GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON. By William H. Rehnquist.[1] William Morrow & Co., Inc. 1992. Reissued in paperback, 1999. Pp. 304. $12.00.

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INTRODUCTION

Chief Justice William H. Rehnquist's is a book that was written well ahead of its time—almost seven years, to be precise. Written in 1992, *Grand Inquests* explores the backgrounds, details, historical contexts, and constitutional significance of the two most important Senate impeachment trials in the nineteenth century—those of Supreme Court Justice Samuel Chase in 1805 and President Andrew Johnson in 1868. Presumably, Chief Justice Rehnquist expected at the time that he published the book that the topic would be a safe one for a sitting chief justice, for it would then have seemed highly unlikely that no similar such trial would have been on the horizon during the Chief Justice's tenure or lifetime. Thus, Chief Justice Rehnquist could have reasonably expected that he could write about the Chase and Johnson impeachment trials without ever having to confront the issues involved in them (or like proceedings) in his formal capacity.

We now know that Chief Justice Rehnquist's interest in impeachment was prescient. The book became enormously significant when, almost seven years after its publication, the House of Representatives impeached President William Jefferson Clinton for perjury and obstruction of justice on December 19, 1998, and in January and February of 1999, the United States Senate conducted an impeachment trial of President Clinton with none other than Chief Justice William Rehnquist presiding. The House's impeachment and the Senate's trial of President Clinton understandably renewed interest in Chief Justice Rehnquist's

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book—indeed, the book had been out-of-print up until the eve of President Clinton's impeachment trial, at which time it was rushed into re-issue as a paperback. There was renewed interest in the book, not just for the details of and the Chief Justice's thoughts about two of our most important impeachment precedents—including the only other presidential impeachment trial—but also for insights into the Chief Justice's disposition towards the role that he would perform in President Clinton's impeachment trial as the presiding officer.

Grand Inquests is significant both for what it discusses and illuminates and for what it does not discuss about the federal impeachment process. Part I briefly examines the ways in which the book surveys (and in doing so satisfies contemporary readers' interest in) the most significant congressional impeachment experiences in the nineteenth century. Part II briefly examines the ways in which readers' expectations might be frustrated by the Chief Justice's failures (thoroughly understandable in light of what he could not have foreseen) to discuss several issues that as it turns out link President Clinton's impeachment trial to, as well as differentiate it from, the Chase and Johnson impeachment trials. Part III sketches some likely explanations for and lessons to be drawn from President's Clinton's impeachment and acquittal, particularly those that are similar to or reaffirmations of the consequences of the Chase and Johnson impeachment proceedings.

I

To bring the Senate impeachment trials of Justice Chase and President Johnson to life, Chief Justice Rehnquist discusses in some detail the personalities of the key figures in the Senate proceedings, the nature of the controversies giving rise to the impeachments of both Chase and Johnson, the legal strategies of those seeking and those opposing the removals of Chase and Johnson, and the reasons for and significance of the acquittals of both Chase and Johnson. These details help to familiarize the uninitiated or the "nonlawyer"—the intended audience of the book (p. 11)—with these important historical events.

To understand the significance of the Chase and Johnson impeachment trials, one needs to appreciate, as Chief Justice Rehnquist explains, how the two trials were inseparable from the political issues dividing the major political parties of the times. The Chase trial, for instance, turned on whether in overseeing the sedition trials of two prominent critics of Federalist policy,

Associate Justice Chase, an ardent Federalist, conducted himself "'in a manner highly arbitrary, oppressive, and unjust,'" motivated, at least according to the justice's critics and political opponents (and, of course, the House Managers who were trying to remove him from office), by the base political desire to abuse his judicial authority in an effort to do harm to vigorous political foes over whose sedition trials Chase presided. (p. 59)

The Johnson trial also featured an impeachment effort masking a thinly veiled effort to remove an unelected, unpopular president (Johnson had become president only as a result of the assassination of Abraham Lincoln), who time and time again had—at least in the opinion of the Radical Republicans in charge of Congress at the time—tried to substitute his personal will and beliefs about appropriate Reconstruction policy for that of Congress. The Radical Republicans in Congress had wanted to tie the re-entry of Southern states into the Union on granting certain rights (such as the vote) to the newly freed slaves, while Johnson, a Democrat from the South, had wanted to deny the vote to African-Americans and effect greater leniency towards and preserve the authority of the popularly elected officials of those southern governments. This contest of wills between Johnson and the Reconstruction Congress had provoked a couple of unsuccessful efforts by the House to impeach Johnson; (pp. 208-212) but eventually the House successfully impeached Johnson based on his dismissal of his Secretary of War, Edwin Stanton, a Radical Republican, in apparent violation of the formal requirement to get Senate approval prior to ordering such termination as set forth in the Tenure in Office Act, an act which Congress had passed (like so much other Reconstruction legislation) over Johnson's veto. Johnson had vetoed the Tenure in Office Act because he believed it illegitimately impeded the President's prerogative to control the exercise of executive power by removing executive officers as he saw fit. Moreover, President Johnson viewed the act as inapplicable to his firing of Stanton, because he construed the act as applying only to a president's removal of cabinet officials whom he had initially nominated (Lincoln, not Johnson, had nominated Stanton). However, the Radical Republicans in Congress intensely disagreed with Johnson over the constitutionality and the construction of the act.

Historians have speculated a good bit about the reasons for the Senate's acquittals of both Justice Chase and President Johnson. Some of the more interesting portions of *Grand Inquests*

include the Chief Justice's speculations about the reasons for each impeached official's acquittal. A majority of the Senate—but not a supermajority—did vote to convict and remove Justice Chase. Chief Justice Rehnquist explains the latter vote partly on the basis of "the personality and character of John Randolph," one of the most zealous of the House Managers who sought Chase's removal from office. (p. 110) Prior to Chase's trial, Randolph had alienated many Republican senators through his zealous, often personal attacks upon those who disagreed with him, including the President at the time of the Chase impeachment, Thomas Jefferson. (Jefferson had encouraged the impeachment of Samuel Chase, an ardent Federalist critic of Jefferson's administration.) Several senators made their antipathy for Randolph known to their colleagues during Chase's trial, (p. 113) and Rehnquist surmises that "Republican senators might view with considerably less enthusiasm the case against Chase when the managers were led by John Randolph than they would have viewed the same case if the managers had been led by a less mercurial and erratic champion."[3] (Id. at 113). Rehnquist speculates further that "one should not rule out statesmanship of a high order as the motivating factor in the case of some Republican senators who voted to acquit. The Federalist senators, who to a man voted 'Not Guilty,' were convinced that the impeachment proceedings were a partisan attack by the Republicans on the independence of the federal judiciary—the branch of government that was in the hands of Federalist appointees.... [P]erhaps to some Republicans the demonstrated misconduct of Chase ... would have been grounds for removal only if it could have been accomplished consistently with the maintenance of an independent judiciary; thinking that it could not be, they accepted Chase's continuance in office as the lesser of two evils." (p. 113)

Chief Justice Rehnquist also gives several reasons for President Johnson's acquittal. Indeed, Johnson was acquitted by the thinnest of margins—a single vote. Chief Justice Rehnquist's explanations are based on his review of a wide variety of historical materials relating to the trial, including written opinions submitted in explanation of their votes by 30 of the 54 senators who participated in Johnson's trial. (p. 240) Chief Justice

3. Interestingly, one might see here a possible foreshadowing of a problem in President Clinton's impeachment trial, in which some senators were turned off by what they regarded as the over-heated, over-stated rhetoric of some of the House Managers.

