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IMPEACHMENT: An Insider's Reflections and Perspective

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INTRODUCTION

The following article was prepared for clients and friends of Van Ness Feldman by our colleague, the Honorable James W. Ziglar, a Senior Counsel at Van Ness Feldman since 2009. Jim served as Sergeant at Arms of the U.S. Senate during the Impeachment Trial of President William Clinton and had responsibility for the logistical elements of the trial. His additional public sector experience includes serving as a Law Clerk to Justice Harry A. Blackmun in the 1972 Term of the Supreme Court, as Assistant Secretary of the Interior for Water and Science in the Reagan administration, and as the Commissioner of the Immigration and Naturalization Service during the George W. Bush administration. Earlier in Jim's career he worked as a staff assistant in the U.S. Senate, and as a legislative and public affairs officer at the U.S. Department of Justice. Jim was a Resident Fellow at the Harvard Kennedy School Institute of Politics and a Distinguished Visiting Professor of Law at the George Washington University Law School.

In this article, Jim provides a unique perspective on the history, process, and procedures of impeachment based on his personal experience, research, and active involvement in the Clinton Impeachment Trial.

OFF WITH YOUR HEAD — AN ATTENTION-GETTING BEGINNING FOR IMPEACHMENT

King Charles I of Great Britain lost his head in 1649, but only after being impeached and removed as King following a failed attempt to consolidate all power in the British throne. The King had enlisted the help of foreign powers in his war with Oliver Cromwell and the House of Commons, an act considered treasonous. And it literally was a "war" with both sides having armies in the conflict. When Charles I (Charles Stuart) was captured by the Cromwell forces, it would have been simple to assassinate him, but he was subjected to the process of impeachment "for high and treasonable offenses." It is a matter of some conjecture that the decision to impeach Charles I was to make it clear that it was Charles Stuart, the man, who was being removed from the throne rather than eliminating the institution of the King. The point was made that the man and the position were not indivisible, and Charles Stuart was unworthy of the position he occupied.

Although Charles I was the first head of state to be impeached and removed, the English system had included impeachment as a tool to deal with errant leaders since at least the 14th century. As Raoul Berger notes in his excellent work, **Impeachment: the Constitutional Problems**, the phrase "high crimes and misdemeanors" was "first met not in an ordinary criminal proceeding but in an impeachment, that of the Earl of Suffolk, in 1386." Berger further notes that "impeachment itself was conceived because the objects of impeachment, for one reason or another, were beyond the reach of ordinary criminal redress." Quoting M.V. Clarke in **The Origin of Impeachment**, he describes impeachment as "essentially a political weapon." The legacy of Charles I and impeachment as a governance and political tool found their way into our Constitution, but not without controversy.

HIGH CRIMES AND MISDEMEANORS IN THE CONSTITUTION

The Constitution in Article II, Section 4 provides that the "President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The present debate on the meaning given to this phrase by the Framers is, of course, focused on "high Crimes and Misdemeanors" since treason and bribery are reasonably definable. The arguments over the meaning of what is an impeachable offense range from claiming the conduct must fit neatly within the four corners of some criminal statute to defining it as whatever the House and Senate consider an impeachable offense to be at any particular moment, as former President Gerald Ford argued when he was member of the House of Representatives

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and pressing for the impeachment of Justice William O. Douglas in 1970. It is likely that this debate will never end and the advocates' positions, understandably and invariably, will be driven by "whose ox is being gored".

Putting aside these debates, which undoubtedly involve partisan motives, a fair reading—or at least my reading and that of many others—of the intentions of the Framers leads to the conclusion that "high Crimes and Misdemeanors" is much broader than the prohibitions contained in any criminal statute. This phrase encompasses activities that are deemed, as Alexander Hamilton noted in Federalist No. 65, as:

> those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL [Hamilton capitalized this word], as they relate chiefly to injuries done immediately to the society itself.

The preponderance of scholarly opinion seems to side with this broader interpretation of "high Crimes and Misdemeanors." Even Supreme Court justices have weighed in on the issue. Chief Justice William Howard Taft, in 1913, noted that the interpretation given "high misdemeanors" by the Senate meant that "there is no difficulty in securing removal of a judge for any reason that shows him unfit." Likewise, Justice Charles Evans Hughes made the point in 1928 that "(a)ccording to the weight of opinion, impeachable offenses include, not merely acts that are indictable, but serious misbehavior which may be considered as coming within the category of high crimes and misdemeanors."

