

January 1999

Dunwody Distinguished Lecture: Lessons from a Debacle: From Impeachment to Reform

Cass R. Sunstein

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Recommended Citation

Cass R. Sunstein, *Dunwody Distinguished Lecture: Lessons from a Debacle: From Impeachment to Reform*, 51 Fla. L. Rev. 599 (1999).

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Florida Law Review

Founded 1948

Formerly

University of Florida Law Review

VOLUME 51

SEPTEMBER 1999

NUMBER 4

DUNWODY DISTINGUISHED LECTURE IN LAW

LESSONS FROM A DEBACLE: FROM IMPEACHMENT TO REFORM*

*Cass R. Sunstein***

We have now had the second impeachment of a President in the Nation's history, and it is actually the first impeachment of an elected President. The previous impeachment concerned an unelected President and was politically inflected in obvious ways after the Civil War and the death of Lincoln.¹ What might be done now, now that it appears to be over, is to see if we can make something good of it. Often in American history, when we have had a serious problem, there have been reform efforts that

* *Editor's note:* Portions of this Lecture are reprinted with permission of the publisher, Georgetown University and Georgetown Law Journal. © 1998. Additional portions of this Lecture are reprinted with permission of the publisher, the Trustees of the University of Pennsylvania and the University of Pennsylvania Law Review. © 1998. This address was presented at the University of Florida Fredric G. Levin College of Law on March 19, 1999 as the annual Dunwody Distinguished Lecture in Law. To retain the speech's original character, it has been edited only sparingly. Footnotes have been added where material is directly quoted and where further readings might prove useful or interesting. A VHS copy of the Lecture is on file with the Florida Law Review.

** Karl N. Llewellyn Distinguished Service Professor, University of Chicago Law School and Department of Political Science. I am grateful to the faculty and students of the University of Florida Levin College of Law for their extraordinary kindness on the occasion of the annual Dunwody Lecture. This Lecture draws, at times very heavily, on two of my previously published papers: *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267 (1998); and *Impeaching the President*, 147 U. PA. L. REV. 279 (1998). I draw on these papers, written well before the conclusion of the proceedings involving President Clinton, in order to explore some general lessons that might be drawn from those proceedings. The reader is asked to make allowances for a transcript of oral remarks.

1. Cf. generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 245 (1992) (discussing the impeachment of Andrew Johnson).

have made something bad into something better. It is quite early to get an historical sense of this astonishing set of events, but maybe it is not too early to have some preliminary reactions. I am going to propose two general thoughts and three particular thoughts. So there are really five thoughts, in sum.

The first general thought is that Congress ought not to renew the Independent Counsel Act.² There has been a kind of revisionist learning in the last weeks that this is an Act that should be salvaged in one form or another. My first suggestion is that the Independent Counsel Act should be allowed to die a quiet death in June 1999 when it is scheduled to expire. There are some general lessons that come from this suggestion. One has to do with the omnipresent danger of turning political disagreements into criminal charges—a danger which we saw realized under President Reagan when allegations of criminality on the part of the President and some of his top people were widespread. Oliver North went to jail. And, under President Clinton, we have seen the same thing. This is a pathology when political disagreements turn into criminal charges.

The other general lesson has to do with the nature of liberty under law. And here, the suggestion is that one of the most important guarantors of liberty under law is that prosecutors have a wide range of possible targets and limited resources. Therefore, most of us are immunized from the prosecutorial gaze. It is not because there are not things that might raise an eyebrow once in a while, but because the prosecutor, who has a wide net and a limited budget, has to focus on really legitimate and extreme cases. At least, unless something has gone very sour. So the suggestion is one of the sources of liberty under law is the conventional set-up of the prosecutor's office, which creates a safeguard against abusive or individualized charges.

Okay, that is about the Independent Counsel Act.

On impeachment, my suggestion is that the Nation ought to adopt, as explicitly as we can, a kind of agreement that impeachment is generally, if not always, limited to large-scale abuses of distinctly public power. The suggestion is that both parties ought to adopt something like an arms control agreement—a kind of pact—that says that unless the President has abused authority in a large way—authority that he or she exercises by virtue of being President—then the political remedies, the ordinary ones, of hearings, soundbites, laws, and budget will be the ones that are used, not the impeachment process. This is a suggestion that there ought to be a norm of reciprocity, really, within the political process, in which Democrats and Republicans converge on a judgment that impeachment should not be used except in the most extreme possible cases. Now, that

2. 28 U.S.C. §§ 591-599 (1996).

notion is intended to pick up on my belief that the impeachment of President Clinton was unconstitutional, a violation of the constitutional responsibilities of the House of Representatives. But those who reject that view might be able to agree on the proposition that impeachment should be limited to the most extreme cases on the theory, perhaps, that President Clinton's case was one of the extreme cases, for reasons I will get into.