Rehnquist suggests that senators acquitted because, inter alia, some of them disliked the person who would have succeeded to the presidency if Johnson were to have been removed, the Senate Pro Tem Benjamin Butler, even more than they disliked Johnson;[4] some senators did not believe Johnson's misconduct constituted an impeachable offense; other senators believed Johnson was entitled to a good faith belief that the Tenure in Office Act did not apply to his removal of Stanton (for it applied only to the removals of people whom a president had nominated to confirmable office and Stanton had been nominated by Lincoln, not Johnson); and Johnson had signaled to senators that he would accept congressional primacy in fashioning Reconstruction. (pp. 240-47) Moreover, "the tactics of the managers from beginning to end undoubtedly antagonized not only senators who were doubtful to begin with but some who leaned toward conviction at the beginning of the Senate trial." (p. 247). These tactics (including, inter alia, waving a bloody shirt on the Senate floor and urging senators to "vote as you shot") included, inter alia, "appeal[ling] to every prejudice and passion, and r[iding] roughshod, when they could, over legal obstacles in their ruthless attempt to punish the President for his opposition to their plans." (p. 247, citation omitted)

Of even greater interest to modern readers than some senators' stated or suspected reasons for acquitting Chase and Johnson is the constitutional significance of the two acquittals in Chief Justice Rehnquist's estimation. According to Chief Justice Rehnquist, Chase's acquittal had a "profound effect on the American judiciary" for two reasons. (p. 114) First, he suggests, "it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body." (Id.)

Chief Justice Rehnquist is much more careful in pronouncing his opinion on the significance of President Johnson's impeachment by the House and acquittal by the Senate. Johnson's acquittal was no sure thing; it turned on the courage of seven Republican senators to buck their party and short-term political interests and vote for acquittal—indeed, all seven would eventu-

4. During Johnon's presidency there was no formal mechanism for filing nor addressing a vacancy in the vice-presidency.

ally abandon or lose their seats. Chief Justice Rehnquist observes that President Johnson's impeachment reflected the strong resolve of Radical Republicans "to make the South pay a high price for its effort to dissolve the Union by force and to use the power of the federal government to aid the newly freed slaves"; (p. 250) Johnson's succession to the presidency by means of assassination rather than popular election or support; the fact that "both houses of Congress were controlled by the Republican party, to whose policies he was opposed"; (p. 251) and the strong "determination on the part of [the President and Congress] to insist on what [each] regarded as its institutional prerogatives. Johnson resolutely vetoed measures he felt were either wrong or unconstitutional, and he used his power of appointment to reward his friends. Congress retaliated by passing laws over his veto, and by enacting measures, such as the Tenure in Office Act . . ., designed to limit the president's power of removal." (p. 251)

Chief Justice Rehnquist concludes further that, had Johnson not been acquitted, his conviction would have transformed impeachment into just another one of the many methods available to the Congress (such as its oversight authority over appropriations or appointments) to "frustrate the president in his effort to carry out his program." (p. 270) In the Chief Justice's view, "the greatest significance of such [a transformation] for impeachment would have been its usefulness simply as a threat—a sword of Damocles, designed not to fall but to hang . . . Future presidents of one party facing a Congress controlled by the opposite party [would have to] think twice about vetoing bills with which they disagreed, and about resisting the inevitable efforts by Congress to poach on the executive domain." (Id.) Thus, for Chief Justice Rehnquist, the acquittal of President Johnson confirms that:

> Impeachment would not be a referendum on the public official's performance in office; instead, it would be a judicial type of inquiry in which specific charges were made by the House of Representatives, evidence was received before the Senate, and the senators would decide whether or not the charges were proven. The Johnson acquittal added another requirement . . . It was not any technical violation of the law that would suffice, but it was the sort of violation of the law that would in itself justify removal from office. . . . With respect to the chief executive, [the acquittal has meant] that as to the policies he sought to pursue, he would be answerable only to the country as a whole in the quadrennial presidential

elections, and not to Congress through the process of impeachment. (p. 271)

II

For anyone familiar with the history of congressional impeachment practices, it should not be surprising to find in the Chase and Johnson impeachment trials the seeds of some of the issues that came to characterize or dominate the impeachment and trial of President William Jefferson Clinton. Chief Justice Rehnquist touches on only a few of these in his book. He should not be faulted for not having foreseen more of these issues. Many of the issues that have preoccupied contemporary observers and commentators, such as the constitutionality of a so-called "finding of fact" or the possibility of a judicial challenge to certain aspects of impeachment proceedings, were simply not part of the impeachment process or on people's minds at the time of the historic events at the center of Rehnquist's book. After all, the Chief Justice's book is a work of history, not a primer for or treatise on presidential impeachment trials. Nevertheless, the very fact that Chief Justice Rehnquist wrote his book without the present circumstances in mind raises reasonable curiosity about whether he was able to foresee or offer some dispassionate insight into some of the issues that would arise in the proceedings against President Clinton. The book does not offer much discussion of these issues, but it does, if one reads it carefully, offer some useful background material.

Take, for example, Chief Justice Rehnquist's assessment of the significance of the Chase acquittal. He copiously recounts the histories of efforts to use the federal impeachment process against presidents and federal judges prior to the Johnson and Chase impeachment trials, respectively, but he does not offer much of an account of the history of federal impeachment efforts after those trials (with the notable exception of analyzing the three articles of impeachment approved by the House Judiciary Committee against President Richard Nixon, whose removal from office Chief Justice Rehnquist considers to have been inevitable). (pp. 272-74) The Chief Justice regards Justice Chase's acquittal as cementing the congressional mind-set against using impeachment to punish federal judges or Supreme Court justices for their official decisions, but he fails to note that subsequent to the Chase acquittal the primary targets of federal impeachment efforts have been federal judges. He also does not suggest any-

thing at all about the competency of members of either the House or the Senate to render informed or principled judgments about impeachment, an issue that has arisen more than once since the nineteenth century. For instance, in the aftermath of the three late 1980s judicial impeachment trials, some commentators (including some senators) raised serious questions about whether senators had the interest, time, or inclination to participate meaningfully in the impeachment trials of lower court federal judges. Indeed, in the early 1990s Congress authorized the creation of the National Commission on Judicial Discipline and Removal to study, inter alia, the propriety of continuing vesting of the constitutional authority of impeachment and removal in Congress. (The Commission concluded that on balance it made sense to keep the division of authority regarding impeachment within the politically accountable authorities in which the framers placed it.)

