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THE SENATE IMPEACHMENT TRIAL FOR PRESIDENT CLINTON

*Charles Tiefer**

I. INTRODUCTION

The Senate trial of President Clinton opened the Pandora's Box of modern presidential impeachment and let us see what happened when that potent process played itself out for the first time in 130 years. This Article describes the ensuing procedures and debates over procedures, which contrasted sharply with what might be called the "passive Senate" model of Senate trials of judicial impeachments. In such judicial trials, with their relatively lesser political pressures and stakes, the Senate leaves the organization and running of the case largely to others. The 1999 Senate process actively shaped the procedures according to the high pressures and stakes of presidential impeachment, thereby playing out the final stage of a new phenomenon in national affairs—the "specially investigated President."¹ Recognizing this, this Article proposes some ways that the Senate should formalize how to handle the new phenomenon.

In a previous full treatment of this issue, I have discussed how the process of specially investigating the President during the preceding decade, from Iran-Contra through Whitewater, took on a life of its own.² Newly intensified parallel investigations of three successive Presidents by independent counsels and congressional committees produced the

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1. See generally Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143 (1998) [hereinafter Tiefer, *Specially Investigated President*] (discussing the process of specially prosecuting the President during the previous decade).

2. See *id.* at 151-61.

new political-legal status of the "specially investigated President."³ In early 1999, that new state of affairs advanced further by the House adopting articles of impeachment against President Clinton.⁴

With the Senate having to resolve those articles, the next stage, like the previous stages of parallel investigation and House impeachment, also consisted of a somewhat novel "political-legal" process.⁵ Of course, guidance comes from the Constitution, Senate rules and precedents, and other legal sources, and these have gotten elaboration from legal and historic commentators.⁶ However, by using the term "political-legal" to describe the process, this Article refers to the impeachment as fitting a formal legal proceeding that might occur for trying the impeachment of

3. See *id.* at 143-44.

4. See 145 CONG. REC. S60 (daily ed. Jan. 12, 1999). For a discussion on the House impeachment process, see Charles Tiefer, *The Controversial Transition Process from Investigating the President to Impeaching Him*, 14 ST. JOHN'S J. LEGAL COMMENT. 111 (1999) [hereinafter Tiefer, *Controversial Transition Process*].

5. See Robert Dudley, *Law, Politics, and Impeachment*, LEGAL TIMES, Oct. 5, 1998, at 62 (examining the political and legal aspects of impeachment).

6. For relevant analyses of impeachment of Presidents, besides other sources cited in this Article, see RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 111-15 (1973) (discussing the judicial power of the Senate); IRVING BRANT, IMPEACHMENT: TRIALS AND ERRORS 6-7, 12-17 (1972) (describing the guidance the Constitution provides to the Senate, the Framers' intent, and the history behind the current provisions); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 33-35 (1996) [hereinafter GERHARDT, IMPEACHMENT PROCESS] (describing the role of the Senate, its practices, and the rules it follows); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (forthcoming 2d ed. 2000); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 269-75 (1994) (discussing the problems involved in impeaching the President, especially noting the problems with judicial review based on the Constitution); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 12-18 (1989) (examining the history of the rules guiding the Senate and describing the Senate's unique capacity); William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 916-18 (1991) (analyzing the Senate's role in the impeachment of Andrew Johnson and the guidance given by the Constitution); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 714-15, 719-20, 727-32 (1988) (discussing the role of the Senate in the impeachment process according to the Constitution, the standard of proof to be used when impeaching the President, and the judicial review of the process); Stephen M. Ryan & Catherine Newcombe, *The Power of Independent Counsel Referrals for Impeachment*, FED. LAW., Mar.-Apr. 1997, at 30, 30 (examining the power of the independent counsel in the impeachment process); Alex Simpson, Jr., *Federal Impeachments* (pts. 1-2), 64 U. PA. L. REV. 651, 662-65, 668-76, 818-20 (1915-1916) (analyzing the process at the constitutional convention leading to the Senate's role and ensuing capacity in the impeachment process and discussing the legal rules the Senate follows in the process); Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 861-62 (1938) (discussing the Senate's role and the procedure followed under the Constitution); Timothy Walthall, Note, *Executive Impeachment: Stealing Fire from the Gods*, 9 NEW ENG. L. REV. 257, 263-64, 273-75, 280-85 (1974) (examining the constitutional provisions used to guide the Senate in impeaching the President, the impeachment of Andrew Johnson, and criticisms of the Senate's role).

a judge inside a political process for this kind of controversy over the President.

Some elements of the 1999 Clinton trial recall the “passive” model in which a Senate, without major political pressures and high stakes, allows its procedures to unfurl without active management. In 1999, the Senate had the Chief Justice presiding, certain aspects fixed by the Constitution, and consistent universal attendance of Senators during trial presentations in which they only listened without speaking.⁷ Those parts resemble the more “passive” judicial impeachment trials, which do not raise (by comparison) so much political interest, and for which the Senators accept the role of just attending, listening, and after final deliberations, voting on removing the judge.⁸ In any impeachment trial, even for trying a judicial impeachment, Senators can and do deliberate on motions, procedures, and other contested issues, but their formal deliberations mostly occur behind closed doors, making much less impact on the public and thereby contributing to the observers’ sense of a “passive” body.⁹

However, by sharp contrast, the 1999 Clinton trial actively struggled over the procedures, reflecting a Senate that could not just sit back and take in presentations. The Senators collectively made procedural decisions regarding whether to have a partisan or bipartisan procedure, whether to have a lengthy proceeding, and whether to have floor testimony.¹⁰ It made these decisions, as usual for the institution, in some measure on calculations like those for other parliamentary processes, such as what would be the reaction of the various internal and external players, the media, and the public.¹¹ This Senate trial of President Clinton, like other political-legal processes, moved along by the step-wise working out of opposing positions by a body that has to get from the

7. See Jack W. Germond & Jules Witcover, *Another Phase for Congress's Trial*, 31 NAT'L J. 144, 144 (1999).

8. See GERHARDT, IMPEACHMENT PROCESS, *supra* note 6, at 33-35 (describing the relatively non-adversarial process the Senate prescribed for itself while sitting on impeachment trials).

9. See *id.*; see also Jonathan Turley, *How We Try Our Leaders: Senatorial Jury, Presidential Defendant, and Presiding Justice*, LEGAL TIMES, Dec. 21 & 28, 1998, at 39 [hereinafter Turley, *How We Try Our Leaders*] (elaborating on the deliberations the Senate as a jury must make and explaining that the deliberations take place in secret); Jonathan Turley, *Senators Prefer Politics to Their Role as Jurors*, NAT'L L.J., Jan. 25, 1999, at A27 [hereinafter Turley, *Senators Prefer Politics*] (contrasting the Senate's interest in maintaining privacy during Senate trials with the House's interest in inviting public scrutiny).

10. See Richard E. Cohen & Kirk Victor, *The Impeachment Show Goes On*, 31 NAT'L J. 268, 268-69 (1999).

11. See *id.* at 269 (noting that during an impeachment trial Senators are compelled to act according to their public image).

beginning to the end, and that takes too much of an interest in the political effect of what it is doing not to manage its proceedings. At the same time, activity at each step requires satisfying both the legal and political constraints upon the legitimacy of, and support for, each step of the procedural decisions. The Senate's development of its procedure exists separately from how the body ultimately votes on the merits. Its procedural journey is not just a period before the arrival at the endpoint; much of the interest consists of the procedural journey itself. As the author of *Congressional Practice and Procedure*, a thousand-page treatise on congressional procedure,¹² I take particular interest in how the Senate, in a constitutionally unique legal proceeding, adapted the parliamentary procedures it uses for the rest of the Senate's business.

In analyzing that political-legal process, this Article's goal is not to assess the appropriateness *vel non* of impeachment on its merits. Indeed, as in my two prior articles,¹³ I suggest looking at issues from two polar opposite viewpoints—of accusers, and defenders, of the President—without undue regard for whether most observers, or I, would accept either, or neither, of those viewpoints in the specific instance of the Clinton trial.¹⁴ The interest lies in how the lines of theory and argument shape the procedure, rather than the merits of the substantive “case” (or even the substantive rules). I hope the reader, particularly the reader who has not read my previous two articles on the “specially investigated President,” will understand that presenting the positions of accusers and defenders is *not* a matter of presenting either one of these as my own preferred position, but a way of structuring a description of opposing positions to illuminate the subject by comparison and contrast.

This Article first summarizes the procedural stages of the Clinton Senate trial by a brief chronological account of January and February 1999.¹⁵ It then discusses the three aspects of special interest. First, a

12. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE (1989).

13. See Tiefer, *Controversial Transition Process*, *supra* note 4, at 112; Tiefer, *Specially Investigated President*, *supra* note 1, at 144.

14. To use an analogy, after some particularly controversial Supreme Court nominations (e.g., of Justice Clarence Thomas or of Justice Louis Brandeis) or the trial of some particularly significant defendant (e.g., Peter Zenger or Oliver North), an article in this vein might analyze active Senate nomination proceedings, or symbolic criminal trials from the polarized perspectives of idealized accusers and defenders. See generally Richard E. Cohen, *The Ghosts of Packwood and Thomas*, 31 NAT'L J. 130, 130 (1999) (comparing the “battle” over Supreme Court nominee Clarence Thomas and the 1995 ethics investigation of Bob Packwood with the Clinton impeachment trial); Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407 (1993) (examining the debate over the Supreme Court justice nomination process based on the competence model and the ideological model).

