Rehnquist's Renunciation - The Chief Justice's Constitutional Duty to Preside over Impeachment Trials

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REHNQUIST'S RENUNCIATION?
THE CHIEF JUSTICE'S CONSTITUTIONAL DUTY TO "PRESIDE" OVER IMPEACHMENT TRIALS

Michael F. Williams

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I. INTRODUCTION

Retirement and retrospection are inextricably linked, and the retirement of Chief Justice William H. Rehnquist will be no exception. The occasion doubtlessly will evoke an explosion of analysis reviewing the contributions of the "Rehnquist Court" to American jurisprudence.\(^1\) Rehnquist's work as a jurist will provide the predominant focus for most accounts of his legacy, and justifiably so. Few would dispute that the Court's decisions during Rehnquist's tenure as Chief Justice presented a dramatic break from the understanding of the Constitution that prevailed during the Burger era. However, no history on this subject could be complete without also assaying Rehnquist's performance in those obligations particular to the office of the Chief Justice. This Article seeks to provide a point of departure for that discussion.

This Article addresses whether Rehnquist adequately discharged his constitutional responsibility to preside over the impeachment trial of William Jefferson Clinton. Legal scholars have devoted considerable attention to the legal questions surrounding President Clinton's trial, but few have cast a critical eye toward Rehnquist's actions as presiding judge.\(^2\) Even those scholars who have commented upon Rehnquist's performance tend to credit the Chief Justice for amicably having completed a formal or symbolic task.\(^3\) Indeed, the prevail-

\(^1\) Indeed, the retrospection has already begun in earnest. See generally Martin H. Belsky, ed., The Rehnquist Court: A Retrospective (forthcoming Spring 2002); Thomas R. Hensley, The Rehnquist Court: Justices, Rulings, and Legacy (forthcoming Spring 2002).

One hopes that these prospective "retrospectives" are aware of the Supreme Court's decision in Bush v. Gore, 531 U.S. 98 (2000), and other noteworthy opinions issued during the 2000-01 term. Compare Tinsley E. Yarbrough, The Rehnquist Court and the Constitution 244 (2000) (observing that members of the Rehnquist Court are "reluctant . . . to use equal protection as a vessel for rights not mentioned elsewhere in the Constitution") with Stephen E. Gottlieb, Morality Imposed: The Rehnquist Court and Liberty in America 38 (2000) ("Conservative disdain for democracy shows quite starkly in the voting and districting cases where the Court's conservatives have backed away from the Warren Court's insistence on the right to vote, and on equality among voters.").


\(^3\) See, e.g., Bloch, supra note 2, at 159 (observing Rehnquist's role to have been "fairly
ing wisdom in the legal academy holds that the Chief Justice's proper role in impeachment trials is or should be extremely limited.  

This Article provides a different view. The Constitution provides only scarce guidance as to how the Senate should conduct impeachment trials, and instruction on the Chief Justice's role in that process is scarcer still. Nevertheless, the text and structure of the Constitution, historical practice, and recent lessons derived from judicial precedent suggest that the Chief Justice's part in the impeachment process is a significant — if rarely exercised — component in the balance of power within the federal government. In other words, the Chief Justice’s role is one with independent, constitutional import, and it should be recognized as such. This more robust ideal is the standard against which Rehnquist's performance should be measured.

Part II of this Article provides a background on the impeachment process. This section presumes that many of the more interesting legal questions involved in impeachment are known to the reader. In fact, the section’s focus on procedure is intended to avoid precipitating a relapse into the fatigue that enveloped most discussions about the impeachment process during the last two years. Part III of the Article recounts in detail the conventional understandings of the Chief Justice's role in the impeachment process. This section seeks to identify and address the shortcomings of the minimalist conceptions of the duty to preside. Part IV offers an alternative perspective through which to gauge the Chief Justice’s participation in the impeachment process. Specifically, the section suggests that the Chief Justice should exert a strong presence over impeachment trials, with the aim of encouraging reasoned deliberation among individual senators. The section also reviews the conduct of William H. Rehnquist during the impeachment trials of President Clinton, assessing his conduct against the standard introduced therein. Part V addresses the implications of Rehnquist’s performance for future impeachment trials.

II. FEDERAL IMPEACHMENT: PURPOSES AND PROCEDURES

Impeachment is the process by which the Congress may remove from office the President, federal judges, or other civil officers of the United States. The overwhelming majority of impeachments since 1789 have sought to remove federal judges, and the only impeachment trials that have resulted in conviction

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4 See Posner, supra note 2, at 130 ("If the limitation of the Chief Justice's authority in impeachment trials isn't clear as a matter of law (I think it is clear), it is clear as a matter of political theory.") (internal footnote omitted).

involve judges as defendants. However, the more intractable problems related to impeachment arise when the Congress attempts to remove the President from office. It is in that rare context – where the legislative branch challenges directly the executive – that impeachment truly warrants the dire descriptions with which many commentators describe the process. More importantly, only presidential impeachments require the Chief Justice to preside over a Senate trial. This following discussion seeks to place that duty in the broader context of constitutional language, historical practice, and judicial construction.

A. The Impeachment Clauses

The Constitution contains six provisions relating to impeachment. The instruction contained therein is, at the same time, maddeningly vague and extraordinarily detailed. Allocation of responsibility among the branches of government and the houses of Congress is clear. The House of Representatives possesses exclusive authority to impeach – that is, “[t]o accuse; to charge a liability on” public officials. As a practical matter, the House may impeach an official through a simple majority vote, but this is not a constitutional command. The Senate has exclusive authority to conduct trials of those public officials so accused, and to acquit or convict those officials. Decisions to convict a federal


8 See U.S. CONST. art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside.").

9 See JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 1 (1978); see also MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 4 n.13 (2d ed. 2000) (identifying five of the six impeachment clauses, without recognizing the prohibition upon pardons for impeachment contained in Article II, section 2, clause 1). The impeachment clauses are described in greater detail infra at notes 11-18 and accompanying text.

10 BLACK'S LAW DICTIONARY 753 (6th ed. 1990); see also GERHARDT, supra note 9, at 26 (“In the words of traditional English parliamentary practice . . . the managers orally ‘impeach’ – or accuse – the impeached official (or respondent) in the Senate.”).

11 See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

12 See id. The Constitution does not provide a requisite threshold for the approval of articles of impeachment, and it grants the House discretion to “determine the Rules of its Proceedings”. Id., art. I, § 5, cl. 2. In practice, it would be nearly impossible for the House to fashion an impeachment procedure that requires less than a majority of its members. A majority could readily undo that process through a parliamentary point of order. See generally 3 THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 1548 (David C. Bacon et al., eds. 1995) (describing requirements for interposing a point of order to halt substantive decisions).

13 See U.S. CONST. art I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).
official require the vote of two-thirds of the senators present, and the senators who participate must "be on Oath or Affirmation." The effect of impeachment upon a public official is nearly as clear as the allocation of responsibility among branches. Impeachment removes the public official from his or her post and disqualifies the official from thereafter holding a position of public trust. Impeachment is beyond the scope of those offenses for which the President may grant pardons, and a convicted official remains liable in criminal or civil courts. Before the House of Representatives approved articles of impeachment against President Clinton, some questions lingered about whether the substitution of censure—a resolution by one or both houses expressing disapproval of the President’s conduct—for impeachment could comport with the Constitution. The overwhelming weight of authority indicates that at least some forms of censure are acceptable alternatives to impeachment.