I now have three more minor suggestions. The first quick one is that the Supreme Court's decisions in *Morrison v. Olson*³ and *Jones v. Clinton*⁴ were disastrous, and, in retrospect, astonishingly obtuse. If you read Justice Scalia's dissenting opinion in *Morrison*, he nailed the objections to the Act a long time ago. In *Jones*, the Court suggested that a civil action against the President could not possibly divert the President in any serious way. These decisions were disastrous and obtuse, but they were nonetheless correct; the remedy for them, therefore, is statutory and not constitutional. The recent rebellion against the Supreme Court is not born out by the nature of the cases.

The second proposition is the saddest of the whole set. And, that is, we now have fresh reason to doubt the fashionable ideas that constitutional interpretation ought to be a responsibility of legislatures and that we ought to have some optimism that legislatures can carry out the task of interpreting the Constitution fairly. In reaction against, I think, the Warren Court's aggressive use of the Constitution, there has been a lot of suggestion, crossing political lines, that we ought to entrust our elected representatives, more than we have, with the job of thinking seriously about the Constitution's meaning. This is just one incident, and it is an unusual one, but it does supply some new grounds for skepticism about the notion that constitutional interpretation on the legislature's part can be immunized from partisan—even grossly partisan—considerations. This is the least happy note.

My last ancillary suggestion is that it is not correct to say that the law of sexual harassment is broken. Many people have held the law of sexual harassment responsible for the events of the last two years. But, it does need to be fixed—in one smallish, but quite important, way.

To orient discussion, let us think a little bit about what the founders of the Constitution tried to create, and how they tried to create it. We might think, as a kind of shorthand, that they had a picture of democracy which had a revolutionary feature: they wanted to combine a high degree of political accountability with a commitment to deliberation and reason-giving. They sought to ensure that outcomes would be supported by reasons, not just power, and that if public force was going to be used

3. 487 U.S. 654 (1988).

4. 520 U.S. 681 (1997).

against someone or on someone's behalf, there ought to be a degree of reflection first. This notion was that we would have a deliberative democracy combining popular responsiveness with reason-giving. What the Framers added to that goal was an understanding of likely incentive effects of different institutions. And, at their most ingenious, what they sought to create were institutions that would have a realistic picture of human nature, and would use that in the service of the ideal of deliberative democracy. The notion of national representation, of which Madison was so fond, was designed to ensure a kind of separateness from the play of faction, so that representatives could engage in deliberative tasks. In Madison's words, this would allow our representatives "to refine and enlarge" the public view, rather than just replicate it.⁵ That is to suggest that we might think of the Constitution's structure as attempting to wed an ideal—that of a deliberative democracy—with some mechanisms which were attuned to incentive effects. What institutions will have what incentive effects on what people?

Now, let us turn to the Independent Counsel Act, and think, in particular, about the incentives it creates for the most important actors in our system, such as political officials generally; the media; and the independent counsel, herself or himself. If you look at political officials generally, any party that is out of power is under tremendous pressure by virtue of the Act's existence to call for the appointment of an independent counsel when allegations of wrongdoing are made, and to draw attention to the independent counsel's activity or inactivity as the proceedings go on. Under the Independent Counsel Act, whenever a party is out of power, one or more members of that party have a tremendous incentive to call on the Attorney General to appoint an independent counsel, to ensure that serious allegations of wrongdoing are taken seriously by someone who is not in the President's pocket. It is no wonder that no matter whether that Congress is controlled by Democrats or Republicans, no matter which is in the majority or minority, a certain number of members of the party opposed to the president in office will spend a considerable of time calling for the appointment of an independent counsel. So much so, that the pressure to appoint an independent becomes for an administration nearly irresistible. Hence, it is the case that every administration since the Independent Counsel Act has been enacted has been subjected to an independent counsel investigation at least once.⁶ It is not as if corruption is high; it is that the incentive effect is created by the Act for members of the opposing party, and the ability to resist that pressure on the Attorney General's part is extremely limited.

