army, to form an Army of the Atlantic under the command of General William T. Sherman.⁴⁶² Sherman was a solid racist and sympathetic to Southern whites despite his tactics during the war.⁴⁶³ On February 13, Johnson sent the Senate a nomination to promote Sherman to the rank of General of the Army, the same rank as Grant's.⁴⁶⁴ "Sherman was thunderstruck" and declined the command.⁴⁶⁵ He wrote to his brother, a Republican Senator from Ohio, that "[t]he President would make use of me to begat violence."⁴⁶⁶ On February 21, Johnson fired Stanton.⁴⁶⁷

Three days later, the House impeached Johnson by a vote of 126 to 47.⁴⁶⁸ With one exception, the articles of impeachment charged him with violating the Tenure of Office Act.⁴⁶⁹ The exception accused him of trying "to impair and destroy the regard and respect of all the good people of the United States for the Congress . . . and to excite the odium and resentment of all good people of the United States against Congress" and of "mak[ing] and deliver[ing], with a loud voice, certain intemperate, inflammatory, and scandalous harangues [with] loud threats and bitter menaces . . . against Congress" and the statutes it had recently enacted.⁴⁷⁰

462. BENEDICT, *supra* note 435, at 100; B.H. LIDDELL HART, SHERMAN: SOLDIER, REALIST, AMERICAN 409-10 (1930); TREFOUSSE, *supra* note 447, at 128.

463. MICHAEL FELLMAN, CITIZEN SHERMAN: A LIFE OF WILLIAM TECUMSEH SHERMAN 242-43 (1995) (quoting Sherman, in a letter to a Radical Republican: "I am not yet prepared to receive the negro on terms of political equality . . ."); JAMES MERRILL, WILLIAM TECUMSEH SHERMAN 142 (1971) (Sherman, in a letter to his wife: "Niggers won't work unless they are owned . . ."); GEOFFREY PERRET, ULYSSES S. GRANT: SOLDIER AND PRESIDENT 413 (1997) ("Sherman did not believe in Reconstruction. . . . He opposed nearly every Reconstruction measure.").

464. BENEDICT, *supra* note 435, at 100; TREFOUSSE, *supra* note 447, at 128.

465. BENEDICT, *supra* note 435, at 100; *accord* HART, *supra* note 462; TREFOUSSE, *supra* note 447, at 128.

466. BENEDICT, *supra* note 435, at 100.

467. *Id.*; BUSHNELL, *supra* note 92, at 137; TREFOUSSE, *supra* note 447, at 133-34; VAN TASSEL & FINKELMAN, *supra* note 82, at 224.

468. BUSHNELL, *supra* note 92, at 137; LABOVITZ, *supra* note 74, at 57.

469. BRANT, *supra* note 97, at 137; LABOVITZ, *supra* note 74, at 58-59; 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 6-10 (1868) [hereinafter TRIAL OF ANDREW JOHNSON]; VAN TASSEL & FINKELMAN, *supra* note 82, at 227-36.

470. A. Johnson Impeachment Articles, <http://www.vw.vccs.edu/vwhansd/HIS269/Documents/ImpeachArticles.html> (last visited Apr. 21, 2007); *see also* BRANT, *supra* note 97, at 137; VAN TASSEL & FINKELMAN, *supra* note 82, at 232; *see also* LABOVITZ, *supra* note 74, at 61.

Radical Republicans in the House had been itching to impeach. They actually tried to impeach Johnson in 1867, but failed by a vote of fifty-seven to one hundred and eight.⁴⁷¹ And on January 30, 1868—a little more than three weeks before they actually did impeach Johnson—the House ordered an impeachment inquiry concerning a Supreme Court Justice who could not, from the evidence before the House, be identified.⁴⁷² The totality of the evidence, in fact, was the following paragraph published in a newspaper story:

At a private gathering of gentlemen of both political parties, one of the justices of the Supreme Court spoke very freely concerning the reconstruction measures of Congress, and declared in the most positive terms that all these laws were unconstitutional, and that the court would be sure to pronounce them so. Some of his friends near him suggested that it was quite indiscreet to speak so positively, when he at once repeated the views in a more emphatic manner.⁴⁷³

This was hardly an impeachable offense. If it were, Justice Scalia would have been impeached after he publicly took a position concerning the 2004 Pledge of Allegiance case before it had been argued in the Supreme Court.⁴⁷⁴ Even if a Justice had in fact prejudged an issue in this way, the proper remedy would have been recusal from cases where that issue arose. No such cases had reached the Supreme Court, and thus no opportunity to recuse had arisen. But the House voted to investigate anyway, by a vote of ninety-seven to fifty-seven.⁴⁷⁵ On June 18—after Johnson had been acquitted in the Senate—the relevant House committee asked for authorization to terminate the investigation into the unidentified Supreme Court Justice.⁴⁷⁶ The House agreed by voice vote and without debate.⁴⁷⁷ The available records do not reveal whether the committee was unable to learn the Justice's identity (thought to be Justice Stephen Field),⁴⁷⁸ or the accuracy of the newspaper story, or whether, after Johnson's acquittal, the House had tired of impeachment, or whether the

471. LABOVITZ, *supra* note 74, at 49-56; TREFOUSSE, *supra* note 447, at 98-114.

472. 3 HINDS, *supra* note 422, § 2503.

473. *Id.*

474. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); Charles Lane & David Von Drehle, *Is Scalia Too Blunt To Be Effective? Justice Out of Case About Which He Cares*, WASH. POST, Oct. 17, 2003, at A27.

475. 3 HINDS, *supra* note 422, § 2503.

476. *Id.*

477. *Id.*

478. BRANT, *supra* note 97, at 137.

House was no longer worried about whether Reconstruction legislation might be declared unconstitutional.

Johnson's Senate trial began on February 25.⁴⁷⁹ Johnson's lawyers provided several key defenses: (1) that the Tenure of Office Act was unconstitutional; (2) that it did not protect Stanton (who was appointed during Lincoln's first term); (3) that Johnson fired Stanton to test the constitutionality and interpretation of the statute in court; and (4) that the impeachment article that complained about his views of Congress violated his First Amendment rights.⁴⁸⁰ In May, the trial adjourned for a few weeks to permit Senators to attend the Republican Convention, which nominated Grant for president.⁴⁸¹ On May 26, the Senate reconvened and acquitted Johnson by a vote of thirty-five for conviction to nineteen against, one vote short of the two-thirds necessary to convict.⁴⁸² All the votes to convict were Republican, although seven Republicans voted to acquit.⁴⁸³ "The closeness of the vote may be deceiving," according to Trefousse, a leading historian of Johnson's impeachment. "Considerable evidence exists that other senators [who voted to convict] stood ready to vote for acquittal [instead] if their votes had been needed."⁴⁸⁴

Johnson's impeachment is remembered as the ultimate use of the procedure as a partisan political weapon. It took to extremes tendencies that dominated three of the five impeachments that preceded it. And some of the participants had much to gain personally from the outcome. Throughout, everyone expected Grant to be a candidate for president in 1868. Because Johnson became president on Lincoln's death, and because no procedure existed for filling a vice-presidential vacancy (later supplied by the Twenty-Fifth Amendment), under the law of presidential succession at the time, the president pro tempore of the Senate, Benjamin Wade, would become president if Johnson were convicted. Although the propriety of Wade's sitting with the other Senators as a judge in Johnson's trial was questioned at the time, he was permitted to do so.⁴⁸⁵ When a president is impeached, the chief justice presides at the Senate trial, and Chief Justice Salmon Chase did so in this instance, even though it was well

479. TREFOUSSE, *supra* note 447, at 151.

480. SEFTON, *supra* note 446, at 177.

481. TREFOUSSE, *supra* note 447, at 170.

482. BRANT, *supra* note 97, at 137; TREFOUSSE, *supra* note 447, at 170-71.

483. BUSHNELL, *supra* note 92 at 159-60.

484. TREFOUSSE, *supra* note 447, at 169.

485. BUSHNELL, *supra* note 92, at 139; Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 87 n.412 (1999).

known that he wanted to run for president.⁴⁸⁶ Chase had even tried to outmaneuver Lincoln and gain the presidential nomination in the 1864 Republican Convention.⁴⁸⁷

It was obviously in Wade's interest that Johnson be convicted because that would make Wade president immediately. But it was in Grant's and Chase's interest that he be acquitted. If Wade became president, he would be in a much stronger position to win the 1868 presidential election. But at the same time, both Grant and Chase had to avoid alienating the Radicals because neither could be nominated for president by the Republican Party if the Radicals opposed them. It is unclear how many of the seven Republicans who voted to acquit Johnson did so in order to prevent Wade from gaining this advantage. If that was their motive, they would have needed to hide it because Wade would remain a powerful Senator with whom they would have to work.⁴⁸⁸ Similarly, it is unclear to what extent House Republicans who voted to impeach Johnson were motivated by a desire to give Wade a position of strength over Grant and Chase in the 1868 presidential election.

Later in 1868, after his acquittal, Johnson tried but failed to get the Democratic nomination for president.⁴⁸⁹ He returned to Tennessee and failed to be elected Senator in 1869.⁴⁹⁰ He ran unsuccessfully for other offices until he was elected Senator and returned briefly in 1875 to the body that nearly convicted him seven years before.⁴⁹¹ He died later that year.⁴⁹²

Grant was elected president as a Republican in November 1868. Immediately after taking office, he asked Congress to repeal the Tenure of Office Act. Johnson was no longer president, and both Grant and Congress thought similarly about Reconstruction. Instead of completely repealing the act, Congress rewrote it by deleting the punishments for a president's violation of the act but preserving the Senate's power to overrule a president's dismissal.⁴⁹³ In 1872, Congress enacted another statute providing that certain postal officials, including some local postmasters,

486. Turley, *supra* note 485, at 87 n.412.

487. *Id.* at 90 n.426.

488. BENEDICT, *supra* note 435, at 126-43; VAN TASSEL & FINKELMAN, *supra* note 82, at 227.

489. BENEDICT, *supra* note 435, at 183; BUSHNELL, *supra* note 92, at 160.

490. BUSHNELL, *supra* note 92, at 160.

491. BENEDICT, *supra* note 435, at 183; BUSHNELL, *supra* note 92, at 160.

492. BUSHNELL, *supra* note 92, at 160.

493. Tenure of Office Act, ch. 10, 16 Stat. 6 (1869) (repealed 1887).

could be dismissed only with the consent of the Senate.⁴⁹⁴ In 1887, Congress repealed the Tenure of Office Act in its entirety.

The postal statute remained in place until 1926, when it came before the Supreme Court in an appeal by a dismissed postmaster in *Myers v. United States*.⁴⁹⁵ The Solicitor General did not defend the statute but instead argued that it was unconstitutional—a rare event in the history of the Solicitor General's office.⁴⁹⁶ Chief Justice Taft wrote the Court's seventy-two page opinion, which struck down the statute as a violation of the Separation of Powers doctrine.

E. The Era of Nonpartisanship and Bipartisanship

After 1868 and through the 1980s, most impeachments were nonpartisan, although beginning in 1968, extremely partisan impeachments were threatened and occurred.

1. *Belknap to Hoover*

Secretary of War William Belknap resigned in 1876, “two hours before the House voted to impeach him” for corruption in office.⁴⁹⁷ By a vote of thirty-seven to twenty-nine, the Senate concluded that it still had jurisdiction, despite his resignation.⁴⁹⁸ Belknap refused to defend himself,⁴⁹⁹ perhaps because his lawyers predicted from the jurisdictional vote that the two-thirds majority needed for conviction would not materialize. That is exactly what occurred, though most of the Senate thought him guilty.⁵⁰⁰ It is impossible to know from the vote how many of the Senators voting to acquit did so because Belknap had already resigned.⁵⁰¹

In 1872, the House voted to impeach Mark Delahay, a district court judge in Kansas, for drunkenness and corruption.⁵⁰² But he resigned before

494. 17 Stat. 284 (1872), *reenacted* 19 Stat. 80 (1876).

495. 272 U.S. 52 (1926).

496. REHNQUIST, *supra* note 219, at 265.

497. Report of the Nat'l Comm'n on Judicial Discipline & Removal, 152 F.R.D. 265, 296 (1993); *see also* VAN TASSEL & FINKELMAN, *supra* note 82, at 12; Turley, *supra* note 485, at 53-56.

498. VAN TASSEL & FINKELMAN, *supra* note 82, at 192.

499. BUSHNELL, *supra* note 92, at 177; Turley, *supra* note 485, at 55.

500. Turley, *supra* note 485, at 55.

501. BLACK, *supra* note 67, at 51.

502. *Judicial Discipline & Removal*, 152 F.R.D. at 296; BORKIN, *supra* note 422, at 201, 229; 3 HINDS, *supra* note 422, §§ 2504-05; VAN TASSEL & FINKELMAN, *supra* note 71, at 119-23; Turley, *supra* note 485, at 58.

the House could present articles of impeachment to the Senate.⁵⁰³ Almost the same thing happened after the House impeached George English, a district court judge in Illinois, except that English resigned at the beginning of his Senate impeachment trial—after the House had presented the impeachment articles—on charges of corruption, favoritism, and abuse of power; the House managers withdrew the articles of impeachment.⁵⁰⁴

Charles Swayne, a district court judge in Florida, was impeached in 1904, which the Florida state legislature had twice petitioned the House to do.⁵⁰⁵ He was a Republican, appointed by Republican President Benjamin Harrison.⁵⁰⁶ Politically, Florida was a Democratic state at the time. The House that impeached Swayne included 207 Republicans and 178 Democrats, and the initial vote to impeach was 198 to 61, suggesting bipartisanship.⁵⁰⁷ But after the impeachment vote the House appointed a committee to draft articles of impeachment—an odd and no longer used procedure, which has the defect of asking Representatives to vote for an accusation in principle and then approve the wording of it later.⁵⁰⁸ When the articles of impeachment eventually were submitted to the House, the votes on each article of impeachment were much closer—165 to 160, 162 to 138, and 159 to 136—and had become partisan, most of the yeas being Democratic and most of the nays being Republican.⁵⁰⁹ In the Senate, Swayne was acquitted, and none of the articles got even a majority of the votes, much less the two-thirds required for a conviction.⁵¹⁰

The articles accused Swayne of improprieties involving railway travel, filing false expense accounts, not living inside his judicial district (which the law, at that time, required), and improperly sentencing people for

503. *Judicial Discipline & Removal*, 152 F.R.D. at 296; BORKIN, *supra* note 422, at 201, 229; 3 HINDS, *supra* note 422, §§ 2504-05; VAN TASSEL & FINKELMAN, *supra* note 82, at 119-20; Turley, *supra* note 485, at 58.

504. BORKIN, *supra* note 422, at 203-04, 231-32; 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 544-47 (1935) [hereinafter CANNON'S PRECEDENTS]; 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 14, § 16 [hereinafter DESCHLER'S PRECEDENTS]; VAN TASSEL & FINKELMAN, *supra* note 82, at 144-52; Turley, *supra* note 485, at 58.

505. BUSHNELL, *supra* note 92, at 191; Turley, *supra* note 485, at 63.

506. BUSHNELL, *supra* note 92, at 191-92; Jacobus tenBroek, *Partisan Politics and Federal Judgeship Impeachment since 1903*, 23 MINN. L. REV. 185, 188 (1938-1939).

507. BUSHNELL, *supra* note 92, at 192-93.

508. As a result of the problems caused by this procedure in the Swayne impeachment, it was replaced in 1912, during the Archbald impeachment, with the practice of having the committee report at the same time both a recommendation to impeach, and the draft articles of impeachment which, if the House were to vote for impeachment, would be forwarded to the Senate. See LABOVITZ, *supra* note 74, at 114 n.34.

509. BUSHNELL, *supra* note 92, at 193.

510. *Id.* at 212; VAN TASSEL & FINKELMAN, *supra* note 82, at 124-25.

contempt of court.⁵¹¹ These are too insignificant to motivate a state legislature to petition Congress twice to remove a federal judge. None of the impeachment scholars who has written about Swayne has fully considered the position of a Republican federal judge in a Southern state with a large African-American population⁵¹² During the last decade of the nineteenth century and the first decade of the twentieth. Henry Cabot Lodge's National Election Bill⁵¹³ failed of enactment in 1890, and Southern whites escalated the disenfranchisement of African-American voters through intimidation and fraud and eventually through new statutes and state constitutional provisions that made it extremely difficult if not impossible for African-Americans to vote in the South⁵¹⁴ until passage of the Voting Rights Act in 1965.⁵¹⁵ When African Americans were able to vote in the South, they largely voted Republican. The closest any impeachment scholar comes to recognizing this context is a single comment by Bushnell—not mentioning race or the final loss of rights gained during Reconstruction—that Harrison had nominated Swayne “to ensure swift and firm hearing of cases stemming from election frauds in Florida . . . allegedly committed by the Democratic party,”⁵¹⁶ and because he had enforced the law, “the impeachment of Judge Swayne was made a party issue by Democrats.”⁵¹⁷

511. BUSHNELL, *supra* note 92, at 193.

512. The Florida population was 42% African-American in the 1890 census and 44% African-American in the 1900 census. 1 HISTORICAL STATISTICS, *supra* note 439. Only five states—Alabama, Georgia, Louisiana, Mississippi, and South Carolina—had, by percentage, larger African-American populations. *Id.* at 1-180 to 1-379.

513. See Henry Cabot Lodge, *The Federal Election Bill*, 151 N. AM. REV. 257 (1890) “The Southern Democrats declare that the enforcement of this or any other law will cause social disturbance and revolutionary outbreaks. As the negroes now disenfranchised certainly will not revolt because they receive a vote, it is clear, therefore, that this means that the men who now rule in those States will make social disturbances and revolution in resistance to a law of the United States.” *Id.* at 259.

514. See V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION (1949); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974); MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908 (2001); THOMAS ADAMS UPCHURCH, LEGISLATING RACISM: THE BILLION DOLLAR CONGRESS AND THE BIRTH OF JIM CROW (2004); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

The Jim Crow codes deprived Southern African Americans of equal participation in nearly every aspect of modern life. Until the Civil Rights movement began after World War II, the Supreme Court held them to be constitutional. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

515. 42 U.S.C. §§ 1971-1973i (2007).

516. BUSHNELL, *supra* note 92, at 191-92.

517. tenBroek, *supra* note 506.

In some sense Democrats used impeachment as a political weapon against Swayne. Democrats had looked hard for pretexts to oust a judge who had offended them by enforcing the law in political cases. But this was not of the same character as the impeachments of Blount, Pickering, Chase, Johnson, or Clinton. Swayne was an obscure trial judge in what was then almost an entirely rural state. Democrats were trying neither to wound the Republican Party nationally nor win a national political or constitutional confrontation.

Robert Archbald of the U.S. Commerce Court (which existed for only three years)⁵¹⁸ was impeached in 1912 and convicted by the Senate in 1913. "Archbald's case . . . followed the modern model of a largely nonpartisan impeachment" after he was accused of a wide range of corruption.⁵¹⁹ In the 1930s, Jacobus tenBroek wrote an article trying to show, among other things, that the Archbald impeachment was an attempt by President William Howard Taft's enemies to embarrass Taft because "the Democrats persistently voted against Archbald, and they were continuously supported by the Progressives and the adherents of Theodore Roosevelt"⁵²⁰ right after Taft was defeated for reelection by Woodrow Wilson, a Democrat, and Roosevelt, a third-party candidate. The numbers can be looked at as tenBroek describes them, but that presents a misleading picture. First, the Senate trial began on December 3, 1912,⁵²¹ a month after Taft was soundly defeated. Second, the votes for conviction were overwhelming. The Senate convicted Archibald on five articles of impeachment by votes of sixty-eight to five, sixty to eleven, fifty-two to twenty, sixty-six to six, and forty-two to twenty, acquitting him of other charges.⁵²² And third, only five Senators voted on every charge to acquit; one was a Democrat, and two were the Senators from Archbald's home state.⁵²³ Every other Senator thought he was guilty of at least one of the charges.

518. VAN TASSEL & FINKELMAN, *supra* note 82, at 132.

519. Turley, *supra* note 485, at 64-65; *see also* BUSHNELL, *supra* note 92, at 217-42; VAN TASSEL & FINKELMAN, *supra* note 82, at 132-52.

520. tenBroek, *supra* note 506, at 191. TenBroek was an unusual and interesting person. He was on the political science faculty at the University of California at Berkeley. Although not a lawyer, he had a deep effect on several aspects of mid-twentieth century constitutional scholarship, and, at one time, students in law school constitutional law courses would have been familiar with his work. Perhaps his most valuable book was *EQUAL JUSTICE: THE ORIGINS OF THE FOURTEENTH AMENDMENT* (1969). He was also the founder of the National Federation of the Blind and was an early and still cherished advocate for the rights of the disabled. *See* FLOYD MATSON, *BLIND JUSTICE: JACOBUS TENBROEK AND THE VISION OF EQUALITY* (2005).

521. BUSHNELL, *supra* note 92, at 220.

522. *Id.* at 237-38; VAN TASSEL & FINKELMAN, *supra* note 82, at 133.

523. BUSHNELL, *supra* note 92, at 239.

Harold Louderback, a district court judge in California, was impeached in 1932 and acquitted by the Senate in 1933. The House investigating committee recommended censure rather than impeachment, but the House voted to impeach anyway.⁵²⁴ Of the five articles of impeachment, four failed to get even a simple majority in the Senate, and the fifth failed for lack of a two-thirds majority.⁵²⁵ The San Francisco Bar Association had asked the House to investigate Louderback for corruption in the appointment of receivers in bankruptcy cases.⁵²⁶ Democratic Senators were split between conviction and acquittal, and Republicans mostly voted for acquittal.⁵²⁷

Several other federal judges resigned during this period to avoid impeachment. Charles Sherman, an Ohio district court judge, resigned in 1873 during an impeachment investigation in the House on charges of corruption.⁵²⁸ Richard Busteed, a district court judge in Alabama, resigned in 1875 after the House Judiciary Committee recommended impeachment for failing to hold court regularly and for manipulating his judgeship for self-enrichment.⁵²⁹ Edward Durrell, a Louisiana district court judge, resigned after the House Judiciary Committee recommended impeachment in 1875 for irregularities in supervising bankruptcy cases.⁵³⁰ Cornelius Hanford, a district court judge in Washington State, resigned in 1912 during a House investigation into allegations of corruption and drunkenness.⁵³¹ Daniel Wright of the Supreme Court of the District of Columbia resigned in 1914 during a House Judiciary Committee subcommittee impeachment investigation on corruption and miscellaneous other charges.⁵³² And Francis Winslow, a district court judge in New York, resigned in 1929 on the day a House Judiciary Committee subcommittee was to begin impeachment hearings on allegations of corruption.⁵³³

In 1921, the House referred to the Judiciary Committee an impeachment resolution accusing Kenesaw Mountain Landis, a district judge in Illinois, of “neglecting his official duties for another gainful

524. *Id.* at 245; VAN TASSEL & FINKELMAN, *supra* note 82, at 152.

525. VAN TASSEL & FINKELMAN, *supra* note 82, at 152-53.

526. BUSHNELL, *supra* note 92, at 246-47.

527. tenBroek, *supra* note 506, at 198.

528. BORKIN, *supra* note 422, at 202, 245; 3 HINDS, *supra* note 422, § 2511.

529. BORKIN, *supra* note 422, at 202, 226; 3 HINDS, *supra* note 422, § 2512.

530. BORKIN, *supra* note 422, at 201-02, 230; 3 HINDS, *supra* note 422, §§ 2506-09.

531. BORKIN, *supra* note 422, at 203, 232-33; 6 CANNON'S PRECEDENTS, *supra* note 504, § 526.

532. BORKIN, *supra* note 422, at 203, 257; 6 CANNON'S PRECEDENTS, *supra* note 504, § 528.

533. BORKIN, *supra* note 422, at 255-57; 6 CANNON'S PRECEDENTS, *supra* note 504, § 550.

occupation not connected therewith.”⁵³⁴ In 1920, Landis had accepted a job as the first Commissioner of baseball—which paid \$50,000 a year compared to a federal judge’s \$7,500 salary⁵³⁵—and did not think he needed to resign from the bench. After a public outcry, and after an impeachment investigation began, Landis rethought that position and resigned from the less lucrative and, some would say, the less intriguing of the two jobs.⁵³⁶

From 1931 until he left office in March 1933, Herbert Hoover was probably the most reviled of all presidents, and his handling of the Great Depression was widely felt to have exacerbated a national disaster with enormous human suffering. Millions of people who had lost their jobs were reduced to living in shacks or tents in communities of the homeless called Hoovervilles. At no other point in American history have so many people felt that they were being personally and directly harmed by the failures of a single president. The enduring image of the Great Depression is one of destitute people selling apples on street corners. Hoover was so isolated from what was happening that he actually believed that these people were doing well financially, that they had not become unemployed as factories and other businesses went bankrupt—but instead, in Hoover’s words, had “left their jobs for the more profitable one of selling apples.”⁵³⁷

Even though the economy was in free fall from late 1931 through the end of Hoover’s term, no one seriously thought of impeaching him. He could not have been convicted. Although the Democrats controlled the House of Representatives during this period, the Republicans barely held onto the Senate.⁵³⁸ There is no evidence that the Democrats even considered using impeachment as a political tactic to harass and embarrass Hoover and his party in preparation for the 1932 elections, as the Republicans in 1998 and 1999 used impeachment to harass and embarrass Clinton and the Democrats. In December 1932, a lone Congressman moved for Hoover’s impeachment. A month earlier, Franklin D. Roosevelt had overwhelmingly defeated Hoover, but Hoover’s term still had four months to run because the Twentieth Amendment, shortening the

534. 6 CANNON’S PRECEDENTS, *supra* note 504, § 535.

535. JONATHAN FRASER LIGHT, THE CULTURAL ENCYCLOPEDIA OF BASEBALL 179 (1997); DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 195 (1998). The impeachment resolution alleged that the Commissioner’s salary was \$42,500, 6 CANNON’S PRECEDENTS, *supra* note 504, § 535, but baseball historians presumably know more about such things than contemporary Congressmen did.

536. PIETRUSZA, *supra* note 535, at 196-208; 6 CANNON’S PRECEDENTS, *supra* note 504, § 535.

537. 3 HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE GREAT DEPRESSION 195 (1952).

538. See *infra* tbl.3.

time between election and inauguration, had not yet been adopted. The House quickly and overwhelmingly rejected the motion.⁵³⁹

In the years since 1868, impeachment had largely lost its political purpose and was used primarily to remove from office deeply unsatisfactory officials. By the 1930s, impeachment had become so nonpartisan that its use as a political weapon seemed to have left everyone's consciousness.

2. 1937

Sometimes, the thing that is most revealing is what did *not* happen, like the dog that did not bark,⁵⁴⁰ or the impeachment that was never attempted or threatened.

In 1928, Hoover was elected president in a landslide. The Great Depression began the following year. By November 1932, when Franklin D. Roosevelt defeated Hoover in an even bigger landslide, the economy had collapsed. The week before Roosevelt's inauguration in March 1933, virtually every bank in the United States was closed, and commerce was being conducted by barter. In Roosevelt's first administration, a massive amount of legislation was enacted in attempts to restore prosperity and to stabilize capitalism by adopting the types of social insurance that had long ago been enacted in nearly every advanced European country.

This New Deal resulted from a massive political realignment. The Democrats, who had been a minority party since the Civil War, suddenly became the majority party and remained so for the next two generations. The size and speed of this political tidal wave can be seen in the results of Congressional elections from 1928 through 1938.⁵⁴¹

539. 6 CANNON'S PRECEDENTS, *supra* note 504, § 541; 3 DESCHLER'S PRECEDENTS, *supra* note 504, § 14.3; Turley, *supra* note 485, at 76 n.364.

540. "Is there any other point to which you wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes. . . . "Obviously the midnight visitor was someone the dog knew well."

Arthur Conan Doyle, *Silver Blaze*, in 1 THE COMPLETE SHERLOCK HOLMES 413-15 (Jeffrey Broesche ed. 2003).

541. *See infra* tbl. 3.

Table 3
*Congressional Party Divisions After
 the Elections of 1928 Through 1938*

| | 1928 | 1930 | 1932 | 1934 | 1936 | 1938 |
|-----------------------|------|------|------|------|------|------|
| Senate ⁵⁴² | | | | | | |
| Democrats | 39 | 47 | 59 | 69 | 76 | 69 |
| Republicans | 56 | 48 | 36 | 25 | 16 | 23 |
| Farmer-Labor | 1 | 1 | 1 | 1 | 2 | 2 |
| Progressive | | | | 1 | 1 | 1 |
| Independent | | | | | 1 | 1 |
| House ⁵⁴³ | | | | | | |
| Democrats | 164 | 216 | 313 | 322 | 334 | 262 |
| Republicans | 270 | 218 | 117 | 103 | 88 | 169 |
| Farmer-Labor | 1 | 1 | 5 | 3 | 5 | 1 |
| Progressive | | | | 7 | 8 | 2 |
| American-Labor | | | | | | 1 |

The numbers in Table 3 understate Democratic strength because the third-party Senators and Representatives nearly all voted enthusiastically for New Deal legislation. At times, political change happened so fast that party divisions in Congress changed every few weeks. For example, in the November 1930 elections the Republicans retained the House of Representatives by two seats. But before the first day the newly elected Congress convened, nineteen Representatives-elect had died. In special elections to replace them, fourteen of these seats changed hands, producing a Democratic majority in the House not reflected in Table 3.

Roosevelt viewed the Supreme Court with suspicion even before he was elected president. In the 1932 election campaign, he feared that, even if he won, the Republican Party would continue to control the Court.⁵⁴⁴ Republican presidents concerned with property rights had nominated seven of the nine Justices then on the Court. Although two of those seven had joined the progressive wing (Harlan Fiske Stone and Benjamin Cardozo), one of the Justices nominated by a Democratic president had become viscerally and reflexively right-wing (James McReynolds). The senior Justice, Willis Van Devanter, had been nominated by William Howard

542. Senate Party Divisions, *supra* note 198.

543. House Party Divisions, *supra* note 199.

544. JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 15 (1938).

Taft. In four years as president, Taft had appointed a total of six Justices—more than any other president except George Washington, who appointed the entire first Supreme Court, and Franklin Roosevelt, who was president for longer than anyone else.⁵⁴⁵

Taft had had a profound influence on the entire federal judiciary, and he would rather have been chief justice than president, as he admitted while appointing Chief Justice Edward D. White.⁵⁴⁶ At the 1912 Republican Convention, Taft and his campaign manager had asked Warren Harding to make the speech nominating Taft for reelection.⁵⁴⁷ After Harding was himself elected president in 1920, Taft successfully lobbied to be appointed chief justice.⁵⁴⁸ (Taft is the only person to have headed both the executive and judicial branches of the federal government.) While chief justice, Taft persuaded Harding to nominate Pierce Butler as associate justice.⁵⁴⁹ Butler “had the distinction of voting to overturn sixty-nine federal statutes after Franklin D. Roosevelt became president.”⁵⁵⁰ Taft “then strategized with Butler and the White House staff on how to get Butler confirmed by the Senate.”⁵⁵¹ When the next Supreme Court vacancy appeared, Taft dissuaded Harding from appointing Learned Hand.⁵⁵² While chief justice, he constantly badgered presidents and attorneys general on whom to appoint to any vacancy on any federal court.⁵⁵³ His only significant failure was when, out of office, he opposed Woodrow Wilson’s nomination of Louis Brandeis.⁵⁵⁴

Well aware of all this, Roosevelt and the Democrats viewed the Supreme Court as Jefferson and his allies had viewed the Court and the federal judiciary of their time: as a fortress into which a party soundly defeated in elections had retreated. By 1935, four Justices—James

545. ABRAHAM, *supra* note 430, at 377-81; C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at 17 (1948).

546. 1 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 535 (1939).

