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FALLING OUT OF LOVE WITH AMERICA: THE CLINTON IMPEACHMENT AND THE MADISONIAN CONSTITUTION

FRANK O. BOWMAN, III*

INTRODUCTION

Watergate made me a lawyer. On August 8, 1974, Richard Nixon resigned the office of President of the United States.¹ Three weeks later, I returned to college to begin my junior year. I was a pre-med biochemistry major scheduled to spend most of the fall semester surrounded by beakers, spectrophotometers, test tube racks, glass slides, and fumes of formaldehyde and acetone. During the summer, as the evidence against the President mounted and impeachment moved from the realm of the fantastic to virtual certainty, the prospect of a life among the petri dishes grew less and less alluring. I will confess that some of this disenchantment undoubtedly arose from a persistent inability, demonstrated in two passes through organic chemistry, to grasp the molecular configurations made possible by the hexagonal geometry of the carbon atom. Nonetheless, the most powerful source of my disquiet was the realization, growing for a year and more as I watched the televised hearings before Senator Sam Ervin's Watergate Committee, and then the proceedings of the House Judiciary Committee as it agonized toward a vote on articles of impeachment, that I was far more interested in what these men and women were doing than in all the cytosol, osmosis, and symbiosis of all the microorganisms ever spawned.²

* Associate Professor of Law, Indiana University School of Law, Indianapolis. B.A., The Colorado College; J.D., Harvard Law School. This Article is dedicated to David Conner, gentleman, tireless warrior, and matchless advocate, who has honored me with his friendship for nearly twenty years. I am grateful for the comments of Andy Klein and Dr. Frank O. Bowman, Jr., on an earlier draft of this Article.

1. President Nixon announced his resignation in a speech delivered August 8, 1974. The resignation became effective at noon the following day. See THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 442-46 (1986) (text of the resignation speech of President Richard M. Nixon).

2. These things are, of course, all a matter of perspective. Professor Ernest Young, in a testament to the aptness of his surname, recently wrote that his "only distinct memory of Watergate [was] being upset that the Flintstones cartoon program was canceled for an entire summer so that the networks could show those awful hearings on TV." Ernest A. Young, *The Virtues of Presidential Weakness: A Comment on Fitts*, 43 ST. LOUIS U. L.J. 741, 741 (1999).

It was not merely the theater of Watergate that drew me in, though the drama of the thing was undeniable. After all, one can be mesmerized by the grisly spectacle of a train wreck without feeling any urge to become an engineer. What captivated me was the people of Watergate, principally the legislators on the Senate and House committees, but also members of the Watergate Special Prosecutor's Office, and even members of the Nixon administration itself—elected or appointed officials, partisan politicians mostly, and certainly no saints—who, on balance, acted with firmness, integrity, and restraint. As a Democrat and no special fan of Richard Nixon,³ my particular heroes were the obvious ones: Archibald Cox, Sam Ervin, Peter Rodino, Barbara Jordan. But I think even then I admired them as much for their caution and their obvious and unfeigned sense of the gravity of the task they had undertaken as for their investigative prowess, their rhetoric, their wit, or their ultimate success in forcing a flawed and corrupt president from office. And even back then, despite my instinctive rooting interest in the Democrats, I came away from Watergate with a deep respect for those Republicans in and out of Congress who—despite the personal and political cost—insisted on finding the truth, refused to blink at what they found, and finally, sadly, repudiated their own leader.⁴

I wanted to be like these people, wanted a part, however small, in the high drama of American public life. The immediately obvious point was that nearly all of the players in Watergate (both the heroes and the villains) were lawyers. And so, in the fall of 1974, I abandoned the study of the natural world, took up the study of history and politics, and resolved to go to law school. Twenty-five years later, after law school, two decades of practice as a trial lawyer, and at the beginning of a second career as a legal academic, to my immense surprise, I found myself playing a (very) small part in the second presidential impeachment of my lifetime as the co-author of the official statement of the National Association of Criminal Defense Lawyers to the House Judiciary Committee on the meaning of "high Crimes and Misde-

3. Although, in a spirit of candor and full disclosure, I remember quite distinctly that, had I been nine months older and legally able to do so, I probably would have voted for Nixon over George McGovern in 1972.

4. My enduring admiration for Barry Goldwater, a man for whom, like many young Democrats of the time, I had very little use, began with his unflinching leadership of the congressional delegation that went to Richard Nixon to convince him to resign in the wake of the disclosure of tapes proving his efforts to obstruct justice. See WHITE, *supra* note 1, at 34 (discussing Goldwater's decision to tell President Nixon that he must resign).

meanors.”⁵ Of course, we know how that came out. President Clinton was impeached by the House of Representatives and acquitted by the Senate.⁶ By the time this Article reaches print, he will have completed his term. Irremediably stained, but defiant. Disgraced and diminished, but persistently, almost perversely popular.

The fall of Richard Nixon was tragedy in the classic sense. A commanding personality clawed to the heights of power and was then brought low when crippling flaws in his character led him into conduct that was a serious affront to democratic government. The Clinton impeachment was vulgar farce.⁷ A surpassingly agile politician with an adolescent sex drive and an urge for self-preservation that far outstripped any sense of personal honor was attacked by opponents who missed their quarry and destroyed or diminished themselves by trying to elevate a squalid extramarital sexual encounter into an affair of state. For me at least, the effect of watching Nixon's descent was all that the ancient Greek commentators on the drama could have wished for in the spectator of a tragedy: pity, terror, catharsis, enlightenment, an aspiration to nobler things. By contrast, the dominant emotion inspired by Bill Clinton's escape from early retirement was

5. See *Background and History of Impeachment: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 105th Cong. 342 (1998) [hereinafter *Hearing on the Background and History of Impeachment*] (statement of Frank O. Bowman, III, Professor, and Stephen L. Sepinuck, Professor, Gonzaga University School of Law). This paper, substantially expanded and revised in light of the outcome of the Clinton impeachment proceedings, was later published as a law review article. Frank O. Bowman, III & Stephen L. Sepinuck, “*High Crimes & Misdemeanors*”: *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517 (1999).

