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## **Book Review of Arnold H. Leibowitz, an Historical-Legal Analysis of the Impeachments of Presidents Andrew Johnson, Richard Nixon, and William Clinton: Why the Process Went Wrong**

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Cover Page Footnote

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**BOOK REVIEW OF ARNOLD H. LEIBOWITZ, AN  
HISTORICAL-LEGAL ANALYSIS OF THE IMPEACHMENTS  
OF PRESIDENTS ANDREW JOHNSON, RICHARD NIXON AND  
WILLIAM CLINTON: WHY THE PROCESS WENT WRONG**

*Jeffrey B. Morris*\*

Arnold H. Leibowitz has written a provocative and absorbing book about Presidential impeachment.<sup>1</sup> Leibowitz has had a distinguished career as both an attorney and an author, writing extensively about territories affiliated with the United States in the Pacific and Caribbean, many of which he represented before the United States government.<sup>2</sup>

While the literature on Presidential impeachment is not skimpy,<sup>3</sup> what Leibowitz brings to the table is sharp criticism of the

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<sup>1</sup> ARNOLD H. LEIBOWITZ, AN HISTORICAL-LEGAL ANALYSIS OF THE IMPEACHMENTS OF PRESIDENTS ANDREW JOHNSON, RICHARD NIXON, AND WILLIAM CLINTON: WHY THE PROCESS WENT WRONG (2012).

<sup>2</sup> See, e.g., ARNOLD H. LEIBOWITZ, COLONIAL EMANCIPATION IN THE PACIFIC AND CARIBBEAN: A LEGAL AND POLITICAL ANALYSIS (1976); ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989); ARNOLD H. LEIBOWITZ, EMBATTLED ISLAND: PALAU'S STRUGGLE FOR INDEPENDENCE (1996); ARNOLD H. LEIBOWITZ, FEDERAL RECOGNITION OF THE RIGHTS OF MINORITY LANGUAGE GROUPS (1982). Leibowitz has been General Counsel of the United States Commission on the Status of Puerto Rico, counsel to the Guam and Virgin Islands constitutional conventions, and special legal counsel to the Select Commission on Immigration and Refugee Problems.

<sup>3</sup> See, e.g., RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (3d prtg. 1974); H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT (2010); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000); PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805 (1984); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT (1999). There also is a shelf of other books concentrating on particular Presidential impeachment efforts, judicial impeachments, and impeachments generally.

use of the process. He argues that, in each of the three Presidential impeachment efforts, the process was not worth the damage done not only to the Presidency, but to the body politic as well.<sup>4</sup> In place of impeachment, Leibowitz would employ the weapon of a formal, bi-partisan resolution of censure.<sup>5</sup>

Leibowitz argues that the Framers of the United States Constitution saw impeachment as an extraordinary remedy that would not be tainted by partisanship,<sup>6</sup> but complicated the process by not defining “high [c]rimes and [m]isdemeanors.”<sup>7</sup> Leibowitz argues that in all three cases in which Congress became involved in the impeachment process—Andrew Johnson, Richard M. Nixon and Bill Clinton—partisan politics infected every aspect of the process.<sup>8</sup> Leibowitz believes that the public interest in having a fully functioning President is so great that impeachment is rarely, if ever, warranted.<sup>9</sup> It will be seen that this reviewer, while respecting the author and finding the book stimulating, deeply disagrees with his conclusions.

## I. THE IMPEACHMENT OF ANDREW JOHNSON

In 1868, after years of tension with the Republican Congress, Andrew Johnson, Lincoln’s successor (though from a different political party), was impeached.<sup>10</sup> Nine of the Articles of Impeachment dealt with Johnson’s violations of the Tenure in Office Act and Command of the Army Act for removing Secretary of War Edwin T. Stanton without the consent of the Senate.<sup>11</sup> The tenth accused the President of bringing Congress into disgrace, ridicule, contempt and reproach.<sup>12</sup> The eleventh article was an omnibus charge essentially accusing the President of violating the Take Care Clause of the Constitution.<sup>13</sup> After the trial before the Senate, which began March 23,

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<sup>4</sup> LEIBOWITZ, *supra* note 1, at 11. As Leibowitz’s book concentrates on Presidential impeachment, this review will not discuss judicial impeachments.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> U.S. CONST. art. II, § 4. “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.” *Id.*

<sup>8</sup> LEIBOWITZ, *supra* note 1, at 7.

<sup>9</sup> *Id.* at 9-10.

<sup>10</sup> *Id.* at 107.

<sup>11</sup> *Id.* at 112.

<sup>12</sup> *Id.* at 112-13.

<sup>13</sup> VAN TASSEL & FINKELMAN, *supra* note 3, at 235; U.S. CONST. art. II, § 3.

1868 and lasted until May 16, 1868, Johnson was acquitted by one vote.<sup>14</sup> With less than ten months left in office, Johnson served out the rest of his term.<sup>15</sup>

While Leibowitz faithfully lays out the policy differences between President Andrew Johnson and the Fortieth Congress, in my estimation he understates the wrong-headedness of Johnson's positions as well as the long run damage he caused the United States.