15. See discussion *infra* Part II.

Senate trial must make *procedural decisions*, either by the majority party's own partisan will, or by a process that accords influence to the minority.¹⁶ Whatever the issues short of the final outcome—e.g., to vote early on censure or dismissal, to spend on the trial whatever time is to be spent from a week to six months, or to allow the parties discovery or live witnesses on the Senate floor—these can be decided in the majority party caucus, or between the bipartisan leadership by motion, or, this being the Senate, by a unanimous consent agreement.¹⁷ In the Senate's ordinary consideration of legislation, the rules, particularly the rules of filibuster and cloture, arm the minority with influence, but, impeachment does not follow those rules of ordinary legislating; it is a new and different game.¹⁸

In a trial such as the Clinton trial, largely divided between a Senate majority party unsympathetic to the President and a Senate minority party relatively sympathetic to the President,¹⁹ the accusers and defenders start out with different general guidelines about procedures. The accusers of the President will prefer procedures devised as much as possible by the majority party's preferences, though with reluctance to appear partisanly oppressive; the defenders of the President will prefer procedures developed with as much influence as possible by the minority, though with reluctance to appear partisanly obstructive. The Constitution, the formal rules, and even the informal practices frame the ten-

16. See Lori Nitschke & Carroll J. Doherty, *With Great Difficulty, Senate Devises a Blueprint for Proceedings*, 57 CONG. Q. WKLY. 44, 44 (1999) (outlining the Senate's procedural plan for the Clinton impeachment proceedings); discussion *infra* Part III.

17. See TIEFER, *supra* note 12, at 467; Carroll J. Doherty, *After Historic Swearing-In, Duty Trumps the Party Line*, 57 CONG. Q. WKLY. 40, 40, 41, 43 (1999) [hereinafter Doherty, *Duty Trumps*] (providing examples of caucuses during trial).

18. See Ellen J. Silberman, *This Trial Will Be Televised, But Cameras Won't Go Behind Closed Doors*, BOSTON HERALD, Jan. 14, 1999, at 6 (stating that the Senate, in a bipartisan caucus, developed the rules that will govern Clinton's impeachment trial).

19. Two caveats deserve mention. First, there is no commandment that the Senate majority party during impeachment will always be the party in opposition to the President's. Had something like a Starr report led to an impeachment in 1993-94, for example, the Senate majority party would have been the Democratic party, sympathetic to the President, and the Senate minority party would have been the Republican party, unsympathetic to the President. As a matter of probabilities, impeachment trials may be less likely when the President's party is the majority party in the Senate, but, a President committing, and getting caught at, a sufficient outrage could bring on a trial by a Senate of his own party. Second, in 1999 the Senators did not all fall into neat party-defined positions. For a particular example, much is made below about the Gorton-Lieberman bipartisan plan, reflecting that Senator Slade Gorton (R-Wash.) championed a procedure that would have largely spared the President. See also Anne E. Kornblut, *Questions on Clinton to Test Senators: Lawmakers Grapple with Trial*, BOSTON GLOBE, Jan. 3, 1999, at A1 (explaining that the Gorton-Lieberman plan called for a speedy trial). Referring to party positions is thus a generalization, with significant exceptions.

sion over how impeachment procedural decision-making occurs, but lines of argument, with both legal and political attractiveness, exist for both the President's accusers and his defenders to argue for the partisan, or bipartisan, procedural decision-making they want.

Second, the Senate must decide the important specific question of *alternatives to trial*.²⁰ The President's accusers sought a trial in January 1999,²¹ while the President's defenders urged an early non-trial alternative such as dismissal or censure.²² As on other aspects, the accusers argued for their position from the House having adopted articles of impeachment and from majority opposition in the Senate to just dropping the matter.²³ The President's defenders argued from the lack of public desire for a full trial, the evident absence of a two-thirds Senate supermajority for removing the President, and the particular arguments for dismissal or censure.²⁴ The extensive scholarly debate²⁵ between those who did,²⁶ and those who did not,²⁷ think the charges warranted President Clinton's impeachment comes in on the issue of dismissal.

20. See discussion *infra* Part III.

21. See Robert Novak, Commentary, *Trial Plan a Relief to Clinton Allies*, CHI. SUN-TIMES, Jan. 11, 1999, at 23.

22. See William Neikirk, *GOP Senate, House Leaders in Dispute on Impeachment*, CHI. TRIB., Dec. 31, 1998, at 3.

23. See Carroll J. Doherty, *Senate's Uncertain Course*, 56 CONG. Q. WKLY. 3326, 3326 (1998) [hereinafter Doherty, *Senate's Uncertain Course*].

24. See Doherty, *Duty Trumps*, *supra* note 17, at 40; Doherty, *Senate's Uncertain Course*, *supra* note 23, at 3326.

25. This was also the subject of a hearing with academic testimony. See generally *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (Nov. 9, 1998).

26. See generally Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL'Y 619, 620-21 (1999) ("[T]he crimes of perjury and obstruction of justice, like the crimes of treason and bribery, are quintessentially offenses against our system of government, visiting injury immediately on society itself, whether or not committed in connection with the exercise of official government powers."); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650 (1999) (concluding that obstruction of justice and perjury fall within the ambit of "high crimes and misdemeanors"); Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1791 (1999) (arguing that "the Framers did not intend to limit the application of the [Impeachment] Clause to misconduct related to office"); Mark A. McDermott, "The Truth, the Hole Truth": *Perjury and Obstruction as High Crimes and Misdemeanors*, FED. LAW., Jan. 1999, at 24 (emphasizing that "a President who commits perjury or obstructs justice upsets the balance of power and threatens our form of government, our law, and our liberty. [And] therefore commits High Crimes and Misdemeanors").

27. See Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 699, 705 (1999); see generally Daniel H. Pollitt, *Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259 (1998) (concluding that President Clinton's actions do not constitute impeachable offenses given the language, history, and past applicability of the Im-

Finally, the Senate must decide how to *conduct the trial* all the way to its termination.²⁸ The President's accusers wanted discovery and live witnesses, and sought an outcome that would vindicate the impeachment articles adopted by the House as borne out by the President's conduct.²⁹ Defenders of the President thought further investigation or live witnesses unnecessary, and sought an outcome centered on not removing a Chief Executive both duly elected and highly popular.³⁰

As in my previous articles about the specially investigated President which made relatively modest procedural suggestions about the preceding stages (investigation, and House impeachment),³¹ my conclusions focus on relatively modest procedural suggestions for the Senate trial. In particular, the 1999 process looked like it could use some formal recognition in the rules of the developing parliamentary aspects of what the Senate does today that differs from the "passive Senate" model. The Senate could formally establish a bipartisan leadership steering group, recognizing that negotiations among the leaders, and others, guide what the Senate does. Moreover, the Senate could establish a larger role of participation for Senators, to bring back into the institution some of their debate and decision-making that now occurs offstage in informal caucuses and in the media. Finally, it might go so far as to give a conviction-proof minority some power, not to block the trial or a verdict, but to downgrade the floor proceedings and get on with legislative business.

II. PROCEDURAL SUMMARY OF THE SENATE TRIAL

On December 19, 1998, the House of Representatives adopted House Resolution 611, with two articles of impeachment against President Clinton.³² The House majority party's post-election decision³³ to

peachment Clause).

28. See Doherty, *Duty Trumps*, *supra* note 17, at 40; discussion *infra* Part V.

29. See Doherty, *Duty Trumps*, *supra* note 17, at 40-41.

30. See *id.* at 41.

31. See Tiefer, *Controversial Transition Process*, *supra* note 4, at 193-204; Tiefer, *Specially Investigated President*, *supra* note 1, at 128-34.

32. See Jeffrey L. Katz & Andrew Taylor, *House Accuses Clinton of Perjury, Obstruction*, 56 CONG. Q. WKLY. 3320, 3320 (1998).

33. The decision was something of a surprise. If the Republicans had improved their House margin, the expectation had been that while the House Judiciary Committee might continue with its task during the months between the November 1998 election and the January 1999 convening of the 106th Congress, floor proceedings on impeachment would wait until after that convening. Immediately after the election, the expectation had been that the public's disenchantment with impeachment might doom it. Speaker Newt Gingrich (R-Ga.) was preoccupied with what shortly became his decision not to be Speaker in the 106th Congress. The impetus to report an impeach-

convene a lame duck session and to vote impeachment meant that the Senate was not in session; the Senators were mostly not even in Washington, and neither they nor anyone else had much of a precise picture of how the Senate trial would proceed.

On January 7, 1999, the Senate started its proceedings.³⁴ Chief Justice William H. Rehnquist was sworn in to preside, and he, in turn, swore in the 100 Senators.³⁵ Initially, a bipartisan plan for a very limited proceeding was sponsored by Senator Slade Gorton (R-Wash.) and Senator Joseph I. Lieberman (D-Conn.), and received support from Senate Majority Leader Trent Lott (R-Miss.).³⁶ The plan would impose a four-day limit, and not have witnesses testify on the Senate floor; if an initial vote showed no two-thirds sentiment for conviction (as was likely), the Senate would skip holding a full trial, abandon impeachment, and turn to devising a censure resolution.³⁷ The Lott-backed Gorton-Lieberman plan represented a major Senate response, which with the Majority Leader's backing was not at all improbable, to the House's having sent impeachment articles to the Senate without strong expectation of a conviction.

