

## BILL CLINTON WAS NO ANDREW JOHNSON: COMPARING TWO IMPEACHMENTS

*Keith E. Whittington\**

### I. ABSTRACT

The recent impeachment of President Bill Clinton has called attention to the only other presidential impeachment in American history, that of Andrew Johnson in 1868. Parallels between the two cases have been drawn to suggest that both were unjustified attacks on the presidency by a partisan Congress. Such comparisons have also suggested that the Clinton impeachment will result in a weakened presidency, just as the Johnson impeachment ushered in an era of congressional government in the nineteenth century. This paper argues that such comparisons are misguided. Although both impeachments were organized along partisan lines, the Johnson impeachment, unlike the Clinton impeachment, was constitutionally substantive, constructive rather than mechanical in its constitutional application, and focused squarely on the presidency as an institution. Both the substantive content and the political context of the Johnson impeachment contributed to a weakening of the presidency. The Clinton impeachment, by contrast, is unlikely to have any significant, long-term institutional implications. A comparison of the two impeachments also counsels against formalistic efforts to further define "high crimes and misdemeanors."

A sense of constitutional failure hangs over the recent impeachment of President William Jefferson Clinton. Although the wisdom of the procedural difficulty of removing a President has been celebrated,<sup>1</sup> there is a lingering sense that the constitutional system as a whole suffered from the recent episode. Although many were critical of the substance of the particular charges against the President, the impeachment also seemed to lack a certain constitutional gravity. The con-

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\* Assistant Professor of Politics, Princeton University. I thank Fred Greenstein, Michael Klarman, Mark Graber, and Sandy Levinson for their useful comments and conversations.

<sup>1</sup> See, e.g., Laurence H. Tribe, *And the Winner Is . . .*, N.Y. TIMES, Feb. 12, 1999, at A27.

stitutional discourse surrounding the impeachment was surprisingly thin, and analysis of the impeachment generally emphasized the familiar script of partisan politics and political handicapping.<sup>2</sup>

In looking for a context for the recent impeachment, it is not surprising that many turned to the only previous example of a presidential impeachment, that of Andrew Johnson in 1868. Given the fortunate rarity of presidential impeachments, the search for appropriate standards and procedures for such an event required going back more than a century for adequate precedents.<sup>3</sup> But many also looked to the Johnson impeachment for more substantive parallels to current events.<sup>4</sup> Johnson has once again been portrayed as a martyr to the partisan ambitions of the Reconstruction-Era Republican Congress.<sup>5</sup> The Republican senators who provided the crucial votes to acquit Johnson were once again lauded as "profiles in courage" who saved the presidency itself.<sup>6</sup> As the impeachment inquiry began, commentators began to worry publicly that we were moving toward a "system of parliamentary government."<sup>7</sup> As the process concluded, it was readily pronounced that Clinton's offenses fell somewhere between the clear case in favor of removing Richard Nixon and the clear mistake of the Johnson impeachment.<sup>8</sup> Presidential historian Arthur Schlesinger Jr. has been the most prominent in predicting future constitutional developments

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<sup>2</sup> See, e.g., Richard L. Berke, *Polls Find Most Americans Still Oppose Impeachment and Now Frown on the G.O.P.*, N. Y. TIMES, Dec. 15, 1998, at A24; Howard Fineman & Matthew Cooper, *The New Impeachment War*, NEWSWEEK, Oct. 10, 1998, at 28; Robert Kuttner, *Don't Count on the Senate to Acquit*, BOSTON GLOBE, Dec. 20, 1998, at C7.

<sup>3</sup> By coincidence, Chief Justice William Rehnquist had written a book on the Johnson impeachment that became a prime source for historical precedents and context for participants in the Clinton impeachment. See WILLIAM H. REHNQUIST, *GRAND INQUESTS* 199-248 (1992).

<sup>4</sup> See, e.g., Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 281 n.7, 295 (1998); Bruce Ackerman, *What Ken Starr Neglected to Tell Us*, N.Y. TIMES, Sept. 14, 1998, at A23 [hereinafter *Ken Starr*]; Adam Cohen, *An Impeachment Long Ago: Andrew Johnson's Saga*, TIME, Dec. 21, 1998, at 28; Alan Dershowitz, *How Trial of the Century Will Likely Unfold in the Senate*, USA TODAY, Dec. 21, 1998, at 27A; Thomas Oliphant, *The GOP's Real Purpose*, BOSTON GLOBE, Dec. 20, 1998, at C7; David E. Rosenbaum, *Effects on the Presidency Uncertain, but Certainly Lasting*, N.Y. TIMES, Dec. 14, 1998, at A28; Betsy McCaughey Ross, *Rehnquist Holds Key to Impeachment*, USA TODAY, Oct. 19, 1998, at 27A.

<sup>5</sup> See, e.g., Ross, *supra* note 4.

<sup>6</sup> See Cohen, *supra* note 4; Robert L. Jackson, *The Impeachment Debate*, L.A. TIMES, Dec. 19, 1998, at A34; Robert A. Jordan, *Wanted: An Edmund G. Ross to Save Us from Ourselves*, BOSTON GLOBE, Dec. 13, 1998, at D4; David Stout, *Family of "Ruined" Senator Recalls a Legacy of Honor*, N.Y. TIMES, Jan. 17, 1999, at 31.

<sup>7</sup> Ackerman, *Ken Starr*, *supra* note 4, at A23.

<sup>8</sup> See Ronald Dworkin, *The Wounded Constitution*, N.Y. REV. BOOKS, Mar. 18, 1999, at 8 (quoting William A. Edmundson).

based on the aftermath of the Clinton impeachment, concluding that "[t]he failed impeachment of Andrew Johnson left a wounded, weakened Presidency, one that lasted for many years, and I think the failed impeachment of Bill Clinton will do the same thing."<sup>9</sup>

Although there is little question that both the Johnson and Clinton impeachments were organized along party lines,<sup>10</sup> the two impeachments were otherwise quite dissimilar. Unlike the recent impeachment of Clinton, the Johnson impeachment featured a rich and substantively important constitutional debate, demonstrating that partisanship is not necessarily a barrier to valuable constitutional politics. Recent events have served to bury a whole generation of scholarship on the Johnson episode that had helped rehabilitate the Reconstruction-Era Congress and explain the impeachment.<sup>11</sup> Revisiting the Johnson impeachment at this point is necessary not only to recover the historical significance of those events, but also to clarify the nature of the impeachment power itself. Although they failed to remove the President from office, the Reconstruction-Era Republicans were far more successful in justifying their actions and mobilizing political support for their impeachment effort. They understood, as modern-day congressional Republicans did not, that the impeachment power is not a technical instrument for punishing those who commit "impeachable offenses" but rather is a powerful tool for interpreting our constitutional inheritance. As a consequence, the early Republicans were far less concerned with applying some abstract standard of "high crimes and misdemeanors" than with defining the boundaries of presidential power in a republic.

An important lesson of the Clinton impeachment is a

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<sup>9</sup> R.W. Apple Jr., *The Fallout of the Trial*, N.Y. TIMES, Feb. 13, 1999, at A1 (quoting Schlesinger).

<sup>10</sup> See *Partisanship and Impeachment*, CONG. RESEARCHER, Mar. 19, 1999, at 250. No Democrat voted to support any of the articles of impeachment against Andrew Johnson in either the House or the Senate. In the House, Republican support for the articles was unanimous, except for the tenth article from which eleven dissented and seven abstained. In the Senate, seven Republicans voted not guilty. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 113-14, 173 (1973) [hereinafter *IMPEACHMENT*].

<sup>11</sup> See, e.g., BENEDICT, *IMPEACHMENT*, *supra* note 10 (offering a reanalysis of Johnson's impeachment); W.R. BROCK, *AN AMERICAN CRISIS* (1963) (discussing the role of Congress in Reconstruction); ERIC FONER, *RECONSTRUCTION* 176-411 (1988) (analyzing Johnson's failure during Reconstruction); ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960) (same); HANS L. TREFOUSSE, *IMPEACHMENT OF A PRESIDENT* (1975) (same); Michael Les Benedict, *A New Look at the Impeachment of Andrew Johnson*, 88 POL. SCI. Q. 349 (1973) (discussing reluctance of Congress to impeach Johnson); David Donald, *Why They Impeached Andrew Johnson*, AM. HERITAGE, Dec. 1956, at 21 (discussing Johnson's political blunders leading up to his impeachment).

warning against an excessive constitutional formalism that emphasizes textual exegesis at the expense of careful deliberation on substantive public values. The example of the Clinton impeachment should not lead us into new efforts to further refine the meaning of the phrase "high crimes and misdemeanors" or to demand that future impeachments be consensual, bipartisan affairs.<sup>12</sup> Presidential behavior that might warrant impeachment is hard to predict beforehand, and the presidency will always attract partisan defenders as well as partisan critics. Bipartisan impeachment inquiries may be expected only when the wrongdoings of the targeted officials are beyond question, and the party of the target has more to gain by distancing themselves from that particular government official than from defending him. Some of our most important impeachments, however, have turned on contested principles, in which partisanship is a vehicle for altering public understandings of what the Constitution requires.<sup>13</sup> Such was the case in the Johnson impeachment, when the Republican and Democratic parties were divided by their constitutional visions as well as by their electoral fates.

The impeachment of Andrew Johnson did help foster the congressional government of the late nineteenth century, but both the broader political context and the substance of the impeachment itself distinguish the Johnson from the Clinton impeachment. Although the trial of Andrew Johnson did have significant institutional and constitutional ramifications, the implications of the trial of Bill Clinton are likely to be much more personal and paltry. This Article will explain why the Johnson impeachment was so constitutionally successful and why the Clinton impeachment is unlikely to have much constitutional significance.<sup>14</sup> Part II explains how the Johnson impeachment was centrally about presidential power and the ways in which the impeachment worked in complement with other political factors to strengthen the Congress at the expense of the presidency. Part III more briefly highlights the limited and personal character of the Clinton impeachment.

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<sup>12</sup> See Sunstein, *supra* note 4, at 314 (arguing that impeachment along partisan lines casts doubt on its validity).

<sup>13</sup> See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 20-71, 113-57 (1999) (discussing the impeachments of Justice Samuel Chase and President Andrew Johnson).

<sup>14</sup> An impeachment can have constitutional significance in two ways: by redefining appropriate political behavior or by redefining the scope of the impeachment power itself. My primary concern here is with the former. Ultimately, I do not believe that the Clinton impeachment pushed very hard on the historical boundaries of the impeachment power, and thus is likely to have little long-term significance in reshaping the definition of impeachable offenses, but I do not pursue that argument here.

The Article concludes in Part IV by suggesting how the modern political and constitutional system insures continuing presidential power despite the recent impeachment and how that impeachment emphasizes the importance of constitutional politics.

## II. THE JOHNSON IMPEACHMENT, PRESIDENTIAL POWER, AND CONGRESSIONAL GOVERNMENT

The Johnson impeachment was centrally about presidential power. Just as the Civil War, sparked by the particular issue of slavery, was both structured by and reconstructed federalism, so the particular issue of Reconstruction placed the presidency at issue. The conflict between Johnson and the Republican Congress over government policy toward the South and the freedmen both motivated the impeachment and helped focus it on the question of presidential power.<sup>15</sup> Johnson occupied the presidency in a period of great constitutional flux. Within that context, his actions as President were seen as both constitutionally innovative and deeply threatening to the health of the republic.<sup>16</sup> His impeachment was designed not only to overcome a temporary obstruction to a partisan congressional majority, but also to reestablish a set of constitutional norms and practices that would endure after the Johnson presidency had expired.<sup>17</sup>

Section A establishes the importance of the political and constitutional context of Reconstruction for the impeachment. Reconstruction and the shadow of the Civil War created a crisis atmosphere and sense of constitutional instability that critically shaped the interaction between Congress and the White House. Moreover, the unique nature of Reconstruction raised important institutional questions as to who would set national policy as the nation transitioned from war to peace. Section B then sketches out the several ways in which Johnson was an aggressor in pushing the boundaries of presidential power and why his opponents readily perceived such actions as abusive. Finally, Section C indicates the ideological and material resources supporting the congressional reaction against Johnson and the institution of "congressional government."

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<sup>15</sup> See WHITTINGTON, *supra* note 13, at 116.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 117.

### A. *The Political Context of the Johnson Impeachment*

The overarching political context of the Johnson presidency was Reconstruction itself.<sup>18</sup> The question of what to do with the Southern states and the freedmen after the conclusion of military conflict was already becoming a central issue when Johnson was chosen as Abraham Lincoln's running mate on the presidential ticket of the National Union Party in 1864.<sup>19</sup> Resolution of the issue promised to have a significant impact on the constitutional and political future of the nation as a whole, but the proper character of an eventual peace remained severely underdetermined by the Union's justifications for war. The Republican Party's war aims set certain minimum conditions for a successful conclusion of the war, but the actual details of any settlement threatened to fracture the party into different camps. On this precarious landscape, Johnson staked out a relatively extreme position, helping to unify the Republican Party against his presidency.<sup>20</sup> The battles over Reconstruction were of extraordinary intensity and importance, elevating policy and partisan disputes into tests of constitutional fidelity. In that superheated environment, Johnson struggled against the politically dominant tides. In order to overcome his political opposition, Johnson pushed the envelope of presidential powers. In the context of the times, such challenges were unlikely to be tolerated.

