Book Reviews

THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH ABOUT "*HIGH CRIMES AND MISDEMEANORS*" AND THE CONSTITUTION'S IMPEACHMENT PROCESS

HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON. By Ann Coulter[1] Regnery Publishing, Inc. 1998. Pp. 358. $24.95.

Vikram David Amar[2]

On the first page of her bestselling book, *High Crimes and Misdemeanors*, Ann Coulter observes that political punditry and careful legal analysis are very different things. (p. 1) This insight—the truth of which has been driven home, painfully at times, to anyone with cable over the last few years—may seem unremarkable. But it does pose great difficulties for someone like me, steeped as I am in the legal academy, in reviewing her book. For *High Crimes and Misdemeanors* does not purport to be a thorough, analytic, balanced and rigorous treatment of the impeachment process, either in general or as applied to President Clinton. And it would be unfair for me to hold it to the standards of good academic scholarship.

On the other hand, good academic scholars should care about the things Ms. Coulter asserts in her book, for a few reasons. To begin with, the book sets out an interesting, though by no means uncontested, synthesis of the events surrounding vari-

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ous of President Clinton's legal/political problems. The facts she alleges and the evidence she adduces concerning matters outside the Starr Report—such as Whitewater, Filegate and the Travel Office episode—should perhaps be taken with a healthy dose of salt, especially given that Judge Starr and his office apparently have disagreed with Ms. Coulter as to the weight of the actual proof of wrongdoing. But Ms. Coulter's depiction of these affairs is interesting reading nonetheless, and helps paint a picture of President Clinton's personality that may help to explain—better than any legal niceties ever could—why so many persons, both within and without Congress, simply cannot abide Mr. Clinton.

The book's factual account of the Monica Lewinsky matter is better grounded, by references to grand jury and civil deposition testimony and other supporting documentation, and provides a good starting point for any discussion—on the Hill or in the ivory tower—about the impeachability of Mr. Clinton. For that reason alone, people really interested in factually unraveling the mess that has preoccupied Washington will find the book worth skimming. But perhaps more important than any of this, the more general arguments the book makes, about the nature of the impeachment process and its alternatives, both reflect and in turn help shape the perceptions held by the reading public and those in Congress. And because nearly everyone agrees that there is no (or virtually no) judicial review of the Presidential impeachment process, the impressions of Congresspersons and the public are the impressions that count. One could argue that in the long run the Constitution *always* means what the People who continue to make it the Supreme Law of the Land believe it to mean. Whether that statement is descriptively true about the entire Constitution or not, it is certainly true about the impeachment provisions, which are self-consciously styled as a hybrid of law and politics. Thus, what Ms. Coulter is saying in this book is constitutionally important merely because she has been saying it to so many and such impressionable people.

What she says about the facts of the Monica Lewinsky episode is, as I just suggested, within the mainstream of both Republican and larger American opinion. At bottom, she demonstrates that President Clinton had an extremely unseemly, inappropriate and unwise physical (I'll avoid the contested term "sexual" here) affair, and that he lied in order to cover it up, sometimes while he was under oath, and at other times looking the American people in the eye. I think Ms. Coulter is basically right about these facts. But when Ms. Coulter goes on to discuss

the constitutional backdrop against which these facts ought to be considered, her arguments are much weaker—even when judged by standards less rigorous than those employed in law reviews. Ironically, many of the failings of Ms. Coulter's description and analysis of the Constitution resemble in form the failings of Mr. Clinton's factual statements concerning the Lewinsky affair. That is, like the President she detests (and she makes no bones about detesting him), Ms. Coulter is often guilty of telling half-truths—statements that may be in some sense technically true but which are terribly misleading[3]—about the Constitution. In the balance of this short review, I shall explain and try to set the record straight as to some of the most important of these constitutional half-truths.

