

# Clinton's Impeachment Will Have Few Consequences for the Presidency

The Clinton crisis that dominated news headlines in 1998 and early 1999 yielded no dearth of emphatic pronouncements about its consequences for the institution of the presidency. While some commentators downplayed its likely adverse consequences, most public debate was rife with dire predictions.<sup>1</sup>

Before considering the merits of these dire predictions, three qualifications invite mention. First, in assessing the impact of the Clinton scandal on the presidency, one must separate the person from the office. Second, the consequences of the Clinton crisis must be measured against the totality of the presidential institution. It is very easy to exaggerate the significance of that which is peripheral to presidential governance, so commentators must bear in mind that the presidency is most important for the political and policy role

it plays in governance and for its structural relationship in the constitutional separation of powers.

Third, the history of the presidency provides much support for the counterintuitive lesson that strength may arise from weakness—what I refer to here as a political “slingshot effect.” That is, one may not simply assume that a weak or failed president, however one might care to define this, automatically injures the institution or that the injury lingers after the term of that particular “failed” president. So-called weak or failed presidents of the nineteenth century, such as John Tyler, James K. Polk, Andrew Johnson, and Rutherford B. Hayes, ultimately helped to extend the scope and powers of the office even as they paid a substantial political price during their terms.<sup>2</sup>

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## Watergate vs. Monicagate

An assessment of the consequences of the Clinton crisis on the presidency draws one immediately to a comparison with the last great impeachment-tinged presidential scandal, Watergate. The two scandals are, of course, very different. If Watergate was a “long national nightmare,” the Clinton scandal seems more like a drug-induced hallucination. Nevertheless, some limited

comparisons can prove useful, especially for gauging the consequences on the institution. In general, Watergate was a transformative moment for the institution of the presidency, above and beyond its consequences for Richard Nixon and his place in history. Rather than ending the century-long march toward an ever-stronger presidency, which it might have done, it altered the nature of the imperial presidency debate and legitimized the wariness of executive excess, a notion that had once been the province solely of old-fashioned institutional conservatives (e.g., Berman 1986, 285; Pious 1996, 101; Tatalovich and Daynes 1984, 10).

The Clinton crisis stands in stark contrast to Watergate in that, aside from some very specific institutional questions to be discussed later, no reformulating debate over the power of the presidency, or even the internal functioning of the executive branch, has arisen. Surely this reflects, in part, the fact that Clinton's misdeeds were unrelated to the execution of his official duties.<sup>3</sup> Admittedly, specific constitutional questions pertaining to the invocation of executive privilege, the nature of impeachable offenses, the proper function of the independent counsel, and the proper role of the courts found parallels in both crises. Yet, these matters arose directly from the nature of the respective investigations and prosecutions of Nixon and Clinton. Starkly absent from the Clinton crisis was any broader constitutional soul-searching of the sort spawned by Watergate. Permit me to turn, then, to specific areas where the institution's power may be altered.

## Legal Questions and the Courts

The Clinton crisis generated several court actions pertaining to elements of executive power and authority. Most notable among these was the Supreme Court ruling in *Clinton v. Jones* (137 L Ed 2d 945; 1997), in which a unanimous court ruled for the first time that a sitting president could be sued for private actions unconnected with presidential responsibilities.

Several lower court rulings addressed matters pertaining to executive privilege

and attorney-client privilege in a governmental context. In a May 1998 case brought before the District of Columbia Circuit, Judge Norma Holloway Johnson affirmed the right of the president to assert claims of executive privilege concerning conversations with senior aides, but also said that those claims were outweighed by the independent counsel's request to have access to such information for its criminal investigation. Judge Johnson also concluded that the first lady was a senior advisor, and therefore had the right to claim executive privilege. Further, she ruled that the president could claim attorney-client privilege in order to prevent disclosure of consultations with a government-employed lawyer but that, in this case, the needs of the Starr investigation outweighed privilege claims extended to White House lawyer Bruce Lindsey (Baker and Schmidt 1998; Biskupic 1998; *In re: Bruce Lindsey* 1998, 98-3060).

Two months later, a three-judge panel of the U.S. Court of Appeals for the DC Circuit ruled that Secret Service agents could be compelled to testify regarding what they saw or heard while on duty, rejecting the Clinton administration's effort to extend a "protective function privilege" to agents guarding the president (Schmidt 1998). Amar (1999) argued that the Clinton rulings have rendered the presidency "unimperial" and deemed such a change undesirable. These cases, Amar asserted, undercut Congress's constitutional watchdog role over the executive and impinged on "a zone of presidential privacy." Worse, these rulings affirmed the power of an imperial judiciary that had set itself up to improperly

intervene in executive affairs, making a mockery of the separation of powers.