Conflicts between Congress and the President over Reconstruction policy began even before the war was over.<sup>21</sup> As Union armies began to capture Southern territory, Lincoln came under fierce attack from the more radical members of his party. They objected to his practice of countermanding the orders of generals that emancipated slaves and his decision to replace the particularly antislavery General John Fremont with the Democrat John McClellan in the West.<sup>22</sup> As the war was winding to a close and Union armies occupied Louisiana, Lincoln imposed the so-called "Ten Percent" plan

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<sup>18</sup> See BENEDICT, *IMPEACHMENT*, *supra* note 10, at 1-25; FONER, *supra* note 11, at 333-38; MCKITRICK, *supra* note 11, at 486-509. Building on revisionist historiography, Bruce Ackerman has recently and insightfully examined the Johnson impeachment in constitutional terms that emphasize the centrality of Reconstruction. For Ackerman, Johnson's impeachment was centrally about the Fourteenth Amendment. In pursuing his theory of constitutional regimes and informal amendments, however, Ackerman obscures the institutional issues at stake in the impeachment that are emphasized here. See 2 BRUCE ACKERMAN, *WE THE PEOPLE* 209-30 (1998) [hereinafter 2 ACKERMAN].

<sup>19</sup> See FONER, *supra* note 11, at 43-46.

<sup>20</sup> See WILLIAM A. DUNNING, *RECONSTRUCTION* 51-52 (1907).

<sup>21</sup> See FONER, *supra* note 11, at 35-76; MCKITRICK, *supra* note 11, at 120-51.

<sup>22</sup> See WHITTINGTON, *supra* note 13, at 118.

for Reconstruction, which would allow Southern states to re-establish civilian governments once ten percent of the pre-war voting population swore its loyalty to the Union.<sup>23</sup> Lincoln's plan angered congressional Republicans both because it claimed to settle this critically important policy by executive fiat without legislative consultation, and because, in the eyes of congressional leaders, it set the price for Southern readmission into the Union too low.<sup>24</sup> When Lincoln pocket-vetoed legislation to overturn the Ten Percent plan, its sponsors, Senator Benjamin Wade and Congressman Henry Davis, issued a joint statement bitterly denouncing Lincoln for his dictatorial actions and reasserting congressional supremacy over the terms of peace.<sup>25</sup> The 1864 victory of the National Union ticket was only a temporary break from what promised to be a critical confrontation between Congress and the President over the course of Reconstruction.

The assassination of Lincoln just days after the Southern surrender at Appomatox and weeks after the presidential election briefly lessened the tension over who would set the terms of peace. For many Radicals, the ascension of Andrew Johnson to the presidency was welcomed as a blessing. Though a Democrat from Tennessee, Johnson had opposed secession and, unlike many of his brethren, chose to stay in Washington after his state left the Union. When Union troops occupied Tennessee, Johnson was appointed military governor and exercised his powers with vigor, frequently repeating the slogan that "[t]reason must be made odious and traitors punished."<sup>26</sup> In the context of civil war, Johnson's Jacksonian nationalism complemented Republican efforts. Likewise, his populist antipathy to the slaveholding elite gave him a common enemy with the Republican Radicals.<sup>27</sup>

Johnson quickly dashed Radical hopes, however. The Southern surrender and Lincoln's death came during the lengthy nineteenth century congressional recess. Rather than calling a special session of Congress, Johnson followed Lincoln's example in directing the military to prepare the Southern states for a return to civilian control of the government.<sup>28</sup> Johnson also followed Lincoln's relatively moderate plan for Reconstruction, as well as his example of presidential reconstruction.<sup>29</sup> Johnson's "policy has been one which was

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<sup>23</sup> See MCKITRICK, *supra* note 11, at 131-33.

<sup>24</sup> See BROCK, *supra* note 11, at 23-24.

<sup>25</sup> See FONER, *supra* note 11, at 61.

<sup>26</sup> FONER, *supra* note 11, at 43; see also *id.* at 177, 178.

<sup>27</sup> See MCKITRICK, *supra* note 11, at 134-74.

<sup>28</sup> See FONER, *supra* note 11, at 181-84.

<sup>29</sup> See DUNNING, *supra* note 20, at 35.

intended to restore the glorious Union – to bring those great States . . . to their *original* relations to the Government of the United States.”<sup>30</sup> As always, Johnson understood the war to be a legal, not a constitutional, crisis. The President’s obligation was to quell a massive outbreak of lawlessness and restore civil order. Using the force of executive order and martial law and the leverage of a conditional presidential pardon, Johnson quickly oversaw the dismantling of the Confederate government, the dissolution of its armies, and the legal abolition of slavery.<sup>31</sup> By the time Congress met in regular session, Johnson was able to present restored state governments with new constitutions, a generally pacified Southern countryside, and a cohort of newly elected federal representatives and senators.<sup>32</sup>

The congressional reaction was swift, though hostilities between congressional Republicans and the President grew at a slower pace. The Republican caucus directed the House clerk to exclude the names of the Southern representatives from the roll, and the Thirty-Ninth Congress refused to seat them until the legislature had determined for itself the status of the Southern states.<sup>33</sup> Congress formed the Joint Committee on Reconstruction to examine the situation.<sup>34</sup> The Joint Committee first refused to readmit Johnson’s home state of Tennessee, which had been under Northern occupation since 1862, until further conditions were met.<sup>35</sup> Two days later, Johnson surprised Congress by vetoing the Freedmen’s Bureau Bill.<sup>36</sup> Three days after that (in a speech on Washington’s birthday), Johnson denounced Republican leaders as extremists no better than the secessionists in a speech on Washington’s birthday.<sup>37</sup> Congress narrowly overrode Johnson’s veto of the next major piece of Reconstruction legislation, the 1866 Civil Rights Act.<sup>38</sup> It was the first time a presidential veto of a major piece of legislation was defeated. Likewise, the Fourteenth Amendment was sent to the states for ratification over Johnson’s objections.<sup>39</sup> The midterm con-

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<sup>30</sup> President Andrew Johnson, Speech of 22d February, 1866, in *POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 58 (Edward McPherson ed., 1871) [hereinafter *POLITICAL HISTORY*] (emphasis added).

<sup>31</sup> See FONER, *supra* note 11, at 181-84, 190-93.

<sup>32</sup> See *id.* at 176-226; President Andrew Johnson, Speech of 22d February, 1866, in *POLITICAL HISTORY*, *supra* note 30.

<sup>33</sup> See DUNNING, *supra* note 20, at 51-52.

<sup>34</sup> See *id.*

<sup>35</sup> See BROCK, *supra* note 11, at 132-34, 138-39.

<sup>36</sup> See DUNNING, *supra* note 20, at 60.

<sup>37</sup> See BROCK, *supra* note 11, at 110-11.

<sup>38</sup> See *id.* at 114.

<sup>39</sup> See *id.* at 148.



gressional elections of 1866 were bitterly contested by Johnson and largely focused on the Reconstruction issue.<sup>40</sup> The Republicans themselves offered a relatively conservative Reconstruction program that, combined with a well publicized riot in New Orleans, gave them a decisive victory at the polls.<sup>41</sup> Congress easily overrode the President's veto on every subsequent piece of Reconstruction legislation, often on the same day it was issued.<sup>42</sup> Congress isolated the President from the administration of Reconstruction policy, writing legislation so as to eliminate presidential discretion and prohibit him from removing executive officers or altering the military chain of command without congressional approval.<sup>43</sup>

Reconstruction dramatically raised the stakes for the eventual impeachment of Andrew Johnson. Despite Republican electoral and legislative victory, Johnson had continued to hamper the execution of congressional policy and, more importantly, had encouraged the South to resist Reconstruction.<sup>44</sup> The articles of impeachment passed by the House represented the fourth impeachment attempt against Johnson, each more credible and better supported than the last, as congressional frustration with presidential obstruction grew.<sup>45</sup> This successful impeachment was precipitated by Johnson's effort unilaterally to remove his Secretary of War arguably in violation of the Tenure of Office Act, which required Senate confirmation before cabinet members could be removed from office.<sup>46</sup> The Secretary of War, in particular, was a key position for implementing military Reconstruction. Lincoln's holdover appointee, Edwin Stanton, took his instructions from congressional Radicals and was no longer on speaking terms with the President.<sup>47</sup> Reconstruction was both a key motivation and backdrop for the impeachment and trial of the President, and the future course of the nation seemed to be at stake in the battle. Disagreements between Congress and the

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<sup>40</sup> See *id.* at 155.

<sup>41</sup> See BENEDICT, IMPEACHMENT, *supra* note 10, at 14-15 (characterizing the Republican program as "conservative"); BROCK, *supra* note 11, at 153-59 (describing the New Orleans Riot).

<sup>42</sup> See ROBERT J. SPITZER, THE PRESIDENTIAL VETO 59 (1988).

<sup>43</sup> See FONER, *supra* note 11, at 261-70, 291-33; MCKITRICK, *supra* note 11, at 274-324, 422-28, 473-84.

<sup>44</sup> See BENEDICT, IMPEACHMENT, *supra* note 10, at 16.

<sup>45</sup> See MCKITRICK, *supra* note 11, at 491-509.

<sup>46</sup> See *id.* at 506. Johnson and his attorney disputed whether Stanton was covered by the Act. See *id.*

<sup>47</sup> Johnson had tried once before to remove Stanton. He first chose General U.S. Grant as Stanton's replacement, but after consulting with congressional Republicans, the General withdrew from the position and returned to army headquarters. Stanton promptly barricaded himself in his office at the War Department. See *id.* at 495-504.

President could no longer be regarded as normal matters of tolerable policy differences. For both sides in the dispute, the constitutional significance of Reconstruction left little room for compromise and called into question the good faith and political legitimacy of the opposition.

Reconstruction was also fundamentally a matter of substantive policy, and thus the resolution of the issue carried important institutional implications. The extraordinary importance of Reconstruction gave all parties a strong interest in the ultimate resolution. The character of Reconstruction as a matter of domestic policy also lent additional significance to the question of how and by whom the matter would be resolved. Although increasingly controversial as the war progressed, Lincoln's actions could at least be justified as implicit in the extraordinary presidential power to conduct war. With the war officially over and the character of the domestic peace at stake, Johnson's efforts to control Reconstruction reminded congressional Republicans of their Whig ancestors' complaints about the presidency of "King Andy" Jackson, Johnson's namesake and political mentor.<sup>48</sup> In these early stages of Reconstruction, the future of the national government and federal policy was not yet clear. In opposing Reconstruction, Johnson located domestic policymaking authority in the presidency and the states. Republican Reconstruction, by contrast, became identical to Reconstruction by Congress. Congressional supremacy seemed both necessary to and implied by the Republican commitment to Reconstruction.

A second dimension of the political context of the Johnson impeachment was its proximity to the Civil War. The exigencies of war had long been recognized to give the President extraordinary powers, but war had also been recognized as a particularly dangerous time for democracies and republics. Although Republicans generally supported Lincoln's presidential war powers, the implications of such power within the context of a civil war were nonetheless shocking, as in his unilateral suspension of habeas corpus and the emancipation of slaves.<sup>49</sup> Doubts about Lincoln's leadership led to the formation by Congress of the Joint Committee on the Conduct of the War to examine the policies of the Commander in Chief.<sup>50</sup>

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<sup>48</sup> Alfred H. Kelly, *Comment on Harold M. Hyman's Paper*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 40, 51 (Harold M. Hyman ed., 1966).

<sup>49</sup> See generally J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1964) (discussing the Habeas Corpus Act of 1863 and the Emancipation Proclamation among other examples of the expansion of presidential power under Lincoln).

<sup>50</sup> See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 215-27 (1993) [hereinafter *POLITICS*] (noting Lincoln's tenuous relationship with Radicals in

Andrew Johnson's occupancy of the expanded presidency more seriously alarmed Republicans. Johnson's military restoration of the South was justified under his own conception of his war powers, which were extensive enough to reconstitute state governments, authorize elections, and rewrite state constitutions.<sup>51</sup> Northern Republicans found those powers rather more ominous when the President began to compare congressional Radicals with the secessionists and pledged to defend the Constitution against those whom he thought might trample it.<sup>52</sup> Unlike its Confederate counterpart, the Union army had not been demobilized after the Southern surrender, and troops still filled Washington. In a period of constitutional upheaval and deep political division, the transition from war to peace had not yet been made, and neither Congress nor the President was confident that the other would respect the authority of its office. In particular, Congress had both immediate fears of a presidential dictatorship backed by the military and more forward looking concerns regarding how much power the President might retain in the postbellum era, especially one in which half the nation would still be under martial law for the foreseeable future.<sup>53</sup>

A final and less unique aspect of the political context surrounding the first presidential impeachment was Johnson's standing relative to the majority party. In political scientist Stephen Skowronek's words, Johnson was a preemptive President, a Democratic interruption of a Republican regime.<sup>54</sup> In historian Eric McKittrick's more familiar terms, Johnson was an outsider in the capital.<sup>55</sup> Thomas Nelson opened his defense of the President at the impeachment trial by describing Johnson as "a democrat of the straightest of strict constructionists; an old Jacksonian, Jeffersonian democrat."<sup>56</sup> This description was meant to explain the President's anomalous behavior in the Republican dominated

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the Congress); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 348-65 (1988) (explaining that the issue of emancipation exacerbated the rift between Lincoln and the congressional Radicals).

<sup>51</sup> See generally MCKITTRICK, *supra* note 11, at 100-10 (describing the "presidential theory" of Reconstruction).

