TOP PROFS: NOT ENOUGH TO IMPEACH; NLJ

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Byline: Harvey Berkman National Law Journal , Staff Reporter

Body

NLJ JURY OF 12 CON-LAW EXPERTS WEIGHS EVIDENCE.

on a jury of 12 constitutional law professors, all but two told The National Law Journal that, from a constitutional standpoint, President Clinton should not be impeached for the things Independent Counsel Kenneth W. Starr claims he did.

Some of the scholars call the question a close one, but most suggest that it is not; they warn that impeaching William Jefferson Clinton for the sin he admits or the crimes he denies would flout the Founding Fathers' intentions.

On the charges as we now have them, assuming there is no additional report [from Mr. Starr], impeaching the president would probably be unconstitutional, asserts Cass R. Sunstein, co-author of a treatise on constitutional law, who teaches at the University of Chicago Law School.

The first reason for this conclusion is that the one charge indisputably encompassed by the concept of impeachment-abuse of power-stands on the weakest argument and evidence.

The allegations that invoking privileges and otherwise using the judicial system to shield informationis an abuse of power that should lead to impeachment and removal from office is not only frivolous, but also dangerous, says Laurence H. Tribe, of Harvard Law School.

The second reason is that the Starr allegation for which the evidence is disturbingly strong-perjury-stems directly from acts the Founders would have considered personal, not governmental, and so is not the sort of issue they intended to allow Congress to cite to remove a president from office.

No Large-Scale Infidelity

Says Professor Sunstein, Even collectively, the allegations don't constitute the kind of violation of loyalty to the United States or large-scale infidelity to the Constitution that would justify impeachment, given the Framers' decision that impeachment should follow only from treason, bribery or other like offenses What we have in the worst case here is a pattern of lying to cover up a sexual relationship, which is very far from what the Framers thought were grounds for getting rid of a president.

Douglas W. Kmiec, who spent four years in the Justice Department's Office of Legal Counsel and now teaches at Notre Dame Law School, agrees: The fundamental point is the one that Hamilton makes in Federalist 65: Impeachment is really a remedy for the republic; it is not intended as personal punishment for a crime.

There's no question that William Jefferson Clinton has engaged in enormous personal misconduct and to some degree has exhibited disregard for the public interest in doing so, he says. But does that mean that it is gross neglect-gross in the sense of being measured not by whether we have to remove the children from the room when the president's video is playing, but by whether [alleged terrorist Osama] bin Laden is now not being properly monitored or budget agreements aren't being made?

Adds Prof. John E. Nowak, of the University of Illinois College of Law, the impeachment clause was intended to protect political stability in this country, rather than move us toward a parliamentary system whereby the dominant legislative party can decide that the person running the country is a bad person and get rid of him. Mr. Nowak co-authored a constitutional law hornbook and a multivolume treatise with fellow Illinois professor Ronald Rotunda, with whom he does not discuss these matters because Professor Rotunda is an adviser to Mr. Starr.

It seems hard to believe that anything in the reportcould constitute grounds for an impeachment on other than purely political grounds, Professor Nowak says. If false statements by the president to other members of the executive branch are the equivalent of a true misuse of officeI would think that the prevailing legislative party at any time in our history when the president was of a different party could have cooked upways that he had misused the office.

And that, says Prof. A.E. Dick Howard, who has been teaching constitutional law and history for 30 years, would be a step in a direction the Founders never intended to go.

The Framers started from a separation-of-powers basis and created a presidential system, not a parliamentary system, and they meant for it to be difficult for Congress to remove a president-not impossible, but difficult, says Professor Howard, of the University of Virginia School of Law. We risk diluting that historical meaning if we permit a liberal reading of the impeachment power-which is to say: If in doubt, you don't impeach.

Many of the scholars point to the White House's acquisition of FBI files on Republicans as an example of something that could warrant the Clintons' early return to Little Rock-but only if it were proved that these files were acquired intentionally and malevolently misused. The reason that would be grounds for impeachment, while his activities surrounding Monica Lewinsky would not, the professors say, is that misuse of FBI files would implicate Mr. Clinton's powers as president. But if Mr. Starr has found any such evidence, he has not sent it to Congress, which he is statutorily bound to do.

One professor who believes there is no doubt that President Clinton's behavior in the Lewinsky matter merits his impeachment is John O. McGinnis, who teaches at Yeshiva University, Benjamin N. Cardozo School of Law. I don't think we want a parliamentary system, although I would point out that it's not as though we're really going to have a change in power. If Clinton is removed there will be Gore, sort of a policy clone of Clinton. A parliamentary system suggests a change in party power. That fear is somewhat overblown.

Professor McGinnis considers the reasons for impeachment obvious. I don't think the Constitution cares one whit what sort of incident [the alleged felonies] come from, he says. The question is, Can you have a perjurer and someone who obstructs justice as president? And it seems to me self-evident that you cannot. The whole structure of our country depends on giving honest testimony under law. That's the glue of the rule of law. You can go back to Plato, who talks about the crucial-ness of oaths in a republic. It's why perjury and obstruction of justice are such dangerous crimes.