THE INCLUSION OF IMPEACHMENT WAS NOT A FOREGONE CONCLUSION AT THE CONSTITUTIONAL CONVENTION

There was a lively debate in the Constitutional Convention as to whether an impeachment clause should be included in the proposed Constitution. There was no such provision in the Articles of Confederation, which provided for no executive, and the Congress was little more than a debating forum for delegates from the states. For all practical purposes, there was no central government and it was clear after only eight years of experience with the Articles of Confederation that a new Constitution was required if the nation was to survive. In fashioning a new government under the Constitution, the debate was between the Federalists, who favored a strong central government, and Anti-Federalists who were more favorably inclined to a weak central government. The Anti-Federalists, in the person of Gouverneur Morris, argued that an impeachment clause should not be included because it would make the executive the handmaiden of the legislative branch. The Anti-Federalists proposed that, if impeachment was to be included, the process should be commenced by the Congress on application by a majority of the state executives (governors). The Federalists supported an impeachment clause with some trepidation because it was not totally consistent with the separation-of-powers concept at the core of the constitutional framework. The impeachment power provided the legislative branch with an opportunity to interfere with or undermine the power and prerogatives of the executive and judiciary.

THE NATURE OF MAN MUST BE CONSIDERED IN CONSTRUCTING INSTITUTIONS

Notwithstanding their concern about including an impeachment clause, the Framers, idealists though they were, had a deep understanding of the nature of man (which includes women) and were vocal in their warnings about the threat to the commonweal by people whose motives were less than pure. George Mason, a Virginia delegate to the Convention who did not sign the Constitution because it lacked a specific bill of rights, echoed this warning when he stated at the Virginia Ratification Convention: "Considering the natural lust for power so inherent in man, I fear the thirst for power will prevail to oppress the people." Although we tend to think that the Framers' warnings were focused primarily on the power of the Executive, they included not just the executive power but, even more so, the legislative power. In Federalist No. 48, James Madison notes that the "legislative department" derives a superiority in our government and "(i)ts constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments."

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In fashioning an impeachment power, the Framers also were keenly aware of the presence and danger of partisanship, sometimes extreme, in any impeachment proceedings. Hamilton, in Federalist No. 65, rather eloquently describes a foreseeable sequence of events in impeachment proceedings:

> (t)he prosecution of them [impeachment articles], for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

His words were prescient.

The construct of our government with a division of powers and a checks-and-balance system required, however, a mechanism to control the passions of those who were unmindful of the public interest and would violate the trust bestowed upon them. The Framers recognized that the Congress, or at least the House of Representatives, was the branch that would be closest to the people and only the House was to be elected by and accountable directly to the people. The Senate would be elected by the state legislatures and the President would be chosen by the Electoral College. Consequently, they concluded that the power of impeachment should be lodged in the Congress with barriers to ensure, as much as possible, that the power of impeachment would not be abused or misused. The construct of the impeachment power is found in Article I, Sections 2 and 3. Section 2 provides that the House of Representatives "shall have the sole power of Impeachment." Section 2 is otherwise silent as to any procedural requirements necessary for the House to exercise that power. Article II, of course, limits the offenses for which an impeachment may be had to "Treason, Bribery or other high Crimes and Misdemeanors." Section 3 of Article I provides some barriers to abuse and misuse of the power of impeachment by first requiring that "(t)he Senate shall have the sole Power to try all Impeachments." It was the belief of the Framers that the Senate would be a more mature and deliberative group than the House, since the Senators were required to be older (30), would serve for six years, and it was assumed that only the most distinguished citizens would be chosen by the various state legislatures.

FIREWALLS AGAINST ABUSE OF THE IMPEACHMENT POWER

In an effort to control partisan passions and ensure a fair impeachment "trial," the Framers required in Article I, Section 3 that the Senate:

> (w)hen sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside; And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

The above requirements seem to outline four protections against the consequences of an overbearing political environment. First, the "Oath or Affirmation" that is required of Senators when sitting as the "triers" in an impeachment trial seems designed to impose on those Senators, in addition to the oath they take when sworn in as Senators, an additional and specific duty and responsibility. The impeachment oath, as administered by the Chief Justice provides, "(d)o you solemnly swear that in all things appertaining to the trial of the impeachment of ___________, President of the United States, now pending, that you will do impartial justice according to the Constitution and laws, so help you God?" "Impartial justice" is a particularly high standard in a politically charged environment. No one knows what is in another person's heart or mind, but in the Clinton Impeachment Trial, my personal observation, as Sergeant at Arms of the Senate, of many of the Senators was that they struggled mightily to reconcile their human and partisan instincts with the metaphysical, and perhaps spiritual, concept of impartial justice. Some didn't seem to care about the oath they took, but a large majority

did. At the time, it gave me great hope about our leaders and the future, regardless of the outcome of the Clinton Impeachment Trial.