HALF-TRUTH #1: IMPEACHABLE CONDUCT NEED NOT BE CRIMINAL, AND MAY BE "PRIVATE" IN NATURE

Ms. Coulter quite correctly debunks the myth that the phrase "bribery, treason and other high crimes and misdemeanors" refers only to matters that would be considered criminally indictable in a federal or state court. Quick reference to history and common sense confirms this result. The impeachment of federal judges in the early 19th century for inability to perform job duties on account of senility or habitual drunkenness, as well as the extensive discussions on the relevance of the criminal law to impeachment undertaken in the Andrew Johnson impeachment proceedings, strongly refute the idea that conduct need violate some criminal statute in order to support impeachment and conviction. Instead, non-criminal conduct which renders a national official incapable or unwilling to faithfully discharge his public trust will support removal. And this has to be the case. Imagine a President who simply ran off on vacation for months at a time, even (or especially) during times of national crisis, phoning in once a week for messages.[4] Even though such irresponsible conduct runs afoul of no criminal statute, could a sen-

3. By this I do not mean to suggest that the President is guilty only of half-truths. Some of his statements, including some statements under oath, such as his statements that he couldn't recall being alone with Ms. Lewinsky, or that he couldn't recall any specific gifts she gave him or any specific conversations he had with her, can only be fairly characterized as outright lies.

4. A variant on this hypothetical, as well as other convincing hypotheticals, can be found in Charles Black, *Impeachment: A Handbook* 33-49 (Yale U. Press, 1974).

sible Constitution (and ours is nothing if not sensible) bind the country to four years of such (non)rule?

Ms. Coulter is also technically accurate when asserting that "private" misconduct can justify Presidential impeachment. Suppose a President committed murder or rape for purely private reasons. The fact that such misdeeds were committed by the President not in his capacity as President but rather in capacity as individual, and the fact that the victim was not the public fisc, surely does not mean the country is stuck with a murderer or rapist as President for his entire elected term.[5] Indeed, because I—along with people from Laurence Tribe to Robert Bork—believe that a sitting President is not criminally prosecutable while in office,[6] my view is that impeachment for the commission of abhorrent crimes like murder, which render the President absolutely unable to credibly lead, is the only way to remove.[7]

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5. Here I part company with the House Judiciary Committee Report in the Andrew Johnson impeachment affair, which concluded that "private" misconduct, even murder, might not be the basis for impeachment. See Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* 74-80 (W.W. Norton & Co., 1973). I also part company with some of the statements made by esteemed constitutional law scholars, such as Cass Sunstein, before the House Judiciary Committee investigating President Clinton, to the same effect.

6. The simplest way to see that federalism and separation of powers precludes prosecution of a sitting President is to ask, "who would be empowered to prosecute him?" A state prosecutor and grand jury, which represents only a small locality and its parochial disagreements with a President? (Imagine a South Carolina grand jury and district attorney having the power to indict and prosecute newly-elected President Abraham Lincoln in 1861). A United States Attorney, who is "inferior" and accountable to, as well as removable by, the President himself? Or an "independent" counsel, who answers to no one? Even assuming the Independent Counsel Act is constitutional as applied to the President (a question not addressed in *Morrison v. Olsen*, 487 U.S. 654 (1988)), actual prosecution of a sitting President raises even more constitutional problems than investigations and reports. To put the point another way, there is a big difference between a referral to Congress (which then has the power to act and the accountability to the entire People of the country when it does act) and a criminal prosecution itself. For a discussion of this issue, as well as other issues such as the practical question whether a convicted President could preside from prison, see Akhil Reed Amar and Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 Nexus J. Op. 11 (1997).

Nor is the question of presidential susceptibility to prosecution resolved by the Supreme Court's decision in the Paula Jones civil case. It goes without saying that criminal prosecution of the President threatens the ability of the executive branch to function much more than does the specter of civil litigation and liability. Moreover, Paula Jones had but one redress for her alleged injuries—civil litigation. Impeachment simply would not have solved Ms. Jones' problem. By contrast, where criminal misdeeds are alleged, the public—in whose name any criminal action would be brought—can vindicate its interests through the impeachment process.

7. As an aside, let me set the record straight on a non-truth Ms. Coulter asserts about the impeachability of Congresspersons. Notwithstanding her suggestions, (p. 265) House members and Senators are not "officers" within the meaning of the impeachment clauses of the Constitution and are thus not impeachable. Each member of the House and Senate can be expelled by two-thirds of his chamber. See U.S. Const., Art. I, § 5, cl.