547. DAVID H. BURTON, *TAFT, HOLMES, AND THE 1920S COURT* 113-14 (1998); ROBERT K. MURRAY, *THE HARDING ERA: WARREN G. HARDING AND HIS ADMINISTRATION* 12 (1969); FRANCIS RUSSELL, *THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING AND HIS TIMES* 229 (1968); PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT’S NOMINATION BATTLES* 225 (1992).

548. PRITCHETT, *supra* note 545, at 17-18; SIMON, *supra* note 530, at 227.

549. DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 41-55, 87 (1964); RUSSELL, *supra* note, at 507 n.5; SIMON, *supra* note 530, at 227; EUGENE P. TRANI & DAVID L. WILSON, *THE PRESIDENCY OF WARREN G. HARDING* 49 (1977).

550. TRANI & WILSON, *supra* note 549.

551. SIMON, *supra* note 530, at 227.

552. *Id.*

553. *Id.* at 226-28; *see also* RUSSELL, *supra* note at 507 n.5.

554. PRINGLE, *supra* note 546, at 955.

McReynolds, George Sutherland, Pierce Butler, and Willis Van Devanter—consistently voted to strike down New Deal statutes as unconstitutional. Later, they became known collectively as the Four Horsemen of the Apocalypse.⁵⁵⁵ Three Justices—Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone—generally voted to sustain New Deal legislation. The swing votes belonged to Owen Roberts and Chief Justice Charles Evans Hughes, both of whom frequently sided with the Four Horsemen in 1935 and 1936.

More than any other before or since, this was the Supreme Court that most clearly deserved the designation of “judicial activist.” In not much more than a year, it struck down the Railroad Pension Act,⁵⁵⁶ the National Industrial Recovery Act (the NIRA, but more commonly known by the initials of the agency it authorized, the National Recovery Administration or NRA),⁵⁵⁷ the Frazier-Lemke Farm Mortgage Act,⁵⁵⁸ section five of the Federal Home Owner’s Loan Act,⁵⁵⁹ the Agricultural Adjustment Act (the AAA),⁵⁶⁰ the Bituminous Coal Conservation Act,⁵⁶¹ and the Municipal Bankruptcy Act.⁵⁶²

The weakest New Deal legislation—both constitutionally, and logically—were some of the emergency bills written and enacted quickly

555. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 19 (2000).

556. *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330 (1935).

557. *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (the “sick chicken” case).

558. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

559. *Hopkins Fed. Sav. & Loan Ass’n v. Cleary*, 296 U.S. 315 (1935).

560. *United States v. Butler*, 297 U.S. 1 (1936). Actually, the Court held that the tax at the heart of the AAA was unconstitutional (rather than the entire statute), but without the tax, the AAA was an empty shell. Before the AAA was enacted, Brandeis told Administration officials privately that he thought the bill would be economically destructive. Through Adolf Berle, Brandeis wrote to Roosevelt and threatened—in Brandeis’s words—“to hold the government’s control legislation unconstitutional from now on” if it continued to reward large businesses and farmers at the expense of smaller economic actors (the NRA case had not yet reached the Supreme Court). MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 128-30 (2002). In the summer of 1934, Administration officials visited Brandeis on Cape Cod, where he was vacationing, and tried to persuade him that the AAA should be sustained when eventually litigated in the Supreme Court. Under the conflict-of-interest statute in effect today, all of this would have required Brandeis’s recusal from *Butler*, the AAA case. See 28 U.S.C. § 455(a). Brandeis was quiet on the bench when *Butler* was argued and in conference when it was considered. MCKENNA, *supra*, at 133. He wrote no opinion, only signing Stone’s dissent from the decision to hold the AAA tax unconstitutional. The only plausible explanation for this mute about-face would be a realization on Brandeis’s part that he had said too much earlier, and that if he voted with the majority, the Administration would complain that he had been behaving and thinking unjudicially, which was true. *Id.*

561. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

562. *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936).

after Roosevelt's inauguration in 1933. Typically, the Four Horsemen voted solidly against New Deal legislation and picked up one or both of the swing votes, although with some of the emergency legislation, like the NRA, the Justices' vote to nullify was unanimous. The NRA was clearly beyond the constitutional power of Congress to legislate. It was also dreadful economic policy. The NRA was designed to raise industrial wages for those who were employed. At a time of epidemic business failures and consequent unemployment, its effect—had it been permitted to continue—would have been to drive even more companies out of business and put even more people out of work while raising the prices of goods and services that consumers already could not afford to buy. The AAA had similar defects in regard to food and agriculture. It is fashionable today among neoclassical economists to blame Roosevelt for this, but economic knowledge in the 1930s was so primitive (even the available economic statistics could not meet modern standards for accuracy), and the Great Depression was so cataclysmic and unprecedented, that the only thing Roosevelt could do was to try several different approaches simultaneously to see which would work. In retrospect, what did work was not regulation of wages and production but instead simple government spending through the Works Progress Administration, the Civilian Conservation Corps, and similar programs, which gave people employment and money to create demand for goods and services. What finally ended the Depression was the largest government spending program in history: the Second World War. But, during the Depression nearly everyone feared that if the government spent too much, it would collapse into insolvency.

New Deal legislation of a more permanent nature was more thoroughly thought out than the NRA and the AAA. Much of it had been proposed before Roosevelt became president and had been refined through years of vetting by legislators and academics associated with the Progressive movement that preceded the New Deal. These more carefully written statutes not only accomplished their goals more effectively, but were easier to defend constitutionally. An example was the statute authorizing the Tennessee Valley Authority, which would build dams on the Tennessee River and generate affordable electricity for the middle South, and which the Court did sustain.⁵⁶³

But the distinction between emergency legislation meant to stimulate the economy and legislation meant to permanently reform and modernize capitalism is apparent only now in hindsight. Almost nobody understood it at the time. The first wave of New Deal legislation to reach the Supreme

563. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936).

Court was made up primarily of emergency statutes, and the Court's reaction was startling. On Black Monday, May 27, 1935, the Court unanimously struck down, on constitutional grounds, legislation in three separate cases. It seemed as though no part of the New Deal was safe. Every time the Justices took the bench to announce any decision involving a statute enacted after Roosevelt's inauguration, the country anxiously waited to find out which part of the New Deal would be struck down or allowed to survive. When Wall Street "stockbrokers heard that Hughes was reading the opinion in *Ashwander*," on the constitutionality of the Tennessee Valley Authority, "they jumped to the conclusion that it was adverse to the government and began buying utility stocks as fast as they could get their orders filled. . . . Later, when it appeared that the Administration had been sustained, they made frantic efforts to get rid of the stocks they had bought less than an hour earlier."⁵⁶⁴

Roosevelt was convinced that unless something changed drastically and quickly the entire New Deal—including aspects of government we take for granted today, such as social security—would be struck down by the Supreme Court as unconstitutional, making recovery from the Depression and a modernized capitalism impossible. Essential elements of the New Deal—such as the Social Security Act,⁵⁶⁵ the National Labor Relations Act,⁵⁶⁶ the Banking Act of 1935,⁵⁶⁷ and the Securities Exchange Act of 1934—were being litigated in the lower courts and had not yet reached the Supreme Court. After a Cabinet meeting in December 1935, Harold Ickes, Roosevelt's Secretary of the Interior, wrote in his diary, "Clearly, it is running in the President's mind that substantially all of the New Deal bills will be declared unconstitutional by the Supreme Court. This will mean that everything that this Administration has done of any moment will be nullified."⁵⁶⁸ Roosevelt considered several options, among them limiting the Court's jurisdiction by statute, amending the Constitution to provide the federal government with the powers the Court had held it lacked, and amending the Constitution to create a procedure through which Congress could reenact nullified statutes and constitutionalize them.⁵⁶⁹ The Depression had already brought the National Socialist Party to power in Germany and had brought Fascist and Communist parties near power

564. MCKENNA, *supra* note 560, at 189 n.28.

565. ch. 531, 49 Stat. 620 (1935).

566. ch. 372, 49 Stat. 449 (1935).

567. ch. 614, 49 Stat. 684 (1935).

568. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 95 (1995) (quoting Ickes's diary).

569. *Id.*; MCKENNA, *supra* note 560, at 165-75.

elsewhere in Europe.⁵⁷⁰ When Roosevelt first explained to a meeting of Cabinet officials and Congressional leaders what he intended to do about the Supreme Court, he said: “When I retire to private life on January 20, 1941, I do not want to leave the country in the condition Buchanan left it to Lincoln [on the eve of the Civil War].”⁵⁷¹

On January 20, 1937, Roosevelt was inaugurated for his second term as president. On February 5, he asked Congress to enact legislation to make the judiciary generally more efficient, one aspect of which—treated as a minor one in Roosevelt’s message—would be to add an additional Justice to the Supreme Court whenever an existing Justice passed the age of 70.⁵⁷² Roosevelt’s slyness in packaging the court-packing plan in a proposal on judicial efficiency was quickly seen as deceptive. The whole proposal was really intended to achieve a single goal: Roosevelt needed at least a three-vote margin in the Supreme Court. If the number of Justices remained at nine, he would have been satisfied with six-to-three votes in his favor, but he viewed five-to-four victories as, in his own words, “too uncertain.”⁵⁷³

Almost a quarter-century before, McReynolds himself had proposed the concept on which Roosevelt’s court-packing plan was based. In Justice Department files, Administration lawyers had found a forgotten proposal drafted by McReynolds in 1913 or 1914, when he was Woodrow Wilson’s Attorney General.⁵⁷⁴ The McReynolds plan would have applied to the lower courts and not to the Supreme Court, but the idea was the same: when a federal judge did not retire at a stipulated age, the president could appoint another judge to supplement and in some ways supplant the one who would not retire.⁵⁷⁵ Homer Cummings, Roosevelt’s attorney general, recommended it to Roosevelt, who loved the irony of using McReynolds’ own idea against the Four Horseman.⁵⁷⁶ A “seething rage had been building in Roosevelt for a long time.”⁵⁷⁷ Even though he had won massive electoral landslides, everything he had accomplished was being

570. The Fascist government in Italy and the Communist government in the Soviet Union predated the Depression.

571. LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 10 (1967); LEUCHTENBURG, *supra* note 568, at 109.

572. MESSAGE FROM THE PRESIDENT OF THE U.S. TRANSMITTING A RECOMMENDATION TO REORGANIZE THE JUDICIAL BRANCH OF THE FED. GOV’T, H.R. DOC. NO. 75-142 (1937).

573. ALSOP & CATLEDGE, *supra* note 544, at 209.

574. *Id.* at 33; BAKER, *supra* note 571, at 134; LEUCHTENBURG, *supra* note 568, at 120.

575. ALSOP & CATLEDGE, *supra* note 544, at 33.

576. *Id.* at 33-36; BAKER, *supra* note 571, at 134; MCKENNA, *supra* note 560, at 256-57, 268-69; STEPHENSON, *supra* note 151, at 312.

577. MCKENNA, *supra* note 560, at 263.

dismantled by a handful of unelected judges. Perhaps his outrage and the pleasure of the irony is why neither Roosevelt nor Cummings noticed that the court-packing plan was crude, impractical, and certain to offend most people's sense of what is fair and appropriate.⁵⁷⁸

Rejiggering the number of Supreme Court Justices to gain a partisan advantage had a great deal of historical precedent. In the Constitution's first century, politicians continuously fiddled with the size of the Court so they could pack it:

John Adams, as his Presidency came to an end, had Congress pass a law to reduce the size of the court from six to five members, to take effect when the next vacancy occurred, so that Thomas Jefferson, his successor, would not have an opportunity to fill a vacancy. When Jefferson was President, he was able to make appointments by having the Court restored to six justices and then raised to seven. In 1837, the Court was increased to nine. In 1863, to prevent the Court from blocking Lincoln's war policies, the Court was increased to ten, to, in effect, pack the Court in Lincoln's favor. In 1866, when there were two vacancies . . . , the Congress reduced the Court's membership from ten to eight so that President Andrew Johnson might not be able to fill the two empty seats. In 1869, the eight-man Court had one vacancy. It also [had held] unconstitutional the Legal Tender Act, by which the Union had financed the Civil War. Congress increased the Court's size to nine, giving President Ulysses S. Grant two appointments As soon as his two appointees took their seats on the Court, the Court voted again on the Legal Tender Act and approved it.⁵⁷⁹

The primary difference between all these precedents and Roosevelt's plan was the formula for increasing the size of the Court, which McReynolds had unwittingly supplied. But Roosevelt's plan stunned Congress and the public. After intense political maneuvering, it died through a procedural vote in the Senate in July 1937—a humiliation for a president who had just won an historic landslide, and whose party had huge majorities in both Houses of Congress. Roosevelt personally suffered a loss of public trust and credibility because the court-packing plan was widely seen as reflecting bad political judgment, disingenuousness, and an appetite for power in conflict with the checks and balances inherent in the Constitution.

But Roosevelt ultimately got what he wanted, even if he appeared to lose. Folklore has it that Hughes and Roberts were so intimidated by the

578. See *infra* text accompanying notes 600-605.

579. BAKER, *supra* note 571, at 133-34.

1936 Democratic landslide, or by the court-packing plan, or both, that they switched sides and began voting with Brandeis, Cardozo, and Stone—the “switch in time that saved nine.” The switch is generally thought to have begun when Roberts changed his position on whether a government could constitutionally require employers to pay a minimum wage. In the spring of 1936, the Court had struck down a New York statute requiring employers to pay a minimum wage to women.⁵⁸⁰ The statute was not part of the New Deal, but the Court’s reasoning replicated the rationale in some of its decisions striking down New Deal legislation. In the fall, the Court had granted certiorari to review a nearly identical Washington State statute. The case was argued in December 1936, and the Justices first discussed it in conference around the turn of the year. The Court again reconsidered the case in conference on February 6, the day after Roosevelt’s court-packing proposal was sent to Congress.⁵⁸¹ In both conferences—before and after the court-packing plan had been announced—Roberts voted to sustain the Washington statute.⁵⁸² The decision was announced on March 29.⁵⁸³ More cases quickly followed in which the Court sustained the

580. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

581. ALSOP & CATLEDGE, *supra* note 544, at 139-40; BAKER, *supra* note 571, at 175-76; MCKENNA, *supra* note 543, at 414.

582. ALSOP & CATLEDGE, *supra* note 544, at 140-41; BAKER, *supra* note 571, at 176; MCKENNA, *supra* note 560, at 414.

583. *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937). After Felix Frankfurter was appointed to the Supreme Court, he heard from Roberts an explanation for this about-face that Frankfurter urged Roberts to commit to writing. In the resulting memorandum, Roberts claimed that in *Tipaldo*, the state of New York had not asked the Court to overrule an earlier case, *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), that held minimum wage legislation unconstitutional, and that as long as *Adkins* was good law, Roberts felt compelled to follow it, even though he thought it should be overruled. Although New York had not done so in its brief or in oral argument, it did in its certiorari petition take the position that the circumstances prevailing in 1936 “call for a reconsideration of the *Adkins* case.” BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 96 (1998) (quoting the petition). The New York statute had been enacted during the Depression, but the Washington State statute dated from 1913. *Id.* *West Coast Hotel* was an appeal from a decision of the Washington State Supreme Court holding that *Adkins* had been impliedly overruled by later decisions of the U.S. Supreme Court. But in the Supreme Court, the State of Washington did not argue that *Adkins* should be overruled or treated as though it had already been overruled. *Id.* Thus, the explanation Roberts gave in the memorandum is not entirely consistent with the procedural facts. And, a year after *West Coast Hotel*, Roberts joined in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to overrule a much older and more widely followed precedent, *Swift v. Tyson*, 41 U.S. 1 (1842), even though none of the parties had briefed, argued, or in any other way raised the issue of whether *Swift* should be overruled. Moreover, overruling was not the only way around *Adkins*. A judge who cannot *distinguish* into oblivion a precedent he does not wish to follow has not learned some basic analytical skills taught beginning in the first year of law school. Cushman argues that Roberts might have been willing to vote to overrule *Adkins* in *Tipaldo* except that he was under the impression that the votes to do so were lacking at the time because Hughes had not said he would, and that the *Tipaldo* fiasco, for which the Court was

National Labor Relations Act⁵⁸⁴ and the Social Security Act⁵⁸⁵ in April and May 1937. From then on, "the Supreme Court upheld every New Deal statute that came before it."⁵⁸⁶

The switch alone would not have been enough to satisfy Roosevelt or to persuade Congress that the crisis had passed. Van Devanter announced his retirement in May 1937.⁵⁸⁷ He was able to do so only because a few months earlier Congress had enacted a statute guaranteeing retiring Justices for the rest of their lives their salary at the time of retirement, in lieu of a pension.⁵⁸⁸ The bill had been introduced in 1935 but failed on the floor of the House.⁵⁸⁹ The Administration wanted this bill to pass⁵⁹⁰ but failed to make it a priority. When Roosevelt announced the court-packing plan, Hatton Sumners, the chair of the House Judiciary Committee, resuscitated the retirement bill and got it enacted at warp speed. Sumners was joined by other legislators who opposed packing the Court and wanted a different solution.⁵⁹¹ The bill cleared the House five days after Roosevelt's

severely criticized at the time, was thus the result of miscommunication between Hughes and Roberts. CUSHMAN, *supra*, at 100-03. Although this has a ring of human realism to it, particularly because *Tipaldo* was decided "[a]t the end of the most fractious and exhausting term of Hughes' tenure," *id.* at 103, it is only a possibility for which there is no direct evidence. The memorandum Roberts wrote at Frankfurter's suggestion is not persuasive, both because of the inconsistencies mentioned above and because of general principles of historical analysis. Careful historians are usually not persuaded by what people say to justify their actions. We learn more about why people have acted from the nature of their actions and the context in which they acted and from what they have said in *unguarded* circumstances. It is not that historical figures should be assumed to lie about their motivations (though some do lie). The problem is that the urge to rationalize and justify one's own behavior can cause anyone to lose insight about themselves or not develop it. This is especially true of people who are worried about how they will be remembered by history, and it may be even more true of lawyers and judges, whose everyday business is rationalizing and justifying.

584. *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

585. *Helvering v. Davis*, 301 U.S. 619 (1937); *Charles C. Stewart Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1936).

586. LEUCHTENBURG, *supra* note 568, at 220.

587. ALSOP & CATLEDGE, *supra* note 544, at 208; STEPHENSON, *supra* note 151, at 160.

588. Act of March 1, 1937, ch. 21, 50 Stat. 24 (current version at 28 U.S.C. § 371 (2007)); see also DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* 3-4 (1999); CHARLES EVANS HUGHES, *AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 302-04 (David J. Danelski & Jos. S. Tulchin eds., 1973); BAKER, *supra* note 571, at 229; STEPHENSON, *supra* note 151, at 160. Previously, Congress had granted pensions to Supreme Court Justices but could reduce them, as it did with Holmes after he retired, cutting his pension in half for the sake of economy. HUGHES, *supra*, at 303; MCKENNA, *supra* note 560, at 35.

589. CUSHMAN, *supra* note 583, at 15.

590. LEUCHTENBURG, *supra* note 568, at 281.

591. CUSHMAN, *supra* note 583, at 15; MCKENNA, *supra* note 560, at 335.

announcement of the court-packing plan, and the Senate passed it soon thereafter; Roosevelt signed it into law on March 1⁵⁹²—a little more than three weeks from resuscitation to presidential signature.

Van Devanter timed his retirement announcement for the morning of the day on which the Senate Judiciary Committee was to vote on the court-packing plan. His announcement helped persuade some members of the committee that the Court need not be packed.⁵⁹³ Whether because of Van Devanter's retirement or not, the committee voted to recommend that the Senate not approve the plan.⁵⁹⁴ Sutherland's retirement the following January,⁵⁹⁵ created a second vacancy for Roosevelt to fill. Eventually, Roosevelt appointed a total of eight Supreme Court Justices and promoted a ninth to Chief Justice.⁵⁹⁶ Supreme Courts that have left their mark on history are usually known by the name of the Chief Justices who led them—the Marshall Court, the Taney Court, the Warren Court, the Rehnquist Court, and so on. The only exception is the one Roosevelt appointed, which we know as the Roosevelt Court.

Remarkably, in this titanic clash between the Supreme Court and the most popular president since 1820, no one seems seriously to have contemplated using impeachment as a partisan political weapon. There is no evidence that anyone in the Roosevelt Administration or in Congress looked for impeachable misdeeds in the public acts of Justices, as the Jeffersonian party did in the first decade of the nineteenth century, or in their private lives, as the Nixon Administration was to do in 1969 and 1970.⁵⁹⁷ None of the leading studies of the court-packing controversy⁵⁹⁸ or of the doctrinal evolution of the Supreme Court in the 1930s⁵⁹⁹ mention

592. ALSOP & CATLEDGE, *supra* note 544, at 77; CUSHMAN, *supra* note 583, at 15; MCKENNA, *supra* note 560, at 335.

593. ATKINSON, *supra* note 588, at 105; BAKER, *supra* note 571, at 229; MCKENNA, *supra* note 560, at 454-60.

594. ALSOP & CATLEDGE, *supra* note 544, at 209.

595. ATKINSON, *supra* note 588, at 106; HUGHES, *supra* note 588, at 302.

596. LEUCHTENBURG, *supra* note 568, at 154.

597. See *supra* text accompanying notes 211-242; *infra* text accompanying notes 732-781, 811-846. Bills were introduced to alter the jurisdiction of the Court and in other ways limit its ability to declare statutes unconstitutional, but never passed in either the House or the Senate. See CUSHMAN, *supra* note 583, at 12.

598. ALSOP & CATLEDGE, *supra* note 544; BAKER, *supra* note 554; LEUCHTENBURG, *supra* note 568; MCKENNA, *supra* note 560. The Leuchtenburg and McKenna studies are more thoroughly researched than the others.

599. CUSHMAN, *supra* note 583; LEUCHTENBURG, *supra* note 568; WHITE, *supra* note 555.

any interest in impeachment. Nor do any of the standard histories of the New Deal.⁶⁰⁰

Nobody was interested in impeaching even McReynolds, who nursed scores of hatreds and, like Chase, had alienated through his own intemperate behavior a great many people. If the House had impeached McReynolds, some would have defended him out of duty or for political reasons, but none would have done so out of personal loyalty to him or out of respect for him or his work. It was in his nature to abuse those around him. During the Harding Administration, Justice Clarke expressed a desire to resign partly because "McReynolds had made life on the Court almost unbearable for him by his incessant insolence and personal insults."⁶⁰¹ McReynolds detested virtually all ethnic groups other than his own.⁶⁰² He despised Brandeis and Cardozo because they were Jewish, and "there is no official photograph of the Court in 1924, because McReynolds would not sit next to Brandeis as protocol required."⁶⁰³ He especially hated Roosevelt and vowed, "I'll never resign as long as that crippled son-of-a-bitch is in the White House."⁶⁰⁴ But after Roosevelt was reelected in 1940, McReynolds finally gave up and announced his retirement eleven days after Roosevelt took the presidential oath of office for an unprecedented third time.⁶⁰⁵ No Justice attended McReynold's funeral,⁶⁰⁶ although several went to the funeral of his messenger, an African-American who for many years had suffered with great dignity through McReynolds's racist tirades.

Of the four great confrontations among the branches of the federal government,⁶⁰⁷ the battle between Roosevelt and the Supreme Court is the only one in which none of the political branches reached instinctively for

600. See ANTHONY J. BADGER, *THE NEW DEAL: THE DEPRESSION YEARS, 1933-1940* (1989); JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* (1956); PAUL CONKLIN, *THE NEW DEAL* (1967); KENNETH S. DAVIS, *FDR: THE NEW DEAL YEARS 1933-1937, A HISTORY* (1986); KENNETH S. DAVIS, *FDR: INTO THE STORM 1937-1940, A HISTORY* (1993); DANIEL R. FUSFIELD, *THE ECONOMIC THOUGHT OF FRANKLIN D. ROOSEVELT AND THE ORIGINS OF THE NEW DEAL* (1956); WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY* (1995); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963); JOHN MAJOR, *THE NEW DEAL* (1967); RONALD A. MULDER, *THE INSURGENT PROGRESSIVES IN THE SENATE AND THE NEW DEAL* (1979); ARTHUR M. SCHLESINGER, *THE POLITICS OF UPHEAVAL, 1935-1936* (1960); ARTHUR M. SCHLESINGER, *THE COMING OF THE NEW DEAL, 1933-1935* (1959).

601. DANELSKI, *supra* note 549, at 42.

602. Dennis J. Hutchinson & David J. Garrow, *Foreward* to JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX*, at xx (Dennis J. Hutchinson & David J. Garrow eds. 2002).

603. *Id.* at xix.

604. LEUCHTENBURG, *supra* note 568, at 121.

605. ATKINSON, *supra* note 588, at 113.

606. *Id.* at 112.

607. See *supra* text following note 20.

impeachment as a partisan weapon. One reason was that the events of 1937 occurred deep in the era of almost purely nonpartisan and bipartisan impeachment. A second was that Roosevelt's personal political style was not confrontational. He preferred to lead through flanking maneuvers, goading the public in whatever direction he wanted to go while pretending to follow the consensus he was building. He believed that winning by defeating others was costlier and more distasteful than winning by following an indirect path to his goal. A third reason was that the Democratic landslide of 1936 was massive, the most lopsided since 1820 both in popular votes and in the composition of Congress; it has not been equaled since then. A party in so enviable a position can afford to have the confidence that its problems can be solved without attacking individuals.

In the end, Roosevelt got what he wanted, although historians disagree about how it happened. Some believe that the election, or the court-packing plan, or both, influenced Roberts and, to a lesser extent, Hughes in how they voted, thus causing an abrupt change in constitutional law.⁶⁰⁸ Others argue that, even before the election in November 1936 and Roosevelt's presentation of the court-packing plan in February 1937, the Court had been evolving toward what we now think of New Deal and post-New Deal jurisprudence.⁶⁰⁹ It is true that some ingredients of the post-1937 doctrine on government regulatory powers appear in embryonic form in some pre-1937 cases. But the rationalizations in judicial opinions are often justifications for what judges want to do rather than their real reasons for deciding, and one of the more effective methods of justifying a court's decision is to write the opinion so that it appears to be grounded in past practice as much as possible. Academically formalistic analysis is thus a limited and only partially reliable tool for discovering what judges are really up to. Moreover, Roberts never satisfactorily explained the 180-degree somersault he made between the two state minimum wage cases, and even he might not fully have understood why he did what he did. Perhaps the most we can know is that the timing proves that Roberts could

608. This view is common among the historians cited in note 600, including LEUCHTENBURG, *supra* note 568, and, to a lesser extent, MCKENNA, *supra* note 560.

609. CUSHMAN, *supra* note 583; WHITE, *supra* note 555; Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and the Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994). For a debate between the two sides in this controversy, see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005), available at <http://www.historycooperative.org/journals/ahr/110.4/kalman.html>; William E. Leuchtenburg, *Comment on Laura Kalman's Article*, 110 AM. HIST. REV. 1081 (2005), available at <http://www.historycooperative.org/journals/ahr/110.4/leuchtenburg.html>; G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094 (2005), available at <http://www.historycooperative.org/journals/ahr/110.4/white.html>.

not have been influenced by the court-packing plan, which was announced after he stated his position in conference, and that he might have been influenced by the election, which happened before he did so.

It is plain, however, that the effect of the retirement bill has been underestimated. Van Devanter and Sutherland hinted that they would have retired immediately after it became law. But to avoid giving the impression that the court-packing plan had intimidated them, they delayed their retirements.⁶¹⁰ The Court might have been “nine old men,” as it was pejoratively dismissed at the time,⁶¹¹ but the power the Four Horsemen exercised had obscured the fact that at least some of them were very fatigued old men.

3. Ritter

Halsted Ritter, a Republican lawyer in Colorado, moved to Florida in 1925.⁶¹² Four years later, Republican President Calvin Coolidge nominated him for a district court judgeship in Florida.⁶¹³ A Republican-dominated Senate confirmed him. Apparently his appointment annoyed Florida politicians and the Florida Bar. Florida was a predominantly Democratic state with memories of the Reconstruction. The annoyance stemmed from having a Republican with no roots to Florida—a “carpetbagger” in Southern speech—appointed to the federal bench. In 1933, only four years after Ritter assumed the bench, the House began an impeachment investigation.⁶¹⁴ In 1936, Ritter was impeached for allegedly denying a plaintiffs’ motion to dismiss their own lawsuit; awarding excessive fees in the same case to his former law partner, who immediately gave money to Ritter; evading income tax; and practicing law while a federal judge.⁶¹⁵ In an overwhelmingly Democratic House, the vote to impeach was 181 to 146.⁶¹⁶ Almost all the votes for impeachment were Democratic.⁶¹⁷ Sixty-three Democrats and eighty-one Republicans voted against impeachment.⁶¹⁸ It appears that Republicans were united against

610. BAKER, *supra* note 571, at 229; CUSHMAN, *supra* note 583, at 230-31; HUGHES, *supra* note 588, at 303.

611. See, e.g., DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* (1936).

612. BUSHNELL, *supra* note 92, at 269.

613. *Id.*

614. *Id.*

615. *Id.* at 271.

616. *Id.* at 272.

617. *Id.*

618. *Id.*

impeachment, but Democrats were free to vote one way or the other, though most voted to impeach.

Ritter was acquitted of all the articles of impeachment that charged him with criminal activity and was convicted only of the article that alleged that his conduct, as set forth in the other articles, had brought his court “into scandal and disrepute.”⁶¹⁹ On all the articles of which he was acquitted, at least a simple majority—but not a two-thirds majority—voted for conviction.⁶²⁰ On each article, most Republicans voted to acquit.⁶²¹ On three articles, almost as many Democrats voted to acquit as to convict.⁶²² On the other four articles, Democrats voted to convict by sizeable majorities.⁶²³

TenBroek argued that the Ritter impeachment could have been motivated by partisan political motives because Ritter was acquitted of the articles charging criminal conduct but convicted of discrediting his court, and because the Ritter trial preceded by ten months Roosevelt’s court-packing proposal.⁶²⁴ To justify his unsuccessful attempt to get Justice Douglas impeached,⁶²⁵ Gerald Ford repeated this theory, arguing that in the Ritter impeachment “the criminal charges were admittedly thin,” that Ritter was a conservative Republican, and that the impeachment occurred “in the context of F.D.R.’s effort to pack the Supreme Court with Justices more to his liking.”⁶²⁶

That theory cannot be substantiated by the facts. First, the Senate vote to convict on the first and most important article alleging corruption was fifty-five in favor and twenty-nine against⁶²⁷—one vote shy of the two-thirds needed to convict. The tally on the scandal-and-disrepute article was fifty-six to twenty-eight to convict, or exactly two-thirds. A single vote differentiates the two articles of impeachment. On all but one of the other articles, a majority voted to convict.⁶²⁸ The straightforward explanation is that one or more Senators thought Ritter was guilty of the corruption alleged in the other articles, but not of the corruption alleged in the first article, and joined in voting to convict on the scandal-and-disrepute article.

