Articles

THE DAY AFTER: DO WE NEED A "TWENTY-EIGHTH AMENDMENT?"

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Having decided on a fixed term presidency and quadrennial electoral assessment of a president's performance, and having all but abandoned the parliamentary model of a "president" beholden to Congress for his power, the framers of our Constitution decided to hedge their bets. They provided that the president (as well as other officers) could be removed by the Congress, but only through the extreme measure of impeachment. Only two presidents have ever been impeached, and none has been convicted and removed from office. In fact, only seventeen persons have been impeached in the 210 years of government under the Constitution: two presidents, one Supreme Court justice, one cabinet member, one senator (whom the Senate refused to try), and twelve lower federal court judges. In the twentieth century, prior to the impeachment of President Clinton, only judges have been impeached (although President Nixon would almost certainly have been impeached had he not resigned).[1]

Notwithstanding the ambiguity of the constitutional impeachment standard of "treason, bribery, or other high crimes and misdemeanors,"[2] it is now generally accepted that a president should be impeached only if he or she has engaged in conduct that constitutes substantial misconduct in office, akin to what the 1974 House Judiciary Committee Task Force later

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1. See generally Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Princeton U. Press, 1996).
2. Id. at 1-21.

termed a serious "constitutional wrong."[3] Andrew Johnson clearly and knowingly refused to comply with an act of Congress (albeit a politically inspired one later held to be unconstitutional[4]), Richard Nixon was accused of obstructing justice, and Bill Clinton was accused of both that offense and of committing perjury before a grand jury. Other presidents have engaged in activities of dubious legal or constitutional validity (e.g., FDR's Lend Lease policies to aid Britain, JFK's Bay of Pigs invasion, and the Reagan-Bush Iran-Contra affair), but were never seriously threatened with impeachment. Thus it may be said that impeachment of a president is the unpredictable product of perceived misconduct and political opportunity.

When the Supreme Court ordered the release of the Watergate tapes in 1974, there was widespread and ultimately bipartisan agreement that Nixon's behavior constituted an impeachable offense. Debate about President Clinton's behavior, however, revealed no similar consensus. Indeed, Clinton was impeached by a slim, partisan majority contrary to the overwhelming judgment of the American people who, while condemning his inappropriate behavior, wanted him to remain in office for the duration of his term. Despite these differences, however, the proximity of the Nixon and Clinton cases suggest that we are entering a new era in which impeachment may not be limited to extraordinary abuses of presidential power or serious threats to governmental legitimacy, but may extend to executive actions that are merely offensive or improper.

President Clinton's impeachment and subsequent trial before the Senate have revealed worrisome ambiguities in the Constitution's impeachment provisions, and have created understandable concerns about the absence of any formal check on potential congressional abuse of the impeachment process. These concerns may have been alleviated somewhat by Clinton's acquittal in the Senate, but they have certainly not been put to rest. This is particularly true since the Supreme Court has all but decided that it will not resolve such ambiguities or provide such a check. In the Court's view, impeachment is a nonjusticiable "political question" that is not reviewable because it is commit-

3. See *The Impeachment Report: A Guide to Congressional Proceedings in the Case of Richard M. Nixon, President of the United States* (New American Library, 1974).

4. *Myers v. United States*, 272 U.S. 52 (1926).

ted by the Constitution to the sole discretion of a coordinate branch.[5]

It is thus likely that every time a president is subjected to impeachment these same constitutional issues will be debated again and again, without much hope of increasing coherence or resolution. Self-imposed congressional restraints may regress into license, the concept of the fixed-term presidency will be further eroded, and governmental stability fostered by the separation of powers principle will be endangered. How long will it be before the next Republican presidential foible ignites an impeachment inquiry by spiteful Democrats seeking revenge? Impeachment of the president, an extraordinary remedy designed to condemn offenses that *truly* threaten the fabric of our governmental system, will continue to lose integrity and moral force as it becomes merely a mainstream strategy for partisan attack—a forum for the "legalization of political disputes" rather than an ultimate sanction reserved for misconduct that cannot be resolved by the political and/or electoral process.

The day after he took office on August 9, 1974, President Gerald Ford sought to reassure the nation by declaring that "the Constitution works." In light of the Clinton impeachment crisis, no such assurance is possible today. Even though the president was acquitted and the nation may have been spared the most drastic consequences of impeachment confusion, we are convinced that the impeachment process no longer "works."