So much for the "truth" part of the half-truth. It is where Ms. Coulter goes with these technically accurate points that I am disinclined to follow. Based on the constitutional principles discussed thus far, Ms. Coulter concludes that President Clinton's conduct *easily* qualifies as impeachable. If the only applicable constitutional principles were the ones she describes, I might agree with her. But they are not, and I do not. Let me be clear. I am not saying that the President's alleged misconduct relating to the Paula Jones and Monica Lewinsky matter did not ultimately satisfy the constitutional threshold of impeachability. I am saying that if it did, it did so barely, not easily.

The disagreement I have with Ms. Coulter here is not simply one of applying law (the Constitution) to alleged facts. Instead, I fault Ms. Coulter—and characterize her argument as misleadingly incomplete—for not laying out all of the law (the Constitution) itself. Remarkably, Ms. Coulter never carefully parses the provision in the Constitution that is most closely on point—Article II's statement that the President (and other civil officers) can be impeached, convicted and removed for "bribery, treason and other high crimes and misdemeanors." Ms. Coulter simply never analyzes, as a good lawyer must, what the text says.

To begin with, notice that the Constitution here refers to "*high*" crimes and misdemeanors, not just ordinary crimes—which are referred to elsewhere in the Constitution. What does "high" mean in this setting? Again, the text of the Constitution is instructive in its specification of "other" high crimes and misdemeanors—namely, bribery and treason. That the Constitution lists these two grave offenses as its only examples of "high" misconduct suggests that "high" really does mean serious indeed. So whether or not conduct has to be similar in *kind* to bribery and treason to be impeachable, it—as a matter of constitutional text—has to be similar in height, or gravity. Thus, although non-criminal and private misconduct can render a President impeachable, it must be *high* non-criminal and private misconduct. For this reason, Ms. Coulter's repeated assertion that the President's illicit and inappropriate affair with Ms. Lewinsky *by itself* would support (indeed would require) impeachment—even without any consideration of perjury or obstruction of justice—borders on the absurd.[8] A consensual yet stupid affair with a

2. See generally, Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?* 48 Stan. L. Rev. 113, 115-16 (1995).

8. She makes this assertion a number of times. (pp. 9, 258, 312)

somewhat unstable underling simply cannot be characterized as high misconduct of a gravity akin to bribery or treason.

Whether Mr. Clinton's public deceits and lies can be thought of in terms as serious as bribery and treason poses a more difficult question. But here, too, Ms. Coulter's analysis is clipped and doesn't present enough of the whole constitutional backdrop to enable a reader to evaluate her conclusions. Apart from the textual inferences described above, that backdrop consists of a structure and history of the Constitution (and of the state constitutions enacted between 1776 and 1787), all of which suggest that quintessential impeachable misdeeds are those which seriously corrupt or subvert the process of government itself and the country's faith in the fundamental integrity of its leadership. Bribery and treason have this corrosive effect. So would murder, by demonstrating utter contempt for the most deeply-held American values and beliefs. The ultimate question—both as a legal and as a political matter—is whether the offense is the kind of *high* misconduct that unfits a man to serve in the White House even though he was duly elected. How does Mr. Clinton fare under this standard? As I explain in a little further detail below, I think the answer depends on a number of things. My own view is that the obstruction of justice allegations were more serious in nature than the perjury allegations,[9] but that proof of obstruction has always been weaker than proof of lying. For now, let me just say that I find it hard to understand how Ms. Coulter cannot agonize over her view at all.

One other point bears mention in this context. To say that conduct need not be criminal to be impeachable does not mean that the criminal realm is *irrelevant* to impeachability. Consistent with her general tendency, Ms. Coulter recognizes part of, but not all of, the relevance of the criminal law. She correctly observes that serious crimes (like murder) will often (she says almost always) evince sufficient immorality to constitute "high crimes and misdemeanors." (p. 6) But she fails to mention to her readers that when certain criminal conduct is unlikely to be

9. I think obstruction—if it takes the form alleged in the Clinton episode—is a more serious corruption of government than is lying under oath. One reason is that corrupting others, such as Monica Lewinsky or Sidney Blumenthal, is more akin to bribery than is simple perjury, because obstruction on these facts involves more than one person. There is a legal as well as philosophical underpinning to this intuition. Legally, involving others in one's criminality has always been an aggravating circumstance. It is for this reason that the law punishes conspiracy independently from the underlying criminal acts agreed to. Philosophically, using other people for one's own corrupt ends seems to violate Kantian notions of respect and autonomy.

prosecuted criminally by federal and state prosecutors because it doesn't seem unusual and/or serious enough to warrant court and jail time, that fact *also* bears on the "height" of the misdeeds. If the vast majority of state and federal prosecutors would not find the alleged misconduct of Mr. Clinton, even if proven, to be serious enough to warrant criminal prosecution, that should count as a relevant (though not always dispositive) consideration that Ms. Coulter fails to ever adequately address.