It is certainly true that the thrust of these cases ran against Clinton. But it is also true that the courts validated the existence of executive privilege, building on the court's initial recognition of the power in *U.S. v. Nixon* (418 U.S. 683; 1974), and then extended the privilege explicitly to aides and the first lady. Attorney-client privilege was also recognized as legitimate. The only factor militating against these new and enhanced executive prerogatives is the wedge of a criminal investigation. Amar wrote with alarm that "proper (but politically sensitive) conversations in the Oval Office" are, according to the court, "entitled to even *less* protection than conversations between attorneys and clients" (1999, 26; emphasis in original). If this is, in fact, an intrusion on presidential prerogative, it is an entirely appropriate one, as the presidential office is, first and foremost, a political office whose inner workings are routinely opened to public inspection even before a presidency ends. To treat routine conversations in the executive branch (regardless of their political sensitivity) as sacrosanct, to make them subject to the lawyer-client privilege attached to a civil or criminal action, would indeed put the capital "I" on the imperial presidency. The court's ruling to compel secret service agents to testify on noncriminal matters is, arguably, the most troubling ruling, because it may, as critics charged,

impel future presidents to leave agents behind so they might not observe actions that were potentially criminal—or merely embarrassing. Such an action could increase the risk to the president's well-being. Still, by definition, such incidents are likely to be those most removed from the president's formal, official responsibilities, and, therefore, are highly unlikely to have any impact on the day-to-day execution of the president's formal responsibilities.

The ruling in the *Jones* case has great potential to weaken the presidential institution since it allows civil suits to proceed during a president's term in office. While the Court's confidence that few suits will ensue might be false, the Court's invitations to other courts to dismiss frivolous suits, and to Congress to enact protective legislation, should produce adequate barriers to properly protect the presidency. In any case, when one surveys the presidency, the inescapable conclusion is that these cases fortify presidential prerogative as much as, if not more than, they erode it, primarily because the affected presidential actions represent such a small

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'proportion of formal, official duties, powers, and responsibilities. The bigger constitutional question involves the relationship between the executive and legislative branches, especially with regard to the impeachment power.

## Congress and Impeachment

Returning to the Watergate comparison, the Nixon impeachment inquiry, although halted by Nixon's resignation, ultimately met both the legal standard involving high crimes and misdemeanors and the political standard of proceeding with public support. The Clinton impeachment inquiry arguably failed to meet the minimum standard in the legal trial (certainly as judged by the Senate's verdict and the weight of most academic commentators), and undeniably failed to meet the political minimum standard in the court of public opinion. If one believes the Clinton case to have important value as precedent, this suggests that the proceedings against Clinton did, indeed, lower the bar for subsequent congressional impeachment inquiries, as many commentators warned it would (Sullivan 1998). Clinton's trial may make impeachment both more routine and more partisan. The routine and partisan tone of the Clinton episode is especially noteworthy when compared to the prevailing attitude toward impeachment during the Nixon era. As Jimmy Breslin noted, in 1973, the very mention of the word "impeachment . . . had danger hanging from it the instant it left the mouth" (1975, 163–64). It is also worth noting that political support for Nixon in the country had ebbed before the impeachment inquiry picked up steam.

These differences underscore Alexander Hamilton's two-fold warning about the downside of giving impeachment power to an elected body—that the charges brought against the president might be of insufficient legal weight and that the impeachment process might be overtaken by the force of fierce partisanship. In *Federalist 65* Hamilton warned "there will always be the . . . danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt" (Rossiter 1961, 396–97). Terry Sullivan (1998) argued that Hamilton's warning came to pass in the Clinton matter. Congress's harder partisan edge pushed impeachment as a mechanism akin to a vote of no confidence, he argued, with Congress increasingly tempted to pursue impeachment in order to remove a president with whom they had mere policy differences.