After the Civil War ended, the devastated Southern States enacted Black Codes, which, while providing some rights for the freed slaves (such as legalized marriage), denied others (such as, the right to vote, to serve on juries and to testify in court against whites).<sup>16</sup> Some of the Black Codes declared that those who failed to sign yearly labor contracts could be arrested and hired out to whites.<sup>17</sup> Fugitives from labor were to be arrested and carried back to their employers. Some states banned land ownership by African-Americans. The Black Codes represented a concerted effort by whites to restore the master-servant relationship, to replace slavery with peonage.<sup>18</sup>

At issue were the terms which the United States would insist upon before allowing the conquered and devastated states of the Confederacy back into the Union they once had fought to leave, but now sought to return. The central issue between the President and the Congress was the degree to which the Union would use its leverage to see that the freed slaves would have the same rights as other American citizens (including the right to vote), land reform (so the freedmen could earn a living), as well as the degree of protection the Northern army would give them so that they would not become victims of violence.

The United States government had important leverage in two respects. It could set the terms for readmission to the Union of the

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<sup>14</sup> Richard M. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 883 (1999).

<sup>15</sup> Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2131 (2002).

<sup>16</sup> Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 311 (2000).

<sup>17</sup> Donna J. King, *The War on Women's Fundamental Rights: Connecting U.S. Supreme Court Originalism to Rightwing, Conservative Extremism in American Politics*, 19 CARDOZO J. L. & GENDER 99, 114 n.65 (2012).

<sup>18</sup> See, e.g., 1 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 492-94 (3d ed. 2011); CIVIL RIGHTS AND THE BLACK AMERICAN: A DOCUMENTARY HISTORY 217-25 (Albert P. Blaustein & Robert L. Zangrando eds., 1970).

seceded states, and it had the power to pardon or not to pardon those Southerners who had aided and abetted the war. At first, the states of the former Confederacy had no leverage, but over time they were able to trade on the great desire in the North and West for re-union.

Johnson sought unity for the nation, but not equality for former slaves. He used his veto power frequently, vetoing, for example, the Civil Rights Act of 1866, which wrote into federal law rights to contract, own property, and serve on juries.<sup>19</sup> After the law was passed over his veto, Johnson emasculated its enforcement. Congress's attempt to enlarge the scope of the work of the Freedmen's Bureau to care for the freed slaves and to let them work and later own abandoned lands in the South was greatly weakened by Johnson's opposition. He resisted giving effect to even the anemic bill, which also became law over his veto. Johnson at one point portrayed black suffrage as "worse than the military despotism under which [the southern states] . . . are now suffering."<sup>20</sup> That was a matter that he wished to leave to re-empowered Southern whites.<sup>21</sup>

A strict constructionist where federal power was involved, Johnson was a very loose constructionist where Presidential power was concerned, often not "tak[ing] [c]are that the [l]aws be faithfully executed . . . ."<sup>22</sup> He used the Presidential veto power far more than any previous President; he also made blanket use of the President's power to pardon, refused to try former rebels, dispensed with oaths of loyalty to the Union, and refused to exclude former Confederates from political office.<sup>23</sup>

Johnson's Presidency was indeed a "catastrophe." As Van Tassel and Finkelman have written, "By any measure he was truly the wrong man in the wrong place, at the wrong time."<sup>24</sup> Rigid, thin-skinned, humorless and lacking ability to compromise, Johnson swiftly alienated nearly the entire Republican Party.<sup>25</sup> Post-1954 histori-

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<sup>19</sup> Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 27 (2011).

<sup>20</sup> MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 75 (1973) (alterations in original) (internal quotation marks omitted).

<sup>21</sup> *Id.*

<sup>22</sup> U.S. CONST. art. II, § 3.

<sup>23</sup> VAN TASSEL & FINKELMAN, *supra* note 3, at 223.

<sup>24</sup> *Id.* at 222.

<sup>25</sup> See HOWARD MEANS, *THE AVENGER TAKES HIS PLACE: ANDREW JOHNSON AND THE 45 DAYS THAT CHANGED THE NATION* 228 (2006) (showing Johnson's unwillingness to compromise); BENEDICT, *supra* note 20, at 8 (describing President Johnson as inept).

ans have criticized his Presidency harshly.<sup>26</sup> The website of the University of Virginia's Miller Center of Public Affairs calls Johnson "the greatest failure of all Presidents in making a satisfying and just peace."<sup>27</sup> He is viewed, it states, as "a rigid, dictatorial racist who was unable to compromise or to accept a political reality at odds with his own ideas" and was "principally responsible for the failure of Reconstruction to solve the race problem in the South and perhaps in America as well."<sup>28</sup>

On the whole, Leibowitz does not heavily criticize the conduct of the impeachment trial.<sup>29</sup> This is in accord with modern thought. If what was at stake was tantamount to a vote of confidence in a parliamentary regime, at the least the swing voters saw the trial itself, Chief Justice Rehnquist has written, as "an essentially judicial proceeding."<sup>30</sup> Even though Chief Justice Salmon P. Chase who presided was, as was his habit, angling for a Presidential nomination, the trial was not conducted in a circus atmosphere and the Senate was not a "kangaroo court." Indeed, thirty of the fifty-four senators filed written opinions "explain[ing] their view of the proceedings and why they had voted the way they did."<sup>31</sup> That the President was spared conviction by a single vote was due in some measure to principle, to the fact that the statute the President was accused of violating was

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<sup>26</sup> Sanford V. Levinson, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 465-67 (1974) (book review) ("Johnson was shown to have been an obdurate man, incompetent as a politician, who was basically a racist, willing to accept the South back into the Union so long as the Southern States recognized merely that the formal institution of slavery was a thing of the past.").