<sup>52</sup> See President Andrew Johnson, Speech of 22d February, 1866, in *POLITICAL HISTORY*, *supra* note 30, at 60-61 (stating that members of Congress were "opposed to the fundamental principles of this Government, and as now laboring to destroy them").

<sup>53</sup> See 1 *TRIAL OF ANDREW JOHNSON ON IMPEACHMENT* 26, 112-13, 115 (De Capo Press 1970) (1868) [hereinafter 1 *TRIAL*]; 2 *TRIAL OF ANDREW JOHNSON ON IMPEACHMENT* 112 (De Capo Press 1970) (1868) [hereinafter 2 *TRIAL*].

<sup>54</sup> See SKOWRONEK, *POLITICS*, *supra* note 50, at 34-45.

<sup>55</sup> See MCKITTRICK, *supra* note 11, at 85-92.

<sup>56</sup> 2 *TRIAL*, *supra* note 53, at 123.

capital. But not only did Republicans dominate Congress, many Republicans also believed that the Civil War had been fought precisely against the Jeffersonian strict constructionism of the Democratic Party.<sup>57</sup> In 1868, the Republicans held a larger proportion of seats in the House and Senate than any party since the Era of Good Feelings, a margin not matched again until 1936.<sup>58</sup> At least to the Republicans, the Democrats were tainted by their association with secession and slavery. The Jacksonian Johnson had been added to the 1864 presidential ticket as an effort to portray the war as a national rather than partisan effort and to help win over conservative voters.<sup>59</sup> Lincoln's death elevated a man to the presidency with few ties to the Republican leadership and little commitment to the long-term health of the Republican Party. Indeed, Johnson recognized that his own electoral hopes in 1868 depended either on his nomination by the Democratic Party or the formation of a real National Union Party, and his administration was largely composed of and supported by Democrats and disaffected conservative Republicans.<sup>60</sup> His largest and most impassioned base of support was in the disenfranchised South.<sup>61</sup>

Johnson was politically isolated within Washington, with few allies and even fewer supporters who had a real stake in the longevity of his administration. Moreover, Johnson's electoral and policy goals and ideological commitments were at odds with the most fundamental tenets of an ascendant Republican Party that was looking to consolidate its military victory before the South regained the suffrage.<sup>62</sup> Johnson was an "accidental" President in the most extreme sense of the term, and he had little political authority with which to challenge the Republican Congress for control of the government or to protect his presidency from a congressional reaction.<sup>63</sup> These factors led Johnson to seek to maximize his formal powers as President in order to make his mark on the government. They also made him vulnerable to a Republican reaction.

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<sup>57</sup> See Kelly, *supra* note 48, at 49-54.

<sup>58</sup> See KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS, 1789-1989* (1989).

<sup>59</sup> See DUNNING, *supra* note 20, at 18.

<sup>60</sup> See BROCK, *supra* note 11, at 160-65; FONER, *supra* note 11, at 216-20; MCKITRICK, *supra* note 11, at 377-420.

<sup>61</sup> See FONER, *supra* note 11, at 268-69.

<sup>62</sup> See DUNNING, *supra* note 20, at 51-70.

<sup>63</sup> See SKOWRONEK, *supra* note 50, at 43-45.

### B. Johnson as Constitutional Innovator

Until a relatively recent round of revisionist scholarship, Johnson was often portrayed in both scholarly and popular literature as a passive victim of congressional aggression.<sup>64</sup> This portrait was facilitated by the fact that the Republicans were clear constitutional innovators, reconceptualizing the basic ends of union and devising new means for advancing those ends. The impeachment effort was seen as among the less fortunate of their innovations, but consistent with the Republicans' willingness to experiment with and manipulate the inherited Constitution.<sup>65</sup> Johnson, by contrast, was understood to be a hapless defender of the old order and, in the end, a near martyr for the presidency.<sup>66</sup>

But Johnson was a constitutional innovator in his own right. He pressed the powers of the presidency to their fullest, while arguing for a greatly enhanced, vastly empowered office. Johnson came to the office with models of the Jackson and Lincoln presidencies in mind. As his conflict with Congress intensified, Johnson built on his inheritance to defend a distinctly new type of presidency that would fit within a reconfigured constitutional order. Although these innovations were at least plausible extrapolations of the founders' institution and his predecessors' practice, his contemporaries who shared neither his substantive goals nor his presidential perspective readily saw them as gross abuses. Though many of Johnson's actions would be unobjectionable in the modern context, they were both extraordinary and highly objectionable to congressional Republicans. His innovations came as popular leader, independent constitutional actor, and as a party leader.

In an era when strong political parties were seen as necessary mechanisms of popular government, Johnson sought to reconfigure the President as a popular leader with unmediated access to the electorate.<sup>67</sup> The Washington Birthday speech itself was a surprising gambit by Johnson. The

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<sup>64</sup> See MCKITRICK, *supra* note 11, at 486-90 (summarizing the various interpretations of the Johnson impeachment).

<sup>65</sup> See *id.* at 487-88.

<sup>66</sup> See, e.g., HOWARD K. BEALE, *THE CRITICAL YEAR* (1930); WILFRED E. BINKLEY, *PRESIDENT AND CONGRESS* 156-77 (3d rev. ed. 1962); LOUIS BROWNLOW, *THE PRESIDENT AND THE PRESIDENCY* 58 (1949); DUNNING, *supra* note 20; JOHN F. KENNEDY, *PROFILES IN COURAGE* 126-27 (1961); LOUIS W. KOENIG, *THE CHIEF EXECUTIVE* 70 (1964); GEORGE MILTON, *THE AGE OF HATE* (1930); CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 52, 79-80 (1960).

<sup>67</sup> See generally JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION* 124-40 (1991) (discussing parties as "the life-blood of the Republic").

speech came in response to a traditional serenade of the President from the White House lawn and, rather than giving the usual ceremonial thanks, the President launched into an emotional political tirade.<sup>68</sup> Although generally a solemn figure, Johnson had always been an emotional stump speaker who liked to mix it up with the crowd. As a senator, Johnson's speeches "were reasoned arguments, more like a lawyer's brief than a stump harangue. But . . . he repeatedly—almost uniformly—burst forth in fiery rhetoric whenever he faced a crowd of partisans."<sup>69</sup> Oratory was a basic political skill of the nineteenth century, but previous Presidents had set it aside as beneath the dignity of the office and potentially dangerous in a representative democracy. At the time of the founding, demagoguery was seen as a central threat to the stability of democratic regimes, and popular rhetoric was associated with the power to sway the masses behind a charismatic leader who would break the fetters of constitutional office.<sup>70</sup> Early nineteenth century Presidents had limited their public speeches to espousing constitutional pieties and patriotic platitudes, and many limited their public appearances to formal occasions, such as inaugurals.<sup>71</sup> As the patrician politics of the founding era gave way to the more rough-and-tumble style of party politics, the grounds of presidential authority were reconceptualized. Presidential authority was seen to derive less from the constitutional office and the good character of its occupant than from the web of party connections that extended out from the White House.<sup>72</sup> The presidency was the crown jewel of the victorious party and the presidential candidate himself was to be a partisan figurehead chosen by convention delegates for that purpose.<sup>73</sup> Although some antebellum Presidents had been relatively active campaigners, popular support for the President was understood to be mediated through a political party.

Johnson was raised within that system, but soon found himself to be a President without a party. He attempted to make up for his lack of party support within Washington by

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<sup>68</sup> See BROCK, *supra* note 11, at 110-11.

<sup>69</sup> James D. Barber, *Adult Identity and Presidential Style: The Rhetorical Emphasis*, 97 DAEDALUS 938, 949 (1968).

<sup>70</sup> See JAMES W. CEASER, PRESIDENTIAL SELECTION 52-61 (1979) (discussing the Founders' fears of "popular leadership"); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 27-33 (1987) (discussing the view that demagoguery is a danger to democracy).

<sup>71</sup> See TULIS, *supra* note 70, at 47-87.

<sup>72</sup> See CEASER, *supra* note 70, at 158.

<sup>73</sup> See generally *id.* at 123-69; RALPH KETCHAM, PRESIDENTS ABOVE PARTY 141-65 (1984).

recurring to the people in the countryside. As he became convinced that the Republican Party in Congress was an incestuous cabal, Johnson offered himself to the people as their true representative in the government.<sup>74</sup> Having not yet won an election in his own right, he appealed to the people in 1866 to show their support for him indirectly by defeating his enemies in Congress.<sup>75</sup> Besides several speeches in Washington, Johnson embarked on a national speaking tour in 1866, the "Swing Around the Circle."<sup>76</sup> The tour itself was not unprecedented—previous Presidents had left Washington to tour the nation as well—but its substance and purpose were novel. The tour, which began with the bipartisan trappings of the ceremonial presidency, quickly took a partisan turn as Johnson used his speeches to deliver ringing denunciations of the Republicans and urged his audiences to vote against them in the upcoming election.<sup>77</sup>

Johnson's speeches were highly personal, as he asked his listeners for their support in his battle against the Congress. The authority that he sought from the people was not for a party but for himself.<sup>78</sup> Referring to Republican officeholders, Johnson assured his listeners that "if you will stand by me in trying to give the people a fair chance . . . I will kick them out. I will kick them out just as fast as I can."<sup>79</sup> After the anticipated groundswell of popular support failed to materialize in the 1866 election returns, Johnson appealed to his own silent, and silenced, majority to justify his actions against the rump Congress. He defended the idea of a popular presidency, arguing both that the President was himself a direct representative of the popular will and that he drew support from the uniquely national nature of his constituency for his role as a tribune of the people.<sup>80</sup> Johnson challenged the representative warrants of Congress with his own more personal, democratic claims.<sup>81</sup> Congressional Republicans saw this ef-

<sup>74</sup> See BENEDICT, IMPEACHMENT, *supra* note 10, at 5.

<sup>75</sup> See DUNNING, *supra* note 20, at 81.

<sup>76</sup> MCKITRICK, *supra* note 11, at 428.

<sup>77</sup> See *id.* at 428-29; see also TULIS, *supra* note 70, at 87-88.

<sup>78</sup> See MCKITRICK, *supra* note 11, at 293-95, 430-37; President Andrew Johnson, Speech of 22d February, 1866, in POLITICAL HISTORY, *supra* note 30, at 61.

<sup>79</sup> MCKITRICK, *supra* note 11, at 390.

<sup>80</sup> See President Andrew Johnson, Veto of the Freedmen's Bureau Bill (February 19, 1866), in POLITICAL HISTORY, *supra* note 30, at 71.

<sup>81</sup> See President Andrew Johnson, Message Respecting the Proposed Constitutional Amendment on Representation, &c. (June 22, 1866), in POLITICAL HISTORY, *supra* note 30, at 83; President Andrew Johnson, On Receiving the Proceedings of the Philadelphia 14th of August Convention (Aug. 18, 1866), in POLITICAL HISTORY, *supra* note 30, at 127; President Andrew Johnson, Speech of 22d February, 1866, in POLITICAL HISTORY, *supra* note 30, at 60; President Andrew Johnson, Veto of the Reconstruction Bill (Mar. 27, 1867), in POLITICAL HISTORY, *supra* note 30, at 172.

fort to go over the heads of the "people's representatives" by appeal directly to the people themselves as an invitation to anarchy and tyranny and made that attempt the basis of an article of impeachment against Johnson.<sup>82</sup>

Johnson's political weakness also forced him to develop expansive claims for the independent authority of his constitutional office. Johnson portrayed the President as an independent actor and policymaker within the constitutional system and not merely as an agent of the congressional majority.<sup>83</sup> Reconstruction itself was ample evidence of Johnson's belief in the President's independent policymaking authority. Through his unilateral powers, Johnson remade the South in accord with his own beliefs about the appropriate requirements of peace.<sup>84</sup> Once Congress rejected his plan, Johnson was active in resisting congressional policymaking and advancing his own alternatives. As the Joint Committee inquired into the status of the freedmen and lawlessness in the former Confederacy, Johnson offered competing reports on the situation.<sup>85</sup> As Congress legislated its own Reconstruction policy, Johnson exercised his veto power, throwing up obstructions more often than had any previous President.<sup>86</sup> Although organized Republican majorities soon rendered the presidential veto moot, congressional leaders denounced Johnson for abusing his constitutional powers. Whereas Johnson argued that Congress had a constitutional obligation to take his vetoes seriously regardless of its ability to override, congressional Republicans asserted that the President had a constitutional obligation to defer to legislative judgments on policy and to cease expressing his dissent from them.<sup>87</sup>

Johnson actively used his appointment and executive powers to hamper the implementation of congressional policy.

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<sup>82</sup> See CONG. GLOBE 40th Cong., 2d Sess. 1642 (1868) (listing the articles on which Congress impeached Johnson).

<sup>83</sup> See President Andrew Johnson, Veto of the Freedmen's Bureau Bill (Feb. 19, 1866), in POLITICAL HISTORY, *supra* note 30, at 72.

<sup>84</sup> See DUNNING, *supra* note 20, at 35-42.

<sup>85</sup> See President Andrew Johnson, Speech of 22d February, 1866, in POLITICAL HISTORY, *supra* note 30, at 60; President Andrew Johnson, Veto of the Civil Rights Bill (Mar. 27, 1866), in POLITICAL HISTORY, *supra* note 30, at 78; President Andrew Johnson, Veto of the Freedmen's Bureau Bill (Feb. 19, 1866), in POLITICAL HISTORY, *supra* note 30, at 71-72.