This argument has some force, says Professor Kmiec, but the public is hesitant to impeach in this case because of a feeling that the entire process started illegitimately, that the independent counsel statute is flawed and that the referral in this case was even more flawed, in that it was done somewhat hastily by the attorney general.

Jesse H. Choper, a professor at the University of California at Berkeley School of Law (Boalt Hall) and co-author of a con-law casebook now in its seventh edition, agrees that perjury, committed for any reason, can count as an impeachable offense. The language says high crimes and misdemeanors, and [perjury] is a felony, so my view is that it comes within the [constitutional] language. But whether we ought to throw a president out of office because he lied under oath in order to cover up an adulterous affairmy judgment as a citizen would be that it's not enough.

A Judge Would Be Impeached

Many of the professors say Mr. Clinton would almost certainly be impeached for precisely what he has done, were he a judge rather than the president. That double standard, they say, is contemplated by the Constitution in a roundabout way. Says Professor Kmeic, The places where personal misbehavior is raised have entirely been in the context of judicial officers. There is a healthy amount of scholarship that suggests that one of the things true about judicial impeachments (which is not true of executive impeachments) is the additional phraseology saying that judges serve in times of good behavior. The counterargument is that there is only one impeachment clause, applying to executive and judicial alike. Butour history is that allegations of profanity and drunkenness, gross personal misbehavior, have come up only in the judicial context.

In addition to history, there is another reason for making it harder to impeach presidents, says Akhil Reed Amar, who teaches constitutional law at Yale Law School and who recently published a book on the Bill of Rights: When you impeach a judge, you're not undoing a national electionThe question to ask is whether [President Clinton's] misconduct is so serious and malignant as to justify undoing a national election, canceling the votes of millions and putting the nation through a severe trauma.

They're Uncomfortable

None of these arguments, however, is to suggest that the professors are comfortable with what they believe the president may well be doing: persistently repeating a single, essential lie-that his encounters did not meet the definition of sexual relations at his Paula Jones deposition. Mr. Clinton admits that this definition means he could never have touched any part of her body with the intent to inflame or satiate her desire. It is an assertion that clashes not only with Ms. Lewinsky's recounting of her White House trysts to friends, erstwhile friends and the grand jury, but also with human nature.

That's one of the two things that trouble me most about his testimony-that he continues to insist on the quite implausible proposition [of] Look, Ma, no hands, which is quite inconsistent with Monica Lewinsky's testimony, and that he's doing that in what appears to be quite a calculated way, Professor Tribe laments. But I take some solace in the fact that [a criminal prosecution for perjury] awaits him when he leaves office.

Professor Amar agrees that whatevercrimes he may have committed, he'll have to answer for it when he leaves office, and that is the punishment that will fit his crime.

Also disturbing to Professor Tribe is the president's apparent comfort with a peculiar concept of what it means to tell the truth, a concept the professor describes as It may be deceptive, but if you can show it's true under a magnifying glass tilted at a certain angle, you're OK.

But even that distortion, he believes, does not reach the high bar the Founders set for imposing on presidents the political equivalent of capital punishment.

It would be a disastrous precedent to say that when one's concept of truth makes it harder for people to trust you, that that fuzzy fact is enough to say there has been impeachable conduct, Professor Tribe says. That would move us very dramatically toward a parliamentary system. Whether someone is trustworthy is very much in the eye of the beholder. The concept of truth revealed in his testimony makes it much harder to have confidence in him, but the impeachment process cannot be equated with a vote of no confidence without moving us much closer to a parliamentary system.

Professor Kmiec does suggest that something stronger than simple no confidence might form the possible basis for impeachment. Call it no confidence at all.It is possible that one could come to the conclusion that the president's credibility is so destroyed that he'd have difficulty functioning as an effective president, Professor Kmiec says. But the public doesn't seem to think so, and I don't know that foreign leaders think so, given the standing ovation Mr. Clinton received at the United Nations.

In the end, Professor Howard says that he opposes impeachment under these conditions not only because the past suggests it is inappropriate, but also because of the dangerous precedent it would set. Starting with the Supreme Court's devastatingly unfortunate and totally misconceived opinion [in **Clinton v. Jone** s, which allowed Ms. Jones's suit to proceed against the president while he was still in office], this whole controversy has played out in a way that makes it possible for every future president to be harassed at every turn by his political enemies, Professor Howard warns. To draw fine lines and say that any instance of stepping across that line becomes impeachable invites a president's enemies to lay snares at every turn in the path. I'm not sure we want a system that works that way.

The other jurors on this panel of constitutional law professors were:

--The one essentially abstaining juror: Michael J. Gerhardt, of the College of William and Mary, Marshall-Wythe School of Law.

--Douglas Laycock, of The University of Texas School of Law.

--Thomas O. Sargentich, co-director of the program on law and government at American University, Washington College of Law.

--Suzanna A. Sherry, professor at the University of Minnesota Law School.

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