However, a powerful backlash from strongly conservative Republicans forced Lott to abandon the plan.³⁸ This backlash in the majority party threatened a hardening of the Senate minority position, in turn, and a repetition in the Senate of the extraordinary polarization in the House the month before, where the two parties evinced little respect for each other's position by the end. Fearing the prospect of a House-like polarization, the Senate came together in a rare closed-door informal meeting of the whole Senate membership on January 8 in the old Senate chamber, in which the Senators agreed to a procedural plan embodied in Senate Resolution 16.³⁹ Although the procedures represented a compromise, having them at all amounted to a sizable tactical victory for the President's accusers, who had headed off a plan to steer the Senate, in effect, to non-trial alternatives without much of an impeachment trial.

Following the Resolution, the Senate put the President's response to the articles of impeachment and any threshold motions on a fast track with trial memoranda by the White House on January 13 and House

ment resolution out of committee for lame duck session consideration came in November from Judiciary Chairman Henry Hyde (R-Ill.) and House Majority Whip Tom Delay (R-Tex.).

34. See Doherty, *Duty Trumps*, *supra* note 17, at 40.

35. See *id.* at 42.

36. See *id.* at 43.

37. See *id.*

38. See *id.*

39. See *id.* at 40, 43; S. Res. 16, 106th Cong. (1999) (enacted).

Managers' rebuttal on January 14.⁴⁰ Beginning the week of January 14, a fully-attending and attentive Senate listened to House Managers present opening arguments emphasizing the obstruction of justice article.⁴¹ The following week, on January 19-20, the President's lawyers presented their opposing arguments, partly on the facts, and partly on the theme that the nation would not support the President's removal on such charges.⁴² When President Clinton delivered an effective State of the Union address on January 19, his job approval rose to a record seventy-six percent in an NBC News poll, buttressing this defense.⁴³

On January 25-26, the Senate deliberated behind closed doors on the procedural motions that defined the conduct of the remaining trial.⁴⁴ On a motion by Senator Robert Byrd (D-W.Va.), the Senate's leading proceduralist, to dismiss the impeachment proceedings, the Senate split with fifty-five Republicans (and one maverick Democrat, Senator Russell Feingold, (D-Wis.)) voting to reject the motion, and forty-four Democrats voting for it, assuring a further trial but providing a count that the accusers would not pick up anything remotely like the minimum number of minority votes necessary to convict.⁴⁵ Reflecting the public's tuning the trial out and the majority party's fall in the polls as the trial went on, even majority Senators had become publicly antagonistic to the House Managers' call for witnesses on the floor.⁴⁶ So, while the Senate voted on party lines to reject a Democratic plan for the trial which barred videotaping of depositions, it also voted on the same party lines for a Republican plan—a plan that had been narrowed.⁴⁷ To avoid losing completely, the House Managers had to reduce their list of deponents to just three (i.e., with significant omissions),⁴⁸ thereby reducing

40. See Vanita Gowda, *The Paper Trail*, 57 CONG. Q. WKLY. 143, 143 (1999).

41. See Dan Carney & Lori Nitschke, *Trial Takes On a Hybrid Character When Politicians Are Jurors*, 57 CONG. Q. WKLY. 140, 140 (1999); Evan Thomas, *Why Clinton Won*, NEWSWEEK, Feb. 22, 1999, at 24.

42. See Dan Carney, *Defense Focuses on Facts*, 57 CONG. Q. WKLY. 185, 185 (1999).

43. See Andrew Taylor, *A Manifesto for 2000*, 57 CONG. Q. WKLY. 174, 174 (1999).

44. See Carroll J. Doherty & Chuck McCutcheon, *Senate Limits Witnesses, Begins Push Toward Finishing Trial*, 57 CONG. Q. WKLY. 244, 248 (1999) [hereinafter Doherty & McCutcheon, *Senate Limits Witnesses*].

45. See *id.* at 248; *For the Record: Senate Votes*, 57 CONG. Q. WKLY. 274, 274 (1999) (tallying the votes on the Byrd motion).

46. See Doherty & McCutcheon, *Senate Limits Witnesses*, *supra* note 44, at 248.

47. See *id.*

48. See *id.* The original procedural resolution, Senate Resolution 16 adopted on January 8, had provided that the House Managers would submit a list of witnesses to be deposed for an all-or-nothing Senate vote. See Nitschke & Doherty, *supra* note 16, at 44. When the House Managers made their list of three, they omitted Betty Currie, the President's secretary, who played a key part in their arguments about obstruction, on issues such as whether the President had talked to her in

the amount of what could occur after the depositions, in the way of live floor testimony, and without a strong expectation that the Senate would even vote for that reduced amount.⁴⁹

Videotaped depositions of Monica Lewinsky, Vernon E. Jordan Jr., and Sidney Blumenthal took place on February 1-3, but yielded nothing striking.⁵⁰ The Senate voted down, 70-30, the motion for Lewinsky to testify live on the floor, an intriguing vote in which the Democrats were joined by moderates and senior members of the majority party, with thirty more junior Republicans supporting the House Managers.⁵¹ The previous likelihood that the Senate would adopt something critical of the President short of a conviction evaporated as each side rejected the other's alternatives.⁵² Accordingly, on February 12, the Senate simply voted on the articles, defeating the obstruction article by a vote of 50-50, with five moderate Republicans joining the unanimous Democrats in rejecting the charge, and defeating the perjury article by 55-45.⁵³

III. PROCEDURAL DECISIONS

To those who follow congressional procedure, perhaps the most open and interesting question of the Clinton trial concerned how the procedural decisions would be made, even more than the particular outcomes.⁵⁴ The Senate has a regular decision-making process for its regular legislative activity, which accords considerable influence to the mi-

an effort to obstruct her truthful testimony or whether she had concealed gifts at the President's behest. See Doherty & McCutcheon, *Senate Limits Witnesses*, *supra* note 44, at 247-48. Observers took the decision to omit her as reflecting that "[a]s an African-American and a career government secretary, Currie is seen as a sympathetic figure." *Id.* at 248. The Senate and/or the House Managers may have feared the impression created by the unfriendly questioning of such a person.

49. Pursuant to the January 8 resolution, only witnesses who were deposed could testify on the Senate floor, and sentiment in the Senate was not favoring even live testimony from these three. See Doherty & McCutcheon, *Senate Limits Witnesses*, *supra* note 44, at 248; Nitschke & Doherty, *supra* note 16, at 44.

50. See Carroll J. Doherty, *Senate Gropes for Another Way to Record Disapproval of Clinton*, 57 CONG. Q. WKLY. 326, 326-27 (1999) [hereinafter Doherty, *Another Way*].

51. See *id.* at 326, 329; *For the Record: Senate Votes*, *supra* note 45, at 339 (tallying the votes on Monica Lewinsky's live testimony).

52. See Doherty, *Another Way*, *supra* note 50, at 327, 329.

53. See Carroll J. Doherty, *Senate Acquits Clinton*, 53 CONG. Q. WKLY. 361, 361-62 (1999). A number of Senators said they voted "not guilty" even though they considered President Clinton guilty, in a sense, of the charges. See Louis Fisher, *Starr's Record as Independent Counsel*, 32 PS 546, 548 (1999).

54. See generally T.R. Goldman, *Who Sets the Rules? In an Impeachment Trial, a Precedent Is Whatever a Majority of the Senate Wants It to Be*, LEGAL TIMES, Jan. 4, 1999, at 2 (noting that there would be a host of procedural issues to address prior to the trial).

nority, particularly in contrast to the House.⁵⁵ First, because the objections or extended discussions of even a single determined Senator can hold up Senate legislative proceedings, the Senate makes most minor procedural decisions, and quite a lot of major ones, by unanimous consent.⁵⁶ Second, because the Senate can only stop Senators from filibustering a measure, i.e., talking it to a dead halt, by a vote of sixty Senators for cloture, the majority must propitiate the minority enough to be able to vote cloture if necessary.⁵⁷ Neither of these factors applies in the House, where a unified majority party has the procedural machinery to run roughshod over any individual objector and to work its will even without support from a minority party with a forty-nine percent share of the chamber.⁵⁸

An impeachment proceeding differs. The visible symbol consists of the Chief Justice presiding, but as in all Senate proceedings, the presiding officer does not wield that much power.⁵⁹ Rather, what makes an impeachment proceeding different consists of the unavailability in trial proceedings of the ordinary minority procedures for resistance in legislative proceedings. Because the trial consists primarily of the parties setting forth their positions, during those presentations Senators serve primarily as non-speaking listeners preparing to render a verdict, and the proceedings go ahead without requiring their unanimous consent. Deliberations occur, but in ways that reduce minority resistance rights.⁶⁰ The minority Senators do not have the right to stop the proceedings by extended debate.⁶¹ They cannot filibuster.⁶² The majority does not need sixty votes to move the process along by cloture as with legislation

55. The discussion that follows about Senate legislative procedure is drawn from my chapters on the Senate in CONGRESSIONAL PRACTICE AND PROCEDURE. See TIEFER, *supra* note 12, at 463-765.

56. See *id.* at 467, 468.

57. See *id.* at 692.

58. See *id.* at 188, 208.

59. See Turley, *How We Try Our Leaders*, *supra* note 9, at 39, 40. In the 1867 trial of President Andrew Johnson, the majority had demonstrated that it could overrule a Chief Justice who tried to control the proceedings. See, e.g., BERGER, *supra* note 6, at 268 (indicating that the Senate overruled Chief Justice Chase on admissibility of evidence issues). At no time in 1999 did Chief Justice Rehnquist, who as the author of a book on impeachment history understood the limits of his role, attempt to control the chamber by resolving the big procedural questions. See Michael J. Gerhardt, Book Review, 16 CONST. COMMENT. 433, 443 (1999) (reviewing WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992)) [hereinafter Gerhardt, *Grand Inquests*].