<sup>86</sup> Johnson vetoed nearly three times as many bills as any previous President and used his regular veto more than twice as often. He also had three-quarters of his regular vetoes overridden, by far both the largest absolute number and largest proportion of overrides for any President. See PRESIDENTIAL VETOES 1989-1994 viii-ix (Gregory Harness ed., 1994).

<sup>87</sup> See 1 TRIAL, *supra* note 53, at 110-13, 115-17, 120-21; *The President on the Stump*, 102 N. AM. REV. 532-33, 537-38 (1866).



He construed his cabinet to be a set of presidential policy advisors obligated to help him formulate and implement his own agenda, in sharp contrast to dominant contemporary norms which viewed cabinet members as representatives of party factions and the executive agents of legislative leaders.<sup>88</sup> This dispute over who controlled the cabinet, and consequently who could make government policy, was at the heart of the attempted Stanton firing and the subsequent impeachment.<sup>89</sup> In the President's view, he and Stanton had lost their "mutual confidence," preventing the secretary from fulfilling his constitutional duties as the President's advisor and necessitating that Stanton step aside.<sup>90</sup>

More broadly, Johnson argued that because the President was the chief executive, he required unfettered authority over subordinates in the executive branch.<sup>91</sup> Johnson insisted that congressional policy should filter through the executive hierarchy by way of the President rather than be directly communicated to various executive officials.<sup>92</sup> Efficient executive administration of the government required that the President be free from congressional interference.<sup>93</sup> Pointing to Lincoln's rapid efforts to identify and remove Southern sympathizers from the government after secession, Johnson insisted on the necessity of an executive branch that answered only to one master.<sup>94</sup>

Johnson's impeachment over his violation of the Tenure of Office Act provoked his most extreme claims on behalf of presidential independence. With the Act, Johnson thought, Congress had clearly exceeded its constitutional authority by restricting legitimate presidential powers. As a consequence, he argued, the President was free to ignore the Act and refuse to obey or enforce it.<sup>95</sup> Unconstitutional legislation could not be binding on the President, and the President was obliged to

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<sup>88</sup> See I TRIAL, *supra* note 53, at 62.

<sup>89</sup> The Tenure of Office Act was controversial in its own time, and former President William Howard Taft later declared it unconstitutional. See *Myers v. United States*, 272 U.S. 52, 176 (1926). But it would be anachronistic to claim that Taft's twentieth century assertion that the President had to have full control over the executive branch settled the matter in Johnson's favor.

<sup>90</sup> I TRIAL, *supra* note 53, at 59 (quoting Johnson's request for Stanton's resignation).

<sup>91</sup> See President Andrew Johnson, Veto of the Civil Tenure Bill (Mar. 2, 1867), in POLITICAL HISTORY, *supra* note 30, at 176.

<sup>92</sup> See I TRIAL, *supra* note 53, at 47-48, 61-63.

<sup>93</sup> See President Andrew Johnson, Veto of the Civil Tenure Bill (Mar. 2, 1867), in POLITICAL HISTORY, *supra* note 30, at 176 ("[M]isfortune [in other countries] has resulted from their unfortunate failure to maintain the integrity of each of the three great departments [of government] while preserving harmony among them all.").

<sup>94</sup> See I TRIAL, *supra* note 53, at 39, 55-56.

<sup>95</sup> See *id.* at 39-40.

exercise an independent judgment to determine whether legislation was constitutional.<sup>96</sup> Johnson's defenders sometimes broadened this claim to allow presidential discretion in enforcing legislation generally, and sometimes narrowed it such that Johnson could refuse to comply with legislation directed at the President himself in order to bring the statute before the Supreme Court for review.<sup>97</sup> In either case, however, Johnson's departmentalist claims were the extreme extension of his more general argument on behalf of the President as an independent constitutional actor with unilateral powers and substantive discretion as to their use. The President was to be understood as the head of an equal branch of government with his own duties, responsibilities, and powers.<sup>98</sup>

Johnson's final set of innovations was as a party leader. Political parties were integral to the nineteenth century American state.<sup>99</sup> The norms and structures of the parties were extensions of the government itself and critical features of the larger political system. Indeed, after the election of 1800, the Constitution was altered to recognize the crucial role of parties, and when Franklin Delano Roosevelt violated the related norm of two-term presidencies, the Constitution was again amended to reestablish it.<sup>100</sup> Martin Van Buren, an architect of the nineteenth century party system, had justified political parties in part for their value in constraining Presidents and elevating average citizens into government.<sup>101</sup> Government patronage was a key component of the party system, allowing electoral victors to distribute government offices to their supporters. Patronage helped both to mobilize electoral support behind parties and to coordinate the activities of far-flung government officials. A substantial portion of the nineteenth century President's time was dedicated to the business of filling offices.<sup>102</sup> He was expected to use his constitutional power of appointment to advance the goals of the party as a whole.<sup>103</sup> As a consequence, the President was of-

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<sup>96</sup> See President Andrew Johnson, Veto of the Civil Tenure Bill (Mar. 2, 1867), in *POLITICAL HISTORY*, *supra* note 30, at 175.

<sup>97</sup> See 1 *TRIAL*, *supra* note 53, at 126, 136, 200, 272, 292-93, 387-88.

<sup>98</sup> See WHITTINGTON, *supra* note 13, at 132-36.

<sup>99</sup> See SILBEY, *supra* note 67, at 125-40 (discussing popular sentiment for political parties); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 24-34 (1982) [hereinafter *AMERICAN STATE*] (characterizing "early America as a state of courts and parties").

<sup>100</sup> See U.S. CONST. amend. XII (restructuring the electoral college); U.S. CONST. amend. XXII (limiting Presidents to two terms).

<sup>101</sup> See CEASER, *supra* note 70, at 123-69.

<sup>102</sup> See MORTON KELLER, *AFFAIRS OF STATE* 298 (1977)

<sup>103</sup> See LEONARD D. WHITE, *THE REPUBLICAN ERA* 31-35 (1958) [hereinafter *THE REPUBLICAN ERA*].

ten a clerk who sorted through the various candidates for office forwarded to him by congressmen, senators, and party leaders.<sup>104</sup>

The Constitution, however, lodged the power of appointment in the President, subject only to Senate confirmation, a potentially weak link in the patronage system. For congressionally based parties, access to executive patronage was uncomfortably dependent on presidential cooperation. As the demand for patronage increased, expectations of a four-year rotation of offices developed, and appointments became associated as much with individual administrations as with parties.<sup>105</sup> Moreover, Presidents would occasionally use the spoils to threaten members of their own party over policy or party matters, as Lincoln had in order to secure his own re-nomination.<sup>106</sup> Such behavior stretched the boundaries of antebellum partisan norms. In his struggle with Congress, Johnson broke them.<sup>107</sup>

With few connections to the Republican Party in Congress and facing increasing hostility from the Republican Party generally, Johnson became an uncooperative source of patronage. Soon after taking office, Johnson was warned to delay several appointments until the administration had time to "know who is who and what we are doing to fortify ourselves and the cause of right."<sup>108</sup> As Congress began routinely overriding his vetoes, Johnson in turn began to limit his appointments to administration loyalists regardless of their formal party affiliation.<sup>109</sup> Johnson's patronage policies caused substantial concern among congressional Republicans. In the North, patronage was an important resource for individual congressmen to maintain their positions. In the South, patronage was viewed as an essential building block to a sustainable Republican Party that could survive the end of martial law.<sup>110</sup> Repeated calls for legislative intervention in the presidential distribution of the spoils were made, and initially rejected both for want of an adequate remedy and because of the limited immediate political impact of Johnson's

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<sup>104</sup> See *id.* at 33-45.

<sup>105</sup> See *id.* at 313.

<sup>106</sup> See HARRY J. CARMAN & REINHARD H. LUTHIN, *LINCOLN AND THE PATRONAGE* 164-65, 240, 281-82, 313-15 (1943); LEONARD D. WHITE, *THE JACKSONIANS* 313, 315, 341 (1954).

<sup>107</sup> See WHITTINGTON, *supra* note 13, at 121-32.

<sup>108</sup> MILTON, *supra* note 66, at 275-76 (quoting Secretary Welles's statement to Johnson).

<sup>109</sup> See *id.* at 275-76, 311; BEALE, *supra* note 66, at 115-21.

<sup>110</sup> See generally FONER, *supra* note 11, at 346-58 (describing party-building activities in the South).

actions.<sup>111</sup> As the 1866 election approached, Johnson became more aggressive. Presidential control of patronage became a central theme of his stump speeches as he promised to "cut off the heads of the Republicans" and "take the nipples out of their mouths."<sup>112</sup> Presidential patronage was regarded as a central strategy of revitalizing the National Union Party as an electoral force behind Johnson's leadership.<sup>113</sup>

For Republicans in particular, presidential use of the spoils at midterm against his own congressional party and in favor of a presidency-centered party seemed a gross violation of existing norms.<sup>114</sup> Patronage was no longer to be used for the good of the polity, but rather for the self-serving goals of the President alone.<sup>115</sup> The passage of the Tenure of Office Act was the legislative response. Others suggested the use of the impeachment power itself to reestablish traditional constitutional understandings. Treatise writers such as John Norton Pomeroy, Alfred Conkling, and Timothy Farrar argued that the President's appointment and removal power was implicitly limited by substantive constraints and that the "removal of a meritorious" individual for political gain was an impeachable offense.<sup>116</sup> They asserted that the congressional impeachment power should be used to reestablish a sense of the purpose of and constraints on presidential power.<sup>117</sup> As the Republicans saw it, Johnson had cynically placed his own political fortunes above the national good, undermining national reconciliation and democratic norms for the sake of personal ambition and hubris.<sup>118</sup>

Far from being a passive and innocent victim of congressional aggression, Johnson was himself a constitutional innovator. In order to press his opposition to congressional Re-

<sup>111</sup> See MCKITRICK, *supra* note 11, at 379-94 (describing Johnson's inability to use the patronage effectively and the ability of his opponents to turn dismissals to their advantage).

<sup>112</sup> President Andrew Johnson, At St. Louis (Sept. 8, 1867), *in* POLITICAL HISTORY, *supra* note 30, at 140.

<sup>113</sup> See BROCK, *supra* note 11, at 163-66; MCKITRICK, *supra* note 11, at 377-420.

<sup>114</sup> See BENEDICT, IMPEACHMENT, *supra* note 10, at 147.

<sup>115</sup> See H.R. REP. NO. 40-7, at 34, 40-41 (1867) (presenting congressional attacks on the President for his use of patronage); 2 TRIAL, *supra* note 53, at 27, 43, 63-64, 81, 114, 228-29; 3 TRIAL OF ANDREW JOHNSON ON IMPEACHMENT at 32-34, 60-64, 103, 137, 163, 310 (De Capo Press 1970) (1868).

<sup>116</sup> JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 422-39 (New York, Hurd & Houghton, 1870); *see also* ALFRED CONKLING, THE POWERS OF THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT OF THE UNITED STATES 95-139 (Albany, Weare C. Little, 1866); TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 453-54 (Boston, Little, Brown, 1872).

<sup>117</sup> See FARRAR, *supra* note 116, at 454.

<sup>118</sup> See MCKITRICK, *supra* note 11, at 384-85.

construction, the President gambled on the strength of his office and his ability to mobilize popular support behind his policies. When popular support failed to emerge, he was left exposed. Johnson's actions built on existing institutions and ideologies, but pushed them in new directions and for exceptional purposes. In the context of the mid-nineteenth century, Johnson's conception of an expansive, activist presidency was extraordinary, and rather frightening. Johnson was not just an obstacle to the partisan and policy goals of congressional Republicans, he was increasingly a threat to their understanding of the requirements of the American constitutional system.

### *C. The Johnson Impeachment and Congressional Government*

The impeachment of Andrew Johnson had a partisan and personal dimension, but it developed as a constitutional challenge to the presidency as it was being constructed by Johnson. A central purpose of the impeachment was to reconstruct the constitutional basis of the presidency and the system of separated powers.<sup>119</sup> The impeachment by the House and trial by the Senate represented the fullest flowering of congressional supremacy and symbolized the appropriate location of political power under the Constitution as the Republicans understood it. Johnson's missteps and political weakness may have been necessary conditions for the impeachment, and his removal may have been its immediate goal, but the Republicans were looking past the Johnson administration when building their case for impeachment. The system of congressional government of the late nineteenth century was consistent with both the constitutional vision put forward in the impeachment and the institutional context within which it took place.

Presidential power was the target of the Johnson impeachment. Johnson had demonstrated the dangerous potential of the presidency, and the impeachment was an effort to check that threat. In order to make their case for removing Johnson from office, Republicans were forced to attack the office itself. Referring specifically to the presidential removal power, House manager Ben Butler denounced the "more than

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<sup>119</sup> This is not to deny the importance of Reconstruction itself in motivating the impeachment. Even after the 1866 elections gave the Republicans a secure governing majority in Congress, Johnson remained an obstruction to Republican plans in the South, and the impeachment helped bolster the cause of racial reform, at least temporarily. See 2 ACKERMAN, *supra* note 18, at 219-30.

kingly prerogative" of at-will removal.<sup>120</sup> For Butler, Johnson's example meant that "the momentous question, here and now, is raised whether the *presidential office itself (if it has the prerogatives and power claimed for it) ought, in fact, to exist as a part of the constitutional government of a free people.*"<sup>121</sup> The high crimes with which Johnson was charged were unique to the presidency and were not analogous to normal criminal charges or even applicable to other government officials. Congress had included a provision in the Tenure of Office Act making its violation a "high misdemeanor."<sup>122</sup> Though the House managers hardly relied on this attempt at statutory fiat to sustain their effort to remove the President, it was indicative of the issues underlying the articles of impeachment against Johnson. Johnson's abuses were unique to the presidency and arose from the use of presidential powers. Moreover, in order to characterize Johnson's actions as abusive, the managers needed first to define appropriate presidential behavior. The problem was not so much Johnson himself as the "more than kingly prerogative" that he claimed. The impeachment of Johnson became an effort by the Republicans to explain how a President could avoid being a king.