Aside from these "easy questions," two ambiguous clauses pertaining to impeachment have generated important and persistent problems of interpretation. First, the designation within the Constitution that impeachment remedy “Treason, Bribery, or other high Crimes and Misdemeanors” has sparked a debate about what conduct subjects an official to impeachment, who decides whether particular conduct is an impeachable offense, and whether an official has any recourse if impeached for an offense that does not meet the constitu-

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14 See id. ("And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

15 Id.

16 See id., art. I, § 3, cl. 7 ("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.").

17 See id., art. II, § 2, cl. 1 ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

18 See id., art. I, § 3, cl. 7 ("The Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.").

19 See House Floor Debate on Four Articles of Impeachment against President Clinton, Second Segment, Dec. 18, 1998 (Remarks of Rep. Ray LaHood (R-Ill.)), available at 1998 WL 883527 ("We discussed this in the committee, and there were numerous constitutional experts that addressed that. Stephen Presser, Raoul Berger Professor of Legal History at Northwestern University School of Law, wrote a letter to Congressman Delahunt disagreeing about censure, and saying that censure would not be constitutional. He said, 'In my opinion, impeachment is the remedy for misconduct.'").

20 See Michael J. Gerhardt, The Constitutionality of Censure, 33 U. RICH. L. REV. 33, 34 (1999) (asserting that "every conceivable source of constitutional authority—text, structure, original understanding, and historical practices—supports the legitimacy of the House's and/or the Senate's passage of a resolution expressing disapproval of the President's conduct.").

tional threshold. The impeachment of President Clinton appears to have heightened, rather than resolved, the disagreement on those matters. Second, and more importantly for the subject of this Article, the delegation to the Senate of the power to "try all Impeachments" sparked litigation about what procedures the Constitution requires of a Senate impeachment trial. The Supreme Court deemed this question to be a nonjusticiability political question, but the Court rooted its decision on grounds, discussed below, that did not foreclose entirely future challenges to the procedure employed in Senate trials.

Finally, the requirement that the Chief Justice preside over the impeachment trial of the President is one of the ambiguous Impeachment Clauses. During the Clinton impeachment proceedings, the Congress, the Chief Justice, and commentators considered the definition of "preside" to be an easy question, as plain as the quantum of votes required to convict the President, or the requirement that the House impeach and the Senate conduct a trial. That the word "preside" is at least as ambiguous as the word "try," and that the Supreme Court had recently considered the latter to be so unclear as to avoid judi-


23 The academic discussion of this topic is almost too voluminous to cite with any effect, but the testimony before the House Judiciary Committee of several prominent law professors during the Clinton impeachment proceedings provides an illustrative cross-section. See, e.g., Testimony before the House Judiciary Committee, Subcommittee on Impeachment, U.S. House of Representatives, Nov. 9, 1998, available at 1998 WL 783744 (testimony of Professor Susan Low Bloch); Testimony before the House Judiciary Committee, Subcommittee on Impeachment, U.S. House of Representatives, Nov. 9, 1998, available at 1998 WL 781678 (testimony of Professor Robert F. Drinan); Testimony before the House Judiciary Committee, Subcommittee on Impeachment, U.S. House of Representatives, Nov. 9, 1998, available at 1998 WL 783736 (testimony of Professor Michael J. Gerhardt); Testimony before the House Judiciary Committee, Subcommittee on Impeachment, U.S. House of Representatives, Nov. 9, 1998, available at 1998 WL 783740 (testimony of Professor Jonathan Turley); Presentation of the White House to the Committee on the Judiciary, U.S. House of Representatives, Dec. 8, 1998, available at 1998 WL 850444 (testimony of Professor Bruce Ackerman) [hereinafter Presentation of the White House to the Committee on the Judiciary].

24 See supra note 13 and accompanying text.


26 See id. at 238 ("[W]e conclude, after exercising that delicate responsibility, that the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.").

27 See infra Part II.C.

28 See supra note 8 and accompanying text.
cial definition,29 appeared insignificant compared to the pressing legal questions that directly touched upon whether the President would be ousted from office. With that said, in contrast to the requisite elements of an impeachment trial, the history of Article I, section 3 provides some guidance on the contemplated scope of the Chief Justice's role.

B. Historical Insights on the Role of the Chief Justice

That the Constitution establishes procedures particular to presidential impeachment trials is no accident. The Framers drafted the Impeachment Clauses with the removal of the President primarily in mind.30 The deliberations of the Framers and of the delegates to ratifying conventions provide insights into why the Framers thought the Senate to be the proper forum for the trial of impeachments, and why the Chief Justice has any part in the trial of the President. The lessons that one can derive from history on these matters falls into two broad categories: the Framers' concern for balance between the legislative and executive branches and the competing virtues of law and politics as animating principles for adjudicating impeachment.

These problems of institutional balance permeate the Framers' discussion of impeachment procedures. Historical literature recounts the debates at the Convention about whether to establish a strong executive or a strong legislature in excruciating detail, and the allocation of power within the national government colored every decision on impeachment. Even for those scholars who do not believe the original intent of the Framers to be the conclusive goal of constitutional interpretation, the proposals for impeachment procedures offered at the Convention are significant for their persuasive authority.31 In other words, beyond being legislative history, the derivation of the impeachment proposals provides an extraordinary survey in political theory. As such, the Framers' ideas about the allocation of responsibility among the coordinate branches is relevant in both the positive and the normative sense to determining the Chief Justice's appropriate role.

The initial draft for a national government presented to the Convention's Committee of the Whole accorded to the proposed national judiciary the authority to adjudicate "impeachments of any National officers."32 At the time the Committee debated that plan, originally proposed by Edmund Randolph,33

29 See Nixon, 506 U.S. at 230
30 LABOVITZ, supra note 9, at 2; see also BERGER, supra note 5, at 97.
31 See GERHARDT, supra note 9, at 4 ("[I]t is worth examining in some detail the constitutional convention debates on impeachment because they not only are inherently interesting but also reflect the understanding of reasonable readers of the document at or around the time of its drafting and ratification.").
32 LABOVITZ, supra note 9, at 2 (quoting Virginia Plan at art. 9).
33 Id.; see also GERHARDT, supra note 9, at 5.
its members had not yet determined whether national executive authority would reside within a single person. The delegates perceived it necessary to create a procedure for removing federal officials—"to place the power of removing somewhere," in the words of John Dickinson of Delaware—but they disagreed about the desirability of placing such power within the hands of judges.

Dickinson proposed that the executive be removed upon petition of a majority of state legislatures after trial by the national legislature. By rough analogy to our constitutional system, the Senate, as it existed before the enactment of the Seventeenth Amendment, could remove the President by majority vote. During debate, James Madison of Virginia and James Wilson of Pennsylvania objected that the proposal would "enable a minority of the people to prevent [the] removal of an officer who had rendered himself justly criminal in the eyes of a majority," and this criticism doomed the Dickinson resolution. Seen as excessively counter-majoritarian, the resolution garnered the support of only Delaware upon a vote, with the rest of the Committee of the Whole pronouncing an overwhelming rejection. Ultimately, the Committee, propelled by the support of Madison and Randolph, discharged Article Nine of the Virginia Plan, which granted jurisdiction over impeachments to the judiciary.