<sup>27</sup> *American President: A Reference Resource: Impact and Legacy*, MILLER CENTER, <http://Millercenter.org/President/Johnson/essays/biography/9> (last visited Apr. 19, 2013).

<sup>28</sup> *Id.* At one time, when the sympathies of historians were engaged with the prostrate South and Congressional Republicans were viewed as vengeful and vindictive, Johnson was to be found in the middle rank of Presidents because of his courage in challenging the usurpation of Congressional authority. Eric Foner, *He's the Worst Ever*, WASH. POST, (Dec. 3, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/01/AR2006120101509.html>. During and after the "Second Reconstruction," the period in which the constitutional rights of African-Americans were finally recognized, Johnson plunged in the rankings. *Id.* In 1948, a poll of scholars ranked him nineteenth of Presidents. ROBERT W. MERRY, *WHERE THEY STAND: THE AMERICAN PRESIDENTS IN THE EYES OF VOTERS AND HISTORIANS* 244 (2012). By 2005, he was ranked thirty-seventh (of forty) just above Franklin Pierce, Warren Harding and James Buchanan. *Id.* at 245.

<sup>29</sup> See LEIBOWITZ, *supra* note 1, at 111-12 (arguing that Johnson's impeachment was "legalistic").

<sup>30</sup> REHNQUIST, *supra* note 3, at 245.

<sup>31</sup> *Id.* at 240.

“opaque,”<sup>32</sup> as well as the result of antagonism to the tactics of the House managers, antipathy to Senator Benjamin Wade, who would have succeeded to the Presidency, and finally, to the fact that the President was so politically crippled that it was unlikely he would cause much harm in his last year in office.<sup>33</sup>

Leibowitz is not unaware of the deep policy differences between the Congress and President Johnson, nor is he excessively sympathetic to the President. Nevertheless, although Leibowitz prefaces this opinion with “[s]ome have argued,” it seems to this reviewer that this is his, Leibowitz’s, view as well—that the conflict was over “an effort by the Radical[] [Republicans] . . . to gain long-term control over the government” for decades to come by obtaining in the South a political structure that was theirs.<sup>34</sup> He sees the Tenure of Office Act as a pretext (which many believe was true).<sup>35</sup>

The Tenure of Office Act may have been a “pretext” for some and the impeachment process carried with it high *political* stakes, but that does not mean that the battle was unwarranted and the *policy* stakes insignificant.<sup>36</sup> At issue was the direction of the nation immediately upon the conclusion of a catastrophic civil war.

Profound issues were at stake. Had the Confederate states left the Union and, therefore, was their status that of “conquered provinces?” Could conditions be placed on the seceding states for (re)admission to the Union? Should former Confederates be treated as traitors? Had slavery been abolished simply to end up with another Missouri Compromise? In other words, after over 600,000 deaths, was the nation which had been “half-slave and half-free,” going to become one where African-Americans had *some* rights in *one* part of the country and remain a subjugated class in the *other*? Would the former slaves be protected by the federal government or would they have to survive on the scraps of liberty doled out to them by the Southern white plantation elite?

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<sup>32</sup> Professor Benedict states that the impeachment “turned largely on the construction of a law the language of which had been purposely obfuscated to satisfy the demands of both the Senate and the House without appearing to require a concession by either.” BENEDICT, *supra* note 20, at 140. The law would be held unconstitutional by the Supreme Court of the United States fifty-eight years later. *Myers v. United States*, 272 U.S. 52, 106, 295 (1926).

<sup>33</sup> BENEDICT, *supra* note 20, at 137; *see also* REHNQUIST, *supra* note 3, at 227-28; VAN TASSEL & FINKELMAN, *supra* note 3, at 226-27.

<sup>34</sup> LEIBOWITZ, *supra* note 1, at 130-31.

<sup>35</sup> *Id.* at 131.

<sup>36</sup> *Id.*



There were also extraordinarily important separation of powers questions connected to the impeachment battle. May a President refuse to faithfully execute laws? May the President “judicially” determine the validity of every enactment of Congress, effectively repealing or at least ignoring them at his pleasure?<sup>37</sup> Must the branch charged by the Constitution with making the laws automatically give way when the President refuses to execute a law or laws?