6. 144 CONG. REC. H12,040-42 (daily ed. Dec. 19, 1998) (House vote on Articles of Impeachment); 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999) (Senate vote of acquittal on Articles of Impeachment).

7. Judge Posner has a far higher opinion of the dramaturgy of the Clinton-Lewinsky entanglement, calling it:

high drama—Wagnerian in intensity and protraction, with wonderful actors, the Clintons, in the lead roles, a supporting cast of hundreds, dramatic revelations aplenty (the tapes, the dress, the sex lives of Republican Congressmen), a splendid libretto by Kenneth Starr, a Greek chorus of television commentators; plus hapless walk-ons, clandestine comings and goings, betrayals, suspense, reversals of fortune, hints of violence (supplied by the Clinton haters), a May-December romance as it might be depicted by an Updike or a Cheever, a doubling and redoubling of plot, a *Bildungsroman*, even allegorical commentary (the movies *Primary Colors* and *Wag the Dog*) and a touch of comic opera (Chief Justice Rehnquist's costume out of *Iolanthe*).

RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 262 (1999) (footnotes omitted). I'd be lying if I didn't admit that some parts of the ghastly business were fun to watch. And it did drag on longer than the Ring Cycle. But the Clinton-Lewinsky mess more closely resembled the 1950s Alan Drury political novel *Advise and Consent*—as reimagined by Jerry Springer and narrated by Gerardo Rivera—than anything by Wagner. (And I don't even know what a *Bildungsroman* is.)

the urge to bathe with strong disinfectant soap—and then to retreat into the countryside to take up beekeeping, or some other occupation as removed as possible from the contemplation of American law and politics.

This radical contrast in my reactions to the impeachment controversies that stand at either end of my life in the law so far has led me to ask three questions. First, were the Nixon and Clinton affairs truly as different as my memory makes them? Were the villains of Watergate as villainous and the heroes as heroic as I remember them? Were nearly all the players on both sides of *l'affaire* Lewinsky as shallow and fatuous as they seemed? Or to put the question in broader historical context, was the impeachment of Bill Clinton truly distinct, not only from Watergate, but from all of the other (fortunately few) occasions on which a president was seriously threatened with removal from office? Second, if the Clinton impeachment really was as bizarre, unprecedented, and unsettling an event as it seemed, how could such a thing have happened? Finally, what are the implications for the future of the presidency, and more generally, for the project of governance in America, of the incredible but incontrovertible fact that a president of the United States was impeached and nearly stripped of his office for lying about sexual infidelity?

I. WAS THE CLINTON IMPEACHMENT REALLY ALL THAT DIFFERENT?

I originally intended to devote a hefty chunk of space to a meticulous comparison of the Clinton impeachment with the cases of Andrew Johnson and Richard Nixon, as well as with the near-impeachment experience of Ronald Reagan in the Iran-Contra affair, all in aid of demonstrating, with furrowed brow, pursed lips, and in a tone of high scholarly seriousness, that the Clinton case really was different. After a very few hours work on this project, I abandoned it as just too silly.

If the question is whether the subject matters of these four constitutional crises were notably dissimilar, a simple word association exercise provides answer enough: *Andrew Johnson*: Civil War, Reconstruction, reintegration of the defeated South into the Union, Tenure of Office Act, presidential appointment authority, congressional versus presidential power;⁸ *Richard Nixon*: Vietnam War, burglary, illegal wiretaps of political opponents, IRS audits of enemies,

8. See generally DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (special ed. 1992) (discussing the events leading to the impeachment and acquittal of President Johnson).

directing CIA to halt the FBI Watergate investigation, bribes to silence witnesses, secret bombing of Cambodia;⁹ *Ronald Reagan*: war in Nicaragua, hostages in Iran, the Boland Amendment, presidential accountability to Congress for covert operations;¹⁰ *William Jefferson Clinton*: Monica Lewinsky, Paula Jones, civil deposition, thong, cigar, fellatio.¹¹ For the past two years, a small army of commentators (including myself)¹² has ploughed this furrow with every implement in the scholarly toolshed.¹³ All this industry was understandable, indeed inevitable, so long as there was a real prospect that President Clinton might be removed. One necessary strand of the recent impeachment debate was the common law exercise of winnowing sparse precedents for evidence about the historical understanding of the vexing phrase "high Crimes and Misdemeanors."¹⁴ Now that the crisis has ended and we stand at the edge of the field in the cool of the evening, looking back on our labor, it is plain that millions of carefully chosen words were expended, painstakingly proving the obvious: Bill Clinton's offenses, poorly as they reflect on him as a human being, were substantively trivial and constitutionally insignificant.

If, on the other hand, the question is whether the primary decision-makers in pre-Clinton impeachment crises had notably different attitudes toward the presidency and the country, better understood the gravity of their task, and were wiser in the exercise of their responsibilities than the players in President Clinton's imbroglio, the answer is less certain and rests more in the eye of the beholder. To me, at least, the conclusion is still plain enough. Although endless compari-

9. See generally WHITE, *supra* note 1 (detailing the unfolding of the Watergate scandal and President Nixon's resignation).

10. See LAWRENCE E. WALSH, *IRAN-CONTRA: THE FINAL REPORT* 1-24 (1994) (documenting the events surrounding the Iran-Contra scandal).

11. See POSNER, *supra* note 7, at 16-58 (discussing President Clinton's conduct leading up to his impeachment).

12. See Bowman & Sepinuck, *supra* note 5.

13. Among the many post-mortems on the Clinton impeachment, two of the best are Richard Posner's book, *An Affair of State*, *supra* note 7, and Robert W. Gordon's article, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639 (1999).