619. VAN TASSEL & FINKELMAN, *supra* note 82, at 158, 165-67.

620. *Id.* at 158.

621. tenBroek, *supra* note 506, at 200.

622. *Id.*

623. *Id.*

624. *Id.* at 198-204.

625. See *infra* text accompanying notes 811-846.

626. 116 CONG. REC. 11914 (1970); VAN TASSEL & FINKELMAN, *supra* note 82, at 59.

627. VAN TASSEL & FINKELMAN, *supra* note 82, at 158-60.

628. *Id.* at 158.

Second, the chronology shows no connection between Ritter and the controversy over the Supreme Court and the New Deal. The first efforts in the House to investigate Ritter began in May and June 1933,⁶²⁹ at a time when the Supreme Court had not (and could not have) decided any New Deal cases, as Roosevelt and the first New Deal Congress had taken office only a few months earlier. Ritter was impeached by the House in March 1936,⁶³⁰ and convicted by the Senate in April 1936.⁶³¹ When the Supreme Court invalidated the National Industrial Recovery Act in 1935,⁶³² Roosevelt expressed his annoyance to the press,⁶³³ and the reaction to those comments was so hostile that Roosevelt said virtually nothing else critical of the Supreme Court until early 1937⁶³⁴—a period that includes the entire time during which Ritter was being impeached and tried. Roosevelt maintained this near silence even from January to June 1936, a time when the Court delivered a string of decisions attacking the New Deal.⁶³⁵ During the 1936 presidential election campaign, Roosevelt never mentioned the Supreme Court because he feared that any criticism on his part of the judiciary would permit the Republicans to convert the core election issue from economic recovery into preservation of constitutional checks and balances, which the Republicans were eager to do.⁶³⁶ During a period when Roosevelt was afraid even to criticize the Supreme Court in public, it could hardly be true that the Democrats were impeaching and removing an obscure federal judge to bully the Supreme Court.

Moreover, most of Roosevelt's closest advisors were astounded when he proposed his court-packing plan in February 1937—ten months after Ritter had been removed from office.⁶³⁷ Congress reacted similarly. James MacGregor Burns, one of the most perceptive Roosevelt scholars, concluded that Roosevelt contemplated doing something about the

629. 3 DESCHLER'S PRECEDENTS, *supra* note 504, §18.1.

630. *Id.* §§ 18.5-.10; VAN TASSEL & FINKELMAN, *supra* note 82, at 159.

631. 3 DESCHLER'S PRECEDENTS, *supra* note 504, §§ 18.17-.18.

632. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (the "sick chicken" case).

633. William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2079-81 (1999).

634. *Id.* at 2081-87.

635. See *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (invalidating the Municipal Bankruptcy Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act); *Jones v. SEC*, 298 U.S. 1 (1936) (comparing the SEC to the Star Chamber); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act).

636. Leuchtenburg, *supra* note 633, at 2084-96.

637. BURNS, *supra* note 600, at 295.

Supreme Court as early as 1935 but told only those few people needed to draft the legislation.⁶³⁸ Cummings, Roosevelt's attorney general, drafted the plan in secret and without the knowledge of Roosevelt's usual advisors.⁶³⁹ When Roosevelt announced the court-packing proposal at a meeting of Cabinet officers and congressional leaders, "the congressional delegation sat as if stunned."⁶⁴⁰ Not only had there been no prior serious congressional interest in impeaching the judiciary, but Roosevelt's plan failed mostly because it surprised and appalled many in Congress. The Senate Judiciary Committee report rejecting the proposal is unique for the rhetoric with which legislators derogated a measure behind which a president of their own party had placed his prestige: the court-packing plan was "an invasion of judicial power such as has never been attempted in this country"⁶⁴¹ (which was not actually true);⁶⁴² it would lead to "the very thing against which the American colonies revolted, and to prevent which the Constitution was in every particular framed";⁶⁴³ and "[i]t is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."⁶⁴⁴ These were the same Senators who convicted Ritter.

Third, Roosevelt's troubles were not with the lower judiciary, but with the Supreme Court, which had been declaring unconstitutional significant parts of the New Deal. Roosevelt never showed any interest in packing the lower judiciary, and never needed to because the constitutionality of any important federal statute would be decided only in the Supreme Court anyway. Ritter himself never held any New Deal legislation to be unconstitutional.

Fourth, given the relatively large number, historically, of federal judges who had resigned in the preceding years during House impeachment investigations for corruption,⁶⁴⁵ or who had not resigned and been impeached,⁶⁴⁶ there seems to be nothing special or different about Ritter's situation that would suggest to a Supreme Court Justice that Ritter's impeachment was aimed at the Supreme Court. Not counting those on

638. *Id.* at 293.

639. ALSOP & CATLEDGE, *supra* note 544, at 25-37; SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 249 (1951); MCKENNA, *supra* note 560, at 268-69, 281.

640. BURNS, *supra* note 600, at 294.

641. S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FED. JUDICIARY, S. REP. NO. 75-711, at 11 (1937) [hereinafter REORGANIZATION OF THE FED. JUDICIARY].

642. *See infra* text accompanying note 598.

643. REORGANIZATION OF THE FED. JUDICIARY, *supra* note 641, at 15.

644. *Id.* at 23.

645. *See supra* text accompanying notes 505-527.

646. *See supra* text accompanying notes 528-536.

senior status, there were over two hundred federal judges in 1936,⁶⁴⁷ and Ritter was an obscure trial judge in what was in 1936 a backwater rural state. None of the leading studies of the court-packing controversy⁶⁴⁸ even mentions Ritter.

Finally, the most realistic explanation is that Ritter's appointment irritated people who were locally important in Florida. that they watched him carefully for misbehavior, and that he obliged them by misbehaving. Although the Democrats had a 322 to 103 majority in the House⁶⁴⁹—one of the largest in history—the vote to impeach Ritter was 181 to 146.⁶⁵⁰ And although in the Senate the Democrats had a sixty-nine to twenty-five majority⁶⁵¹—also one of the largest in history—the vote on the only article on which Ritter was convicted was fifty-six to twenty-eight.⁶⁵² On most of the other six articles, the margin was much closer.⁶⁵³

4. *Judicial Impeachments After Ritter*

Several judges resigned during or just before impeachment investigations. In 1939, Martin T. Manion, Chief Judge of the Second Circuit, was accused of corruption by Manhattan District Attorney Thomas E. Dewey, who demanded that the House impeach. Manson resigned within days, before the House could authorize an investigation.⁶⁵⁴ Ferdinand A. Geiger, a district court judge in Wisconsin, resigned in 1939 after House Judiciary Committee hearings on his dismissal of a grand jury before it could issue findings in a major antitrust case.⁶⁵⁵ John P. Nields, a district court judge in Delaware, was the subject of House Judiciary Committee hearings on unspecified charges in May 1941; he retired in October of that year.⁶⁵⁶ Albert W. Johnson, a Pennsylvania district court judge, resigned in 1945 after a House Judiciary subcommittee recommended impeachment for bribery.⁶⁵⁷ The subcommittee found that his decisions were "commonly sold for all the traffic would bear."⁶⁵⁸

647. See 84 F.2d v-x (1936); 15 F. Supp. v-x (1936).

648. ALSOP & CATLEDGE, *supra* note 544; BAKER, *supra* note 571; LEUCHTENBURG, *supra* note 568; MCKENNA, *supra* note 560.

649. See *supra* text accompanying note 543.

650. VAN TASSEL & FINKELMAN, *supra* note 82, at 158.

651. See *supra* text accompanying note 542.

652. VAN TASSEL & FINKELMAN, *supra* note 82, at 158.

653. *Id.*

654. BORKIN, *supra* note 422 at 27-29, 38-82.

655. *Id.* at 232.

656. *Id.* at 240.

657. *Id.* at 41-86; 3 DESCHLER'S PRECEDENTS, *supra* note 504, § 14.10.

658. H.R. REP. NO. 79-1639 (1946).

Otto Kerner, a court of appeals judge in the Seventh Circuit, was convicted and sentenced to prison for corrupt activities while he was Governor of Illinois before his appointment to the federal bench; he resigned his judgeship before entering prison, avoiding almost certain impeachment.⁶⁵⁹ This was the first time a federal judge had been convicted while still holding office; he resigned only after he had exhausted all of his appeals.⁶⁶⁰ Robert F. Collins, a district court judge in Louisiana, was convicted in 1991 of bribery, conspiracy, and obstruction of justice, and sentenced to six years and ten months in jail.⁶⁶¹ Although he was imprisoned in 1991, Collins did not resign from the bench (and continued to draw his judicial salary) until 1993. At that point, the chair and the ranking minority member of the House Judiciary Committee jointly introduced a resolution to impeach him.⁶⁶² On the other hand, Robert P. Aguilar, a district court judge in California, was convicted in 1990 of disclosing a wiretap, and obstruction of justice, and sentenced to six months imprisonment; in 1993, the Ninth Circuit affirmed the wiretap disclosure conviction, reversed the obstruction of justice conviction, and remanded for resentencing.⁶⁶³ The House received a resolution to impeach him in 1993 but did not act upon it.⁶⁶⁴ Aguilar took senior status in 1996.⁶⁶⁵

Harry E. Claiborne, a district court judge in Nevada, was convicted in a criminal trial of tax evasion.⁶⁶⁶ He was sentenced to two years of imprisonment but refused to resign his judgeship, drew his full salary for the two years spent in prison, and threatened to sit behind the bench again and try cases as soon as his imprisonment ended.⁶⁶⁷ This was the first time a federal judge had been incarcerated while still holding office. He was impeached by the House⁶⁶⁸ and convicted by the Senate⁶⁶⁹ in 1986.⁶⁷⁰

659. Report of the Nat'l Comm'n on Judicial Discipline & Removal, 152 F.R.D. 265, 326 (1993). "This appears to be the first time a sitting judge was effectively forced from office as the result of a criminal conviction." *Id.*

660. Van Tassel, *Resignations*, *supra* note 190, at 337, 392.

661. *United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992).

662. *Judicial Discipline & Removal*, 152 F.R.D. at 300; Van Tassel, *Resignations*, *supra* note 190, at 338.

663. *United States v. Aguilar*, 994 F.2d 609 (9th Cir. 1993).

664. *Judicial Discipline & Removal*, 152 F.R.D. at 300.

665. 922 F. Supp. XXIII (1996).

666. *Judicial Discipline & Removal*, 152 F.R.D. at 327.

667. Van Tassel, *Resignations*, *supra* note 179, at 337.

668. IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, H.R. REP. NO. 99-688 (1986).

669. PROCEEDINGS OF THE U.S. SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, S. DOC. NO. 99-48 (1986).

Alcee L. Hastings, a district court judge in Florida was indicted for bribery but acquitted.⁶⁷¹ The Judicial Conference certified to the House that there might be grounds to impeach Hastings.⁶⁷² Despite Hastings' claims that his prosecution and impeachment were motivated by racism, the House voted 413 to 3 to impeach.⁶⁷³ The Senate committee charged with examining the evidence was less persuaded. The Democratic committee chair and Republican vice chair both argued against conviction because of ambiguities and gaps in the evidence.⁶⁷⁴ In 1989, the Senate convicted Hastings on the impeachment articles that charged him with conspiring to solicit a bribe, lying under oath, and fabricating evidence.⁶⁷⁵ Hastings later ran for election to the House of Representatives and won.⁶⁷⁶

Walter L. Nixon, a district judge in Mississippi, was convicted of perjury in a criminal trial and sentenced to five years in prison.⁶⁷⁷ Like Claiborne, he refused to resign after his conviction.⁶⁷⁸ And, like Claiborne, he was impeached (in 1988) and convicted (in 1989) while still in prison.⁶⁷⁹ Like Hastings, Nixon had been nominated for the bench by a Democratic president, impeached by a Democratic House, and convicted by a Democratic Senate.⁶⁸⁰

By 1974, impeachment had become so non-partisan that Raoul Berger could write that it "has sunk in this country to the ouster of dreary little judges for squalid misconduct."⁶⁸¹

5. *Nixon and Agnew*

On June 17, 1972, a security guard at the Watergate complex in Washington noticed a burglary in progress and called police, who arrested

670. See BUSHNELL, *supra* note 92, at 289-306.

671. *Judicial Discipline & Removal*, 152 F.R.D. at 326.

672. *Id.* at 327.

673. MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT 107 (1993); *see also* IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, H.R. REP. NO. 100-810 (1988).

674. VOLCANSEK, *supra* note 673, at 114.

675. *Id.* at 115; *see also* BUSHNELL, *supra* note 92, at 307-14.

676. VOLCANSEK, *supra* note 673, at 116.

677. Report of the Nat'l Comm'n on Judicial Discipline & Removal, 152 F.R.D. 265, 327 (1993).

678. *Id.*

679. *Id.* at 140; *see also* IMPEACHMENT OF WALTER L. NIXON, JR., H.R. REP. NO. 101-36 (1989); BUSHNELL, *supra* note 92, at 307, 314-18.

680. BUSHNELL, *supra* note 92, at 318.

681. BERGER, *supra* note 31, at 3.

five men inside the offices of the Democratic National Committee.⁶⁸² The Committee to Re-Elect the President, which was coordinating the reelection campaign of Richard Nixon, had hired them. Six days later, Nixon and H.R. Haldeman, his principal aide, had a private conversation in the Oval Office in which they strategized about how to hide White House involvement in the burglary (this later became known as “the cover-up”). After the burglars were convicted, and before they were to be sentenced, one of them wrote a letter to the trial judge, John Sirica, saying that the burglars had been paid off to keep silent about the White House’s role (“the hush money”). Three days later, Sirica read the letter into the record in court before sentencing the burglars to long prison terms, which he offered to reduce if they cooperated with a grand jury investigation of the cover-up.

Because of public suspicion that Nixon’s Justice Department could not be relied upon to investigate crimes that might have been committed in the White House, Attorney General Elliot Richardson appointed Archibald Cox, a former Solicitor General, as a special prosecutor with his own independent staff on May 18, 1973. On July 13, Alexander Butterfield, Nixon’s former appointments secretary, testified to a Senate committee investigating the Watergate burglary and cover-up, that Nixon had ordered a voice-activation audiotaping system installed in the Oval Office and that the system recorded every conversation there since 1971.⁶⁸³ On July 23, 1973, Nixon refused to turn over any of these recordings to the Senate committee or to Cox. Cox later subpoenaed certain recordings from the White House. Nixon offered instead to let an elderly Senator listen to the tapes and summarize their contents for Cox. On October 19, 1973, Cox refused and said that he would seek judicial enforcement of his subpoena. A day later, on Saturday, October 20, Nixon ordered Richardson to fire Cox and abolish the office of special prosecutor; Richardson refused and resigned instead. Within minutes, Nixon ordered Deputy Attorney General William Ruckelshaus to do what Richardson would not, but he, too, refused and resigned. Solicitor General Robert Bork then became Acting Attorney General and, obeying Nixon’s orders, fired Cox, abolished the office of special prosecutor, and had the FBI lock up the office and its records (“the Saturday night massacre”).

682. All the published accounts of the Watergate scandal support, without exception, the narrative in this and the following paragraphs. See MARLYN AYCOCK ET AL., CONG. QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS (1999); FRED EMERY, WATERGATE (1995); STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1992); MICHAEL SCHUDSEN, WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST (1993).

683. “Nixon Bugged Himself” was the *New York Post* headline the next day. The headline alone occupied almost the entire first page of the newspaper.

Public and congressional outrage was so overwhelming ("the firestorm") that impeachment resolutions were introduced in the House, and Nixon was forced to back down and appoint another special prosecutor, Leon Jaworski. By then, the term "Watergate" had expanded in everyday speech to include allegations about other burglaries, fraudulent political campaign practices, income tax evasion by Nixon, stealing government money to improve his private residences in California and Florida, and the use of the FBI, IRS, and other federal agencies to harrass political opponents and cover up illegal White House activities. On March 1, 1974, a grand jury supervised by Jaworski's office indicted John Mitchell, Nixon's Attorney General at the time of the Watergate burglary, H.R. Haldeman and John Ehrlichman, the most important people on Nixon's White House staff, and other White House aides. In these indictments, Nixon was named as an unindicted co-conspirator, which did not become public until later that summer. Jaworski decided not to indict Nixon because he was not sure he could indict a sitting president.⁶⁸⁴

On July 24, 1974, the Supreme Court affirmed the lower courts' orders commanding Nixon to surrender the tapes sought by Jaworski and earlier by Cox.⁶⁸⁵ On July 27, 29, and 30, the House Judiciary Committee voted to recommend to the House that it impeach Nixon on three articles of impeachment. On August 5, the White House released transcripts of the June 23, 1972, conversation and two others between Nixon and Haldeman showing that the White House directed the Watergate burglary and that Nixon directed the cover-up and ordered the FBI not to investigate the burglary ("the smoking gun"). Nearly all the Republicans on the House Judiciary Committee who had voted against the obstruction of justice article of impeachment announced that they would reverse their votes.⁶⁸⁶ "By early August, Nixon lost almost all Republican support in Congress"⁶⁸⁷ On August 7, Republican leaders in the House and Senate went to the White House, told Nixon that he would certainly be impeached and would probably be convicted, and implored him to resign.⁶⁸⁸ On August 9, Nixon resigned, preventing his certain

684. LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* (1976); *see also* WATERGATE SPECIAL PROSECUTION FORCE, REPORT (1975).

685. *United States v. Nixon*, 418 U.S. 683 (1974); *see also* Philip Allen Lacovara, *United States v. Nixon: The Prelude*, 83 MINN. L. REV. 1061 (1991).

686. *See* IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE U.S., REP. OF THE COMM. ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, H.R. REP. 93-1305, at 359-528 [hereinafter HOUSE JUD. COMM. RPT. ON NIXON].

687. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 55 (2d ed. 2000).

688. *See id.*

impeachment.⁶⁸⁹ On September 8, Gerald Ford, who had succeeded to the presidency on Nixon's resignation, granted a pardon for "all offenses against the United States" committed by Nixon while he was president.

The first article of impeachment approved by the House Judiciary Committee charged Nixon with obstruction of justice for lying and making deceptive statements and causing others to lie and make deceptive statements to federal law enforcement personnel and in court; withholding evidence; interfering with federal law enforcement investigations; paying hush money to witnesses; misusing the CIA to obstruct justice; leaking information gathered by federal law enforcement personnel to people under criminal investigation; and deceiving the public about investigations of the Watergate burglary.⁶⁹⁰ The committee vote in favor of this article was twenty-seven to eleven.⁶⁹¹ Democrats voted for it, twenty to zero, and Republicans voted against it, six to eleven⁶⁹²—although after the smoking gun tapes became public a few days later, ten of the eleven Republicans who opposed it announced that they would reverse their positions and vote to impeach.⁶⁹³

The second article of impeachment charged Nixon with abuse of power for using the IRS, FBI, Secret Service, CIA, and "a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions" to violate the constitutional and statutory rights of citizens.⁶⁹⁴ The committee vote in favor of this article was twenty-eight to ten.⁶⁹⁵ Democrats voted for it, twenty-one to zero, and Republicans voted against it, seven to ten.⁶⁹⁶ The Republicans who reversed their votes on the first article declined to do the same on the second.⁶⁹⁷

The third article of impeachment charged Nixon with contempt of Congress for disobeying Congressional subpoenas.⁶⁹⁸ The committee vote

689. 3 DESCHLER'S PRECEDENTS, *supra* note 504, ch. 14, § 15; VAN TASSEL & FINKELMAN, *supra* note 82, at 11.

690. HOUSE JUD. COMM. RPT. ON NIXON, *supra* note 686, at 1-3.

691. *Id.* at 335; VAN TASSEL & FINKELMAN, *supra* note 82, at 259.

692. Compare HOUSE JUD. COMM. RPT. ON NIXON, *supra* note 686, at 335 (comparing to the party affiliation listed at ii).

693. *Id.* at 359-528.

694. *Id.* at 3-4.

695. *Id.* at 336; VAN TASSEL & FINKELMAN, *supra* note 82, at 259.

696. HOUSE JUD. COMM. RPT. ON NIXON, *supra* note 686, at 336 (comparing to the party affiliation listed at ii).

697. *Id.* at 359-60.

698. *Id.* at 4.

in favor was twenty-one to seventeen.⁶⁹⁹ Democrats voted for it, nineteen to two, and Republicans voted against it, two to fifteen.⁷⁰⁰ (The committee rejected other articles on income tax evasion and the bombing of Cambodia secretly and without Congressional authorization).⁷⁰¹

Separately from all this, in 1973, about two weeks before Vice President Spiro Agnew resigned and pleaded *nolo contendere* to criminal charges of receiving bribes,⁷⁰² he asked the House to begin an impeachment inquiry against him on the claim that he could not be prosecuted criminally while still vice president.⁷⁰³ The House ignored this request,⁷⁰⁴ which was a tactical feint to delay a criminal indictment.

Although the Nixon near-impeachment may be remembered in some extremist right-wing circles as a wound, it was non-partisan in every conceivable sense. Individual members of the House Judiciary Committee imposed on themselves the extraordinarily high evidentiary burden of clear and convincing evidence, and in some cases, the higher burden of proof beyond a reasonable doubt.⁷⁰⁵ In the initial committee votes, a significant bloc of Republicans voted, with Democrats, for impeachment. After the smoking gun tape transcripts were released, all but one of the remaining Republicans deserted Nixon, and Republican leaders of both Houses of Congress went to the White House, advised Nixon that he would be impeached by an overwhelming vote in the House, and asked him to resign, which he did.

F. The Revival of Impeachment as a Partisan Political Weapon

By the 1950s, historical memory treated the Andrew Johnson impeachment as an aberrational abuse of power, regrettable no matter how badly Johnson himself had behaved. Then-Senator John F. Kennedy's 1955 book *Profiles in Courage* described Senator Edmund G. Ross's deciding vote against convicting Johnson as an act of heroism.⁷⁰⁶ Impeachment had been utilized so long for the sole purpose of ousting corrupt office holders, that its other use—as a political weapon during

699. *Id.* at 337; VAN TASSEL & FINKELMAN, *supra* note 82, at 259.

700. HOUSE JUD. COMM. RPT. ON NIXON, *supra* note 686, at 337 (comparing to the party affiliation listed at ii).

701. *Id.* at 217-26, 338-39; VAN TASSEL & FINKELMAN, *supra* note 82, at 259.

702. See RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW* (1974).

703. 3 DESCHLER'S PRECEDENTS, *supra* note 504, ch. 14, § 14.17.

704. *Id.*

705. See *infra* text accompanying notes 982-984, 1071-1092.

706. JOHN F. KENNEDY, *PROFILES IN COURAGE* 115-38 (1955).

periods of political crisis—had been forgotten or considered an artifact of past and less civilized times. In the mid-1950s, billboards urging “Impeach Earl Warren” began proliferating along rural highways, at least some of them paid for by the John Birch Society,⁷⁰⁷ and in 1957 the Georgia State House of Representatives passed a resolution petitioning Congress to impeach not only Chief Justice Warren, but also Justices Black, Frankfurter, Douglas, Clark, and Reed.⁷⁰⁸ But these instances were seen at the time as marginal and irrelevant, rather than as beginnings of the revival of impeachment as a partisan political weapon.

1. The Fortas and Douglas Investigations: The Beginning of the Struggle for the Supreme Court

*Brown v. Board of Education*⁷⁰⁹ began a long process through which the vacating and filling of seats on the Supreme Court became an interminable focus of partisan political fighting. At one point, during the first Nixon Administration, confirmation struggles and attempted impeachments were joined into a single battlefield. *Brown* and its progeny infuriated most of the white South, and in the 1950s and 1960s, it could be dangerous to be a federal judge in a Southern state enforcing desegregation law.⁷¹⁰ And the Supreme Court angered other constituencies as well through a wide range of decisions⁷¹¹ concerning reapportionment,⁷¹² criminal procedure,⁷¹³ obscenity,⁷¹⁴ civil rights,⁷¹⁵ the relationship between government and religion,⁷¹⁶ and eventually abortion.⁷¹⁷ The Republican

707. Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 263 (1998); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 506 (2002).

708. Ross, *supra* note 707, at 506 n.114.

709. 347 U.S. 483 (1954); *see also* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

710. *See* FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* (1978).

711. *See* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

712. *See e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

713. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

714. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969).

715. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

716. *See, e.g.*, *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

717. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

Party developed a strategy to build an electoral majority by converting Southern whites from Democrats into Republicans.⁷¹⁸

The first Supreme Court confirmation battle in the style with which we have now become accustomed—antagonistic interest groups researching the nominee's background for any conceivable damaging information, unfriendly Senators cross-examining the nominee while supporters complain that the nominee is being persecuted, and people on both sides spinning the facts rather than exploring them with an open mind—occurred in 1968⁷¹⁹ when President Lyndon Johnson nominated Associate Justice Abe Fortas to replace retiring Chief Justice Earl Warren. The model for attacking the nominee was set by Republicans and right-wing Southern Democrats in the 1968 Senate Judiciary Committee.⁷²⁰ Democrats and interest groups allied with them learned from that experience and used similar techniques in a muted way in the later confirmation hearings of Clement Haynsworth, G. Harrold Carswell, William Rehnquist, and then more aggressively against, Robert Bork and Clarence Thomas.

The Senate had many times before rejected Supreme Court nominations. The earliest Senate rejection had been of George Washington's nomination of John Rutledge. Although Rutledge had chaired the Committee on Detail, which wrote the first draft of the Constitution at the Constitutional Convention, the Senate refused to confirm him as Chief Justice because he had made a speech opposing the Jay Treaty with France.⁷²¹ Jefferson wrote that "[t]he rejection of Rutledge by the Senate is a bold thing, for they cannot pretend to have any objection to him"—one of the outstanding lawyers in the country—"but his disapprobation of the Treaty. It is, of course, a declaration that they will have none but tories"⁷²²

718. See JOSEPH A. AISTRUP, *THE SOUTHERN STRATEGY REVISITED: REPUBLICAN TOP-DOWN ADVANCEMENT IN THE SOUTH* 8-9 (1996); NUMAN V. BARTLEY & HUGH D. GRAHAM, *SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION* (1975); REG MURPHY & HAL GULLIVER, *THE SOUTHERN STRATEGY* (1971); KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1970).

719. Before 1968, only one Supreme Court nominee in the twentieth century, John J. Parker in 1930, had been rejected by the Senate. NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* 44-45 (1998).

720. The parties have realigned since then, and right-wing Southern legislators are now Republicans.

721. ABRAHAM, *supra* note 430, at 54; J. MYRON JACOBSTEIN & ROY M. MERSKY, *THE REJECTED: SKETCHES OF THE 26 MEN NOMINATED FOR THE SUPREME COURT BUT NOT CONFIRMED BY THE SENATE* 8-9 (1993).

722. JACOBSTEIN & MERSKY, *supra* note 721, at 8 (quoting Jefferson's words).

In all, “33 of the 148 nominees for the highest court [now 150 nominees, including John Roberts and Samuel Alito] have either been rejected by a vote of the Senate, had the voting on their nomination repeatedly postponed or filibustered into nonexistence or eventually bowed out.”⁷²³ In fact, during the nineteenth century over a third of those nominated to the Court failed to achieve confirmation.⁷²⁴ Among the casualties was Roger Taney, who was rejected by the Senate when nominated by Andrew Jackson to be an Associate Justice. The reason was purely political: as Secretary of the Treasury, Taney had approved Jackson’s withdrawal of federal deposits from the Bank of the United States⁷²⁵—an issue about which virtually no one at the time had feelings that could be described as moderate. Actually, the Senate did not reject the nomination on an up-or-down vote. It moved the nomination off its agenda and then voted to abolish the vacant seat in a bill that failed enactment in the House⁷²⁶ and surely would have been vetoed by Jackson. When Chief Justice Marshall later died, Jackson nominated Taney again, and he was confirmed.⁷²⁷ “[S]enators often admitted to political motives when they opposed a nominee.”⁷²⁸ President Tyler nominated six men to the Supreme Court, only one of whom was confirmed.⁷²⁹ Although some nominations in

723. Joshua Spivak, *Opinion: Judicial Nomination: Battles Are Not New*, NAT’L L.J., Mar. 7, 2005, at col. 1. Different commentators report different numbers because sometimes there is ambiguity about whether a nomination should be counted as having actually been made or whether it has been truly rejected. For example, Washington nominated William Paterson for the Supreme Court in 1793. Paterson co-authored the Judiciary Act of 1789, and “the first nine sections of the seminal statute, establishing federal district and circuit courts, were in Paterson’s handwriting.” ABRAHAM, *supra* note 430, at 57. But when nominated, Paterson was still a Senator in the Congress that created the positions of Justices on the Supreme Court. The Constitution established the Court in Article III, section 1, but the Judiciary Act of 1789 created the individual jobs. And Article I, section 6, of the Constitution provides that “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created . . . during such time.” When Washington realized his mistake, he quickly withdrew Paterson’s nomination. *Id.*; JACOBSTEIN & MERSKY, *supra* note 721, at 171. Many failed nominations are withdrawn when the impossibility of their being approved by the Senate becomes clear. A commentator could reasonably count Paterson’s as a failed nomination, or not. As soon as Paterson’s Senate term ended four days after Washington’s initial attempt to nominate him, Washington sent his name to the Senate again, and the Senate immediately approved. ABRAHAM, *supra* note 430, at 57; JACOBSTEIN & MERSKY, *supra* note 721, at 171.

724. Spivak, *supra* note 723, at col. 1.

725. ABRAHAM, *supra* note 430, at 74; JACOBSTEIN & MERSKY, *supra* note 721, at 28-29.

726. ABRAHAM, *supra* note 430, at 75; JACOBSTEIN & MERSKY, *supra* note 721, at 30.

727. ABRAHAM, *supra* note 430, at 75; JACOBSTEIN & MERSKY, *supra* note 721, at 30.

728. David Greenberg, *Filibustering Judicial Appointments Is Unprecedented?*, HIST. NEWS NET., May 6, 2005, available at <http://hnn.us/articles/11754.html>.

729. JACOBSTEIN & MERSKY, *supra* note 721, at 35-41.

the twentieth century had been controversial, (most notably Woodrow Wilson's nomination of Louis Brandeis in 1916)⁷³⁰ at the time of the Fortas nomination in 1968, the most recent rejection of a nominee by the Senate had been that of John J. Parker, who was nominated by Herbert Hoover in 1930.⁷³¹

But the events of 1968 started an era of confirmation battles in a long-running war for control of the Supreme Court. The earlier rejections and controversies had been episodic, many of them having unique dynamics. From 1968 on, each nomination became either a battle or a truce in a war over the Court that sometimes spilled over into impeachment or attempted impeachment. That is not to say that every impeachment or attempted impeachment after 1968 was a partisan political attack. The impeachments of Judges Claiborne, Hastings, and Walter Nixon, and the near-impeachment of President Richard Nixon were all nonpartisan or bipartisan.⁷³² In 1968, however, the United States entered an era in which impeachment could be used as a partisan political weapon in a long and not-yet-ended struggle.