HALF-TRUTH #2: PRESIDENT CLINTON'S PERJURY WAS IMPEACHABLE, BECAUSE PERJURY HAS HISTORICALLY BEEN CONSIDERED A SERIOUS CRIME AND BECAUSE FEDERAL JUDGES HAVE BEEN IMPEACHED, CONVICTED AND REMOVED BECAUSE OF PERJURY

This line of argument, which runs through Ms. Coulter's discussion, (p. 280) is less than fully accurate in a number of respects. For starters, it ignores the differences between the President and federal judges. Unlike judges, the President himself represents an entire branch of the Federal government; he and he alone sits atop and controls the entire executive branch. Unlike Article III, which vests federal judicial power in the Supreme and lower federal courts (which consist of hundreds of individuals), the Constitution—in Article II—vests the entirety of the executive power in a single person—the President. A related difference between federal judges (as well as the Vice President and cabinet members, for that matter) on the one hand, and the President on the other, is that the President alone enjoys a personal electoral mandate from the millions of citizens who voted for him. Undoing that mandate is a bigger deal for a democratic republic than is removing an unelected judge.[10] Also, since federal judges serve for life, impeachment and conviction is the only way to prevent years, perhaps decades, of continued officeholding. A President can, of course, always be removed electorally at the next election.[11] Finally, of relevance to the Clinton matter,

10. Some have argued that the Constitution's admonition that federal judges hold their offices during "good behaviour," see U.S. Const., Art. III, § 1, also distinguishes them from the President. As I read the history, however, the term "good behavior" was intended to mean "for life." See generally, Note, *Bribery and Other Not So "Good Behavior:" Criminal Prosecution as a Supplement to Impeachment of Federal Judges,* 94 Colum. L. Rev. 1617 (1994). For this reason, I am hesitant to conclude that the "good behaviour" clause means that federal judges can be impeached and removed for something less than "high crimes and misdemeanors."

11. If the President is serving his second full term, removal at the conclusion of that

judges are more closely associated in the public's mind with the integrity of judicial processes than are executive branch officials. For all these reasons, the same clause of the Constitution—Article I's "bribery, treason and other high crimes and misdemeanors"—can have a different meaning when applied to the President as opposed to federal judges.[12] And yet Ms. Coulter does not consider, let alone address, any of these things.

Even if one were to reject all of this, and conclude as a matter of impeachment (common) law that because perjury has been a basis for impeaching federal judges, it must also satisfy the high crimes and misdemeanors threshold as to the President, Ms. Coulter's analysis would still be so incomplete as to be misleading. Crucially, she writes (and many others talk) as if all conduct that constitutes "high crimes and misdemeanors" *MUST* be pursued by the House and the Senate. She speaks in terms of the public's and Congress' "obligation" to impeach, and "duty" to remove. (pp. 18-19) She never identifies the source of these obligations and duties—and for good reason; the Constitution simply does not embody them. Once again, the text of Article I (which Ms. Coulter never really analyzes) is instructive: "the House . . . shall have the sole *Power* of Impeachment"[13] and "[t]he Senate shall have the sole *Power* to try all Impeachments."[14] Thus, the Constitution speaks only of power, not of duty. Other Congressional powers conferred in the Constitution—such as the power to regulate interstate commerce, to borrow money, to create lower federal courts—are all understood to be discretionary; there is no textual or historical reason to think that the impeachment power alone does not include the discre-

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term is automatic under the Twenty-Second Amendment.

Obviously, there are differences between a President and federal judges that in some circumstances may make a President *more* worthy of impeachment. For example, a senile President with his finger on the button poses a more serious threat than any federal judge. And the fact that the President owes his job to the People makes his *lies to the American public*, whether under oath or not, more serious than similar lies by a federal judge. The big point here is not that Presidential impeachment standards are necessarily *higher* than those for federal judges; instead, the point is merely that the two settings involve different considerations, such that judicial impeachment precedent should have been of limited relevance in the Clinton episode.