14. U.S. CONST. art. II, § 4; see, e.g., *Hearing on the Background and History of Impeachment*, *supra* note 5, at 342 (statement of Frank O. Bowman, III, Professor, and Stephen L. Sepinuck, Professor, Gonzaga University School of Law) (seeking "to assist Members of Congress by discussing the meaning of the constitutional phrase 'treason, bribery, or other high crimes and misdemeanors,' with particular emphasis on five interpretive questions implicit in the nature of the specifications by the Independent Counsel"); Bowman & Sepinuck, *supra* note 5, at 1520 (discussing the issue of defining impeachable offenses by "reviewing history . . . , text, and scholarship to discern the meaning of the constitutional phrase 'Treason, Bribery, or other high Crimes and Misdemeanors'" (quoting U.S. CONST. art. II, § 4)).

sons are possible, the essential difference between the protagonists of Clinton-Lewinsky and those of, say, Watergate, is captured in a single pairing. In Watergate, Peter Rodino, a New Jersey congressman of no particular prior distinction, cautiously but firmly steered the House Judiciary Committee to a bipartisan consensus on procedure, and finally, after long and careful debate, to a strongly bipartisan vote on articles of impeachment against Richard Nixon.¹⁵ When it was over, and when the vote to impeach was at last taken, Rodino returned to his office, gazed out his window, and cried at the enormity of what he and his colleagues had done.¹⁶ Rodino's Clinton-era successor, Henry Hyde, early abandoned the idea of procedural consensus, pushed articles of impeachment through the Judiciary Committee on a straight party-line vote,¹⁷ and then, chanting "Rule of Law, Rule of Law," as a protective mantra,¹⁸ sought vainly to distinguish President Clinton's adulteries from his own¹⁹ (and those of a startling number of the Republican leadership),²⁰ and President Clinton's lies from the Iran-Contra perjuries of the Reagan administration (which Hyde had defended).²¹

15. See WHITE, *supra* note 1, at 354-60, 380-406 (discussing the appointment of Peter Rodino and his strategy in navigating the House Judiciary Committee through the Nixon impeachment debate).

16. See *id.* at 407.

17. See *Impeachment of William Jefferson Clinton, President of the United States*, H.R. REP. NO. 105-830, at 128-36 (1998) (setting forth the votes of the House Committee on the Judiciary on articles of impeachment with votes being cast along strict party lines, 21 to 16 in favor of the first and third articles, and 20 to 17 in favor of the second article).

18. See Press Release, Rep. Henry J. Hyde, Trial of William J. Clinton: Closing Remarks of Congressman Henry J. Hyde (Jan. 16, 1999) (Federal Document Clearing House, Inc.) (stating that "[t]he rule of law is what stands between all of us and the arbitrary exercise of power by the state").

19. Hyde attempted to differentiate his adulterous affair from that of the President by stating that "[t]he statute of limitations has long since passed on my youthful indiscretions." Howard Kurtz, *Report of Hyde Affair Stirs Anger; Judiciary Chairman Admits '60s Relationship but Calls Story 'Attempt to Intimidate Me,'* WASH. POST, Sept. 17, 1998, at A15.

20. See Lloyd Grove, *Under Fire in a Glass House; Congressional Stone-Throwers Face an Onslaught of Dirt-Digging*, WASH. POST, Sept. 18, 1998, at C1 (stating that during the course of the Lewinsky scandal, the extramarital affairs of Reps. Dan Burton, Helen Chenoweth, and Henry Hyde were exposed). Republican Majority Whip Tom DeLay indignantly condemned the exposure of these Republican affairs as an attempt by Democrats in the White House "to destroy their enemies." David Stout, *Testing of a President: Mudslinging; Leaders in House Act to Discourage the Spread of Embarrassing Stories*, N.Y. TIMES, Sept. 18, 1998, at A23.

21. See Gordon, *supra* note 13, at 680-81 (comparing Hyde's "stentorian" denouncement of perjury in the Clinton matter with his vocal support of Oliver North and John Poindexter, both of whom were charged with committing perjury in the Iran-Contra matter); *The Impeachment Hearings; Never Condoned Lying Under Oath, Hyde Says*, L.A. TIMES, Dec. 9, 1998, at A20 (stating that "[i]n 1987, when Reagan's aides were accused of lying to Congress, Hyde defended them and faulted those who 'label every truth and every deception an outrage'").

I do not wish to overstate this second point by drawing too great a distinction between, for example, the mass of public men and women of the Watergate generation and the mass of politicians of today. The political classes of every age and every country are generously populated with shallow opportunists, eager to exploit scandal for partisan gain, and with sheep easily convinced that acquiescence in whatever the leadership of their party or faction may command is synonymous with statesmanship. There can be no doubt that there were radical Republicans who sought the impeachment of Andrew Johnson, and modern Democrats who strove for the ouster of Richard Nixon and Ronald Reagan, for no better reason than that these presidents were leaders of the opposition party, whose downfall would represent a short-term political coup. Likewise, in every case in which a presidency has been in jeopardy, those who defended the president, whether successfully or not, were often motivated by their own narrow partisanship or other less-than-highminded considerations. And in every age, it is easy for even decent and well-meaning people to convince themselves that what harms their political opponents and pleases their most fervent supporters is also in the best interest of the country. Nonetheless, one glaring distinction between the Clinton case and all those that came before it was the presence in every prior case and the virtual absence in *l'affaire Lewinsky* of grown-ups in the leadership group—persons of a serious cast of mind who restrained the venom of their own zealots, led the sheep in their flocks, reached out to engage the views of the opposition, and most importantly, thought long and hard about the implications of their conduct for the future of the Republic.²²

The final point of difference between the Clinton impeachment and its historical antecedents is that Clinton's troubles arose from the confluence of a presidential disposition to lust and mendacity—neither of which had been unheard of among America's chief executives—and the post-Watergate criminalization of politics, a phenomenon that really was without precedent in this country.²³ The

22. See Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745, 746 (2000) (exploring the view that the Clinton impeachment was "more political and less responsible than the Nixon impeachment hearings of 1974").