Article Nine did not last long. On July 17, 1787, the Convention struck the clause giving the judiciary jurisdiction over impeachments. At the time of that decision, the delegates had not yet determined the method by which judges would be appointed, nor whether the executive would be eligible to serve more than one fixed term of office. The decision to strike Article Nine granted the delegates a tabula rasa upon which to decide whether the executive would be subject to impeachment and what entity or entities would assert and resolve impeachments.

The Convention affirmed that federal officials would be subject to impeachment, and the delegates then addressed the allocation of impeachment authority. Two proposals framed the deliberations, from the initial report of the

34 See LABOVITZ, supra note 9, at 2.
35 Id. at 3.
36 See id.
37 See U.S. CONST. amend. XVII.
38 LABOVITZ, supra note 9, at 3. The counter-majoritarian concerns resulted from the ability of states with small populations, such as (Dickinson's) Delaware, to seek or to oppose removal with strength equal to that of larger states, such as (Madison's) Virginia and (Wilson's) Pennsylvania.
39 See id.
40 See LABOVITZ, supra note 9, at 5; see also GERHARDT, supra note 9, at 5.
41 LABOVITZ, supra note 9, at 5.
42 See id.
43 See id. at 6.
Committee on the Whole, through the debates on the Committee on Detail and the Committee of Eleven, to the Convention’s final decision to rest the authority to conduct impeachment trials within the exclusive jurisdiction of the Senate.

Several delegates believed that the judiciary should possess all power over impeachments. Madison and Randolph, the strongest proponents of the Virginia Plan in the Committee of the Whole, advocated granting to the Supreme Court authority over the initiation and trial of impeachments. Alexander Hamilton proposed a variation based on the New York Constitution, under which all impeachments would be “tried by a Court to consist of the Chief or Judge of the Superior Court of Law of each state.” William Paterson of New Jersey suggested that the national legislature hold the power to initiate impeachments. The Committee on Detail approved a modified version of Paterson’s “New Jersey Plan” in the draft resolution that it released on August 6, 1787, granting the House of Representatives the “sole power of impeachment,” but recommending that “impeachments shall be . . . before the Senate and the judges of the [federal] judicial Court.”

The initial proposal to give the judiciary authority to try impeachments is significant in several respects. First, the proposal reflected that the Framers considered impeachment to be primarily a legal or judicial endeavor. As demonstrated by the rejection of Dickinson’s proposal in the Committee of the Whole and subsequent proposals for a parliamentary-type system, the Framers considered impeachment to be an undertaking governed by principle, rather than raw politics. Even Hamilton, eventually a fierce proponent of legislative control of impeachment trials, would later warn of the connection between impeachment and “preexisting factions.” Hamilton did not dispute that principles should motivate impeachment, but asserted that the super-majoritarian provi-

44 The Committee on Detail possessed responsibility for producing a draft constitution composed of the various proposals that prevailed on the floor. LABOVITZ, supra note 9, at 11.

45 The Committee on Eleven possessed responsibility for reporting those parts of the Constitution which had not yet been acted upon. GERHARDT, supra note 9, at 6.

46 See id. at 5-6.

47 Id. at 5-6.

48 See id. at 5.

49 Id., at 6; see also Michael J. Gerhardt, Constitutional Limits to Impeachment and Its Alternatives, 68 TEX. L. REV. 1, 11 n.36 (1989) [hereinafter Gerhardt, Constitutional Limits to Impeachment and Its Alternatives].

50 See Akhil Reed Amar, On Impeaching Presidents, 28 HOSTRA L. REV. 291, 307 (1999) (“Sometimes, the rule of law does require a Senator to damn the polls. If in her heart a Senator thinks the President is innocent in fact (he actually did not do it) or in law (even if he did it, it is not a ‘high crime or misdemeanor’), then she must vote not guilty — even if she thereby offends her constituents, who want that man’s head.”).

51 THE FEDERALIST No. 65, at 424-25 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); see also BERGER, supra note 5, at 100 (describing the contrary views of James Madison).
sions contained in the Constitution could be sufficient to alleviate the effects of partisanship on the impeachment process.\textsuperscript{52}

Second, the strongest opposition to vesting the legislature with the power to remove the executive arose from fears that doing so would erode the executive’s authority. Madison observed that such an arrangement would make the President “improperly dependent” on the Senate for any conduct that could be characterized as an impeachable offense.\textsuperscript{53} Charles Pinckney of South Carolina warned that granting the legislature the authority to remove the executive would vitiate the executive’s veto power.\textsuperscript{54} Rufus King of Massachusetts concurred that “under no circumstances ought [the executive] to be impeachable by the Legislature” because such an arrangement would be “destructive of [the executive’s] independence and of the principles of the Constitution.”\textsuperscript{55} The two concerns voiced in this debate – against partisan impeachment and against dooming the executive to legislative sufferance – were recurring themes during President Clinton’s impeachment trial.

The second proposal, by Gouverneur Morris of Pennsylvania, an early proponent of choosing the executive through popular election,\textsuperscript{56} sought to place the power to try impeachments exclusively within the national legislature. Morris moved to postpone consideration on the inclusion of impeachment trials within the Supreme Court’s jurisdiction.\textsuperscript{57} The success of Morris’s motion had the effect of giving the Committee of Eleven license to draft impeachment trial procedure.\textsuperscript{58} The committee decided, first, that a college of national electors, rather than the Senate, would elect the President, and, second, that the Senate would possess “power to try all impeachments.”\textsuperscript{59} It was this draft that eventually prevailed at the Convention, with only Pennsylvania and Virginia dissenting from the decision to make the Senate the sole forum for impeachment trials.\textsuperscript{60}

There are important lessons to be derived from this shift as well. The decision to vest the Senate with the power over impeachment trials was not the product of reasoned deliberation by the Convention as a whole, but resulted from a parliamentary maneuver that delegated decision-making control to a committee favorable to Morris’s opinion. The Convention did approve the proposals, and there is no question that the result was legitimate, but the delegates

\textsuperscript{52} \textsc{The Federalist} No. 65, supra note 51, at 424 (Alexander Hamilton).
\textsuperscript{53} \textsc{Gerhardt}, supra note 9, at 7; see also \textsc{Labovitz}, supra note 9, at 15.
\textsuperscript{54} See \textsc{Labovitz}, supra note 9, at 8-9; see also \textsc{Berger}, supra note 5, at 96, 100.
\textsuperscript{55} \textsc{Labovitz}, supra note 9, at 9.
\textsuperscript{56} \textit{Id.} at 4.
\textsuperscript{57} \textsc{Gerhardt}, supra note 9, at 6.
\textsuperscript{58} See supra note 44.
\textsuperscript{59} \textsc{Gerhardt}, supra note 9, at 6-7.
\textsuperscript{60} \textit{Id.} at 7.
did not review the respective virtues of trial by court or by legislature during the debates.\textsuperscript{61} The Committee of Eleven’s report was a paradigmatic legislative log-roll, bundling several momentous decisions into one recommendation.\textsuperscript{62}

The objections to vesting trial authority in the judiciary differed qualitatively from the objections against granting power to the legislature. Morris was concerned that granting the Supreme Court command of impeachment trials would create conflicts of interest for the Court and the executive.\textsuperscript{63} The Committee on Detail proposed that the Chief Justice of the Supreme Court be appointed to the President’s privy council, an idea upon which the Convention never voted to approve or to reject.\textsuperscript{64} Morris noted that it would be anomalous for the President’s fate to hinge on the judgment of his counselor.\textsuperscript{65} Roger Sherman disagreed with delegating to the Supreme Court authority over presidential impeachment trials because “the Judges would be appointed by [the president].”\textsuperscript{66} Morris and Hamilton pointed to the additional problem of granting the Supreme Court jurisdiction over impeachment trials because the Court might subsequently rule on criminal or civil trials of the same official.\textsuperscript{67} These objections may be properly characterized as those based on potential for the appearance of conflict, rather than systemic problems with the balance of powers among the branches.