The questions at issue in the Johnson impeachment process were great questions, some of the greatest that have confronted the American republic. This episode was *not* “politics as usual,” nor was it just an attempt by Congress to remove an “accidental President.” Not only were great issues at stake, but the proceedings in the Senate were, at least in part, a great legal case in which “a political officer [was given] a full and fair trial in a time of political crisis.”<sup>38</sup> Perhaps it would have been better had the House of Representatives not employed the short hand of violation of the Tenure of Office Act in its charges, but instead had “detailed Johnson’s [misfeasance and] malfeasance in office, his obstruction of congressional policy, and his high-handed unilateral actions.”<sup>39</sup>

In the short run, Johnson survived and was unable to do any real harm to Reconstruction during his remaining months in office. But, Johnson’s policies already had the effect of converting “a conquered people, bitter but ready to accept the consequences of defeat, into a hostile, aggressive, uncooperative unit.”<sup>40</sup> He had restored to the Southern elite much of its pre-war “political and economic power and through that power domination of the men and women they had recently held as slaves.”<sup>41</sup> Precious time was lost. Reconstruction was set back two full years and eventually Northern public opinion lost interest.<sup>42</sup> Reconstruction was over by 1877.

Leibowitz believes that the President’s conviction would not have been enough to have made Reconstruction a success for the freedman.<sup>43</sup> Perhaps he’s right, but without Johnson a much stronger

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<sup>37</sup> VAN TASSEL & FINKELMAN, *supra* note 3, at 247.

<sup>38</sup> BENEDICT, *supra* note 20, at 143.

<sup>39</sup> VAN TASSEL & FINKELMAN, *supra* note 3, at 225.

<sup>40</sup> BENEDICT, *supra* note 20, at 49.

<sup>41</sup> *Id.* at 49.

<sup>42</sup> *Id.* at 107-08.

<sup>43</sup> See LEIBOWITZ, *supra* note 1, at 129-30 (“Whether Hayes or Tilden became President, the country didn’t want military reconstruction to continue; and without it, no matter who was President, it didn’t look like the legal interpretation that was desired could be ob-

effort would have been made. Not only Johnson's policies, but the Southern elite also won the battle and it remained the victor for over eighty years. The result haunts us still.

## II. THE NIXON IMPEACHMENT EFFORT

For Mr. Leibowitz, the impeachment process involving Richard Nixon was too partisan and too damaging for the nation.<sup>44</sup> He takes this position while relating quite well the story of the cover-up of the Watergate burglary (encompassing at the highest level lying to law enforcement and to the American people, withholding evidence, suborning perjury, and paying hush money) and the involvement of Nixon and those close to him in illegal acts in other realms (the misuse of the Department of Justice, Federal Bureau of Investigation, Central Intelligence Agency, Secret Service, Internal Revenue Service, and Republican Party for harassment of political opponents; involvement in illegal surveillance as well as stimulating and sanctioning "dirty tricks" in the 1972 Presidential campaign).<sup>45</sup>

Leibowitz relates all of this, but implies that the investigations of Nixon and the impeachment process were simply a part of a bitter power struggle between the President and Congress and the Democratic Party over Nixon's intentions to substantially reduce the size of the federal government and restructure and limit it.<sup>46</sup>

There is another perspective, which is somewhat beyond Leibowitz's concern, but worth mentioning here. That is to remind the reader of the unconstitutional and extra-constitutional behavior of the Nixon Administration during its first term in office, before its plan to reshape the federal government was a real threat, if indeed it ever was. During that period, federal judges appointed by the President of *both* parties had struck down, often on constitutional grounds, such actions as the dragnet arrests of antiwar demonstrators;<sup>47</sup> extreme claims of executive privilege;<sup>48</sup> exemptions from the Freedom

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tained.”).

<sup>44</sup> See *id.* at 134-35, 137 (comparing the Nixon impeachment to that of Johnson's).

<sup>45</sup> *Id.* at 134.

<sup>46</sup> LEIBOWITZ, *supra* note 1, at 134-35, 137.

<sup>47</sup> *Sullivan v. Murphy*, 444 F.2d 840, 840 (D.C. Cir. 1971). Where the three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit included a Nixon appointee as well as the former number two person of the FBI. *Id.*

<sup>48</sup> See *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783,788 (D.C. Cir. 1971); *Mink v. Envtl. Prot. Agency*, 464 F.2d 742, 746-47 (D.C. Cir. 1971) (both decisions were

of Information Act<sup>49</sup> and of course, the attempt to prevent the Washington Post from running a series of articles on the origin and conduct of the Vietnam War.<sup>50</sup> As the Watergate scandal began accelerating in 1973, federal judges continued to overturn the actions of the Nixon Administration on constitutional grounds.<sup>51</sup>

Leibowitz repeats what I would call the “*Così fan tutte*” defense,<sup>52</sup> one often heard during the years of Watergate, that the illegal and unconstitutional activities of the Nixon Administration were not unique, and that many of the same activities had occurred in previous administrations.<sup>53</sup> But, while some of Nixon’s predecessors had engaged in secret wiretaps or misused the Internal Revenue Service or violated other laws, the number of illegal acts in such a diversity of fields and the number of high officials who committed them were (and are) unprecedented.<sup>54</sup>

As with the Andrew Johnson impeachment, Leibowitz tends to belittle the motives and abilities of those supporting impeachment even though their conduct regarding their public duties brought out the truth and led to Nixon’s downfall.<sup>55</sup> He considers the breadth for the charter of Special Prosecutor Archibald Cox “extraordinary,” “the size of his staff . . . staggering,” and asks “[o]n what basis” Cox could organize his office “so that Watergate was only a portion—a small portion—of his effort?”<sup>56</sup> The basis was, of course, prior public revelations of improper conduct, which had been unconvincingly denied

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per curiam). *Id.* at 743; *Seaborg*, 463 F.2d at 784.

