

Testimony Submitted to the House Committee on the Judiciary
Bruce Ackerman
Sterling Professor of Law and Political Science, Yale University
Tuesday, December 7, 1998

Good morning, Mr. Chairman, and the distinguished members of this Committee. My name is Bruce Ackerman. I am Sterling Professor of Law and Political Science at Yale, and the author of many books on constitutional law, including work on impeachment. I request the Chair's permission to revise and extend these remarks.

Since you have already heard so much on the subject of constitutional standards for impeachment, I thought I would concentrate on three big mistakes that have characterized the discussion up to now.

I.

The first big mistake centers on the power of this Committee and the present House of Representatives to send a case to trial in the Senate. People seem to be assuming that once the present Committee and the full House vote for a bill of impeachment, the stage will be set for a trial in the Senate during the coming year, and that the next House will not have to take any further actions on the matter.

Nothing could be further from the truth. As a constitutional matter, the House of Representatives is not a continuing body. When the 105th House dies on January 3, all its unfinished business dies with it. To begin with the most obvious example, a bill passed by the 105th House that is still pending in the 105th Senate on January 3rd cannot be enacted into law unless it once again meets the approval of the 106th House.

This is as it should be. Otherwise lame-duck Congresses would have a field-day in situations like the present, where the old House majority has had a set-back in the polls. Recognizing that its political power is on the wane, the dominant party will predictably use its lame-duck months to pass lots of controversial legislation on to the Senate in defiance of the judgment made by the voters.

This abuse was very common during the first 150 years of the Republic. Until the Twentieth Amendment was passed in 1933, a newly elected Congress ordinarily waited 13 months before it began its first meeting in Washington. In the meantime, lameducks did the nation's business for a full session, often in ways that ran against the grain of the last election. This might have been an acceptable price to pay in the eighteenth century, when roads were terrible and it took time for farmer-representatives to arrange their business affairs. But over time, the operation of lameduck Congresses proved to be an intolerable violation of democratic principles, and they were finally abolished by the twentieth amendment in 1933.

This amendment orders the new Congress to begin meeting as soon as possible after the elections – the text specifies January 3. In enacting it into our fundamental law, Americans believed they were reducing the lame-duck problem to vestigial proportions.¹ Perhaps some grave national emergency might require decisive action, but the old Congress would simply fade

¹See John Copeland Nagle, A Twentieth Amendment Parable, 72 N.Y.U. 470 (1997).

away as the nation enjoyed a respite from politics between Thanksgiving and New Year's Day.

Generally speaking, lame-duck Congresses have proved faithful to this expectation. For example, during the sixty-five years since the twentieth amendment became part of our higher law, no lame-duck House has ever impeached an errant federal judge, much less a sitting president. Such matters have been left to the judgment of Congresses that were not full of members who had been repudiated at the polls or were retiring from office.

These proceedings, then, are absolutely unprecedented in the post lameduck era. Despite this fact, I do not question the raw constitutional power of the current lame-duck House to vote out a bill of impeachment. But I do respectfully submit that the Constitution treats a lame-duck bill of impeachment in precisely the same way it treats any other House bill that remains pending in the Senate on January 3. Like all other bills, a lame-duck bill of impeachment loses its constitutional force with the death of the House that passed it.

This point was rightly ignored before the election, since everybody expected the new Congress to be more Republican than its predecessor. On this assumption, it was perfectly plausible for this distinguished committee to proceed in earnest – if the 105th House voted to impeach, there was every reason to suppose that the 106th House would quickly reaffirm its judgment, and send the matter on its way to the Senate. But now that the voters have spoken, the constitutional status of lameduck impeachments deserves far more attention than it has been given.

Worse yet, we cannot rely much on the past for guidance. The closest precedent comes from the 1988 impeachment of federal district judge Alcee Hastings. The 100th House had impeached Hastings, but both sides wanted to delay the Senate trial to the 101st session, and the Senate Rules Committee granted their request. The Senate's perfunctory six-page Report, however,² does not resolve any of the key issues raised by the present case.

Judge Hastings wanted to delay his Senate trial as long as possible, and did not even try to argue that his bill of impeachment expired on January 3rd in fear that his Senate trial would be expedited. What is more, Hastings was a judge not a president; and he was impeached during a normal session of Congress, not by a Congress of lame-ducks. As a consequence, the Senate committee understandably failed to consider any of the crucial constitutional issues raised by the present case. It did not even pause to consider the implications of the fact that the People decisively sought to limit the capacity of lame duck Congresses by solemnly enacting the twentieth amendment. If we take this amendment seriously, it means that a lame-duck House should not be allowed to relieve its freshly elected successor of solemn obligation to determine whether the nation's political life should be disrupted by a lengthy trial in the Senate. In short, whatever decision is reached by this Committee and this House this month, the Constitution requires the newly elected House to consider impeachment afresh in January..