Fortas was considered at the time to have a brilliant legal mind, but he was not an unblemished nominee. While on the Court, he had advised President Johnson "on national policy and had even done some behind-the-scenes lobbying on the president's behalf."⁷³³ Justice Frankfurter, had done similar things for President Franklin Roosevelt,⁷³⁴ and later Chief Justice Warren Burger tried to give advice to President Nixon.⁷³⁵ Only much later did it become apparent how deeply Fortas's advice had created conflicts of interest. Fortas had also accepted speaking fees paid by some prominent businessmen recruited by his former law partner, Paul Porter; apparently neither Fortas nor Porter worried that the contributors sat on the boards of a number of corporations which might some day be parties before the Supreme Court.⁷³⁶ Although this could sound like carelessness or corruption, it was not; no one told Fortas who the contributors were.⁷³⁷ Moreover, judges must recuse themselves from cases involving former

730. ABRAHAM, *supra* note 430, at 136-37.

731. *Id.* at 30-31.

732. See *supra* text accompanying notes 666-705.

733. JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 102 (1973).

734. Justices Brandeis and Douglas, and Chief Justices Fred Vinson and Roger Taney had also quietly given advice to Presidents while serving on the Supreme Court. BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 593 (1988).

735. JOHN EHRLICHMAN, WITNESS TO POWER: THE NIXON YEARS 131-33 (1982).

736. MURPHY, *supra* note 734, at 499-500.

737. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 351 (1990).

clients and law firms, as well as friends and political allies,⁷³⁸ and Fortas did so routinely.⁷³⁹

But the timing of his nomination—a promotion from his Associate Justice position to be Chief Justice of the Supreme Court—infuriated Republicans, who hoped to win the 1968 presidential election and have a president of their own party choose the next chief justice.⁷⁴⁰ In confirmation hearings, they cross-examined Fortas in a way that nonstop television coverage today would make impolitic. “Mallory, Mallory,” Senator Strom Thurmond shouted at Fortas, referring to a case⁷⁴¹ decided by the Supreme Court while Fortas was still a lawyer in private practice and with which he had no connection of any kind, “I want that word to ring in your ears—Mallory.”⁷⁴² When Fortas’s nomination got to the Senate floor, the Republicans filibustered it; cloture votes failed; and Fortas asked that the nomination be withdrawn.⁷⁴³ Two months later, a Republican, Richard Nixon, was elected president.

When in 2004 and 2005, Senate Democrats considered filibustering a few nominees to the Courts of Appeals, Republicans claimed that no one had ever filibustered a judicial nominee in the Senate. But the truth is that, in 1968, the Republicans filibustered Fortas’s nomination, and everyone at the time considered what was happening to be a filibuster. After the first day, the headline in the *New York Times* began “Critics of Fortas Begin Filibuster . . . ,”⁷⁴⁴ and the *Washington Post* headline read “Fortas Debate Opens With A Filibuster.”⁷⁴⁵ The first words of the *Washington Post* story were: “A full-dress Republican-led filibuster broke out in the Senate yesterday against a motion to call up the nomination of Justice Abe Fortas

738. 28 U.S.C. § 455 (2007).

739. KALMAN, *supra* note 737, at 352.

740. SIMON, *supra* note 733; MELVIN SMALL, *THE PRESIDENCY OF RICHARD NIXON* 166 (1999).

741. *Mallory v. United States*, 354 U.S. 449 (1957).

742. MURPHY, *supra* note 734, at 426; *see also* KALMAN, *supra* note 737, at 340; ROBERT SHOGAN, *A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT* 170 (1972). Thurmond was so excited that the transcript misses some of what the videotape recorded. Compare the words in the text with those in *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the S. Judiciary Comm.*, 90th Cong. 191 (1968) (statement of Sen. Strom Thurmond, Member, S. Judiciary Comm.) [hereinafter *Nominations of Fortas and Thornberry*].

743. MURPHY, *supra* note 734, at 522-27.

744. Fred P. Graham, *Critics of Fortas Begin Filibuster, Citing ‘Propriety,’* N.Y. TIMES, Sept. 26, 1968, at A1.

745. Robert C. Albright, *Fortas Debate Opens With A Filibuster*, WASH. POST, Sept. 26, 1968, at A1.

for Chief Justice of the United States.”⁷⁴⁶ When the motion to end debate failed, the *New York Times* headline began “Senate Bars Move to End Filibuster”⁷⁴⁷ The historians who have studied the Fortas nomination uniformly agree that it was filibustered.⁷⁴⁸ And Senator Robert Griffen, the Republican floor manager of the opposition to Fortas justified what he was doing as having historical precedent: “it has not been unusual for the Senate to indicate its lack of approval for a nomination by just making sure that it never came up for a vote on the merits.”⁷⁴⁹

According to Nixon’s own legal counsel, John Dean, Nixon began looking for ways of creating Supreme Court vacancies in 1969 soon after being sworn in as president.⁷⁵⁰ Nixon was in the same position Roosevelt had been in 1937. Each wanted a Court that would decide cases differently, and each wanted to appoint Justices to cause that result. But Nixon and Roosevelt used very different strategies. Roosevelt chose a variation of the traditional rejiggering of the number of Justices, which had occurred several times in the nineteenth century.⁷⁵¹ Nixon tried to smear Justices in an effort to get them to resign or to serve as a basis for impeachment. According to Dean, Nixon ordered his Justice Department to use its resources to accomplish that purpose.⁷⁵²

In the spring of 1969, a *Life* magazine reporter began looking into a questionable relationship Fortas had with a businessman named Wolfson. The reporter approached Will Wilson, Assistant Attorney General and chief of the Justice Department’s Criminal Division, who years later told Bruce Murphy he had been “excited about the prospect. I knew what kind of potential coup we had . . . we wanted Fortas off the Court.”⁷⁵³ The Justice Department then began a high priority investigation of its own,⁷⁵⁴ and secretly gave the magazine essential elements of the story that was

746. *Id.*

747. Graham, *supra* note 744.

748. STEPHENSON, *supra* note 151, at 185; ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE SUPREME COURT* 173 (2003). Even the Senate website says that the Fortas nomination was filibustered. Supreme Court Nominations, (1789-present), <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Apr. 21, 2007).

749. George J. Mitchell, *The Not-So-Secret History of Filibusters*, N.Y. TIMES, May 10, 2005, at A17.

750. JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 3-5 (2001).

751. See *supra* text accompanying note 578.

752. DEAN, *supra* note 750, at 5-6.

753. MURPHY, *supra* note 734, at 551; see also KALMAN, *supra* note 737, at 362; MURPHY, *supra* note 734, at 549; SHOGAN, *supra* note 742, at 226.

754. MURPHY, *supra* note 734, at 551.

eventually published.⁷⁵⁵ Nixon was kept informed throughout.⁷⁵⁶ According to John Ehrlichman, one of his closest aides, "Nixon cleared his desk of other work to focus on getting Fortas off the Court."⁷⁵⁷ To get Fortas to resign without being impeached, John Mitchell, Nixon's Attorney General, secretly gave Chief Justice Earl Warren evidence not published in *Life*.⁷⁵⁸

The Justice Department eventually leaked that evidence to the press.⁷⁵⁹ To further intimidate Fortas, the Department convened a grand jury to investigate whether Fortas's wife, Carol Agger, and Fortas's former law partner and best friend, Paul Porter, should be indicted for obstruction of justice over subpoenaed documents that had been mislaid in an unrelated case years earlier (even though the Department had previously decided that Agger and Porter were not at fault).⁷⁶⁰ Fortas resigned. By that point, congressional antipathy was building.⁷⁶¹ Had Fortas remained on the bench, impeachment resolutions almost certainly would have been introduced on the House floor,⁷⁶² and referred to the House Judiciary Committee for investigation. Senator James O. Eastland,⁷⁶³ a Mississippi Democrat and segregationist who was content with the treatment Fortas received when nominated to be Chief Justice in 1968, chaired the Senate Judiciary Committee. But, the House Judiciary Committee was chaired by Representative Emanuel Celler,⁷⁶⁴ a New York City Democrat who was the opposite of Eastland in every respect except party affiliation. Although differences in the membership of the two committees were not as stark as the differences between their chairs, the House Judiciary Committee, then as now, is larger, so that the personalities of individual members leave less of an imprint on its proceedings. Due to its larger size, the House Judiciary

755. *Id.* at 553; SMALL, *supra* note 740, at 167. Without the evidence supplied by the Justice Department, *Life* did not have enough material to publish a story at all. KALMAN, *supra* note 737, at 364; MURPHY, *supra* note 734, at 553, 555.

756. MURPHY, *supra* note 734, at 554; *see also* KALMAN, *supra* note 737, at 362-63.

757. EHRLICHMAN, *supra* note 735, at 116.

758. ATKINSON, *supra* note 588, at 141; DEAN, *supra* note 750, at 9; EHRLICHMAN, *supra* note 735, at 116; KALMAN, *supra* note 737, at 368; MURPHY, *supra* note 734, at 562-63; SHOGAN, *supra* note 742, at 248-49; SIMON, *supra* note 733; JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 396 (1980) [hereinafter SIMON, INDEPENDENT JOURNEY].

759. MURPHY, *supra* note 734, at 566-75.

760. DEAN, *supra* note 750, at 10.

761. *See* MURPHY, *supra* note 734, at 566.

762. In the short period between the publication of the *Life* article and Fortas's resignation, one Congressman "announced that he had [already] prepared articles of impeachment." *Id.*

763. *Nominations of Fortas and Thornberry*, *supra* note 742, at ii.

764. MURPHY, *supra* note 734, at 566; SHOGAN, *supra* note 742, at 262.

Committee apportions more of its work into subcommittees, which gives added power to the committee chair to control the flow of business.

The House committee would not have abused Fortas as the Senate committee had. On the other hand, an investigation involving Fortas would not have ended as quietly as the one that, a short while later, would involve Justice Douglas.⁷⁶⁵ It would have gone on very publicly and painfully for months while Republicans tried to read nefarious intent into every ambiguity in the evidence, and while Fortas, who seemed to lack the ability to make his own case except legalistically, would have looked more and more disingenuous. The House probably would not have impeached Fortas, and the Senate certainly would not have convicted him. There was no evidence of the kind of corruption that had been essential in every other instance of a Senate conviction. Moreover, Democrats controlled both Houses of Congress. Although party realignment in the South had only just begun and a significant bloc within the Democratic majorities was still made up of right-wing Southerners, it would have been extraordinarily difficult in the Senate to collect the constitutionally required two-thirds majority needed to convict. But the humiliation of a public impeachment investigation would almost certainly have led Fortas to do later what he actually did earlier: resign.

The Fortas incident must be included among the impeachments that did not run their full course because they were aborted by the accused's resignation. And it would be an understatement to say that it must also be included among instances of impeachment's used as a partisan political weapon. Throughout, the Republicans were determined to get Fortas off the Court for partisan political reasons, and they were turning to an impeachment investigation at the moment when his resignation made it unnecessary.

Although Fortas's relationship with Wolfson was questionable, it was not illegal at the time.⁷⁶⁶ Nixon's own Justice Department could find no violation of law.⁷⁶⁷ Wolfson controlled a nonprofit foundation, and Fortas had accepted a \$20,000 consulting fee from the foundation while the SEC

765. See *infra* text accompanying notes 837-846.

766. ABRAHAM, *supra* note 430 at 10.

767. SHOGAN, *supra* note 742, at 263. In March 2007, Kenneth Starr argued a case before the Supreme Court even though Starr is the dean of the Pepperdine University School of Law and Pepperdine employs Justices Antonin Scalia and Samuel Alioto Jr. to teach in the school's overseas summer programs. Tony Mauro, *High Court Advocate Ken Starr Is Justices' Summer Employer*, *Legal Times*, March 26, 2007. A Justice who accepts even short-term employment from an entity supervised by a lawyer who appears before the Justice could reasonably be said not only to have violated the federal judicial conflict-of-interest statute, 28 U.S.C. § 455, but also to have put what Fortas did into perspective.

was investigating Wolfson.⁷⁶⁸ In compensation for helping the foundation plan its public service activities, Fortas was to receive the same amount annually, as long as he or his wife lived.⁷⁶⁹ But when Wolfson's legal problems deepened, or, more precisely, when it finally dawned on Fortas that a Supreme Court Justice should not be accepting money from an entity controlled by a person being investigated by a law enforcement agency,⁷⁷⁰ Fortas returned the \$20,000 he had already received and cancelled his consulting contract with Wolfson's foundation.⁷⁷¹ Moreover, Fortas did nothing to help Wolfson escape his legal difficulties, which ended in imprisonment.⁷⁷²

Although the Republicans did everything they could to force Fortas off the Court, Fortas, like Chase and Andrew Johnson, had faults that seemed to conspire with his enemies to do him in. Certainly money mattered enough to him that he took it when he should not have.⁷⁷³ Fortas had lived very well on his income as a named partner in one of the country's leading law firms,⁷⁷⁴ but, when he became a Supreme Court Justice, his income shrank to a fraction of what it had been.⁷⁷⁵

Fortas hurt himself in three ways. First, Fortas never seemed to understand that judges, unlike lawyers, do not sell their professional time. Although part of what it takes to succeed as a lawyer is knowing how to bill clients, leaving the practice of law often means leaving that mentality behind. Second, like so many lawyers who come to grief in Washington, Fortas assumed that if a position is legally arguable, it will for that reason alone satisfy politicians and the public. He never understood that it would appear corrupt for a Justice earning \$39,500 a year to accept a *lifetime* income from a private source of an additional \$20,000 a year, even if legal

768. KALMAN, *supra* note 737, at 322-25; SIMON, *supra* note 733; SIMON, INDEPENDENT JOURNEY *supra* note 758, at 395.

769. KALMAN, *supra* note 737, at 323-24; MURPHY, *supra* note 734, at 195-97; SIMON, *supra* note 733.

770. Fortas's law clerk played a significant role in awakening him to this problem. KALMAN, *supra* note 737, at 325; MURPHY, *supra* note 734, at 208-09.

771. MURPHY, *supra* note 734, at 209. Fortas waited some time before returning the fee. In the interim, Wolfson was indicted, and his health and that of his wife deteriorated. KALMAN, *supra* note 737, at 360; MURPHY, *supra* note 734, at 209. Fortas told his law partner, Paul Porter, that he delayed returning the money because he did not want to "kick this guy in the teeth under these circumstances" MURPHY, *supra* note 734, at 209. Finally, in December 1966, Fortas sent Wolfson a check for \$20,000 to avoid the income tax liability that would accrue on January 1, 1967. *Id.*

772. KALMAN, *supra* note 737, at 369; SHOGAN, *supra* note 742, at 263.

773. MURPHY, *supra* note 734, at 196.

774. Arnold, Fortas & Porter, now Arnold & Porter.

775. SHOGAN, *supra* note 742, at 192-93.

devices like recusal were sufficient to avoid any genuine harm.⁷⁷⁶ He also never understood that, although the money Wolfson paid him might have been consistent with his billing rates in private practice, it looked like a gross overpayment—one intended to secure special treatment for Wolfson—when compared to Fortas's judicial salary.

And third, although Fortas could strategize with exceptional skill in the narrow confines of litigation,⁷⁷⁷ he, like many other lawyers, was a mediocre strategist in the broader world. Lawyers, especially litigators, usually feel that they get results by sharing as little information as possible with adversaries and third parties, and by putting a self-serving spin on the information they do share. Throughout all of his troubles in 1968 and 1969, Fortas's instinctive reaction was to do exactly that, and it created a convincing impression that he was hiding something and being disingenuous.⁷⁷⁸ Even in the final days before he resigned, Fortas could not understand how much he was being hurt in this way. The lifetime payments feature of the consulting contract was the fact most damaging to Fortas. When John Mitchell learned of it, he was overjoyed.⁷⁷⁹ At the time Fortas resigned, the nature of the consulting contract had not yet become public knowledge. But the Nixon Administration knew of it, had informed Chief Justice Warren about it, and could tell the public about it at any time.⁷⁸⁰ Fortas sought Justice Hugo Black's advice, and explained everything to him. "After he heard about the lifetime nature of the Wolfson contract, Black recognized what had to be done. Tell the press yourself, he advised Fortas. After all, the initial payment had been returned and the agreement had been cancelled."⁷⁸¹ That was Fortas's last opportunity to appear forthright and honest. He refused.

To fill the vacancy created by Fortas's resignation, Nixon nominated Clement Haynsworth, Chief Judge of the Fourth Circuit.⁷⁸² The civil rights and labor movements, initially suspicious, mobilized to oppose the nomination.⁷⁸³ "Senators who opposed Haynsworth on ideological grounds, as well as those Democrats furious about the Fortas affair, could

776. MURPHY, *supra* note 734, at 197, 593.

777. See, e.g., Richard K. Neumann, Jr., *On Strategy*, 59 *FORDHAM L. REV.* 299, 310 n.28 (1990) (explaining how Fortas devised a winning litigation strategy that forestalled a legal challenge to Lyndon B. Johnson's eighty-seven-vote primary victory in the 1948 Texas election for the U.S. Senate).

778. KALMAN, *supra* note 737, at 365; SHOGAN, *supra* note 742, at 236.

779. KALMAN, *supra* note 737, at 367.

780. MURPHY, *supra* note 734, at 562-63.

781. *Id.* at 565.

782. SHOGAN, *supra* note 742, at 270.

783. ABRAHAM, *supra* note 430, at 10-11; SHOGAN, *supra* note 742, at 270.

point to two cases of apparent conflict of interest," in which Haynsworth, while on the Court of Appeals, had participated even though he had undisclosed personal interests and probably should have recused himself.⁷⁸⁴ At the time, the ABA *Canons of Judicial Ethics* required recusal in such circumstances, but the federal judicial conflict-of-interest statute did not. (As a result of this and the Fortas and Douglas controversies, the statute was rewritten later into the form today at 28 U.S.C. § 455.)⁷⁸⁵ Most federal judges at the time followed the Canons, although they were stricter, and it reflected badly on Haynsworth's character that he did not do so.⁷⁸⁶ Haynsworth, in essence, could not pass the standards that Fortas had been held to,⁷⁸⁷ and the Senate rejected him by a vote of fifty-five to forty-five.⁷⁸⁸ After the Haynsworth defeat, Nixon told one of his aides, "I want you to go out this time and find a good federal judge further south and further to the right" of Haynsworth.⁷⁸⁹ The result was the nomination of G. Harrold Carswell.

Carswell was not qualified for the Supreme Court. He had been a mediocre district court judge whose annual output of published opinions averaged less than 16 pages,⁷⁹⁰ and who was reversed 58% of the time when his decisions were appealed.⁷⁹¹ He had been promoted to the Court of Appeals only six months before Nixon nominated him for the Supreme Court.⁷⁹² Dean Louis Pollack of the Yale Law School told the Senate Judiciary Committee that Carswell had "more slender credentials than any Supreme Court nomination put forth in this century."⁷⁹³ Professor William

784. SMALL, *supra* note 740, at 168; see also SHOGAN, *supra* note 742, at 270-71; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 400-01; VIEIRA & GROSS, *supra* note 719, at 46.

785. See Richard K. Neumann, *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 380-81 (2003).

786. *Id.* In a law school graduation speech in 1975, which was also published as a law review article, Haynsworth said that a lawyer "serves his clients without being their servant . . . the lawyer must never forget that he is the master . . . It is for the lawyer to decide what is morally and legally right . . . the lawyer must serve the client's legal needs as the lawyer sees them, not as the client sees them. During my years in practice, I never had any problem in this respect, although some lawyers today say they do." Clement F. Haynsworth, Jr., *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976).

787. ABRAHAM, *supra* note 430, at 10.

788. *Id.*; SHOGAN, *supra* note 742, at 271; SMALL, *supra* note 740, at 168.

789. SMALL, *supra* note 740, at 168.

790. Ross, *supra* note 707, at 262.

791. JACOBSTEIN & MERSKY, *supra* note 721, at 152.

792. ABRAHAM, *supra* note 430, at 11.

793. NOMINATION OF GEORGE HARROLD CARSWELL TO BE ASSOC. JUSTICE OF THE SUPREME COURT OF THE U.S.: HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 91ST CONG. 238-54 (Comm. Print 1970); see also ABRAHAM, *supra* note 430, at 12.

Van Alstyne of Duke, a Haynsworth supporter, told the Judiciary Committee that “[t]here is, in candor, nothing in the quality of [Carswell’s] work to warrant any expectation whatever that he could serve with distinction on the Supreme Court.”⁷⁹⁴ Nixon’s own aides felt the same way.⁷⁹⁵ Senator Hruska, the floor manager of the Carswell nomination, made the most memorable—but not the only—argument that Carswell’s mediocrity was a virtue: “there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance. We can’t have all Brandeises and Frankfurters and Cardozos and stuff like that there.”⁷⁹⁶

There was speculation at the time that Nixon nominated Carswell both out of annoyance over Haynsworth’s rejection,⁷⁹⁷ and as a cynical tactic to set up a claim, after Carswell’s likely rejection, that the Senate, so long as it was controlled by the Democratic Party, could never be fair to a white Southern nominee. (Haynsworth was from North Carolina and Carswell from Florida.) Carswell had helped convert a public golf course into a private club at which only whites could play.⁷⁹⁸ And, while running for the state legislature in 1948, Carswell made a racist speech that included comments like “I yield to no man . . . in the firm, vigorous belief in the principles of White Supremacy, and I shall always be so governed,”⁷⁹⁹ and “I believe that segregation of the races is proper and the only practical and correct way of life in our states.”⁸⁰⁰ At his confirmation hearings, Carswell disavowed the speech.⁸⁰¹ The Senate rejected him by a vote of fifty-one to forty-five.⁸⁰²

A day later, Nixon told the press, “[W]ith the Senate as presently constituted[,] I cannot successfully nominate to the Supreme Court any Federal appellate judge from the South who believes as I do in the strict

794. ABRAHAM, *supra* note 430, at 12.

795. See, e.g., SMALL, *supra* note 740, at 169 (quoting William Safire (“[the nomination was] one of the most ill-advised public acts of the early Nixon Presidency”)); Ross, *supra* note 707, at 282 (quoting Jeb Stuart Magruder (“few of us thought he was qualified”) and Clark Mollenhoff (“[I] wouldn’t have defended him under any circumstances”)).

796. SMALL, *supra* note 740, at 169; see also ABRAHAM, *supra* note 430, at 11-12; SHOGAN, *supra* note 742, at 272.

797. ABRAHAM, *supra* note 430, at 11.

798. *Id.*; SHOGAN, *supra* note 742, at 272; VIEIRA & GROSS, *supra* note 719, at 47.

799. ABRAHAM, *supra* note 430, at 11.

800. SMALL, *supra* note 740, at 169; see also SHOGAN, *supra* note 742 at 271-72.

801. ABRAHAM, *supra* note 430, at 11.

802. *Id.* at 12; DEAN, *supra* note 750, at 21; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 403; SMALL, *supra* note 740, at 170; VIEIRA & GROSS, *supra* note 719, at 47.

construction of the Constitution.”⁸⁰³ These were code words meaning that Nixon could not successfully nominate a Southerner hostile to *Brown* and its progeny. In fact, there were five judges on the Fifth Circuit—Griffin B. Bell, John R. Brown, Richard T. Rives, Elbert P. Tuttle, and John Minor Wisdom⁸⁰⁴—whose reputations were so commanding that they could have been confirmed for the Supreme Court as easily as Lewis Powell later was. Burke Marshall, Assistant Attorney General in the Kennedy Administration and later on the law faculty at Yale, said that Brown, Rives, Tuttle, and Wisdom “have made as much of an imprint on American society and American law as any four judges below the Supreme Court have done on any court.”⁸⁰⁵ But Nixon would nominate none of them, even though Brown, Tuttle, and Wisdom were Republicans,⁸⁰⁶ because all five were in the habit of voting to enforce *Brown*. Instead, Nixon nominated Harry Blackmun of the Eighth Circuit,⁸⁰⁷ a Minnesotan who at the time gave no indication of the kind of Justice he would later become.⁸⁰⁸ The Senate confirmed Blackmun unanimously.⁸⁰⁹

Carswell’s nomination was defeated on April 8, 1970.⁸¹⁰ On April 12, Republican House Minority Leader Gerald Ford announced that the House would investigate Justice William O. Douglas with a view toward impeachment.⁸¹¹ Of all the Justices on the Supreme Court, Douglas irritated the Republicans most deeply. He voted against their principles more regularly than other Justices; he wrote books and articles they considered offensive; and he had been married four times to successively younger women.⁸¹² His most recent book at the time, *Points of Rebellion*, contained sentences like “We must realize that today’s establishment is the new George III.”⁸¹³

Douglas’s vulnerability was that he had accepted \$12,000 a year over six years for serving as the president of a nonprofit foundation—an arrangement that Republicans claimed replicated Fortas’s.⁸¹⁴ Much of the

803. ABRAHAM, *supra* note 430, at 12; SMALL, *supra* note 740, at 170.

804. See READ & MCGOUGH, *supra* note 710.

805. Jack Bass, *John Minor Wisdom and the Impact of Law*, 69 MISS. L.J. 25, 26-27 (1999) (quoting Burke Marshall).

806. *Id.* at 38, 52, 54.

807. ABRAHAM, *supra* note 430, at 13; SHOGAN, *supra* note 742, at 273.

808. MURPHY, *supra* note 716, at 580; SMALL, *supra* note 740, at 171.

809. ABRAHAM, *supra* note 430, at 13; BRANT, *supra* note 97, at 92.

810. SMALL, *supra* note 740, at 170.

811. *Id.*

812. *Id.*

813. SIMON, *INDEPENDENT JOURNEY*, *supra* note 758, at 402.

814. *Id.* at 392; SMALL, *supra* note 740, at 170.

foundation's income came from a mortgage on a Las Vegas hotel and casino, and the foundation's primary benefactor owned stock in three Las Vegas casinos,⁸¹⁵ all of which allowed Republicans to claim falsely that Douglas was consorting with gamblers and gangsters.⁸¹⁶ But there were fundamental differences between Douglas's situation and Fortas's. Fortas's consulting contract did not actually seem to require that he do much work, while "Douglas actually ran the [foundation that paid him] and took an active role in the implementation of its very tangible and highly praised programs in the United States and Latin America."⁸¹⁷ Moreover, the \$12,000 salary was not really a salary at all. Originally, the foundation had offered Douglas a \$20,000 salary, which he refused because he did not want to be paid.⁸¹⁸ "He then was voted a salary of \$12,000 plus expenses," which were to be significant because the work involved travel, "but he refused to collect expenses and said that he would treat the salary (after income tax) as an expense account."⁸¹⁹ Although the foundation used a small portion of the salary to purchase an annuity for Douglas,⁸²⁰ he worked almost for free, and the foundation's correspondence with him suggests that the foundation's board felt guilty or embarrassed because of his generosity.⁸²¹ In 1969, because of Fortas's troubles, Douglas resigned as president of the foundation.⁸²²

With help from the White House and from Will Wilson, the same Assistant Attorney General who had coordinated building the case against Fortas,⁸²³ Ford "accumulate[d] a mound of information on Douglas."⁸²⁴ Nixon directly encouraged Ford.⁸²⁵ "From the beginning," according to John Ehrlichman, one of the president's closest aides, "Nixon was interested in getting rid of William O. Douglas. . . . John Mitchell had

815. SIMON, *INDEPENDENT JOURNEY*, *supra* note 758, at 392.

816. *See id.* at 404.

817. *Id.* at 397.

818. BRANT, *supra* note 97, at 95.

819. *Id.*

820. ASSOC. JUSTICE WILLIAM O. DOUGLAS: FINAL REP. OF THE SPECIAL SUBCOMM. ON H.R. RES. 920 OF THE COMM. ON THE JUDICIARY, 91ST CONG. 236-49 (Comm. Print 1970) [hereinafter FINAL REPORT].

821. *Id.* at 245, 248.

822. SIMON, *INDEPENDENT JOURNEY*, *supra* note 758, at 404.

823. MURPHY, *supra* note 734, at 579.

824. SIMON, *INDEPENDENT JOURNEY*, *supra* note 758, at 398; *see also* MURPHY, *supra* note 716, at 579; SMALL, *supra* note 740, at 170.

825. EHRLICHMAN, *supra* note 735, at 122; SMALL, *supra* note 740, at 168. "Ford had been working privately on the case before the administration asked him to take the lead." SMALL, *supra* note 740, at 170.

begun to gather information about Douglas's nonjudicial sources of income, and some of it looked hopeful."⁸²⁶ "A loosely organized impeach-Douglas effort was organized in the House," led by Ford and two other senior Republican Congressmen, "with the single goal of filing articles of impeachment against Douglas during the 1970 congressional term."⁸²⁷ Not long afterward, Wilson himself resigned over allegations that he helped a former client who was being investigated by the Justice Department and the SEC.⁸²⁸ Mitchell was later convicted and imprisoned in the Watergate scandal.⁸²⁹

Eventually, Ford took the House floor to accuse Douglas of being a "well-paid moonlighter" as a foundation president;⁸³⁰ of having voted on the Court in a case where a publisher that had once paid him \$350 was a party;⁸³¹ of having done some work for an organization Ford considered subversive,⁸³² the Center for the Study of Democratic Institutions,⁸³³ (even though Chief Justice Warren Burger, a Nixon appointee, had worked for the same organization, as had William Buckley, the conservative writer, and some Senators and other people whose views were not controversial⁸³⁴); of having written *Points of Rebellion*; and of having published a chapter of it in a magazine Ford considered pornographic⁸³⁵ (even though the book's publisher had licensed the magazine to publish the chapter without telling Douglas about it until after the fact, a common practice in the publishing industry).⁸³⁶

While Ford was making this speech, he was outmaneuvered procedurally by Democratic Representative Andrew Jacobs, Jr., a Douglas supporter, who went into the well of the House and filed a resolution to impeach Douglas.⁸³⁷ Ford wanted a select committee designated because

826. EHRLICHMAN, *supra* note 735, at 116.

827. SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 401.

828. *Id.* at 580.

829. *Id.*

830. 116 CONG. REC. 11916 (1970). Ford also mentioned Bugsy Siegel, Meyer Lansky, and Ice Pick Willie Alderman, *id.*, none of whom had any connection with Douglas. FINAL REPORT, *supra* note 820, at 176; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 404.

831. 116 CONG. REC. 11915 (1970). The article was on folk singing. *Id.*; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 404.

832. 116 CONG. REC. 11918 (1970).

833. BRANT, *supra* note 97, at 96; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 405.

834. BRANT, *supra* note 97, at 96.

835. 116 CONG. REC. 11915-16 (1970); SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 404-05.