<sup>49</sup> *Soucie v. David*, 448 F.2d 1067, 1070, 1076 (D.C. Cir. 1971) (Nixon appointee on panel).

<sup>50</sup> *United States v. Wash. Post Co.*, 446 F.2d 1327, 1328 (1971), *aff’d*, 403 U.S. 713 (1971).

<sup>51</sup> See JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* 244-263 (2001). For a broader discussion of the Nixon Administration’s litigation before the lower federal courts, see generally STANLEY I. KUTER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990).

<sup>52</sup> Thomas Kemp, *Getting to Grips with Mozart’s Così Fan Tutte*, GRAMOPHONE (June 1, 2012), <http://www.gramophone.co.uk/blog/gramophone-guest-blog/getting-to-grips-with-mozarts-cos%C3%AC-fan-tutte> (Mozart’s great opera, “*Così fan tutte*” is often translated: “They are all like that”) (internal quotation marks omitted).

<sup>53</sup> LEIBOWITZ, *supra* note 1, at 342.

<sup>54</sup> See *id.* at 341-42, 344 (explaining that the rationale of “national security” was also used often and loosely).

<sup>55</sup> See *id.* at 128-29, 134-35 (“[T]he Nixon impeachment was a dispute between the Congress and the Executive over the proper governance of the country similar, if far more subtle, to the Andrew Johnson impeachment dispute almost a century before.”).

<sup>56</sup> *Id.* at 253-55.

by the White House and its supporters. Leibowitz queries “[w]hether Cox was a hero” for not accepting the compromise proposed by the White House permitting the elderly Senator John Stennis, and Stennis alone, to listen to subpoenaed taped conversations, compare them to the actual recordings, and then submit a verified transcript of the recordings to Judge John J. Sirica.<sup>57</sup> He wonders whether in refusing the “Stennis compromise,” Cox had “missed an opportunity to save [his] country a tremendously divisive process?”<sup>58</sup>

Certainly Leibowitz is not the first to term Judge Sirica “overzealous” and his preliminary sentencing of the Watergate burglars “outrageous,”<sup>59</sup> and perhaps that was so, although certainly one or two good words might have been found for the performance of a man who by his overall conduct of the Watergate prosecutions perhaps best exemplifies the meaning of an independent judiciary.<sup>60</sup> It takes Leibowitz but one sentence to diminish the reputations of the chairs of the two Congressional committees, Sam Ervin and Peter Rodino, which educated the nation about the real meaning of separation of powers. Leibowitz puts it this way: “Like [Sam] Ervin in the Senate, [Peter Rodino] was a man who was notable for being undistinguished.”<sup>61</sup> Even the work of the Special Counsel to the House Committee on the Judiciary, John Doar, one of America’s great American public servants, is dismissed. Leibowitz writes that, although Doar’s summation “would be hailed at the time as overwhelmingly persuasive, after a passage of time, except for Watergate, the substantive case is extremely weak.”<sup>62</sup>

While finding no heroes among those whose work contributed to the drive to impeach Nixon, Leibowitz does give a relatively balanced picture of the *events* of the Watergate period.<sup>63</sup> Yet, he has tilted the scales by giving considerable weight to those (few) who see Watergate simply as a contest for power between Congress and the

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<sup>57</sup> *Id.* at 277.

<sup>58</sup> LEIBOWITZ, *supra* note 1, at 277.

<sup>59</sup> *Id.* at 223, 233.

<sup>60</sup> *See id.* at 234-35 (“Sirica’s sentence was designed to force a confession. However much such a sentence appealed to Sirica, whose integrity and earnestness were unquestioned, it cannot be done in the United States. . . . A judge cannot sentence a criminal to life imprisonment to get him to inform on others. Why Sirica thought he could is bewildering.”).

<sup>61</sup> *Id.* at 289.

<sup>62</sup> *Id.* at 303.

<sup>63</sup> *See* LEIBOWITZ, *supra* note 1, at 178-82 (recounting Watergate).

President.<sup>64</sup> The Nixon impeachment was not a mere dispute over the subpoena of a few documents or tapes. Nor was it simply a partisan battle. The central judicial figure had been a conservative Republican. The central figure in the Senate, Sam Ervin, was a conservative Southern Democrat whose views were probably closer to the Nixon Administration than to Northern and Western Democratic liberals.<sup>65</sup> The critical votes for impeachment in the House Judiciary Committee came from Republicans crossing party lines and Southern Democrats whose views were probably not far from Ervin's. No reasonable person could view the impeachable offenses approved by the House Judiciary Committee as justified by "national security."