5. THE FEDERALIST No. 10 (James Madison).

6. See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2283 (1998) (providing an appendix detailing investigations under the subject Act).

Politicians who think the appointment of an independent counsel would not be a good idea—it would be diversionary or such—are unlikely to resist their fellow Democrats' or fellow Republicans' pleas, because it makes them look soft on corruption or soft on the opposing party. So, the pressure for opposition and scandal-mongering is very hard to resist for members of the opposing party. If we look at the media in particular, the Framers hoped that the media would serve the interest of having a genuinely deliberative democracy. But in the current media, it is no news to say that there is a tendency for sensationalism. What is a little more interesting is to suggest the way in which the Independent Counsel Act feeds and aggravates that tendency, by diverting attention from problems such as the increase in asthma in the inner-cities to such problems as whether the Vice President made the phone call from the wrong office. The truth is that scandals sell, and newspaper people know that fact. They are under tremendous pressure to cover political scandals, even if they would like not to.

I remember fairly early in the Lewinsky scandal, I had a call from someone at the *Washington Post*. And this was frustrating to get these calls about details of where someone was and where some piece of clothing was. So I said to the reporter, "Don't you wish you were working on something else? Do you ever get sick of this topic? It seems to be what you are spending all your time on." And she said, "I hate my job. I really went into this because I wanted to cover things that really mattered to people. But, if we don't do it, some other newspaper is going to. And, if they do, and we don't, we're going to be at a competitive disadvantage in the marketplace. The editors know that, and we're stuck." They are in kind of a race to the bottom with respect to competitive pressures. The independent counsel is not responsible for the tendency, but the Act tends to aggravate it, insofar as attention to complaints of criminal allegations tends to sell newspapers and attract viewers, and not doing that has the opposite effect.

Let us think for a moment about the incentives faced by the independent counsel himself or herself. What got me thinking about this was not the Clinton administration's difficulties with independent counsels, but the Reagan administration's. In particular, the sad tale of Theodore Olson, the Assistant Attorney General of the Morrison and Olson cases. He was and is an extremely honorable person who defended President Reagan quite vigorously against allegations that the Justice Department had wrongly invoked executive privilege in connection with investigations of environmental policy. He testified very vigorously before Congress. Some members of Congress alleged, implausibly, that he perjured himself. Now, if you can name cases in which perjury before Congress has resulted in serious criminal investigation, you are an expert. If you can name cases in which people have perjured themselves before

Congress, you just watch T.V.

The number of cases in which people are subject to serious criminal investigation because of misstatements before Congress is either trivial or zero. Nonetheless, Olson faced several years of serious criminal investigation, spending millions of dollars of his own money to fend off an indictment which was, after those years of investigation, ruled meritless by the independent counsel herself.

The problem is that from the standpoint of the independent counsel, you have one person to focus on and there are two options: indict or not indict. Not to indict looks like a waste of time, indictment looks heroic—a kind of Archibald Cox act. The distortion stems from the fact that the independent counsel, unlike most prosecutors, has one target rather than many and an unlimited rather than limited budget, which produces an incentive for zealotry. This is not a suggestion that any one of the independent counsels is dishonorable or part of a conspiracy or anything like that. It is a suggestion that the problems we have seen under the Act are a natural product of the incentive effects of the office of the independent counsel, which creates a kind of fixation on particular people and particular events with a kind of bias toward detailed investigation and, ultimately, indictment.

Cases that ordinary prosecutors would spend no more than ten minutes on (or no time at all) become the occasion for weeks, months, years of investigation. For public servants generally, the Independent Counsel Act creates a bad incentive, too. Everyone who accepts a Cabinet-level post knows that the possibility is far from trivial that they will be subject to an independent counsel investigation and, ultimately, be indicted—even if they are like ordinary people or a little worse or a little better. The risk of a credible and specific allegation being made against anyone in the position to be appointed to the Cabinet is pretty high, and everybody knows that before the fact, which creates a disincentive to become a public official. It is not the worse thing in the world, but it is an adverse effect.