Nor did Chief Justice Rehnquist discuss the interesting question whether the standards for impeaching federal judges (or justices) and presidents should be the same. This issue was on the minds of many of the members of Congress throughout the impeachment proceedings against President Clinton, because the articles of impeachment approved by the House against him included one charge—perjury—that had served successfully as the basis for removing at least two federal judges in the late 1980s—Alcee Hastings and Walter Nixon. Moreover, a third federal district judge, Harry Claiborne, had been impeached and removed from office in 1986 based on income tax evasion (obviously a crime involving a form of lying under oath). Members of Congress in the nineteenth century certainly did consider the kinds of legal violation that would constitute an appropriate basis for impeachment, but there is little record of any explicit discussion of the comparable standards for impeaching federal judges (or justices) and presidents.

One reason for this relative silence might have been that the charges against Justice Chase and President Johnson turned to a significant degree on their different responsibilities—in Chase's case, those of a federal judge in overseeing trials while those against Johnson turned on his duties to comply with a civil law directed at the President but that, in Johnson's opinion, either did not apply in the circumstances of his firing of Stanton or, if it did, was unconstitutional. The very fact that members of Congress did not fret much, if at all, about the degree to which the standards for impeaching justices and presidents were the same

or different is telling; it reflects an important theme that has run throughout impeachment history—that impeachment primarily exists for dealing with serious abuses of power or privilege and thus is likely to differ to the extent that officials' different responsibilities have been involved or implicated in any given impeachment proceeding. The point is that the standard for impeachment might be the same for all officials (i.e., "other high crimes and misdemeanors"), but it might be applied differently, depending on the context in which misconduct has arisen and the particular responsibilities allegedly abused by the particular official involved.

Chief Justice Rehnquist does not discuss several other questions that intrigue contemporary observers of the impeachment process. These questions include, inter alia, whether the House should function something like a grand jury in an impeachment proceeding. The Chief Justice did not explicitly address this issue, though it seems that implicit within his conception of the House's responsibility as including the formulation of specific charges against an impeached official might well be something like a grand jury or prosecutorial function. One thing that cuts against this conception of the House's role is that President Clinton's impeachment featured the most extensive discussion ever in the House of its function within the impeachment process as tantamount or similar to a grand jury. (Significantly, this contention was made by only a few House Members and was never formally endorsed by nor articulated by a majority of House members.) Usually, the House has conducted its own, separate investigation into charges of impeachable misconduct, even in cases (such as those of Richard Nixon, Harry Claiborne, Alcee Hastings, and Walter Nixon) referred to the House by some external authority. Regrettably, the Chief Justice did not dwell on the House's proceedings in impeaching either Chase or Johnson; consequently, his readers do not come away from the book with any conception or grounding in how the House, at least in the nineteenth century, understood its function (in contrast to how it understood or performed its function on other occasions, including the Clinton impeachment).

The Chief Justice's book is silent on other issues that did not arise explicitly in any impeachment proceedings prior to the 1970s. Of particular significance is the question of the appropriate burden of proof in the House as well as the Senate. An issue that arose first in the impeachment inquiry against William O. Douglas in 1970 and a few years later against Richard Nixon had

to do with the degree to which an impeachable official could be impeached and removed from office for misbehavior not formally nor strictly related to his or her official duties. The House refused to approve any formal inquiry against Douglas based on his lifestyle (or, for that matter, on his judicial decisions), confirming the Chief Justice's assessment of the lasting significance of Chase's acquittal; and the House Judiciary Committee refused to approve an article of impeachment against Richard Nixon based on tax fraud. Private misconduct for the first time became clearly an appropriate basis for impeachment and removal when the House impeached and the Senate removed Harry Claiborne from his federal district judgeship in 1986 for tax evasion. Claiborne's impeachment helped to blur the line between the public and the private, such that President Clinton's misconduct became, in the view of many, fair game for impeachment and removal from office.

Another recent development that has become important to the impeachment process, but that did not figure into either the Chase or Johnson impeachments, has had to do with the innovations made by the Twelfth Amendment (which arguably helped to transform the President into a popularly elected official as opposed to one that had been primarily chosen by the Electoral College) and Seventeenth Amendment (which changed the way in which Senators were elected, from being chosen by their respective state legislatures to the citizenry of their respective states). No doubt, the degree to which these amendments have made all federal officials directly accountable to the electorate has introduced a dynamic into the federal impeachment process that did not make any difference to the outcomes of the Chase and Johnson impeachment efforts. In contrast, Richard Nixon became the first elected president to have been subjected to a serious impeachment inquiry, while William Jefferson Clinton became the first elected president to have been formally impeached. In their defenses, both presidents raised the arguments that their respective popular elections should not be lightly overturned nor disregarded in the impeachment process. Indeed, President Clinton was able to muster high popularity ratings that undoubtedly helped to put pressure on senators not just to acquit the President but also to end his trial as quickly as possible. President Clinton's trial dramatically illustrated some of the ways (which I explore in more detail in Part III) in which the Twelfth and Seventeenth Amendments have made senators more sensitive to the electorate's preferences.