The second barrier constructed by the Framers in the impeachment trial of a President is the requirement that the Chief Justice preside over the trial. Although the popular idea is that the Framers were dealing with the conflict of interest that the Vice President would have in presiding over a trial in which the outcome could result in his or her elevation to the Presidency, there also seems to be greater meaning to this requirement than meets the eye. During the discussion of the impeachment provision there was consideration of having the Senate and the Supreme Court jointly hold the trial. That idea was quickly dismissed because the Supreme Court might, in the future, have to rule on questions regarding the impeachment or a subsequent prosecution of the President after leaving office. However, the idea that there should be a judicial presence at the trial of a President was satisfied by having the Chief Justice preside. Regardless of the reason for this provision, the reality is that the presence of the Chief Justice, and the prestige and power of his position, does provide a calming and leavening effect. It certainly did in the Clinton Impeachment Trial. It might also be noted that the Chief Justice takes the same oath as the Senators to do "impartial justice." I am sure that if there is an impeachment and trial of President Donald Trump, Chief Justice John Roberts will have to deal with the same reality as did Chief Justice William Rehnquist. Chief Justice Rehnquist struggled with the idea that he ultimately did not control his "courtroom" and that, other than the Senate produced "Procedures and Guidelines for Impeachment Trials in the United States Senate" which can be changed by a vote of the Senate, the Federal Rules of Evidence and other well-established rules and procedures utilized in a federal judicial setting simply do not apply in an impeachment trial. Chief Justice Rehnquist was particularly surprised to discover that even if he ruled on a motion, his ruling was subject to being overturned by a majority vote of the Senators. To his credit, Chief Justice Rehnquist "got it" quickly and went on to earn the respect of the Senate for the adroit and respectful (and sometimes humorous) manner in which he handled a difficult situation.

The third protection that the Framers provided was the requirement that "no Person shall be convicted without the Concurrence of two thirds of the Members present." The two-thirds barrier to conviction and removal of a President (or anyone else being impeached under Article I, Section 3) is an important, though not complete, check on a blatantly partisan use of the impeachment power. Obviously, it also can be argued that the two-thirds requirement provides partisans in the minority with the power to block the will of the majority. But let's not forget that protection of minority and individual rights is a hallmark of our American representative democracy.

The fourth so-called barrier to an out-of-control mob atmosphere surrounding an impeachment trial is the provision that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." As you recall, King Charles I not only was impeached and lost his throne, but he also lost his head. Impeachment in Great Britain, at least in its early days, also provided a forum for addressing criminal conduct and meting out punishment for that conduct. The American version of impeachment does not include punishing criminal conduct—that is left for our criminal justice system. Thus, the Framers made it clear that conviction in an impeachment trial only resulted in removal from office and disqualification from holding any office of "honor, Trust or Profit under the United States." However, they also made it abundantly clear that the convicted party "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law." I read this provision as being yet another way that the Framers told us that impeachment could occur even if no criminal statute had been violated, but that criminal conduct connected with or identified in an impeachment proceeding also could be prosecuted in a non-impeachment venue.

IMPEACHMENT IN ACTION — A SHORT HISTORY

The impeachment power provided in the Constitution has been invoked only 19 times in our 230-year history under the Constitution. The large majority of impeachment articles adopted by the House of Representatives have involved lower federal judges, with 14 having been impeached (the first in 1803). Of the 14, three were acquitted, five were convicted and removed from office, three resigned before completion of their trials, and three were convicted, removed, and disqualified from holding any future

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office. When a person is convicted and removed from office, a separate vote is taken as to whether he or she will be disqualified to "hold and enjoy any Office of honor, Trust or Profit under the United States." Only three individuals have received this disqualification.

One Senator, one Supreme Court Justice, one Cabinet Member (Secretary of War) and two Presidents have been impeached. Except for the Senator, who was expelled from the Senate without a trial, the remainder were acquitted after a Senate trial. In the face of almost certain impeachment, President Richard Nixon resigned in 1974. Much has been written about Nixon and impeachment and most of the "Monday morning quarterbacks" agree that he probably would have been convicted and removed from office had the impeachment process continued. The possibility that he would have faced criminal prosecution also was short-circuited by the pardon that he was granted by President Ford, an act that many speculate was a major cause of Ford's loss to Jimmy Carter in the 1976 election.