### III. THE CLINTON IMPEACHMENT

One can hardly disagree with Leibowitz's description of the impeachment of Bill Clinton as partisan and trivial.<sup>66</sup> Substantively, it is hardly worth the 180 pages the author gives to it, but it is a good story told well.<sup>67</sup> Leibowitz takes us through a number of unproven or trivial scandals: Whitewater, Travelgate, the sexual harassment of Paula Jones, the suicide of Vincent Foster and, of course, the saga of the President and the intern.<sup>68</sup> He does not even neglect the final coda, long after the impeachment battle was over—the pardons issued by Clinton during the last days of his administration.<sup>69</sup>

For Bill Clinton's impeachment, the House of Representatives cobbled together a number of offenses connected with the Special Prosecutor's investigations of Clinton's sexual behavior and attached to them—not entirely wrongly—labels such as perjury, obstruction of justice, and abuse of power.<sup>70</sup> The House of Representatives, with overwhelmingly partisan votes, adopted as impeachable offenses perjury to a grand jury and obstruction of justice, two offenses for which Clinton was investigated.<sup>71</sup> If, in the case of Nixon the facts were long at issue (although ultimately they became clear), with Clinton

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<sup>64</sup> *Id.* at 183.

<sup>65</sup> *Id.* at 135.

<sup>66</sup> *See id.* at 420 (arguing that the Republicans controlled both the House of Representatives, as well as the Senate).

<sup>67</sup> *Id.* at 367-547.

<sup>68</sup> LEIBOWITZ, *supra* note 1, at 373-450.

<sup>69</sup> *Id.* at 541.

<sup>70</sup> *Id.* at 474-75.

<sup>71</sup> *Id.* at 512.

the facts were clear; the issue was whether his conduct met the constitutional standard of “high Crimes and Misdemeanors.”<sup>72</sup> Efforts to limit this silly, partisan battle through the use of a censure motion, coupled with a financial penalty, were made by Presidents Gerald Ford and Jimmy Carter and by a bi-partisan group of six Senators.<sup>73</sup> They failed, at least in part, because of Clinton’s refusal to admit to perjury.<sup>74</sup> But, they also failed because the public was able to distinguish quite well between Clinton’s personal failings, of which they did not approve, and Clinton’s performance of his public duties, of which they did.<sup>75</sup>

The Clinton experience is and will be a precedent for the proposition that the impeachment process should not be easy to use. The bar should be set high and the remedy employed only to deal with public wrongdoing.<sup>76</sup> The charges against Clinton involved perjury in a civil suit on a collateral matter and lying to a grand jury to cover up a sexual dalliance.<sup>77</sup> Although the evidence against him could have been used to argue lack of fitness for office and violation of the Take Care Clause of the Constitution, the charges were simply too distant from abuse of office.<sup>78</sup> “[I]mpeachable conduct, whether criminal or not, [ought to arise] from, or relate to, or . . . have a direct substantial effect on[] the execution of the public responsibilities of the president.”<sup>79</sup> In the Clinton case, the misconduct lay, as historian Jack Rakove said, “at the far boundaries of what might be considered impeachable.”<sup>80</sup> In the end, half of the Senate accepted a central argument of the President’s attorneys—that the remedy was disproportionate to the sin. “Clinton’s omissions, half-truths, and apparent lies about his personal sexual conduct simply [were] not the stuff of high

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<sup>72</sup> *Id.* at 479; U.S. CONST. art. II, § 4.

<sup>73</sup> LEIBOWITZ, *supra* note 1, at 480.

<sup>74</sup> *Id.* at 479-84, 517, 522; KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE: CLINTON V. STARR* 611 (2010).

<sup>75</sup> BROWN, *supra* note 3, at 115. The 1998 Congressional elections ended with the strongest “showing of an incumbent president’s party since 1934.” *Id.* at 114.

<sup>76</sup> See LEIBOWITZ, *supra* note 1, at 486 (discussing why the House decided to impeach Clinton).

<sup>77</sup> *Id.* at 486-87.

<sup>78</sup> BROWN, *supra* note 3, at 91.

<sup>79</sup> *Id.* at 115.

<sup>80</sup> *Background and History of Impeachment: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, 105th Cong. 249-50 (1999) (statement of Jack N. Rakove, Stanford University Coe Professor of History and American Studies), *quoted in* BROWN, *supra* note 3, at 104.

crimes and misdemeanors within the contemplation of the Framers.”<sup>81</sup>

At least the trial in the Senate was relatively dignified. Chief Justice Rehnquist presided without partisanship and in the end Clinton did receive tangible punishment of a sort, although not from Congress.<sup>82</sup> He was found in contempt of court and signed a consent order accepting a five-year suspension of his law license.<sup>83</sup>

#### IV. IMPEACHMENT AS A CONSTITUTIONAL REMEDY

This observer does not disagree with the author regarding the inappropriateness of impeachment in the case of President Clinton. He does, however, strongly disagree with the prescription that impeachment generally should be laid upon the shelf. It may well be that once the impeachment process is set in motion, partisan tensions are amplified. It may also be that the impeachment process inevitably becomes a struggle for power between the legislative and executive branches. However, to dismiss impeachment entirely as a constitutional check against the head of the executive branch in an age of “imperial presidents” would be folly.