836. BRANT, *supra* note 86, at 98; FINAL REPORT, *supra* note 820, at 172-74.

837. SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 405.

that would cause his own resolution to be "referred automatically to the House Rules Committee, chaired by a Mississippi segregationist."⁸³⁸ But Jacobs' resolution called for referral to the Judiciary Committee, where Celler would control procedure. Because Jacobs filed first, his resolution took priority.⁸³⁹

Celler appointed a subcommittee consisting of himself, two other Democrats, and two Republicans.⁸⁴⁰ The subcommittee produced a 924-page report that found the allegations against Douglas to be groundless.⁸⁴¹ All three Democrats voted to that effect.⁸⁴² One of the Republicans criticized the subcommittee but conceded that Douglas had committed no impeachable offense.⁸⁴³ The remaining Republican neither joined the majority nor dissented.⁸⁴⁴ Ford and his allies later called the subcommittee investigation a "travesty" and a "whitewash."⁸⁴⁵ Will Wilson, who as Assistant Attorney General had helped assemble the case against Douglas, remembered things differently. "Ford took the material we gave him and screwed it up," Wilson said later: "Ford blew it."⁸⁴⁶

The Douglas investigation occurred in 1970. In 1973, Spiro Agnew resigned the vice-presidency and was convicted of taking bribes while a state official. Under the Twenty-Fifth Amendment, Nixon nominated and Congress confirmed Ford to replace Agnew as vice president. When Nixon later resigned in 1974, Ford became president. During all this, Douglas's health deteriorated, and in 1975 he resigned from the Supreme Court.⁸⁴⁷ Ironically, Ford nominated Douglas's successor, John P. Stevens, then a judge on the Seventh Circuit. Still more ironically, Stevens became a leader of the liberal bloc on the Supreme Court.

The war in which the Fortas and Douglas incidents were the first battles continued through the defeated nomination of Robert Bork in 1987,⁸⁴⁸ and the confirmation of Clarence Thomas in 1991. Eventually, the

838. BRANT, *supra* note 97, at 90; *see also* SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 405.

839. BRANT, *supra* note 97, at 90; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 405.

840. BRANT, *supra* note 97, at 90; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 409; *see also* FINAL REPORT, *supra* note 820, at III.

841. FINAL REPORT, *supra* note 820; *see also* BRANT, *supra* note 97, at 89; 3 DESCHLER'S PRECEDENTS, *supra* note 504, §§ 14.14-16; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 409.

842. BRANT, *supra* note 97, at 91; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 409.

843. FINAL REPORT, *supra* note 820, at 351-52.

844. BRANT, *supra* note 97, at 91; SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 409.

845. SIMON, INDEPENDENT JOURNEY, *supra* note 758, at 405.

846. MURPHY, *supra* note 734, at 579.

847. ATKINSON, *supra* note 588, at 146-49.

848. *See* VIEIRA & GROSS, *supra* note 719, at 3-181.

war broadened, and Republicans used impeachment as part of a partisan attack on a Democratic president.

2. Clinton

While complicated events are happening, we are least able to understand what is really going on and why. Only afterward—with historical distance—does the big picture emerge, and causation can be discussed meaningfully. History does not merely reconstruct the knowledge that people in the past had about what they lived through. It discovers what they could not have realized at the time.

Bill Clinton had sex with Monica Lewinsky and lied about it to the public and under oath. The question here is not whether that merited impeachment and conviction. Reasonable people can differ about that. The argument in favor of the impeachment's appropriateness is that perjury is a felony, and that a president who commits perjury deserves impeachment and removal because the known example of a high official committing perjury corrodes the public's confidence in government as well as the public's own commitment to honesty.⁸⁴⁹ As we shall see in Part IV(A) of this article, this argument has the potential of boomeranging back onto those who make it.

There are three arguments against the appropriateness of Clinton's impeachment. First, not every felony is a high crime or misdemeanor,⁸⁵⁰ and felonies outside the scope of impeachable offenses include those that do not damage the integrity of government or the political system in substantial ways. For example, income tax evasion has not been considered an impeachable offense. In 1974, the House Judiciary Committee, including all of its Republican members, voted *not* to recommend impeaching Richard Nixon for tax evasion, even though a taxpayer signs every tax return, at the bottom of Form 1040, "[u]nder penalties of perjury" A second argument is that other presidents have told, encouraged, or helped others to tell much more damaging lies that have not led to impeachment, such as lying to create a basis for a war in which thousands die and in which the national interest is substantially harmed.⁸⁵¹ According to this argument, the absence of an oath to tell the

849. See, e.g., WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* (1998); ANN COULTER, *HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON* (1998); DAVID P. SCHIPPERS, *SELL OUT: THE INSIDE STORY OF PRESIDENT CLINTON'S IMPEACHMENT* (2000).

850. See *supra* text accompanying notes 74-78.

851. The Iraq War that began in 2003 is not the only set of facts to meet this description. Congress was deceived into passing the Tonkin Gulf Resolution of 1965, which was claimed to be the legal justification for the Vietnam War. ERIC ALTERMAN, *WHEN PRESIDENTS LIE: A HISTORY*

truth in these situations is more than compensated for by the injury to the integrity of government and the national interest. A third argument is that impeachment is not the only method Congress has of sanctioning a president. One or both Houses of Congress have censured other presidents,⁸⁵² and in both Houses attempts were made (and defeated) to censure Clinton.⁸⁵³ By extension, this argument would also posit that, if both Houses of Congress had voted to censure Clinton, that would have been a rebuke more satisfying to the public than to have the House impeach him and the Senate acquit him.

This Article does not analyze or choose among these arguments. That has been done amply elsewhere. Instead, the question here is whether the Republicans merely reacted to the misdeeds of an office holder, or whether they set Clinton up so they could impeach him to gain political advantages, or more precisely, whether some Republicans set him up and others impeached him to gain political advantages.

Richard M. Scaife has a large fortune that he inherited from the Mellon banking family and from oil interests.⁸⁵⁴ Over decades, he gave between \$200 million and \$300 million to right-wing organizations, and, though almost unknown to the public, he was considered one of the essential figures “in building the modern conservative movement.”⁸⁵⁵ Beginning with Clinton’s 1992 campaign for president, and continuing throughout his first term in office, Scaife and others financed a campaign to destroy Clinton’s political viability. Perhaps the best known person in this campaign was David Brock, a journalist who had written a book extraordinarily hostile to Anita Hill, the witness who almost cost Clarence

OF OFFICIAL DECEPTION AND ITS CONSEQUENCES 160-237 (2004); JOSEPH C. GOULDEN, TRUTH IS THE FIRST CASUALTY: THE GULF OF TONKIN AFFAIR, ILLUSION AND REALITY (1969); EDWIN MOISE, TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR (1996).

852. Both Houses passed resolutions condemning John Tyler and James Polk—the latter for, in Congress’s words, “a war unnecessarily and unconstitutionally begun by the President of the United States.” VAN TASSEL & FINKELMAN, *supra* note 82, at 203. And the Senate censured Andrew Jackson for removing the government’s deposits from the Bank of the United States. *Id.* at 201-02, 204-20; *see also* Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 927-28 (1999).

853. THE IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON: THE OFFICIAL TRANSCRIPTS FROM THE HOUSE JUDICIARY COMMITTEE HEARINGS TO THE SENATE TRIAL 451, 467 (Merrill McLoughlin ed., 1999) [hereinafter IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON]. When these motions were made, they were objected to on the grounds that they amounted to unconstitutional bills of attainder. That is wrong both precedentially and analytically. The precedents are in the preceding footnote. The analytical reasons are explained at GERHARDT, IMPEACHMENT PROCESS, *supra* note 687, at 186-87.

854. DAVID BROCK, BLINDED BY THE RIGHT 79 (2002).

855. *Id.* at 80; *see also* JOE CONASON & GENE LYONS, THE HUNTING OF THE PRESIDENT 107 (2000).

Thomas his confirmation to the Supreme Court.⁸⁵⁶ Brock later repented his role in the campaigns against Clinton and Hill, and he apologized to both of them.⁸⁵⁷ “[I]n its secretiveness and in its single-mindedness [and] also in its lack of fidelity to any standard of proof, principle, and propriety,” wrote Brock in retrospect about the early campaign against Clinton, “there was no precedent in modern American politics.”⁸⁵⁸

Scaife invested a substantial amount of money in trying to prove that Bill and Hillary Clinton “were leaders of a criminal syndicate” and had murdered a White House aide named Vince Foster “to cover up their crimes in Whitewater, a failed real estate deal.”⁸⁵⁹ (Investigations by two different independent counsels later showed that the Clintons had done none of this.) In 1999, Scaife told a magazine that Clinton “can order people done away with at his will . . . there must be 60 people [associated with Clinton] who have died mysteriously.”⁸⁶⁰ Over the years, Scaife had given the right-wing magazine for which Brock wrote, *The American Spectator*, about \$6 million, and he subsequently used the magazine as a front to operate something he called the Arkansas Project, which used private investigators to scour the state for evidence of crimes he believed Clinton must have committed while governor.⁸⁶¹

Theodore Olson, the second President Bush’s Solicitor General from 2001 to 2004, gave legal advice to the Arkansas Project.⁸⁶² At one point, Brock asked Olson to read a draft article, written by another journalist, that argued that Foster had been murdered. Brock opposed publishing the article because it lacked evidence. He hoped that Olson would back him up, but was surprised at Olson’s response. “Ted . . . told me bluntly . . . that while he believed . . . that Foster had committed suicide, raising questions about the death was a way of turning up the heat on the [Clinton] administration until another scandal was shaken loose, which was the *Spectator*’s mission.”⁸⁶³ Olson also wrote articles for the magazine under a fictitious by-line accusing the Clintons of committing various crimes and comparing President Clinton to Don Corleone of the Godfather films.⁸⁶⁴

856. See DAVID BROCK, *THE REAL ANITA HILL: THE UNTOLD STORY* (1993); see also *infra* text accompanying notes 1049-1056.

857. BROCK, *supra* note 854, at 295-98, 321-22, 326.

858. *Id.* at 129.

859. *Id.* at 189.

860. *Id.* (alteration in original) (quoting Scaife).

861. *Id.* at 193-214.

862. *Id.* at 205-07.

863. *Id.* at 206.

864. *Id.* at 210.

In 1994, Brock himself wrote the original article portraying Bill Clinton “as a sexually voracious sociopathic cipher” and Hillary Clinton “as a foulmouthed, castrating, power-mad harpy, joined together in a sham power marriage.”⁸⁶⁵ Brock interviewed some Arkansas state troopers, who told salacious stories about the Clintons. The stories were later discredited because some of the troopers wanted and accepted money for talking to journalists;⁸⁶⁶ the troopers retracted much of what they said when put under oath in depositions,⁸⁶⁷ and in Brock’s own words later, “[n]one of the trooper allegations that could be independently checked turned out to be true.”⁸⁶⁸

One of the troopers, however, described an incident in which he accompanied a woman named Paula to Clinton’s hotel room, and that she told the trooper she was willing to be Clinton’s “regular girlfriend.”⁸⁶⁹ Some time later, a person named Paula Jones announced that she was the Paula described in Brock’s article, and that the article had portrayed her inaccurately and damaged her reputation. Normally such an accusation would result in a defamation action against Brock and *The American Spectator*. But that did not happen. According to Brock, Jones did not sue him because “a conniving cadre of right-wing lawyers and operatives was secretly calling the shots in the *Jones* case to forward [their] own political agenda of undermining the Clinton presidency, which meant leaving me out of it.”⁸⁷⁰ Jones’s original Arkansas lawyer lacked the skills and resources to litigate her case. He found help in “the Landmark Legal Foundation, a right-wing public-interest law firm generously funded by Richard Mellon Scaife.”⁸⁷¹ The retainer agreement between Jones and her original lawyer gave the lawyer a share of any royalties Jones might later gain from a book or movie about her story.⁸⁷² And Jones’s sister told the media that Jones had told her, “Whichever way it goes, it smells money” or “Whichever way it goes, it smells *big* money” (depending on the journalist reporting).⁸⁷³ Later, Jones was represented by lawyers supplied by the

865. *Id.* at 151.

866. *Id.* at 154.

867. *Id.* at 323-24.

868. *Id.* at 157.

869. *Id.* at 152.

870. *Id.* at 179.

871. *Id.*

872. *Id.* at 185; MICHAEL ISIKOFF, UNCOVERING CLINTON: A REPORTER’S STORY 49, 179 (1999); JEFFREY TOOBIN, A VAST CONSPIRACY 25 (1999).

873. BROCK, *supra* note 854, at 185.

Rutherford Institute, which also benefited from donations by Scaife.⁸⁷⁴ In the background, a small group of lawyers who called themselves “the elves,” did some of the legal work without publicly acknowledging their involvement; one of them was Ann Coulter.⁸⁷⁵

Eventually, Jones’s lawsuit was dismissed for lack of evidence on a summary judgment motion.⁸⁷⁶ But the dismissal came only after her Jones’s lawyers deposed Clinton about Monica Lewinsky. “One of the secret legal strategists for Paula Jones” told David Brock years before that deposition “that the purpose of the sexual harassment suit was to probe Clinton’s consensual sex life through the deposition process, and then to question Clinton under oath about it,” and thus, according to Brock, “the Jones case had become a vehicle to create a crime where one may not have otherwise existed.”⁸⁷⁷

In January 1994, after the Independent Counsel Act had expired and had not yet been reenacted by Congress, Attorney General Janet Reno, using her inherent authority as chief official in the Department of Justice, appointed Robert B. Fiske⁸⁷⁸ as a special prosecutor to investigate allegations that Clinton had had Vince Foster murdered, and had committed various kinds of fraud while governor of Arkansas and an investor in a real estate development called Whitewater. Fiske, a Republican and a retired federal judge with a national reputation for nonpartisanship, “was a reviled figure in the conservative movement, dating back to the days when he sat on an American Bar Association review panel that gave Robert Bork a low rating and damaged his confirmation prospects in the Senate.”⁸⁷⁹ When Fiske, after an investigation, issued a report concluding that Foster had committed suicide because of untreated depression, rightists determined to prove that Foster had been murdered began lobbying for his dismissal. “From the moment that Fiske issued his findings . . . , Republican leaders and influential

874. BROCK, *supra* note 854, at 184; TOOBIN, *supra* note 872, at 134-36.

875. BROCK, *supra* note 854, at 180-83; CONASON & LYONS, *supra* note 855, at 302; TOOBIN, *supra* note 872, at xi, 41, 136. At the time, Coulter had just begun to work also as a political commentator and had not yet published *HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON* (1998); *SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT* (2002); *TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERROR* (2003); *HOW TO TALK TO A LIBERAL (IF YOU MUST): THE WORLD ACCORDING TO ANN COULTER* (2004); and *GODLESS: THE CHURCH OF LIBERALISM* (2006).

876. Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998), *appeal dismissed*, 161 F.3d 528 (8th Cir. 1998).

877. BROCK, *supra* note 854, at 307; *see also* TOOBIN, *supra* note 872, at 393.

878. TOOBIN, *supra* note 872, at xvii; VAN TASSEL & FINKELMAN, *supra* note 82, at 267.

879. BROCK, *supra* note 854, at 190.

conservatives began maneuvering to eliminate him.”⁸⁸⁰ Shortly afterward, Congress reauthorized the Independent Counsel Act, which had the effect of terminating the appointments of special prosecutors who had been appointed during the period between the Act’s expiration and its reauthorization. Because Fiske had already concluded the Foster matter and had done a great deal of investigation in the Whitewater matter, the logical step would have been to appoint Fiske as an independent counsel under the Act to finish the job. That did not happen. Instead, Kenneth Starr was appointed in Fiske’s place with authority to reopen the Foster issue.

880. CONASON & LYONS, *supra* note 855, at 132.

Under the Independent Counsel Act,⁸⁸¹ a unique three-judge panel called the Special Division appointed the independent counsel. In

881. 28 U.S.C.A. §§ 591-99 (West 2007). Although the authority to appoint new independent counsel expired when the Act was not reauthorized in 1999, the remainder of the Act continued in effect so that independent counsels already appointed could finish their work. *See id.* § 599.

The Act was adopted in 1978 because the Watergate special prosecutors had gotten their authority from executive department orders and regulations and hence were vulnerable to being fired, as Cox was, by the people they were investigating. *See supra* text accompanying notes 683-684. During the Reagan and Bush Administrations, independent counsels investigated and prosecuted Republicans in the executive branch. Because of that, Republicans in Congress “mounted an attack on the statute so fierce that they succeeded in blocking its re-authorization even though Republicans comprised a minority of Congress.” Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2079 (1998). Then, as soon as an opportunity arose to investigate Clinton, Republicans reversed their position and “enthusiastically joined with then reluctant Democrats in Congress to pass the independent counsel Reauthorization Act of 1994 . . . so that an independent counsel would be available to investigate the President’s involvement in the Whitewater matter.” *Id.*

It is an indication of the deterioration of political behavior in the last several decades that the Independent Counsel Act was originally needed because Republican partisanship had threatened to overwhelm prosecutorial integrity in the Nixon Administration and that the Act was then destroyed by the Republican partisanship that infected Kenneth Starr’s work as independent counsel. To illustrate this, it is enough to observe that permanent independent special prosecutors—ready to prosecute government officials and employees when a regular prosecutor would have a conflict of interest or be politically suspect—have been in operation in Sweden and Finland for hundreds of years without any controversy over whether their behavior has been infected by partisanship. The Swedish *justitiekansler* (JK) was created in 1713, and the first Swedish *justitieombudsman* (JO) in 1809 (there are now four). (Finnish law has historically derived from Swedish law and has adopted the same institutions.) The JK and JO primarily do other work, but when needed, they prosecute or supervise prosecution in situations where U.S. law has allowed ad hoc appointment of special prosecutors (under the Attorney General’s inherent authority) or independent counsel (under the Independent Counsel Act from 1978 to 1999 and under the Attorney General’s inherent authority since then). The Swedish legislation uses the terminology that American law has historically used: a special prosecutor (*särskild åklagare*). And the Swedish media use the same term to refer to independent counsel acting as special prosecutors in the United States, as in this headline in a story about independent counsel Patrick Fitzgerald’s investigation of the Bush Administration’s involvement in the Valerie Plame affair: “*Särskild åklagare utreder läckor från Vita huset*” (“Special Prosecutor Investigates Leaks from the White House”). Sveriges Radio, Dec. 31, 2003, <http://www.sr.se/ekot/arkiv.asp?DagensDatum=2003-12-31&Artikel=345885> (last visited Apr. 21, 2007).

“When acting as a special prosecutor, a *Justitieombudsman* may prosecute an official who, in disregard of the obligations of his office or commission, has committed a criminal offense . . .” 6 § Lag med instruktion för Riksdagens Ombudsmän [JO-instruktionen] [Law with Instructions for the Riksdag’s Ombudsmen] [1986:765], available at <http://www.jo.se>. “A *Justitieombudsman* has a duty to commence and prosecute legal proceedings that the Committee on the Constitution has decided to institute against a Minister pursuant to § 12:3 of the Instrument of Government . . .” *Id.* § 10. “The *Justitiekansler* may, as a special prosecutor, begin prosecutions against government employees who have committed criminal acts in disregard of the obligations of their office or commission.” 5 § Lag om justitiekanslerns tillsyn [Law on the *Justitiekansler*’s Authority] [1975:1339], available at <http://www.justitiekanslern.se>. “No special prosecutor other than the *Justitiekansler* or a *Justitieombudsman* may begin or continue a prosecution in the Supreme Court.” 7 ch. 8 § Lag om ändring i rättegångsbalken [Law Amending the Procedure Code] [SFS 2001:280], available at <http://65.95.69.3/SFSdoc/01/010280.pdf>.

assigning judges to the Special Division, the Act instructed the Chief Justice of the Supreme Court that “priority shall be given to senior circuit judges and retired justices” of the Supreme Court.⁸⁸² A senior federal judge is one who is semi-retired. In 1992, Chief Justice William Rehnquist ignored this provision and assigned Judge David Sentelle to preside over the Special Division.⁸⁸³ Not only was Sentelle not semi-retired, he was 48 years old at the time, and had been on the federal bench for only seven years.⁸⁸⁴ Before becoming a judge, Sentelle had devoted a great deal of time and money campaigning and raising money for Republican candidates for political office, and he was a protégé of right-wing Republican Senator Jesse Helms.⁸⁸⁵

On June 30, 1994, Fiske issued his report concluding that Foster’s death was a suicide and not murder.⁸⁸⁶ On the same day, Clinton signed into law the reenactment of the Independent Counsel Act.⁸⁸⁷ The next day, Janet Reno, filed a motion asking the Special Division to appoint Fiske as independent counsel so that he could finish the job he started as special prosecutor.⁸⁸⁸ That afternoon, Senator Lauch Faircloth spoke on the Senate floor in favor of replacing Fiske, whom Faircloth believed had been too lenient with Clinton.⁸⁸⁹ Senators Faircloth and Helms both represented North Carolina, where Sentelle had been active politically in the Republican Party before accepting an appointment to the D.C. Circuit. On July 14, Helms, Faircloth, and Sentelle met for lunch.⁸⁹⁰ When this later became public, all of them at first denied they discussed whom to appoint as independent counsel, but Sentelle later admitted that it “may” have come up in conversation. For years afterward, the three insisted that they talked mostly about the conditions of their prostates.⁸⁹¹

On August 5, the Special Division replaced Fiske and appointed Kenneth Starr, a judge on the D.C. Circuit from 1983 to 1989 and the first

882. 28 U.S.C. § 49(c) (expired 1999).

883. CONASON & LYONS, *supra* note 855, at 131.

884. *Id.* The pathologists Fiske consulted told him that the evidence was so unequivocal that it was “one of the easiest cases” in their experience. BENJAMIN WITTES, STARR: A REASSESSMENT 83 (2002) (quoting Fiske).

885. BROCK, *supra* note 854, at zx; CONASON & LYONS, *supra* note 837, at 131; *see also* TOOBIN, *supra* note 872, at 70.

886. TOOBIN, *supra* note 872, at 71.

887. *Id.* at 71-72.

888. CONASON & LYONS, *supra* note 855, at 132.

889. TOOBIN, *supra* note 872, at 73.

890. *Id.* at 72.

891. CONASON & LYONS, *supra* note 855, at 132-33.

President Bush's Solicitor General from 1989 to 1993.⁸⁹² In removing Fiske, the Special Division stated that he had a conflict of interest because Reno initially appointed him.⁸⁹³ But Starr's conflicts of interest were much larger. Starr had been Solicitor General throughout the Administration of the first President Bush, whom Clinton defeated for reelection (which had the effect of ousting Starr from the second-most important position in the Justice Department). Starr had given strategic advice to Paula Jones's lawyers in her lawsuit against Clinton,⁸⁹⁴ and his law firm "was negotiating a highly sensitive legal settlement" with officials of the Resolution Trust Corporation, whom Starr would later investigate in connection with Whitewater.⁸⁹⁵ The replacement made even less sense given that Fiske, as a former U.S. Attorney, possessed extensive experience both prosecuting and defending white-collar criminal cases,⁸⁹⁶ while Starr had virtually no criminal litigation experience. The Special Division's objections to Fiske thus appeared to be contrived.

When the media reported the Sentelle-Helms-Faircloth lunch, there was an uproar. "The timing of the lunch suggested that the senators were lobbying Sentelle to dump Fiske—which the judge promptly did."⁸⁹⁷ Five former presidents of the American Bar Association joined in asking Starr to resign as independent counsel, which he refused to do.⁸⁹⁸ Because of the Republican campaign to appoint politically reliable judges, the federal judiciary has become more politically partisan than at any other time since the judicial domination by the Federalists at the end of the eighteenth century and the beginning of the nineteenth.⁸⁹⁹ According to Michael J. Luttig, formerly a judge on the Fourth Circuit (appointed by the first President Bush):

Judges are told, "You're appointed by us to do these things." So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get? . . . I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process.

892. TOOBIN, *supra* note 872, at xiii, 72; VAN TASSEL & FINKELMAN, *supra* note 82, at 267.

893. *In re Madison Guar. Sav. & Loan Ass'n*, No. 94-1, 1994 WL 913274, *1 (D.C. Cir. Aug. 5, 1994).

894. CONASON & LYONS, *supra* note 855, at 357.

895. *Id.* at 195-96.

896. TOOBIN, *supra* note 872, at 71.

897. *Id.* at 73.

898. CONASON & LYONS, *supra* note 855, at 132.

899. See *supra* text accompanying notes 151-371; see also CASS R. SUNSTEI ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

And it has to be resisted, by the judiciary and by the politicians.⁹⁰⁰

As a lawyer in the Justice Department, before his own appointment to the bench, Luttig prepared Clarence Thomas to testify at the hearings on his nomination to the D.C. Circuit and his later nomination to the Supreme Court.⁹⁰¹

Starr reopened the question of how Vince Foster had died, and his staff investigated everything all over again. In October 1997, he issued a report finally concluding that Fiske had been right all along, and that Foster had committed suicide. Later, Starr also reported that there was insufficient evidence that the Clintons had done anything criminal in the Arkansas Whitewater development, or in the 1993 firing of White House travel office employees, or in the mishandling of FBI files.⁹⁰² But by then, these accusations were no longer needed because Starr had Monica Lewinsky instead.

Congressman Bob Barr, a Republican member of the House Judiciary Committee, campaigned to have Clinton impeached.⁹⁰³ In June 1997, he wrote a letter to Congressman Henry Hyde, chair of the Judiciary Committee, insisting that the Committee begin an impeachment investigation.⁹⁰⁴ On November 5, 1997—at a time when no one in Congress had ever heard of Monica Lewinsky—Barr, joined by eighteen other Republican co-sponsors, introduced a resolution in the House that would direct the House Judiciary Committee to determine whether Clinton should be impeached for “engag[ing] in a systemic effort to obstruct, undermine, and compromise the legitimate and proper functions and processes of the executive branch.”⁹⁰⁵ The language was purposefully elastic. Some Republicans were determined to find a cause to impeach Clinton, but were not quite sure what that cause would be.

Throughout 1997, right-wing agitation for impeachment built up based on claims that Clinton had murdered Vince Foster and had won the 1996 election through fraud.⁹⁰⁶ The editorial page of the *Wall Street*

900. Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 38; see also SUNSTEIN ET AL., *supra* note 899.

901. ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 319, 354-56 (2001).

902. PETER BAKER, THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON 24, 33, 38, 94, 107-08, 127, 140, 170, 172, 200 (2000); SUSAN SCHMITT & MICHAEL WEISKOPF, TRUTH AT ANY COST: KEN STARR AND THE UNMAKING OF BILL CLINTON 8-12, 94-95, 101, 134, 145-48, 153-56, 191, 226-27, 246, 276 (2000).

903. Barr, *supra* note 168.

904. BROCK, *supra* note 854, at 299.

905. H.R. Res. 304, 105th Congress (1997).

906. BROCK, *supra* note 854, at 300-01.

Journal twice published articles demanding that Clinton be impeached because, among other things, he had “met with drug dealers . . . and mobsters”⁹⁰⁷ and stolen the 1996 election.⁹⁰⁸ Regnery Publishing, the leading publisher of right-wing political literature, published a novel called *The Impeachment of William Jefferson Clinton*, written by the editor of *The American Spectator*. All of this occurred before the name Monica Lewinsky reached any news source. According to David Brock, the former right-wing journalist,

the Republican right . . . continued to maintain that the Clinton scandals represented a wide pattern of vague criminality by the first couple, and therefore that it was only a matter of time until the truth would be revealed, the Clinton administration would be brought down, and the world would be set right again. They seemed to believe this, or at least they asserted it, all the more intensely the more they failed to prove any of it, and they went around the bend as the promised indictments never came.⁹⁰⁹

At one point, Brock’s home answering machine told callers to leave a message because “I’m out trying to bring down the president.”⁹¹⁰

As a White House intern assigned one day to deliver some papers to the president, Lewinsky surprised Clinton by showing him her underwear. This began a series of furtive encounters that reflected poorly on both participants. Lewinsky confided what was happening to Linda Tripp, a Pentagon employee, who secretly tape-recorded her telephone conversations with Lewinsky—itsself a crime under Maryland law. Tripp in turn told Starr’s Office of the Independent Counsel about the Clinton-Lewinsky affair and claimed that Clinton was trying to get Lewinsky a private industry job as the price of Lewinsky’s silence.⁹¹¹ Tripp needed a lawyer to assist her in negotiations with Starr and to defend her against a potential Maryland prosecution. Ann Coulter helped her find one.⁹¹²

On January 16, 1998, without Clinton’s knowledge, the Special Division expanded Starr’s jurisdiction to include any criminal liability Clinton might have had because of his behavior with Lewinsky.⁹¹³ Under

907. Mark Halprin, *Impeach*, WALL ST. J., Oct. 10, 1997, at A22.

908. Paul Gigot, *A Stolen Election*, WALL ST. J., Oct. 17, 1997, at A22.

909. BROCK, *supra* note 854, at 285.

910. *Id.* at 186.

911. SCHMITT & WEISKOPF, *supra* note 902, at 17-20.

912. SCHMITT & WEISKOPF, *supra* note 902, at 35-36, 45.

913. OFFICE OF THE INDEP. COUNSEL, APPENDICES TO THE REFERRAL TO THE U.S. HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, U.S. CODE, SECTION 595(c), PART 1, H.R. DOC. NO. 105-311, at 6-7 (1998) [hereinafter INDEP. COUNSEL APPENDECIES]; TOOBIN, *supra* note 872, at xx.

the statute, an independent counsel who wanted expanded jurisdiction had to request it from the Attorney General, who was required to "give great weight to" the independent counsel's recommendation, and if the Attorney General, so deferring to the independent counsel, "determine[d] that there are reasonable grounds to believe that further investigation is warranted," the Special Division was required to ("shall") grant the request.⁹¹⁴ This deference, both direct and indirect, to the independent counsel meant that any arguable request for expanded jurisdiction was likely to be granted. Nothing in the public record suggests that Starr informed the Attorney General or the Special Division that he had simultaneously been working with Paula Jones's lawyers to set a trap for Clinton at his January 17th deposition, before his jurisdiction had been expanded to include the Lewinsky matter.

In fact, Starr had been looking for sexual misbehavior by Clinton long before his jurisdiction was expanded to include Lewinsky, and before any of the perjury and alleged evidence tampering that later formed the basis for the impeachment had even happened.⁹¹⁵ In other words, Starr was using the law enforcement power of his office to try to produce material that could be used politically to embarrass Clinton even if Clinton had not yet violated the law. Starr also did not tell the Special Division that, as a private lawyer, he gave strategic advice to Paula Jones's lawyers, one of whom "had billed Jones \$975 [in lawyer time] for consultations with [Starr] on six occasions in 1994."⁹¹⁶

Whoever drafted the Special Division's order—whether it was Starr's office or the Special Division itself—tried to hide the fact that the real target was Clinton. The order expanded Starr's jurisdiction to "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . ." INDEP. COUNSEL APPENDECIES, *supra*, at 6 (emphasis added). Starr later admitted that it was unwise for him to have asked for an enlarged jurisdiction. John Rogers, *Starr Has Mixed Feelings for Clinton*, AP ONLINE, Sept. 16, 1999; Kenneth Starr, *What We've Accomplished*, WALL. ST. J., Oct. 20, 1999, at A26. He did not admit that his own partisanship undermined the credibility of his investigation, or that he had collaborated with Paul Jones's lawyers to set a trap for Clinton.

914. 28 U.S.C. § 593(c) (1994); see also Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 662-65 (1998); Karen A. Popp, *The Impeachment of President Clinton: An Ugly Mix of Three Powerful Forces*, 63 L. & CONTEMP. PROBS. 223, 228-31 (2000).