The impeachment of Senator William Blount from Tennessee in 1797-1798 is worthy of note because it was the first impeachment under the new Constitution and it raised the question whether Members of Congress are covered by the impeachment clause and, specifically, are they "civil Officers of the United States" as provided in Article II, Section 4 of the Constitution? I would argue that they are not since they are elected, not appointed, and do not serve in any executive capacity. Senator Blount was impeached for conspiring with the British to seize Spanish-controlled territories in what is now Florida and Louisiana, thereby potentially bringing the United States into a war with Spain. When the Articles of Impeachment reached the Senate and the trial commenced, they were dismissed for want of jurisdiction. Senator Blount already had been expelled by the Senate under its own rules and power authorized by the Constitution. Indeed, the Constitution specifically provides in Article I, Section 5, that "(e)ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members" and that "(e)ach House may determine the Rules of its Proceedings, Punish its members for disorderly Behaviour, and, with the concurrence of two thirds, expel a Member." It seems reasonable to conclude that the Framers would not have provided specific provisions for how Congress was to deal with errant Members if impeachment was applicable to them.

In the present dialogue, debate, and controversy over the potential impeachment of President Trump, there are some exaggerated claims, not unexpectedly, that somehow this is the first, or at least the most, partisan Presidential impeachment inquiry in the history of the nation. That claim is a bit difficult to square with the history of the Andrew Johnson, and even the President Clinton, impeachments.

In the case of Andrew Johnson, who ascended to the Presidency upon the death of Abraham Lincoln, even though he ostensibly was attempting to follow the path of reconciliation with the South upon which President Lincoln had embarked, he was intensely disliked by the Radical Republicans because of his "soft" approach to the South and Reconstruction (Johnson was a Democrat from Tennessee) and his seeming disregard for the prerogatives of the Congress. He also was intensely disliked because of his abrasive personality and his tendency to make public derogatory statements about members of Congress and others. Johnson also was known for his propensity to consume more alcohol than he could handle. Almost from the beginning of his Presidency, Johnson was the subject of efforts to find reasons to impeach him. In fact, articles of impeachment were proposed by the House Judiciary Committee in 1867 but failed to get a majority vote in the House. The Radical Republicans set a trap for him by passing, over Johnson's veto, the Tenure of Office Act which prohibited the President from firing any Senate-confirmed officer in the Executive Branch without the approval of the Senate. Johnson defied the Senate and fired Secretary of War Edwin M. Stanton, an ally of the Radical Republicans, declaring that the Tenure of Office Act was unconstitutional. Within days, the House passed articles of impeachment and the Senate proceeded to try Johnson for his violation of the Tenure of Office Act and a variety of other charges (11 articles of impeachment were adopted). He survived by one vote in the Senate. A footnote to this episode is that Congress repealed the Tenure of Office Act in 1887 and, in 1926, the Supreme Court agreed with Johnson and struck down a similar law as unconstitutional. In Myers v. United States, the Supreme Court found that the President has the exclusive ability to remove Executive branch officials.

It took the passage of 130 years before the United States was subjected to another impeachment trial of a President, Bill Clinton. To suggest that the Clinton Impeachment was devoid of political considerations

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would be patently absurd. For those of you who were around and aware of what was happening, the impeachment of President Clinton had its origins in a federal investigation of land dealings in Arkansas that involved Clinton and his wife, Hillary. The investigation was placed in the hands of Ken Starr, a former federal judge and Solicitor General of the United States, who was appointed as an Independent Counsel. The investigation was enlarged when President Clinton was implicated in a tawdry affair with a young White House Intern. To this day, many Americans think that he was impeached because of the affair. However, the two articles of impeachment passed by the House dealt not with the affair (or other allegations against him regarding improper sexual behavior) but because he committed perjury in testimony to a federal grand jury (on this article the House vote was 228-206) and he lied in a deposition in a civil case against him in the federal courts in Arkansas (on this obstruction of justice article the House vote was 221-212).

President Clinton set the trap for himself, and his political adversaries, of which there were many, used his "high crimes" of perjury and obstruction of justice to launch an impeachment inquiry. In particular, Clinton was not liked by most Republicans on Capitol Hill because of a number of his policies and his dismissive attitude toward Congress. A surprising number of Democrats privately, and a few publicly, expressed their disdain of Clinton, and especially for his conduct which many believed was an impeachable offense. However, all 45 Senate Democrats voted to acquit Clinton on both articles obviously concluding that even if he committed impeachable offenses, that did not justify removing him from office. Five Republican Senators joined the Democrats in voting to acquit Clinton on both articles of impeachment and five other Republicans voted to acquit him on the perjury article. Clinton generally remained popular with the public during the impeachment process, and this helped provide him with some political insulation from removal by the Senate.