It is thus appropriate and important, now that the Clinton matter has been concluded—but before a similar crisis occurs again—for the nation and the Congress to consider the implications of, and attempt to reverse, impeachment's downward course. The nation must contemplate seriously what impeachment should be: who can and should be impeached? for what reasons? and by what processes? Whether or not there should be an ultimate judicial check is also a question that merits further thought. We seek to encourage this debate by formulating for discussion a draft constitutional amendment that articulates our thoughts on how impeachment should work in the twenty-first century.

We recognize, of course, that a constitutional amendment cannot by itself correct all the problems of the political system, whose roots lie deep in our evolving and increasingly diverse,

5. *Nixon v. United States*, 506 U.S. 224, 228 (1993).

fractious, and partisan political culture. No artificial separation between the Constitution and politics is possible—or desirable. But clear constitutional language helps to structure political action, while at the same time contributing to its legitimacy. Thus debate over this proposed amendment is an appropriate way to stimulate a thoughtful and objective reconsideration of the impeachment process.

Existing provisions for impeachment are spread throughout Articles I, II, and III of the Constitution. To enhance coherence we believe that all impeachment provisions should be combined in a single location. Thus, our proposed amendment includes some existing constitutional provisions and language that we would retain, as well as suggested clarifications, new language, and substantive changes.

The major goal of the "28th Amendment" would be to ensure that impeachment of a *president* remains a rare occurrence, limited to those occasions when he or she has significantly abused the powers or threatened the integrity of the office. Impeachment should not be utilized merely to rebuke a president for inappropriate behavior or, even worse, to settle partisan accounts. It should reflect a widespread and bipartisan consensus that removal is absolutely necessary for the good of the nation. Section 1 thus replaces the constitutional words "high crimes and misdemeanors," which are ambiguous, confusing, and the subject of much controversy, with a more detailed specification of offenses. It makes clear that a criminal offense, depending on its character and severity, *may* warrant impeachment and removal, but that an impeachable offense need not be criminal in nature. For example, if the president were to move to Paris and attempt to conduct the business of government by email and fax, that would surely be grounds for impeachment. A president's refusal to conduct a war declared by Congress, or to fulfill some other significant constitutional duty such as refusing to make any executive or judicial appointments, or refusing to inform Congress of the "state of the union," would also be impeachable (particularly if attempts at political and/or judicial resolution were unavailing). This is not to say, of course, that such alleged actions would or should actually result in impeachment and conviction in a particular case, only that they are examples of a constitutionally appropriate basis for congressional action.

Section 2 repeats the constitutional language assigning sole responsibility for impeachment to the House of Representatives. However we have converted the Senate's "sole power to try im-

peachments" to an "exclusive right to try impeachments" in order to emphasize that while only the Senate can try articles of impeachment voted by the House, it is (or should be) under no constitutional obligation to do so. Section 2 also raises the barrier for conviction slightly by requiring a two-thirds vote of the entire Senate for conviction, rather than merely two-thirds of the senators present. Although in practice there may not be much difference between the two standards, requiring an absolute two-thirds majority may help to ensure greater bipartisanship and legitimacy, and also to further strengthen the recognition that impeachment and trial of a president is a matter of the utmost gravity.

In the spirit of open discussion to which our proposal is directed we identify an additional change that we considered but did *not* include in our proposed amendment: requiring that a House vote to impeach a president receive the approval of a majority of the members of *each political party*, and similarly, that a Senate vote to convict and remove a president receive the approval of two-thirds of the members of each party. Such a rule would insure a bipartisan basis for impeachments and removals—a threshold that seems desirable. We did not include it because parties, to say nothing of the two party system, are not otherwise mentioned in the Constitution. To constitutionalize them in this way might have ramifications not otherwise desirable.

Section 2 also partially endorses the decision of the Supreme Court in *Nixon v. United States*[6] which upheld the right of the Senate to use a summary committee procedure in trying impeachment charges against a federal judge (or, arguably, other constitutional officers). We believe, however, that such expedients, although cost-effective and efficient, are inappropriate when a president is tried, and they would be prohibited. Finally, we include in Section 2 the requirement that articles of impeachment passed by the House be tried by the Senate during the same session of Congress, and that the impeachment process be disabled after a general election until a new Congress is convened, thus eliminating the possibility that lame-duck representatives or senators could vote on impeachment matters.[7]

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6. Id.