The impeachment became a central venue for the Republicans to articulate and establish their constitutional vision of congressional supremacy. The impeachment and trial featured elaborate arguments explaining why the President's claims to popular leadership and constitutional independence were misguided, and why Congress was in fact the primary branch of the federal government.<sup>123</sup> Moreover, the impeachment itself was held up as representative of congressional dominance.<sup>124</sup> The fact that even an elected official such as the President was ultimately accountable to Congress through the "grand inquest" of an impeachment was taken as evidence of the uniquely representative character of Congress. In exercising the impeachment power, Congress effectively is the people: "Here, at least, it may be said: '*Vox populi vox Dei*—'the voice of the people is the voice of God.'"<sup>125</sup> In response to Johnson's claim that he merely sought to challenge the constitutionality of the Tenure Act before the Court,

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<sup>120</sup> 1 TRIAL, *supra* note 53, at 96.

<sup>121</sup> *Id.*

<sup>122</sup> Tenure of Office Act, ch. 1154, 14 stat. 430 (1867).

<sup>123</sup> See 1 TRIAL, *supra* note 53, at 84; 2 TRIAL, *supra* note 53, at 18, 27-28, 32, 70, 91, 228, 239, 246, 256, 427.

<sup>124</sup> See 1 TRIAL, *supra* note 53, at 88; 2 TRIAL, *supra* note 53, at 395; FARRAR, *supra* note 116, at 534.

<sup>125</sup> 2 TRIAL, *supra* note 53, at 18.

House manager James Wilson declared that "we will gratify his desire by carrying his case to the highest court known to the Constitution of the Republic - the high court of impeachment."<sup>126</sup> An impeachment was the most appropriate forum for judging the constitutionality of Johnson's actions, for his most basic crime was his violation of the duties of his office.

The trial of Johnson would serve to establish the appropriate relationship between the President and the Congress. The spectacle of a presidential impeachment would clarify the postbellum constitutional order and congressional supremacy within it. Surveying the implications of the recent war and Reconstruction, Thaddeus Stevens affirmed at Johnson's trial that the "sovereign power in this republic is the Congress of the United States."<sup>127</sup> In the campaign of the election of 1866, Stevens had elaborated that "Congress is the sovereign power, because the people speak through them; and Andrew Johnson must learn that he is your servant and that as Congress shall order he must obey."<sup>128</sup> To the Republicans, as James Wilson argued, Johnson's claims for the political and policy independence of the President made little sense. Ultimately, the national will could only be known "through the enactments of the legislative department of the government."<sup>129</sup> There was no alternative base of popular authority from which Johnson could challenge Congress.

As argued by the congressional Republicans, Congress was the active voice of the sovereign people. The identification of Congress and the people was reflected in the dynamic role of the legislature. The expansive scope of the powers entrusted to Congress by the "necessary and proper" clause was indicative of the legislature's special place in the constitutional scheme. It was to Congress alone that the people had given powers "ample for all the necessities of national life" and to "adapt the administration of affairs to the changing conditions of national life."<sup>130</sup> Congress was entrusted

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<sup>126</sup> CONG. GLOBE, 40th Cong., 2nd Sess., 1387 (1868). Similarly, Timothy Farrar argued that the Senate was "a higher tribunal" above the Supreme Court specifically in order to provide a body capable of looking beyond mere legalisms in measuring the requirements of the Constitution. See FARRAR, *supra* note 116, at 533-34.

<sup>127</sup> 2 TRIAL, *supra* note 53, at 228.

<sup>128</sup> BINKLEY, *supra* note 66, at 166 (quoting *Speech at Lancaster, N.Y. HERALD*, Sept. 29, 1866); see also CONG. GLOBE, *supra* note 82, at 177, 195, 199, 201, 214 (1868); SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 60, 142-43 (J.B. Lippincott 1969) (1862); E.P. Whipple, *The President and Congress*, ATLANTIC MONTHLY 500 (Apr. 1866) ("In any comparison between the two as to the direct derivation of their power from the people and the States, Congress has everything in its favor; Mr. Johnson, nothing.")

<sup>129</sup> 1 TRIAL, *supra* note 53, at 684.

<sup>130</sup> 2 TRIAL, *supra* note 53, at 70.

with the welfare of the people and the responsibility for reconstructing governing structures to secure their welfare under changing circumstances. In that context, the President's effort to interpose himself as a check on congressional power misunderstood the congressional character, for "it is not to be presumed, even for the purpose of argument, that they would wantonly disregard the obligations of their oath."<sup>131</sup> Congress organized, represented, and gave life to the sovereign people. As a consequence, the Republicans readily portrayed the impeachment as a conflict between the "Chief Executive Magistrate" and the "people of the United States."<sup>132</sup> The President was an agent of the people, but Congress was the people themselves.

Elevating Congress in this fashion had extensive implications for the relative stature of the presidency. In contrast to Johnson's vision of a government composed of co-equal, independent branches each responsible to the people and the Constitution, the Republicans firmly subordinated the President to the congressional will. Congress alone spoke for the people and had the right to make policy. Congress alone was responsible for insuring the viability of the Constitution. The President was merely an executive officer. His defining function was to "follow and enforce the legislative will," without "uncertainties" or "discretion unless it is conceded to him by express enactment" of Congress.<sup>133</sup> The President's highest obligation was to defend the statutory law, for "he is its minister."<sup>134</sup> In this ministerial role, Johnson had no right to challenge congressional policy or interfere with the execution of that policy by other "faithful and patriotic public officers."<sup>135</sup> Rather than acting as the President's personal "cabal," cabinet members and other executive officers were to be primarily accountable to Congress for both the definition and the conduct of their duties.<sup>136</sup> As the Tenure of Office Act and other legislative measures indicated, the President had no intrinsic powers to oversee or direct these lower officials whose offices were created by Congress and whose appointment and removal were ultimately controlled by Congress.<sup>137</sup> Congress

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<sup>131</sup> *Id.* at 91.

<sup>132</sup> *Id.* at 231; *see also id.* at 15-16, 42, 67-68, 105, 109-10, 230-31, 237-38, 251-52, 390-92.

<sup>133</sup> 1 TRIAL, *supra* note 53, at 687.

<sup>134</sup> 2 TRIAL, *supra* note 53, at 256; *see also id.* at 26, 69, 228, 397-99; FARRAR, *supra* note 116, at 535-45.

<sup>135</sup> 2 TRIAL, *supra* note 53, at 81.

<sup>136</sup> *Id.* at 43; *see also* 1 TRIAL, *supra* note 53, at 112-13, 115, 676-77; 2 TRIAL, *supra* note 53, at 27, 42-43, 63-64, 114, 228-29.

<sup>137</sup> *See* WHITTINGTON, *supra* note 13 at 126-27.



could organize the executive branch as it wished.

With the crisis of the war over, the time was ripe for reining in the President and reestablishing the central place of Congress in controlling political affairs.<sup>138</sup> As the House understood it, and as most senators ultimately confirmed, republican government required a weak executive officer unable to oppose the will of the legislature.<sup>139</sup> The examples of the American patriots and the Glorious Revolution were near at hand for the Republicans, and the Johnson presidency readily evoked the specters of Cromwell, Napoleon, and Caesar. Johnson's impeachment was necessary not simply because of his technical violation of the Tenure Act, but because of the evidence it provided of presidential defiance of the express will of Congress. Evidence of this larger "crime" could be found in his persistent use of the veto power, in his reluctant execution of Reconstruction, in his use of the patronage, and in his public speeches, as well as in his suspension of Stanton.<sup>140</sup>

The success of the larger goals of the impeachment could be secured even without the removal of Johnson. The President was spared to serve out the remainder of his term by the orchestrated margin of one vote only after he sent word that he would concede to the will of Congress in the future.<sup>141</sup> Johnson served his remaining ten months in political irrelevance.<sup>142</sup> In the midst of Johnson's impeachment, Ulysses S. Grant accepted the Republican nomination for President with the double entendre of "[l]et us have peace."<sup>143</sup> He hastened to accept the terms of the interbranch peace, assuring the Republican delegates, many of whom would soon return to Washington to complete the vote against Johnson, that he would "administer all laws in good faith," and that he regarded the President as "a purely administrative officer."<sup>144</sup> Grant was even more emphatic in his inaugural, insisting that he had no policy "to enforce against the will of the peo-

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<sup>138</sup> See 2 TRIAL, *supra* note 53, at 63, 402.

<sup>139</sup> See, e.g., 2 TRIAL, *supra* note 53, at 15-16, 70, 78-79, 110-11, 123, 126, 134-35, 144, 151-52, 176-77, 193.

<sup>140</sup> See 1 TRIAL, *supra* note 53, at 96, 98, 110-13, 115-17, 120-21; 2 TRIAL at 62-63, 70, 72, 402; H.R. REP. NO. 40-7, at 2, 37 (1867); see also Charles Mayo Ellis, *The Causes for Which a President Can be Impeached*, ATLANTIC MONTHLY 88-91 (January 1867); *The President on the Stump*, *supra* note 87, at 532-33, 37-38; *The Shifting of Powers: Balances and Checks in Government*, ATLANTIC MONTHLY 665 (June 1871).

<sup>141</sup> See BENEDICT, IMPEACHMENT, *supra* note 10, at 168-80.

<sup>142</sup> See *id.* at 170-73; FONER, *supra* note 11, at 336-38; see generally DUNNING, *supra* note 20, at 107.

<sup>143</sup> Ulysses S. Grant, Letters of Acceptance of the Republican Nominees, General Grant's Letter (May 29, 1868), in POLITICAL HISTORY, *supra* note 30, at 366.

<sup>144</sup> *Id.* at 365.

ple" and assuring Congress that "all laws will be faithfully executed whether they meet my approval or not."<sup>145</sup> Congress tightly restricted his appointments, and Grant explained to a reporter that "the President very rarely appoints, he merely registers the appointments of members of Congress."<sup>146</sup>

The conclusion of Andrew Johnson's trial marked the beginning of the era of congressional government that numerous commentators would observe for the remainder of the century.<sup>147</sup> The impeachment of the President was a concerted effort to establish such a constitutional order. Moreover, the impeachment was successful in this regard because it reinforced the dominant political institutions and ideologies of the period. Johnson's use of presidential power was regarded as abusive precisely because it was innovative in the nineteenth century context. Relatively few previous Presidents could claim the standing and political influence that Johnson sought for himself, and those Presidents were leaders of ascendant political movements, not obstructionists on behalf of a defeated and disenfranchised region.<sup>148</sup> Johnson's weakness in the face of congressional attacks reflected a weakness in the nineteenth century presidency more generally, and his effort to break free of those constraints was crushed by the impeachment.

The norms of nineteenth century politics proved to be resilient in the face of Johnson's violations of them. The Republicans' arguments for the supremacy of Congress as a constitutional and representative institution were generally compelling, and sitting Presidents once again refrained from appearing as advocates in the public sphere. Presidents appeared before the public as ceremonial figures conveying patriotic messages, not as activists seeking political authority. Johnson's "great exception" did not seem to be an example worth replicating, given his failure at the polls and revulsion at his "demagogic" appeals.<sup>149</sup> Party conventions continued to control presidential selection, and Congress continued to dominate the conventions. As Lord Bryce observed, the late century President was "a party man, seldom much above the

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<sup>145</sup> President Grant's Inaugural Address (Mar. 4, 1869), *in id.* at 416.

<sup>146</sup> WHITE, *THE REPUBLICAN ERA*, *supra* note 103, at 24.

<sup>147</sup> See, e.g., BINKLEY, *supra* note 66, at 156-227; KELLER, *supra* note 102, at 108-10, 297-307 (1977); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (Boston, Houghton, Mifflin & Co. 1885); James Garfield, *A Century of Congress*, 40 *ATLANTIC MONTHLY* 49 (1877).

<sup>148</sup> See SKOWRONEK, *POLITICS*, *supra* note 50, at 62-85, 130-54, 198-227.

<sup>149</sup> See MCKITRICK, *supra* note 11, at 428-38; *The President on the Stump*, *supra* note 87; TULIS, *supra* note 70, at 87-93.

average in character or abilities."<sup>150</sup> With little independent stature prior to gaining office and few resources with which to appeal to the public while in office, late century Presidents were in no position to challenge congressional supremacy. As Carl Swisher concluded, "no President during the period (except Lincoln) added particularly to the stature of his office."<sup>151</sup> Democracy was embodied in Congress and mass political parties, not the presidency.