12. My brother has invoked an analogy to the Senate's advice and consent function here. There is only one "advice and consent" clause, U.S. Const., Art. II, § 2, but that clause means something very different, constitutionally speaking, when it is applied to Cabinet members than when it is applied to Supreme Court Justices. See Akhil Reed Amar, *Trial and Tribulation*, New Republic 17 (Jan. 18, 1999).

13. U.S. Const., Art. I, § 2, cl. 5 (emphasis added).

14. U.S. Const., Art. I, § 3, cl. 6 (emphasis added).

tion not to exercise it to the hilt.[15] Thus, the House need not prosecute all high crimes and misdemeanors; and the Senate need not try all cases the House presses.[16]

All of this begs the question: how should Congress exercise the discretion that it enjoys in this context? I would suggest a few considerations that Congress should always keep in mind. First is the setting in which the alleged misconduct took place. Not all perjuries are alike. For example, suppose President Clinton were asked in the Paula Jones case deposition if he has always loved his wife during their marriage. (This question, argue Jones' lawyers, would go to the question of motive to seek extramarital sex.) And suppose further that, regardless of any objections he may have had available to him, he answered the question, and answered it with a "yes." He then walked out of the room, and confided to his new paramour that he had answered that way only to spare Mrs. Clinton's feelings—that he hadn't loved her for some time, but that he didn't want to further embarrass her. Would this be perjury? Quite possibly. Would it thus be a "high crime or misdemeanor?" Maybe not. Would it be worthy of impeachment? Certainly not. Context is key.[17] And although Presidential supporters oversimplify when they argue that the whole impeachment charge was about sex (surely lies under oath and to the American people are matters of public concern), we ought never to forget the factual context in which the President's deceitful conduct occurred.[18]

The second consideration that ought to inform the House and Senate is the public interest. Grand juries and prosecutors (the House), as well as judges and petit juries (the Senate) are all

15. Where Article I commands Congress or either House to *do* something in particular, the Constitution's words are clear. See, e.g., U.S. Const., Art. I, § 2, clause 5 ("[t]he House of Representatives shall chuse their Speaker and other Officers"); § 3, clause 5 ("[t]he Senate shall chuse their other Officers, and also a President pro tempore"); § 4, clause 2 ("[t]he Congress shall assemble at least once in every Year"); § 5, clause 3 ("[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same.")

16. In a similar vein, in the criminal setting, grand juries and prosecutors enjoy discretion not to indict, and petit juries enjoy discretion not to convict when to do so would create injustice.

17. You could play the same game with other crimes. If President Clinton assaulted Trent Lott to force him to vote in favor of legislation pushed by the President, this assault would be much more impeachment-worthy than a punch in the nose thrown by the President in response to a wisecrack someone made about Chelsea as the first family was walking down the street. Just as all assaults are not equally serious, so too with lies, even lies under oath.

18. This, of course, is one of the features that distinguishes the recently concluded impeachment episode from Watergate and President Nixon's misconduct.

supposed to discharge their duties consistent with the public interest, and yet the aspect of the whole impeachment that has been most intriguing is the way in which the informed and expressed will of the American people was almost explicitly ignored by Congress. Now I am certainly not suggesting that good leadership in Congress requires that the House and Senate always heed the latest overnight poll. But when a supermajority of the People of the United States—who ordained, established and perpetuate the Constitution itself—are informed (as they surely have been) of the facts, and then repeatedly express the opinion that the President's alleged misconduct does not warrant a change of leadership, it is hard to understand why this doesn't count.[19] What better way to ascertain the public interest than to listen to the informed and repeated views of the public itself.

There has been one other constitutional change since 1787 that makes the People's desire to retain the President worthy of more respect, and that is the decline in the independence of the electoral college. Like the Senate, the Presidency is a much more populist institution today than it was under the original Constitution; as a result, displacing a President whom the People favor today is undoing the People's choice in a very direct way, and requires taking that choice by the People into account.