Now, as a good Chicagoan, I am required by my contract to use the words “cost benefit analysis” in every talk, and to undertake a little cost benefit analysis. And, we would have to say that, on the benefit side, there is something rather than nothing. That is, the Act does deter official wrongdoing and it has punished genuine official wrongdoing. Judge Starr has found some and Judge Walsh did, too. So, it is not as if there is nothing on the benefit side. But the cost in terms of the incentives created for the independent counsel, the media, members of opposing parties, and prospective public servants is extremely high, and it would be very good to try to figure out a way to obtain the good without the bad.

Now we probably do not have to be very adventurous to think about how to do that. For over 180 years of the Republic’s history we have had serious investigations of wrongdoing on the part of high level executive

branch officials. They came from the United States Department of Justice. Sometimes, in the extraordinary cases, the Department of Justice would, by regulation, create an independent counsel, and the system worked pretty well; it was not broken. The Watergate example, sometimes taken to be the strongest argument on behalf of the Independent Counsel Act, seems more to be the strongest argument against the Independent Counsel Act. The Watergate situation was handled not with an independent counsel statute but with some combination of ordinary Justice Department activity and political safeguards. You will recall that President Nixon had Archibald Cox fired—unlawfully, by the way. He was, by regulation, an independent counsel, and President Nixon replaced Archibald Cox with another independent officer, Leon Jaworski—who did his job well. The system worked plenty well enough without an Independent Counsel Act.

There is no reason to mend rather than end this Act, because any version of the Act that results post-mending will continue the tendency, in one form or another, to abridge the safeguard provided by wide focus and limited funds, or to continue the trend to turn into criminal charges essentially political disagreements. There is no reason for the Nation to continue to face those dangers. If we go back to the old regime which worked plenty well enough, we will do just fine. So much for the Independent Counsel Act.

What about impeachment? Well, if we want to come to terms with the constitutional words “high Crimes and Misdemeanors,”⁷ we would like to probably look at the matter in two different ways. If we have a Justice Scalia-like approach to the Constitution, we will want to do it from the standpoint of the original understanding. What did the Founders think in, say, 1789? If we have a different approach to the Constitution, we might look at the whole picture of our constitutional history to try to figure out the kind of implicit common law of impeachment that the Nation has followed. Let us do it both ways, briefly.

If you look at the Constitution, the terms do not tell you a tremendous amount—“Treason, Bribery, or other high Crimes and Misdemeanors.”⁸ Can we get anything out of that language if we try to transport ourselves in a time machine back into 1789? Well, maybe the keyword in the phrase is “or”—“Treason, Bribery, *or* other high Crimes and Misdemeanors.”⁹

We might think to ourselves that these ambiguous terms, “high Crimes and Misdemeanors,” ought to be understood by seeing what the Framers’ defining central cases were. This is nothing like a decisive legal argument, but it is suggestive. If the Framers were thinking of “treason, bribery, or other high crimes and misdemeanors” you might think that they were

7. U.S. CONST. art. II, § 4.

8. *Id.*

9. *Id.* (emphasis added).

thinking of things of the same kind and magnitude as treason and bribery. And, at the time of the Founding, there is no question that “treason” would mean basically what everyone today would think it means.

There is also no question that “bribery” would not mean bribing an official to call traveling when it was very dubious in the last seconds of a basketball game. What was meant by “bribery” was something more like taking money from a foreign nation in order to do something different from what you would otherwise do, or going to members of the Electoral College and paying them to vote for you. Those were actually the examples discussed at the time of ratification. When we think of “treason, bribery, or other high crimes and misdemeanors” we might think that what we are after is an abuse of the authority that people have in virtue of being in the relevant office. So you might think that if the President, in a time of war, decides to sleep eighteen hours a day because it is kind of scary and intimidating, that would be impeachable. Even though it is not a crime, it might qualify as a “misdemeanor” as it was understood in 1789. Or, if the President decides to use the CIA in order to harm his political enemies, there would be no “treason” and no “bribery,” but there would be a large-scale misuse of distinctly presidential power.

That is kind of a glance at the text. If we look at the original understanding, at the time of the Constitutional Convention, we can fortify that view by noticing that the question, “What were the legitimate grounds for impeachment?”, was debated in detail at the Convention itself. Contrary to what has been suggested, this was not an issue on which the Framers said little and left answers to posterity. They said a fair bit. A number of people in the constitutional Convention did not want impeachment at all. They claimed that this would be a recipe for factional fights, hence defeating the system of separation of powers, which could be ensured only if the legislature could not remove the executive.