Many delegates did voice structural concerns about holding impeachment trials in the judiciary. Hamilton’s defense of granting exclusive power to the legislature over impeachment contained in \textit{The Federalist No. 65}, for example, is the justification for legislative trial that prevails in popular thought today.\textsuperscript{68} The essay appealed to English and colonial precedent,\textsuperscript{69} but also forcefully cast impeachment as a check by popular representatives upon overreaching

\begin{enumerate}
\item See \textit{Labovitz}, supra note 9, at 19.
\item See Kathleen M. Sullivan, \textit{Unconstitutional Conditions}, 102 HARV. L. REV. 1413, 1469 n.248 (1989) (“‘Logrolling’ refers to the practice of trading a vote on one issue in exchange for another’s vote on another issue. The term derives from the construction of log cabins in new settlements: ‘I’ll roll your log if you’ll roll mine.’ The practice of attaching substantive riders to appropriations bills furnishes a familiar example. A faction unable to pass its agenda in the normal course may succeed by holding the rest of a carefully wrought budget hostage to its goals.”) See generally \textit{Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law} (1997).
\item See \textit{Labovitz}, supra note 9, at 12.
\item \textit{Id.} at 12 n.24.
\item See \textit{id.} at 12.
\item \textit{Id.} at 16.
\item See Gerhardt, \textit{Constitutional Limits to Impeachment and Its Alternatives}, supra note 49, at 12 n.41.
\item See \textit{supra} note 51; see also \textit{Labovitz}, \textit{supra} note 9, at 19.
\item See \textit{The Federalist No. 65}, \textit{supra} note 51, at 427.
\end{enumerate}
by the executive branch. 70 Similarly, Madison's Convention notes describe the concern that delegating control of impeachment trials to the judiciary would taint the courts. 71 However, these structural reasons for not delegating impeachment trials to the Supreme Court address different concerns than those reflected in Madison's notes. The objections do not contend that principle should not guide impeachment, but they identify reasons why the Senate would provide a more legitimate or more responsive tribunal for applying those principles. Like Madison, Hamilton recognized passions and partisanship within the Senate to be a persistent problem, but Hamilton disagreed with Madison about the extent to which factionalism posed a real threat to the republic. 72

The Committee of Eleven introduced the idea that the Chief Justice would preside over Senate impeachment trials. 73 The provision was not the subject of debate at the Convention, and the directive appeared in the wake of the more significant decision to strip the judiciary of all authority to conduct impeachment trials. 74

C. The Lessons of Later Judicial Precedent

The United States Supreme Court had occasion to revisit the history of the Impeachment Clauses in Nixon v. United States, 75 in which the Court rejected as a nonjusticiable political question a challenge by an impeached federal judge to impeachment procedures that did not include a full-evidentiary hearing in the Senate. 76 In so doing, the Court declined to decide whether the former judge had been tried by the Senate in a procedural manner that comported with the Senate's constitutional duty. Commentators have declared that the decision effectively foreclosed all judicial review of impeachment trials. 77

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70 LABOVITZ, supra note 9, at 19; see also Gerhardt, Constitutional Limits to Impeachment and Its Alternatives, supra note 49, at 124.
72 See supra note 57 and accompanying text.
73 See LABOVITZ, supra note 9, at 13.
74 See Gerhardt, Constitutional Limits to Impeachment and Its Alternatives, supra note 49, at 26-27 ("No doubt, the framers may have envisioned a trial-like proceeding as the means by which the Senate would effect impeachments and removals, but this fact hardly justifies the inference of an appeal to a court of law, particularly because the Constitution explicitly directs the Chief Justice to preside over presidential impeachments and because the framers specifically rejected having judges serve as the impeachment or removal tribunal.").
76 See id. at 238 ("[W]e conclude, after exercising that delicate responsibility, that the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.").
77 See Michael J. Gerhardt, Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon, 44 DUK L. J. 231, 233 (1994) ("Nixon recognized that in the area of im-
Judge Nixon challenged the validity of Senate Impeachment Rule XI, which permits a select committee of Senators to receive and consider evidence of impeachable offenses, obviating the need for the entire Senate to devote its attention to an impeachment trial.\(^7\) In finding that the Supreme Court could not review Nixon's allegation that Rule XI violated the Senate's constitutional obligation to "try" impeachments,\(^7\) Chief Justice Rehnquist made two observations of great significance to the scope of the Chief Justice's responsibility to "preside" that appears in the Impeachment Trial Clause.

First, Chief Justice Rehnquist determined that the word "'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions.\(^8\) The Chief Justice examined the plain text of the Constitution and dictionary definitions of the word "try" dating to the inception of the Republic.\(^8\) In language that could apply with equal force to the meaning of the word "preside" that appears in the same clause of the Constitution, the Chief Justice concluded that there was insufficient evidence to rule that the use of the word "try" in the Impeachment Trial Clause provided any implied limitations on the Senate's conduct of impeachment trials.\(^8\) The term was too imprecise to provide courts guidance as to how the Senate should conduct its proceedings, and the Supreme Court found this to support the conclusion that the Court could not review the constitutional validity of Rule XI.

Second, Chief Justice Rehnquist observed that the existence of other, more specific, procedural safeguards in the Impeachment Trial Clause cast doubt upon the implied existence of judicially enforceable trial prerequisites aside from those delineated in the Constitution itself. Referring to the requirements that Senators be under Oath when considering impeachment,\(^8\) that the

\(^{78}\) See Senate Committee on Rules and Administration, Senate Impeachment Rule XI, S. Doc. No. 1, 101st Cong., 1st Sess., 186 (1989) ("[T]he presiding officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof . . . shall . . . exercise all the powers and functions conferred upon the Senate . . . when sitting on impeachment trials.")

\(^{79}\) See supra note 13 and accompanying text.


\(^{81}\) See id.

\(^{82}\) See id. ("Based on the variety of definitions, however, we cannot say that the Framers used the word 'try' as an implied limitation on the method by which the Senate might proceed in trying impeachments.").

\(^{83}\) See supra note 15 and accompanying text.
Senate not convict without a super-majority of support,\textsuperscript{84} and that the Chief Justice preside over presidential impeachment trials,\textsuperscript{85} the Chief Justice observed that the “limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word ‘try’ in the first sentence.”\textsuperscript{86} In other words, the explicit safeguards refuted the possibility of implicit procedural requirements.