Leibowitz believes partisanship is bad.<sup>84</sup> He is not wrong in finding no indication that the Framers anticipated how great partisanship in the impeachment process might become.<sup>85</sup> This is no surprise since many of the Framers wished to avoid political parties. Nor can one deny that, in the period we are living through, partisanship has risen to an unhealthy level. Yet, it must not be forgotten that the two great, national parties remain at the core of the American republic; that it is through them that “the people” choose the direction their nation will take as well as those who will hold high office. In many respects, political parties are the nation’s fundamental tools for governmental accountability. Even if extreme partisanship can be a *cause* of impeachment battles, it certainly was not the only and probably not the *major* cause of the Johnson and Nixon impeachment efforts.

Even though, as Raoul Berger wrote two generations ago,

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<sup>81</sup> BROWN, *supra* note 3, at 121.

<sup>82</sup> *Id.* at 122.

<sup>83</sup> LEIBOWITZ, *supra* note 1, at 542.

<sup>84</sup> *Id.* at 548.

<sup>85</sup> *Id.* at 550.

“’Twas ever thus; impeachment was ‘essentially a political weapon’ from its inception in 1388;”<sup>86</sup> nevertheless, one can act politically without being partisan in a narrow sense. Chief Justice Rehnquist, studying the impeachments of Justice Samuel Chase and President Andrew Johnson *before* he was called upon to preside over Clinton’s, asked whether the dominant role played by political parties made the Senate a partisan tribunal, and answered, “Remarkably, in each of these two cases, the answer to that question proved to be no.”<sup>87</sup>

That the impeachment process was harmful to the nation may have been true of the Clinton impeachment. In Nixon’s case, the harm of having a crippled President must be weighed against the evils his administration had done and the lesson the nation received in constitutionalism. It remains an important reminder to future presidents. In Andrew Johnson’s case, the President’s unwillingness to enforce important laws at a crucial time provoked the impeachment.<sup>88</sup> In that sense, the Johnson impeachment was tantamount to a vote of confidence in a parliamentary regime.

Another of Leibowitz’s concerns (and those of many others) is the vagueness of the constitutional standard, “high Crimes and Misdemeanors.”<sup>89</sup> Inevitably, impeachers argue for a broad standard for impeachment, while supporters of the President contend for a standard of criminal behavior akin to treason and bribery committed in the performance of official duties. Of course, ambiguities in the clauses of the United States Constitution are hardly limited to the impeachment clause in Article 2, section 4.<sup>90</sup> Ordinarily, ambiguities in the Constitution are resolved by the courts, although sometimes a long period of practice by the other branches serves as a constitutional precedent. In the case of impeachment, it can be argued that the three experiences with Presidential impeachment have yielded an acceptable standard—impeachment should occur when there are Presi-

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<sup>86</sup> H.R. 93-7, 93d Congress (1973) (enacted) (quoting M. V. Clarke, *The Origin of Impeachment*, in OXFORD ESSAYS IN MEDIEVAL HISTORY 184 (Frederick Maurice Powicke ed., 1934)).

<sup>87</sup> REHNQUIST, *supra* note 3, at 277. John Quincy Adams, however, described the Justice Samuel Chase trial as “a party prosecution.” *Id.* at 107.

<sup>88</sup> BROWN, *supra* note 3, at 120.

<sup>89</sup> LEIBOWITZ, *supra* note 1, at 115-16.

<sup>90</sup> U.S. CONST. art. II, § 4; VAN TASSEL & FINKELMAN, *supra* note 3, at 1-2 (The impeachment clause “must remain ambiguous, for in the end the legitimacy of the impeachment process and the outcome of impeachment trials remain deeply tied to the politics and the social context of the particular time in which individual cases arise.”).



dential actions “predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.”<sup>91</sup> This would include mal-administration, misfeasance and malfeasance in office.<sup>92</sup> As Alexander Hamilton wrote in Federalist 65, impeachment was to be a remedy for offenses “which may with peculiar propriety be denominated POLITICAL” and which arise “from the abuse or violation of some public trust.”<sup>93</sup>

While impeachment may not require the president to have committed a crime, neither should it be used for petty misconduct.<sup>94</sup> As H. Lowell Brown points out, “an impeachable high crime and misdemeanor must be a breach of faith with the Constitution that is so egregious and so exigent that rather than allowing the electorate to do so in an election, the president must be ejected from office immediately by the Congress . . . .”<sup>95</sup> This means “constitutional wrongs that subvert the structure of government . . . and even the Constitution itself . . . .”<sup>96</sup> By that standard, Nixon clearly qualified and Andrew Johnson probably did. Clinton did not.

Leibowitz argues that none of the three Presidential impeachments were “worth it in terms of the damage done to the Presidency and the body politic.”<sup>97</sup> He writes of a country torn apart, of a government badly distracted.<sup>98</sup> He suggests that in the Nixon and Clinton cases impeachment weakened the stature of the United States in international affairs and led each man to take actions that he probably would not have, had he not been facing impeachment.<sup>99</sup> Essentially, Leibowitz accepts Henry Kissinger’s argument that Moscow

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<sup>91</sup> VAN TASSEL & FINKELMAN, *supra* note 3, at 6 (quoting IMPEACHMENT INQUIRY STAFF, COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 49 (1974)).