23. Many other observers have commented on this phenomenon. See, e.g., Edwin M. Yoder, *The Presidency and the Criminalization of Politics*, 43 ST. LOUIS U. L.J. 749 (1999) (discussing post-Watergate "reforms" that have led to the criminalization of normal political behavior); John M. Griesbach, *Three Levels of Trouble: A Comment on Edwin Yoder's "The Presidency and the Criminalization of Politics"*, 43 ST. LOUIS U. L.J. 761 (1999) (analyzing the post-Watergate legal structure that has been developed to regulate the ethics of federal public officials).

conditions necessary for the emergence of this phenomenon aggregated slowly, and its many components, often beneficial in themselves, fell together largely by accident. The twentieth century saw an explosive growth in the reach of federal criminal law, for reasons wholly unrelated to concern about wrongdoing among the governing classes of the federal government.²⁴ Included in the federal criminal code, quite properly, are prohibitions against perjury and false statements²⁵ that are seldom used, but always available.²⁶ On the civil side, Congress passed an ever-more-comprehensive set of laws that makes virtually every sort of unpleasant, unethical, or merely boorish behavior a legal cause of action.²⁷ The courts and Congress also approved rules of civil discovery that allow intrusive questioning into the most collateral of matters.²⁸

In addition to these general developments, the post-Watergate impetus for reform of politics produced a variety of ethics-in-government laws. Notable among these were codes of behavior regarding campaign finance and conflicts of interest for elected and appointed officials, the violation of which carried both civil and criminal penalties.²⁹ Watergate also gave us an independent counsel statute³⁰ that conferred on unelected officials belonging to none of the three constitutional branches of government the power to pursue our highest public officers for any real or suspected transgression of the sprawling federal criminal code.³¹ Most critically in the Clinton case, the independent counsel statute devolved substantial responsibility for investi-

24. For a brief discussion of the expansion of federal criminal jurisdiction, see Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 312-14 (2000).

25. See 18 U.S.C. § 1001(a) (2000).

26. For a discussion of the application of federal perjury law in the Clinton case, see Bowman & Sepinuck, *supra* note 5, at 1554-58.

27. See, for example, the discussion of hostile work environment sexual harassment claims in *Jones v. Clinton*, 990 F. Supp. 657, 674-76 (E.D. Ark. 1998). In the public sphere, examples include regulation of lobbying, financial disclosure, receipt of gifts, honoraria, outside earned income, and outside and post-employment activities. See Griesbach, *supra* note 24 (discussing these laws and the role they play in overseeing the "ethics" of federal public officials).

28. See, e.g., FED. R. CIV. P. 26(b)(1) (allowing discovery of any information relevant to the subject matter of a civil action, even if the subject matter is not related to a claim or defense, provided that the information sought is not privileged).

29. See Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified as amended at 5 U.S.C. app. §§ 101-505 (1994)).

30. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

31. See *id.*; Morrison v. Olson, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting) (discussing the inherent problems with creating an independent counsel that is not a part of the executive branch).

gating impeachable offenses from Congress, where political calculations can restrain as well as breed excess, to professional crime-fighters³² to whom political calculations, even those of moderation, are anathema and presumptively corrupt.

Moreover, in this century, government has become an indispensable participant in so many arenas of economic and social life in a country that is increasingly, almost indecently, wealthy, while becoming increasingly heterogeneous in ethnicity, religion, economic interests, and social mores. The omnipresence of government in a wealthy, heterogeneous society has spawned well-funded advocacy groups at both extremes of the political spectrum that seek to influence government, but which are beyond direct political control. Such groups—right-wing examples of which figured prominently in the Clinton matter³³—have demonstrated a propensity to use any available legal or public relations tool to demonize and destroy those they perceive to be their enemies.³⁴

The confluence of all these developments created a new possibility in American political life—the routine use of the civil and criminal law to disable one's political opponents. The method was refined in the years preceding Clinton's encounter with it. Find a mistake or personal weakness. If it is already criminal, call for an independent counsel or a Justice Department investigation. If not criminal yet, file a civil lawsuit or start a congressional investigation. If no direct evidence of criminality is unearthed, get the target under oath. Force the victim to admit indiscretions that will embarrass and bring politi-

32. See 28 U.S.C. § 594(a) (1994) (enumerating the duties and powers of the independent counsel).

33. One such organization, Judicial Watch, has been suing the Clintons and the federal government throughout the Clinton presidency. See, e.g., *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1 (D.D.C. 1995) (adjudicating Judicial Watch's challenge to the legality of a legal defense fund created by President and Mrs. Clinton); Harvey Berkman, *Even If Starr Disappeared, There'd Be Klayman*, NAT'L L.J., Nov. 9, 1999, at A9 (describing the activities of Judicial Watch and its founder, Larry Klayman). The role of Richard Mellon Scaife, a millionaire publisher and ardent Clinton opponent, was also often discussed during the Whitewater and Lewinsky scandals. See *In re Starr*, 986 F. Supp. 1144, 1153 (E.D. Ark. 1997) (describing Scaife as a person who, "according to various media reports, has used his fortune to press a media campaign discrediting President Clinton and suggesting that Vincent Foster, Jr., may have been murdered"). The conservative Southeastern Legal Foundation, another example, funded the Paula Jones lawsuit against President Clinton. John Delano, *Push to Disbar Clinton Would Find Dead-End in PA*, 11 LAWYERS J. 6 (2000).

34. See *supra* note 33. Republicans would doubtless point to the role of liberal advocacy groups in the confirmation proceedings of Robert Bork and Clarence Thomas. See generally NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* (1998) (analyzing the Bork hearings and subsequent confirmation proceedings and discussing the role of special interest groups in the confirmation process).

cal ruin, or to lie and commit perjury. The Clinton affair was the logical endpoint of an increasingly ugly trend: the constitutional mechanism of impeachment pressed into service as the ultimate weapon in the arsenal of practitioners of the politics of personal destruction.

In the end, the Clinton impeachment was unique because of the combination of three factors: the squalid triviality of the underlying conduct, the absence of mature leadership from the elected and appointed guardians of the constitutional system, and a new, mean, criminalized politics. The next question is, how did we come to such a pass? Even if politics has turned ugly and public officials have become feckless beyond the historical norm, how did oral sex become the core of a successful impeachment of an American president?