Moreover, if the next House of Representatives seeks to duck this fundamental constitutional responsibility, the Senate will not be free to dispense with the problem of lameduck impeachment by a simple reference to its 1988 decision in Judge Hastings' case. Not only does this Report fail to confront the basic issues, but the Senate Rules Committee, which authored the Report, will not even be the final judge of the matter this time around. Instead, the

²Sen. Rep. 100-542, 100th Cong., 2 Sess. (Sept 22, 1988).

constitutionality of a lame-duck impeachment will be the first question confronting Chief Justice Rehnquist, the designated presiding officer at the Senate trial. Following the precedent established by Chief Justice Chase before and during the trial of President Andrew Johnson, the Chief Justice will rightly assert his authority to rule on all procedural issues.³ And the first of these should undoubtedly be a motion by the President's lawyers to quash the lameduck impeachment as constitutionally invalid unless reaffirmed by the 106th House.

Now Chief Justice Rehnquist is in fact a scholar on the impeachment process, having written an entire book on the subject. I am sure that he will be fully aware of the historical importance of his conduct of the proceeding, and will quickly grasp the obvious dangers of lameduck impeachment. Moreover, there are many strands in the Chief Justice's jurisprudence which will lead him to give great weight to the idea that it is only a truly democratic House, and not a collection of lameducks, that has the constitutional authority to proceed against a man who has been fairly elected to the Presidency by the People of the United States. Without any hint of partisanship, he would be well within his rights to quash the lameduck impeachment and remand the matter back to the House..

Since the status of lameduck impeachments has never before been briefed and argued in the modern era inaugurated by the twentieth amendment, it is impossible to make a firm guess as to the way the Chief Justice will rule on the matter. Only one thing is clear. It would be far better for the country and the constitution if the Chief Justice is never put to this test. As Alexander Bickel, my great predecessor in the Sterling chair at Yale, frequently reminded us, the health of our constitutional system is not measured by the number of "hard cases" that have been resolved by clear rulings. It is measured instead by the number of statesmen in our history who, seeing a hard case on the horizon, act in sensible ways so as to avoid ever precipitating a constitutional crisis.⁴

If this Committee and the present House choose to go forward and vote in favor of a bill of impeachment, I respectfully urge the new Speaker of the 106th Congress to do the right thing, and remit the matter once again for consideration by the new House. Suppose, however, he does not do so; suppose further that, if pressed, the Chief Justice upholds the continuing validity of the lameduck impeachment despite the expiration of the 105th Congress. Even then, the new House of Representatives will not be able to escape the need for another up or down vote to determine whether a majority of members continue to favor impeachment.

To see why, consider that the House must select a group of its members, called Impeachment Managers, to present its case against the President at the Senate trial. Without the energetic prosecution of the case by the managers, the Senate trial cannot go forward. No managers, no trial, but only the new House can appoint the managers. This was done in Judge Hastings' case, and it certainly should be required in the case of a sitting President facing a lameduck impeachment.

Thus, even if the new House leadership chooses to rely on a lameduck impeachment, and

³See Bruce Ackerman, *We the People: Foundations* 467-68 (1998).

⁴This is a leitmotiv linking early works like *The Least Dangerous Branch* to his posthumous *The Anatomy of Consent*.

refuses to allow another vote on a fresh bill before sending the matter to the Senate, there is no way it can avoid the need to test the majority sentiment of the new House. By voting against the slate of managers, a majority of the new House will be in a position to stop the impeachment process dead in its tracks.

It is a big mistake, then, for the distinguished members of this Committee and this House to suppose that they are the final judges of the bill of impeachment. To be sure, the recommendations of this Committee and the vote of the entire House deserve serious consideration by the members taking office next month. But so do the judgments of the voters, as expressed at the elections in November. I respectfully urge you to consider this point as you determine your present course.

To put my point in operational terms: If you don't believe that a bill of impeachment or the election of impeachment managers will gain the majority support of the next House, the wise thing to do is to stop the process now. While it may be embarrassing to reverse gears after so much momentum has been generated in favor of a bill of impeachment, the leadership of the next House will confront a much embarrassing situation if it becomes evident that its slender pro-impeachment majority has vanished over the Christmas recess.

II.

So much for the first big mistake. A second mistake involves a persistent confusion about impeachment standards. People keep on talking as if the standards that apply to judges also apply to presidents. But the constitutional text establishes that this is a mistake. Under Article three of the Constitution, any federal judge may be deprived of his lifetime job if he fails the test --and I quote -- of "good Behavior." Thus, the House and Senate may remove a judge even if his "bad" behavior would not otherwise amount to a "High Crime and Misdemeanor."

In contrast, the Constitution does not allow Presidents to be removed for want of "good behavior" -- for the obvious reason that he does not serve for life, but is under regular electoral scrutiny by the People. Moreover, there should be no doubt that the Framers were serious in restricting themselves to *high* crimes and misdemeanors. In contrast to the impeachment clause, other textual references to crime do not contain similar emphasis on high crime. Thus, the Extradition Clause requires states to extradite anyone charged in another state whenever they commit "Treason, Felony of other Crime," and Article 1, Section 6 gives every Congressman an immunity from arrest except in cases of "Treason, Felony, and Breach of the Peace." This stands in sharp contrast to the *high* crimes required of Presidents, and the mere breaches of "good behavior" required in the impeachment of judges. It is a bad mistake, then, to assume that the relatively low impeachment standard also applies to the President.