Postbellum Presidents, with only a mediated link to the public, were unable to break free from the Republicans' limited conception of their constitutional office. Late century Presidents were administrators, not policymakers. Although they used their veto power with far greater frequency than their antebellum predecessors, these Presidents focused on trimming waste from appropriations bills and private legislation, not primarily on major policy legislation.<sup>152</sup> President James Garfield seemed to regret leaving Congress, complaining that "[a]ll these years I have been dealing with ideas, and here I am dealing only with persons."<sup>153</sup> In the midst of the Hayes administration, Woodrow Wilson lamented that the President was "merely the executor of the sovereign legislative will."<sup>154</sup> Even in the context of administration, late century Presidents were forced to struggle to overcome Johnson's legacy. The congressional reaction to Johnson's effort to use the spoils for his own political benefit kept postbellum Presidents on a short leash in appointments and removals. Late century Presidents had to fight for the right to choose from a menu of congressionally approved candidates, rather than simply rubber stamp a single legislator's choice. Presidents such as Hayes eventually won significant victories over the Senate in regard to patronage, but from a modern perspective, or Andrew Johnson's, those victories were exceedingly limited.<sup>155</sup> Garfield argued that the President should not be reduced to a mere "registering clerk of the Senate."<sup>156</sup> After his victories in the Senate, Hayes bragged that no legislator attempts "to dictate appointments."<sup>157</sup> However, neither Garfield nor Hayes imagined that his appointments could be used against congressional interests, as Johnson hoped, or that they deserved the kind of senatorial deference that modern Presidents rou-

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<sup>150</sup> JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 65 (1889).

<sup>151</sup> CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 487 (2d ed. 1954).

<sup>152</sup> See WHITE, *THE REPUBLICAN ERA*, *supra* note 103, at 39-40.

<sup>153</sup> KELLER, *supra* note 102, at 298.

<sup>154</sup> BINKLEY, *supra* note 66, at 215.

<sup>155</sup> See WHITE, *THE REPUBLICAN ERA*, *supra* note 103, at 287-88.

<sup>156</sup> *Id.* at 194-95.

<sup>157</sup> *Id.*

tinely expect and enjoy.<sup>158</sup>

Consistent with this limited presidential control over the selection of personnel, Congress favored a plural executive that could be laterally penetrated by legislative interests rather than the hierarchical, unitary executive favored by Johnson.<sup>159</sup> Senator John Sherman summed up this approach at the end of the century, contending that:

The president has no more right to control or exercise the powers conferred by law upon [the departments] than they have to control him in the discharge of his duties. . . . This limitation of the power of the President, and the distribution of power among the departments, is an essential requisite of a republican government . . . .<sup>160</sup>

Leonard White found that the "tacit assumption" of contemporary observers was that the executive branch was "a cluster of department heads."<sup>161</sup> The late century Congress was not opposed to administration; in fact the executive branch grew in both size and function during the period. Whenever possible, however, policy discretion was placed directly in the hands of "independent" executive branch officials, not the President's. Congress controlled departmental duties and budgets, and executive officials dealt with Congress directly and without presidential consultation.<sup>162</sup>

The Johnson impeachment was followed by a period of weak Presidents dominated by a relatively strong Congress, a pattern typical through much of the nineteenth century. Congressional supremacy was consistent with both the ideological assumptions about republican government and the institutional structures of the party-based system that defined

<sup>158</sup> See, e.g., *id.* (discussing President Garfield's battle with the Senate concerning the nomination of the collector of the port of New York).

<sup>159</sup> There is an extensive debate over whether the founders intended the executive to be unitary or plural, but the norms of the mid- (and especially the late) nineteenth century clearly favored a more pluralistic understanding of the executive branch. On the unitary executive, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); David P. Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. (1986). On the plural executive, see Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

<sup>160</sup> 1 JOHN SHERMAN, JOHN SHERMAN'S RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET 449-50 (New York, Werner 1895).

<sup>161</sup> WHITE, THE REPUBLICAN ERA, *supra* note 103, at 47.

<sup>162</sup> See *id.* at 20-31, 45-48; Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy*, ch. 1 (1996) (unpublished manuscript, on file with *The University of Pennsylvania Journal of Constitutional Law*).

American politics during its first century.<sup>163</sup> Those patterns were not broken until the turn of the century when the increased importance of foreign policy and the increasingly active and bureaucratic national state elevated the importance of the presidency. Only then did Presidents establish the direct links with the electorate and the independent base for governing that compelled Congress to recognize an expanded constitutional authority for the presidency.<sup>164</sup>

Johnson was a constitutional innovator who threatened entrenched political interests and longstanding political norms. While his impeachment was a partisan affair, congressional Republicans understood Johnson to be a threat to the constitutional order itself. The debates of the time were filled with sustained efforts to understand the underpinnings of the American constitutional system and its possible future. The President's political isolation made him vulnerable to congressional attacks, but the personal animosity that Republicans developed for Johnson was equally aimed at the institution of the presidency. Johnson's presidency was consumed by a struggle over who would control the reconstruction of the nation after the Civil War, and his impeachment became an effort to secure congressional control over domestic policy and politics. As an individual, Johnson had brought the conflict between Congress and the President to the point of crisis, but the resulting impeachment was not personal. His crimes were less offenses *against* the office than offenses *of* the office. In his effort to dominate Congress, Johnson tried to build the presidency into an institution that could challenge congressional supremacy. The impeachment demonstrated that such a challenge was not yet sustainable and would not be tolerated.

### III. BILL CLINTON, PERSONAL SCANDAL, AND PRESIDENTIAL WEAKNESS

By contrast, the impeachment of Bill Clinton targeted the individual, not the office. His offenses grew out of personal scandal and were intimately connected to his own term of office. Little about his impeachment and trial suggested flaws in the office of the presidency that needed to be corrected. Indeed, for the Republicans it was precisely the contrast be-

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<sup>163</sup> See generally Sergio Frubbrini, *The American System of Separated Government: An Historical-Institutional Interpretation*, 20 INT'L POL. SCI. REV. 97, 97-106 (1999) (describing "congressional predominance").

<sup>164</sup> See SKOWRONEK, *AMERICAN STATE*, *supra* note 99, at 285-92; SKOWRONEK, *POLITICS*, *supra* note 50, at 228-33.

tween the stature of the office and the actions of its occupant that necessitated Clinton's removal.<sup>165</sup> Whereas the Johnson episode suggested to Republicans the dangers implicit in the presidency itself, the Clinton scandals seem to suggest merely the character flaws of an individual President. For most observers, Clinton's actions would have seemed to disqualify a candidate from becoming President. The question, however, was whether they were of sufficient gravity to justify removing a sitting President from office. As with Johnson, Clinton's exposure to the impeachment threat was purely contingent—another occupant of the office would almost certainly not have provoked Congress to the point of impeachment. Unlike Johnson, however, Clinton's crisis was primarily a personal one. His struggle to retain power had great individual significance, but relatively few implications for the nation as a whole. As a consequence, the effects of Clinton's impeachment are unlikely to extend past the expiration of his own term of office.<sup>166</sup> With the constitutional stakes so small, the impeachment effort came to seem essentially misguided. In contrast, the impeachment of Andrew Johnson seemed a more dramatic and significant moment precisely because the constitutional stakes were so high. In the Clinton case, congressional Republicans never really established themselves as engaging in an important constitutional enterprise, and their effort never gained traction.

The targets of earlier presidential impeachment efforts were as much institutional as personal. Unlike Johnson or Nixon, Clinton's impeachment was not preceded or followed by efforts to constrain the institution of the presidency or shift power from the executive to the legislative branch more generally. As we have seen, Andrew Johnson's impeachment came only after a lengthy struggle between the President and Congress, during which Congress systematically stripped the President of important powers and resources. Similarly, the Watergate crisis of the Nixon administration and the President's ultimate resignation were accompanied by a variety of

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<sup>165</sup> The call by Republicans, and others, for Clinton to resign from office reflects this personal focus. Clinton's resignation by itself would solve the perceived problem because the problem was the individual holding office. Although the Reconstruction-Era Republicans would undoubtedly have welcomed Johnson's resignation, their concerns about the presidency itself would not have been addressed by a resignation, and they did not call for one. Similarly, Nixon's resignation did not stop congressional efforts to reform the presidency through various statutory means.

<sup>166</sup> I am only concerned here with the constitutional effects of the impeachment. As of this writing, it remains possible that a political "impeachment backlash" could emerge in the 2000 elections, which would in turn have political and policy consequences beyond Clinton's term of office.

legislative efforts to hold the modern presidency more accountable, including new budget procedures, the War Powers Resolution, restrictions on campaign financing, the institutionalization of the independent counsel, and intelligence reforms.<sup>167</sup> With both Johnson and Nixon, the actions of an individual President fed an antipathy to the office of the presidency itself. The reaction against those two Presidents required a reevaluation of the power of the presidency more broadly, which was seen as facilitating individual transgressions and abuses. The central question of these impeachments concerned the unprecedented or problematic use of the presidential office. Although neither President's actions were literally unprecedented, their scope and purpose were new, and an altered political environment gave new significance to such presidential power.<sup>168</sup> Johnson's misdirection of the spoils and Nixon's expansion of the domestic surveillance apparatus called into question the nature of the presidential office. Partisan conflict and political incompetence brought growing concerns about presidential power to a head.

In the case of Clinton, there were no underlying doubts about the presidency itself into which partisan conflict and personal misjudgment might feed. Indeed, the more common theme of commentary on the presidency during the last two decades has been one of relative weakness.<sup>169</sup> Despite the brief success of Ronald Reagan in restoring luster to the presidency, most recent Presidents have been unable to recover the sense of prestige and power that Presidents enjoyed prior to Watergate. The presidency has more often seemed "fettered," and presidential power has been exceedingly fleeting. Although Clinton has at times proven to be a formidable political adversary, he has not emerged as a particularly threatening presence as had Johnson and Nixon. Instead, after his party lost control of Congress in the 1994 midterm elections, the President was forced to insist publicly that he was still relevant to the policy process.<sup>170</sup> Even in the midst of

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<sup>167</sup> See STANLEY I. KUTLER, *THE WARS OF WATERGATE* 574-611 (1990); JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 199-414 (1981); WHITTINGTON, *supra* note 13, at 158-206.

<sup>168</sup> See Barton J. Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940*, 40 *LAW & CONTEMP. PROBS.* 58 (1976).

<sup>169</sup> See, e.g., HAROLD M. BARGER, *THE IMPOSSIBLE PRESIDENCY* (1984); JAMES MACGREGOR BURNS, *THE POWER TO LEAD* (1984); COLLIN CAMPBELL, *THE U.S. PRESIDENCY IN CRISIS* (1998); *THE FETTERED PRESIDENCY* (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); MICHAEL A. GENOVESE, *THE PRESIDENTIAL DILEMMA* (1995); THEODORE J. LOWI, *THE PERSONAL PRESIDENT* (1985).

<sup>170</sup> See The President's News Conference, April 18, 1995, 31 *WEEKLY COMP. PRES. DOC.* 657 (Apr. 24, 1995).

his impeachment, Clinton's harshest critics denounced him as an embarrassment, not as a threat.<sup>171</sup>

Clinton's impeachment came at the end of a lengthy scandal focusing on his personal conduct that was primarily pursued by an independent counsel. Prior partisan conflicts between the President and Congress had left a substantial store of personal animosity against Clinton among Republican legislators, and the President's preemptive position left him politically isolated, despite his own reelection in 1996. Nonetheless, the nature of the scandal focused on Clinton as a person rather than as a President, an angle that the President and his defenders persuasively played to his advantage in arguing against his removal from office.<sup>172</sup> The existence of an independent counsel investigation of the President served to further personalize the charges against Clinton. Despite the eventual broad scope of counsel Kenneth Starr's investigation, its strictly legal focus served to restrict the manner in which eventual charges against the President would be framed, excluding a broader context as an extended political congressional investigation would not have. Similarly, the focus of Starr's investigation was necessarily on violations of the criminal law. This legal orientation stripped the charges of important political issues and further served to emphasize the personal nature of the offenses. Clinton had erred in attempting to cover up a sexual affair and in doing so potentially broke the law. Such a charge hardly seemed to implicate the office of the presidency in Clinton's own problems.

At the same time, House Republicans used the Starr investigation to minimize their own role in the impeachment inquiry. As the House Judiciary Committee hearings dramatically demonstrated, Starr almost single-handedly provided the evidentiary support for the impeachment effort.<sup>173</sup> More importantly, congressional Republicans used Starr to avoid an extended discussion concerning the nature of the presidency and impeachable offenses. For months after the initial scandal broke, legislators avoided elaborating on their own or

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<sup>171</sup> Notably, more threatening claims about Clinton never achieved political traction or widespread credibility. The President's plea of administrative incompetence regarding the White House's possession of FBI files on members of the previous administration seemed all too believable. Though persistent, assertions that aide Vincent Foster's suicide was in fact a politically motivated murder have been confined to fringe groups. In the midst of the impeachment, Bill Clinton reminded four times as many Americans of John Kennedy than of Richard Nixon and most found Clinton's crimes less serious than Nixon's. See Fineman & Cooper, *supra* note 2, at 28.

<sup>172</sup> See, e.g., Sunstein, *supra* note 4, at 305-06.