That was a strongly held position in the Convention. The key people who held it yielded by reference to examples of cases in which the President basically sold the country out during wartime. The swing votes agreed that treason and bribery would be legitimate reasons for removing a President from office. That is basically where the Constitution stood until September, which were the closing days of Constitutional drafting.

At the last moment, George Mason, someone who had been persuaded to support impeachment, said that treason and bribery are too narrow. What if the President subverts the whole Constitution, ignores it, doesn't pay attention to it, doesn't do what the President's authorities are, or does something inconsistent with his distinctly presidential authorities? Shouldn't we allow discharge for “maladministration” also? Madison, at that point, said no, maladministration is too vague and too broad. That's no good. We need a more specific form of words. At which point the Framers put in the words “other high Crimes and Misdemeanors against

the United States,”¹⁰ clearly signaling Mason’s concern that you could have things that were like treason and bribery—offenses against the Nation as such, that did not qualify—that should be grounds for impeachment, too.¹¹

The words “against the United States” were deleted by the Committee on Arrangement and Style, which had no authority to make substantive changes, and thought, it appears, that they were just eliminating redundancy.¹² It turned out to be an important act by the Committee on Arrangement and Style. In any case, it seems pretty clear that by the period 1789, 1790, and 1791, there was general agreement that the defining cases for impeachment, at least, were large-scale abuses of distinctly presidential authority. Thus, what President Clinton did, and some of what President Nixon was alleged to have done, do not fall within the cases that the Framers had in view, however egregious some or all of those things are.

If we look forward and get a sense of our constitutional history, we will notice a remarkable fact: a tradition of forbearance and restraint on the part of both parties, even in an extraordinarily large number of cases in which something other than forbearance and restraint might have been expected. Here is an historically non-exhaustive list of cases.

President Nixon, as noted, was alleged to have behaved dishonestly with respect to his tax obligations. Many Democrats concluded that that was not a legitimate basis for impeachment because it did not involve misuse of presidential power. And they self-consciously decided not to include that among the grounds for impeaching President Nixon.¹³

President Reagan, it was alleged, sold arms unlawfully to the Contras, and there was extensive discussion of this. Vice President Bush, it was alleged, was also involved in the deal, in violation of the Boland Amendment, which expressly prohibited this kind of transaction. For all of the noise and fury over President Reagan’s allegedly unlawful acts, there was no serious talk, at any point, of impeachment. There was an unwillingness to invoke the kind of artillery that would destabilize the Nation, even the face of allegations of unlawful transfers of arms to a nation with whom our relations were quite complex.

It is clear that President Eisenhower lied to the country, very prominently, at least twice. Once he lied in connection with the downing of a U.S. airplane over Russia, which Russia claimed was a spy plane. Eisenhower said that it was not; he knew that it was. It turned out that he had to agree that it was, eventually, because the evidence was

10. *Id.*

11. See 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 499-551 (1966).

12. See *id.* at 600.

13. See Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 296 n.70 (1998).

overwhelming. He also lied to the country about transferring arms to an unfriendly nation in return for the release of hostages. He said that it did not happen. It did—the documents are crystal clear.

President Roosevelt transferred arms to England under the precursor of the “Lend-Lease” program which became a statutory program. This was an unlawful program in which Roosevelt transferred the arms to England in such a way as to concern the Secretary of Defense about what the Secretary of Defense thought was, this is a quote, “illegality and deception.”¹⁴ There was no serious talk, even when the facts came to light, that President Roosevelt should have been impeached.

President Kennedy, in addition to his sexual misconduct, was romantically involved with someone who was romantically involved with at least one high-level member of the Mafia.¹⁵ Now that goes beyond sexual recklessness. That puts the activities of the Justice Department at risk. Nonetheless, even the people who knew it did not think that this was legitimately impeachable.

In context of the Vietnam War, maybe the largest social upheaval since World War II, President Johnson was subject to tremendous criticism. He lied to the country on numerous occasions about how things were going and about what was planned. However, not even his fiercest detractors undertook a serious impeachment effort.

President Lincoln suspended the writ of habeas corpus during the Civil War. The courts told him that that was unconstitutional. He basically ignored what the courts told him to do, thereby continuing to suspend the writ of habeas corpus. Even his detractors did not come close to suggesting that this violation of the Constitution’s habeas corpus clause was a legitimate ground for impeachment.