The lessons of Nixon for the question of the Chief Justice’s role in presidential impeachment trials are straightforward. The conduct that constitutes “to preside” is ambiguous and, under the rationale of Nixon, probably would elude meaningful judicial review. However, Chief Justice Rehnquist identified the Chief Justice’s role in presidential impeachments to be an “explicit constitutional constraint... on the impeachment power.”\textsuperscript{87} To the extent that this conception of the duty to preside is accurate, the Chief Justice’s part in impeachment proceedings cannot be a complete nullity.

III. CONVENTIONAL IDEAS ABOUT THE DUTY TO PRESIDE AND THEIR SHORTCOMINGS

This section of the Article reviews the conventional conceptions of the duty to preside that prevail in the legal academy today. This section posits that, amidst the weightier issues that enveloped the potential removal of a President, the legal academy directed scant attention toward the performance of the Chief Justice, and that critical review of the Chief Justice’s conduct to date has lacked an overarching normative framework through which to assay the Chief Justice’s role.

A. The Minimalist Notion of the Chief Justice As Symbolic Official

The conception of the duty to preside that goes furthest in denying the Chief Justice any structural part in the impeachment of the President is that which grants the position a completely symbolic role. Under this perspective, the justification for the Chief Justice’s participation in the impeachment process is symbolic.\textsuperscript{88} In the words of Professor Akhil Reed Amar, the reason for the Chief Justice’s occupation of the Vice President’s chair in the Senate chamber is “to mark these [presidential] impeachments as hugely distinct from all others, calling for special solemnity.”\textsuperscript{89} Presidential impeachments, as Professor Amar

\textsuperscript{84} See supra note 14 and accompanying text.
\textsuperscript{85} See U.S. CONST. art. I, § 3, cl. 6 (“When the President of the United States is tried, the Chief Justice shall preside.”).
\textsuperscript{86} Nixon, 506 U.S. at 230.
\textsuperscript{87} Gerhardt, Rediscovering Nonjusticiability, supra note 77, at 248-49.
\textsuperscript{88} See Amar, supra note 50, at 311.
\textsuperscript{89} Id. at 311-12.
observes, have the potential to "transform . . . an entire branch of government." The sight of the Chief Justice of the United States, the nation’s most powerful jurist, sitting (or standing) on the dais is supposed to instill the impeachment trial with a sense of gravity. As with any courtroom, the specter of a judge sitting on high is to warn the Senators, impeachment managers from the House, defense attorneys, witnesses, and assembled onlookers that something of great importance transpires.

Support may be found elsewhere in the Constitution for the proposition that the Chief Justice’s participation has a symbolic significance in the impeachment process. The Constitution requires that Senators “be on Oath or Affirmation” during impeachment trials. Pursuant to this requirement, Rule XXIV of the Senate’s rules on impeachment procedure establish the form of the oath to be administered to the members of the Senate sitting in the trial of impeachments:

I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of [the impeached official], now pending, I will do impartial justice according to the Constitution and its laws: So help me God.

The Chief Justice recognized this constitutional requirement to be another explicit constraint on the Senate’s impeachment authority in Nixon. When one considers that the Senators have already sworn, by virtue of their position as public officials of the United States, an oath to uphold the Constitution and its laws, the special oath taken before participating in an impeachment trial, the oath of impeachment must be either wholly redundant or of great – and intentional – symbolic value. Accordingly, it is likely that the Framers did wish to instill solemnity within the proceedings.

Even conceding that it is desirable for participants in presidential impeachments to recognize the gravity of their actions, there are several problems

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90 Id. at 304.

91 See Senate Impeachment Trial of William J. Clinton, Jan. 14, 1999, 1999 WL 12853 (recording Chief Justice Rehnquist’s warning that he “would like to inform members of the Senate and the parties in this case of my need to stand on occasion to stretch my back. I have no intention that the proceedings should be any way interrupted when I do so.”).

92 See U.S. CONST. art. I, § 3, cl. 6.


95 See U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).
with the idea that the Constitution memorializes a duty to remind the players in the impeachment drama that they are involved in something important.

First, this perspective fails to recognize the substantive importance of the Chief Justice's role. As discussion of Chief Justice Rehnquist's decision in Nixon indicated, the duty to preside is an explicit -- if ambiguous -- constraint on the power of the Senate.\textsuperscript{96} The Chief Justice does rule on questions of procedure and evidence that pertain to the Senate trial.\textsuperscript{97} If the primary justification for seating a member of the judiciary on the dais is to instill solemnity in the proceedings, the Chief Justice -- or any official, for that matter -- could perform that function without possessing that sort of procedural authority.

In addition, the Chief Justice's role could conceivably expand beyond applying the procedural rules that the Senate has already established.\textsuperscript{98} Consider the case of a hypothetical Senate impeachment trial in which a majority of the Senate attempts to institute a flawed procedural mechanism, for example, placing a burden upon the accused to disprove the existence of an impeachable offense. The accused might rightfully claim that such a scheme violates the Fifth Amendment guarantee of due process.\textsuperscript{99} Even if the procedural chicanery does not rise to the level of a due process violation, the gambit might nevertheless reflect poorly upon the fairness and the legitimacy of the trial. Few scholars would assert that, in that case, the Chief Justice should not intervene. A failure on the part of the Chief Justice to interpose an objection -- or, at least, to uphold the objection of the accused -- in those circumstances, independently of the Senate, could cause him to violate his own oath to uphold the Constitution.\textsuperscript{100}

That the Senate could become infected with partisanship was well within the contemplation of the Framers. Indeed, it was a driving force in the campaign to place impeachment trials within the jurisdiction of the judiciary.\textsuperscript{101} Although it is true that the Convention ultimately approved a system different from the Virginia Plan, the somewhat cryptic choice of the Committee of Eleven to replace judicial trials with a Senate trial over which the Chief Justice would preside offers some circumstantial support for the proposition that the Chief Justice is not intended to provide the Senate a high priest who enforces solemn traditions.

\textsuperscript{96} See Nixon, 506 U.S. at 230.

\textsuperscript{97} See Selected Materials, supra note 93, at 108-09.

\textsuperscript{98} See John O. McGinnis, Impeachment: The Structural Understanding, 67 GEO. WASH. L. REV. 650, 652 (1999) ("And in the case of presidential impeachment, they even required the Nation's highest judicial officer--the Chief Justice of the United States--to preside over the trial to check any partisan procedural devices.").

\textsuperscript{99} See U.S. CONST. amend. V ("No person shall be . . . be deprived of life, liberty or property, without due process of law"); see also Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952) (recognizing the possibility of a property interest in public employment that falls within the protections of the Due Process Clause).

\textsuperscript{100} See U.S. CONST. art. VI, cl. 3.

\textsuperscript{101} See supra notes 40-43 and accompanying text.
Second, the idea of the Chief Justice as a symbolic official is inconsistent with conventional understandings of the Constitution's purpose. In contrast to the Declaration of Independence, with its broad assertions of liberty, the Constitution is, and has long been recognized as, "an inherently practical document." The Framers did not evince a concern for appearances when they drafted sensitive constitutional provisions, such as the Refugee Slave Clause. It is improbable that, in this instance, the Framers chose to bow to the power of symbols and install a figurehead over presidential impeachment trials.

