

1-2000

Comparing the Nixon and Clinton Impeachments

Fred H. Altshuler

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745 (2000).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol51/iss4/11

This Panel is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Perspectives on Watergate Panel

Comparing the Nixon and Clinton Impeachments

by

FRED H. ALTSHULER*

This symposium's review of the 1974 impeachment proceedings against President Richard Nixon¹ invites a comparison to the 1998 impeachment of President Bill Clinton. One notable difference is the more strident and partisan character of the 1998 proceedings. The 1974 House Judiciary Committee's vote to approve articles of impeachment against President Nixon was bipartisan,² with as many as seven of the Committee's seventeen Republicans voting in favor of one or more of the articles.³ The 1998 House Judiciary Committee remained sharply divided along party lines, with virtually all of the Republicans voting in favor of all of the proposed articles of

* Fred H. Altshuler is a San Francisco attorney and a partner in the law firm of Altshuler, Berzon, Nussbaum, Rubin & Demain. In 1974 he served as counsel on the House of Representatives' Impeachment Inquiry Staff.

1. From July 24, 1974 through July 30, 1974, the House Judiciary Committee held public hearings and approved three articles of impeachment against President Nixon. On August 9, 1974, after the disclosure that previously withheld tape recordings showed his complicity in the Watergate cover-up, President Nixon resigned. Accordingly, the articles of impeachment approved by the 1994 House Judiciary Committee were never voted upon by the House of Representatives as a whole.

2. The vote on the first article of impeachment was 22 Democrats and 6 Republicans in favor and 11 Republicans against; the vote on the second article was 22 Democrats and 7 Republicans voted in favor and 10 Republicans against; the vote on the third article was 19 Democrats and 2 Republicans in favor and 2 Democrats and 15 Republicans against. The Committee rejected two other proposed articles of impeachment, both by votes of 26-12 against their adoption.

3. After President Nixon resigned and previously withheld tape recordings of his conversations were made public, nine of the ten Republicans on the Judiciary Committee who had voted against all of the proposed articles of impeachment filed supplemental statements in the Committee's Final Report stating that they would have voted in favor of impeachment on the House floor if they had known of the contents of the recordings.

impeachment and all of the Democrats voting against.⁴ Opinion polls and the results of the Congressional elections during or immediately after the two impeachment votes suggest that the public viewed the 1998 Clinton impeachment as more political and less responsible than the Nixon impeachment hearings of 1974.⁵

Although there were many reasons why the 1974 House Judiciary Committee's hearings were more bipartisan in character, three aspects of the 1974 Committee's impeachment process appear to have fostered a less divisive proceeding. First, in 1974 the Committee began its impeachment inquiry by forming a special non-partisan Impeachment Inquiry Staff. That staff conducted a neutral, behind-closed-doors investigation and then presented Committee members in closed sessions with evidence and legal analysis in a non-judgmental fashion. This created a core of mutual understanding within the Committee that aided the formation of a bipartisan majority at the end of the Committee's deliberations. The 1998 House Judiciary Committee, in contrast, had no such neutral analytical process and its procedural and substantive deliberations were marked from the outset by open partisan conflict.

Second, the Special Prosecutors who led the Watergate criminal investigations of the activities of the Nixon White House, Archibald Cox and Leon Jaworski,⁶ played no direct role in the 1974 House

4. The 1998 House Judiciary Committee voted along straight party lines, 21-16, in favor of the first and third articles of impeachment. The Committee voted in favor of the second article of impeachment by a margin of 20 to 17, with one Republican joining the Democrats in voting against impeachment.

5. In the November 1974 midterm Congressional elections, held after the House Judiciary Committee's impeachment vote and the August 9 resignation of Republican President Nixon, the Democrats gained 43 seats in the House of Representatives, with four of President Nixon's supporters on the House Judiciary Committee being defeated. In the November 1998 midterm Congressional election, held during the middle of the House's impeachment proceedings against Democratic President Bill Clinton, the Republicans lost five seats in the House. Polls in the 1974 election showed strong approval of President Nixon's proposed impeachment, while polls in the 1998 election showed that impeachment proceedings against President Clinton were unpopular.

6. The incident that triggered the Watergate investigations was the arrest on June 17, 1972, of burglars working on behalf of President Nixon's reelection campaign who had broken into the offices of the Democratic National Committee at the Watergate office complex. On May 21, 1973, Attorney General Elliot Richardson appointed Archibald Cox as Special Prosecutor in charge of the pending Watergate criminal investigation.