60. Deliberations occur behind closed doors and under time limits. See Turley, *How We Try Our Leaders*, *supra* note 9, at 39.

61. See Doherty & McCutcheon, *Senate Limits Witnesses*, *supra* note 44, at 248.

62. See *id.*

facing a filibuster.⁶³ Without needing to overcome the minority powers of resistance found in Senate legislative proceedings, the Senate trying an impeachment can either passively watch the evidence presented by the House Managers and the President's lawyers guided by the Chief Justice, or the majority party can more actively direct the proceedings by majority-vote motions.

Conversely, a frustrated minority in a Senate impeachment trial, not having the influence it normally has upon Senate procedure, could become like the minority in the House. Being uninterested in yielding on important points, it could take clear-cut stands in order to present to the public political issues against the majority. In a presidential impeachment, the minority can get the country's attention even without a filibuster. If the majority crafts a trial procedure to follow only the wishes of its President-disliking wing, the majority risks the blame for the ensuing undignified partisanship; whereas, the minority party, in arguing to the country that something bad and unfair is happening to the person whom it elected President, may win some of the country's sympathy. The Senate majority party thus faces a novel question: whether to give influence to the minority even though the normal constraints of filibuster and unanimous consent do not apply, because the minority can get public support and because, in the end, it takes some of the minority's votes to add up to the two-thirds needed for a conviction.

Those competing considerations show just some of the background to the debate over procedural decision-making between the accusers and defenders of the President; they hardly make what will happen readily knowable in advance.⁶⁴ Observers could only speculate about what process the Senate would follow.⁶⁵

A. *The Accusers' Perspective*

From the accusers' perspective, the House vote on December 19 to impeach had already made the fundamental procedural decisions, and all further decisions should occur by the constitutionally imperative

63. See TIEFER, *supra* note 12, at 691-92.

64. To reminisce, in late December 1998, I myself was the guest for a one-hour television call-in show on C-SPAN the week before the House vote, discussing not only the imminent House proceeding but the likely ensuing Senate proceedings. On that show and others, I was part of the horde of cable-television "talking heads" that marked (some would say marred) this impeachment. Even knowing the impeachment rules and precedents, to me at that time and to other observers, confident prediction was impractical, because there was no knowing how the Senate would approach the procedural decision-making.

65. See Doherty, *Senate's Uncertain Course*, *supra* note 23, at 3326.

need to try the charges, under the guidance of the Senate majority.⁶⁶ The Constitution gives the House the power to impeach,⁶⁷ and when the House adopted articles of impeachment, the Constitution anticipated not just a Senate vote on those articles, but a Senate trial.⁶⁸ History tells us that the Framers thought highly of the power to impeach, a familiar and valued tool to them in the struggle of the colonial assemblies with the colonial governors representing the Crown.⁶⁹ The Framers gave the power to impeach to the House as the body closest to the people, and allowing a Senate minority in 1999 to thwart the House's decision would violate that constitutional grant of authority to the House.

Some might think the new age of the Internet has rendered obsolete such expectations from the era of the powdered wig and the hand-cranked printing press. However, the House Managers' ability in January, 1999 to reach out successfully through the electronic media for public support, at least in their party's own base, against truncation of the Senate trial, illustrated resources of popular support for the impeaching people's House, quite as had been expected (albeit without anticipating the media technology) by the Framers in 1787.⁷⁰

Moreover, from this same accusers' perspective, the Senate minority did not have a basis for demanding great influence over the procedure. Analogies from legislative processes fail; the minority's filibuster power and procedural rights do not apply. When impeachment begins, all the players must rethink their ordinary situation.⁷¹ Impeachment is like a criminal case. The House can impeach, like a grand jury indicting, without creating any special kind of a record. Then, just as the court must hold a trial of an indictment, so the Senate has to try the articles, not skimp on procedure and let off an impeached President. Here, a

66. See Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 773 (1999) [hereinafter Turley, *Congress as Grand Jury*] (arguing that it was the Framers' intent that the House, in its procedural role, should bring matters of impeachment to the Senate and that the Senate, in its more substantive role, should make the final determination for removal).

67. See U.S. CONST. art. I, § 2, cl. 5.

68. See Turley, *Congress as Grand Jury*, *supra* note 66, at 773.

69. See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 14, 41-56 (1984). A more complex question is the relevance of the English tradition of impeachment in the 17th Century struggles of the House of Commons with the Stuart monarchs. On the one hand, that tradition had largely died out by the time of the Constitution's Framers; on the other hand, they regarded the old tradition as important in how to maintain democratic liberty against an usurping Crown.

70. See Jeanne Cummings, *Conservative, Liberal Groups Turn up Heat on Senate*, WALL ST. J., Jan. 14, 1999, at A22.

71. See Kirk Victor, *The Curtain Rises*, 31 NAT'LJ. 124, 124 (1999).

majority of the Senate decided the procedures during impeachment by voting on motions, and did not have to let a Senate minority use alleged defects in House consideration of the articles as a basis to have its procedural way in the Senate.⁷² While a Senate minority of one-third plus one can preclude conviction in the end by voting to acquit, this gives the Senate minority no procedural rights earlier in the proceedings.⁷³

Finally, the accusers of President Clinton might well argue that as the Senate proceeded, the Senate majority party did try "making the President's trial as bipartisan as possible."⁷⁴ Even in the beginning the Senate developed what proved to be the procedural charter for the trial as a compromise worked out largely between the odd couple of Senator Phil Gramm (R-Tex.) and Senator Edward Kennedy (D-Mass.).⁷⁵ In the latter stages, the Senate curtailed the trial far more than the House Managers wanted, leading the House Managers to make some bitter reproaches of the Senate majority party's procedural yielding. The Senate majority party wanted to look procedurally more bipartisan and more dignified than the House had in December, and believed it had made major efforts in that direction.⁷⁶

B. *The Defenders' Perspective*

From the defenders' perspective, the Senate made its key procedural decisions shaping the Clinton trial on an excessively partisan, improper, majority party dominated basis. This amounted to a constitutionally improper development of regrettable approach that started when the House majority party published and acted upon the provocative Starr report of partisan impeachment.⁷⁷ For two centuries, national politics, in a frequently divided government, had kept itself in order by a taboo

72. In fact, when the Chief Justice proved troublesome during the 1867 Johnson trial, the Senate adjusted the rules to make clear the ease of its majority making the decisions. See BERGER, *supra* note 6, at 268-69. Opposition to depositions or live witnesses in the Senate when the House impeachment proceedings had included none represented a lack of awareness from history of just how tough the congressional majority in the House and in the Senate could be. In 1867, the House had rammed through the impeachment of President Andrew Johnson within three days after the "offense" (the violation of the Tenure of Office Act). See *id.* at 267.

73. Plenty of other matters, from treaties to constitutional amendments to veto overrides, require supermajority votes for final decision, yet the pertinent preliminary procedures and amendments consistently get decided by a majority vote on motions.

74. William Schneider, *Why the GOP's Gambling on Impeachment*, 31 NAT'L J. 150, 150 (1999).

75. See Doherty, *Duty Trumps*, *supra* note 17, at 43.

76. See Germond & Witcover, *supra* note 7, at 144.

77. See John M. Broder & Don Van Natta, Jr., *Clinton Staff Derides 'Lurid' Account of Lewinsky Case*, N.Y. TIMES, Sept. 12, 1998, at A1.

against partisan impeachment. The one exception, the 1867 Johnson impeachment, received history's judgment as partisan, overzealous, and ill-advised.⁷⁸ Rather, the one proper use of impeachment occurred with the start of proceedings concerning President Nixon in 1974.⁷⁹ The proceedings followed a relatively more bipartisan model, in which the "opposition" party (House Democrats) made every effort at procedural compromise, somewhat successfully, with centrist members of the President's party to avoid complete partisan discrediting of the proceedings.⁸⁰ Partisan impeachment made no sense as a responsible way to proceed.⁸¹ It alienated the minority votes necessary for a conviction; it would only reduce impeachment to a futile gesture and a sullied tactic.

Hence, from the presidential defenders' perspective, procedural decisions should occur along the Senate's usual procedural approach in legislating. This approach involves the majority not imposing its will, but compromising on procedure with the minority so as to test fairly for a consensus in the chamber on substantive merits issues.⁸² When Majority Leader Lott initially backed the Gorton-Lieberman procedural compromise in January, 1999, he did not act out of sudden affection for the impeached President. He acted both from a desire to spare his majority party from going through with an unpopular process, and in the normal spirit of Senate procedural decisions.⁸³ In contrast, his letting the right wing of the Republican conference scuttle the deal and dictate a different procedure, just like the subsequent party-line votes on procedure that led to depositions and a prolongation of the trial, amounted to excessive partisanship in procedure.⁸⁴

The President's defenders cite public opinion as the legitimate basis for opposing majority party procedural domination.⁸⁵ In contrast to

78. See Gerhardt, *Grand Inquests*, *supra* note 59, at 438; Cass R. Sunstein, *Lessons from a Debacle: From Impeachment to Reform*, 51 FLA. L. REV. 599, 609 (1999).

79. See GERHARDT, *IMPEACHMENT PROCESS*, *supra* note 6, at 54-55 (1996).

80. See *id.*

81. See also Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 623 (1999) ("[M]embers of Congress increasingly feel the pressure to find some non-partisan basis for their decisions that will withstand the test of time.").