<sup>173</sup> See Adam Clymer, *Three Issues Stand Out in the Logic of the Committee's Proceedings*, N.Y. TIMES, Dec. 14, 1998, at A37.



the President's constitutional responsibilities in favor of awaiting the findings of the Starr investigation.<sup>174</sup> Of course, given that Starr's own efforts were evidentiary and legal rather than constitutional, such congressional deference had the effect of posing criminal offenses as presumptively impeachable offenses. Rather than discussing the nature of the presidency, Congress urged us to wait to see whether Clinton obstructed justice. Unsurprisingly, congressional hearings following the release of the Starr referral focused on such narrow questions as whether perjury was a high crime or misdemeanor, rather than such broader questions as whether there was an imbalance in the separation of powers or whether modern democratic practices had altered the standards of impeachment.<sup>175</sup> Once the impeachment inquiry focused on the possible criminality of Clinton's actions, it almost necessarily lost any institutional purchase.<sup>176</sup>

The core justification for the impeachment was the conflict between the actions of Clinton as an individual and the official role of the President.<sup>177</sup> Republicans cast themselves in the role of saving the presidency from Clinton's offenses. The logic of their position required them to raise the presidency to an elevated status in order to contrast our heroic expectations of its ideal occupant with the sordid actions of its actual incumbent. Ironically, it was the President's defenders who had more to gain from reducing the stature of the presidency, implicitly asserting that the President was a mere manager not a role model.<sup>178</sup> For those who sought to remove Clinton, the goal was to cleanse the presidency, not to weaken it. The central reference point of the impeachment was the most basic virtues of the rule of law and the obligations of those who hold public office.<sup>179</sup> Republicans primarily focused on alleged crimes that bore little relationship to the office that Clinton occupied. Clinton's actions equally could have been

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<sup>174</sup> See, e.g., Chris Black, *Republicans Revive Impeachment Talk*, BOSTON GLOBE, Jan. 22, 1998, at A3 (discussing congressional reliance on Starr investigation).

<sup>175</sup> See Clymer, *supra* note 173.

<sup>176</sup> This is true unless the institutional question becomes one of how the electoral system fails and allows such personalities to become President or, alternatively, how the contemporary "politics of personal attack" fails and causes Presidents to become criminals.

<sup>177</sup> See 145 CONG. REC. S76 (daily ed. Jan. 14, 1999) (Trial Memorandum of the United States House of Representatives) (summarizing the charges against President Clinton).

<sup>178</sup> See Jacob Weisberg, *The Governor-President Bill Clinton*, N.Y. TIMES MAG., Jan. 17, 1999, at 31-32. Weisberg has perceptively suggested that Clinton has helped reshape the presidency on the gubernatorial model in which the President is more chief executive than head of state. See *id.*

<sup>179</sup> See 145 CONG. REC. S76 (daily ed. Jan. 14, 1999) (Trial Memorandum of the United States House of Representatives).

performed by any private citizen and would have been equally objectionable. The necessity of impeachment did not arise from Clinton's actions as President but from the inconsistencies between his private actions and his public role. In drawing on rationales for presidential impeachment developed against Richard Nixon, the House managers notably skipped over such concerns as the "arrogation of power" in order to focus on conduct "undermining the integrity of office."<sup>180</sup> Moreover, in the context of Clinton's offenses, this became synonymous with "erod[ing] respect for the office of the President."<sup>181</sup> The impeachment became a replay of the standard electoral question: Is this individual qualified to hold public office? The focus was on the individual, not the office.

Congressional Republicans did not offer an elaborated constitutional vision that would define the appropriate character of the presidency or the President's place within the larger constitutional order.<sup>182</sup> Such freighted concepts as "the rule of law" were allowed to stand on their own without serious inquiry or further specification. The ways in which Clinton's actions may have shed light on the modern presidency or done lasting damage to constitutional institutions were left unstated. The House managers did not ask what responsibilities the Constitution imposed on a President, other than the minimal expectation that he not commit felonies while in office. They did not ask what the conditions of constitutional government were, and how the presidency might support or undermine them. Even the purpose of the congressional power of impeachment was left largely unexplored in favor of a minimal effort to simply identify a list of "high crimes." The managers portrayed their task as technical and legal and ultimately uncontroversial.<sup>183</sup> In other words, the congressional Republicans of 1999 did none of the things that the congressional Republicans of 1868 had done. The modern Republicans chose to portray themselves as the mere executors of the criminal code, whereas the Reconstruction-Era Republicans understood themselves to be constitutional actors.

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See RICHARD A. POSNER, *AN AFFAIR OF STATE* 157-58 (1999) ("It is on the ground of disrespect for his office and for decency in the conduct of government that the most powerful case for impeachment and conviction could have been pitched. But neither Starr nor the Republican majority of the House Judiciary Committee attempted to do this.").

<sup>183</sup> See 145 CONG. REC. S76 (daily ed. Jan. 14, 1999) (Trial Memorandum of the United States House of Representatives).

It is not surprising, however, that the Republicans did not advance a larger constitutional argument aimed at weakening the presidency and elevating the legislature. Although the heady days of the mid-century modern presidency are clearly over, there is little intellectual or political support for a return to congressional government. The congressional "resurgence" of the Watergate period focused more on building congressional independence and presidential accountability than substituting legislative for presidential leadership.<sup>184</sup> Recent examinations of presidential powers have had more the tone of lament over the inability of the modern presidency to fulfill its promise than normative preference for legislative supremacy.<sup>185</sup> Unlike the Republicans of the Reconstruction Era, or even the Democrats of the Watergate Era, neither political party currently views Congress as its primary institutional home. Partisan animosity toward the presidency is decidedly contingent and transitory, and neither party believes in either the virtue or the necessity of weakening the presidency for the long-term.

Despite the presidency's more limited significance in the post-Cold War constitutional order, the Presidents of the early twenty-first century will have institutional and political resources to sustain their power relative to Congress that were unavailable to Andrew Johnson and his immediate successors. Indeed, Clinton's ability to weather successfully his recent crisis is indicative of the vastly enhanced baseline of presidential strength in the late twentieth century compared to the late nineteenth. Both the structure of the party state and a set of ideological beliefs that favored legislative supremacy supported the congressional government of the last century. Despite his formal powers, Johnson could not control either the executive branch or party patronage. In trying to build support for his struggle with Congress, he encountered entrenched norms and institutions that refused to invest the President with personal popular authority. By contrast, the modern presidency is built on a powerful bureaucratic state that favors executive rather than legislative power and exists within a political environment that recognizes presidential claims to democratic legitimacy.<sup>186</sup>

Unlike the party state of the nineteenth century, the bureaucratic state of the twentieth century offers substantial political resources to the President.<sup>187</sup> Although there are

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<sup>184</sup> See KUTLER, *supra* note 167, at 607-08; WHITTINGTON, *supra* note 13, at 201-03.

<sup>185</sup> See *supra* note 169.

<sup>186</sup> See SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES* 75-183 (1993).

<sup>187</sup> See generally PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* (2d ed. 1998)

clearly limits to presidential control over the executive branch and to presidential dominance over Congress, the modern presidency exercises substantial influence over the executive bureaucracy. Executive budgeting has given the President an important role in the larger budgeting process, and Clinton has adroitly used the budgeting process to enhance his stature relative to Congress. Executive branch personnel are not under direct control of the President, but they are no longer primarily loyal to Congress either and can be significantly influenced by presidential actions.<sup>188</sup> The executive also now plays a critical independent role in policymaking through the creation of regulations. The Office of Management and Budget, among other mechanisms, allows the President to exercise substantial oversight of regulatory activity. Moreover, the importance of regulations to modern government gives the President unilateral policymaking powers that have often been exploited to circumvent Congress. Of course, the President has substantial discretion in foreign affairs, which remains a relatively important aspect of national political life.<sup>189</sup> The modern President has enough chips with which to bargain with Congress that he cannot be dealt out of the game as were the nineteenth century Presidents.

At least as important as the President's enhanced institutional power is his enhanced informal authority. When Andrew Johnson took to the stump to advance his policies, he was denounced as a dangerous demagogue. Presidents are now criticized if they do not go to the public to defend their policies often enough. Despite its analytical problems, the idea of a presidential mandate is now well accepted. Modern Presidents are readily accepted as national leaders and popular representatives.<sup>190</sup> Their claims to represent the peo-

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(tracing the development of presidential powers associated with the administrative state); MILKIS, *supra* note 186 (describing the shift from party to administrative politics in the twentieth century); JAMES P. PFIFFNER, *THE MANAGERIAL PRESIDENCY* (1999) (collecting various perspectives on the power of the executive in the administrative state); SKOWRONEK, *AMERICAN STATE*, *supra* note 99, at 285-92 (noting that the rise of the bureaucratic state produced expanded responsibilities and powers for the President).

<sup>188</sup> See generally Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* (Michael Nelson ed., 5th ed. 1998) (explaining presidential advantages in controlling bureaucracy).

<sup>189</sup> See generally LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) (detailing the development of presidential war powers since World War II).

<sup>190</sup> See generally SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (3d ed. 1997) (discussing the tendency of modern Presidents to appeal to the public directly); LOWI, *supra* note 169 (discussing the increasingly personal nature of presidential leadership); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 3-9 (1990) (noting changes in presidential leadership); TULIS, *supra* note 70, at 117-204 (discussing the emergence of modern presidential leader-

ple are at least as great as those of the legislature. In contrast to the partisan print media of the nineteenth century, the modern media favors Presidents and often takes them as the personification of the government as a whole.<sup>191</sup> Modern media, campaign structures, and party nomination procedures facilitate the development of personalized presidential authority that relies on neither party nor constitutional office.<sup>192</sup> Such resources are independently accessible to the President and are both source and symptom of a radically transformed democratic sensibility that helps sustain presidential power against legislative encroachment.<sup>193</sup> Thaddeus Stevens's declaration that Congress is the people would hardly be plausible in a modern context, and without it congressional government is not viable. Indeed, the apparatus of modern opinion polling and electronic mass media constantly put Congress on the defensive during the impeachment by challenging the representative credentials of legislators.<sup>194</sup> For the nineteenth century Republican Congress, the presidential impeachment symbolized legislative supremacy and the identity of the people and their legislative representatives. For the twentieth century Republican Congress, the presidential impeachment highlighted the multiple claimants to popular authority in the modern era and the political resilience of the presidency.

A future President may find him or herself in a position similar to Bill Clinton's. The relative power of the modern presidency cannot fully insulate individual Presidents from scandal and constitutional checks, as Richard Nixon discovered. Historically, threats of presidential impeachment have arisen when strong-willed Presidents have adopted an aggressive posture in a climate of political isolation.<sup>195</sup> Andrew Johnson, Richard Nixon, and Bill Clinton found themselves in a capital dominated by their political opponents. Their efforts to advance their respective agendas in this unfavorable strategic climate bred hostility and contempt not only among their political enemies but also from their putative political allies, even as the struggle encouraged rigidity and paranoia

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<sup>191</sup> See SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS* 124 (1987).

<sup>192</sup> See LOWI, *supra* note 169, at 62-80.

<sup>193</sup> See generally KERNELL, *supra* note 190; LOWI, *supra* note 169, at 67-133; MARTIN P. WATTENBERG, *THE RISE OF CANDIDATE-CENTERED POLITICS* (1991).

<sup>194</sup> See, e.g., Berke, *supra* note 2; Adam Clymer, *Starr's Remarks Sway Few, Polls Show*, N.Y. TIMES, Nov. 21, 1998, at A11; Andrew Ferguson, *Speaking for the American People . . .*, TIME, Oct. 19, 1998, at 50; Paul Leavitt, *End the Trial Now, Public Says in Polls*, USA TODAY, Jan. 25, 1999, at 4A.

<sup>195</sup> See SKOWRONEK, *POLITICS*, *supra* note 50, at 44-45.

in the White House.<sup>196</sup> Such political conditions are likely to arise again in the future, and a similar drama of bitterness, scandal, and miscalculation may be played out. But such future impeachment efforts would not reflect any immediate legacy of the Clinton crisis. In this regard, Bill Clinton's experience may be closer to John Tyler's. Tyler also faced calls for an impeachment after a series of increasingly bitter struggles with Congress. The impeachment effort against Tyler stalled, however, in the House.<sup>197</sup> As with Clinton, Tyler's troubles with Congress were personal, not institutional.<sup>198</sup> The Tyler episode had no effect on the presidency, and with the next election the crisis was forgotten. Similarly, there is little to gain from reforming the impeachment power itself in reaction to the transitory difficulties of the Clinton presidency.<sup>199</sup>

#### IV. THE IMPORTANCE OF CONSTITUTIONAL POLITICS

The Clinton impeachment was so unsatisfying in part because it seemed so constitutionally unimportant. The heaviest artillery in the constitutional arsenal was called out to address a scandal of the meanest character. Despite a numbing amount of commentary on the scandal, there was surprisingly little effort to explain the constitutional value of an impeachment. Republicans seemed to assume that Clinton had defaulted on his presidency and could be removed from office on a technicality. The President and his defenders, of course, were in no position to advance a rich constitutional defense of the presidency, but they seemed content to exploit Republican weaknesses. With its foreordained outcome and sordid subject matter, the impeachment was a constitutional crisis only in its banality.

The House's rather reductionist approach to the constitutional text should not be surprising. Given the relative clarity of the President's offenses and the ambiguity of the Constitution's requirements, advocates of impeachment had immedi-

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<sup>196</sup> See *id.* at 44-45, 444-45; Stephen Skowronek, *The Risks of "Third-Way" Politics*, SOCIETY, Sept.-Oct. 1996, at 32.

<sup>197</sup> See Lonnie E. Maness & Richard D. Chesteen, *The First Attempt at Presidential Impeachment: Partisan Politics and Intra-Party Conflict at Loose*, 10 PRESIDENTIAL STUD. Q. 51 (1980) (discussing the attempted impeachment of President Tyler).

<sup>198</sup> Tyler's alleged offenses were personal in that they concerned his "moral and political character," his "shameless duplicity," and "corrupt use of the veto power to gratify his personal and political resentments against the Senate of the United States." They were not personal, however, in the sense of concerning "private" affairs. *Id.* at 56, 58.