Which leads me to the third and last mistake. Perhaps because of the introduction of the Special Prosecutor in this case, there has been a constant temptation to imagine that what we are doing here is something similar to a criminal indictment. In fact, there was a time when it might have been plausible to view impeachment as a criminal trial. When impeachment began in the English parliament five hundred years ago, this medieval assembly still thought of itself as a High Court, and often subjected the victims of impeachment to dire criminal punishments. But the Framers of our Constitution rejected these precedents. They carefully limited the sanctions for impeachment to removal from office. Once a President departs, he is fully subject to the

rigors of criminal prosecution. Rather than standing above the law, William Jefferson Clinton probably runs a much higher risk of an indictment for perjury in the year 2001 than any other American citizen alive today. This committee does not sit as a grand jury of the District of Columbia, but must ask itself a very different question: Does the conduct constitute alleged in this case such a threat to the very foundations of the Republic that it is legitimate to deprive the People of their freely elected choice as President?

For two centuries, the Congress has shown the greatest restraint in answering this question in the affirmative. From the era of George Washington to that of Ronald Reagan, Presidents have often stretched their constitutional authority to the very limits, making unpopular decisions which have often proved to be in the larger interest of the Nation. And yet only one President -- Andrew Johnson -- has been impeached, and only one -- Richard Nixon -- has resigned under threat of impeachment. The Presidential conduct involved in both cases amounted to an assault on the very foundations of our democracy. Andrew Johnson sought to make it impossible to enact Fourteenth Amendment, and its guarantees of equal protection and due process to all American citizens. Richard Nixon sought to undermine the very foundations of the two-party system. Once we lower the impeachment standard to include conduct that does not amount to a clear and present danger to our constitutional order, we will do grievous damage to the independence of the Presidency.

James Madison saw this. At the Convention, he opposed the addition of any language which would water down the solemn requirement of a "high crime and misdemeanor." A lower standard, he said, would transform the Presidency from an office with a fixed four year term to one "whose term will be equivalent to a tenure during the pleasure of the Senate."⁵

Indeed, when the Founders voted on the impeachment standard, they did not in fact vote on the provision that appears in the text today. Instead, they actually approved a standard that required the proof of a "high crime and misdemeanor *against the state*." These last three words were later eliminated by the Committee on Style, which had absolutely no authority to change the substance of the provision. Instead, the Committee believed that the text's insistence on "*high crime and misdemeanors*" already included the requirement of an assault on the foundations of the American state.

And as we have seen, this is the standard that has in fact consistently governed the House's actions over the past two centuries. If the House had been operating under any lower standard, our history books would have been littered with many, many bills of impeachment, and not only two. When judged against this consistent history of restrained Congressional interpretation of the impeachment clause, there can be little doubt that the present case falls far short of the standard set by the Framers when they insisted on "high crimes and misdemeanor against the state."

Indeed, if the Committee does find President Clinton's conduct impeachable, you will be setting a precedent that will haunt this country for generations to come. Under the new and low standard, impeachment will become an ordinary part of our political system. Whenever Congress and the Presidency are controlled by different political parties, the Congress will regularly use impeachment as a weapon to serve its partisan purposes..

⁵2 Farrand, Records of the Constitutional Convention 550 (1966).

After all, Presidents are often been called upon to make fateful decisions of the first importance, and, in the short term at least, these decisions are often very unpopular. Once the House's centuries-long tradition of constitutional restraint has been destroyed, the future leadership of the House will be sorely tempted to respond to unpopular decisions by regularly seeking to force the President from office. The result would be a massive shift toward a British-style system of parliamentary government.

This is what happened in the aftermath of the impeachment of President Andrew Johnson in 1868. Though this impeachment effort barely failed to gain two-thirds support in the Senate, it drained effective power from the Presidency – to the point where Woodrow Wilson, writing in 1885, could describe our system as “congressional government.” And it could readily happen again. Imagine, for example, that the political wheel turns once again, and that a Democratic Congress confronts a Republican President in the year 2001. Can there be any doubt that enterprising members of the House will be tempted to use the Clinton precedent to unseat the next Republican President at the first politically propitious opportunity?

My study of history and human nature convinces me that once such an abusive cycle of impeachments has begun, it will be very difficult to keep the bitter disagreements generated by our often-divided government under control. Let me emphasize that, though the lawyers for President Clinton asked me to testify today, I would be equally emphatic in my opposition to any future effort by a Democratic Congress to impeach a Republican President for anything short of an outright assault on the foundations of the Republic. But it is a far far better thing to cut short a cycle of incivility before it starts. I respectfully urge the distinguished members of this Committee to defer further action on impeachment to the next session of Congress, where our newly elected Representatives will be in a much better position to decide on the kind of action -- ranging from impeachment to censure to nothing -- that is most appropriate in this case.