915. See Bob Woodward & Susan Schmidt, *Starr Probes Clinton Personal Life*, WASH. POST., June 25, 1997, at A1 (Starr's office and FBI agents working under the office's direction "have questioned Arkansas state troopers in recent months about their knowledge of any extramarital relations Bill Clinton may have had while he was Arkansas governor . . . including Paula Corbin Jones.").

916. CONASON & LYONS, *supra* note 855, at 357.

On January 17, 1998, a day after the Special Division expanded Starr's jurisdiction, Clinton testified at a deposition in Jones's lawsuit.⁹¹⁷ Linda Tripp had told Jones's lawyers about Monica Lewinsky, and they asked Clinton whether he had sex with Lewinsky or been alone with her; Clinton answered in the negative.⁹¹⁸ That was a lie. Because Clinton was under oath, it was also perjury. Lewinsky had previously signed an affidavit denying that she had had sex with Clinton. Clinton's lawyers, unaware of its falsity, put the affidavit into evidence at the deposition, while Clinton, who knew the falsity of its contents, watched silently.⁹¹⁹ This was later to form part of the basis for the impeachment articles alleging obstruction of justice. The issue of whether Clinton had had sex with someone other than Jones, however, was not naturally part of the Jones lawsuit, although the right-wing backers of Jones's lawsuit had paid money and supplied lawyers so they could put Clinton under oath and ask exactly these kinds of questions.⁹²⁰

On August 17, 1998, Clinton testified again, this time to Starr's grand jury.⁹²¹

[Starr] called the President to testify before the grand jury to ask him whether he had lied in his deposition. The aim was to put him in the position of having to confess to possible perjury, or to commit a fresh perjury by denying he had lied. The tactic ingeniously created a more formal and imposing setting than a discovery deposition in a defunct civil case, one in which the President's denials of wrongdoing would seem more grave and culpable. Ordinary defendants sidestep traps like the one the OIC set for Clinton by invoking their Fifth Amendment privilege not to incriminate themselves: but for political reasons, as [Starr] knew, the President could not "take the Fifth."

[Thus,] the point of calling Clinton to the grand jury was not to investigate an ordinary crime: it was . . . to produce a public spectacle of a president defying the rule of law by testifying falsely under oath.⁹²²

917. TOOBIN, *supra* note 872, at xx.

918. SCHMITT & WEISKOPF, *supra* note 902, at 35-36, 45, 48.

919. *Id.* at 47-48.

920. *See supra* text accompanying notes 869-877.

921. BAKER, *supra* note 902, at 427; TOOBIN, *supra* note 854, at xxi; VAN TASSEL & FINKELMAN, *supra* note 82, at 270. Clinton testified at the White House, and on videotape, which was later shown to the grand jury. VAN TASSEL & FINKELMAN, *supra* note 82, at 270.

922. Robert W. Gordon, *Legalizing Outrage*, in AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF PUBLIC SPECTACLE 97, 105 (Leonard V. Kaplan & Beverly I. Moran eds., 2001).

On September 9, Starr delivered two van loads of evidence to the House along with what he called a "referral"⁹²³ alleging that Clinton "obstructed justice in the *Clinton v. Jones* lawsuit by lying under oath and concealing evidence of his relationship with Lewinsky [and] lied under oath and obstructed justice during the grand jury investigation."⁹²⁴ The referral then listed what it called "eleven possible grounds for impeachment." Starr thus asked the House to impeach Clinton.⁹²⁵ Neither Cox nor Jaworski had done that with Nixon. Cox was fired before he could do anything, and Jaworski turned his evidence over to the House Judiciary Committee without any recommendation.⁹²⁶ The referral's description of the events between Clinton and Lewinsky was widely reprinted in the press and on the Internet.

Clinton came across not as a cunning seducer and monster of predation but as an awkward and guilt-stricken overgrown adolescent, Lewinsky as a sexually aggressive and experienced but also touchingly insecure young woman. Starr meanwhile came across as a Puritan pornographer, obsessed with sex and the destruction of the President. Most readers were horrified at the brutal invasion of the lovers' privacy, and the dumping of the details into the public domain. Their horror grew as it became apparent [that Starr] had subpoenaed family members to inform on their sources; bookstores to inform on their customer's reading habits; the Clinton's lawyers, closest aides, and even their Secret Service guards to reveal the most intimate aspects of their personal lives; Lewinsky's family, closest friends, and former lovers to reveal what she had told them, and her psychiatric records and personal computer files. . . . Not to catch a master terrorist, a drug boss, or a Mafia chieftain, but a hapless schmo with a sexual secret.⁹²⁷

In October, investigators from the House Judiciary Committee started searching through the files physically located in Starr's office looking for evidence that Starr's staff might have inadvertently not sent to the House along with Starr's referral.

923. BAKER, *supra* note 902, at 427; TOOBIN, *supra* note 872, at xxi; *see also* REFERRAL FROM INDEP. COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, U.S. CODE, SECTION 595(c), H.R. DOC. NO. 105-310 (1998).

924. VAN TASSEL & FINKELMAN, *supra* note 82, at 272.

925. TOOBIN, *supra* note 872, at 328-29; VAN TASSEL & FINKELMAN, *supra* note 82, at 273.

926. TOOBIN, *supra* note 872, at 328.

927. Gordon, *supra* note 922, at 106-07.

Rummaging through Starr's file cabinets, the House lawyers discovered interviews with Monica Lewinsky's hairdressers, childhood friends, and college lovers. There were files [on] Kathleen Willey's dentist [Clinton was alleged to have made a pass at Willey], her mail carrier, the woman who had bought her house, and the funeral home director who had buried her late husband. Starr's investigators had tracked down Vernon Jordan's chauffeur [Jordan was alleged to have tried to get a job for Lewinsky in exchange for her silence] and at least three people who worked at a Parcel Plus store near the Watergate where Lewinsky would go to log onto the Internet. They had scanned Lewinsky's library records at the Pentagon (where she had checked out just one book) and seemingly quizzed almost everyone who had ever worked in the Clinton White House, including the painters, the custodians, the men who washed the Oval Office windows, and the doorman who talked about the weather with the president every day.

None of this Starr had included in the . . . boxes of evidence he had shipped to Congress House investigators counted more than 320 grand jury transcripts or FBI interviews . . . that never made their way to Capitol Hill. There seemed to be virtually no tip, lead, or rumor that had not found its way to the prosecutors, and they had wandered down numerous undisclosed rabbit trails searching for misconduct by Clinton and his allies. The Democratic lawyers finally concluded that Starr must not have sent all this because it would prove to be powerful evidence of how overzealous his pursuit of the president had become.⁹²⁸

Starr's staff investigated a total of twenty-one women whom the staff suspected might have been connected with Clinton sexually.⁹²⁹ But there was no real evidence that Clinton, or anyone acting on his behalf, had tried to tamper with Lewinsky as a witness. "No one ever asked me to lie," she testified, "and I was never promised a job for my silence."⁹³⁰

On November 19, Starr testified at a House Judiciary Committee hearing and argued that Clinton should be impeached.⁹³¹ Although the Committee had not yet examined the evidence—at the time they had only read Starr's referral and heard his arguments in favor of impeachment—the Republican members of the Committee, including Chairman Henry Hyde,

928. BAKER, *supra* note 902, at 137.

929. *Id.* at 138.

930. *Id.* at 325.

931. *Id.* at 429; TOOBIN, *supra* note 872, at xxii.

gave Starr a standing ovation at the end of his testimony.⁹³² The spontaneity of this gesture revealed not only the depth of the Republicans' partisanship but also their obliviousness to the impression of partisanship that their behavior was creating in the public mind.

Clinton's standing in the polls took a dip in August,⁹³³ when he testified before Starr's grand jury and immediately afterward made a statement on national television that many thought insincere. But from that point on, as the partisanship of the Republicans alienated portions of the public, Clinton's approval ratings were nearly always favorable and continually grew stronger,⁹³⁴ in spite of (or perhaps because of) what the public saw the Republicans doing in the House Judiciary Committee, on the floor of the House, and in the Senate. On December 15, four days before the House impeached Clinton, a *Washington Post*/ABC News poll found 60% of the public against impeachment and 39% in favor, while by 57% to 36% the public favored a congressional resolution censuring Clinton.⁹³⁵

The public seemed to take a sophisticated view of impeachment, close to that of the drafters of the Constitution.⁹³⁶ The polls revealed that the public saw what Clinton had done—both adultery and perjury—as wrongs committed by Clinton as a private person, not as an officeholder, and certainly not involving the abuse of official power. Though Clinton deserved some type of punishment, removal from office seemed to the public to be unrelated to the offense. Republican arguments interpreting the phrase “high Crimes and Misdemeanors” came off as formalistic and appeared to ignore the policy purposes behind the impeachment provisions in the Constitution, which the public seemed to sense intuitively. That is why part of former Senator Dale Bumpers's argument to the Senate on Clinton's behalf during the impeachment trial resonated so thoroughly. Before entering politics, Bumpers had litigated hundreds of divorce cases in rural Arkansas. “In all those divorce cases,” he told the Senate:

932. BAKER, *supra* note 902, at 174.

933. Polling data from the period are compiled on the Polling Report website at <http://www.pollingreport.com/wh-hstry.htm>. See Molly W. Andolina & Clyde Wilcox, *Public Opinion: The Paradoxes of Clinton's Popularity*, in *THE CLINTON SCANDAL AND THE FUTURE OF AMERICAN GOVERNMENT* 171 (Mark J. Rozell & Clyde Wilcox eds., 2000).

934. *Id.* The only serious exception was the polls taken for Fox News, which purported to show the public disapproved of Clinton in virtually every poll Fox took from August 1998 until the end of Clinton's Presidency, even though every other organization's polls, except in August 1998, showed the exact opposite. See *infra* note 941.

935. BAKER, *supra* note 902, at 224.

936. See *supra* text accompanying notes 62-78.

I would guess that in eighty percent of contested cases, perjury was committed. . . . Do you know what it was about? Sex. Extramarital affairs. But there is a very big difference between perjury about whether there was marital infidelity in a divorce case and perjury about whether I bought the murder weapon. . . . And to charge somebody with the first and punish them as though it were the second stands our sense of justice on its head.⁹³⁷

At the center of the effort in the House to impeach Clinton had been Tom DeLay, then the Republican House Whip and later the House Majority Leader. Beginning in August 1998, before Starr delivered his referral to the House, DeLay organized an effort, which he and his staff called "The Campaign," to get Clinton impeached.

In a conference room in the Capitol . . . [DeLay's staff] flood[ed] House Republicans with information and provid[ed] a central booking agency for members who shared DeLay's conviction and were willing to go public with calls for Clinton to resign. . . . A "message of the day" would be sent to every Republican member's office to keep up the pressure. Sample press releases would be written for other Congressmen to release in their own names

. . . .
. . . DeLay [used] a network of conservative talk shows and party fund-raisers to generate pressure within the GOP. He would go on as many as ten radio talk shows a day, and his staff would blast-fax talking points and tip sheets to perhaps two hundred such programs at a time, revving up the conservative audiences that would then turn up the heat on their local congressmen.⁹³⁸

That pressure could be substantial because most Republican Representatives were out of touch with the mainstream of public sentiment.

From the time the Republicans took control of the House after the 1994 elections, their majorities had been among the smallest in American history. In fact, the Democratic majorities in the House for nearly all of the period from 1932 through 1994 were enormous compared to the tiny margins available to the Republicans after 1994.⁹³⁹ The Republicans ran the House as though they had massive public support, which they did not.

937. TOOBIN, *supra* note 872, at 381.

938. BAKER, *supra* note 902, at 45, 179.

939. See *infra* text accompanying notes 1093-1106.

They tended to get their news from *The Washington Times*⁹⁴⁰ and Fox News.⁹⁴¹ Exposed to a narrow range of opinion, they expected the world to conform to their views, and did not feel obligated, as generations of politicians before them had, to find practical solutions that worked and could satisfy a broad political consensus. They were not afraid of losing general elections because their districts had been gerrymandered to have Republican majorities, even if there were more Democrats than Republicans in the national population. What a Republican incumbent could be afraid of was losing a primary election to an even more right-wing challenger who might be supported and bankrolled by the very constituents that DeLay had aroused to badger their Representatives into voting for impeachment.⁹⁴²

Before Starr testified, the Committee sent Clinton a demand that he answer eighty-one questions that the Republicans claimed were necessary to the Committee's investigation. Few, if any, of the questions were

940. *The Washington Times* was created in 1982 by the Rev. Sun Myung Moon, and has been heavily subsidized by his organizations, to present right-wing views in competition with *The Washington Post*. A typical *Washington Times* story on the Clintons claimed that Hillary Clinton is bisexual, and that Bill and Hillary Clinton "have had a pact for decades: He gets to fool around with women, and she gets to fool around with women (plus the occasional man like Vince Foster)." Jack Wheeler, *Harry Potter and Bill Clinton*, WASH. TIMES, June 30, 2004, at A17. *The Washington Times* has frequently been challenged as deliberately inaccurate for political purposes, distorting facts to favor Republicans and harm Democrats. See Dante Chinni, *The Other Paper: The Washington Times's Role*, COLUM. JOURNALISM REV., Sept.-Oct. 2002; Allen Freedman, *Washington's Other Paper: Is the Time Right for the Times?*, COLUM. JOURNALISM REV., Mar.-Apr. 1995.

941. The Fox News Channel was created by Rupert Murdoch, who owns the largest media empire in the world. Murdoch hired as Fox News's chief executive officer Roger Ailes, a media strategist to the presidential campaigns of Richard Nixon (1968), Ronald Reagan (1984), and George Bush (1988). Ken Auletta, *Vox Fox: How Roger Ailes and Fox News Are Changing Cable News*, THE NEW YORKER, May 26, 2003, at 58. According to former employees of Fox News, news writers and reporters receive a daily memo instructing them on what to say about particular stories, often before the staff has investigated those stories. OUTFOXED: RUPERT MURDOCH'S WAR ON JOURNALISM (Carolina Productions 2004). "I've never heard of any other network or any legitimate news organization doing that," said Walter Cronkite, the anchor for CBS Evening News from 1962 to 1981, who believes Fox News is "a far right-wing organization." *Id.* A former Fox News reporter told Greenwald that his supervisors made it clear to him that Fox is not "a news gathering organization so much as a proponent of a point of view," and that "any ad-lib that made the Democrats look stupid or made the Republicans look smart would get an 'attaboy,' a pat on the back, a wink and a nod." *Id.* According to another former Fox News staffer, "[w]atching Fox News at the end of [the] Clinton [administration], where it was all attack mode . . . and then Bush takes power" in January 2001 "and they're like lap dogs. It was like night and day. It was a party line shift." *Id.* Although Fox News adopted a deferential tone toward the White House after Bush's inauguration, the network's attitude toward the Clintons did not change. "Guess who's giving sympathy to illegal immigrants linked to terrorists," said a Fox News announcer in a typical story on Feb. 11, 2003, as footage of Hillary Clinton appeared on the screen: "You're looking at her." Auletta, *supra*.

942. BAKER, *supra* note 902, at 225.

investigatory. The first was: "Do you admit or deny that you are the chief law enforcement officer of the United States?"⁹⁴³

No congressional judiciary committee could have been in any doubt about the answer to this question (and a number of the others). Its purpose was to taunt Clinton and to generate an answer that would enable Republicans to proclaim that Clinton admitted being the chief law enforcement officer of the land but still himself committed a felony. In 1974, if the Democratic majority on the House Judiciary Committee had tried to send similar questions to Richard Nixon, the Republican minority would have erupted in protests that the majority was behaving in a partisan manner. It was to avoid any conceivable appearance of partisanship that the 1974 committee majority treated Nixon and his advocates with solicitous respect and treated the idea of impeachment as a regrettable duty, to be undertaken only if absolutely unavoidable.

Throughout the proceedings in the House Judiciary Committee and on the floor of both the Senate and the House, Republicans refused to call the subject of the proceedings "President Clinton" or "the President" or "Bill Clinton"—which was the only name by which the public knew him. Instead, Republicans referred to him as "William Jefferson Clinton," enunciating each syllable in the tone that a bailiff might use while reading aloud an indictment during an arraignment in a criminal courtroom. The purpose was to de-legitimize Clinton by treating him as though he were nearly already convicted and not a real president. This tactic appeared to have an opposite effect on those of the public who noticed it. The Republicans, carried away with their own partisanship, appeared to be the ones treating the office of the presidency with disrespect.

On almost entirely party-line votes, the House Judiciary Committee recommended four articles of impeachment on December 11 and 12.⁹⁴⁴ On December 19, 1998, the House adopted two of the four articles, charging Clinton with perjury before the grand jury, and with obstruction of justice by concealing evidence in the Paula Jones litigation.⁹⁴⁵ The perjury article was adopted 228 to 206⁹⁴⁶ on a nearly party-line vote, with only 5 Democrats voting yea and only 5 Republicans voting nay.⁹⁴⁷ The

943. *Id.* at 251, 443.

944. IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE U.S., REP. OF THE COMM. ON THE JUDICIARY TO ACCOMPANY H.R. RES. 611, H.R. REP. 105-830, at 2, 128-134; BAKER, *supra* note 902, at 430.

945. BAKER, *supra* note 902, at 430, 438-42; Turley, *supra* note 485, at 96-98.

946. 144 CONG. REC. H12040 (daily ed. Dec. 19, 1998).

947. TOOBIN, *supra* note 872, at 367; Turley, *supra* note 485, at 97 n.463.

obstruction of justice article was adopted by a vote of 221 to 212⁹⁴⁸—an extraordinarily close vote and again nearly party-line, only 5 Democrats voting yea and 12 Republicans voting nay.⁹⁴⁹ During the debate, Democrats protested that the impeachment was a “partisan railroad job,”⁹⁵⁰ and that it was hypocrisy to impeach a Democratic president for perjury after a Republican secretary of defense had been indicted for perjury and then pardoned by the first President Bush.⁹⁵¹

Some in the House Republican leadership, especially Tom DeLay, believed that impeachment would enable them to make large gains in the November 1998 congressional elections, because the elections would occur after the initial House Judiciary Committee meetings on impeachment were nationally televised. In congressional elections occurring in a president’s sixth year, the party not in control of the White House has traditionally gained House seats—often in large numbers. At that point in a presidency, an Administration’s mistakes could look bigger than they did earlier while the president himself could appear less attractive than he once was. This happened to Woodrow Wilson (whose party lost twenty-two House seats in 1918), Franklin Roosevelt (seventy-two seats in 1938), the Roosevelt/Harry Truman Administration (fifty-four seats in 1946), Dwight Eisenhower (forty-eight seats in 1958), the John F. Kennedy/Lyndon Johnson Administration (forty-five seats in 1966), and the Richard Nixon/Gerald Ford Administration (forty-eight seats in 1974), though sometimes the damage could be lighter as with Warren Harding/Calvin Coolidge (eight seats in 1926) and Ronald Reagan (five seats in 1986).⁹⁵² In 1998, Republican ambitions were not as big as the historical average, but Republicans were nevertheless confident nonetheless of gains. On the day of the election, Republican House Speaker Newt Gingrich predicted his party would pick up twenty seats at the expense of the Democrats.⁹⁵³

Instead, the Republicans lost five seats because the Republican campaign to impeach Clinton had alienated voters.⁹⁵⁴ The Republicans retained control of the House, but more people actually voted for Democratic House candidates than for Republican House candidates. This was the only time since *Baker v. Carr* rationalized House voting in 1962 by

948. 144 CONG. REC. H12041-12042 (daily ed. Dec. 19, 1998).

949. TOOBIN, *supra* note 872, at 367; Turley, *supra* note 485, at 98 n.464.

950. IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON, *supra* note 853, at 174 (quoting Congressman Jerrold Nadler).

951. *Id.* at 170, 175.

952. House Party Divisions, *supra* note 199.

953. BAKER, *supra* note 902, at 435.

954. TOOBIN, *supra* note 872, at 344.

requiring that legislative districts be of equal size⁹⁵⁵ that the party that *lost* the popular vote won a majority of the seats in the House.⁹⁵⁶ The Republicans won a majority only because of intense gerrymandering that was not possible before the invention of computers.

Table 4
*Congressional Party Divisions after
the Elections of 1996 and 1998
Together with Popular Vote for House
Candidates in the Same Elections*

| | 1996 | 1998 |
|-----------------------------------|------|------|
| Senate Seats ⁹⁵⁷ | | |
| Democrats | 45 | 45 |
| Republicans | 55 | 55 |
| House Seats ⁹⁵⁸ | | |
| Democrats | 206 | 211 |
| Republicans | 228 | 223 |
| Others | 1 | 1 |
| House Popular Vote ⁹⁵⁹ | | |
| Democratic | 48.5 | 48.9 |
| Republican | 48.9 | 47.9 |

When the articles of impeachment were considered by the House on December 19, the Republican leadership refused to allow a vote on a motion that would express the sense of Congress that Clinton had “dishonored” the Presidency and “deserves[] the censure and condemnation of the American people and the Congress,” which Clinton would have had to acknowledge by his signature on the resolution.⁹⁶⁰ Peter Baker, who published the most exhaustive history of the Clinton impeachment, wrote that “DeLay . . . crushed the possibility of a censure vote on the floor.”⁹⁶¹ On February 12, a few minutes after the Senate acquitted Clinton, a Democratic Senator and a Republican Senator moved a similar censure resolution in the Senate. Even though a fifty-six to forty-

955. 369 U.S. 186, 192-95, 237 (1962).

956. 1 HISTORICAL STATISTICS, *supra* note 439, at 5-193.

957. Senate Party Divisions, *supra* note 198.

958. House Party Divisions, *supra* note 199.

959. 1 HISTORICAL STATISTICS, *supra* note 439, at 5-193.

960. BAKER, *supra* note 902, at 251, 443.

961. *Id.* at 229.

three majority voted to consider the resolution, it failed because it was made outside the process for ordinary business, which requires a two-thirds majority to suspend temporarily the Senate rules.⁹⁶² If it had not been necessary to suspend the rules, the resolution obviously would have been adopted.

Everything changed when the House managers appeared in the Senate to present their case. After the mob psychology that dominated their party in the House, the impeachment managers were stunned by the calm skepticism of a number of Republican Senators, who could not be disciplined by their party leadership the way that House Members could, as well as by the imperviousness to persuasion on the part of every single Democratic Senator. This should not have been a surprise to the House managers. Conviction in an impeachment trial requires a two-thirds majority in the Senate. Nothing about the Senate of 1998 and 1999, and nothing about the articles of impeachment, or the evidence behind them, could have supported any rational hope that Senators would have been more enthusiastic about convicting Clinton than the House of Representatives had been about impeaching him.

On January 7, 1999, the Senate trial began.⁹⁶³ Moderate Republican and Democratic Senators, with support from Senate Republican Majority Leader Trent Lott, proposed that after four days of hearing arguments and debate, the Senate would take a straw vote, and if that vote showed that the two-thirds majority needed to convict was unreachable, the Senate would table the impeachment articles and instead consider censuring Clinton.⁹⁶⁴ "However, a powerful backlash from strongly conservative Republicans forced Lott to abandon the plan."⁹⁶⁵

On January 27, Senator Robert Byrd made the impeachment equivalent of a motion to dismiss for failure to state a claim on which relief can be granted, and forty-four Senators (all Democrats) voted to dismiss the articles of impeachment.⁹⁶⁶ A Senator who believes that neither article states an impeachable offense will not later vote to convict, no matter how amply later evidence supports the allegations in that article. If forty-four Senators take the position that the allegations in the impeachment articles,

962. *Id.* at 411-12, 444-45.

963. *Id.* at 431; TOOBIN, *supra* note 872, at xxii; Turley, *supra* note 485, at 101.

964. Charles Tiefer, *The Senate Impeachment Trial for President Clinton*, 28 HOFSTRA L. REV. 407, 414 (1999).

965. *Id.*

966. BAKER, *supra* note 902, at 360; Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton*, 63 L. & CONTEMP. PROBS. 143, 143-155 (2000); Tiefer, *supra* note 964, at 415.

even if they are later proved with evidence, would not constitute grounds for conviction, then the largest number who could vote to convict after hearing the evidence would be fifty-six—far less than the sixty-seven votes needed for a conviction. It thus became clear that Clinton could not be convicted.⁹⁶⁷

Between February 1st and 3rd, Lewinsky, Vernon Jordan, and Sidney Blumenthal⁹⁶⁸ were deposed, so that any Senator who wanted to could watch their testimony on videotape.⁹⁶⁹ This produced nothing new. The House impeachment managers wanted Lewinsky to testify on the Senate floor, but the Senate rejected that plan by a thirty to seventy vote. The thirty aye votes were all Republican but included virtually no senior Republicans.⁹⁷⁰ Throughout the trial, it was the Republican House managers who wanted to put as much testimony as possible before the Senate (and national television audiences), while Clinton's lawyers and Senate Democrats argued that little or no evidence was necessary because the House had not alleged grounds for conviction. This was the inverse of what happened in past impeachments, where the defendant has usually insisted that the House prove its case factually.⁹⁷¹

On February 12, the Senate acquitted Clinton.⁹⁷² On neither article did even a simple majority of the Senate vote to convict. On the perjury article, forty-five Senators voted to convict, and fifty-five voted to acquit.⁹⁷³ On the obstruction of justice article, the Senate split evenly, fifty Senators voting to convict and fifty to acquit.⁹⁷⁴ Of the three high-profile partisan impeachments to go to a Senate trial—Chase, Johnson, and Clinton—here the prosecution from the House fared the worst. In the Chase trial, 56% of the Senate voted to convict on one of the articles.⁹⁷⁵ In the Johnson trial, 65% of the Senate voted to convict.⁹⁷⁶ By contrast, the best the House managers could get in the Clinton impeachment was 50% on one article and 45% on the other.

967. BAKER, *supra* note 902, at 361; Turley, *supra* note 485, at 106.

968. Blumenthal was a Clinton advisor accused of trying to smear Lewinsky.

969. BAKER, *supra* note 902, at 432; Tiefer, *supra* note 964, at 416.

970. Tiefer, *supra* note 964, at 416.

971. *Id.* at 425-26.

972. TOOBIN, *supra* note 872, at xxii.

973. 145 CONG. REC. S1458 (daily ed. Feb. 12, 1999); BAKER, *supra* note 902, at 438-42.

974. 145 CONG. REC. S1458-1459 (daily ed. Feb. 12, 1999); BAKER, *supra* note 902, at 438-42.

975. VAN TASSEL & FINKELMAN, *supra* note 82, at 102.

976. *Id.* at 226.

On June 30, 1999, the Independent Counsel Act expired. It has not been reenacted.⁹⁷⁷

Michael Gerhardt, the leading legal scholar on impeachment, wrote shortly after the Clinton trial:

[I]f a majority vote by the Senate to convict both Chase and Johnson could not save either's impeachment from being regarded as illegitimate, the absence of a majority vote in the Senate [against] Clinton (coupled with other criticisms of it) could be viewed as an even rounder rejection of the legitimacy of the House's case.⁹⁷⁸

That may be evidence of the House Republicans' partisanship, but it may also be evidence of how much their partisanship blinded them to political realities. In both the Chase and Johnson impeachments, the impeaching political party started with more than a two-thirds majority in the Senate—ample votes, in other words, to convict. In the Chase impeachment, all the Federalists voted to acquit on the important articles, but that would not have been enough: Chase was saved by defections among Jeffersonians who knew their party had overreached.⁹⁷⁹ The same thing happened in the Johnson trial. There, Republicans in the Senate had more than a two-thirds majority, the Democrats all voted against impeachment, and Johnson was acquitted only because of the defections of Republicans troubled by what their party was doing.⁹⁸⁰ In 1999, Republicans started with only fifty-five of one hundred Senators. To win, they would have to keep all of those votes *and* persuade at least twelve Democrats to join them. But the partisanship of the House not only failed to persuade a single Democrat to vote to convict, but it also, as in the Chase and Johnson trials, caused defections from their own party.

Elsewhere, Gerhardt has written that “[i]t is tempting but misguided to dismiss President Clinton's impeachment and acquittal as having been driven largely by partisanship.”⁹⁸¹ His reasoning appears to have been that “Democrats arguably acted throughout the proceeding in at least as partisan a fashion as their Republican counterparts.”⁹⁸² But nonpartisanship and bipartisanship are possible only when the party with greater legislative power makes room for it. In 1974, many, though not all, Republicans were

977. See *supra* note 881.

978. Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 368 (1999).

979. See *supra* text accompanying notes 227-242.

980. See *supra* text accompanying notes 482-488.

981. GERHARDT, *supra* note 687, at 175.

982. *Id.* at 176.

eventually able to see that their own president should be removed from office only because the Democratic majority conducted the impeachment inquiry in a nonpartisan manner. Because in 1998 and 1999, the majority Republicans acted in a highly partisan manner from the start, and because the impeachment was the culmination of many years of campaigning to delegitimize Clinton and smear him and his family, it is not surprising that Democrats did not approach the issues with completely open minds. The record actually demonstrates that many Democrats did seek to compromise, which the Republicans rejected—for example the Democratic proposals to censure Clinton. In both the House and Senate, a very large proportion of Democrats made it clear that they were disgusted both with Clinton's behavior and with the Republican impeachment movement.

Individual members of the House Judiciary Committee did not impose on themselves in 1998 an evidentiary burden,⁹⁸³ such as the clear and convincing evidence standard used by most Committee members during the Nixon impeachment hearings in 1974.⁹⁸⁴ The 1998 Committee did not form a bipartisan impeachment staff, which the 1974 Committee did when investigating Nixon. In 1974, the "staff conducted a neutral, behind-closed-doors investigation and then presented Committee members in closed sessions with evidence and legal analysis in a nonjudgmental fashion," while in 1998, the Committee's "deliberations were marked from the outset by open partisan conflict."⁹⁸⁵ In 1974, Leon Jaworski, as special prosecutor, merely turned his evidence over to the Committee.⁹⁸⁶ Because the evidence was so massive, Jaworski had to add a report that summarized it, but he first showed the report to the federal judge who tried all the Watergate criminal cases to make sure that it did nothing other than summarize the evidence and was devoid of conclusions and recommendations.⁹⁸⁷ But in 1998, Starr "actively participated in the Committee's impeachment hearings, strongly advocating President Clinton's impeachment."⁹⁸⁸ Unlike Cox and Jaworski, who "[w]hile investigating Nixon . . . avoided any partisan political activities," Starr and his investigation "acquired overtones of political motivation."⁹⁸⁹

983. Gerhardt, *supra* note 978, at 369.

984. See *supra* text accompanying note 705; *infra* text accompanying note 1077.

985. Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745, 746 (2000); see also *id.* at 747-48.

986. *Id.* at 747.