<sup>199</sup> See Keith E. Whittington, *Do We Need a New Understanding of Impeachable Offenses?*, 99 POLY REV. \_\_ (2000).

ate strategic reasons for minimizing discussions of the purposes of impeachment.<sup>200</sup> But this thin deliberation on the meaning of Congress's constitutional responsibilities is also unsurprising given the historical and intellectual context of this impeachment. Our recent impeachment experience has emphasized relatively clear cases of criminal wrongdoing by public officials. The long drama of Watergate in the 1970s and the spectacle of criminally convicted and imprisoned federal judges in the 1980s were relatively easy cases that emphasized criminality as the sufficient condition for impeachment.<sup>201</sup> The reliance on an independent counsel's grand jury investigation of presidential misconduct as a prelude to a congressional impeachment inquiry further highlighted the criminal, and essentially private, dimensions of this probe. Recent academic commentary on the impeachment power has been overwhelmingly legal in its orientation, or else narrowly historical.<sup>202</sup> It was predictable, therefore, that the House would approach impeachment in a highly formalistic manner—a mechanical matter of comparing discovered facts to an implicit list of “impeachable offenses.” As the public disinterest, if not active disapproval, of the Clinton impeachment suggests, this formalistic emphasis is not enough.

Asking what constitutes an impeachable offense is not quite the same as asking why Congress might impeach. The listing of impeachable offenses involves an abstraction that quickly loses significance in the context of an actual impeachment investigation. “Crimes” that seem real and significant in the abstract may seem trivial in a given political context, even as actions that seem innocent in the abstract may take on a more ominous cast within a given political situation. The mantra of “obstruction of justice” had a rather different meaning in the context of Watergate than in the context of “Zippergate,” just as Johnson's midterm removal of executive officials meant something different than the patronage activities of his predecessors. As Reconstruction-Era Republicans recognized, their political and constitutional task

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<sup>200</sup> The Senate trial, however, did expose the Republicans' inadequate preparation for establishing the precise nature of the presidential offenses as well.

<sup>201</sup> The House's trial brief primarily relied on those 1980s precedents to justify removal in this case. See 145 CONG. REC. S74 (daily ed. Jan. 14, 1999) (Trial Memorandum of the United States House of Representatives).

<sup>202</sup> See, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973) (examining the historical uses of impeachment); CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974) (considering the nature of impeachable offenses and a list of crimes and wrongdoing); ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES* (1992) (describing past federal impeachments); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* (1996) (emphasizing the original understanding of impeachment as a congressional power).

was to explain why Johnson's actions threatened the health of the republic, not to minutely examine the phrase "high crimes and misdemeanors."

A focus on defining the category of impeachable offenses invites an exercise in textual interpretation. Consideration of the scope of impeachable offenses almost necessarily leads to an examination of the historical roots and founding intent behind the pregnant term "high crimes and misdemeanors." It is unsurprising, if somewhat ironic, that both academic commentators and interested politicians became faithful adherents of original intent when they sought to interpret the Constitution's impeachment clauses.<sup>203</sup> In the midst of an impeachment drama, however, such debates are likely to seem merely academic in the worst sense. They are also likely to be inconclusive. British history, discussions at the founding, and subsequent practice suggest that "impeachable offenses" is more of a constrained set than a determinate list.<sup>204</sup> Interpretive analysis might suggest that the scope of impeachable offenses has some recognizable limits—Gerald Ford's claim that the House could define the term however it wants notwithstanding.<sup>205</sup> We know, for example, that the limitation of the impeachment power to high crimes and misdemeanors was understood by the founders to exclude removal of officers for innocent policy errors or "maladministration."<sup>206</sup> Likewise, only a specific act—the commission of a "high crime"—can trigger an impeachment inquiry. A general assessment that an individual is incompetent or wrong-headed is insufficient. An impeachment is not a vote of confidence.<sup>207</sup> But there is an unusually large set of "hard cases"

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<sup>203</sup> See John O. McGinnis, *Impeachable Defenses*, 95 POLY REV. 27, 27-29 (1999).

<sup>204</sup> Compare BERGER, *supra* note 202, at 56-107, with PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENTS IN AMERICA, 1635-1805* (1984). See generally Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631 (1999).

<sup>205</sup> See 116 CONG. REC. 11,913 (1970) (statement of Rep. Gerald Ford) (asserting that an impeachable offense "is whatever a majority of the House of Representatives considers [it] to be").

<sup>206</sup> During the Convention, George Mason moved to add "maladministration" to treason and bribery as additional grounds for removal under the Impeachment Clause. After objections by Madison (for vagueness) and Morris (for irrelevance), Mason withdrew the language and substituted "other high crimes and misdemeanors against the State." JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, 605 (indexed ed. 1987).

<sup>207</sup> Even this fairly clear requirement can create some complications, however. General competency concerns can usually be framed around some specific objectionable action. For example, the primary reason for removing Judge John Pickering from the bench was his increasing alcoholism and mental instability, but the specific charges against him focused on his conduct in a single trial. See WILLIAM PLUMER, *WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807*, 99-100 (Everett Somerville Brown ed., 1923). The Pickering impeachment



at the fuzzy boundary of the term.

In any case, simply providing a definition of impeachable offenses is unlikely to be satisfactory to those who must determine whether to act on them. In the recent House hearings on the meaning of impeachable offenses, scholarly witnesses were quick to reassure worried congressmen that the House had discretion on whether to impeach, even upon the presentation of clear evidence of an unambiguously impeachable offense.<sup>208</sup> But the concept of discretion does not capture the considerations at stake in an impeachment inquiry. Although the recognition of discretion does emphasize that impeachments are not a mechanical act upon discovery of evidence of the commission of one of a predetermined set of crimes, the idea of discretion also seems to imply that congressmen may ignore what they regard as impeachable actions by the President and that the decision to initiate an impeachment turns on considerations unrelated to the Constitution. Thus, "discretion" implies, for example, that Congress could recognize that a President has committed an impeachable act, but choose not to impeach him because he is of the same party as the majority of Congress and because doing so would be politically damaging to Congress. "Discretion" suggests that the scope of impeachable crimes is fixed and clear, but that the prosecution of those crimes is optional. It reinforces the assumption that we already know what high crimes are, and that in any given case we must merely decide whether they have been committed and whether to punish them.

In fact, the rationale for a presidential impeachment must be constructed through the process itself.<sup>209</sup> Impeachments

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prompted President Thomas Jefferson to complain that impeachment was "a *bungling way*" to remove unfit judges. *Id.* at 101.

Somewhat differently, it is clear that many congressional Republicans thought the fundamental problem with President Andrew Johnson was his policy views on Reconstruction; the impeachment effort fed on that concern. The high crime requirement slowed and structured the impeachment movement, but it did not stop it. After several attempts, Radical Republicans were able to find a set of specific actions that could form the basis for an impeachment, even as Senator Simon Cameron assured his Pennsylvania constituents that he never thought a "low white of the South was fit to become President." MILTON, *supra* note 66, at 378.

<sup>208</sup> See, e.g., *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 89 (1998) (statement of Cass R. Sunstein); *id.* at 241 (statement of William Van Alstyne). *But cf.* Sunstein, *supra* note 4, at 300 n.79.

<sup>209</sup> This is not to suggest that the justification for an impeachment can never be clear-cut or that every impeachment must become an exercise in constitutional construction. The impeachments of many federal judges have been simple exercises of removing clear offenders. The nature and significance of presidential offenses are unlikely to be so obvious, however, and the removal of a high official necessarily

require judgment. They are not the mechanical application of the law of the Constitution. They are products of the constitutional judgment of high political officials. There is simply not a single moment of decision in which congressmen lay the requirements of the Constitution against the actions of a government official and observe whether the acts are covered by the law.<sup>210</sup> The entire decisionmaking process of impeachment is suffused with constitutional considerations. In the case of the Johnson impeachment, congressional Republicans well understood this aspect of their political task. For Reconstruction-Era Republicans, constitutional sensibilities, policy preferences, and partisan calculations were conjoined and provided the motivation and justification for the impeachment.<sup>211</sup> In the case of Clinton, the impeachment was never placed within a compelling constitutional context. Republicans allowed Starr to explain what Clinton had done, and they were unprepared to explain why it mattered. Without an explanation of the constitutional significance of Clinton's actions, the congressional reaction seemed out of proportion with the underlying events. If the President had shown bad judgment in conducting his affair and his effort to cover it up, Congress seemed to show bad judgment in seeking to truncate his regular term of office. As the Republicans were unable or unwilling to frame their efforts in constitutional terms, the impeachment was easily framed in familiar partisan terms. The point is not that the House Republicans should have emulated their predecessors in their substantive goal of weakening the presidency and strengthening Congress. The modern Republicans did, however, need to engage in a debate over the principles behind the impeachment power and explain why an impeachment was substantively justified in this case. As the Clinton scandal wore on, any political consensus over the scope of impeachable offenses broke down. Critics of the President needed to rebuild those constitutional foundations and not simply try to interpret and apply putatively settled law.<sup>212</sup>

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raises more serious questions than the removal of an appointed district court judge.

<sup>210</sup> Ronald Dworkin makes a similar point in arguing against the distinction between enumerated and unenumerated rights, noting that the distinction leads interpreters to look for lists of items included within the scope of some given constitutional phrase. As he argues, however, "[t]he key issue in applying these abstract principles to particular political controversies is not one of reference but one of interpretation, which is very different." RONALD DWORKIN, *FREEDOM'S LAW* 78 (1996). Although the "high crimes and misdemeanors" clause looks, at first glance, more like it refers to an implicit list than states a political principle, historic practice suggests otherwise.

<sup>211</sup> See *supra* notes 119-46 and accompanying text.

<sup>212</sup> The Reconstruction-Era Republicans likewise engaged in a separate debate over

Although the impeachment of Andrew Johnson has been portrayed as a cynical partisan putsch, the records of the period display a rich constitutional debate over the requirements of a republican government and the President's place within it. Both the Reconstruction-Era Republicans and the President marshaled political support for their causes through a distinctly constitutional discourse that explained both the appropriate nature of the presidential office and the purpose of the congressional power to impeach. The Senate trial offered two competing visions of the future constitutional order, and the impeachment was understood to be part of an effort to construct that new order. Timothy Farrar, a prominent Republican constitutional scholar of the period, emphasized the enormity of disputes over constitutional meaning, noting that "[a]ll the iniquity of the late rebellion may be said to have arisen out of a mere difference of opinion on a constitutional question."<sup>213</sup> For him, the impeachment power was an instrument for insuring that all "[t]hose who accept the responsibility of understanding, executing, and administering [the Constitution] . . . are bound to know its meaning, and to execute it right."<sup>214</sup> The impeachment and trial of Andrew Johnson helped determine what it would mean to get the Constitution right. The Reconstruction-Era Republicans understood that the Constitution could not speak for itself, and their attack on Johnson was centrally concerned with establishing what the Constitution meant. It is perhaps unsurprising that a century later we no longer find all of their constitutional project compelling, but there is little doubt that their project was constitutional in purpose.<sup>215</sup> Moreover, the constitutional project of the Reconstruction Era was constructive and creative. Those Republicans were seeking to explicate and redefine inherited constitutional norms, not just mechanically apply previously accepted standards.

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the proper scope of the impeachment clause that complemented and was informed by their understanding of the separation of powers. See WHITTINGTON, *supra* note 13, at 140-52.

<sup>213</sup> FARRAR, *supra* note 116, at 531.

<sup>214</sup> *Id.*

<sup>215</sup> Interestingly, in his account of the constitutional politics of the Reconstruction era, Bruce Ackerman combines the two historical positions that are most consistent with our modern sensibilities. Consistent with the post-civil rights revisionism, Ackerman endorses the Reconstruction Republicans' substantive goals of racial egalitarianism. Ackerman ignores, however, the institutional goals of the congressional Republicans. Instead, he emphasizes Lincoln as a precedent for post-New Deal presidentialism. In doing so, he effectively removes the Republican Congress from its institutional context by portraying it as an extraordinary constitutional convention rather than an instance of nineteenth century legislative supremacy. See 2 Ackerman, *supra* note 18, at 120-252; see also Rogers S. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 Yale L.J. 2039, 2056-62 (1999).

The impeachment of Bill Clinton is notable, by contrast, for the shallowness of its constitutional discourse. Whereas the Republicans of the nineteenth century understood their task to be fundamentally political, the Republicans of the twentieth century hoped to render their task as essentially technical. Rather than being a "grand inquest," the impeachment power was to become a mechanism for enforcing the criminal law. The House managers hoped to be mere prosecutors, not constitutional actors. The sense of constitutional failure that surrounds the Clinton impeachment indicates how misguided that self-conceptualization was. The issue is not whether Clinton's offenses were "private" or "public," serious or minor. The issue is whether they implicate important constitutional principles that need to be made explicit and reinforced through congressional action. In sharp contrast to its predecessors, the contemporary Republican Congress was unwilling or unable to situate the President's actions within a larger constitutional framework that could explain the necessity of an impeachment. In the end, it could not effectively state what the lesson of the Clinton impeachment should have been. Ignoring the educative and constructive function of an impeachment, the contemporary Republicans focused only on the particulars of the past, reducing the impeachment to mere punishment of an individual. As a consequence, they were neither able to muster political support for their immediate effort nor to establish the kind of vibrant constitutional norms that make congressional government possible.