Moreover, Chief Justice Rehnquist does not discuss the constitutionality or significance of censure in his book. This is a little surprising, because censure was very much a nineteenth century phenomenon, though it seems to have fallen out of vogue in the twentieth century. Interestingly, the House of Representatives passed resolutions (in one form or another) that censured, rebuked, or reprimanded Presidents John Tyler, James Polk, and James Buchanan, while the Senate censured (but later expunged the resolution against) President Andrew Jackson. (This is not to mention almost a dozen other resolutions passed by the House or the Senate critical in some fashion of other high-ranking governmental officials.) As Congress's devices for checking presidential (and other high-ranking officials) missteps have grown, the need for censure seems to have diminished. In addition, the eventual expungement of President Jackson's censure demonstrated to some its futility as a measure of lasting rebuke. Nevertheless, censure was a meaningful alternative to impeachment for many members of Congress (particularly Democrats) throughout the impeachment proceedings against President Clinton, and any sequel to Chief Justice Rehnquist's book will have to address the arguments made for and against censure in President Clinton's impeachment proceedings

Of course, one cannot leave a discussion of Chief Justice Rehnquist's book without considering whether and, if so, how he would figure as a character in any sequel. No doubt, he will not write it. Just as he has avoided any extra-judicial commentary on his function as an associate justice and a chief justice, he will in all likelihood avoid writing about his own performance as the second chief justice to have presided over a presidential impeachment trial. As the presiding officer in President Clinton's presidential impeachment trial, Chief Justice Rehnquist demonstrated a great sensitivity to adhering to and respecting Senate procedures and precedents. No one understood better than the Chief Justice that the impeachment trial was the Senate's to conduct as it saw fit. Thus, he helped in his own way to confirm one of the most important lessons that he has identified as having been initially established in the nineteenth century grand inquests—that the Senate has by virtue of its complete authority to structure and conduct impeachment trials as it sees fit the opportunity to vindicate or defend constitutional principles that are as important to defining the relations between the branches as any opinion rendered by the other court over which the Chief Justice presides.

III

Perhaps the most important question raised by *Grand Inquests* is whether the lessons the Chief Justice has identified as lying at the heart of past grand inquests have helped to guide the present generation through its most recent grand inquest. The answer, at least tentatively, seems to be only to a limited degree. In the more than hundred years after the impeachment trial of President Andrew Johnson, impeachments have not realized the kinds of dangers that Chief Justice Rehnquist foresaw as possibly resulting from the conviction of President Johnson. Nevertheless, in the past 25 years, this nation has witnessed more serious impeachment proceedings attempts—at least six—than it has experienced in any other comparable (25-year) period in our history.[5] Indeed, of the six attempts initiated in this 25-year period, the President has been the subject of two.

Explaining President Clinton's impeachment and acquittal in light of the American experience with grand inquests is no simple task. Here I can only begin to sketch some possible explanations for the event. For instance, as Chief Justice Rehnquist did with respect to President Johnson's acquittal, one could explain the outcome in President Clinton's impeachment trial in terms of the stated reasons that senators have given for casting their acquittal votes. The most serious problem with relying on such statements is that not all senators produced them. Only 72 senators published such statements. These 72 included only 34 of the 45 Democratic senators who voted not guilty on both articles of impeachment, 4 of the 5 Republicans who voted not guilty on both impeachment articles, and 3 of the 5 Republicans who voted not guilty on the first but guilty on the second article of impeachment. Of those 39 senators who published statements on their reasons for voting not guilty on both articles, more than half—27—explained that they did not regard the misconduct alleged in either article of impeachment approved by the House as constituting an impeachable offense.[6] Sixteen of

5. The six officials were Presidents Nixon and Clinton and former judges Henry Claiborne, Walter Nixon, Alcee Hastings, and Robert Collins. Three of these officials (Claiborne, Walter Nixon, and Hastings) were formally impeached and removed from office; two (Richard Nixon and Robert Collins) resigned from office before being formally impeached; and only one (President Clinton) was acquitted.

6. See Published Closed-Door Statements of Senators Akaka, Boxer, Biden, Breaux, Bryan, Cleland, Collins, Dorgan, Durbin, Graham, Harkin, Hollings, Jeffords, Johnson, Kennedy, Kerry, Kohl, Lincoln, Leahy, Lieberman, Levin, Mikulski, Moynihan, Reid, Sarbanes, Snowe, Wellstone, and Wyden (all released into the Congressional Record on February 12, 1999).

the 39—all Democrats—explained that the Republicans' partisanship in conducting the impeachment proceedings in the House affected their votes,[7] while fourteen (joined by Republican Arlen Specter) explained that the House Managers had not proven the misconduct alleged in either article of impeachment.[8] Two Republican senators indicated that they had voted not guilty on the first article of impeachment (and guilty on the second article) even though they believed that all charges against the President had been proven,[9] while another Republican senator, Fred Thompson, explained that he had voted not guilty on the first article (but guilty on the second) based on his belief that the former was impossible to defend against because it was vague and did not specify the statements in which the President had allegedly perjured himself.[10]

These numbers hardly tell the full story of the President's impeachment and acquittal. Consequently, one could try to explain the event further in partisan terms. Notably, all 35 votes to convict the President on the first article and all 50 votes to convict him on the second article were cast by Republicans. Over 95% of the votes cast in the House to impeach the President were cast by Republicans. Yet, Senate Democrats arguably acted in at least as partisan a fashion as did the Republicans. At the outset of the impeachment trial, it was clear that if the 45 Senate Democrats were to vote as or close to a block in opposition to the President's removal it would be numerically impossible for him to be convicted. In fact, no Democratic senator bolted from his or her party to vote for either article of im-

7. See Published Closed-Door Statements of Senators Akaka, Biden, Boxer, Bryan, Dodd, Dorgan, Durbin, Harkin, Hollings, Kennedy, Lautenberg, Leahy, Moynihan, Sarbanes, Wellstone, and Wyden (released into the Congressional Record on February 12, 1999).

8. See Published Statements of Senators Akaka, Biden, Dodd, Durbin, Edwards, Feingold, Kennedy, Lautenberg, Levin, Mikulski, Murray, Rockefeller, Sarbanes, Specter, and Wyden (released into the Congressional Record on February 12, 1999). Senator Robb explained that he voted not guilty on the first article, because he did not believe that the House Managers had proven beyond a reasonable doubt that the President had committed perjury in his grand jury testimony; but he voted not guilty on the second article because it illegitimately bundled so many charges together that defending against it was a virtual impossibility. In Senator Robb's opinion, the second article was drafted in such a way to allow at least two-thirds of the Senate to vote in favor of it though most would have disagreed over the specific misconduct for which they were voting to remove the President. See Published Statement of Senator Charles Robb (released into the Congressional Record on February 12, 1999).

9. See Published Closed-Door Statements of Senators Gorton and Stevens (released into the Congressional Record on Feb. 12, 1999).

10. See Fred Thompson, *Senate Trial of Clinton Is Over, and It's Time to Move On*, Knoxville News-Sentinel (Feb. 15, 1999), available at 1999 WL 9155314.

peachment, while ten bolted from the Republican contingent to vote against the first article and five Republicans voted against the second article of impeachment.