82. The Senate traditionally did not let the majority dominate procedures the way the House majority does. Rather, the Senate majority party decides the Senate agenda, but does so looking out for what will be popular with the country and what, in consultation with the minority leader, will keep the chamber moving along in its procedural steps with a maximum of unanimous consent and a minimum of filibusters.

83. See Kirk Victor, *The Trials of Trent Lott*, 31 NAT'L J. 46, 46, 47 (1999) [hereinafter Victor, *Trials of Trent Lott*].

84. See *id.* at 56.

85. See Carney & Nitschke, *supra* note 41, at 141 (stating that Clinton's defenders "stress Clinton's popular mandate" and argue that "the House case is not sufficient to rebuff the will of

the Nixon matter of 1974, in which support for impeachment built with fresh revelations, as the Lewinsky matter approached its second year nothing new was emerging to build impeachment support. High poll ratings of the President in general and the public's intense desires, expressed in the November 1998 election and in polls in January and February of 1999, to put the Lewinsky matter behind it, armed the Senate minority to argue for procedures that would bring the matter to a quicker conclusion.⁸⁶ That a lame duck session of the House in the previous Congress had voted impeachment by a (largely) party-line vote, and was now preoccupied with trying to organize itself under a new Speaker with just a six-vote majority, left the Senate majority ill-positioned, in this view, to insist upon tough trial procedures.⁸⁷

And, from this perspective of two sides, this Article can turn to other procedural aspects of interest: not just how to make the decisions, but what decisions needed to be made.

IV. NON-TRIAL ALTERNATIVES?

In the Clinton case, the President's defenders urged a threshold non-trial alternative such as dismissal or censure.⁸⁸ From the accusers' perspective, the arguments made for dismissal or censure lacked merit.⁸⁹

A. *From the Accusers' Perspective*

From the accusers' perspective, threshold alternatives such as dismissal or censure represented the last in a long series of arguments made throughout the years of the specially investigated Presidents for why they should be above the law.⁹⁰ No one else in the country would have charges of obstruction of justice, or perjury, dismissed or reduced to something like mere censure for the reasons urged as to President Clinton.⁹¹ Time and again, the processes of law had thrown out similar

the people").

86. See James A. Barnes, *Defying Nixon-Like Gravity*, 31 NAT'L J. 220, 220 (1999).

87. See generally Akhil Reed Amar, *Next Stop, The Senate: Questions to Ponder as Impeachment Proceeds*, LEGAL TIMES, Jan. 4, 1999, at 17 [hereinafter Amar, *Next Stop, The Senate*] (answering some basic questions about the players' roles in the Clinton impeachment proceedings).

88. See Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 722-24 (1999).

89. See *id.* at 724-25.

90. See *id.* at 725-28.

91. See Cooper, *supra* note 26, at 628-29; Gary L. McDowell, "High Crimes and Misdemeanors": Recovering the Intentions of the Founders, 67 GEO. WASH. L. REV. 626, 647 (1999); Miller, *supra* note 88, at 712-13.

arguments: by the courts in refusing to create special immunities,⁹² by the Congress in enacting and reenacting the Independent Counsel Act⁹³ from 1978 to 1999,⁹⁴ and by the public in providing the support, without which the investigations from Watergate to Iran-Contra would never have started (even if that support tended to ebb as the investigations persisted).

A high rating in the polls for President Clinton in no way relieved the Senate of its constitutional responsibilities to try the case, any more than some indicted defendant's popularity warrants dropping or watering-down charges. The President could be expected, if he continued in office, to do his job, notwithstanding an unsuccessful impeachment.⁹⁵ For the House to vote articles of impeachment for obstruction and perjury, and the Senate not to try the matter but just to dismiss it or to censure the President, would put the President above the law.

One argument for dismissal was that the articles of impeachment had gone moot like old bills, or deserved disregarding due to their adoption in a previous Congress that had adjourned and been succeeded by the current one.⁹⁶ From the accusers' perspective, this argument went against venerable parliamentary law, followed as recently as the judicial impeachments of the 1980s, that articles of impeachment voted in one Congress could be tried in the next.⁹⁷ Another argument for dismissal, that a President should be removed only for official wrongdoing, met its refutation simply from imagining some horrible nonofficial crimes, from murder to child abuse, that would make it abhorrent to allow a President to continue in office.⁹⁸ As for censure, presidential accusers contended it had no textual support in the Constitution and little in history.⁹⁹ As an extraconstitutional pronouncement by Congress on the President, censure amounted either to an empty gesture or something

92. See *Clinton v. Jones*, 520 U.S. 681, 691-95 (1997).

93. 28 U.S.C. §§ 591-597 (1994 & Supp. III 1998).

94. See Miller, *supra* note 88, at 687, 688.

95. See Alexis Simendinger, *When Making Nice Is Necessary*, 31 NAT'L J. 400, 400 (1999).

96. See Amar, *Next Stop, The Senate*, *supra* note 87, at 17; see also Gregory C. Baumann, *Impeachment Only Looks Like Legal Process*, LEGAL TIMES, Feb. 9, 1997, at 14 (concluding that a succeeding Congress would proceed in an *ad hoc* fashion, irrespective of what a previous Congress decides).

97. See Amar, *Next Stop, The Senate*, *supra* note 87, at 17; see also Abner J. Mikva, *Last Call, Congressmen: In the Ruins of the Clinton Inquiry*, LEGAL TIMES, Dec. 7, 1998, at 25 (examining whether the recommendations of the old Congress must be acted upon by the new Congress).

98. See Mark R. Slusar, Comment, *The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment*, 49 CASE W. RES. L. REV. 869, 878 (1999).

99. See Miller, *supra* note 88, at 724-26.

outside the well-defined constitutional limits for the branches to rule upon each other. Congress might as well censure judges for unpopular rulings, or the courts censure the Congress for fuzzily worded statutes, or the President censure both for tasking him to govern without the tools.

B. From the Defenders' Perspective

From the perspective of the President's defenders, the absence from the very outset of either public desire, or of a two-thirds Senate supermajority for removing the President, argued for some non-trial option.¹⁰⁰ To suggest that the vaguely worded articles of impeachment¹⁰¹ left room for some new earth-shaking facts that might come forth in a trial to change minds, with neither a proffer for what those might be nor any ongoing process that would bring any such thing out, simply distracted from reality. On the charges made and the evident facts, both the public, and a rock-solid group in the Senate sufficient to acquit, had made up their minds beyond change. A trial held neither doubt as to the outcome, nor interest other than prurient, nor benefit other than symbolic. The Senate should have allowed itself to vote either to dismiss or for censure instead of trial.

There was more to the arguments for dismissal than impeachment proponents admitted. The text and the Framers' debates lent real support to the argument that when the Constitution limits impeachment to "Treason, Bribery or other high Crimes and Misdemeanors,"¹⁰² "high" offenses meant offenses as to the conduct of office, not misconduct committed in a personal capacity, like adultery, lying about sex, or signaling witnesses in a civil suit about pre-Presidency conduct.¹⁰³ By voting to dismiss on those grounds, the Senate would not condone what President Clinton did, but would merely say that it was not the occasion for the Senate to consider removal of the elected President.¹⁰⁴ Based on two centuries of actual experience with the Presidency, the dangers of partisan Congresses misusing a loose cannon (and impeachment on moral grounds was the loosest cannon around) were at hand and real,

100. See Victor Williams, *No Short Cut in Censure*, LEGAL TIMES, Sept. 21, 1998, at 32.

101. See T.R. Goldman, *Whose Side Are the Articles On? Parsing the Language of Impeachment*, LEGAL TIMES, Jan. 18, 1999, at 1.

102. U.S. CONST. art. II, § 4.

103. See Charles Tiefer, *The Short Arm of the Impeachment Clause*, LEGAL TIMES, June 8, 1998, at 21.

104. See Akhil Reed Amar, *If You Convict, You Must Evict*, LEGAL TIMES, Feb. 8, 1999, at 19.

while the asserted dangers of Presidents holding office after murder or child abuse were fanciful.

Censure was a proper alternative to the oddity of this impeachment.¹⁰⁵ It had some precedents, it was quite compatible with the constitutional structure,¹⁰⁶ and it fit well within the nature of the moral charges against the President, the views of the public, the views of the centrist Members of Congress, and even the President's own months of public apology.

The issue was not whether the President was above the law. For the previous decade, the intensity of special investigation of three Presidents had produced a new kind of national politics. From the perspective of presidential defenders, the over focus not on policy decisions but on scandal and personal attack had displaced the proper business of Washington with a diversionary spectacle for the media. At this final stage of action by Congress, it made eminent sense for the elected figures to accept the national consensus and end the matter without a trial. The country could appropriately anticipate that a trial would not only amount to a needless imposition, but would reduce, by delay and by partisan polarization, the possibility for Congress to achieve legislative progress on issues that mattered, like Social Security.¹⁰⁷

V. TRIAL CONDUCT

Much of the procedural dispute in the Clinton trial concerned just how much trial to have.¹⁰⁸ The House Managers sought a substantial amount of trial. Their position solidified into a desire for full opportunities not just to argue their case, but to present live witnesses.¹⁰⁹ On the other side, the President and the Senate Democrats sought less: to hasten the trial's end as most of the public desired.¹¹⁰ It was a somewhat novel debate in the history of impeachment; usually it is the defendants who argue that the case against them must be fully probed, and that instead

105. See David Cole, *What We Need Is an Ounce of Discretion*, LEGAL TIMES, Feb. 1, 1999, at 23.

106. See generally Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 33 (1999) (arguing that "censure . . . is plainly constitutional").