The requirements of an oath, as generally applicable to public officials and specifically applicable to Senators participating in impeachment trials, might seem to be a concession to symbolism when viewed through a contemporary lens. However, there is strong evidence that the Framers viewed oaths as tangible sources of obligation, not hortatory gestures.

Furthermore, that the Framers delegated to the Chief Justice an authority that intermingled with that of a coordinate branch casts further doubt that the Framers intended for the Chief Justice's role to be illustrative or inspirational. The Framers, to use a modern cliché, took separation of powers very seriously. Indeed, Chief Justice Rehnquist commented on this solicitude for functional separation in his own account of the impeachment trial of Andrew Johnson:

One need only note the way in which the framers arranged the text of the United States Constitution to realize that they were concerned about the separation of powers within the new federal government which they were creating. Each of the three powers of government — legislative, executive, and judicial — is dealt with in a separate article. Article I grants legislative power to Congress, Article II grants the executive power to the President, and Article III vests the judicial power in the Federal Courts.

Chief Justice Rehnquist's focus on the textual structure of the Constitution is illuminating. The Constitution establishes important components of the balance among coordinate branches by listing responsibilities beyond the confines of a particular branch's article. The presidential veto power, the Senate's responsibilities with regard to federal appointments, the Senate's responsibil-

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103 U.S. CONST. art. IV, § 2, cl. 3.
106 See U.S. CONST. art. I, § 7, cl. 2.
107 See U.S. CONST. art. II, § 2, cl. 2.
ties with regard to treaty promulgation, and the impeachment procedure itself involve responsibilities that transcend the textual allocation of power into the article associated with a particular branch.

The Framers' decision to include the Chief Justice's role in presidential impeachments in this select class of "cross-article" delegations evinces something qualitatively different than the hope that the Chief Justice would maintain solemnity when the Senate attempts to remove the President. The Constitution does not mingle the responsibilities of the branches for such pedestrian aims. Instead, the Framers resorted to cross-listing institutional responsibilities only when enumeration could not suffice to constrain the power of a coordinate branch. In other words, the Chief Justice's duty to preside falls into a narrow structural category of constitutional directives: those that appear when to permit one branch to define and exert its own authority would upset the balance in the national government as a whole.

That the Framers recognized impeachment to be a *sui generis* sort of inter-branch phenomenon is clear throughout the Constitution's organization. In addition to vesting power over executive (Article II) and judicial (Article III) officials in Article I, the Constitution also prohibits the executive (Article II) from issuing a pardon to the subject of an impeachment, and specifies that the impeached official shall be liable to other judicial (Article III) remedies after the impeachment is consummated. In light of this elegant and purposive regime, it would be, at least, out of character for the Framers to grant the Chief Justice a symbolic place within the text of Article I. The idea is particularly striking when one considers that the Framers did not include what has come to be the Chief Justice's most visible symbolic role in American political life, administering the Oath of Office at the President's inauguration.

The Framers also recognized the primary danger of impeachment to be aggrandizement by the legislative branch. Hamilton's defense of vesting the Senate with the power to try impeachments did not purport to eliminate the problems associated with factionalism. As Rehnquist observes, "[t]he Framers were particularly concerned about the possibility of overreaching and bullying by the legislative branch – Congress – against the other branches." The Convention selected the Senate as the forum for impeachment trials because its delegates considered the absence of political accountability among judges to be a greater evil than partisan passions where removing the President is concerned. The appointment of the Chief Justice to the Senate as presiding officer during presidential impeachment trials was, against this context, a manner to alleviate

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108 See id.
109 See U.S. CONST. art. II, § 1, cl. 7 (establishing text of Oath, but with no mention of the Chief Justice).
110 See THE FEDERALIST NO. 65, supra note 51, at 424.
111 See id.
112 REHNQUIST, supra note 105, at 9.
the danger of a congressional putesch while retaining the legitimacy associated with placing the ultimate decision to convict a President in legislative hands.

In sum, something hollow lies at the center of the idea that the Chief Justice's role in the presidential impeachment process is merely symbolic. The delegation to the Chief Justice of actual procedural authority, and the possibility of independent constitutional power to review Senate impeachment rules, grant too much control of the trial's conduct to be consistent with the modest goal of encouraging solemnity during the trial. More importantly, the decision by the Framers to grant the Chief Justice what is essentially an Article I power suggests that they perceived the Chief Justice's responsibility to be important for the balance of relative strengths among the branches of the national government.

B. The Minimalist Notion of the Chief Justice As the Vice President's Substitute

Another, more popular, conception of the Chief Justice's role in the impeachment process posits that the Framers intended the Chief Justice to prevent the Vice President from sitting over a trial that could "vault him into the presidency." According to this view, the Chief Justice's role is not substantive, but completely procedural. The jurist stands at the Senate rostrum for one reason: to avoid the actual or apparent conflict of interests that would result if the Vice President presided over the President's trial.

This idea has many prominent proponents, and the fact that many of the more illustrious members of the legal academy embrace it is reason to give a critic pause. The strident tone in which some proponents have defended this view is similarly daunting. Consider the arguments of Chief Judge Richard A. Posner:

The function of the Chief Justice is to preside as the chairman of a meeting governed by Robert's Rules of Order presides; that is, to keep order. He is to rule on objections to evidence and other matters relating to the conduct of the trial, subject (as under Robert's Rules) to appeal to the Senate; he is not to rule on issues going to the validity of the proceeding, such as whether the impeachment was lawful. The Constitution assigns the Chief Justice to preside over trials of Presidents not because he's a judge but because the Vice President, who presides over all other impeachment trials even though he is not required to be a lawyer, let alone a judge, would have a conflict of interest in presiding over the trial of the President.

If the limitation of the Chief Justice's authority in impeachment trials isn't clear as a matter of law (I think it is clear), it is clear

113 Amar, supra note 50, at 297.
as a matter of political theory. It would undermine the judiciary to put a single judge, even one as exalted as the Chief Justice of the United States, in the position of having to determine whether the President shall be tried by the Senate and possibly convicted and removed from office, or let off without a trial. That is one reason impeachments are not tried before the Supreme Court or convictions in impeachment trials reviewed by the courts.  

Similarly, Professor Amar declares that "[the idea here was to have a presiding officer utterly free from even the appearance of conflict of interest." He further observes that "[i]t is mandatory recusal rule made even more sense at the Founding, when Presidents did not hand-pick their Vice Presidents, who were more likely to be rivals than partners."  

With respect to Chief Judge Posner, Professor Amar, and other notable scholars who advance similar justifications for the Chief Justice’s participation, their arguments are internally inconsistent and reflect contemporary ideas about impeachment in which the Framers almost certainly did not share. First, the argument falters according to its own terms. If the role of the presiding officer is nothing more than that of a chairman, then conflict of interest is of no concern. That is to say, the danger that a Vice President – or any federal official – would abuse his or her position as presiding official is proportional to the authority that the presiding official possesses. If, as Chief Judge Posner asserts, the Chief Justice possesses only “limited authority,” then the Chief Justice’s propensity for abuse of that authority is just as limited. It is beyond dispute that the Senate could, as a standing rule or as a matter of appeal, review every decision of the Chief Justice rendered in fulfillment of his duty to preside. As such, the Chief Justice probably could not usurp the Senate’s control over the result of impeachment, even if his jurisdiction extended to resolution of the most important substantive questions.  