Now, I do not mean to suggest, by any means, that any of these cases were appropriate cases for impeachment. I do not think any of them were. What I mean to suggest, instead, is that there has been a kind of national convergence, a tacit, case-by-case common law notion that impeachment should be reserved only for the most extreme possible cases of abuse of distinctly presidential authority.

How ought we to think of the impeachment of President Clinton in this light? The most obvious conclusion is that there was only one legitimate impeachment article: the one claiming the President misused his presidential power to get his staff and so forth to lie on his behalf. That is the only article that comes within the ballpark. The allegations of perjury

14. Aaron Xavier Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 *BUFF. J. INT’L L.* 413, 486 (1996-97).

15. *See, e.g., Dangerous World: The Kennedy Years* (ABC television broadcast, Dec. 4, 1997) (reporting that Judith Campbell met Kennedy through Frank Sinatra, became Kennedy’s lover, and was “involved in Kennedy’s secret dealings with the Mafia”).

and obstruction of justice, while quite serious and severe—these are, after all, felonies, and are nothing to laugh at or trivialize—are not legitimate bases for impeachment, even though they are legitimate bases for criminal punishment.

To the suggestion that this means the President of the United States can continue to serve if he or she is a felon, the answer is: absolutely. That is our Constitution. The Constitution does not make the President removable for the commission of a felony; it makes the President removable for “Treason, Bribery, or other high Crimes and Misdemeanors,”¹⁶ and those are not the things at issue.

To the suggestion that this means the President can continue to serve, even if he has violated the rule of law, the answer is the most obvious proposition in the whole debate—that Presidents frequently have violated the rule of law. President Truman seized the steel mills, President Johnson probably violated the law several times in connection with the Vietnam War, while President Roosevelt and President Eisenhower certainly violated the law. Violations of the rule of law do not make out an impeachable offense.

Maybe the deeper problem is that it is going to be very hard in practice to distinguish this impeachment from other imaginable grounds for impeachment that will arise in the future. This is not to say that what President Reagan did is worse than or better than what President Clinton did. It is only to say that reasonable people go both ways on that issue. So long as we have reasonable people going both ways on that issue, this impeachment, as a precedent, threatens to undo our common law understanding of what the legitimate grounds for impeachment are, and what the nature of the standard is.

The upshot of all this is that there are two ways to read the recent events, and either, for the purposes just suggested, would be good enough. One way—the preferred way—is to say that this is like the impeachment of President Johnson, which historians have found a partisan matter in which those who resisted impeachment were heroes. Of course, this is not to say that President Johnson did not violate the law—he did. He fired a Cabinet head in violation of a statute. Nonetheless, that was a partisan impeachment, and a highly destabilizing event where the impeachment device was used as a political tool. The best notion is that the Clinton impeachment was illegitimate and ought not to be repeated.

An alternative reading—which Republicans in favor of impeachment seem to be converging toward—is to say that this was a legitimate impeachment because of the very unusual and genuinely egregious nature of the President’s misconduct in connection with the criminal justice

16. U.S. CONST. art. II, § 4.

system. What is unusual about this view is that the President committed quite serious crimes in the course of activities which frequently place ordinary citizens at risk. This does not endanger the general principle that impeachment is generally for cases of large-scale abuse of distinctly presidential power. All this means is that this—President Clinton's particular crimes of perjury and obstructing justice—is one thing that does not fall within "generally." In other words, it is a narrow exception to the Senate prerequisite.

You will have noticed that I prefer the view that this was an unconstitutional impeachment to the second view, that this was a legitimate, but narrow, case of impeachment. But either will do the trick for the future. Either will work for posterity. Those are the main propositions. Here are three littler ones.

Number one: It has become very popular to blame the Supreme Court for causing all of this. It has become popular to blame the Supreme Court on the theory that none of this would have happened if the Court had struck down the Independent Counsel Act in *Morrison v. Olson*, or if the Supreme Court had not allowed the civil action to go forward in *Jones v. Clinton*. Justice Scalia is not a gloater, but he must have been something like the most gratified man in Washington to hear people who do not normally like Justice Scalia quoting him and admiring him for his prescience. And his dissenting opinion against *Morrison* was really on the money about the nature of the Independent Counsel Act and the incentives it creates. The problem with the claim that the Supreme Court was wrong in *Morrison* is, in my view, that it is not very easy to come up with a *constitutional* argument that legitimates the invalidation of the Independent Counsel Act.