Yet another possible explanation for the President's acquittal is the unprecedented impact of the public and the media on the impeachment proceedings. First, the Clinton impeachment proceedings are the first in which the public's preferences helped to drive the final outcome. Throughout the President's impeachment trial, his approval ratings held steady at or near 67%.[11] Similarly, a majority of Americans throughout the proceedings steadily opposed the President's removal from office. (In contrast, the Senate's acquittal of President Johnson opposed the public's preferences.) Yet, more than 70% of the American people believe that the President was guilty of the misconduct charged in the first article;[12] and 67% believe that he had violated various laws.[13] These statistics can be reconciled on the ground that, as one poll found, 76% of the American people believe that the case against the President involved purely private misconduct that should not have been made the basis for his impeachment.[14] Another poll found most of the public did not regard the charges made against the President as constituting appropriate grounds for his removal.[15] In other words, most of the public did not regard the President's as constituting impeachable misconduct. The Democrats' steady opposition to the President's removal plainly followed the preferences of most Americans.

Moreover, the media's coverage might have had four effects on the public (or at least the 61% of the public that regularly followed the hearings) and, through public opinion, on the members of Congress. First, it might have served as a constant reminder to the public as well as members of Congress, particularly senators, of the House Managers' difficulty of arguing convincingly that the President had breached the public trust—a

11. See, e.g., Mark Z. Barabak, *The Times Poll*, The Los Angeles Times A1 (Jan. 31, 1999).

12. See Josh Getlin, *The Truce Behind the Culture Wars; Values: Shrill Clinton Debate Drowns Out Broad American Consensus on Most Issues*, The Los Angeles Times A1 (Feb. 7, 1999) (reporting the finding of a "recent" USA Today/CNN poll that 79% of the public "believed the president committed perjury"), available at 1999 WL 2127851.

13. Id.

14. Id.

15. Kenneth T. Wald, et al., *The Price of Victory*, U.S. News & World Report 26 (Feb. 22, 1999) (reporting that 55% of those polled did not believe Clinton's behavior was serious enough to warrant his removal from office).

classic prerequisite for impeachment—as long as the public did not regard its trust with the President as having been breached. Second, the media's constant airing of bashing of the President's integrity throughout his presidency (particularly for the more than nine months that preceded the formal impeachment inquiry against the President) might have lowered the public's expectations regarding the President's integrity. New allegations of presidential misconduct would not have surprised much of the public nor shifted its basic opinion of the President. Third, the media's obsession with finding the next Watergate might have increased the public's skepticism over the likelihood that the impeachment proceedings against the President had uncovered it. The rhetoric with which the media characterized every new scandal of the Clinton White House—Filegate, Travelgate, MonicaGate, Koreagate, Whitewater—had been phrased to liken President Clinton's scandals to those of Richard Nixon, but the public found the comparisons wanting. The repeated attempts to liken the President's scandals to Watergate, particularly before full investigations had been launched, might have led much of the public to conclude that the President's harshest critics and the proponents of his impeachment were akin to the boy who cried wolf. Fourth, the media's comprehensive coverage might simply have bored the public. Prolonging the hearings held little, if any, prospect that anything new would happen. In virtually every poll, the vast majority of Americans indicated that they were sick and tired of the trial by the time it was over. As reported by the media (and reflected in phone calls, faxes, and e-mail to members of Congress), the public's exasperation if not boredom with the trial, coupled with the public's steady opposition to removal of the President, intensified pressure to end the hearings.

As one moves from possible explanations for the President's impeachment and acquittal to the likely lessons that will be drawn from the experience, the focus of the inquiry shifts. In analyzing both Justice Chase's and President Johnson's impeachments and acquittals, Chief Justice Rehnquist took this step in his book. This step requires a shift in focus from relying primarily on empirical data to determining how subsequent generations, particularly subsequent congresses, have understood the significance of each previous grand inquest. Obviously, we can only speculate about the range of possible lessons or consequences of the President's impeachment and acquittal, based on some of the spin that already is being applied to the event (by

those for and against the President's removal) and the consequences that roughly similar events have had in the past. It of course remains to be seen which lessons will withstand the test of time and which consequences do in fact arise.

First, the Democrats' uniform opposition to the President's conviction highlights the enormous difficulty (if not the impossibility) of securing a conviction in a presidential impeachment trial as long as the senators from the President's party unanimously stand by him. Rarely does a political party dominate more than two-thirds of the seats in the Senate. Hence, the solidity of the Democratic ranks in President Clinton's impeachment trial dramatically illustrated that removal of a president is possible only if the misconduct is sufficiently compelling to draw support from both sides of the aisle for a conviction. In the absence of bipartisan support for removal, acquittal is virtually guaranteed. (The likelihood of this result is also a consequence of the constitutional requirement that at least two-thirds of the Senate must vote to convict in order for a removal to occur. The supermajority requirement makes conviction and removal highly unlikely, for it is no easy task to get such a high degree of consensus among senators, particularly when the stakes are so high. When such consensus is achieved, it is likely to be the result of a very compelling and credible case for conviction and removal.)

Second, the President's acquittal might have shown that impeachment is not an effective check against the misconduct of a popular president. It is quite feasible that the President's acquittal might have the consequence of leaving subsequent generations uncertain as to whether Congress will have the resolve in any future impeachment proceeding against a president with high approval ratings. The congressional investigation into Watergate took more than two years, before the "smoking gun"—the tapes of certain conversations in the White House—that led to President Nixon's resignation was discovered.[16] The Clinton impeachment trial took only a month, and the entire impeachment proceedings against President Clinton are among the shortest in history (with the shortest being Harry Claiborne's in 1986, lasting only four months from start to finish). Even so, that was too long for most people. While it is true that most people did not believe President Clinton's case involved legitimately impeachable offenses, some investigations might not uncover seriously

16. See generally Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* 187-527 (Knopf, 1990).

problematic misconduct (insofar as the public is concerned) for some time. Future congresses might think twice before engaging in a relatively prolonged investigation of a President's misconduct, for fear that it might alienate the public. (In this respect, the Clinton impeachment proceedings could be viewed as strengthening rather than weakening the office of the presidency.) The Clinton impeachment proceedings raise a question about just how serious the misconduct of a popular president must be to convince a majority of Americans to support removing him from office. It is possible that impeachment will be effective only for the kinds of misconduct that can galvanize the public to set aside its approval of a president's performance to support resignation or formal removal. Indeed, a future Congress might support removal only if it has direct evidence of very serious wrongdoing and unambiguous consensus (in Congress and among the public) on the gravity of such wrongdoing.

Third, President Clinton's impeachment proceedings might have underscored the greater vulnerability to impeachment and removal of those officials who lack a president's resources or popularity. It is conceivable that an unpopular president such as Andrew Johnson might meet a different fate in an age in which the media constantly applies pressure to investigate a president's misconduct (or conduct that has made him unpopular) and in which polls indicate widespread popular support for removal. In this circumstance, removal or resignation might be extremely likely. (To date, the only instance like this occurred during the final days of Richard Nixon's presidency, when the public for the first and only time during the Watergate investigation expressed support for the President's ouster based on information revealed in the Watergate tapes.) The dynamic is likely to be even more problematic for a federal judge, including a Supreme Court justice, whose hearings are not likely to get anything near the widespread media coverage that President Clinton's proceedings got, nor the outpouring of public support (or the public's opposition to the prolongation of hearings). In the absence of these factors, a federal judge or other low-profile official simply lacks the resources available to a president (particularly a popular one) in defending against political retaliation in the form of an impeachment.