I think the situation is somewhat different where the People are clamoring for removal rather than retention. In that kind of case, about which the framers did express concern, I think the will of the People, while still relevant, should count for less, and there is more room for independent Congressional judgment. Thus, in the end, I think Congress and the American people must each be of the view that removal is warranted before Presidential impeachment should go forward; if either thinks removal is too hasty, the status quo of retention is and ought to be preserved. Why do I view the constitutional role of the People in

19. In this vein, it bears noting that the framers specifically rested impeachment in Congress (rather than the Supreme Court) to ensure some accountability. And the inclusion of the House in the process—which is the one aspect of the plan that never changed from the beginning of the Convention—seems intended to make sure that some body close to the People would be involved. (Indeed, in describing the House's role in the impeachment process in Federalist 65, Alexander Hamilton refers to the House as the "representatives of the people, [the] accusers." Federalist 65 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers*, 396, 398 (Mentor, 1961).) And after the Seventeenth Amendment, which brought the Senate closer to the People by providing for direct election of Senators, even the Senate sitting as a court of impeachment should take serious account of the People's wishes. See generally, Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1389-1405 (1996).

these asymmetrical terms—counting more in one direction than the other? Begin with the distinction drawn in the Constitutional text between Congressional duty and power. Congress has the duty to refuse impeachment for anything less than "high crimes and misdemeanors," whereas once that threshold is cleared, the Constitution imposes no obligation to do anything. Obligatory duties, unlike discretionary powers, one might argue, require independent assessment. Beyond that, my asymmetrical intuition in favor of independent interpretation and Presidential retention flows from the essentially conservative nature of the impeachment provisions in the Constitution generally.

Consider first the involvement of BOTH houses of Congress. That structure means that an overwhelming majority of members of Congress (435 house members and 66 Senators, or 501 total) could favor impeachment and removal, but the will of a mere 34 Senators would carry the day. That's a conservative design—in the same way that other federal processes are conservatively designed. Take legislation, where each of the four federal institutions in essence has a one-branch veto. If the House kills a bill, it's dead. If the Senate kills it, it's dead. If the President vetoes it or declines to enforce it, it is meaningless. And if courts find it unlawful, it cannot be enforced. Alexander Hamilton explained this bias in favor of the status quo in Federalist # 73 in terms of error costs: "to keep things in the same state in which they happen to be at any given period [is] much more likely to do good than harm . . . The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones."[20] I think the same rationale informs the structure of Presidential impeachment provisions.

Consider too in this regard another federal process, and one which is often analogized to impeachment—criminal prosecution. In any criminal case, all 23 grand jurors and 11 of 12 petit jurors could vote to convict, and yet a single petit juror can preserve the status quo. No one doubts that each institution and individual in that process should independently agree on culpability before there is a conviction, even though leniency in deference to community sentiment is perfectly appropriate.

Indeed, the impeachment process in at least one way seems to privilege the status quo even more than does the criminal process. Recall the 2/3 supermajority requirement in Senate im-

20. Federalist 73 (Hamilton) at 441 (cited in note 19).

peachment. Ordinarily, in a civil or criminal jury setting, when fewer than the requisite supermajority agree on a result either way, we say there has been a hung jury. But in impeachment, when fewer than 67 Senators vote to convict, we say the impeached person is acquitted—even though 67 did not vote against conviction. This has been true from the beginning of the Republic all the way through William Rehnquist's pronouncement that Bill Clinton was acquitted. It takes 67 to convict, but only 34 to acquit. That's asymmetry.

This constitutional preference for the status quo depends, of course, on the legitimacy of the status quo to begin with. I think Presidents who prevail in honest elections have always had a strong claim to legitimacy under our Constitution—Presidential elections have always been big things (and here I would draw a distinction between Clinton and Andrew Johnson, who was never elected President, and even between Clinton and Richard Nixon, whose electoral victory was tainted by alleged campaign improprieties). And that claim to legitimacy has only grown stronger as the role of the People in directly electing their President has itself grown, in ways mentioned above.

HALF-TRUTH #3: IMPEACHMENT IS AN APPROPRIATE REMEDY FOR GROSS (NO PUN INTENDED) PRESIDENTIAL MISCONDUCT

Once again, this argument may be accurate as far as it goes, but it doesn't go far enough. In particular, it suggests that an appropriate remedy—impeachment—is *the only* appropriate remedy. And that is simply not the case. Ms. Coulter makes only passing (and derogatory) mention of censure or findings of fact or other non-removal alternatives, (p. 287) but any account of the Clinton fiasco that aspires to anything resembling comprehensiveness must discuss this very important topic.