On the night of October 19, 1973, President Nixon ordered Attorney General Richardson to fire Cox after Cox refused the President's order not to subpoena presidential tapes and documents. When first Richardson and then Deputy Attorney General William Ruckelshaus resigned rather than carry out President Nixon's order, Solicitor General Robert Bork complied with the President's directive and fired Cox. The events of that night came to be known as the "Saturday night massacre," and they precipitated several resolutions calling for President Nixon's impeachment.

Judiciary Committee's impeachment hearings. In 1998, in contrast, Independent Counsel Kenneth Starr actively participated in the Committee's impeachment hearings, strongly advocating President Clinton's impeachment. Because Starr had long been seen by Clinton supporters as a partisan adversary of the President, his participation in the 1998 Judiciary Committee's hearings further politicized the Committee's proceedings.

Third, the 1974 House Judiciary adopted a stringent standard for presidential impeachment, requiring a serious abuse of presidential power. It found that President Nixon's use of the Federal Bureau of Investigation, the Central Intelligence Agency, the Internal Revenue Service and other government agencies to undermine his political opponents and obstruct government investigations constituted a sufficient threat to the constitutional order to warrant his impeachment. The 1998 House Judiciary Committee adopted a far broader view of its impeachment power, concluding that it could impeach a president on the basis of personal misconduct that violated the criminal law. Focusing its attention on President Clinton's improper relationship with former White House intern Monica Lewinsky, the 1998 Committee asserted that impeachment was appropriate because the President lied under oath and obstructed justice in the course of concealing his private personal relationship. If the broad standard for presidential impeachment adopted by the 1998 House had been accepted by the Senate, it would have set a precedent that could have led to the more frequent use of impeachment as a partisan political tool.

I. Impeachment Inquiry Procedures

In conducting its inquiry into the possible impeachment of President Nixon, the 1974 House Judiciary Committee adopted a series of procedures governing the conduct of its investigation. At the outset, it formed a special nonpartisan Impeachment Inquiry Staff, consisting of outside attorneys hired specially for the impeachment proceedings, headed by a respected Republican, John Doar.⁷ Although the members of the Staff were selected separately by the Chairman and Ranking Minority Member, they worked on an integrated basis, sharing office space and participating jointly in various working groups. The Staff operated under a rule of strict confidentiality and there were no leaks of confidential information. Even Judiciary Committee members other than the Chairman and

7. After being appointed head of the Civil Rights Division of the Justice Department under President Eisenhower, Doar continued in that position under Presidents Kennedy and Johnson.

Ranking Minority Member were given access to evidentiary material gathered by the Staff only at executive sessions held toward the end of the investigation.

The Impeachment Inquiry Staff began its work by reviewing the history of English and American impeachments and publishing a neutral report entitled "Constitutional Grounds for Presidential Impeachment." At the same time, its bipartisan task forces reviewed the record of the earlier Senate Watergate investigation,⁸ executive branch documents that it subpoenaed and eventually confidential grand jury materials given over by the Special Prosecutor. After the Staff completed its compilation of factual material, the Committee held executive sessions in which the Staff presented neutral "statements of information," containing exculpatory as well as inculpatory evidence. President Nixon's counsel was permitted to attend the closed sessions and to submit evidence and present and cross-examine witnesses. It was only after the completion of this process that public hearings began. Although the public hearings were, on occasion, contentious, the members operated from the basis of a common understanding of the underlying facts and the law relating to impeachment, and a sizable group of moderates within the Committee, consisting of conservative Southern Democrats and moderate Republicans, was able to reach consensus on the proposed articles of impeachment.⁹

In its 1998 Clinton impeachment proceedings, the House Judiciary Committee also added special impeachment staff, but this staff was divided along party lines and did not operate as an integrated unit. There was no bipartisan review of the underlying factual information and the Committee's analysis of the applicable legal standard took place in contentious public hearings. The Committee's proceedings were marked by repeated accusations of partisanship and attempts to achieve a consensus on factual and legal issues were unsuccessful. There were continual leaks of confidential material and the sealed report of the Independent Counsel was made public and placed on the Internet within two days after its delivery to the Committee.

8. On February 7, 1973 the Senate voted to create a Senate Select Committee on Presidential Campaign Activities, headed by Senator Sam Irvin, to investigate the Watergate break-in and its alleged cover-up. The Irvin Committee's televised hearings drew wide public attention and uncovered evidence of unlawful conduct by White House officials.