II. HOW COULD IT HAVE HAPPENED?

A. *The Trap That Post-Watergate Legalism Set for Politics*

One might argue on behalf of the congressional leadership that the fault was not in themselves, but in their stars. That is, one might reasonably contend that the quota of legislators with the makings of statesmen was no higher among the Democrats of 1974 than among the Republicans of 1999.³⁵ What changed, on this view, was the political and legal environment in which the Nixon and Clinton scandals occurred. One explanation for the Clinton mess is that the post-Watergate reforms have substituted ethical perfectionism enforceable through criminal penalties—a sort of utopian legalism—for the constitutional scheme of controlling both public corruption and factional excesses through political interactions between, and factional conflict within, governmental branches. Not only did the post-Watergate legal apparatus, composed of expanded substantive criminal law and novel politically unaccountable institutions like that of the independent counsel, grind out sometimes quite unreasonable political prosecu-

35. There is some reason to think that Congress has in fact grown more ideologically polarized in the last twenty-five years. For example, one study of Senate voting records showed that in 1999, for the first time in the nineteen years for which data was kept, every Democrat in the Senate had a more liberal voting record than the most liberal Republican, and conversely, every Republican had a more conservative voting record than every Democrat. Similar results were reported for the House of Representatives. Terry Carter, *In the Beltway: Even Lobby Shops Are Dividing Along Political Lines These Days*, 86 A.B.A. J. 25 (Oct. 2000). Of course, strong ideological convictions need not necessarily produce uncivil, destructive behavior, but a legislature divided between two parties, each weighted toward its own ideological extreme, is a tough environment for the gentle art of compromise.

tions on its own,³⁶ but its existence had indirect effects on the nominally unrelated traditional constitutional mechanisms. The Clinton case is a wonderful illustration of both phenomena.

First, the Independent Counsel's office pursued the President's underlings, and his wife, and ultimately the President himself, in directions and to degrees that a politically responsive Justice Department or Congress (controlled by the opposing party though it was) would very likely never have done.³⁷ (I think it beyond dispute, for example, that had Linda Tripp taken her story to the House Judiciary Committee, the very most that might have happened would have been that she and Monica Lewinsky would have been used to create a temporary political embarrassment for the President. The suggestion that an impeachment inquiry would have been opened on this basis is absurd.) Second, and more critically to the present point, by sticking doggedly to a legalistic view of his mandate, exposing every tawdry detail of the Lewinsky matter, and in the course of doing so, forcing the President into a grand jury perjury trap, the Independent Counsel also trapped Republicans in the legislative branch.

The essence of politics—even politics of a very mean kind—is messy and imprecise moderation. Politicians rarely fight battles to the last trench. Thus, discovery of every detail of the absolute truth about a disputed matter is almost never a precondition for political decision. The arts of compromise and living to fight another day require a toleration for ambiguity and obfuscation. Law, however, has the opposite disposition. The law trumpets its devotion to Truth, with a capital “T.” Lawyers, particularly good lawyers, and still more particularly good prosecutors, are experts at the craft of excavating every detail of any transaction that comes under their scrutiny. The product of the Independent Counsel's legal investigation was thus a monument to a certain aspect of the lawyer's art—a treasure trove of detail, which the Independent Counsel delivered to Congress with the air of one who has done something wonderful. And although certain congressmen may have welcomed it, the effect was akin to your dog strolling into the family reunion and proudly presenting the fragrant corpse of a long-dead skunk. Such a thing cannot be ignored. It calls for an im-

36. See Gordon, *supra* note 13, at 640-41 (providing as examples of unreasonable political prosecutions the three-year, \$11.9 million investigation of Mike Espy for receiving gifts totaling \$35,000, and the four-year, \$10 million investigation of Henry Cisneros for making false statements to the FBI regarding payments he made to a former mistress).

37. See *id.* at 641 (discussing how Independent Counsel Starr, after failing to collect enough evidence to charge the Clintons with wrongdoing in the Whitewater matter, “leverag[ed] his authority” to conduct an investigation into the Paula Jones sexual harassment matter).

mediate and regrettably public decision—both about what to do with the skunk and what to say to the dog. Republicans who, without the Independent Counsel's report, would have enjoyed (and exploited) the President's discomfiture over disclosure of his sexual misadventures, but would never have used congressional investigative powers to pursue the details, were now forced to choose between impeaching the President or seeming to condone both his personal immorality and a felony violation of the criminal law.³⁸ With the world looking on, they congratulated the dog, and convinced themselves that dead skunk was *filet mignon*.

The post-Watergate reformers sought to cure a perceived weakness in the constitutional system of checks and balances in the face of serious presidential wrongdoing by turning to law to fix politics. They wrote laws delineating the proper conduct of public men and women, and created an extra-constitutional inquisitorial office to ensure that the law was enforced, even if the heavens should fall.³⁹ What the reformers forgot is that politics has virtues as well as vices, and that one of those virtues is the instinct to moderation. The framers of the Constitution certainly relied on political competition among institutions and factions to produce conflict in which the self-interest of each institution or faction would be checked by the strivings of its institutional or factional opponents.⁴⁰ But the framers also recognized that politics is often home to public-spirited action, and that even narrow calculations of political interest will often counsel in favor of restraint and magnanimity. The trouble with the rule of law is that sometimes "the law is a ass," knowing neither common sense nor anything else outside itself. Thus, Clinton's congressional tormentors might justify themselves by arguing that post-Watergate utopian legalism left little room for either political maneuver or broadminded statesmanship.

There is, I think, a good deal of truth in this critique of post-Watergate reforms. But it only partially explains, and cannot excuse, the Clinton-Lewinsky fiasco. Ronald Reagan served under the strictures of the Watergate reforms and was subject to scrutiny by an inde-

38. Although the point has been endlessly debated, it seems futile to deny that President Clinton committed perjury on several occasions in the Paula Jones deposition and during his grand jury testimony. For further discussion of this point, see Bowman & Sepinuck, *supra* note 5, at 1560 n.166, 1561 n.168.

39. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)) (creating the Office of Independent Counsel); *supra* notes 31-33 and accompanying text (discussing the independent counsel statute).