A few things are constitutionally clear. When a President is impeached by the House and *convicted* by two-thirds of the Senate, removal from office is automatic, and disqualification from future office-holding is within the discretion of the Senate.[21] But

21. One law professor has recently taken issue with this conventional wisdom. In "Impeachment and Presidential Immunity from Judicial Process," Occasional Paper # 39, University of Chicago Law School, Professor Joseph Isenbergh argues that the standard of "high crimes and misdemeanors" is not the only standard that governs impeachments, and that Congress has the power to impeach and convict a President for lesser misdeeds, in which case it has the power, but not the obligation, to remove him. Although this is not the place to explain all the reasons I disagree with Professor Isenbergh's position, let

nothing in the Constitution says that a Congress that starts down the impeachment path cannot explore other avenues as well. The power to impeach implies, at the very least, the power to make known the conditions under which impeachment is more or less likely. Thus, Congress could always have legitimately decided the President has committed certain reprehensible acts for which he must be accountable and then informed the President—either formally or informally—that an apology and demonstration of personal monetary sacrifice by him would have restored public faith in the administration such that he would have remained fit for office and thus unimpeachable. The President could then have determined for himself whether the conditional grant of impeachment immunity was acceptable. If so, impeachment proceedings could have ended; if not, they could have continued.

Such a deal, while not judicially enforceable, would not have been unconstitutional. It would not necessarily have been a forbidden "Bill of Attainder" as some have suggested.[22] Bills

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me just observe here that under his reading of the relevant constitutional text, a President could be impeached, convicted and (if Congress felt like it) removed from office by a majority of the House and two-thirds of the Senate for vetoing an important piece of legislation, whereas overriding the veto itself would require MORE in the way of process, that is, a two-thirds majority of both houses. Enough said.

22. A mere Congressional or one-house censure of the President, without a Congressional request or requirement of apology or monetary sacrifice, would to my mind not be a bill of attainder, even without President assent. The reason for this is simple: censure alone likely does not "punish" in a legally cognizable way. This is suggested by *Paul v. Davis*, 424 U.S. 693, 713-14 (1976), where the Court held there was no protected interest/cognizable injury for purposes of a procedural Due Process claim when police distributed to local merchants a flyer identifying plaintiff as a "known active shoplifter" notwithstanding the effect such circulation had on his reputation. Like procedural Due Process, Bill of Attainder jurisprudence focuses not on whether government can inflict injury on an individual, but rather on the process government goes through before inflicting the injury. For that reason, *Paul* is relevant, though not controlling, precedent for Congressional censure of President Clinton. Such a permissible censure could take the form of separate resolutions by the House and Senate, or a concurrent resolution not subject to Presidential presentment.

Nor is Presidential censure problematic because the Constitution makes no explicit mention of any such congressional power. The Senate's sole power to try all impeachments (and/or the House's sole power to initiate impeachments) would provide the requisite enumerated authority. Judges often make findings of fact even when they ultimately conclude that the law affords the plaintiff no relief. And just as judges or juries (which may be polled) can explain their results, so too the Senate (or the House, for that matter, acting as a grand jury) can explain what it did and did not conclude. In short, there is simply no requirement that courts—or the Senate as a court—rule on the ultimate question of guilt or innocence without making or before making any findings of fact and sentiment.

Two final points: (1) Although there may be sound prudential reasons for waiting until after the Senate impeachment Court is dismissed before introducing any motion of censure (to avoid confusion about the actual impeachment vote and to avoid any ques-

of Attainder are person-specific laws enacted by a legislature to punish individuals. A conditional grant of impeachment immunity would be person-specific, but because of the context and the President's assent it would be lenient rather than punitive. Consider the following analogy: Legislation that provided "Vik Amar shall be deported for violating immigration laws" would be a Bill of Attainder. But legislation that provided "Vik Amar, who has violated immigration laws, shall not be subject to deportation" would not be an attainder, because it would be merciful rather than punitive. So too, legislation that provided "Vik Amar, who has violated immigration laws, shall not be subject to deportation *provided* he promises not to violate immigration laws in the future" would not be a prohibited Bill of Attainder. So long as Congress believes that a President may—if he does not accept the conditional amnesty—be subject to Congressional prosecution and removal, a Congressional offer would be an exercise of mercy, rather than punishment, when compared to the harsher alternative of possible conviction and removal.[23]