Chief Judge Posner might respond that the appearance of conflict, rather than actual conflict, was the evil that the Framers sought to address. However, this justification explains too little. There are several public officials who could have prevented the appearance of conflict with greater effect than the Chief Justice, who, as Sherman noted, may have attained his post through presidential appointment. The President Pro Tempore of the Senate, for example, owes no formal allegiance to the President under the Constitution. If preventing the appearance of conflict is the mark of a virtuous presiding officer in a presidential impeachment trial, the President Pro Tempore possesses that trait, and possibly

114 POSNER, supra note 2, at 130 (internal footnotes omitted).
115 Amar, supra note 50, at 297.
116 Id. at 312.
117 See supra note 66 and accompanying text.
a comprehensive knowledge of parliamentary procedure as well.\textsuperscript{118} It is odd to suggest, as does Chief Judge Posner, that the Chief Justice, the Vice President, and other federal officials were interchangeable for purposes of impeachment trials, but for their relation (perceived or actual) to the President.

As the history of the Impeachment Clauses reveals, the Framers were well aware of the costs and benefits of involving judicial officers in impeachment trials. Madison’s fierce advocacy of judicial impeachment trials and Hamilton’s proposal that impeachment trials be conducted by a mixture of judicial and legislative officials demonstrate that the Framers knew that the Chief Justice is a different type of official than the Vice President. In essence, Chief Judge Posner offers an explanation for why the Senate would reject the Vice President as presiding officer, but he does not account for their choice of a judicial officer to fill the breach left by the appearance of conflict.

Second, Chief Judge Posner seems to ignore other constitutional puzzles that spring from the idea that the Chief Justice’s role is primarily the prevention of a conflict. Among them: that the Vice President faces no constitutional disability from presiding over his own impeachment trial, a conflict more visible and severe than that caused by a relation between the Vice President and the President;\textsuperscript{119} that the Framers established a system by which subsequent criminal prosecution of an impeached President would likely reach the Supreme Court on appeal,\textsuperscript{120} prompting the Chief Justice to decide questions with which he became familiar as presiding official at the impeachment trial; and that no constitutional disability prevents the Vice President from presiding over the impeachment trial of a member of the President’s cabinet, with whom the Vice President would cooperate or compete in the formation of executive policy. As a matter of theory, political or otherwise, the conflict of interest justification has too many shortcomings to provide an exclusive explanation for the Framers’ decisions. Chief Judge Posner’s arguments are quite unequivocal in offering that theory as the only reason for the Chief Justice’s presence at a Senate trial.

\textsuperscript{118} Of course, the President Pro Tempore is third in the current line of succession to the Presidency, after the Vice President and the Speaker of the House, but this arrangement postdates the decisions about impeachment procedures at the Convention. In 1792, Congress determined that the President Pro Tempore would be third in line of succession, but that statute was amended in 1886 to replace all congressional representatives with cabinet officials. The Presidential Succession Act of 1947 returned the President Pro Tempore to his place in the line of succession. See generally Ruth Caridad Silva, Presidential Succession (2d ed. 1968). In any case, in order for the President Pro Tempore to exploit his or her role in the impeachment proceedings, he or she would require the cooperation of the Vice President and the House Speaker, a significant check on unilateral misconduct intended to vault the President Pro Tempore into the White House.


\textsuperscript{120} See supra note 18 and accompanying text.
Third, if the Framers' initial intent was simply to prevent an actual or perceived conflict of interest in impeachment trials, they became aware, in short order, that their efforts had failed. Shortly after the Constitution's ratification, Alexander Hamilton criticized insider-trading by powerful colonists in *The Federalist,* and Hamilton later supported Thomas Jefferson's campaign for President.\(^\text{121}\) Aaron Burr later killed Hamilton in a duel, and Burr, as Vice President, presided over the impeachment trial of Justice Samuel Chase.\(^\text{122}\) Chase was one of the colonists criticized by Hamilton in *The Federalist,* and he became, oddly enough, the first justice to praise the wisdom of the Federalist Papers in the U.S. Reports.\(^\text{123}\) These sorts of personal conflicts may have been inherent consequences of the centralized, aristocratic government that existed at the inception of the Republic. Dissatisfaction with the Senate as a repository for impeachment decisions was indeed widespread during the years immediately succeeding the Convention. By 1798, no greater a populist than Thomas Jefferson could observe, in a letter to Madison:

I see nothing in the mode of proceeding by impeachment but the most formidable weapon for the purposes of a dominant faction that ever was contrived. . . . I know of no solid purpose of punishment which the courts of law are not equal to, and history shows, that in England, impeachment has been an engine more of passion than justice.\(^\text{124}\)

The two presidential impeachments suggest that Chief Justices may be recurrent actors in political dramas that result in impeachment. Chief Justice Salmon P. Chase, for example, was a vociferous enemy of Andrew Johnson's conciliatory stance toward the defeated Confederacy. Chase attempted unsuccessfully to convince President Andrew Johnson (and a majority of the Supreme Court) that the Thirteenth Amendment incorporated the Declaration of Independence and Bill of Rights against national and state officials as well as private persons.\(^\text{125}\) Chase's biographer recounts that the impeachment of Andrew Johnson was motivated by Chase's desire to eject Johnson from the Presidency and to prevent General Ulysses S. Grant from attaining that office, so that Chase himself could pursue the Presidency during the next election.\(^\text{126}\) As Professor


\(^{122}\) See REHNQUIST, supra note 105, at 18-20.

\(^{123}\) See McGowan, supra note 121, at 782.

\(^{124}\) 8 THE WORKS OF JEFFERSON 369-70 (Paul L. Ford, ed. 1905).

\(^{125}\) See OXFORD COMPANION TO THE SUPREME COURT 136 (Kermit L. Hall, ed. 1992).

\(^{126}\) JACOB WILLIAM SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON P. CHASE, U.S. SENATOR AND GOVERNOR OF OHIO 548 (1874) ("'The impeachment programme had . . . two motives; the first and most important was, of course, to get Andrew Johnson out of the presidency, and the second and hardly less important was, to keep General Grant from getting in.'").
Amar, a proponent of the conflict of interest explanation of the Chief Justice’s role observes, “Chase’s critics suspected that his trial conduct was politically motivated, and that he was using the spotlight to promote his own presidential candidacy in the upcoming 1868 election.”\[127\] The presence of Chase at the rostrum precipitated a result that is diametrically opposed to what Chief Judge Posner claims the Framers’ to have intended. Even as measured by this limited sample, either he is incorrect about the Framers’ design or the Framers miscalculated horribly.

Chief Justice Rehnquist is also susceptible to accusations of conflict, albeit to a lesser degree. Professor Amar recalls that “[i]t was [Chief Justice Rehnquist], after all, who hand-picked the judges of the special division, which, in turn, hand-picked independent counsel Kenneth Starr to investigate President Clinton.”\[128\] However, Professor Amar concludes that the Chief Justice, not the conflict of interest explanation of the Chief Justice’s role, is wrong: “This coziness between judge and prosecutor is uncomfortably close to the kind of appearance of impropriety that the Framers meant to avoid when they displaced the Vice President from the chair.”\[129\]

Again, the ascension of the Chief Justice to the rostrum failed to prevent the appearance of a conflict. In the two opportunities where the Chief Justice’s proffered raison d’prêsidr – preventing conflict of interest – were implicated, the substitution of the Chief Justice for the Vice President failed to assuage partisan fears. Either the Framers, who were so prescient about so many aspects of political theory, were wrong, or the explanation is misconceived. It warrants note that proponents of the conflict theory rarely cite any persuasive authority in support of their view.