7. We thus eliminate the problem described in Bruce Ackerman, *The Case Against Lame Duck Impeachment* (Seven Stories Press, 1999).

Section 3 confirms what already exists in tradition if not in constitutional language: that removal from office (of *any* impeached officer) is automatic upon conviction by the Senate, but that disqualification from holding future federal office requires an additional vote by the Senate.[8] This is now routinely done by majority vote; we would require a two-thirds vote. Section 3 also constitutionalizes the majority (but by no means universal) consensus that the *president* is not subject to criminal charges while in office. This common sense view is based both on clear constitutional inferences and on the self-evident proposition that there is only one president, whose presence and undivided attention are needed to run the government properly.[9] For obvious reasons we would not extend this immunity to the vice-president, cabinet members, or federal judges. Indeed, such a distinction already exists in practice. Judges impeached and removed in the twentieth century have been routinely convicted (although in one case, acquitted) of criminal acts *prior* to impeachment proceedings.

Our proposed ban on civil actions against a president (for essentially the same reasons as barring criminal actions against him) would reverse the Supreme Court's myopic decision in *Clinton v. Jones*[10] by extending to him or her, while in office, temporary immunity from such litigation. At the same time we would give Congress the power formally (which some believe it has anyway) to extend the statutes of limitations in both state and federal courts to ensure that a wrongdoing president cannot escape ultimate personal responsibility for his actions. Section 3 also confers on Congress the power (which it almost certainly has now, at least with respect to federal prosecutions and suits in the federal courts) to completely and permanently immunize the president from civil suits and/or criminal charges in both state and federal courts if such action appears to be necessary to facilitate a face-saving resignation or a resolution of charges short of actual impeachment and conviction.

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8. Indeed, after being acquitted in a federal trial, then impeached and convicted and removed from office for engaging in a conspiracy to commit a bribe, Judge Alcee L. Hastings was eventually elected to the House of Representatives by his Florida constituents.

9. As Justice Jackson clearly recognized in the *Steel Seizure* case, "[i]n drama, magnitude, and finality [the president's] decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 653 (1952), (Jackson, J., concurring).

10. *Clinton v. Jones*, 117 S. Ct. 1636 (1997).

Section 4 confers on Congress the explicit power to censure presidential actions by means other than impeachment when that seems warranted. Acknowledging that Congress has a range of options below the level of impeachment in dealing with alleged presidential misconduct would help to ensure that impeachment is reserved for only the most serious abuses of presidential power. Section 4 also specifically gives Congress the power to deal with *judicial* disability or misconduct below the Supreme Court level by separating the "good behaviour" clause of Article III, Section 1 from impeachment proceedings. (*Presidential* disability is, of course, addressed by the 25th Amendment.) Congress could then provide, for example, for the removal of disabled or "non-performing judges," or for the immediate suspension of any federal judge convicted of a felony in a federal court, and automatic removal from office when all appeals of that conviction have been exhausted. This would unburden the impeachment process considerably. Maintaining the integrity of the federal bench ought not to depend on the vicissitudes of impeachment. Virtually all states have similar provisions in the their laws and constitutions. This would not threaten judicial independence, properly understood; and it would further emphasize that the impeachment remedy must be tailored to the role and function of the officials to whom it applies.

Section 5 closes a constitutional loophole by making clear that a president may not pardon himself from federal criminal liability. The pardon power already excludes impeachments, but the Constitution does not specifically prohibit self-pardons for criminal actions, although none has ever been issued. President Clinton announced during the impeachment proceedings that he would not, in any case, take such action.[11] And President Nixon never acted on the advice of his lawyers that he could do so.[12] Nevertheless it seems prudential to specifically prohibit self-pardons which, if they were ever issued, might cause a serious crisis of political legitimacy. A presidential self-pardon would simply add fuel to a fire that never should have been ignited in the first place.

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11. White House lawyer Charles Ruff assured the House Judiciary Committee on December 10, 1998, that President Clinton would neither pardon himself nor accept a pardon from his successor. See also Brian Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779 (1996).