987. BAKER, *supra* note 902, at 62.

988. Altshuler, *supra* note 985, at 746-47; see also *id.* at 748.

989. VAN TASSEL & FINKELMAN, *supra* note 82, at 268.

Benjamin Wittes, a journalist, interviewed Starr at length after he resigned as independent counsel.⁹⁹⁰ Primarily on the basis of these interviews, Wittes concluded that Starr had not set out to destroy Clinton's Presidency but instead had conceived of his role as that of a "truth commission."⁹⁹¹ Starr told Wittes that the Independent Counsel Act required him to assume that role. But the statute assigned to an independent counsel the responsibilities of determining whether evidence would support a criminal conviction and, if it would, prosecuting to obtain that conviction; these are the functions of a prosecutor, not a grand inquisitor. The principal author of the Act, Samuel Dash, has written that "an independent counsel . . . is no more and no less than a federal prosecutor in the U.S. Department of Justice," with the sole exception that an independent counsel makes prosecutorial decisions without answering to the Attorney General.⁹⁹² Starr actually hired Dash to advise him and his staff about the Act. But when Starr appeared before the House Judiciary Committee and advocated impeachment, Dash resigned in a letter that told Starr "you have violated your obligations under the independent counsel statute and have unlawfully intruded on the power of impeachment, which the Constitution gives solely to the House."⁹⁹³

What Starr said to Wittes has a very low degree of historical probativeness. It is part of the historical method that we view with relentless skepticism what people say to justify their actions, and that we instead draw inferences primarily from what people *do* and from what they say when they are *not* trying to justify themselves.⁹⁹⁴ Starr initially was appointed to investigate whether the Clintons had committed crimes in connection with the Whitewater real estate investment. In 1997, Starr had his office draft a 100-page referral recommending that Clinton be impeached over Whitewater, but he decided not to send it to the House because he was not confident of his evidence.⁹⁹⁵ Starr also (re-)investigated the death of Vince Foster, allegations about personnel practices in the White House travel office, the disposition of FBI files, and every conceivable allegation about Clinton's sex life. Each investigation lasted years, either because of an inability on the part of Starr and his staff

990. WITTES, *supra* note 884, at viii.

991. *Id.* at xi-xii, 26-28. The phrase "truth commission" is Wittes's, but Starr agreed with the concept and did not disagree with the phrase. *Id.* at 212 n.69.

992. Dash, *supra* note 881, at 2081; *see also* WITTES, *supra* note 884, at 46-47, 66.

993. *The Testing of a President; Letter of Resignation From Ethics Adviser, and Starr's Letter in Response*, N.Y. TIMES, Nov. 21, 1998; *see also* WITTES, *supra* note 884, at 164-65.

994. *See supra* last five sentences of note 566.

995. WITTES, *supra* note 884, at 171-172, 207 n.27.

to reach closure on anything or because the real purpose was to keep Starr's office in operation until something impeachable could be found. Then, when Clinton finally perjured himself about Lewinsky in the *Jones* deposition, Starr and his staff suddenly gained speed that they had never shown before. From the date of the deposition to the date Starr referred the matter to the House, his investigation of the Lewinsky matter was completed in by far the shortest period of time for anything he investigated as independent counsel.

In 1974, individual members of the House Judiciary Committee worked hard and earnestly to develop an evidentiary standard that would identify behavior justifying impeachment. Members disagreed with each other about what that test would be, but nearly all focused on some version of a profound abuse of presidential power that damages the country. For example, the ten Republicans on the 1974 Judiciary Committee who initially voted against impeachment but reversed themselves after the smoking gun tapes were released signed a joint statement in which they said, among other things, that "the Framers . . . intended that the President should be removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution."⁹⁹⁶ One of those ten was Trent Lott. But in 1998, as Senate Majority Leader, he took the position that impeachment would be justified if a president's "bad conduct" put the presidency in "disrepute."⁹⁹⁷ And in 1998, many other Republicans reverted to the formula used by Ford when he tried to have Douglas impeached—that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history"⁹⁹⁸—which is not how Republicans insisted that Nixon be judged.

One of the leading scholars of the Johnson impeachment, Hans Trefousse, considers the Clinton and Johnson impeachments to be essentially parallel:

In both cases, tremendous party pressure brought about the indictment; in both cases, the real cause of the impeachment did not appear to be the ostensible one [recited in the impeachment articles]; and in both cases, the President's bitter opponents . . .

996. HOUSE JUD. COMM. RPT. ON NIXON, *supra* note 686, at 365.

997. Juliet Eilperin & John F. Harris, *House GOP Pushes Wide Clinton Probe; President Wants Time and Subject Limits*, WASH. POST., Sept. 30, 1998, at A1.

998. 116 CONG. REC. 11913-11914 (1970); VAN TASSSEL & FINKELMAN, *supra* note 82, at 9, 59.

particularly Kenneth W. Starr and his supporters in 1998, had been pursuing the President for a long time.⁹⁹⁹

Even Richard Posner called it part of "the Republicans' war against Clinton."¹⁰⁰⁰

IV. The Future of Partisan Impeachments and Threats of Impeachment

Certainly, nonpartisan and bipartisan impeachments will continue. Occasionally, though infrequently, it will be necessary to impeach a corrupt official who refuses to resign. Will impeachments and threats of impeachment continue to be used in partisan political manner, as they have since 1969? To explore that question, it is helpful to consider the relevance of the rhetoric on perjury used during the Clinton impeachment to another dispute involving testimony by a federal official. In so doing, it will be helpful to look at the rules (or lack thereof) on evidentiary burdens in impeachments in the House and Senate and the effect of party insecurity on the use of impeachment and threats to impeach.

A. Thomas

"There is no excuse for perjury. Never, never, never," Kenneth Starr told Diane Sawyer in a television interview during the Clinton impeachment.¹⁰⁰¹ Before the House Judiciary Committee, Starr argued that:

[N]o one is entitled to lie under oath simply because he or she does not like the questions or because he believes the case is frivolous, or that it is financially motivated or politically motivated. . . .

History and practice support the conclusion that perjury is a high crime and misdemeanor. Perjury has been the basis, as the committee knows, for the removal of several judges. As far as we know, no one has questioned whether perjury was a high crime or misdemeanor in those cases. . . . And the House manager's report in the impeachment of Judge Walter Nixon, for perjury, stated, "It is difficult to imagine an act more subversive to the legal process than lying from the witness stand."

999. TREFOUSSE, *supra* note 447, at x.

1000. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 260 (1999).

1001. Gordon, *supra* note 922, at 108.

Witnesses tell the truth. It doesn't matter what the underlying subject matter is. Once you are in court under oath, you tell the truth. That is the way judges look at the world, and perhaps that is why no judge being subjected to an impeachment for perjury has dared suggest don't worry about it, it's not an impeachable offense.¹⁰⁰²

During the Senate Judiciary Committee hearings on his nomination to the Supreme Court, Clarence Thomas made numerous statements of fact, under oath, that were viewed by many as not believable. For example, he testified that he did not know until shortly before the hearings that a friend of his, Jay Parker, represented the South African government by lobbying against sanctions that had been imposed because of that government's racist practices known as apartheid.¹⁰⁰³ The media immediately afterward reported that when Thomas was Chairman of the Equal Employment Opportunity Commission he argued with employees there and defended Parker's lobbying on behalf of the South African government, and one of those employees contacted the Judiciary Committee to give the same account.¹⁰⁰⁴

Thomas denied under oath that he had prepared for the hearings in the manner customary for nominees to high-stakes positions, with extensive coaching on what to say and how to say it.¹⁰⁰⁵ Given the importance of this nomination to the first President Bush's administration, many saw Thomas's claim as inherently incredible. Before the hearings, according to Andrew Peyton Thomas, who has written the only full-length biography of Clarence Thomas:

Thomas . . . spent large blocs of time viewing videotapes of the Bork and Souter hearings, studying them and taking notes. . . . [Thomas also prepared extensively through] "murder boards." Held in Room 180 of the Old Executive Office Building, the mock hearings featured lawyers from the White House and Justice Department seated around a large, horseshoe-shaped conference table. Thomas held the seat of honor in the middle.

1002. IMPEACHMENT INQUIRY: WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE U.S., HEARING BEFORE THE HOUSE JUDICIARY COMM. PURSUANT TO H.R. RES. 581, APPEARANCE OF INDEP. COUNSEL, 105TH CONG. 18, 30, 113 (Comm. Print 1998).

1003. NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOC. JUSTICE OF THE SUPREME COURT OF THE U.S., HEARINGS BEFORE THE SENATE JUDICIARY COMM., 102D CONG., PART 1 253-54, 381-82, 481 [hereinafter THOMAS HEARINGS, PART 1].

1004. *Id.* at 381-82, 481; *see also* TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION 68, 82-84, 89-90, 116-17, 146 (1992).

1005. THOMAS HEARINGS, PART 1, *supra* note 1003, at 260-61, 610-11.

The panel bombarded him with hostile questions, mining his writings for the most offensive passages. . . . These verbal sparring matches were intended not only to help him anticipate likely questions, but to deaden the pain that these assaults would inflict on his pride and, possibly, to his reputation.¹⁰⁰⁶

On the issue of abortion and the precedential value of *Roe v. Wade*,¹⁰⁰⁷ Thomas testified as follows:

SENATOR HATCH: Have you made up your mind, Judge Thomas, on how you will vote when abortion issues are before the Court as a Justice on the Court?

JUDGE THOMAS: . . . *I don't sit on any issues*, on any cases, *that I have prejudged*.¹⁰⁰⁸

SENATOR METZENBAUM: [Do] you believe that the Constitution protects a woman's right to choose to terminate her pregnancy[?]

JUDGE THOMAS: . . . *I have no reason or agenda to prejudge the issue*¹⁰⁰⁹

SENATOR LEAHY: So it would be safe to assume that when [*Roe*] came down—you were in law school, you were in law school, where recent case law is often discussed—that *Roe v. Wade* would have been discussed in the law school while you were there.

JUDGE THOMAS: . . . Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

SENATOR LEAHY: Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?

JUDGE THOMAS: Senator, *I cannot remember personally engaging in those discussions*.

. . . .

1006. THOMAS, *supra* note 901, at 354-55.

1007. 410 U.S. 113 (1973).

1008. THOMAS HEARINGS, PART 1, *supra* note 1003, at 172-73 (emphases added).

1009. *Id.* at 180 (emphases added).

SENATOR LEAHY: Have you ever had discussion of *Roe v. Wade*, other than in this room, in the 17 or 18 years it has been there?

JUDGE THOMAS: Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. *If you are asking me whether or not I have debated the contents of it, that answer to that is no*, Senator.

....

SENATOR LEAHY: . . . Have you made any decision in your own mind whether you feel *Roe v. Wade* was properly decided or not, without stating what that decision is?

JUDGE THOMAS: *I have not made, Senator, a decision one way or the other with respect to that important decision.*¹⁰¹⁰

SENATOR BROWN: I would be interested to know if in your own mind you have come to a decision on the right to terminate a pregnancy. I am not asking what that decision is, but I would like to know within your own mind if you are at a point where you have decided that.

JUDGE THOMAS: . . . *I have no agenda. I am open about that important case.* . . .¹⁰¹¹

"No one believes that," wrote one author in a typical response to Thomas's testimony.¹⁰¹² When Administration lawyers prepared Thomas for his testimony,¹⁰¹³ he told them that he had no position on abortion and had never discussed it with anyone, even his wife.¹⁰¹⁴ Even the Administration lawyers did not believe him.¹⁰¹⁵ *Roe* has been, by far, the most divisive Supreme Court case, and abortion the most divisive constitutional issue, in recent decades, and it seemed that a Supreme Court nominee who claimed to have no position on *Roe* or abortion and further claimed not to have discussed the case or the issue was either unqualified for the Court or lying.

The format of a congressional hearing is not conducive to determining specific facts such as whether Thomas was telling the truth. Investigation before a hearing often does not reveal issues that arise for the first time during the hearing—a process that, compared with discovery in civil

1010. *Id.* at 222-23 (emphases added).

1011. *Id.* at 244 (emphasis added).

1012. JAMES M. WALL, HIDDEN TREASURES: SEARCHING FOR GOD IN MODERN CULTURE 109 (1997).

1013. *See supra* text accompanying note 999.

1014. THOMAS, *supra* note 901, at 355.

1015. *Id.*

litigation, is inadequate. Statements made during a hearing are not fully investigated afterward or before the committee makes a decision. Witnesses are questioned by politicians who lack questioning skills, are often unprepared, and frequently engage in rhetorical posturing rather than a methodical search for truth. Each questioner is limited to a short time, such as ten minutes, which prevents any searching inquiry. Witnesses are allowed to testify to any "fact" they please, even if they have no first-hand knowledge of it and are only guessing—or hoping—that it is true. And questioners are allowed to ask questions designed to elicit such testimony. In general, in a congressional hearing the rules of evidence that govern every trial court are ignored.

Despite all this, some evidence immediately began to appear suggesting that Thomas did have a position on *Roe* and abortion, and had previously expressed it. Much more evidence might exist, but the committee did not conduct an exhaustive inquiry to locate it. The evidence that appeared during the hearings included a report, signed by Thomas, recommending, among other things, that the Administration nominate Supreme Court Justices who would vote to overrule *Roe*,¹⁰¹⁶ as well as a speech in which Thomas praised an article that argued that the natural law philosophy Thomas subscribes to creates a constitutional right to life and that all abortion is unconstitutional.¹⁰¹⁷ Thomas testified that he had not read the passages in the report that discussed *Roe*.¹⁰¹⁸ He also testified that he did not intend to endorse the article's position on abortion, even though the article was titled *The Declaration of Independence and the Right to Life: One Leads Naturally to the Other*, and even though Thomas said in the speech that the article, "on the Declaration of Independence and the meaning of the right to life[,] is a splendid example of applying" natural law.¹⁰¹⁹

After the hearings, it was reported that "Paul Weyrich [the founder of the Heritage Foundation and an influential right-wing activist] remembered that Thomas had expressed an opinion on . . . abortion in prior meetings with him. He found Thomas's lack of candor 'disingenuous' and 'nauseating.' A man of probity . . . , Weyrich seriously considered withdrawing his support of Thomas [but was talked out of it on the argument] that Thomas's responses were cagey but not false."¹⁰²⁰ Even

1016. THOMAS HEARINGS, PART 1, *supra* note 1003, at 129-131.

1017. *Id.* at 127-129, 146.

1018. *Id.* at 129-130.

1019. *Id.* at 128, 146, 389.

1020. THOMAS, *supra* note 901, at 376-77.

Thomas's own mother told reporters that he had told her he was opposed to abortion.¹⁰²¹

Nine months after being sworn in as a Supreme Court Justice, Thomas joined a concurring and dissenting opinion by Rehnquist,¹⁰²² as well as a concurring and dissenting opinion by Scalia in the same case,¹⁰²³ both of which argued that *Roe* was wrongly decided. "We think," the Rehnquist opinion posited, "that the Court was mistaken in *Roe* In our view, authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact."¹⁰²⁴ The Scalia opinion derided the majority's reaffirmation of the essence of *Roe* as "outrageous."¹⁰²⁵ These positions, taken so soon after Thomas's confirmation hearings, created further doubts about his testimony's truthfulness. In another case,¹⁰²⁶ Thomas wrote a dissent filling forty pages in the official reporter.¹⁰²⁷ The first sentence, speaking of *Roe*, stated: "In 1973, this Court struck down an Act of the Texas Legislature that had been in effect since 1857, thereby rendering unconstitutional abortion statutes in dozens of States. . . . As some of my colleagues on the Court, past and present, ably demonstrated, that decision was grievously wrong."¹⁰²⁸ He then cited to then-Justice Rehnquist's dissent in *Roe*¹⁰²⁹ and to Justice White's dissent in a companion case, decided the same day as *Roe*.¹⁰³⁰ In every other case in which the constitutional right established in *Roe*, or the parameters of that right, has been at issue, Thomas has voted against it.¹⁰³¹ The uniformity and comprehensiveness of these views, and the unqualified language with which Thomas has expressed them, and subscribed to others' expression of them, suggest that they were not arrived at after Thomas's confirmation testimony.

1021. JANE MEYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 55 (1994).

1022. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, J., concurring in part, dissenting in part).

1023. *Id.* at 979 (Scalia, J., concurring in part, dissenting in part).

1024. *Id.* at 953-54 (Rehnquist, J., concurring in part, dissenting in part).

1025. *Id.* at 981 (Scalia, J., concurring in part, dissenting in part).

1026. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

1027. *Id.* at 980-1020 (Thomas, J., dissenting).

1028. *Id.* at 980.

1029. *Roe v. Wade*, 410 U.S. 113 at 171-78 (Rehnquist, J., dissenting).

1030. *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting).

1031. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006); *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036 (1998) (Thomas, J., dissenting from denial of certiorari); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1176 (1996) (Thomas, J., joining Justice Scalia's dissent to denial of certiorari).

After these hearings ended, a separate controversy arose, and the committee held a second round of hearings. Anita Hill had been a lawyer supervised by Thomas first at the Department of Education and then at the Equal Employment Opportunity Commission. Hill testified that at the Department of Education Thomas pressured her to date him, which she refused to do because he was her supervisor. She further testified that during conversations ostensibly about her work assignments he subjected her to sexual monologues.

MS. HILL: He spoke about acts that he had seen in pornographic films involving such matters as women having sex with animals, and films showing group sex or rape scenes. He talked about pornographic materials depicting individuals with large penises, or large breasts involved in various sex acts.

On several occasions, Thomas told me graphically of his own sexual prowess. Because I was extremely uncomfortable talking about sex with him at all, and particularly in such a graphic way, I told him that I did not want to talk about these subjects. . . . My efforts to change the subject were rarely successful.¹⁰³²

Hill testified that after some time at the Department of Education Thomas's behavior seemed to end. However, when Thomas became Chairman of the EEOC, she transferred to a job there, which Thomas offered to her. After some time at the EEOC, Thomas's discussions of sex "began again."¹⁰³³

MS. HILL: The comments . . . ranged from pressing me about why I didn't go out with him, to remarks about my personal appearance. . . .

He commented on what I was wearing in terms of whether it made me more or less sexually attractive. The incidents occurred in his inner office at the EEOC.

One of the oddest episodes I remember was an occasion in which Thomas was drinking a Coke in his office, he got up from the table, at which we were working, went over to his desk to get the Coke, looked at the can and asked, "Who has put pubic hair in my Coke?"

On other occasions, he referred to the size of his own penis as being larger than normal and he also spoke on some occasions

1032. NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOC. JUSTICE OF THE SUPREME COURT OF THE U.S., HEARINGS BEFORE THE SENATE JUDICIARY COMM., 102D CONG., PART 4 38 [hereinafter THOMAS HEARINGS, PART 4].

1033. *Id.* at 38-39.

of the pleasures he had given women with oral sex. . . . I began to feel severe stress on the job.

....

In February 1983, I was hospitalized for 5 days on an emergency basis with acute stomach pain which I attributed to stress on the job.

In the spring of 1983, an opportunity to teach at Oral Roberts University opened up. . . . I agreed to take the job, in large part, because of my desire to escape the pressures I felt at the EEOC due to Judge Thomas.

When I informed him that I was leaving in July, I recall that his response was that now, I would no longer have an excuse for not going out with him. . . .¹⁰³⁴

Thomas then testified:

JUDGE THOMAS: I would like to start by saying unequivocally, uncategorically that I deny each and every single allegation against me today that suggested in any way that I had conversations of a sexual nature or about pornographic material with Anita Hill, that I ever attempted to date her, that I ever had any personal sexual interest in her, or that I in any way ever harassed her.¹⁰³⁵

Several employees and former employees of the EEOC testified on Thomas's behalf. The heart of their testimony would not have been admissible in a court of law. Some were allowed to testify that they had never seen Thomas behave as Hill had described and believed him incapable of it.¹⁰³⁶ Others testified to their own speculation that Hill was merely projecting her feelings onto Thomas and that she only testified as she did because her supposed sexual interest in him had not been reciprocated.¹⁰³⁷

The Republicans claimed the Hill could not have been telling the truth because she did not file a complaint against Thomas; she followed him to a second job; and she spoke with him by telephone several times after leaving that job. Hill responded that she did those things because she

1034. *Id.* at 39.

1035. *Id.* at 157. Thomas repeated the denials at other points in his testimony. *See, e.g., id.* at 6, 162-63, 185, 201, 218.

1036. *Id.* at 337-515; *see also* FED. R. EVID. 404 ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," with exceptions not relevant here).

1037. THOMAS HEARINGS, PART 4, *supra* note 1032, at 354-56; *see also* FED. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

"hoped to maintain a professional relationship, for a variety of reasons."¹⁰³⁸ She claimed that she "could not afford to antagonize a person in such a high position."¹⁰³⁹ Virtually all the empirical research on the question shows that large numbers of victims of sexual harassment react just as Anita Hill said she did.¹⁰⁴⁰

Three witnesses testified that, during the time when Thomas supervised her, Hill told them she was being sexually harassed, and a fourth testified that Hill had told him the same thing after she left the EEOC.¹⁰⁴¹ One of these witnesses was a partner in a Wall Street law firm, another was an administrative law judge, and a third was a law school professor. Although one of the witnesses appeared somewhat shaken during cross-examination, collectively the four of them established that, before Thomas was nominated to the Supreme Court, Hill had told others that he had harassed her.

The media had already begun to report Thomas's interest in pornography,¹⁰⁴² and later journalists documented it thoroughly, together

1038. THOMAS HEARINGS, PART 4, *supra* note 1032, at 105.

1039. *Id.*

1040. U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES 29 (1995) ("The single most common response of employees who are targets of sexual harassing behaviors . . . has been, and continues to be, to ignore the behavior or do nothing"); Nina Burleigh & Stephanie B. Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, 75 A.B.A. J. 46, 48, 51 (1989) ("[O]ne of the reasons women lawyers don't report harassment is that they feel inadequate for not being able to cope with it on their own. . . . A lot of women won't object to harassment because they're afraid of alienating their mentors."); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117 (1995); Louise F. Fitzgerald, *Science v. Myth: The Failure of Reason in the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399 (1992); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 23-26, 51-57 (2003); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 723-28 (2000); James F. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED PSYCH. 543 (1995); James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOC. SCI. RES. 3 (1989); James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814 (1986); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment-Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 175-84 (2001); David E. Terpstra & Douglas D. Baker, *The Identification and Classification of Reactions to Sexual Harassment*, 10 J. ORG. BEHAV. 1, 12 (1989). For the reasons the Republicans argued, Andrew Peyton Thomas, however, believes that Hill was not credible; although his citations are confused, it appears that he was relying in part on David Brock's book, which Brock later repudiated, and on rumor disseminated by the Republicans. See THOMAS, *supra* note 901, at 392, 447, 634.

1041. THOMAS HEARINGS, PART 4, *supra* note 1032, at 273-333.

1042. Steven Roberts, *The Crowning Thomas Affair*, U.S. NEWS & WORLD REP., Sept. 16, 1991 (describing how he liked to watch "x-rated movies").

with Thomas's habit of talking about sex in ways that were entirely consistent with the conversations Hill had described.¹⁰⁴³ About two years before Thomas was nominated to the Supreme Court, for example, the former corporation counsel of the District of Columbia had seen Thomas "checking out pornographic videos."¹⁰⁴⁴

Two other people offered to testify in corroboration of Hill's story. One "was willing to testify that [Thomas] had virtually auditioned female employees to play the role of a potential mate."¹⁰⁴⁵ The other, Angela Wright, was willing to testify that Thomas had behaved similarly to her, discussing her anatomy and making comments like: "You need to be dating me."¹⁰⁴⁶ A third person was willing to testify that Wright had told her of the harassment contemporaneously with the time Wright claimed it happened, "which on occasion had reduced Wright to tears."¹⁰⁴⁷ Wright, employed at the EEOC as a publicist, had been fired because she neglected to invite a key person to a press conference.¹⁰⁴⁸ But Thomas and his backers implied that she had been fired because of character defects instead.¹⁰⁴⁹ Although Wright had been previously fired from other jobs and had a reputation for tempestuousness,¹⁰⁵⁰ that alone does not mean that Thomas did not harass her. The committee, under intense Republican pressure, decided not to call either Wright or her corroborating witness, although Republicans implied publicly that Wright had backed out.¹⁰⁵¹ The corroborating witness, who would have testified that Wright contemporaneously told her of the harassment, later said, "These people didn't want to hear from us. . . . Thomas's supporters didn't want another woman, especially one with some of the same looks, age, and brains, telling a similar story as Anita Hill."¹⁰⁵²

The committee rushed through the sexual harassment hearings in three days, October 11 through 13, 1991—a Friday, Saturday, and Sunday. The

1043. MEYER & ABRAMSON, *supra* note 1021, at 55 ("By the time he reached Yale Law School, Thomas was known for not only for the extreme crudity of sexual banter, but also for avidly watching pornographic films and reading pornographic magazines, which he would describe to friends in lurid detail."). See BROCK, *supra* note 854, at 237-38, 242-45.

1044. MEYER & ABRAMSON, *supra* note 1021, at 330, 335 (1994); *see also id.* at 327-31.

1045. *Id.* at 333.

1046. THOMAS, *supra* note 901, at 402.

1047. MEYER & ABRAMSON, *supra* note 1021, at 330, 335; *see also id.* at 327-31.

1048. THOMAS, *supra* note 901, at 266.

1049. MEYER & ABRAMSON, *supra* note 1021, at 321-27; THOMAS, *supra* note 901, at 438.

1050. THOMAS, *supra* note 901, at 265.

1051. MEYER & ABRAMSON, *supra* note 1021, at 342-43. *Contra* THOMAS, *supra* note 901, at 442.

1052. MEYER & ABRAMSON, *supra* note 1021, at 343.

Senate voted two days later, on October 15, to confirm Thomas's nomination by a vote of fifty-two to forty-eight.¹⁰⁵³ Of the 115 Justices who have served on the Supreme Court, only one was confirmed by a closer vote: Stanley Matthews, by a 24-23 vote, in 1861.¹⁰⁵⁴ Many of the Senators who voted against Thomas believed that he lied under oath during the Judiciary Committee hearings. Garry Wills, normally the soberest and least excitable of commentators, wrote: "Now we have a perjurer on the bench."¹⁰⁵⁵

To salvage Thomas's reputation, David Brock was commissioned to write an article portraying Hill as emotionally unstable for *The American Spectator*¹⁰⁵⁶—the same magazine that later acted as a front for Richard Scaife's Arkansas Project.¹⁰⁵⁷ The article grew into a book called *The Real Anita Hill*.¹⁰⁵⁸ The public perception of Hill was substantially influenced by what Brock wrote, although all of his claims have since been refuted,¹⁰⁵⁹ and Brock later confessed that—in his own words—"I was a liar and a fraud in a dubious cause"; that "Hill's testimony was more truthful than Thomas's flat denials"; that to protect Thomas he and others engaged in "smears, falsehoods, and cover-ups"; and that he had "falsified the historical record."¹⁰⁶⁰ "I no longer believed in my own book," he wrote in 2002.¹⁰⁶¹ He found reading Hill's own book about the Thomas hearings¹⁰⁶² to be "too painful" because he finally understood how, having "attacked her, wrongly, as a liar[,] I made this woman's life a living hell."¹⁰⁶³

Perjury is a fertile field for future impeachments because of the opportunities to put ambitious people under oath. In part, this is because of the increased use of litigation as a weapon of partisan politics. And in part it is because of the confirmation battles that have come to accompany Supreme Court nominations, where a nominee testifies under oath and can be put to a choice between fudging the truth and risking a seat on the Supreme Court. Because there is no statute of limitations on impeachments, no official confirmed after testifying about disputed facts at

1053. *Id.* at 348.

1054. Supreme Court Nominations (1789-present), *supra* note 748.

1055. SIMON, *supra* note 530, at 142 (quoting Garry Wills).

1056. BROCK, *supra* note 854, at 87-120.

1057. See *supra* text accompanying notes 861-862.

1058. BROCK, *supra* note 856.

1059. See MEYER & ABRAMSON, *supra* note 1021.

1060. BROCK, *supra* note 854, at 247-48.

1061. *Id.* at 295.

1062. ANITA HILL, *SPEAKING TRUTH TO POWER* (1997).

1063. BROCK, *supra* note 854, at 295.

a confirmation can feel immune from a later impeachment inquiry. And because of the Clinton impeachment, the perjury issues raised by the Thomas confirmation hearings will not fade from memory for a very long time.

After Robert Bork's 1987 Supreme Court nomination failed in the Senate, and after Anthony Kennedy and David Souter were confirmed without having built reputations among right-wing interest groups, and then started evolving into, respectively, a swing vote and a liberal on the Court, it became clear to the lawyers who screened judicial nominations in the first President Bush's administration that to get the kind of Supreme Court nominee they wanted through the Senate of 1991, they needed a "black Bork" who would divide Democrats in general and African-Americans in particular.¹⁰⁶⁴ According to David Brock, "as early as 1981—ten years before he was appointed, when he was scarcely thirty—a number of colleagues recalled [Thomas] setting his sights on" the Supreme Court seat to which he was eventually nominated.¹⁰⁶⁵ Others also recounted similar conversations in which the young Clarence Thomas described an ambition to sit on the Supreme Court.¹⁰⁶⁶ According to Brock, Clarence Thomas worked with administration lawyers to develop the "black Bork" strategy and "was really the only" nominee who had the basic qualifications of race and ideology to fulfill it.¹⁰⁶⁷

Justice Thomas has since then been inseparably associated with the impression that he was nominated only because he satisfied this unique political strategy, and with the suspicion that he committed perjury¹⁰⁶⁸ in order to gain his confirmation. Electoral fortunes swing from one side of the political spectrum to the other inevitably and unpredictably, while competition between political parties often leads one party to adopt the other's tactics. Just as the Jeffersonian party adopted the impeachment tactics of the Federalists and the modern Democrats adopted the

1064. *Id.* at 89.

1065. *Id.* at 18, 151.

1066. THOMAS, *supra* note 901, at 179-80, 208, 316, 318-19.

1067. BROCK, *supra* note 854, at 89.

1068. Under the federal perjury statute, "[w]hoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify . . . truly . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1621(1) (2007). Any congressional committee, and "[a]ny member of either House of Congress" is authorized to administer oaths to witness testifying before any body of Congress. 2 U.S.C. § 191 (2007). Lying under oath before a congressional committee will support a conviction for perjury. *United States v. Debrow*, 346 U.S. 374 (1953); *United States v. Norris*, 300 U.S. 564 (1937).

confirmation hearing tactics pioneered by the Republicans, nothing other than self-restraint can prevent the Democratic Party from using impeachment, or the threat of impeachment, as a partisan political weapon in the way Republicans have. If the Democrats ever adopt the Republican strategy of threatening to impeach and, on occasion impeaching, to gain political advantage, the suspicion of perjury would make Justice Thomas, at least in the abstract, vulnerable indefinitely. If the Democrats feel they must be able to fill his seat, as the Republicans felt they must be able to fill the seats of Justices Fortas and Douglas, the suspicion of perjury may again become a public issue, all the more so because the Republicans built an association of impeachment with perjury through the Clinton impeachment.