Fourth, the Clinton impeachment proceedings serve as a dramatic reminder that the burden in an impeachment proceeding is on the advocates or proponents of impeachment to show that the charges have not been based on nor motivated by parti-

sanship.[17] No doubt, a proponent of President Clinton's impeachment and removal might argue the charges were not based on partisanship but rather the needs to protect the integrity of the judicial system and to ensure the President's compliance with his oath of office (even in a civil lawsuit whose focus in unrelated to his official duties). Yet, those charging Justice Chase and President Johnson with impeachable misconduct argued the very same thing; they claimed that the charges against those officials were based on those officials' respective abuse of authority and not on partisanship. Ultimately, those seeking the removals of President Johnson and Justice Chase failed to carry their burdens (for a critical mass of senators and for posterity). Similarly, those seeking President Clinton's removal from office have failed (thus far) to convince most Americans (as well as any Democrat in the Senate) that their charges against the President were not based on nor motivated to a significant degree by partisan dislike for the President.

The latter failure increases the likelihood that subsequent generations will not look kindly upon the House's judgment to impeach President Clinton. As I have indicated, there were similar failures with respect to Chase's and Johnson's impeachment, and the majority vote cast in favor of convicting both officials did not preclude either's impeachment from being subsequently viewed as lacking political legitimacy by subsequent generations and congresses. Johnson's and Chase's acquittals have each had the effect of dissuading subsequent congresses from bringing or initiating impeachments based on similar misconduct. Subsequent congresses have been able to take such postures in part because the outcomes in Chase's and Johnson's trials did not turn on disputes about the underlying facts. Virtually everyone at the time agreed on the facts, but they disagreed over the significance of the facts. Unencumbered with having to resolve factual disputes, subsequent generations (and congresses) have been free to provide their own assessments of the legal and constitutional significance of the facts (and thus of Chase's and Johnson's misconduct). They have concluded that the misconduct targeted in each impeachment did not warrant removal from office.[18]

17. See Federalist 65 (Hamilton) in Garry Wills, ed., *The Federalist Papers* 381-82 (Bantam 1987).

18. To be sure, the historical version as set forth in Chief Justice Rehnquist's book of the significance of President Johnson's impeachment as a thoroughly partisan effort by some members of Congress to increase congressional power at the expense of the presi-

By similar reasoning, the Clinton acquittal could be construed by subsequent Congresses as a rejection of the House's judgment on the impeachability of the President's misconduct. For one thing, the vote to impeach the President was (as it was in Chase's and Johnson's cases) largely cast along party lines, while there has been relatively widespread perception (at least among the public) that the proceedings generally were conducted and resolved on partisan grounds.[19] Moreover, most people (including most members of Congress) do not disagree much, if at all, about the underlying facts in President Clinton's case; they disagree over the legal significance of the facts. Subsequent congresses might conclude that if such misconduct could not merit a conviction in one case (i.e., Clinton's), it would be inconsistent or unfair to allow it to become the basis for a conviction in another case. In addition, subsequent members of Congress could conclude that if a majority vote by the Senate to convict both Chase and Johnson could not save either's impeachment from being regarded as illegitimate, the absence of a majority vote in the Senate for either article of impeachment against President Clinton (coupled with other criticisms of it) could be viewed as an even rounder rejection of the legitimacy of the House's case than were the Senate votes in Chase's and Johnson's trials.

Perhaps one of the most important consequences of President Clinton's impeachment and trial is that it affirmed the House's and the Senate's final, nonreviewable discretion to conduct its respective impeachment proceedings. In the course of President Clinton's impeachment proceedings, both the House and the Senate followed the holding in *Nixon v. United States*,[20] in which the Supreme Court unanimously ruled that challenges

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dency is not one on which all historians would agree. For instance, Michael Les Benedict, in his well-regarded study of the Johnson impeachment, suggested that the effort to impeach and remove Johnson from office was not necessarily illegitimate because of Johnson's repeated violations of statutes that had been passed by the Congress over his veto and Johnson's efforts to weaken the enforcement of the Fourteenth Amendment. See Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (Norton, 1973). Nevertheless, the understanding of the constitutional significance of Johnson's acquittal, as reflected in *Grand Inquests*, probably remains the dominant historical understanding of the event. Perhaps more importantly, it was the understanding that most members of Congress indicated that they had during the Clinton trial, an understanding that obviously helped to shape these members' understanding of impeachment generally.

19. See, e.g., Hotline (Feb. 16, 1999) (reporting that ABC had determined 71% of the public believed "that Senators based their votes on partisan politics rather than facts" and that other news devices had made similar findings), available at Westlaw 2/16/99 APN-H0 40).

20. 113 S. Ct. 732 (1993).

to the constitutionality of Senate impeachment trial procedures are nonjusticiable. The Court left to the Senate the final, nonreviewable authority to devise impeachment trial procedures as it saw fit. Consequently, the House and the Senate took great liberties in fashioning their respective impeachment proceedings against President Clinton as each saw fit. For example, in relatively controversial decisions, the House decided (for only the third time in history) not to call any live witnesses or otherwise undertake any independent fact-finding,[21] to hold a final vote on the impeachment articles in a lame duck session,[22] and to forego

21. The first instance in American history in which the House did not take any live testimony or undertake independent fact-finding was the House's impeachment of President Johnson. This parallel between the Clinton and Johnson proceedings undercuts the characterization of the House's action as primarily or largely nonpartisan. For the Johnson impeachment remains widely regarded as one of the most partisan in history and thus serves as a dubious precedent for the Clinton impeachment to have followed.

Moreover, the House Judiciary Committee's decision to forego such live testimony in its investigation of President Clinton contrasts with the widely respected move by the House Judiciary Committee in its investigation of President Nixon's misconduct to take live testimony from nine witnesses behind closed doors, even though a special prosecutor had referred evidentiary materials to the committee. The deviation from the latter precedent in President Clinton's case is another move by the House Judiciary Committee that provided a useful basis for attack by the President's defenders on the neutrality of the House's proceedings.

The only other instance in which the House failed to undertake any independent fact-finding prior to impeaching an official was its impeachment of Harry Claiborne (referred to the House by the Judicial Conference of the United States). Judge Claiborne agreed to forego fact-finding by the House to hasten his impeachment by the House and what he expected would be a full trial (and ultimate vindication) in the Senate.