9. The 1974 Judiciary Committee voted in favor of three articles of impeachment and rejected two proposed articles. Only eight Democrats voted in favor of all five articles and only 10 Republicans voted against all five. Twenty members of the 38-member Committee—13 Democrats and 7 Republicans—voted in favor of some of the articles and against others.

II. Role of the Independent Counsel

The House of Representatives' impeachment proceedings in the cases of both President Nixon and President Clinton were preceded by highly publicized criminal investigations. The two criminal investigations differed substantially, however, in both the conduct of the respective prosecutors and their roles in the subsequent impeachment proceedings.

In the case of Watergate, both the first Special Prosecutor, Archibald Cox, and his successor, Leon Jaworski,¹⁰ were senior statesmen of the legal profession who were not currently involved in partisan politics. Cox had been Dean of the Harvard Law School and although he served as Solicitor General under President Kennedy, he was not politically active. Jaworski was a 68-year old Houston attorney and a former President of the American Bar Association. Although there were occasional allegations that they were biased, both Special Prosecutors avoided partisan rhetoric or actions that appeared to be political. After the Watergate Special Prosecutor's office uncovered evidence of President Nixon's personal culpability, it presented its findings in a neutral report, submitted under seal to the District Court where the Watergate criminal proceedings were pending. The report, which was later transmitted under seal to the House Judiciary Committee, contained a simple recitation of facts, including reference to particular tapes and the testimony of particular witnesses, with no commentary, interpretations or conclusions.

The independent counsels who conducted the criminal investigations that preceded the Clinton impeachment were appointed under the Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270 (June 30, 1994), *amending* 28 U.S.C. §§ 591-99, which President Clinton signed on June 30, 1994. On August 5, 1994, the Special Division of the United States Court of Appeals created under the Act replaced the special prosecutor who had been appointed by Attorney General Janet Reno, Robert Fiske, with Kenneth Starr.¹¹ Unlike Fiske, Starr had no criminal law experience.

10. After ordering the firing of Special Prosecutor Cox, President Nixon sought to abolish the office of Special Prosecutor. He backed down, however, after the public outcry over the "Saturday night massacre." On November 1, 1973 Acting Attorney General Bork appointed Leon Jaworski, a respected former President of the American Bar Association, as a new Special Prosecutor.

11. The three-judge panel that replaced Fiske with Starr included two conservative Republican appointees, David Sentelle and Joseph Sneed. On July 14, 1994, during the one-month period between the signing of the Independent Counsel Reauthorization Act and the appointment of Starr as the new Independent Counsel, Judge Sentelle had lunch with Republican Senators Jesse Helms and Lauch Faircloth from their mutual home state of North Carolina, in a meeting at which all participants subsequently denied discussing the impending independent counsel appointment. Although no direct evidence has been

Starr's background included indirect involvement in the Paula Jones sexual harassment lawsuit against President Clinton, financial contributions to organizations strongly opposed to the President and strong ties to right-wing foundations and publications that were among President Clinton's most vocal attackers. He also had considered running as a Republican candidate for the United States Senate less than two years before his appointment. Accordingly, for supporters of President Clinton, Starr's appointment as Independent Counsel was suspect from the outset.

As has been discussed at this Symposium, the Independent Counsel Reauthorization Act included several provisions that led to excessive and unwarranted independent counsel investigations. The Act focused the independent counsel's resources on a single target, granted the independent counsel a virtually unlimited budget, did not impose a definite timetable, and provided inadequate oversight and accountability. In addition, the low threshold for triggering the appointment of an independent counsel resulted in investigations of lower level officials and alleged criminal conduct that was not serious in character.¹² Because Starr's investigations, like the investigations of some of the other independent counsels, were massive and protracted proceedings aimed at relatively minor offenses, they often appeared to be unbalanced and politically motivated.

In addition, Starr took several steps that added to the appearance that he was conducting a partisan inquiry. He chose to maintain his partnership in a large corporate law firm whose clients included companies that opposed policies of the Clinton administration. Some of Starr's deputies were reported to have manifested personal hostility to the President. At several points, the Starr investigation was marked by leaks of grand jury and other confidential information politically embarrassing to the President. Although Starr's office denied being the source of the leaks, the repeated disclosure of confidential information adverse to President Clinton contributed to the perception that Starr's investigation was political in character.

Once the 1998 House Judiciary Committee began its inquiry into the possible impeachment of President Clinton, Starr participated actively in its proceedings. Rather than present the House with a neutral report of his findings, such as the one Watergate Special Prosecutor Jaworski submitted to the District Court overseeing the

adduced that their replacement of Fiske and appointment of Starr was politically motivated, the chronology of the signing of the Act, Judge Sentelle's meeting with the Republican senators, Fiske's removal and Starr's appointment engendered accusations that Starr's appointment was political.