At the time of the Founders, it is not at all clear that the people thought that all prosecution needed to be under the arm of the President. Indeed, at the time of the Founding, and for about a hundred years afterwards, U.S. District Attorneys were not in law or in fact under the power of the President of the United States. It was only about a hundred years later that the Department of Justice was created and started centralizing everything. The notion that prosecutorial authority must, by virtue of being prosecutorial, be under the President's arm, finds no good home in the Constitution's original understanding. Now, maybe we could come up with an argument that would not be based on the original understanding, but that would suggest that the Independent Counsel Act should be doomed on constitutional grounds. Maybe the argument would have roughly the form that the Independent Counsel Act abridges liberty because of the narrow focus and unlimited budget. But that has a kind of jerry-built quality, of the sort that the Warren Court has been reasonably criticized for using to invalidate legislation. And the Supreme Court's reluctance to invalidate an act of Congress made a certain intuitive sense: we do not want people who

are investigating the highest officials in the land to be subject to discharge by the highest official in the land.

The notion that that reasonable judgment by Congress is constitutionally illegitimate seems extremely adventurous. So this is my suggestion: Justice Scalia had the policy right, but he did not have the Constitution right. And the proper remedy, as Justice Scalia often says, for an objection of this kind, is political and not constitutional. The same thing might be said about *Jones v. Clinton*. After all, there are some immunities in the Constitution—the Speech or Debate Clause, for example, gives Congress immunity with regard to speeches on the House floor; but there is no express presidential immunity from civil suits.

If I may, I will just tell you a little bit of an exchange I had when I was testifying in Congress.¹⁷ The members of Congress were extremely upset about the notion that the President could not be punished for these possibly criminal activities until he was out of office—which is my view. Congress, meanwhile, is protected against any kind of action for speeches and debates on the floor. There is nothing foreign to our traditions, in order to serve the public, of creating certain protections against civil and criminal actions. There is nothing new about that. Congress, itself, benefits from that. Indeed, there are several implied immunities in the Constitution. I am sure that you know about them. But they often come from thinking that the relevant officer cannot possibly perform his job if the relevant officer is not going to be immune.

As disastrous as *Jones v. Clinton* turned out to be, it is a pretty unusual case. And the notion that the President cannot perform his job if he is subject to civil actions seems odd. Most people, probably some in this room, have performed their jobs while being subject to civil actions. There is nothing completely disabling about a civil lawsuit. The Supreme Court rightly resisted the claim to build up from an ambiguous constitutional text an immunity that certainly is not there and that is not a necessary implication from it. As in *Morrison v. Olson*, the proper remedy to the policy problem—which Justice Breyer uniquely identified—is statutory, not constitutional. Congress should, it seems to me, pass a law saying that while the President is in office, he or she cannot be subject to civil actions, but the statute of limitations is not going to bar suits that are brought the day after he or she leaves. That is not to protect the President. That is not our concern. It is to protect the country, which is the same theory that underlies the narrow account of the legitimate grounds for impeachment that the Founders adopted and that I have tried to emphasize here.

A further point is that many people have suggested that Congress ought

17. See Testimony Before the United States House of Representatives comm. on the Judiciary, Subcomm. on the Const. (Nov. 9, 1998) (statement of Cass R. Sunstein).

to—and, if encouraged, will—take its constitutional obligations quite seriously. And we ought not to think of the judiciary as uniquely invested with power to think about the meaning of the Constitution. But in this, the most public encounter between our elected representatives and the Constitution of the United States, there were many troubling features. Many members of Congress repeatedly suggested that any crime or violation of the oath of office or violation of the “take-care” clause calls for impeachment, even though the Constitution unambiguously says otherwise, and even though many people, including members of those representatives’ own staffs, were told that the Constitution expressly says otherwise.

The overwhelming majority—and the word “majority” states it too weakly—of constitutional law teachers believed that President Clinton committed possibly felonious acts, but not impeachable acts. The overwhelming majority of Constitutional Law teachers may have been wrong—and this would not be the first time. But the vote in the House of Representatives split, astonishingly, along partisan lines, and the witnesses before the House Judiciary Committee consisted of a handpicked group of people. You had to search very far and wide to find nine constitutional scholars who thought President Clinton’s impeachment was legitimate. Congress searched far and wide and found nine, and they opposed those nine to the hundreds of others who disagreed. The best way to predict members’ judgments about the constitutional issue was looking at party affiliation. Nothing else was nearly as good—geography, law degree, gender, race—nothing else was nearly as good as party affiliation.