107. See Richard E. Cohen & Eliza Newlin Carney, *A Do-Little Congress?*, 31 NAT'L J. 394, 394 (1999).

108. See Helen Dewar, *Senate Democrats Seek an Early Vote on Articles*, WASH. POST, Jan. 21, 1999, at A1.

109. See T.R. Goldman, *Acquittal Autopsy*, LEGAL TIMES, Feb. 15, 1999, at 1 [hereinafter Goldman, *Acquittal Autopsy*].

110. See Bob Hohler, *Lewinsky Testimony Is Aired in Senate: Prosecution, Rebuttal in Sharp Contrast*, BOSTON GLOBE, Feb. 7, 1999, at A1.

of being railroaded out of office, fairness to them demands more trial time and more proceedings. But, there were echoes of the biggest procedural development in the history of Senate impeachment trials of judges, namely the Senate's 1935 adoption of a rule for a twelve-Senator committee to take testimony so as to reduce the amount of floor time taken up.¹¹¹ A challenge to that rule was rejected by the Supreme Court as a political question in *Nixon v. United States*.¹¹²

As the trial came to an end, each side floated alternative outcomes, nicknamed "exit" strategies.¹¹³ Republicans regarded Democratic proposals of censure as something weak that would just provide the minority with political cover, whereas Democrats regarded a Republican proposal of a "finding of fact" about presidential misconduct as improperly imposing punishment by a mere majority vote.¹¹⁴

A. From the Accusers' Perspective

From the accusers' perspective, President Clinton's Senate trial amounted to the fastest and briefest, if not excessively fast and brief, of appropriate proceedings to try an impeached President.¹¹⁵ The Constitution provides for the Senate to try impeachments,¹¹⁶ and both the Framers' expectations and the two centuries of experience since showed that this meant a serious proceeding. At a minimum, the House Managers deserved the opportunity to lay out the case before the Senators, to bring to life the extensive record developed by Independent Counsel Kenneth Starr.¹¹⁷

Moreover, the House Managers had every right to push to present their case fully¹¹⁸ and dramatically by witness testimony.¹¹⁹ The Presi-

111. See Richard M. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 878 (1999) (discussing Senate Rule XI); Ceci Connolly, *Impeached Ex-Judge Revisits History*, WASH. POST, Dec. 28, 1998, at A8.

112. 506 U.S. 224, 226 (1993).

113. See David Von Drehle, *For Senators, Exits Aren't Clearly Marked*, WASH. POST, Jan. 26, 1999, at A8.

114. See Doherty, *Another Way*, *supra* note 50, at 326, 329.

115. "The Clinton impeachment trial took only one month, and the entire impeachment proceedings against President Clinton are among the shortest in history . . ." Gerhardt, *Grand Inquests*, *supra* note 59, at 448.

116. See U.S. CONST. art. I, § 3, cl. 6.

117. See Turley, *Senators Prefer Politics*, *supra* note 9, at A27.

118. The kind of justifications supporting the Senate rule on taking testimony for judges' impeachments in committees simply did not apply as a reason to minimize the proceedings for Clinton's case. With 900 federal judges, one might not matter enough to take up excessive Senate floor time. There is only one President.

119. See William Schneider, *Behind the GOP Push for Witnesses*, 31 NAT'L J. 234, 234

dent's alleged obstruction and perjury only involved a very small cast of characters worthy of trial examination.¹²⁰ When the President's defenders said that a full trial could take four to six months, the accusers showed this as an empty scare tactic and proved the possibility of expedited yet fair proceedings.¹²¹

In the accusers' view, the Senate ultimately handled the trial with minimal procedures and breakneck speed. It confined floor time to presentations of argument, in which House Managers summarized a vast record economically and effectively, with the generous fairness of a full opportunity for response by the President's team.¹²² Depositions were but three in number, and short in duration.¹²³ The absence of live testimony on the floor was a severe handicap to the House Managers, one that they could deem unfair.¹²⁴ In any event, the whole trial ended in less than a month and a half,¹²⁵ far quicker than the scary projections of the President's defenders.¹²⁶

The President's accusers could argue that President Clinton, like President Nixon, stood accused of obstruction of justice, and, in President Clinton's case, also stood accused of perjury before a grand jury. Serious charges deserved at least that minimum of proceedings. President Clinton's high job-approval ratings coincided with extraordinarily low ratings for moral standards or honesty.¹²⁷ Having reviewed the evidence, the Senate could properly disdain censure, and either follow the innovative analysis of Professor Joseph Isenbergh and convict without removal,¹²⁸ or at least consider something similar to a "finding" that would vindicate the charges.

(1999).

120. See Stuart Taylor Jr., *The 'Agony' of Facing the Facts*, 31 NAT'L J. 8, 8-9 (1999); *Senate Nears Plan for Fast, Fair End to Impeachment Trial*, USA TODAY, Jan. 27, 1999, at 12A.

121. For example, in other cases, giving the defendant a long period, say 30 days, to respond to the charges with a formal answer proved unnecessary. The Senate gave President Clinton only a few days to file pleadings and memoranda, and his defense did not seem to suffer (although even hardened observers may sympathize with the lawyers burning the midnight oil to meet those deadlines).

122. See Roger Parloff, *Judging the Advocates*, LEGAL TIMES, Jan. 25, 1999, at 22; *Senate Nears Plan for Fast, Fair End to Impeachment Trial*, *supra* note 120, at 12A.

123. See *Senate Nears Plan for Fast, Fair End to Impeachment Trial*, *supra* note 120, at 12A.

124. See Goldman, *supra* note 109, at 1.

125. See *supra* note 116 and accompanying text.

126. See Judy Keen, *Clinton's Place in History Not All That's at Stake: Vote Could Affect Nation's Mood, Politics, and Economy*, USA TODAY, Dec. 18, 1998, at 17A.

127. See Craig Crawford, *Hotline Extra*, 31 NAT'L J. 502, 502 (1999).

128. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process* (last modified Dec. 31, 1998) <<http://www.law.uchicago.edu/Publications/Occasional>> (setting forth the argument for conviction without removal); Slusar, *supra* note 98, at 880 (discussing and

B. From the Defenders' Perspective

From the defenders' perspective, for no justifiable legal reason but only crass partisan bias, the Senate's far too lengthy and involved trial proceedings scarred the nation. Since the impossibility of a conviction stood clear from the first moment, every day of proceedings wasted a day and turned the public off more, familiarizing Washington with the term "scandal fatigue."¹²⁹ The accusers should have, and could have, satisfied any need for evidential development in the months from August to December of 1998, when the House Judiciary Committee had full powers and full resources to conduct discovery and to present witnesses publicly if that had been warranted. Prosecutors do not commence criminal trials and then first seek discovery to find out what their case is.¹³⁰ The Senate majority prolonged the proceedings, not from any showing of actual evidentiary needs, but from pressures from their ideological party base (potent in Republican primary politics) not to let their nemesis, the President, off the hook without making the trial itself a prolonged form of punishment.¹³¹

From the presidential defenders' perspective, when twenty-five Republicans joined the unanimous forty-five Democrats in voting against live Lewinsky testimony on the floor,¹³² they reflected public antagonism to the demeaning spectacle of testimony for scandal's sake without the prospect of needed new evidence. For ordinary legislation, the 100 Senators rarely convene together on the Senate floor simply to listen to presentations of arguments, debate, evidence, or anything like that.¹³³ The essence of the modern Senate way of trying impeachments, applicable as well to the Clinton case, consists of the 100 Senators giving up their normal all-important right to use their precious time to do committee or other business, and staying instead on the floor, but only

agreeing with Professor Isenbergh's position); Stuart Taylor Jr., *Why Conviction Does Not Require Removal*, 31 NAT'L J. 164, 165 (1999) (summarizing Professor Isenbergh's arguments in favor of censure).

129. See Carl M. Cannon, *So Very, Very Tired*, 31 NAT'L J. 318, 322 (1999) [hereinafter Cannon, *Very Tired*].

130. See T. R. Goldman, *Deposition Blues: How a Simple Trial Procedure Could Ensnare the Senate*, LEGAL TIMES, Jan. 25, 1999, at 1 [hereinafter Goldman, *Deposition Blues*].

131. For discussions attributing the trial to a political-cultural conflict by the Republican base against the rest of the country, see Joan Didion, *Uncovered Washington*, N.Y. REV. BOOKS, June 24, 1999, at 72; Gary Wasserman, *What Will History Say?*, LEGAL TIMES, Feb. 15, 1999, at 21.

132. *For the Record: Senate Votes*, 57 CONG. Q. WKLY. 339, 339 (1999) (setting forth the results of the vote on Monica Lewinsky testifying before the Senate).

133. Rather, the Senate leadership and a few Senators (e.g., majority and minority bill managers and the offerors of amendments) usually handle the floor proceedings until a vote occurs, when the rest of the Senators briefly pop in, chat, vote, and leave.

for specific activity, not just as a prop while House Managers get over-long presentation time, let alone for witnesses to go over known ground. For the Senators to have given this same collective attention to a much shorter set of arguments in the Clinton case, and ended the trial quickly, would have more than sufficed.