12. When the Independent Counsel Reauthorization Act reached its five-year sunset date on June 30, 1999, *see* 28 U.S.C. § 599, Congress refused to renew it.

Watergate investigation, Starr filed a "referral" whose accusatory character and anti-Clinton rhetoric contrasted markedly with the Jaworski transmittal.¹³ Starr also appeared personally before the Committee and argued strongly in favor of passing articles of impeachment, becoming one of the President's most articulate accusers.¹⁴ Because of the political controversy surrounding Starr's background and the conduct of his criminal investigations, his participation in the Committee's impeachment hearings helped to foster the partisan atmosphere that pervaded the proceedings.

III. Standards for Presidential Impeachment

The charges against President Nixon in the 1974 impeachment proceedings asserted serious abuses of presidential powers. They alleged that President Nixon used government agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, the Internal Revenue Service and the Office of the President itself, to engage in a series of unlawful actions aimed at undermining his political opponents and concealing his unlawful acts. President Nixon was thus accused not merely of specific criminal acts, but also of misusing his presidential office in an attempt to undermine the electoral process through unlawful means.¹⁵

In contrast to the abuses of presidential power and misuse of government agencies that underlay the Nixon impeachment proceedings, the accusations against President Clinton in the 1998 impeachment proceedings centered on his sexual relationship with a young White House worker and subsequent efforts to conceal that relationship. No connection was shown between President Clinton's alleged unlawful acts (perjury and obstruction of justice) and his official presidential duties. The Committee adduced no evidence that

13. The Independent Counsel Reauthorization Act provided that an independent counsel "shall advise the House of Representatives of any substantial credible information which such independent counsel receives... that may constitute grounds for impeachment." 28 U.S.C. § 595(c). It did not provide that the independent counsel was to participate in the House's impeachment proceedings.

14. Because he believed that it was inappropriate for Starr to "testify" before the House Judiciary Committee, Starr's ethics advisor Samuel Dash resigned. Dash was a Democrat who had served as minority counsel to the Irvin Committee during its Watergate hearings, and his presence on Starr's staff had been cited by Starr's supporters as showing that it was nonpartisan.

15. The 1974 House Judiciary Committee's conclusion that the standard for presidential impeachment required a serious abuse of the President's Constitutional power is most clearly shown by its rejection of a proposed article of impeachment based on allegations that President Nixon had committed tax fraud. The Committee concluded that even if criminal tax fraud occurred, it was not the type of abuse of presidential power that warranted the Constitutional remedy of impeachment.

President Clinton's alleged misconduct injured the constitutional system of government or so severely undermined his functions as to leave him unable to perform the duties of his office.

In voting along party lines to impeach President Clinton for perjury and obstruction of justice in his grand jury and civil deposition testimony concerning his alleged extramarital affair,¹⁶ the 1998 House of Representatives departed from the standard for presidential impeachment the House Judiciary Committee had followed in 1974. Instead of viewing impeachment as a mechanism for remedying serious abuses of presidential power, the 1998 House majority sought to use impeachment to sanction President Clinton for allegedly lying about improper personal conduct. If accepted by the Senate, this expansion of the grounds for presidential impeachment could have led to an increased use of impeachment for partisan purposes in the future.

The Senate's surprisingly strong vote on February 12, 1999 to acquit President Clinton of both of the articles of impeachment¹⁷ was a recognition that the 1998 House of Representatives' impeachment proceedings were procedurally and substantively flawed. The 1998 House Judiciary Committee's failure to establish a neutral impeachment inquiry process, together with its allowing Independent Counsel Starr to participate in its proceedings as a prime advocate for impeachment, fostered an impeachment inquiry process that was partisan throughout. In addition, the House's adoption of a broad standard of impeachment based on personal misconduct rather than misuse of presidential power created a danger that impeachment could become a commonly used political tool. In voting to acquit President Clinton, the Senate correctly viewed the 1998 House's actions as an improper and unwise use of its impeachment power.

16. *See supra* note 4.

17. The Senate's votes to convict President Clinton on the two articles of impeachment were 45 in favor and 55 against and 50 in favor and 50 against. Sixty-seven votes were needed for a conviction. All 45 Democrats voted not guilty on both articles. Ten Republicans voted not guilty on the first article and five Republicans voted not guilty on the second article.