12. Bob Woodward and Carl Bernstein, *The Final Days* 357 (Simon and Schuster, 1976).

Section 6 addresses a particularly difficult and vexing issue—whether impeachment by the House of Representatives and/or conviction by the Senate may be reviewed by the Supreme Court. In the case involving federal judge Walter Nixon, the Court appeared to hold that the Constitution did not permit such judicial intervention.[13] Although the majority opinion's language was broad enough to cover *all* impeachments, and not just those of federal judges, we believe that impeachment of a president, which involves much higher stakes, warrants *some* potential (but not required) judicial scrutiny to assure its legitimacy. Several justices in the *Nixon* case addressed this problem in their opinions and concluded that there might be occasions where a presidential impeachment is so illegitimate that it could not be condoned or judicially ignored.[14]

Impeachment is a political process that should not be converted to a judicial one, but in our judgment all avenues of judicial review should not be foreclosed. For example, should the Court sit by idly if the president is impeached for no reasons at all, or denied all semblance of due process? To resolve the ambiguity of the *Nixon* decision, to ensure that impeachment of the president conforms to understandable constitutional requirements, and to avoid the consequences of an impeached and convicted president unwilling to accept the legitimacy of that verdict, we have proposed that an impeached president (but only the president) be permitted to seek judicial review of both the procedures and the constitutional basis for such an impeachment. The Supreme Court would not have to decide such a case, but it would have an opportunity to prevent a clear procedural or interpretive abuse of the impeachment power.

We would not extend this right of the president to seek judicial review of impeachment to trial, conviction, and removal from office by the Senate, for two reasons. First, the basic issue of whether an impeachable offense had been properly alleged (and found) would already have been litigated; if the Court approved the constitutional basis of articles of impeachment, the Senate could proceed to try the president unburdened by any

13. *Nixon v. United States*, 506 U.S. 224, 236 (1993). As Chief Justice Rehnquist asserted in his majority opinion, "We agree . . . that opening the door of judicial review would 'expose the political life of the country to months, or perhaps years, of chaos.'" Id.

14. In *Nixon*, Justices White and Blackmun expressed the view that the Constitution did not forbid consideration of the contention that the *method* of impeachment had violated the Constitution. Justice Souter also believed judicial review of impeachment might be justified under "different and unusual circumstances."

doubts about the constitutionality of the impeachment; and a convicted president would have a less credible basis for contesting that conviction. Second, to permit review of an impeachment conviction by the Senate might delay an orderly transition of power and leave open the question, perhaps for a painfully long time, of *who* actually was president. A presidential succession hiatus is a risk that our system should not invite.

Empowering the Supreme Court to review the impeachment of a president does, however, present at least one significant problem. Would it create a conflict of interest, or at least the appearance of a lack of impartiality, if the chief justice both participates in a constitutional review of articles of impeachment *and* then presides over a Senate trial based on those same articles? We believe that establishing an opportunity for judicial review of the impeachment of a president is too important to be rejected for this reason alone. Moreover, upon closer examination, such a "conflict of interest" problem may be no problem at all. Although the House and Senate roles are obviously related, they are still quite separate and distinct. The House must first determine whether a trial on the merits is warranted. If so, the Senate must determine whether the charges have been successfully proven. Certainly the chief justice's willingness to lend the Court's imprimatur to the House's articles (or his refusal to do so, perhaps in the form of a dissenting opinion) would give little if any indication of how he would *manage* or *administer* the Senate trial as its presiding officer. The chief justice has no vote in an impeachment trial, although he or she may be called upon to make procedural rulings. But those rulings can be overridden. Thus even a chief justice determined to influence substantially the outcome of a trial would be hard pressed to do so successfully.

This potential conflict of interest also pales in the face of numerous other such conflicts of interest that Supreme Court justices routinely ignore. One might assume, for example, that any justice would be predisposed in favor of the president who appointed him or her, and thus should not participate in any case in which that president was a litigant. Yet just the opposite approach has been the norm: for example, Justices Burger, Blackmun and Powell participated in *United States* v. *Nixon*,[15] and Jus-

15. *United States v. Nixon*, 418 U.S. 683 (1974). Justice Rehnquist did in fact recuse himself in this case but not (or at least not formally) because he had been appointed by Richard Nixon. Rather, it was because he had been an assistant attorney general in the

tices Breyer and Ginsburg participated in *Clinton* v. *Jones*.[16] In each of those instances the justices voted against the president who appointed them. These disputes were regarded as too important—too critical to the functioning of our constitutional system—to warrant recusal for a theoretical conflict of interest with no basis in demonstrable bias. A similar logic would apply to our proposed judicial review of articles of impeachment against the president, especially since the Supreme Court would not have any authority to assess the weight of evidence against an accused president.