Hamilton's observation that impeachment is POLITICAL and that the "greatest danger" in an impeachment proceeding is that the decision will be based on the "comparative strength of the parties" and not on a "real demonstration of guilt or innocence" was prescient. But the Framers held out hope that the Senate would be the mature body that would do what is right for the nation.

WHAT HAPPENS IN AN IMPEACHMENT TRIAL — PROCEDURES, POLITICS, AND CONFUSION

The impeachment trial of a President is filled with pomp and circumstance, historical precedents and practices, and has some of the elements of a wedding, a funeral, and a Roman circus. With only two impeachment trials of a President in the past 150 years, we have limited historical records and precedents upon which to draw, but, as we learned in the Clinton Impeachment Trial, because there is no scripted format, you make it up as you go along and hope the public doesn't get a sense of the chaos in the background. And I hasten to add that if, during the Clinton Impeachment Trial, the Senate and the United States had not been blessed with the maturity, leadership, and bipartisanship demonstrated by Senators Trent Lott, the Majority Leader, and Tom Daschle, the Minority Leader, who were then, and still are, good friends, the institutions of our government could have been damaged seriously. The Framers expected that the Senate would be a mature, judicious, and measured body, and that is a major reason why the ultimate decision to remove a President was invested solely in the Senate.

With the exception of the requirements that Senators, as the "triers" of Articles of Impeachment, be on "Oath or Affirmation" to do impartial justice, that the Chief Justice presides over the impeachment trial, and that two-thirds of the Senators present must find the President guilty in order for him or her to be removed from office, the Constitution is otherwise silent on how such a trial is to be conducted. To address at least a portion of this vacuum, the Senate adopted "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials." These rules were adopted long before the Johnson Impeachment Trial but were substantially revised for that process. Over the years, the rules have been further revised, the last revision being in August 1986.

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To quickly summarize, the Senate Rules, in layman's language, provide:

- First, when the House of Representatives has adopted Articles of Impeachment and has appointed Managers to present the case to the Senate on behalf of the House, the Senate will receive notice of this event from the House. The Senate then informs the House when it is ready to receive the Managers for the purpose of presenting ("exhibiting") the Articles of Impeachment to the Senate.

- Second, at the appointed hour for the Managers to present ("exhibit") the Articles of Impeachment to the Senate, the House Managers appear at the door of the Senate Chamber and are announced by the Senate Sergeant at Arms. Upon signifying that they are ready to present the Articles of Impeachment to the Senate, the Presiding Officer of the Senate instructs the Sergeant at Arms to make the following proclamation: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against _____________." Following the proclamation, the House Managers present the articles of impeachment to the Senate and the Presiding Officer then informs the House Managers that the Senate will "take proper order" on the impeachment and will provide notice to the House of Representatives of the commencement of the trial.

- Third, the Senate Rules provide that once the articles of impeachment have been presented to the Senate, the Senate shall, at 1:00 p.m. on the day following the presentation (Sundays excepted) commence the impeachment trial and shall continue in session (Sundays excepted) from day to day (unless otherwise ordered by the Senate) until the final judgment is rendered.

- Fourth, when the President is the subject of the articles of impeachment, the Chief Justice presides over the trial (as noted earlier in this article). The Senate then gives him notice of the time and place for consideration of the articles and he receives a "request" to attend. When the Chief Justice presents himself at the Senate Chamber, he is escorted into the Chamber by a committee of Senators known as the "Committee on Escort." The Chief Justice is then given the oath to do "impartial justice" by the Presiding Officer of the Senate and the Chair is relinquished by the Presiding Officer. The Chief Justice then administers the same oath to the Senators, and the trial is underway. During the time that the Senate is convened as a trial body, the Chief Justice is the Presiding Officer.

- When the Senate has organized itself as a trial body, as described above, a summons is issued to the person impeached informing him or her of the articles of impeachment and to appear before the Senate on a day specified in the summons and to file his or her answers to the articles of impeachment.

The Senate rules provide broad discretion, but not direction, to the Senate in fashioning the rules, procedures, and processes for the conduct of the trial, including such things as the power to compel the attendance of witnesses, to appoint a committee to receive evidence and to take testimony, and to punish disobedience of its orders.