From the presidential defenders' perspective, dragging the matter out, by lengthy and redundant argument,¹³⁴ and by the late-stage extension for discovery,¹³⁵ went far beyond what Senate justice requires. It prolonged the institutionalized politics of demeaning personal denigration.¹³⁶ In the end, the judgment came down to the alleged weight of offenses at which the public as well as observers scoffed.¹³⁷ It is true that ending the case in under one and one half months was an improvement over the worst fears of a four to six month trial.¹³⁸ However, remarkably little came out in one and one half months that was not well known from the beginning, nor would floor testimony have helped. The public just tuned out the proceedings,¹³⁹ and the final vote of just forty-five for the perjury article, and fifty for obstruction, struck some observers as "a harsh referendum on [the House Managers'] performance."¹⁴⁰

Finally, presidential defenders would argue that the Senate did not properly consider either the notion of a "finding" by majority vote when the Constitution requires a two-thirds vote for conviction, or the notion of convicting without removal, a constitutional impossibility.¹⁴¹ They would say that the trial simply wasted weeks and months of the nation's political life on an unnecessary, divisive, alienating proceeding.

134. It might even be noted that the length of the House Managers' presentations was not their own first choice; it was what they were given when denied the right to call witnesses on the Senate floor. See Goldman, *Acquittal Autopsy*, *supra* note 109, at 1.

135. See Carney & Nitschke, *supra* note 41, at 140 (discussing deferring the issue of witnesses until after opening arguments).

136. See Carl M. Cannon, *Politics as Nightmare*, 31 NAT'L J. 388, 388 (1999).

137. See Jonathan Rauch, *Case Dismissed*, 31 NAT'L J. 167, 167 (1999).

138. See Gerhardt, *Grand Inquests*, *supra* note 59, at 448.

139. See Cannon, *Very Tired*, *supra* note 129, at 319.

140. Goldman, *Acquittal Autopsy*, *supra* note 109, at 1. So many factors go into a Senate vote that analysts from any perspective might hesitate to put the blame on anyone or anybody. The Senate vote constituted, first and foremost, a decision not to remove the President; and that judgment is one the House Managers may well have had no power to influence by any presentation, long or short, with or without witnesses.

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

VI. CONCLUSION

The reader may wonder why this analysis does not now give the "right answer" as to the above discussions: How should the Senate decide trial procedure issues; should it have either taken a non-trial alternative or (further) truncated the trial proceedings? But this Article, like its predecessors about the special investigations of the last decade's Presidents and the House impeachment, has a modest goal. My previous articles reviewed the last decade of especially intense presidential investigation as a new legal system, and taking the system as a reality of our times, these articles sought to recommend some limited procedures to improve the working of that system. For example, previous recommendations included no grand change in the independent counsel statute, but just (assuming its reenactment at some time) an orderly mechanism for *returning* investigations to the Justice Department, in whole or in part, after the independent counsel has a reasonable initial period to move them along, but before the patience limit of the public is exceeded as occurred both in 1992-93 (from the continuation of the Iran-Contra independent counsel) and in the late 1990s (from the continuation of the Whitewater independent counsel).¹⁴²

In that spirit, this Article has general recommendations for Senate impeachment procedure, not meant so much as a judgment on the Clinton trial, but more as to how to handle the next impeachment trial, which could be quite different. The 1999 proceeding showed that the Senate has gone far, procedurally, in a particular direction. In considering the impeachment of a President, the modern Senate will not sit as a passive body. However, the old model of the "passive Senate" may still work in some measure for impeaching judges. In such scenarios the Senate can let the trial procedure just happen to it, in some measure: the House decides the charges, the Managers and the defense lawyers decide the presentation of the case, and the party leaders mostly just care about fitting the trial into the legislative schedule. In this "passive Senate" model most of the Senators just attend, sit like a jury, and passively absorb the presentation of evidence before they render a verdict.¹⁴³ The less the Senators debate or participate during the trial the better because, like jurors who obey the admonition not to discuss the case, that lets them keep an open mind and an uncommitted position until all the evidence comes in.

142. See Tiefer, *Specially Investigated President*, *supra* note 1, at 195-98.

143. See GERHARDT, *IMPEACHMENT PROCESS*, *supra* note 6, at 33-35.

As the Clinton trial showed, while some elements of the “passive Senate” model occur even in a presidential impeachment, the two parties in the Senate approach a presidential impeachment far more actively than they do a judicial impeachment. Party leaders actively consider just how much partisanship their parties expect of them, expressed by proposals for trial procedure that can vary greatly on a spectrum from espousing alternatives that effectively avoid the trial altogether, to truncating the trial, to trying the President full time for anywhere from a month to half a year. The procedure for trying a President matters too much for the Senate just to let it happen because the whole country watches the trial in the media, and the Senators will not let anything that puts them in the media, so prominently and for so long, get structured at random or by others. The Senators will not devote themselves passively to attending presentations. They want to debate what they are doing publicly, bringing in their tentative or developing impressions of the broader issues. Senators will participate and debate and if not allowed to do this in the Senate, they will do it in informal party caucuses and media appearances at the end of each day’s trial.¹⁴⁴ At some point, the formal Senate sessions lose some of their meaning unless the Senators, in those sessions, do some of the debating and deciding that they most want to do.

A. *Formalized Bipartisan Steering*

The twentieth century bipartisan leadership system of the Senate constitutes one of the extraordinary developments of contemporary American government, albeit less visible than the expansion of the Presidency. Senate leadership authority differs from the formal authority structures of the executive and judicial branches, and even from the House of Representatives, where the Speaker of the House reigns and (to some extent) rules from an office cited in the Constitution,¹⁴⁵ and supported by two centuries of formal rules and precedents. The Senate’s majority and minority leader exercise authority largely conferred by informal custom and subtly operating parliamentary arrangements, with few formal aspects. Few Senate rules even mention the leaders. Senate leaders do not sit in the Chair, and unlike the House Rules Committee, they do not hold identifiable sessions together and discuss on the public

144. See Doherty, *Duty Trumps*, *supra* note 17, at 40, 41, 43 (providing examples of caucuses during the trial); Victor, *Trials of Trent Lott*, *supra* note 83, at 46 (giving examples of media appearances by Senators).

145. See U.S. CONST. art. I, § 2.

record the procedural arrangements they supervise. They simply have, by election of their party caucus, the position of leading their party and speaking for their party about the agenda-setting in the chamber.¹⁴⁶ That suffices to confer on the leaders, to degrees that vary from year to year, powerful statuses vis-à-vis the rest of the Senators, the House, the President, and the media.

In the 1999 Clinton trial, Senate Majority Leader Trent Lott and Minority Leader Tom Daschle performed their vital functions of steering the Senate without having formal rules or precedents.¹⁴⁷ Chief Justice Rehnquist understood well how the Senate works. Above all, he understood that while in a courtroom trial of President Clinton the judge would coordinate proceedings with the prosecuting and defense attorneys, in the Senate the bipartisan leadership arranges the schedule. And, the Senate found its way to holding informal caucuses, some by the political parties separately, some by the full body together, to resolve procedures outside the presentation sessions of the Senate trial itself.¹⁴⁸ However, this process of nesting a formal judge/lawyers/jurors trial inside an informal leaders/Senators legislative body, with no rules about the relationship of these levels of operation, had an improvised quality, particularly at the beginning.

This article's suggestion is simply for the Senate to adopt an impeachment trial rule that would create a "Steering Group" consisting of the Chief Justice, the Majority and Minority Leaders, and such additional Senators as the leaders designate. This group would convene as soon as the House adopts articles of impeachment, primarily to propose orders governing the proceedings for the trial, not inconsistent with the other impeachment trial rules, similar to the key orders of the Clinton trial. The group would not promulgate such orders itself, which sometimes occurred in the past by unanimous consent or motion. Instead, the proposal would create a formal body, and it would build this body around the leadership. The Chief Justice would have a flexible part, like a federal judge in planning a trial, participating to the extent he can help shape workable proceedings, but being silent or absent if the political content of the problems gives him no role.

Such a group might create ways for legitimate, empowered voices to represent the factional positions in the Senate "at the table." In a trial

146. See TIEFER, *supra* note 12, at 470, 473-75, 547-48.

147. For the best pieces on the Majority Leader and the impeachment trial, see Cohen & Victor, *supra* note 10, at 268; Victor, *Trials of Trent Lott*, *supra* note 83, at 46.

148. See Doherty, *Duty Trumps*, *supra* note 17, at 40, 41, 43 (discussing bipartisan and independent caucuses).

like President Clinton's, where a large group in the Republican conference sided strongly with the House Managers, the Majority Leader could designate for membership in the Steering Group someone who represented that faction. Much more importantly is how the Steering Group might handle a trial like that anticipated in the spring of 1974 for President Nixon, when a serious trial looked possible before "smoking gun" evidence made the outcome a certainty and compelled resignation. In such an uncertain-outcome trial, the party of the President splits between a faction strongly behind the President and a faction willing to consider the charges. In such a trial, the leader of the President's party could designate for membership in the Steering Group one or more Senators representative of one or more factions, so that procedural arrangements would accommodate the breadth of views in the chamber, rather than tending toward an unnegotiated polarization. Other positional constellations are also possible.