I agree that the Clinton inquiry came close to changing Hamilton's warnings to prophesies. I do not agree,



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however, that it will result in a degradation of the impeachment power that will invite its use against future presidents simply because of policy differences, even in an era of continued fierce partisanship and divided government. If the history of the presidency teaches anything, it is that the political slingshot effect applies to the presidential institution in just such circumstances.<sup>4</sup> Similarly, the political lesson of the Clinton case will more likely be that Congress will keep the impeachment blunderbuss in its cabinet, precisely because it was used so easily against Clinton, and because it failed to drive him from office, erode public support for his presidency, or alter the direction of national policy.<sup>5</sup> Finally, there is no reason to believe that the Clinton crisis will have any impact on the overall institutional relationship between the legislative and executive branches, especially in regard to the usual political and policy ebbs and flows between them.

## The Electoral Balance and Popular Will

What of the post-Clinton presidency's institutional position with respect to the electorate, and what of the scandal's impact on the partisan balance? The universal assumption, bursting almost immediately on the heels of the initial revelations in January 1998, was that the Democrats would be politically hurt, even crippled, as were the Republicans in the aftermath of Watergate. The upcoming 1998 midterm elections seemed to offer only disappointment, if not doom, for the Democrats, especially for any who chose to side with Clinton in the succeeding months. Vice President Al Gore's 2000 presidential chances also seemed significantly dimmed.

The most stunning political fact to emerge from the

Clinton crisis, however, was that the Democrats didn't merely survive, they benefited. Heading the column was Clinton himself, whose job approval rating, measured within days of the end of the impeachment effort in February 1999, stood at 68%, 8% *higher* than before the Lewinsky scandal broke in January 1998 (Morin and Deane 1999; Zaller 1998). To the shock of virtually every political pundit, the Democrats actually gained five seats in the House midterm elections, a feat not accomplished by any party holding the White House since 1934. Even worse for the Republicans, public support for their party has diminished, especially among swing voters, at least in part *because* of its members' pursuit of Clinton (Berke 1998; Edsall and Balz 1999).

In contrast, the Democrats emerged rather like Dorothy after the tornado—slightly amazed to be walking and talking, and gratified to be greeted by smiling faces (Traub 1999). While the Democrats cannot assume that they will retake control of Congress or keep the presidency in 2000, they seem to hold the advantage thanks to a series of missteps by Republicans following their stunning victories in 1994, including the 1995 government shutdown (most citizens blamed the Republicans), Clinton's 1996 reelection, the 1998 Democratic House gains, the 1998 resignations of House Speaker Newt Gingrich (R-GA) and heir-apparent Rep. Robert Livingston (R-LA), and the failed impeachment effort.

### **Presidential Recruitment and Personal Lives: Sex, Lies, and Audiotape**

Concern continues to be expressed that the most damaging legacy for the post-Clinton presidency will be its impact on the persons seeking or occupying the Oval Office (Whitehead 1999). With the unremitting, unyielding attention paid to Clinton's personal life, beginning even before his election in 1992, many worry that qualified candidates will be scared off by the prospect of intense scrutiny of their private lives and that those who win election will be distracted by the constant probing of private matters. Prolonged focus on the president's personal life may increase the likelihood that public attention will be habitually diverted to the trivial, resulting in a generalized loss of prestige for the institution of the presidency.

It is important to note, first, that the intense focus on presidents' personal lives, including sex-related matters, is nothing new. Thomas Jefferson was dogged throughout his presidency by rumors of his affairs with female slaves; Andrew Jackson was widely criticized for marrying a woman who was still married to another man; Grover Cleveland admitted to fathering an illegitimate child. On the other hand, the intense focus on Clinton's personal life represents a higher and more sustained degree of scrutiny, and it is highly unlikely that any future president will be able to shield sexual dalliances from the media and the public in the manner of, for example, Warren Harding, Franklin D. Roosevelt, or John F. Kennedy, whose infidelities did not become known until

after their presidencies. As for the recruitment of future presidents, there again is nothing new about some prospective candidates bowing out because of the feared personal toll of the campaign. In any event, at the start of 1999, the list of presidential aspirants was no less extensive than in prior years, including 13 Republicans and four Democrats. In short, there is no reason to believe that the Clinton scandal has hampered presidential recruitment.

Finally, the public's unwavering support for Clinton's job performance underscores an additional lesson about presidential sex. While the public strongly disapproved of Clinton's sexual indiscretions, it separated the private from the public as long as the president continued to function effectively as chief executive. This underscores the broader lesson, suggested by cases like Jefferson, Jackson, and Cleveland, that private moral behavior has, at best, a limited impact on the functioning of the presidency. Indeed, "the public is, within broad limits, functionally indifferent to presidential character" (Zaller 1998, 188).