THE CLINTON IMPEACHMENT TRIAL — SOME PERSONAL OBSERVATIONS FROM MY POSITION AS SERGEANT AT ARMS

"**Herding Cats**" is the title of a book authored by Senator Lott, and the title aptly describes the chaos, confusion, and conflict that descended on the Senate before and during the Clinton Impeachment Trial. From my perch as Sergeant at Arms with responsibility for logistics of the trial, it was a somewhat harrowing experience to keep all of the moving parts going in the same direction, when the direction wasn't determined until the last minute. Somehow it all came together and the Senate comported itself with the dignity that the Framers expected.

The Clinton Impeachment Trial, because of its timing, created certain logistical and legal issues that had

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to be addressed, issues that would not be present should the House of Representatives approve articles of impeachment against President Trump in the near future. The House approved the articles of impeachment against President Clinton and appointed House Managers on December 19, 1998, less than a month before the end of the 105th Congress, and after an election had occurred in November 1998 in which the Democrats had gained seats in the House, but not enough to wrest majority control from the Republicans. The House, as a body, dissolves at the end of each Congress and is reconstituted as a new body in the following Congress since all of its Members are elected in each two-year election cycle. The Senate, on the other hand, is a continuous body because only one-third of its Members are elected in each two-year election cycle. When the House adopted the articles of impeachment against President Clinton, the Senate already had adjourned for the year. However, because the Senate is a continuous body, the Senate could receive the notice of the adoption of the articles of impeachment, which the House Managers presented to the Secretary of the Senate on December 19, 1998. Since the Senate had officially received notice from the House of the passage of the articles of impeachment, the question of whether the articles of impeachment would survive the dissolution and reconstitution of the House was not an issue.

I would note here that on December 16, 1998, even before the articles of impeachment had been voted on, we received informal information that, assuming articles of impeachment were approved, Counsel for President Clinton contemplated filing for an injunction to stop the Senate from proceeding with a trial on the grounds that a lame-duck House could not impeach the President. Alternatively, they would argue that if the Senate did not constitute itself as a trial body and be sworn in by the Chief Justice before the House adjourned, the Senate's failure to act in a timely manner would negate the House impeachment action. We started scrambling to determine how we could get the Senate back in session before the end of the year but, fortunately, the President's Counsel quickly decided against filing for an injunction on either ground and advised us of that decision.

However, what still was at issue was the continuing appointment of the House Managers since their appointment would expire with the end of the 105th Congress. Since the election had resulted in an increase in the number of Democrats in the House and the potential that some Republican Members might be having second thoughts about their votes for impeachment, the question was whether the House would move to appoint new Managers (or reappoint the original Managers, none of whom lost their re-election bids). If the House declined to appoint or reappoint Managers, the trial could not proceed. The Senate was placed in a position of waiting to see what the House would do. Notwithstanding the uncertainty on the appointment of new Managers, Majority Leader Lott, on December 28, 1998, made a statement to the press in which he announced that, on January 7, 1999, the Senate would organize itself as an impeachment trial body and that the House Managers would make their opening statement on January 11, 1999, with the President's opening statement occurring on January 12, 1999. On January 6, 1999, at 7:09 p.m., the Senate received a message from the House notifying the Senate that the same Managers had been appointed by the newly constituted House. The trial was on.

Senator Lott's strategy (and I assume that Senator Daschle was in agreement) in somewhat prematurely announcing the beginning of the trial was, as he explained to me, to put pressure on all of the parties to reach an agreement on the trial format and rules. What was happening in the background, particularly after the articles of impeachment were approved by the House, was a somewhat chaotic and often emotional discussion of a plethora of ideas on how the trial should be conducted. Although we had studied earlier impeachment trials, and particularly the Johnson Impeachment Trial, the Senate still was struggling with how to conduct the substantive part of the trial in a fair and efficient way.

The Johnson Impeachment Trial did provide us with a lot of precedents such as how the Senate Chamber was arranged, the printing and distribution of the gallery tickets, who had access to the Senate Floor during the trial, the seating of House Managers and the President's Counsel on the Senate Floor, and other administrative details. Although these details may not seem important, we endeavored to follow the precedents as closely as possible to reduce any charges of partisanship or unfairness. It worked. But the 800-pound gorilla that still was in the room was the establishment of the rules and procedures for the trial itself.