40. See THE FEDERALIST NO. 10 (James Madison) (discussing the uses and dangers of factions).

pendent counsel.⁴¹ Reagan could have been impeached over Iran-Contra, and on more constitutionally substantial grounds than those marshaled against Clinton, but it did not happen. Independent Counsel Lawrence Walsh did not become the head cheerleader and chief witness in the cause of impeachment.⁴² The legislators principally responsible for the Iran-Contra investigation decided early on that, whatever else might come, impeachment was not a live option.⁴³ By contrast, Kenneth Starr—from the moment he sought expansion of his jurisdiction to encompass the Lewinsky affair, to his final oral exposition of his written report to Congress—chose at virtually every juncture the most aggressive, confrontational, prosecutorial option available to him.⁴⁴ Congressional Republicans, for their part, while they ultimately may have outfoxed themselves by using the cover of the independent counsel statute to defer as long as possible direct responsibility for investigating the Clinton-Lewinsky matter, could undoubtedly have dampened Mr. Starr's enthusiasm for impeachment by signaling privately that an opinionated, adversarial report from the Independent Counsel would be unwelcome.

In the end, a determinist explanation of the Clinton impeachment will not wash. The post-Watergate reforms certainly set the stage for the Lewinsky imbroglio, but no law forced Kenneth Starr, congressional Republicans, or, of course, Bill Clinton into the self-defeating choices they made. The question remains, why did they all do what they did?

B. *The Fading Power of the American Idea*

In truth, of course, there is no single explanation for the choices of the actors in the Clinton impeachment saga. Post-Watergate re-

41. See WALSH, *supra* note 10, at 445-72 (discussing investigations into the Reagan White House).

42. *Cf. id.* at xvii (stating that the independent counsel "investigation found no credible evidence that President Reagan violated any criminal statute").

43. See Richard M. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 883-87 (1999) (discussing the consensus among members of the Senate investigation into the Iran-Contra matter that they had no desire to "go after" the President or damage the presidency).

44. See *id.* at 888 (stating that "[t]he Independent Counsel proceeded on his own calculations and submitted his findings about perjury, witness tampering, and obstruction of justice in the matter of the White House intern to the House for purposes of an impeachment inquiry"); *id.* at 897 (reporting that "56% of the public believed Starr was mainly interested in hurting Clinton rather than in finding the truth, [and] 60% thought he was trying to embarrass Clinton").

formism, the changed role of the press in modern politics,⁴⁵ the transformation of the two national political parties from “decentralized yet strong *corporate political parties* into . . . weak *associational political parties*,”⁴⁶ and the ongoing “culture wars” in which deep disagreements about private morality are fought out in public,⁴⁷ all played a role in shaping the decisions that led to impeachment. I want to talk here about one other factor, which I think has been less-discussed.⁴⁸

It is often said that the United States is the only nation in history to be based not on a set of ethnic, territorial, historical, or religious allegiances, but on an idea. While this claim rings true enough to have become commonplace, exactly what the idea is is less often articulated. The “American Idea” is, of course, a constellation of a number of ideas. Some of them are the “truths” about the nature of man and society that the Declaration of Independence held to be self-evident.⁴⁹ But what distinguishes the American idea and the American experience not only from the monarchies and aristocratic oligarchies of the eighteenth century and the totalitarianisms of the twentieth, but also from superficially like-minded regimes, such as the succession of Republics of post-Revolutionary France, which all swore allegiance to the principles of “Liberté, Egalité, Fraternité,” is the embodiment of general principles in a particular set of institutional arrangements. Thus, the American idea is not merely an abstract embrace of freedom, equality, and democratic self-governance, but is instead a societal compact to promote those ideals within the specific, if historically evolving, governmental framework outlined in the Constitution.

I do not, of course, mean to suggest that the institutional forms described in the Constitution would have been conceived by the founding generation to be indispensable to or inseparable from the idea of Americanness. When written, the Constitution was a radical experiment, not a body of scripture. Even the Constitution’s principal

45. See Griesbach, *supra* note 23, at 775-76 (discussing the role of the media in modern politics).

46. *Id.* at 773.

47. See POSNER, *supra* note 7, at 198-216 (identifying the numerous factors that forced previously private matters into open and regular public discourse in the context of the Clinton investigations).

48. I will not say “undiscussed.” Nothing about the Clinton impeachment has been undiscussed, and I am profoundly skeptical that, at this late stage, there is anything very new to say about the business. But I promised the editors of this publication that I’d have a go, and this is it.

49. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”).

draftsmen and strongest supporters anticipated that revisions would be desired and might be reasonably common.⁵⁰ Moreover, an influential body of opinion, famously exemplified by Thomas Jefferson, favored revisiting the question of basic governmental arrangements in every political generation.⁵¹ The identification of the American idea with the political forms of the Constitution grew instead out of two centuries of experience in which those forms evolved (sometimes in directions that would certainly have astonished, and perhaps dismayed, their designers) and proved strong, flexible, and remarkably suitable to the American people and landscape.

Nonetheless, the Constitution we have and the governing tradition it engendered both bear the stamp of James Madison far more than Thomas Jefferson. The United States did not become a land in perpetual revolutionary ferment. Rather, it settled into two centuries and more of remarkable institutional stability under the influence of a fundamental charter that is essentially procedural in character. The Constitution is, on most substantive questions, outcome neutral.⁵² With few exceptions, it does not attempt to dictate what the country shall do, so much as how the decisions will be reached.⁵³ The peculiar strength of the American democracy may be said to rest on two pillars—on the one hand, the undoubted practical genius of the constitutional plan itself, and on the other, a passionate, almost religious faith in the virtues of this most pragmatic of political documents.

What I sensed throughout the Clinton impeachment was that a distressingly large fraction of the people whose decisions affected the course of the scandal did not seem to understand the American idea of government. Or perhaps they understood it, but somehow had fallen out of love with it. The list of offenders begins with those who created the independent counsel statute, a law that grew from mistrust of the ability of either the executive branch's Justice Department or the committees of Congress to investigate official corruption and abuse of power.⁵⁴ The law's drafters not only misread the lessons of

50. This is made apparent in Article V of the Constitution, which details procedures for amending the Constitution.

51. In 1789, Jefferson wrote to James Madison that "the earth belongs in usufruct to the living," and that therefore "[e]very constitution, then, and every law, naturally expires at the end of 19. years." THOMAS JEFFERSON, WRITINGS 959, 963 (Library of America 1984).

52. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 90 (1980) (explaining that the focus of the Constitution is on procedure, not substance, and stating that "[e]ven provisions that at first glance might seem primarily designed to assure or preclude certain substantive results seem on reflection to be principally concerned with process").

53. *Id.*

54. See KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 41-47 (1992) (discussing the public's declining confidence in govern-

Watergate—in which both Congress and special prosecutors operating under the authority of the Justice Department performed very well, despite presidential resistance—but they failed utterly to recognize the dangers of creating a prosecutorial entity subject to no effective control by any of the three constitutional branches of government.⁵⁵

Next on the list of constitutional sinners was the United States Supreme Court, the body supposedly most dedicated to the preservation of constitutional norms. First, the Court upheld the independent counsel statute against compelling challenges based on the Appointments Clause of Article II⁵⁶ and the doctrine of separation of powers.⁵⁷ Then, in an action that was a necessary precursor to the Clinton-Lewinsky-Jones farce, the Court demonstrated an almost unbelievable naiveté about the nature of high-profile civil litigation, the demands of the presidential office, and the dynamics of modern, media-saturated political culture by holding that the district court in the Paula Jones lawsuit abused its discretion by postponing resolution of the case until after the President's term of office.⁵⁸ The Court expressed an airy unconcern—almost morbidly comic in retrospect—about the prospect that a civil lawsuit alleging sexual misconduct by a sitting president might “conceivably hamper the President in conducting the duties of his office.”⁵⁹ And during the long battles over Whitewater and Lewinsky, the Court added insult to injury by denying certiorari in appeals from D.C. Circuit opinions restricting the scope

ment following Watergate and how public attitudes might have influenced the creators of the independent counsel law).

55. See *Morrison v. Olson*, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting) (arguing that the independent counsel statute violates separation-of-power principles because it creates an office that is not accountable and is given virtually limitless discretion).

56. U.S. CONST. art. II, § 2, cl. 2 (“[The president] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . .”).

57. *Morrison*, 487 U.S. at 696-97. Justice Scalia filed a prescient dissent, outlining in detail the problems and excesses to be anticipated from this constitutional oddity. *Id.* at 697-734 (Scalia, J., dissenting); see also Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1125-35 (1998) (demonstrating how independent counsels have fulfilled the prophecies set forth in Justice Scalia's dissent).

58. *Clinton v. Jones*, 520 U.S. 681, 707-08 (1997) (holding that the district court's decision to defer the trial until after the President leaves office was an abuse of discretion because it failed to take into account Jones's interest in bringing the case to trial); *id.* at 708 (finding that the court failed to “assess whether a stay of trial after the completion of discovery would be warranted”).

59. *Id.* at 708.

of attorney-client privilege available to government officials⁶⁰ and requiring that even a president's bodyguards be made to testify against him.⁶¹ The Court's performance throughout this sequence of decisions and abstentions suggests both a failure to appreciate the basic tripartite design of American government, and, perhaps, a willingness to let distaste for the seamy, private behavior of one president affect decisions that have long-term implications for the health of the office of the presidency.

Although not a constitutional officer, the Independent Counsel was particularly guilty of constitutional heedlessness. Although, as noted, the Office of Independent Counsel was misconceived from the outset precisely because its occupant was outside the scheme of constitutional restraint, there is nothing in the charter of an independent counsel that requires him to act without judgment. That Kenneth Starr so often did behave this way, that he so often charged hither and thither, sublimely unconcerned about damage to constitutional offices and institutions, is a sin chargeable not to the office he held, but to the man who inhabited it.

I have already remarked upon the intemperance of congressional Republicans throughout the Clinton scandals, and will not repeat the charges against them. What Congress, the Independent Counsel, and the courts all lost sight of was that fidelity to our Constitution requires a dedication to protecting the institutions that form the constitutional structure, to maintaining the sometimes delicate balance between those institutions, and to giving the inevitably fallible humans who hold office in those institutions enough space, enough slack, to do the jobs that the Constitution calls upon them to do.⁶²

60. See *Office of the President v. Office of Indep. Counsel*, 525 U.S. 996 (1998) (denying certiorari to *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), which held that a White House attorney could not rely on the government attorney-client privilege to withhold from a grand jury information related to criminal misconduct).

61. *Rubin v. United States*, 525 U.S. 990 (1998). In denying certiorari for an appeal from an opinion of the D.C. Circuit, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), the Court rejected a testimonial privilege for Secret Service officers that would protect "information obtained by Secret Service personnel while performing their protective function in physical proximity to the President," even though it would not apply "in the context of a federal investigation or prosecution, to bar testimony by an officer or agent concerning observations or statements that, at the time they were made, were sufficient to provide reasonable grounds for believing that a felony has been, is being, or will be committed." *Id.* at 1075 (internal quotation marks omitted) (quoting Brief for Appellant at 4, 5 n.1, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998)).

62. One must not, of course, omit from this rogues gallery William J. Clinton. He plainly understood the symbolic power of the presidency, and could play the part to perfection when it served his ends. The trouble was that he understood the mythic components of the presidential office as a "player," in both the Shakespearean and ironic modern

What accounts for the apostasy of so many in government from the Madisonian Constitution and the American idea of governance? No definitive answer is possible, of course, but perhaps some part of the answer is this: The last thirty years or so has seen a change in the dominant ideologies at the fermenting, radical, creative ends of the spectrum of both national political parties. For a significant component of the political intellectuals in (or influential in) both parties, the process-oriented norms of democratic government are illegitimate.