22. In his testimony before the House Judiciary Committee, Yale Law Professor Bruce Ackerman made the provocative argument that by impeaching the President in a lame duck session the House had violated the Twentieth Amendment. See Impeachment Inquiry: William Jefferson Clinton, President of the United States: Presentation on Behalf of the President: Hearing before the House Committee on the Judiciary, 105th Cong. 37 (1998) (testimony of Bruce Ackerman). The argument got a lot of attention from the media but won no supporters in Congress. First, the text of the amendment does not clearly forbid such actions. Second, Professor Ackerman's argument is undercut by the fact that several earlier impeachments (one as recently as 1988-89) had been carried over from one congress to the next. These two factors led Professor Ackerman to shift his argument to maintaining (1) that lame duck impeachments are generally a bad idea and (2) a lame duck impeachment might be legitimate only if, like a piece of legislation passed in an earlier Congress, the House were to reaffirm it in a subsequent congress prior to the Senate's acting upon it. The second argument is also undercut by the fact that several impeachment trials involved "carryover" impeachments. Moreover, impeachment is arguably a more complete act than legislation passed only by a single house. Last but not least, Thomas Jefferson, in his influential manual on parliamentary practice drafted while he was Vice-President, maintained that the American system followed the British practice in which impeachments carried over from one Parliament to the next. See Thomas Jefferson, *Jefferson's Manual of Parliamentary Practice*, Section 620, reprinted in H.R. Doc. 104-272, at 313 (1997). Nevertheless, Ackerman's argument served as a reminder that by impeaching the President in a lame duck session the House arguably had put at risk some of the political (as opposed to constitutional) legitimacy of its impeachment judgment.

defining or adopting a uniform standard for defining the impeachability of certain misconduct. In the House, the members also decided for themselves such questions as the applicability of the Fifth Amendment due process clause, the appropriate burden of proof, and the propriety of allowing three of their colleagues to cast votes on the articles even though each had been elected to the Senate and would have the opportunity to sit in judgment on the President in his impeachment trial. In the latter proceeding, senators decided for themselves such procedural questions as the appropriate burden of proof, the applicable rules of evidence (including the need for live testimony), the appropriate standard for determining the impeachability of the President's misconduct, and the propriety of holding closed door hearings on a variety of issues (including the final debates on the President's guilt or innocence.)

Yet another possible consequence of the Clinton impeachment proceedings is that they could be construed as confirming there are different standards for impeaching presidents and judges. An argument made on behalf of the President in the House and the Senate was that there are different standards for impeaching presidents and judges based on the officials' different tenure and responsibilities. Judges serve only "during good Behavior"[23] and thus arguably could be removed for misbehavior that includes but is not necessarily limited to impeachable offenses.[24] Moreover, presidents are elected, and thus the electoral process arguably operates as the primary check against a president's abuse of power. Since a president presumably will return to private life after his term, he is available in a way a judge will not be to be held accountable for both civil and criminal misconduct at a time when it will not interfere with his official duties.

Several factors cut against inferring that Congress endorsed different standards for impeaching different officials from the President's acquittal. First, the constitutional language is uniform.[25] Second, the assertion is counter-historical. It conflicts with the Founders' obvious intention to adopt the phrase "during good Behavior" to distinguish judicial tenure (life) from the

23. U.S. Const., Art. III, § 1.

24. For a more elaborate articulation of this argument (and the counter-argument), see Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 83-86 (Princeton U. Press, 1996).

25. See U.S. Const., Art. II, § 4 ("The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

tenure of elected officials (such as the President) rather than to establish the particular terms of judicial removal.[26] Moreover, the argument that the Constitution establishes different standards for impeaching presidents and judges was never raised prior to the latter quarter of the 20th century. (President Johnson, for instance, never made such a claim, though his impeachment had been preceded by four judicial impeachments, including Samuel Chase's.) Third, allowing judges to be removed for misbehavior that falls short of an impeachable offense undercuts the constitutional safeguards against political retaliation against judges for doing their jobs. The constitutional structure ceases to make much sense if judges may be removed either through the cumbersome, difficult process of impeachment for impeachable offenses, *or* an easier, looser process (administered by Congress or by others such as judges) for misbehavior that does not rise to the level of an impeachable offense. Fourth, the fact that the consequences that might ensue from an attempt to impeach a president might be different from those that might result from the removal of a judge is not a basis for finding different constitutional standards for impeaching presidents and judges. The consequences of an impeachment are plainly relevant as factors to be taken into account in the course of applying the operative standard, but they do not necessarily justify different standards altogether. In addition, of the 17 senators who expressed an opinion about this issue in the Clinton impeachment trial, eleven (ten Republicans and one Democrat) took the position that the same standard applies for impeaching presidents and federal judges.[27]

Regardless of whether subsequent generations will construe the Clinton impeachment proceedings as confirming that there are different standards for impeaching presidents and judges, they will surely ponder what particular standard, if any, the Clinton proceedings endorsed for determining the impeachability of the President's misconduct. To be sure, neither the House nor the Senate formally endorsed a specific standard of impeachment. Instead, it appears that there were almost as many

26. *See* Gerhardt, *The Federal Impeachment Process* at 83-84 (cited in note 24).

27. For the senators who publicly supported different standards for impeaching presidents and judges, see Published Closed-Door Statements of Senators Biden, Breaux, Kerry, Kohl, Robb, and Sarbanes (released into the Congressional Record on Feb. 12, 1999). For senators who published statements opposing the latter view, see Published Statements of Senators Allard, Bond, Brownback, Fitzgerald, Frist, Gorton, Grams, Kerrey, Kyl, Mack, and McConnell (released into the Congressional Record on Feb. 12, 1999).

standards for determining the impeachability of the President's misconduct as they were members of both chambers voting on the articles of impeachment.

Nevertheless, the Clinton impeachment serves as a reminder of the Framers' expectations that Congress would determine on a case-by-case basis the misconduct that constituted "other high Crimes and Misdemeanors."[28] The constitutional standard was designed to narrow the range of impeachable offenses from that which was available in England (where there were no restrictions on the scope of impeachable offenses),[29] but the standard still remains rather broad. The Constitution contemplates that an impeachable offense is a political crime about whose essential elements the framers disagreed (with the exception of such general preconditions such as serious injury to the republic). Consequently, every impeachment (including the most recent one) has featured a debate over whether the misconduct charged constitutes a political crime. As these debates have shown, it is practically impossible to get the House or the Senate to adopt a uniform standard for determining the impeachability of misconduct. The resolution of these debates tracks the historic practice in which each member decides for himself or herself the proper resolution of a series of procedural issues. The debates over the proper definition of impeachable offenses in Congress have thus featured tugs of war in which those seeking impeachment argue for relatively broad, amorphous standards that they can show have been easily met in a given case and those opposing impeachment argue for very narrow standards that they claim have not been met in the specific circumstances of the case before them.