Can a person be impeached for private acts not committed in any official capacity? That issue was settled, at least in part, through the impeachment trial of Judge Claiborne in 1986. Claiborne had earlier been criminally convicted for filing false tax returns. The House then impeached him and the Senate convicted him of the purely private acts of making false statements on tax returns and of the mixed, private and public, act of bringing his court into disrepute through his own criminal conviction.¹⁰⁶⁹

Can a person be impeached for acts committed before taking the oath of office? In his *Treatise on Federal Impeachments*, Simpson considered this question and concluded that "if the offense is directly connected with the attainment of the office he occupies while impeached, as a violation of the Corrupt Practices Act in relation to his nomination or election . . . , the impeachment ought to prevail."¹⁰⁷⁰ But Simpson also proposed the corollary that, "if the offense were the subject of consideration, and the facts in regard to it were substantially known at the time of his election, or appointment and confirmation, it should not again be brought forward."¹⁰⁷¹ However, the reason Simpson offered for the corollary shows that it was not intended to limit the original conclusion:

It is within the memory of all of us [or was within memory in 1916, when Simpson wrote these words] that a candidate for president was charged with and admitted during the campaign the commission by him of a grave moral offence in his early life, yet, because during the years thereafter, he lived a life "void of

1069. See *supra* text accompanying notes 666-670.

1070. SIMPSON, *supra* note 67, at 60.

1071. *Id.* at 61.

offence towards God and towards man," he was wisely elected by the people, and became one of the best of our presidents.¹⁰⁷²

The issue did arise in the Archbald impeachment in 1912, although Simpson believed that "the matter cannot be said . . . to have been decided in that case."¹⁰⁷³ Among other things, Archbald was "charged with offences alleged to have been committed while a district judge, though at the time of his impeachment he was a circuit judge."¹⁰⁷⁴ The Senate acquitted him of those charges but convicted him of others. On the charges that pre-dated Archbald's appointment to the Circuit bench, "some of the votes for acquittal were because the offences were not deemed serious enough; some because the Senators were not certain" that he could be convicted for acts pre-dating his current office and did not feel it necessary to settle the question "in view of the respondent's conviction on other articles; and some of the Senators did not think he could properly be tried upon such charges."¹⁰⁷⁵ In any event, all the acts alleged to have occurred before Archbald became a circuit judge involved financial corruption as a district judge, and *none of them helped him obtain, or could have helped him obtain, the position he had when impeached.*¹⁰⁷⁶

It is that aspect of the Thomas perjury controversy that will keep it alive. Because of the closeness of his confirmation vote—fifty-two to forty-eight—there will always be a suspicion that Thomas obtained his seat on the Supreme Court through perjury that swung the balance. Perjury during a Supreme Court confirmation hearing, especially perjury by the nominee himself, corrupts government far more than perjury in a deposition in a private lawsuit.¹⁰⁷⁷

B. Evidentiary Burdens in the House and Senate

Not only has impeachment been used as a partisan political weapon in times of great conflict between branches of the federal government (except in 1937) but members of the House and Senate have refused to adopt evidentiary rules applicable to impeachment that would inhibit its partisan use. The common law mind cannot manage fact-finding without assigning

1072. *Id.* This kind of circumlocution was a Victorian device for avoiding mentioning sex. Simpson was referring to Grover Cleveland, who was accused of having fathered a child out of wedlock but was nevertheless twice elected President. His political opponents chanted, "Pa! Pa! Where's my Pa? Gone to the White House—hah, hah, hah!"

1073. *Id.*

1074. *Id.*

1075. *Id.*

1076. *Id.* at 207-13 (emphasis added).

1077. See Gerhard, *supra* note 231, at 120 n.134.

burdens requiring parties to introduce evidence of a specified degree of persuasiveness. In fact-finding throughout the common law world, a party that does not carry its evidentiary burden loses. Both the House and the Senate have refused to adopt these kinds of evidentiary burdens for impeachment.

How much evidence is needed to justify a decision to act? In courts, that depends on the nature of the decision under consideration. To justify requiring a person to defend against a criminal accusation, the evidentiary burden is probable cause to believe that the defendant has committed the crime specified in an indictment or information. This is a comparatively light burden equaling "a reasonable ground for belief of guilt."¹⁰⁷⁸ At trial, however, the defendant can be convicted only if the evidence rises to proof beyond a reasonable doubt. This is the highest evidentiary burden known to the law, but it is notoriously difficult to define. One of the better attempts appears in a typical jury instruction:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.¹⁰⁷⁹

Between these two are the evidentiary burdens used in civil cases. On most issues, a plaintiff will prevail at trial if the finder of fact is persuaded by a preponderance of the evidence, which means "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it."¹⁰⁸⁰ A few civil issues, however, require clear and convincing evidence, which the Supreme Court has defined as evidence that makes a factual proposition "highly likely."¹⁰⁸¹ The law tends to require clear and convincing evidence in a few non-criminal situations, where the consequences can be particularly grave, such as involuntary commitments¹⁰⁸² and disbarments.

The House of Representatives has never adopted an evidentiary standard that must be satisfied before the House will impeach. Because

1078. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

1079. FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS, at Instruction 21.

1080. *Hale v. Dep't of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985).

1081. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

1082. *Addington v. Texas*, 441 U.S. 418 (1979).

impeachment by the House is an accusation, vaguely analogous to a grand jury's indictment in a criminal case, the lower evidentiary burdens of probable cause and preponderance of the evidence might seem at least superficially attractive in the House. However, an impeachment ties up both the House and the Senate, distracting them enormously from legislative business. Additionally, if the person impeached is an elected president (one who did not succeed to the office through the death, resignation, or disability of a prior President), an impeachment is an attempt to nullify a democratically held election. For these reasons, when voting on the articles of impeachment against President Richard Nixon, most of the members of the House Judiciary Committee individually announced that they adhered to the burden of clear and convincing evidence.¹⁰⁸³ Some even thought they should not impeach a President unless persuaded beyond a reasonable doubt.¹⁰⁸⁴ But those sentiments are not binding on future judiciary committees or on the House, and they were ignored when the House Judiciary Committee voted to recommend impeachment and the House voted to impeach Bill Clinton.

The Supreme Court has held that the Senate has unlimited discretion to try an impeachment case any way it pleases.¹⁰⁸⁵ When the Senate chooses to invoke it, Senate Impeachment Rule XI permits testimony to be heard and evidence received by a committee of Senators, "who shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee."¹⁰⁸⁶ The rule's purpose is to make it possible for the Senate to dispose of impeachments without allowing them to dominate the Senate chamber for weeks at a time while evidence is being taken.

After having been convicted based on a transcript generated in this way, Walter Nixon, the third of the trio of judges impeached in the 1980s, challenged his conviction in federal court. On the theory that the concept of a trial necessarily involves direct observation of witnesses by the trier of fact, Nixon argued that Rule XI violates the Impeachment Trial Clause's¹⁰⁸⁷ provision that "[t]he Senate shall have the sole Power to try all Impeachments."¹⁰⁸⁸ After dismissing this theory based on its interpretation

1083. LABOVITZ, *supra* note 74, at 192-93; Stanley N. Futterman, *The Rules of Impeachment*, 24 U. KAN. L. REV. 105, 136 (1975); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 719 (1987-88).

1084. HOUSE JUD. COMM. RPT. ON NIXON, *supra* note 686, at 359, 377, 380-81.

1085. *Nixon v. United States*, 506 U.S. 224, 238 (1993).

1086. Senate Impeachment Rule XI, in SENATE MANUAL, S. DOC. NO. 101-1, 186 (1989).

1087. U.S. CONST. art. I, § 3, cl. 6.

1088. *Nixon*, 506 U.S. at 228.

of the provision in the Impeachment Clause,¹⁰⁸⁹ the Supreme Court held that conduct of an impeachment trial is beyond judicial review.¹⁰⁹⁰ An inevitable corollary is that the House has unlimited discretion to conduct an impeachment inquiry in any way it pleases, and that this too is beyond judicial review.

The Senate has never held itself to any particular evidentiary burden of persuasion,¹⁰⁹¹ and the result is that each Senator applies whatever burden of persuasion the Senator prefers—or no burden at all. Harry Claiborne, the first of the trio of judges impeached in the 1980s, moved in his Senate trial for a determination that proof beyond a reasonable doubt is the standard of persuasion in an impeachment trial.¹⁰⁹² The Senate had never imposed this requirement on itself before, and the only authorities Claiborne was able to offer in support of his position were individual and personal statements made by four Senators while the House was considering impeaching President Nixon.¹⁰⁹³ The House managers prosecuting Claiborne in the Senate opposed the motion and took the position that the appropriate burden of persuasion in an impeachment trial is proof by a preponderance of the evidence.¹⁰⁹⁴ But the House managers made no motion to that effect, and so the only question before the Senate was whether the burden of persuasion was proof beyond a reasonable doubt, which Claiborne's motion had put into issue. By a vote of seventy-

1089. *Id.* at 229-33. The Impeachment Trial Clause does impose three requirements on the Senate. First, each Senator must take an oath or affirmation to try the case faithfully. Second, the Impeachment Trial Clause requires that "[w]hen the President of the United States is tried, the Chief Justice shall preside . . ." And third, a super-majority of two-thirds is required to convict. U.S. CONST. art. I, § 3, cl. 6.

1090. *Nixon*, 506 U.S. at 238.

1091. See GERHARDT, *supra* note 687, at 40-42, 112-13.

1092. PROCEEDINGS OF THE U.S. SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, A JUDGE OF THE U.S. DIST. COURT FOR THE DIST. OF NEV., S. DOC. NO. 99-48, at 47, 105-08 (1986).

1093. Senator Sam Ervin, Jr.: "In a case of this kind, if we are called upon to try an impeachment, I would not hope for conviction on any charge unless I was satisfied beyond a reasonable doubt of the truth of the charges." *Id.* Senator Strom Thurmond: "The penalty of impeachment is severe. It is not a criminal penalty, but I know of no penalty that would be more severe than to remove once again a President from office. And therefore I believe the evidence should be beyond a reasonable doubt." *Id.* Senator John C. Stennis: "Where any party is charged with an impeachable offense, and is tried by the Senate . . . , be it a so-called minor official on up to the highest official under our Constitution, then I think the proof required ought to be beyond a reasonable doubt. . . ." *Id.* The fourth Senator, Robert A. Taft, Jr., was quoted only indirectly and only in a somewhat confusing way in oral argument. *Id.* at 107. Citations for these statements were not provided in the motion or in oral argument, and it is impossible to tell whether they were made on the Senate floor, to reporters, or in some other setting.

1094. *Id.* at 107-08.

five to seventeen, the Senate denied the motion.¹⁰⁹⁵ Of the four Senators quoted by Claiborne's lawyers, two were still in the Senate at the time.¹⁰⁹⁶ One voted against Claiborne's motion, and the other did not vote.¹⁰⁹⁷

At various other times, individual Senators and House managers prosecuting impeachments in the Senate have argued in favor of using each of the evidentiary burdens that could be used in court to support a judgment: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt.¹⁰⁹⁸ Because the Senate has never adopted an evidentiary standard in impeachment proceedings, each Senator is free to use any standard he or she wants. Even the denial of Claiborne's motion does not prevent a Senator from adhering to a standard of proof beyond a reasonable doubt, or from persuading other Senators to do so in a future impeachment trial. The burden of proof, as Senator Rudman said in the Hastings trial, "is what is in the mind of every Senator. If you want to use clear and convincing, preponderance, if you want to use beyond a reasonable doubt, I think it is what everybody decides themselves."¹⁰⁹⁹

Courts use evidentiary burdens to regulate decision-making—to reduce the chances of arbitrary and inconsistent judgments and to subject all litigants with similar types of issues to the same rules. Without uniform evidentiary requirements, analysis of the evidence in an impeachment trial becomes nothing better than rhetoric. A Republican Representative or Senator who wants to oust a Democratic office holder, for example, will argue for impeachment or conviction because the evidence satisfies a preponderance standard. When the situation is reversed, and the office holder under attack is a Republican, that same Representative or Senator may insist that impeachment requires clear and convincing evidence and that conviction requires proof beyond a reasonable doubt.

Nothing in the Constitution requires either the House or the Senate to consider evidence at all, much less subject it to burdens of persuasion. The Senate, however, has generally expected an impeachment to be supported by evidence. Similarly, with three exceptions, the House has always received sworn testimony and other evidence, and made findings of fact on that evidence before impeaching.¹¹⁰⁰ One of the exceptions occurred because the person being impeached (Claiborne) preferred for tactical

1095. *Id.* at 150.

1096. *Id.* (Thurmond and Stennis).

1097. *Id.* (Thurmond voted nay, and Stennis did not vote.)

1098. GERHARDT, *supra* note 687, at 42.

1099. *Id.* at 209 n.69.

1100. Michael J. Gerhardt, *The Impeachment and Acquittal of William Jefferson Clinton*, in *THE CLINTON SCANDAL AND THE FUTURE OF AMERICAN GOVERNMENT*, *supra* note 933, at 142, 146.

reasons, to get to a Senate trial as quickly as possible.¹¹⁰¹ Another exception (Johnson) came about because there was no dispute about whether the core fact—his firing of Stanton—had occurred. The third exception arose in the Clinton impeachment, where the “failure of the House to undertake any independent fact-finding . . . provided a basis upon which the House’s impeachment judgment could be attacked as partisan or unfair.”¹¹⁰²

C. The Effect of Party Insecurity on the Partisan Use of Impeachment

When the Jeffersonians impeached Chase and when the Radical Republicans impeached Johnson, both were insecure political movements—new to power, not certain how long they would be able to hold on to it, and driven to use what power they had while they had it. In 1937, the Democrats neither considered, nor threatened impeachment for several reasons, one of which was that the Democratic landslide of 1936 was the most lopsided since 1820, both in popular votes and in the composition of Congress, and it has not been equaled since then.¹¹⁰³ A party in that situation is less impatient about winning its victories as fast as possible. It can look toward its future with confidence that problems can be solved with the passage of time rather than by assaults on individual office holders, fueled by impatience to get quick results.

Even though the Republicans controlled both Houses of Congress almost continuously from 1995 to 2007 and have controlled the executive branch since 2001, their margin of power throughout that period, measured by seats held in Congress and by the popular vote in congressional and presidential elections, has been the thinnest in American history over any comparable period.

The Senate that confirmed the nominations of Chief Justice John Roberts and Justice Samuel Alito consisted of fifty-five Republicans, forty-four Democrats, and one Independent who caucused with the Democrats. The Republicans claimed that the will of the people gave them the power to

1101. *Id.*

1102. *Id.*

1103. Popular votes for President were not tabulated before 1824. Since then, only one presidential candidate has won a larger percentage of the popular vote than Roosevelt’s 60.80%. In 1964, Lyndon Johnson received 61.05%. But Roosevelt carried more states and received more electoral votes than Johnson did. (The most respected and accessible source of presidential election statistics is Dave Leip’s Atlas of U.S. Presidential Elections, <http://www.uselectionatlas.org> (last visited Apr. 21, 2007)). More importantly, as a result of the 1936 elections, the Democrats controlled the Senate and House by much greater margins than after the 1964 elections, or at any other time since the early 1820s, when there was only one real political party.

confirm these nominations. But measured by total popular vote, the Democrats actually won the elections that produced that Senate.¹¹⁰⁴ (Because Senators serve six-year staggered terms and only one-third of the Senate is selected in an election, it takes three elections to produce any given Senate.)

Table 5
*Popular Vote Through Which
the 100 Senators in the
109th Congress Were Elected*¹¹⁰⁵

| Election | Popular Vote | | Senators Elected | |
|---------------|--------------|------------|------------------|-------------|
| | Democratic | Republican | Democrats | Republicans |
| 2000 | 35,773,958 | 35,773,720 | 17 | 14 |
| 2002 | 19,873,164 | 21,566,016 | 12 | 22 |
| 2004 | 44,010,807 | 39,920,562 | 15 | 19 |
| <i>Totals</i> | 99,657,929 | 97,260,298 | 44 | 55 |

The public thus voted for a Democratic Senate but got a Republican one. In individual elections, the disparity can be especially deceptive. In 2004, the Republicans gained four Senate seats, from fifty-one to fifty-five, and 2004 was thus considered a Republican victory. But in that year, as Table 5 shows, the Democrats received *over four million more votes* than the Republicans did. That was possible because the Senate is constitutionally gerrymandered: each state, regardless of size, sends two Senators to Washington. And Republicans have an advantage, though not a commanding one, in small states. Wyoming and California, for example, are equally represented in the Senate, even though California's population

1104. See *infra* tbl. 5.

1105. CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 2, 2004, at 38, 65 (2005) (including, in New York, minor party votes for major party candidates) [hereinafter NOV. 2, 2004 PRESIDENTIAL STATISTICS]; CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 5, 2002, at 53 (2003); CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 7, 2000, at 43, 76 (2001) [hereinafter NOV. 7, 2000 PRESIDENTIAL STATISTICS] (including, in New York, minor party votes for major party candidates, but not including the Missouri vote because the successful 2000 candidate was deceased on election day, resulting in an appointed Senator who was defeated in a 2002 special election).

is sixty-nine times the size of Wyoming's.¹¹⁰⁶ Wyoming's Senator Enzi, a Republican, got 133,710 votes in his last election, while California's Senator Boxer, a Democrat, got 6,955,728 votes.

The Republicans controlled the Senate from 1981 until 1987¹¹⁰⁷ as a result of a 1980 electoral fluke in which, despite getting nearly three million *fewer* votes than the Democrats,¹¹⁰⁸ they gained twelve seats by winning an unusually large number of extremely close races. Most of the Republicans who won those races were defeated when they came up for reelection in 1986, and the Senate then reverted to the Democrats. The Republicans controlled the Senate from 1995 to 2007, except for a year and a half in 2001-2002.¹¹⁰⁹ During those periods, they never had more than fifty-five seats and, at times, had to get by with only fifty seats (out of one hundred), relying upon the Republican vice president to cast tie-breaking votes.¹¹¹⁰ By contrast, from 1959 to 1981 and from 1987 to 1995, when the Democrats controlled the Senate, they never had fewer than fifty-four seats, and their average during those periods was sixty seats. For ten years, from 1959 to 1969, they never had fewer than sixty-four seats, a huge difference in a legislative body of one hundred members. Viewed thus in historical perspective, Republican control of the Senate has been by thin margins—sometimes extraordinarily thin ones.

That is even truer in the House, as Table 6 shows. The Republicans controlled the House from 1995 to 2007 but never during that time had more than 232 seats, while the Democrats never had less than 203 seats.

1106. Population by State based on 2000 Census, at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-PH1-R&-ds_name=DEC_2000_SF1_U&-format=US-9S (last visited Apr. 21, 2007).

In a state legislature, this would violate the Equal Protection Clause of the Fourteenth Amendment. *Baker v. Carr*, 369 U.S. 186 (1962) (unconstitutional for a voter in one Tennessee county to have 23 times as much power in choosing legislators as a voter in another county). The Senate is exempt from the Equal Protection Clause in this respect because of a compromise at the Constitutional Convention that created an upper house of Congress, the Senate, as an assembly of states in which all states were equal, regardless of size. This compromise was considered necessary to induce the smaller of the original thirteen states to ratify the Constitution. But of those original small states, only three are still small. The others have since become medium-sized states and are now hurt by the compromise intended to benefit them. The states that now benefit from it were almost entirely admitted to the Union later, most of them more than a century after the Constitutional Convention. A Senate apportioned this way is not an essential feature of a federal form of government. In Canada, provinces are more autonomous than U.S. states are, but in the Canadian Senate provinces are represented in proportion to their populations. To a lesser extent, so are German states in the German federal parliament.

1107. Senate Party Divisions, *supra* note 198.

1108. 1 HISTORICAL STATISTICS, *supra* note 439, at 5-194.

1109. Senate Party Divisions, *supra* note 198.

1110. *Id.*

(The Independent listed under “other” in Table 6 caucuses with the Democrats.) Never before in American history has a party controlled the House continually through six consecutive elections by such razor-line margins, without ever achieving numerical dominance. In contrast, when the Democrats controlled the House from the 1954 election to the 1994 election, they never had *less* than 232 seats, and had as many as 291, 292, and 295 seats (which constitutes two-thirds of the House) at times when the Republicans had only 144, 143, and 140 seats.¹¹¹¹

1111. House Party Divisions, *supra* note 199.

Table 6
*Party Divisions in the House of Representatives After
the Elections of 1970 Through 2004 Together with
Popular Vote for House Candidates in the Same Elections*

| | 1970 | 1972 | 1974 | 1976 | 1978 | 1980 | 1982 | 1984 | 1986 |
|-----------------------|------|------|------|------|------|------|------|------|------|
| Seats ¹¹¹² | | | | | | | | | |
| Democrats | 255 | 242 | 291 | 292 | 277 | 242 | 269 | 253 | 258 |
| Republicans | 180 | 192 | 144 | 143 | 158 | 192 | 166 | 182 | 177 |
| Others | | 1 | | | | 1 | | | |

| | | | | | | | | | |
|---|------|------|------|------|------|------|------|------|------|
| Popular Vote Percentage ¹¹¹³ | | | | | | | | | |
| Democrats | 53.4 | 51.7 | 57.6 | 56.2 | 53.7 | 50.4 | 55.3 | 52.3 | 54.6 |
| Republicans | 45.1 | 46.4 | 40.6 | 42.1 | 44.9 | 47.9 | 43.1 | 46.8 | 44.5 |

| | 1988 | 1990 | 1992 | 1994 | 1996 | 1998 | 2000 | 2002 | 2004 |
|-------------|------|------|------|------|------|------|------|------|------|
| Seats | | | | | | | | | |
| Democrats | 260 | 267 | 258 | 204 | 206 | 211 | 212 | 204 | 202 |
| Republicans | 175 | 167 | 176 | 230 | 228 | 223 | 221 | 229 | 232 |
| Others | 1 | 1 | 1 | 1 | 1 | 2 | 1 | 1 | |

| | | | | | | | | | |
|-------------------------|------|------|------|------|------|------|------|------|------|
| Popular Vote Percentage | | | | | | | | | |
| Democratic | 53.4 | 52.9 | 50.9 | 45.4 | 48.5 | 48.9 | 46.8 | 45.0 | 46.8 |
| Republican | 45.5 | 44.9 | 45.5 | 52.4 | 48.9 | 47.8 | 47.0 | 49.6 | 49.4 |

When the Republicans took over the House in the 1994 election, they received a majority of the popular vote for House candidates. But in the

1112. *Id.*

1113. 1 HISTORICAL STATISTICS, *supra* note 439, at 5-193 (for 1970 through 2000 elections); CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 5, 2002, at 31-33, 51-52 (2003) (for 2002 election) (including, in New York, minor party votes for major party candidates); CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 2, 2004, at 39-41, 66-67 (2005) (for 2004 election) (including, in New York, minor party votes for major party candidates).

For elections before the late 1960s, aggregating popular votes nationally for the House is of limited statistical validity because most affected states were not yet in compliance with the Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1973i, which greatly increased voting in the South, and with *Baker v. Carr*, 369 U.S. 186 (1962), which required legislative districts (other than those of the U.S. Senate) to be of equal size.

five elections since then, the Republicans have been unable to get as much as 50% of the popular vote. They actually lost the popular vote while retaining the House in 1998—the only time that has happened since *Baker v. Carr* rationalized House popular voting by requiring that legislative districts be of equal size.¹¹¹⁴ In 1996 and 2000, the House popular vote was nearly a tie, the parties being separated by less than half a percentage point. In contrast, when the Democrats controlled the House during the period shown in Table 6, they routinely won between 50% and 58% of the popular vote, and never less than 50%.

The Republicans have been able to pick up and hold seats through relentless computer-aided gerrymandering. For example, in 2004 the Democratic popular vote grew by nearly two percentage points and the Republican popular vote fell very slightly. This should have translated into an increase in the Democratic seats in the House. But the opposite happened.¹¹¹⁵ The Republican gains, however, were achieved entirely in Texas, where a court had drawn the congressional districts after the 2000 census because the legislature and the Governor could not agree on a redistricting plan. After taking control of the Texas legislature in 2002, the Republicans redrew the congressional districts again through a plan conceived of and coordinated by the House Majority Leader Tom DeLay.¹¹¹⁶ Because of the DeLay redistricting plan, the Republicans picked up five House seats in Texas alone, while in the other forty-nine states together the Republicans lost two seats.¹¹¹⁷

From 1995 to 2007, Congress was more rightist, but not *much* more so than it has been in the past. Until the 1980s a significant number of Democrats were right-wing and a smaller but substantial group of Republicans were, by current standards, liberal. For example, the Congress with which John F. Kennedy began his presidency in 1961¹¹¹⁸ was on many issues controlled by right-wing Democrats, several of whom chaired key committees and subcommittees through seniority. Many of them had opinions about African Americans that could be described in family newspapers only through euphemisms. They¹¹¹⁹ and others like them have

1114. 369 U.S. 186 (1962).

1115. See *supra* tbl. 6.

1116. Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES, Oct. 13, 2003, at A1.

1117. GRACE YORK, COMPARISON OF HOUSE OF REPRESENTATIVES, 109TH AND 108TH CONGRESSES (2004), <http://www.lib.umich.edu/govdocs/congress/hou05c.pdf>.

1118. 87th Congress, 1st Session.

1119. Senators Harry Byrd (Virginia), James Eastland (Mississippi), Allen Ellender (Louisiana), Spessard Holland (Florida), Olin Johnston (South Carolina), Everett Jordan (North Carolina), John McClellan (Arkansas), Willis Robertson (South Carolina), Richard Russell

disappeared from the Democratic Party. In the same Congress were a number of Republicans who were so committed to civil rights, environmental protection, and measures to help the poor that they would be considered liberal today. They¹¹²⁰ and others like them have virtually disappeared from the Republican Party. Consolidating all right-wing legislators in the Republican Party has created a coherent and disciplined bloc. But even with that advantage, the Republicans have not been able to produce a commanding majority when they have won elections.

In three of the four presidential elections since and including 1992, the Republican candidate got fewer popular votes than the Democratic candidate, even though the Republicans won one of the elections in which they lost the popular vote.¹¹²¹

(Georgia), George Smathers (Florida), John Sparkman (Alabama), John Stennis (Mississippi), Herman Talmadge (Georgia), and Strom Thurmond (South Carolina). If the Representatives who fit this description were listed here, this footnote would fill the page and continue onto the next one.

1120. Senators George Aiken (Vermont), J. Glenn Beall (Maryland), J. Caleb Boggs (Delaware), John Butler (Maryland), Clifford Case (New Jersey), John Cooper (Kentucky), Jacob Javits (New York), Kenneth Keating (New York), Thomas Kuchel (California), Winston Prouty (Vermont), Leverett Saltonstall (Massachusetts), Hugh Scott (Pennsylvania), and Margaret Chase Smith (Maine). For why it is impractical to list here the Representatives who fit this description, see the last sentence of the preceding note. After long careers in elective office, Case, Javits, and Kuchel were defeated not in general elections, but in Republican primaries by right-wing opponents as their party shifted to the right.

1121. See *infra* tbl. 7.

Table 7
Popular Vote in Presidential Elections
*1992 Through 2004*¹¹²²

| Election | Democratic | Republican | Others |
|----------|------------|------------|------------|
| 1992 | 44,857,747 | 38,798,913 | 20,943,706 |
| 1996 | 47,401,898 | 39,198,482 | 9,789,438 |
| 2000 | 50,996,062 | 50,465,169 | 4,141,789 |
| 2004 | 58,894,584 | 61,872,711 | 1,451,863 |

Never has the post-New Deal Republican Party won a decisive popular mandate or achieved the status of a permanent majority party, which the Democrats enjoyed for so long and which, if they had it, would allow the Republicans to govern with a confident view of the future. This is a deeply frustrated party that has not achieved its goals. That frustration—combined with the insecurity of governing with such thin margins—appears to have produced a party psychology similar to that of the Radical Republicans of 1868, in which some elements of the party instinctively look for reasons to impeach or threaten to impeach.

V. Conclusion

Impeachment will be suspect as long as politicians are able to use it as a partisan weapon. Certainly, impeachment must exist because there is no other way to remove an unfit president, vice president, or federal judge. And certainly it will always have political ramifications because removal of a president, a vice president, or a justice of the Supreme Court has political implications—and sometimes removal of a lower federal judge does as well. It is a political issue, for example, whether the country would suffer more from the continuation in office of a given official or from that official's removal. But because even that seemingly neutral question is so easily distorted by partisanship, it will be possible to manipulate impeachment for partisan political ends unless Congress imposes on itself the self-discipline inherent in burdens of production and persuasion.

Michael Gerhardt has pointed out that the Clinton impeachment illustrates “the vulnerability of the federal judiciary to political retaliation”

1122. NOV. 2, 2004 PRESIDENTIAL STATICS, *supra* note 1105, at 64; NOV. 7, 2000 PRESIDENTIAL STATISTICS, *supra* note 1105, at 74 (2001); CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 5, 1996, at 79 (1997); CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 3, 1992, at 83 (1993).

because “some of the most important factors that helped Clinton survive the threat of removal (i.e., public support and media scrutiny) are absent from lower federal judges’ impeachment proceedings . . . about which the public is largely indifferent.”¹¹²³ That might or might not be true if the impeachment is motivated by widely reported cases such as the Ninth Circuit’s decision in the Pledge of Allegiance case or the decisions of several federal judges not to order the reinsertion of Terri Schiavo’s feeding tube.¹¹²⁴

Is the partisan use of impeachment or impeachment threats an effective political strategy? Of the four great confrontations between or among branches of the federal government—from 1801 to 1808, from 1865 to 1868, in 1937, and since 1968—partisan political impeachment and impeachment threats played an important role in three of them. However, despite the appeal of a strategy that attempts to drive political opponents from office through an accusatory procedure, or threatens to do so in order to intimidate them, partisan political impeachment and impeachment threats generally fail to produce results.

Military people sometimes say that the long way around is often the shortest way there. Frontal assaults—attacks directly on an adversary’s position, like Picket’s charge at Gettysburg—tend to succeed only when the attacker has overwhelming superiority of force. The long way around might be envelopment through an adversary’s rear, for example, or slow attrition from the sides. An impeachment, or a threat of impeachment, is a frontal assault. The Chase, Johnson, and Clinton impeachments all failed for lack of an overwhelming superiority of force, and in each of them the attackers overestimated their forces in part because they underestimated the extent to which moderates of their own party would desert them. In a strategic sense, the Clinton impeachment was particularly unproductive because even if moderates had not defected, the necessary two-thirds to convict in the Senate would still have been impossible, and the House leadership could have foreseen that even before the House voted to impeach.

When the Federalists impeached Blount, they succeeded only in teaching the Jeffersonians how to use impeachment as a political weapon against Chase. When the Jeffersonians then impeached Chase, they made themselves look like extremists. The judiciary eventually became at least nominally Jeffersonian primarily because the short life expectancy of the era offered frequent opportunities to replace Federalists through death and new appointments, although the Jeffersonian party itself became less

1123. Gerhardt, *supra* note 1100, at 144.

1124. See *supra* text accompanying notes 8-12.

Jeffersonian as time passed, absorbing some of the sensibilities of the moderate branch of the Federalist Party. The Radical Republican impeachment of Andrew Johnson also accomplished virtually nothing. Within a year, Grant, who shared Congress's view of Reconstruction, replaced Johnson through the electoral process. In historical memory, the Johnson impeachment allowed the enemies of the Radical Republicans to portray them as oppressive and power-obsessed, rather than as principled politicians whose goal was to complete the liberation of African-Americans. In both instances, the long way around would have been to take advantage of other forces already in motion. After 1937, when no one considered impeachment, Roosevelt got a New Deal Supreme Court despite the failure of his court-packing plan. There, the long way around was deceptively simple and involved taking advantage of the fact that two of the Four Horsemen wanted to retire, and routine legislation let them do it with a reasonable income. As for the Republicans, all their impeachment tactics and strategies have produced only a single gain—a Supreme Court vacancy (Fortas's), in 1969. Everything since then has damaged their credibility.

* * *