Section 7 is merely standard constitutional language giving Congress the power to enforce the amendment.

The impeachment clauses, like the Constitution itself, were written long ago. They contemplated a world, and a political system, that no longer exists. There were no political parties, and thus partisanship was not an issue; the Senate was not a popularly elected body and was generally expected to be a council of "wise men" and experienced statesmen who would act as a brake on the "unbridled passions" of the House of Representatives; judicial review was not mentioned in the constitution (the framers did reject a proposal to have the Supreme Court try impeachments); and the president was not expected to be the dominant national and international actor he has become. The original constitutional structure of impeachment thus made sense for its time. Providentially perhaps, it has worked reasonably well. But it is now on the verge of a breakdown. The old adage "Don't fix it if it ain't broke," is good common sense. But a constitutional breakdown in the impeachment process would have serious implications for our political system. The prospect of a besieged president refusing to concede the legitimacy of his or her impeachment, or even unwilling to leave the White House after conviction, or of the nation's foreign affairs at a standstill for a protracted period of time for want of presidential leadership, counsels us to take action now, rather than later, to modify and relegitimize the impeachment process. Sometimes it is better to fix it *before* it breaks.

Nixon administration.

16. 117 S. Ct. 1636 (1997).

"AMENDMENT XXVIII"

Section 1. The President, Vice President, members of the Cabinet, and federal judges, but not members of Congress or military officers, shall be removed from office on impeachment for, and conviction of, serious abuses of official power that undermine their conduct of office and threaten the integrity and legitimacy of the government. Such abuses include treason, bribery, and other serious crimes, as well as actions that are not criminal in nature.

Section 2. The House of Representatives shall have the sole power of impeachment. The Senate shall have the exclusive right to try all impeachments. When sitting for that purpose senators shall be on oath or affirmation. When the President is tried the chief justice shall preside. No person shall be convicted without the concurrence of two-thirds of the membership of the Senate. Except when the president is tried, summary fact-finding procedures established in advance may be employed. There is no right to a jury trial in cases of impeachment. No impeachment shall survive the biennial adjournment of Congress, nor shall an impeachment or trial take place between a general election and the convening of a new congress.

Section 3. The consequences of conviction by the Senate on impeachment charges shall be limited to removal from office and disqualification to hold and enjoy any appointed or elected office of honor, trust or profit under the United States. Removal from office is automatic upon conviction. Disqualification may be imposed by a two-thirds vote of the members of the Senate. The president shall not be subject to criminal indictment or prosecution, or civil suit, while in office, but all persons impeached and convicted shall be liable to subsequent indictment, trial, judgment, and punishment, or civil action, according to law. Congress may, by law, extend the statute of limitations in federal and state courts in both criminal and civil actions, for actions that a president may have committed. Congress also may grant to the president immunity against subsequent prosecutions or civil actions in both federal and state courts.

Section 4. Congress shall have the power to censure, rebuke, or otherwise publicly condemn official misconduct. Such action shall not constitute a bill of attainder nor shall it bar impeachment. Congress may devise alternative means, other than impeachment, for dealing with the disability, misconduct, or failure to maintain good behaviour, of federal judges other than justices

of the Supreme Court. Removal from office of a judge by means other than impeachment shall require the assent of two-thirds of the members present of both the Senate and the House of Representatives.

Section 5. The President's power to grant reprieves and pardons for offenses against the United States shall not extend to cases of impeachment, nor shall a president have the power to issue a self-pardon.

Section 6. The Supreme Court, under its original jurisdiction, may review, prior to trial by the Senate, in a petition submitted by an impeached president, the procedures employed in, and the constitutional basis of, articles of impeachment voted against the president by the House of Representatives. The Court shall not have the power to review impeachments against other officers nor any action by the Senate concerning articles of impeachment.

Section 7. Congress shall have the power to enforce the provisions of this article by appropriate legislation.