On the right, libertarians view government as an evil in itself, ineradicably hostile to individual rights. The Christian fundamentalist component of the right is also hostile to democratic outcomes that contradict what they believe to be the commands of God—commands that are not subject to debate or to being superseded by the popular will.⁶³

On the left, the post-modernists profess to believe that all public institutions are illegitimate because they serve only to promote the interests of the powerful and keep the disenfranchised powerless. Meanwhile, the left's allies among racial minorities and at least the more radical components of the women's movement denounce the government of the United States as historically and incurably racist and sexist.

senses of the word. He appreciated the instrumental usefulness of the office's mythic aura, and therefore, as a practiced thespian, donned its mantle in most public settings. But he seems never to have understood that the moral stature and iconic power of the presidency are a legacy arising in equal parts from the conduct of past holders of the office and the aspirations of the people for the country the office serves. And he clearly never understood that playing the public role of president imposed any constraints on his private behavior once he stepped away from the front of the footlights. Far from finding in the public's gift of the presidency any obligation of rectitude or self-denial, he seemed to view it mostly as a vehicle for self-aggrandizement, and, incredibly, as a really great way to meet girls. Had the other actors in Clinton's impeachment drama been wiser and loved their country better, they would have resisted the temptation to thrust the president's private flaws into the nation's face. But it must not be forgotten that the principal author of the Clinton impeachment was Bill Clinton.

The final irony of the Clinton impeachment saga is that Bill Clinton's monumental selfishness and utter self-absorption, the very qualities that created the constitutional crisis, finally produced the only observable benefit from the whole mess. In the firestorm following the revelation of the Lewinsky adultery, virtually anyone else would certainly have resigned or wilted under the pressure. Clinton's refusal to admit defeat dragged the country through the sewer of his personal defects, but the experience was so profoundly demoralizing that it killed the independent counsel statute, and may, at least for the immediately foreseeable future, have discredited the politics of personal destruction.

63. See generally Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1647-73 (2000) (reviewing STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* (1998)).

The centrists of both parties are political pragmatists, people for whom the highly specialized, expensive, denatured process of winning elections is the exclusive and absorbing concern. In neither party is there a strong voice for the proposition that the preservation of the processes of democracy itself is more important than the resolution of particular issues or cases. The result is a pervasive lack of respect, even among the political classes, for the unique American constitutional structure and for the institutions within that structure.

III. FALLING IN LOVE AGAIN

If the political classes in American life have indeed fallen out of love with the American idea of politics and governance, what hope is there for reconciliation and rekindling of the old flame? Love is a complex phenomenon. Part of it is an unreasoning attachment to the adored object. Love that progresses beyond infatuation, however, is a more difficult balance. Though the romance persists, making love work requires a hard-headed understanding of the strengths and weaknesses of love's object.

The unique character of the American idea gives rise to a paradox. The American Constitution is procedural in essence,⁶⁴ and guarding it requires a persistent and thoughtful intellectual commitment to keeping the elements of the constitutional structure in alignment. At the same time, central to the cohesion and vitality of any nation is the romance of nationhood. Some part of that romance rests on myths about the country's founding, its history, and the connection between the nation's heroes and the fallible people who now sit in the seats of power. A sophisticated appreciation of the task of stewardship of the nation confers the insight that, sometimes at least, protecting the people who fill the offices by averting our gaze from their personal foibles serves to protect the offices themselves, and thus to protect the process-based values of the Constitution.

All nations need myths. Some commentators have been rather dismissive of the effects of the Clinton impeachment and the related culture of attack politics in dissolving the myths surrounding the presidency. Judge Posner, for example, seems to view diminution of the grandeur as a healthy sign of political maturity.⁶⁵ I disagree. Like all myth, the myth of presidential exceptionalism serves important func-

64. See *supra* notes 52-53 and accompanying text (discussing how the Constitution is outcome neutral).

65. See POSNER, *supra* note 7, at 262-66 (discussing the positive lessons to be learned from the Clinton presidency).

tions and operates at various levels. At the simplest level, the mythic presidency appeals to the desire in all of us to be led by a larger-than-life figure. But more important than the belief that the man who is president is or should be special, is the understanding that the institution of the presidency is crucial to American government, and that belittling the man diminishes the institution.

Thus, when the congressmen of Watergate worried aloud about the damage that the scandal was doing to the presidency and the precedent that would be set by impeachment, they were not political naifs bedazzled by historical myth. They, far more than the public, knew Richard Nixon's ugly side (as well as his undoubted strengths). Many of them had far greater reasons, both political and personal, to despise Nixon the man and his policies. Amidst the undoubted calculations of partisan interests, these men and women were genuinely worried that tearing down a president, even a bad president, would weaken an entire branch of government, and thus the whole country.⁶⁶ Concerns of that sort seemed notably absent from the Clinton impeachment debate. The Republicans in both houses walked lock-step through votes to impeach and convict with scarcely a restraining note sounded by any of them.

The Clinton impeachment is also distinct from the Nixon case for the remarkable failure of the proponents of impeachment to recognize that bringing down a president for these reasons risked more than demythologizing the single institution of the presidency. It risked (and I think did) the far greater damage of tarnishing and belittling all three branches of government, and, indeed, the process of governance generally.

The most common verdict on Watergate and President Nixon's resignation was that "the Constitution worked." The principal lesson that should be drawn from the Clinton impeachment is that ill-advised changes to the constitutional structure combined with short-sighted decisions by constitutional officers very nearly prevented the Constitution from working again. In my own view, farce though it ultimately proved to be, the Clinton affair came nearer to being a long-term catastrophe for the conduct of American politics and government than Watergate. If the Republican fire-breathers had prevailed, if the culture of criminalized attack politics had triumphed, American public life would have been crippled for a generation and more. It was a

66. WHITE, *supra* note 1, at 408 (discussing the concern of one member of the House Judiciary Committee, who, after voting to impeach President Nixon, worried that "[t]he powers of all future Presidents might be reduced because Richard Nixon had abused them").

near-run thing. If such close calls are to be averted in the future, judges, legislators, prosecutors, and presidents will need to think hard about the adult lessons to be learned from William Jefferson Clinton's juvenile affair. The preservation of the Madisonian structure of the American Constitution and of the American idea of governance itself depends on the presence in government of people who understand it, believe in it, and act in each generation to preserve it.

The machine will not "go of itself."