To put my point another way, the Constitution does not deprive Congress of powers that prosecutors traditionally enjoy—to use prosecutorial discretion to plea bargain in those situations where a defendant can still take actions that may make him unworthy of the greater sanction.[24] Indeed, reading the Constitution, as many have done, so as to force Congress into an all-or-nothing situation may lead to situations in which Congress, the President and the People all agree something other than removal is in the public interest and yet Congress will have to remove to avoid doing nothing at all. Such unnecessary and unwise removals of Presidents could in the long run undermine the power of

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tions about res judicata implications for later civil or criminal litigation), such concerns do not rise to the level of constitutional constraints; and (2) Whether the findings are styled as a censure or findings of fact would seem to be no constitutional moment. How specifically the Senate (or the House, for that matter) wants to be in its factual determinations and condemnations are matters of politics, not constitutional law.

23. If Congress did not believe the President had committed impeachable deeds in the first place, or has already acquitted him in an impeachment trial, of course the situation is different. In that case, any "deal" requiring the President to do anything would be problematic, because Congress would not have authority to take any coercive action against the President if he did not comply. Of course, as noted above, see note 22, the Congress—or each house—could still issue findings of fact and/or censure.

24. Nor does the fact that the Constitution does not mention any other offense besides impeachable high crimes and misdemeanors destroy the plea bargain analogy. Imagine a child charged with the lowest crime in the statute books—candy shoplifting. A prosecutor (or judge) could dismiss the charge before trial on the condition that the child steer clear of the complainant store, even though no "lesser" offense is pleaded to.

the Presidency and the balance of powers people who adopt the all-or-nothing reading of the Constitution purport to care about.

Congress could—if it wanted—even go beyond impeachment immunity, and insulate the President from federal (but not state) criminal liability after he leaves office.[25] Just because Presidents enjoy the power to pardon federal criminals does not mean that Congress lacks a similar power, provided exercise of the power furthers legitimate Congressional objectives.[26]

Perhaps many of Ms. Coulter's constitutional half-truths are explained by something she says over and over—that impeachment is, and "was supposed to be" partisan.[27] To the extent that Ms. Coulter means that the process ideally *should* be partisan (and not just that people might *suppose* that the process would devolve into partisanship), I guess I disagree. To be sure, the process is and was intended to be "political"—in that the ultimate question of impeachment worthiness is fitness to lead the country and the free world politically. But politics and partisanship are not quite the same thing in this context. (p. 12) I thought that the two-thirds requirement for conviction in the Senate, and the Andrew Johnson and Richard Nixon impeachment episodes earlier in American history made clear that impeachment of a sitting President in which few of the people who are of the President's party were in favor of ousting him runs afoul of our deepest constitutional and democratic ideals. But sometimes lessons must be relearned in succeeding generations.[28] Understanding and teaching these is one of the primary missions of the legal academy. And if we can get some help from the political punditry, we'll gladly take it.

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25. Although the matter is not entirely free from difficulty, such immunity would not, I believe, be a forbidden "emolument" under Article II, because it would be prospective and speculative (given that criminal liability is not yet affixed).

26. One obvious Congressional objective jumps to mind—making it easier for the President to execute the laws during the balance of his tenure, without being preoccupied with jail-time after leaving. Remember, the necessary and proper clause of Article I gives Congress the power to make laws to effectuate not just its powers, but the President's and the federal courts' powers as well.

27. See p. 19. ("It's *supposed* to be partisan.")(emphasis in original). But see p. 12 ("When Hamilton described impeachable offenses as 'political,' he did not mean partisan.")

28. In addition to reinforcing the lesson, which should have been internalized after Andrew Johnson, that impeachment of a President has to be bipartisan to be worthwhile, the Clinton affair may teach a second, related, lesson: Presidential impeachment is illegitimate and irresponsible when few of the citizens who voted in favor of the President and gave him the Presidency conclude, after learning the facts, that they want to change leadership.