### **Conclusion**

Much of the alarm raised about the potentially harmful consequences of the Clinton crisis arose in connection with the several suits in which the president was involved. On the legal front, taking the several court rulings as a whole, including the likely lapse of the independent counsel law, it is difficult to see how the presidential institution is materially affected or impinged in its day-to-day operations. Amar's claim that court rulings make the presidency "unimperial" is singularly unpersuasive when one notes that the claim was made at the very time when a president, after having just survived two votes in the Senate to remove him from office, was engaged in a full-scale, unauthorized, daily air war over Iraq (followed shortly by the Kosovo intervention), and was offering up to Congress and the country a vast plate of domestic policy proposals which Congress was more than willing to consider (Pianin 1999). If the presidency was imperial when Clinton took office, it will be no less so when he leaves.

While public trust in the government as a whole took a heavy hit, the public's views of the presidency and Congress were little changed (Broder and Balz 1999). As to the impeachment power, little from the Clinton case recommends its use in a similar way in the immediate future. On the electoral front, the Republicans can expect no benefit from the Clinton crisis of the sort realized by the Democrats after Watergate. Finally, the parameters of public debate now allow discussion of the private lives of presidents that is more explicit and graphic than would have been accepted a few decades ago. Aside from that, and the affirmation for future presidential contenders that any private action on their part may become public, little has changed in the era of the tabloid presidency.

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## Notes

1. Typical was the analysis of law professor Akhil Amar who concluded that “the Clinton scandals have done considerable damage to the presidency, leaving us with an office weaker in key respects than the one that the Founders envisioned” (1999, 25).

2. The paradox of weak/failed presidents whose actions nevertheless contributed to the expansion of the office is detailed in Spitzer (1988, 1993).

3. This is not to suggest that a president cannot be impeached for private conduct. A president who committed a murder, for example, would certainly face impeachment. Some have argued that Clinton’s conduct in relation to Monica Lewinsky was in the public realm because he had inappropriate sexual contact with her in his office, which is government property; however, since the conduct was not itself illegal, and did not otherwise influence the execution of his constitutional responsibilities, the fact that they engaged in such behavior in the White House cannot be considered a violation of his oath or public responsibilities. This does not call into question the validity of the impeachment charges brought against him, which pertained to perjury and obstruction of justice.

4. For example, John Tyler’s turbulent, contentious presidency was the first to be confronted with a serious effort to impeach the president. A vote on articles of impeachment failed in the full House in 1843. Widely and properly touted as a “failed” presidency, Tyler’s term nevertheless “prepared the way for the completion of the movement toward executive leadership started by Andrew Jackson” (Binkley 1962, 121). Despite the fiercely partisan and nearly successful impeachment inquiry against Andrew Johnson, no serious impeachment effort was launched again until 1974, despite the roiling partisanship of subse-

quent nineteenth-century presidencies that should have precipitated impeachment efforts based on the Johnson precedent, such as those of Rutherford B. Hayes and Grover Cleveland. These latter two examples are particularly apt. In Hayes’s case, he barely survived the controversial election of 1876, and did not seek his party’s nomination four years later; in Cleveland’s case, he suffered electoral defeat in his first reelection bid.

As for Andrew Johnson’s impeachment, Milkis and Nelson’s account verifies the presidential slingshot effect by first quoting a Senate defender of Johnson’s, who offered a dire warning very similar to that of Clinton lawyer Gregory Craig that “no future president will be safe who happens to differ with a majority of the House and two-thirds of the Senate.” Milkis and Nelson then conclude: “As it turned out, the opposite precedent was established in Johnson’s impeachment trial. The Senate’s failure to remove him in 1868 meant that a president could not be forced from office simply because of unpopularity or disagreements with Congress. . . . The acquittal of Johnson made the impeachment article nearly a dead letter” (1999, 169–70).

5. Sullivan’s assertion that Congress’s heightened partisanship culminating in the impeachment effort against Clinton “make[s] impeachment an attractive tool for winning the policy debate between a recalcitrant president and a hostile congressional majority” (1998, 127), fails by the standard Sullivan himself sets: “The *practice* of impeaching officials, not its constitutional theory, defines the institution of impeachment” (117; emphasis in original). The practical application of the impeachment effort against Clinton brought his opponents no immediate advantages, aside from assuaging some in the Republican Party’s far right.

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