This way of negotiating procedure resembles how the Senate normally decides many matters: by a working group in which a few Senators take the lead in coalescing loose, shared viewpoints into organized blocs with spokespeople so that give and take can occur between the blocs as to procedures and details. During the hiatus between the House impeachment and the start of the Senate trial, like the period from December 19, 1998 to January 7, 1999,¹⁴⁹ or during breaks in the Senate trial, such a Steering Group would continue the planning and arranging. It might provide a formal place for some shared or special staff, giving them clearer authority and additional resources to work on the trial. In the 1999 trial, this function was served by the parties' secretaries, the leaders' counsels, the Senate Parliamentarian's Office, and the office of the Senate Legal Counsel.¹⁵⁰

The proposal is subject to various objections. One may ask what major need the Steering Group structure meets, since the two leaders and the Chief Justice made a fair go of it in 1999. A Steering Group structure may accomplish nothing, since it does not purport to resolve the power questions such as whether, and when, the majority party should just push through its own procedural approach by motion over minority party resistance. To the extent that it did accomplish some-

149. See *id.* at 40.

150. For background on the Senate Legal Counsel's office, see Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, LAW & CONTEMP. PROBS., Spring 1998, at 47, 48-50. The high confidence of the Senate about the Senate Legal Counsel's office's advice during the impeachment trial is described in Goldman, *Deposition Blues*, *supra* note 130, at 1.

thing, those who have formal legal roles in the trial—the Chief Justice, the House Managers, and the President’s lawyers—may consider a political Steering Group structure as diminishing (even further) their formal legal roles, and accentuating (even further) an unwelcome shift from the trial as a legal proceeding for the consideration of evidence and law, to the trial as a political process.

These objections have some merit; however, this Article depicts that presidential impeachments do not follow a “passive Senate” model. The Senate actively manages its procedural decisions. It will want to make them, the way it makes its regular procedural decisions, through a leadership-guided informal group bringing outlying factions to the table through designated spokespeople. That way lies order. If the leadership themselves consider such a system as giving them too large a role, or one with which they feel uncomfortable, they can designate other Senators to take their place. For example, if one of the leaders would likely run for President, or otherwise felt it necessary to remedy the visible existence of a strongly warm or strongly antagonistic relationship with an accused President, she might designate someone like the Chair or Ranking Minority Member of the Judiciary Committee to take her place in the Steering Group. The leader could then have a way of leaving trial procedure to the lawyers.

And to the extent that a Senate consensus does emerge for changing how the procedural decisions occur (e.g., increasing or decreasing the role of majority-voted motions either in general, or on some particular subject), the new arrangements could use the Steering Group as part of the changed procedural system. For example, existing Senate impeachment trial rules make it difficult to open the closed parts of the proceedings, such as the deliberation on the verdict. This Article has not hitherto, and does not now, analyze the closed-session issue. But, just to show the uses of the Steering Group, the Senate could change its rules to provide that a “privileged” motion to open such proceedings would require only a majority vote, with a motion being “privileged” if offered jointly by the party leaders on consultation with the Steering Group. That would provide a place for the closed-session issue and other media issues; in the “passive Senate” model, they have no formal place for consideration.

B. Senator Participation

The Senate trial needs to allow Senators some opportunities to leave their on-stage role of mostly silent listeners, in order to debate publicly and to act on interim issues (like procedure). With the Senate

actively managing its procedures, they have subjects to deal with. And otherwise, in a trial where the novelty runs out, the 100 Senators simply sit and listen, some of them bored from being uninvolved and even alienated from a sense that the process is being imposed upon them. Then, when the proceedings end each day, they open their eyes, and race to the television cameras and the informal caucuses to do what they really care about, which is presenting their individual positions and finding agreement or disagreement. Whether by rule or otherwise, at least some of the kinds of interim decisions about procedure that occurred off the Senate floor in 1999 ought to come back onto the floor. For example, the Senate should have an opportunity for publicly debatable (with limits) motions on non-trial alternatives like dismissal or censure. And, if motions occur to decide such procedural issues as whether to have discovery or whether to have live testimony, then the Senate should have an opportunity for debate (with limits) on these motions.

However, this is subject to serious objection. There is nothing wrong, and much right, with the view of some Senators that they should publicly suspend judgment as long as possible, until the evidence is in. Increasing the early motions and the procedural debates will create opportunities for Senators not to suspend judgment and instead to position themselves early. The change in format would make them less impartial and more active players. A critic of proposals for change might warn that since the most important aspect of a trial to remove the President is the credibility of the ultimate judgment, Senators trying to be (and to look) impartial build more credibility for that judgment than do visibly maneuvering players. It has been something of a point to mock the 1867 Johnson trial by citing the intense positions taken by many of the participants well in advance of the evidence.¹⁵¹

Again, the objection has some merit. Still, the 1999 trial teaches, as this Article shows, that presidential impeachment proceedings may occur after House impeachments for which no chance exists of a conviction. On such occasions, impeachment occurs not to decide upon removal, but as part of the national political-legal process of the specially investigated President. Like it or not, many Senators will not sit silently in this kind of impeachment proceeding. Moreover, from both the accusers' and the defenders' perspectives, as the process overshadows the outcome, the Senators who devote their time and attention to the matter should take part in the process and not just await the decreasingly significant outcome. In an impeachment where the facts and the outcome

151. See Walthall, *supra* note 6, at 275, 282-83.

matter less, and the debate on whether to keep going to the end matters more, the House Managers and the President's lawyers monopolize the on-stage time, and the Senators have too small of an on-stage role. The debates should occur more in the chamber, and less in the television studios.

A more controversial suggestion would create opportunities for minority factions of the Senate to affect procedures. Frankly, this suggestion, if taken too far, may please defenders of Presidents much more than accusers, but it need not go very far in order to accomplish some good. The Senate need not change the fundamental rule that although one-third plus one of the Senators can acquit, they cannot block the trial or take other dispositive steps.¹⁵² When the House votes to impeach, a majority in the Senate that wants some kind of trial, with a verdict of conviction or acquittal, would still have its way. But, just as current Senate procedure allows sixteen Senators, by petition, to bring a vote for cloture,¹⁵³ so the Senate could allow thirty-four Senators, by petition, to bring on various nondispositive procedural steps. For example, the Senate could allow thirty-four Senators, by petition, to trigger a process of a ceiling on live floor testimony (i.e., two major witnesses for each side or five trial days), with any other testimony heard pursuant to the procedure for a twelve-Senator committee to take testimony. In other words, a large Senate minority could get the testimony to go off the floor, and into committee. The Chief Justice might have the option to preside over some of the committee testimony, just as a federal judge may choose to preside at depositions when the stakes are high enough. Or, in another example, the Senate could allow a minority of Senators to force attention to legislative matters in addition to the trial. This could occur either by a petition mechanism or by the operation of a system in which it would take, for example, the same sixty votes now needed for cloture to extend impeachment trial floor time more than four hours each day.

Where, as for President Clinton, a majority of the House adopts articles of impeachment for serious crimes such as obstruction of justice and perjury, and the Senate majority party has some sympathy for the charges, a trial may have to occur. The Clinton trial constituted our first impeachment of a President for non-removal purposes, in the sense that, unlike the 1867 Johnson impeachment or the looming 1974 Nixon impeachment, this time the House impeached with effectively slim

152. See Doherty, *Senate's Uncertain Course*, *supra* note 23, at 3327.

153. See TIEFER, *supra* note 12, at 715 (citing Senate Rule XXII(2) (1979)).

chances that the Senate would convict and remove. Nothing in the text of the Constitution forbids such an impeachment, and I doubt there is a consensus that the Senate should not “try” such an impeachment at all. But, in such instances, the path to a procedural alternative that downgrades the trial might at least be marked and made procedurally easier. A conviction-proof Senate minority should have the right to push the proceedings down to an interim level, below a full-time, full-attention Senate floor trial, and yet well above the mere hearings of an inquiry on the President like the Iran-Contra,¹⁵⁴ Whitewater,¹⁵⁵ or 1996 campaign finance scandal hearings.¹⁵⁶

In some respects, such a procedure might resolve the tensions of the 1999 trial. The Senate would not be disregarding the House vote to impeach. It would try the President, more in committee than on the floor, and it would not turn away from the trial to focus on legislative business. If the trial changed public opinion and Senators’ minds, it could rise up to the level of consideration of conviction and removal. For example, even if thirty-four Senators vote to have the evidence taken in committee, should a smoking gun emerge, some of them could vote to convict. But, giving a conviction-proof minority the procedural right to downgrade the trial would respond to the loss of the taboo, previously effective for two centuries but now breached, that the House would not impeach except with some expectation of a Senate conviction. This proposal loosely corresponds to my proposal of a mechanism for the return of independent counsel investigations that last too long to the Justice Department.

After the decade of “scandal fatigue,” we need ways to respond when investigations and impeachments have not run their full course, but the public has fully run out of patience.¹⁵⁷ Without putting the President above the law by protecting him, the procedures for investigation and impeachment need to have options for downgrading those matters which, after early excitement that propels them awhile, look unlikely, ultimately, to produce a conviction. The options should reduce the drain on Congress and the country, and let regular political and legislative life

154. See Tiefer, *Specially Investigated President*, *supra* note 1, at 151-54.

155. See *id.* at 155-56.

156. See *id.* at 159-60.

157. Some could argue, though, the 1999 Senate trial showed that the Senate would respond to national “scandal fatigue” by shortening the trial. The Senate is more responsive than the independent counsel, who may continue his work for years in the face of a strong national desire to end a matter.

resume earlier and more easily. Giving a conviction-proof minority in the Senate the right to downgrade the trial would accomplish this.

In any event, as the analysis in my previous articles on specially investigating the President, and impeaching him, have illustrated, a new subject has come to the law: a new political-legal process that reorients the relationship of the branches of government, and the interaction between the system of criminal justice and the political process. By 1999, the media and the public seemed to understand this elusive new subject. In January and February 1999, the Senate worked through its own process and evinced its own understanding of the new situation. Our task as legal analysts is to catch up with this.