<sup>92</sup> H.R. DOC. NO. 93-7, at 622. The standard for judges, “Good Behavior” is different and not discussed at length in the Leibowitz book. Raoul Berger states that the impeachment debate at the Constitutional Convention “was almost exclusively concerned with the President.” *Id.* at 649.

<sup>93</sup> THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: BEING A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION AGREED UPON SEPTEMBER 17, 1787, BY THE FEDERAL CONVENTION: FROM THE ORIGINAL TEXT OF ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON 423 (n.d.).

<sup>94</sup> H.R. DOC. NO. 93-7, at 644-45.

<sup>95</sup> BROWN, *supra* note 3, at 123.

<sup>96</sup> LEIBOWITZ, *supra* note 1, at 290 (internal quotation marks omitted).

<sup>97</sup> *Id.* at 9.

<sup>98</sup> *Id.* at 571.

<sup>99</sup> *Id.* at 572-79.

might not have “threatened unilateral military intervention in the Middle East [in October 1973,] if Nixon had been ‘a functioning President.’”<sup>100</sup> He also points to Clinton’s ordering the bombing of suspected chemical, biological and nuclear lab sites in Iraq on the day Congress was to vote on his impeachment.<sup>101</sup> Both presidents, he points out, took trips abroad to bolster their images.<sup>102</sup> For Leibowitz, “the public interest in having a fully functioning President is so great that impeachment is rarely, if ever, wanted.”<sup>103</sup>

In place of impeachment, Leibowitz would have Congress pass a resolution censuring the President, something it did with Andrew Jackson (and later expunged), John Tyler, and James Knox Polk.<sup>104</sup> He argues that “[c]ensure would be easier to accomplish, would be less divisive to the country, and would have a significant impact.”<sup>105</sup> Oddly enough though, rather than looking to the possible restraining effect of censure on the rest of the presidencies of Jackson, Tyler, and Polk, Leibowitz looks to the effects of censure on seven of the nine occasions that the Senator censured one of its own.<sup>106</sup> He finds that in those cases, the censured Senator’s political career ended at the next election.<sup>107</sup>

It is hard to be convinced by this analogy. First, three of those cases occurred when Senators were still being elected by state legislatures. Second, the harm a single Senator can do to the nation by remaining in the Senate for the rest of his term is minimal. Most certainly, the nation’s checks and balances are unlikely to be affected if a Senator remains in the Senate for a few years. However, consigning the constitutional check of Presidential impeachment to the dustbin has far more troubling implications.

Granted that for the past four years a highly partisan Congress has kept a President, seemingly unwilling to put up a pitched battle, hog-tied, at least in domestic matters. Nevertheless, since 1933 there has been an extraordinary growth of Presidential power, which was particularly marked during the presidencies of Lyndon Johnson,

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<sup>100</sup> *Id.* at 576 (quoting ROBERT DALLEK, *NIXON AND KISSENGER: PARTNERS IN POWER* 532 (2007)).

<sup>101</sup> LEIBOWITZ, *supra* note 1, at 579.

<sup>102</sup> *Id.* at 572-79.

<sup>103</sup> *Id.* at 7.

<sup>104</sup> *Id.* at 588; see VAN TASSEL & FINKELMAN, *supra* note 3, at 199-202.

<sup>105</sup> LEIBOWITZ, *supra* note 1, at 588.

<sup>106</sup> *Id.* at 584-88.

<sup>107</sup> *Id.* at 585.

Richard Nixon, Ronald Reagan, and George W. Bush. Wars have been fought with limited Congressional sanction. In the case of Cambodia, the President ordered sustained bombing of a neutral nation and kept the matter secret.<sup>108</sup> Intelligence activities have gone unchecked and illegal surveillance carried out for questionable reasons of national security. To strip Congress of impeachment as a weapon would further weaken the balance of powers that was perhaps the most ingenious creation of the framers of the Constitution.

The impeachment process is lengthy, cumbersome, inefficient and generally not desirable because it weakens the President and distracts the Congress, but it is a central weapon of accountability. However partisan and silly, the impeachment efforts aimed at Bill Clinton, Johnson, and Nixon were legitimately fought over important issues. Andrew Johnson was frustrating the fulfillment of what had become, at least retroactively, one of the purposes of a war that had killed hundreds of thousands of Americans. The President was refusing to execute enormously important policies that had been made by the legislative branch. The stakes for the future of the nation were great. Perhaps in the end Johnson's acquittal was not inappropriate, but the battle against him was warranted.

The impeachment of Richard Nixon was aimed at a Presidential office that had grown enormously powerful, against a President insensitive, if not contemptuous, of the meaning of constitutionalism—that the President too is under the law. He had committed serious felonies. Criminal laws had been violated by his chief aides, members and former members of his Cabinet, and leaders of his political party. Such behavior justified the application of the criminal law to those not holding the Presidential office. In the case of the President, the remedy provided by the Constitution was more than appropriate—it was necessary.

Thus, this reviewer disagrees strongly with Mr. Leibowitz's prescriptions, although he greatly enjoyed his stimulating book and recommends it strongly for others, who then can judge for themselves whether they agree with the author or the reviewer.

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<sup>108</sup> *Id.* at 219-20.