My fellow Illinoisan, Congressman Hyde, the Chairman of the House Judiciary Committee, consistently argued that this was a process mandated by the Constitution, and that the Constitution required its continuation—as if anything in the document meant that the process had to continue as long as possible. There is nothing in the document supporting that judgment. This is not a reason to give up on the notion, that constitutional interpretation within the Congress of the United States should play a larger role and have a bigger place. But it does provide some new basis for skepticism about the possibility that it can be done on either side in good faith.

What about the law of sexual harassment? Many people have urged that the two culprits are the Independent Counsel Act and the law of sexual harassment. In my view, that has half of the picture right, because there is nothing to blame in the law of sexual harassment. Jones’s own case was a tough one, and the District Court, rightly or wrongly—but certainly not unreasonably—dismissed the case. This does not suggest that the sexual harassment law is out of control, or a basis for crazy lawsuits. On the contrary, if anything, it is just the opposite. But there is one problem, and it is not trivial.

The problem that turned up is that in any case involving a sexual harassment allegation, it is apparently open to the plaintiff, at least in some trial courts, to undertake fairly extensive discovery about the consensual sexual activity of the defendant. That is bad for two reasons. One reason is that it opens up to public view activities that may well have a legitimate claim to secrecy. The other problem with this is that it creates a tremendous weapon to extract settlements. Now we do not know the magnitude of the problem, but from talking with trial judges, I, at least, have a sense that this is not a trivial problem. It happens.

What might be done about it? Well, the first notation is let us not overreact. There are two sides to the story. Sexual harassment cases generally involve no witnesses, and the only way the plaintiff can prove that this happened was to show that there was a pattern. Moreover, the only way that he or she, usually she, can prove that there is a pattern, is to try to get other instances before the trier of fact. So, if you say that you cannot ever inquire into activities that the defendant says were consensual, you may insulate defendants from accurate charges. Again, there are two sides to this.

What might be done? Well, here are two tentative suggestions about how to fix this not huge, but not trivial, problem. One is to have secret proceedings to make sure everything is sealed. The other is to condition certain questions on the part of the plaintiff on a prima facie showing that her case has merit or that the activity she wishes to discover was not consensual.

It is time, now, to conclude. My first suggestion is that the Independent Counsel Act should be permitted to expire. It serves as a case study in the law of unintended consequences. This, after all, was a statute designed to increase trust in government, yet it has had exactly the opposite effect. The way high-level illegality ought to be handled is through the ordinary procedures of the Department of Justice, which is filled with civil servants who know what they are doing. Furthermore, the great run of cases can be entrusted, and the exceptional cases can be handled, as in the Watergate era.

The second proposition is that, with respect to impeachment, it is very important that the nation converge, regardless of what we think about the impeachment of President Clinton, on the proposition that impeachment of a President is exceedingly rare, and is generally, if not exclusively, reserved to high-level misconduct on the President's part. It involves the misuse of authority that he or she has by virtue of being President. That tracks the original understanding of the Clause and our practices since the Constitution was ratified.

I have also suggested that we ought not to blame the Supreme Court in *Morrison* and *Jones v. Clinton*; the Court did what it was supposed to do, and there are statutory remedies for the problems created by these cases.

There is fresh reason to be uncertain about whether Congress can be trusted to interpret the Constitution fairly. At the same time, the law of sexual harassment, while hardly the culprit, has a problem—a problem that I have a hunch can be fixed, pretty reasonably.

One final note: After most scandals in our history, what we try to do is devise institutions so that the underlying conduct that created the scandal cannot occur again. I think that is the unbroken pattern of our scandals. This one has a unique feature: Everybody agrees that the President's underlying conduct was very bad. But the primary focus on both sides is to try to figure out institutional remedies that will assure the country that the institutional problems that accompany the scandals will be alleviated. This is a scandal where primary attention is not on the activity by the individuals who caused the scandal, but the institutional mechanisms that made it take the form it did. I think that is wise.

My final suggestion is that the way to make some progress on that is to return to the Founders' aspiration to have a deliberative democracy. Such a democracy is not overrun by passions of the moment, but instead, weds an understanding of that aspiration with some judgments about the likely incentive effects of different governmental institutions.