While the debates over the scope of impeachable offenses in particular cases have not produced consensus among senators requiring guidelines, the Senate's judgments in impeachment trials do reveal an interesting pattern. The seven federal officials whom the Senate has convicted and removed from office (all federal judgeships) have had in common misconduct that (1) has caused a serious injury to the republic and (2) has had a nexus between the official's misconduct and the official's formal duties.[30] In assessing the latter, members of Congress have taken

28. U.S. Const., Art. II, § 4.

29. See generally Hearing before the House Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives, 105th Cong. 46-49 (1999) (statement of Professor Michael J. Gerhardt).

30. See generally id. at 54-56.

into account the degree to which certain misconduct has been completely incompatible with or completely disabled an official. In President Clinton's impeachment trial, several senators explained their acquittal votes on the absence of one or more of these elements.[31]

Yet another possible consequence of President Clinton's impeachment is that it might have left much of the public with the impression that impeachment is just another political event. Indeed, over 70% of the American people believed that the President's impeachment trial had been resolved largely on partisan grounds.[32] This outcome is not what the Framers wanted. For instance, in Federalist Number 65, Alexander Hamilton expressed the hope that senators in an impeachment trial would rise above the passions of the moment to do what is in the best interests of the Constitution or the nation.[33] Arguably, Johnson's acquittal is an example of such altruism. In contrast, the Clinton impeachment proceedings posed a different dynamic from the one that Hamilton explained the founders had tried to guard against. The founders were primarily concerned with a circumstance in which the public pressured Congress to remove a president (and senators resisted), but the Founders did not foresee (nor, at the very least, discuss) a situation in which the public largely opposed while many members of Congress intensely supported removal. Interestingly, the Senate's failure to convict President Clinton followed popular sentiment, but it did not win the respect of the American people. The proceedings generally weakened the public's confidence in Congress.[34]

It is possible that one facet of the Clinton impeachment proceedings that reduced most people's confidence in government to operate in a neutral manner is the fate of censure. Censure failed for several reasons, including the argument that led Republican leaders in the House and the Senate to preclude a separate vote on censure—i.e., the Constitution recognizes only one means—impeachment—for dealing with a President's misconduct. This argument might have struck many people as dis-

31. See Published Closed-Door Statements of Senators Cleland, Dorgan, Jeffords, Johnson, Kerrey, Kohl, Lautenberg, Lieberman, Lincoln, Mikulski, Reid (released into the Congressional Record on Feb. 12, 1999).

32. See note 19.

33. See Federalist 65 (Hamilton) in Gary Wills, ed., *The Federalist Papers* 380-81 (Bantam, 1987).

34. See David S. Broder and Dan Baltz, *Squabbling Sinks Views of Congress*, The Arizona Republic (Feb. 13, 1999), available at 1999 WL 4152239.

ingenuous (indeed, most Americans supported censure as an alternative to impeachment throughout the proceedings[35]). First, the argument that impeachment is the only means for dealing with a President's misconduct missed the point. The argument for censure was that it was a legitimate option for dealing with a president's misconduct that did not rise to the level of an impeachable offense. Impeachment has no bearing whatsoever on what Congress may do with respect to the latter category of misconduct, for it exists as the exclusive mechanism available to Congress for removing a president for impeachable misconduct. Second, the Constitution clearly allows senators individually (by virtue of the First Amendment and the speech or debate clause) to announce publicly each's condemnation of a president's misconduct. If the senators may engage in such expression individually, it is not clear why constitutionally they may not do so collectively. There is also nothing in the Constitution that bars a senator from getting a list of her colleagues' signatures on a document castigating the President and then entering that document into the Congressional Record. A censure is tantamount to the latter action. While one could object that censure might be either a futile act politically or could be overused to frustrate or harass a president (or some other official), these are prudential not constitutional objections. The calculation of whether a censure is constitutional is separate and distinct from whether it makes political sense in any given case to use.[36]

Lastly, President Clinton's acquittal hardly will qualify as a personal vindication. During the hearings, less than a handful of senators published or made public comments that did not include very strong condemnation of the President's misconduct. Those supporting the President's conviction condemned the President in the harshest of terms. Even the President's defenders overwhelmingly condemned his behavior. They contended repeatedly that his acquittal should not be construed as foreclosing other fora in which to hold him accountable for his misconduct. This widespread condemnation of the President is likely to have some historical if not some constitutional significance. For example, it might confirm that our constitutional system includes many fora in which presidents can be held accountable for their misdeeds, including impeachment, civil

35. See, e.g., ABC Good Morning America (7:00 a.m. ET) (December 22, 1998) transcript #98122201-jol, available in LEXIS-NEXIS, News Directory, Transcripts.

36. For a more elaborate discussion of censure, see Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. Rich. L. Rev. 33 (1999).

proceedings, criminal prosecution and trial, public opinion, media scrutiny, and history. As Chief Justice Rehnquist suggested, the lesson of Justice Chase's acquittal is that impeachment is an inappropriate mechanism for retaliating against a Supreme Court justice's (or, for that matter, any federal judge's) official rulings. The appropriate forum for dealing with a judge's mistakes on the bench is the judicial system, particularly through the appeals process. One popular lesson drawn from President Johnson's acquittal is that impeachment is an inappropriate mechanism for redressing a president's mistaken policy judgments. Appropriate fora for dealing with errors of judgment include the court of public opinion, elections, and the judgment of history. Similarly, President Clinton's acquittal might signal to subsequent generations that his misconduct did not have a sufficiently public dimension (nor harm) to warrant his removal from office. Nevertheless, other fora in which to hold him (or others who might engage in similar misconduct) accountable include public opinion, the judgment of history, possibly censure, and civil and criminal proceedings.

What was true about the impeachment process in the nineteenth century, as explained by Chief Justice Rehnquist in *Grand Inquests*, still might be true at the end of the twentieth century—that impeachment is a special mechanism for dealing with only certain kinds of misconduct, i.e., the most serious abuses of uniquely presidential powers, privileges, or trust. Moreover, foreclosing one fora of presidential accountability—impeachment—does not necessarily mean that others, such as civil and criminal proceedings, the court of public opinion, history, perhaps censure, are unavailable. This is just one of the many possible lessons that might be drawn from President Clinton's impeachment and acquittal to be explored in the sequel to Chief Justice Rehnquist's *Grand Inquests*, regardless of who writes it.