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The number of ideas and proposals on how to conduct the trial ranged widely and included, among others, a proposal by Senators Joe Lieberman and Slade Gorton to conduct the trial as if it were a preliminary hearing in a criminal case, with an early vote by the Senate to determine whether it would precede to a full trial, a proposal by Senator Orrin Hatch for a full trial in which the President's Counsel would be able to have as much time as desired to present the President's defense, and a proposal to simply have the House Managers and the President's Counsel stipulate to the records produced by the House impeachment inquiry and go immediately to a final vote on the articles. There were numerous iterations on these themes, each of which the particular proponent(s) thought was the best. What else could you expect from a group of Senators and senior staff, many of whom were lawyers?

A major cloud that hung over the debate about how to proceed with the trial was the widely held assumption that President Clinton would be acquitted on both articles. Consequently, the desire to get the trial over with as soon as possible was strong, but it also was recognized that it was important to hold a trial that the American public would see as fair to all parties and would demonstrate that the Senate was taking seriously its constitutional responsibility.

As the opening date of January 7, 1999 approached, the Senate, and particularly the Senate Republicans, seemed no closer to agreeing on trial procedures. There had been countless conferences, meetings, and small discussions on how to proceed but with little progress to show for all this effort. On January 6, 1999, a meeting was held in Senator Lott's Capitol "hideaway" attended by Congressman Henry Hyde and others from the House, and Senator Lott, another Senator and several of us involved in the planning for the trial. By this time, there was substantial antagonism/hostility between the House and Senate over what the House perceived as the Senate's disrespect for its role by trying to "truncate" the trial. Congressman Hyde made a passionate and convincing case for a "full trial" on the impeachment articles and suggested that to do less would disrespect the House and the Members who had risked their "political lives" to do what they believed was the right thing.

For the remainder of January 6 and until 9:45 a.m. on January 7 when the Senate convened to receive the House Managers for "exhibition" of the articles of impeachment, little progress had been made on the trial rules and procedures. Shortly after the Senate convened, I escorted the House Managers into the Senate Chamber, announced their presence and delivered the opening proclamation. The House Managers presented the articles of impeachment to the Senate and then withdrew from the Senate Chamber. Thereupon, the Senate passed a resolution to send a message to the Chief Justice informing him of the organization of the trial and requesting his presence at 1:00 p.m. that day.

At approximately 1:20 p.m. on January 7, the Senate convened and the Chief Justice was escorted into the Chamber by a "Committee on Escort" composed of Senators Ted Stevens, Orrin Hatch, Olympia Snowe, Robert Byrd, Patrick Leahy, and Barbara Mikulski. The oath was administered to the Chief Justice by Senator Strom Thurmond and the Chief Justice, in turn, administered the same oath to the Senators, all of whom were present. Following the swearing-in of the Senate as an impeachment trial body, I made the "Hear ye, Hear ye" proclamation that I or the Deputy Sergeant at Arms, Loretta Symms, would make each day at the commencement of the trial. Immediately thereafter, the trial was recessed for the day because there still was no plan for how to move forward. By the Senate Rules, the trial was required to continue daily unless otherwise ordered by the Senate and was set to reconvene the following day, January 8, 1999, at the call of the Chair.

Even though the trial was underway, we seemed to be no closer to resolving how the trial would proceed. During post-recess discussions on the Floor, it was suggested by Senator Don Nickles that the Senate meet in the Old Senate Chamber on the following morning prior to the reconvening of the trial to develop a compromise on how to move forward. Although the Democrats were at first reluctant to participate, they were convinced that this was needed to resolve the issues. The remainder of the day was devoted to conferring about the trial rules and a frantic effort to craft a proposed resolution that potentially could gain the support of at least a majority of Senators.

It is important to note that the meeting in the Old Chamber was not an official session of the Senate, but a gathering of 100 individuals who happened to be Senators. There were no recording devices, stenographers or microphones, and only a small number of senior staff were allowed to be present.

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Some of my most pleasant and meaningful memories of my tenure as Sergeant at Arms come from that meeting in the Old Chamber that began at 9:30 a.m. on January 8. The meeting was opened with a warm and spiritually and emotionally uplifting prayer by Senator Daniel Akaka of Hawaii, thereby setting the tone for the discussions. The Senators spoke to each other, not as Senators, but as friends and ordinary human beings, and they shared their personal anguish, disappointment, and deep concern about the reasons for the meeting. Proposals on how to proceed were presented and debated civilly. When it suddenly became clear that Senator Phil Gramm and Senator Ted Kennedy were in agreement on an approach, the deal was done. It would have been hard to find two people more different ideologically, philosophically, and politically. In my personal notes following the meeting I wrote, "(t)he session closed on a very high note and there was a sense of goodwill that I had not seen in a long time."

Putting into words the conceptual framework for the trial that was developed in the Old Chamber meeting was not without its complications or controversies. At a few points it seemed that the agreement might implode. However, at 3:00 p.m., a meeting was held in Senator Lott's office that included key Senators, and particularly Senators Kennedy and Gramm. In a matter of a few minutes the contested details were resolved and at 3:25 p.m. there were separate conferences of the Democrats and Republicans to ratify the final proposal. When the Senate reconvened at 4:02 p.m. as an impeachment trial body, Senator Lott offered a Resolution that provided for the issuance of a summons to the President and outlined the procedures for the trial that had been negotiated. It was passed with all 100 Senators voting for it, a remarkable achievement under the circumstances and, in my opinion, one of the finest hours I have ever witnessed in my years around the Senate.

The Resolution set forth the times and dates for presentations by the House Managers and the President's Counsel, a period for questions and motions, and other trial procedures. However, certain issues such as calling witnesses and taking depositions were left to be addressed as the trial progressed. In particular, there was provision made for consideration of a motion to dismiss after the question period, if such a motion was made. Senator Byrd made such a motion and it was defeated. The vote on the motion to dismiss was 56 against to 44 in favor of dismissing the charges. Although the trial continued as a result of the defeat of the motion to dismiss, the vote of 44 to dismiss was a clear indication of the outcome of the trial since it would have taken a vote of two-thirds of Senators present and voting on either article of impeachment to remove the President. What was a foregone conclusion at the beginning of the trial was validated by this vote.

The Senate Rules and the unanimous Resolution of the Senate, however, did not provide any specificity with respect to how and by whom depositions would be taken and witnesses called, so when the motion to dismiss was defeated, it was back to the drawing board on crafting specific rules for depositions and who would be called as witnesses. But the Senate managed to work its way through these issues and, in my opinion, comported itself with the maturity and dignity that the Framers expected.

One final issue that had been hovering over the trial was the question whether the deliberations of the Senate, before taking votes on the articles, would be in closed session as required by the Senate Rules, or whether the Senators would vote to suspend its rules for the trial and have deliberations that were open to the public. There were a number of sometimes heated discussions among Senators on this question, but the final vote on a motion made by Senator Lott to close the deliberations passed 53 to 47, with two Republican Senators voting with the Democrats to open the deliberations. Having had the opportunity to attend those closed deliberations, I was and continue to be convinced that the decision to close the deliberations was the correct decision. I hasten to add that any Senator who wanted to have his or her remarks during the deliberations published in the Congressional Record was allowed to do so, and many availed themselves of that opportunity.

I would be remiss in ending this article without noting that there were countless other interesting and important events during the Clinton Impeachment Trial that are not included here, such as the drama of President Clinton delivering the State of the Union address while being tried by the Senate, the taking of the depositions of Monica Lewinsky, Vernon Jordan and Sidney Blumenthal, the serious internal discussions on proposals to "censure" President Clinton for his bad conduct, and other such events.

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CONCLUSION — A CALL FOR BIPARTISANSHIP AND MODERATION

There are many lessons that the Senate can learn from impeachment's historic antecedents dating back to the 14th century and from the Clinton Impeachment Trial. I note that Majority Leader Mitch McConnell and Minority Leader Chuck Schumer both were in the Senate and participated in the Clinton Impeachment Trial. It is my hope that the leadership, bipartisanship, and deep concern for the country and the institution of the Senate that were demonstrated by Senators Lott and Daschle, and others, will be remembered and emulated by present Senate Leadership, and by every Senator, should the House of Representative send to the Senate Articles of Impeachment against President Trump. It is critical that every Senator take seriously his or her oath to do "impartial justice" and to refrain from the petty and extreme partisanship that Alexander Hamilton so feared and so eloquently articulated in Federalist No. 1 and No. 65, and James Madison bemoaned in Federalist No. 10.

I conclude with words of wisdom from the father of the American Constitution, James Madison, when he pleaded for moderation in Federalist No. 37:

> (it) is a misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good, and that this spirit is more apt to be diminished than promoted, by those occasions which require an unusual exercise of it.

FOR MORE INFORMATION

Van Ness Feldman monitors and advises clients on the actions of the Administration and Congress. Our professionals help businesses understand and navigate federal policy and the complex intersection between business and government.

If you have questions about the article or would like to interview Mr. Ziglar, please contact Lisa Pavia at lap@vnf.com or (202)298-1899.

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