Fourth, the circumstantial evidence described in the preceding subsection applies with equal force to these arguments that the Chief Justice’s role is constitutionally limited to inconsequential matters. When one considers the countervailing arguments in the aggregate, the minimalist conceptions of the Chief Justice’s responsibilities inadequately explain why the Framers permitted the Chief Justice to intrude in Article I, in the circumstances in which the denizens of Article I seek to topple the embodiment of Article II executive power. An alternative explanation, one that accords the Constitution recognition as a practical, purposive document, is in order.

IV. THE DUTY TO PRESIDE RECONCEIVED: AN AMBITIOUS PROPOSAL

This section attempts to define the contours of a new perception of the Chief Justice’s power. Like other theories about the meaning of the Impeachment Clauses, the theory is bound to be incomplete and, in some aspects,
flawed. Moreover, this discussion can only establish an aspirational ideal. Just as the Supreme Court will not review the procedures established by the Senate for the conduct of impeachment trials, it is extremely unlikely that the Court would ever subject the Chief Justice to scrutiny for allegedly failing to properly preside over a Senate trial. To the extent that this section engages in an imaginative reconstruction of the Framers' goals, the resulting theory may be justified by the benefits that it may generate for the constitutional system.

The Chief Justice should be an independent, active participant in impeachment trials. The Framers selected the Chief Justice as presiding officer because they were aware that adopting judicial participation in the impeachment trial would have three effects. First, the Chief Justice could infuse parliamentary decisions with legal reasoning in a manner that would facilitate informed decision-making on the part of the assembled Senators. Second, the Chief Justice could serve as an institutional check on partisan overreaching by prompting Senators to affirmatively adopt or reject controversial or questionable decisions. Third, the Chief Justice's political involvement in real or imagined conflicts would inevitably create some dissension about his participation in the impeachment trial. It is likely that the Framers reviewed these three consequences of the Chief Justice's participation and determined that, on balance, granting the Chief Justice a role in impeachment trials would provide more benefit than harm.

First, the Chief Justice is an official uniquely suited to offer opinions on the legal and procedural ramifications of the senators' decisions during the impeachment trial. In this regard, this dynamic view of the Chief Justice's role shares the desire of the minimalist, symbolic role for solemnity and recognition that the impeachment trial seek the ends of "impartial justice" to the degree possible within the political environment of the Senate. However, the dynamic conception asserts that the Chief Justice bears an independent responsibility to inform and guide the Senate in crafting resolution of questions that arise during presidential impeachment trials.

This duty to inform is not a severe burden. The Chief Justice, presumably a person skilled in legal reasoning and familiar with legal precedent, should offer an independent opinion in response to any parliamentary inquiry. That is, at any time that a dispute arises between the House impeachment managers and the President's defense, on any matter, substantive or procedural, the Chief Justice should, based on his legal expertise and sound discretion, propose a resolution and offer a reasoned explanation for his decision. This undertaking would in no way impinge upon the prerogative of the Senate to approve or reject the Chief Justice's decision, but it would frame the issues in a manner that renders the issues amenable to lay comprehension and facilitates the informed judgment of the Senate on matters within its jurisdiction.

In other words, the Framers selected the Chief Justice to preside over presidential impeachment trials because of the Chief Justice's position as a judge. Were the Chief Justice unable to bring such a contribution to impeach-

130 See supra note 93 and accompanying text.
ment trials – and that is the only contribution that the Framers could have possibly contemplated as issuing from the Chief Justice’s involvement – the cost of injecting the judiciary into the impeachment trial would be excessive. In short, questions would always linger about the Chief Justice’s political predilections and their effect on his conduct of the Senate trial, but the Chief Justice’s contributions as a legal scholar and, presumably, one who has the capability to render justice decisions, improves the impeachment process in a way that surpasses the severe costs that involving the judiciary in the provenance of a political branch inflicts upon the national government. It is difficult to imagine what other qualities the Chief Justice could bring to impeachment proceedings that could surmount the high cost to the reputation of the jurist and to the Supreme Court. As the preceding discussion indicates, merely attempting to prevent the appearance of conflict on the part of the Vice President does not foot the bill.

Second, the Chief Justice should actively remind the Senate that they sit as a body of law, rather than as a channel for partisan interests. In this sense, the Chief Justice’s role is reactive. In contrast to the duty to educate the Senate and to provide baseline explanations for the Senators to accept or reject, the Chief Justice should respond to actions that it perceives to be partisan attempts to employ the impeachment power for improper ends.

The mechanism by which the Chief Justice may prevent abuses is to issue rulings, subject to approval or rejection by the Senate. Collusion among Senators for the purpose of producing an unjust or unwarranted outcome could easily result in the conviction of an innocent President or the acquittal of one sufficiently culpable that his or her removal is warranted. Moreover, the legislative branch, by its nature, is particularly susceptible to deal making and logrolling. The Chief Justice, with the authority to compel individual Senators to stand and to vote individually on the propriety of any aspect of the impeachment process, serves two purposes: promoting the political accountability that Hamilton trumpeted as the primary benefit of vesting in the legislature the authority to conduct impeachment trials, and appealing to the conscience and reason of individual senators whenever it appears that a decision of questionable integrity or fairness could influence the impeachment trial.

This function of the Chief Justice’s participation could be characterized as deliberation-reinforcement. Like the Oath administered to Senators at the outset of an impeachment trial, the Chief Justice’s review would serve as a reminder that impeachment is a severe remedy. However, in contrast to the Oath – or to the symbolic effect of the Chief Justice’s presence addressed above – the Chief Justice’s ability to call a vote on any issue would provide a substantive constraint on the discretion of the Senate. Consider that this sort of participation in the impeachment trial presents a safeguard of the sort which would sustain Chief Justice Rehnquist’s disposition in Nixon. Indeed, the Chief Justice would, under this perspective, serve as a conscience of sorts, facilitating deliberation over procedural questions before the Senate acts. Of course, because the Chief

131 See note 52 supra and accompanying text.
Justice’s authority would extend only to the ability to force Senators to reconsider their actions, the Chief Justice would not usurp the Senate’s “sole” power to try impeachments. Nevertheless, the quality of constitutional decision-making within the Senate—recently described as a casualty of the Clinton impeachment saga by a few influential commentators—would doubtlessly improve.

For an illustration as to how this conception of the Chief Justice’s role differs from that posited by Chief Judge Posner, consider Posner’s criticism of Professor Bruce Ackerman’s suggestion that the House or the President may petition the Chief Justice for a ruling that the impeachment process is invalid. Professor Ackerman asserted that lame-duck impeachments, in which both houses of Congress are not subject to election during the term that they initiate and resolve impeachment charges, are constitutionally invalid. In a particularly striking passage, Professor Ackerman pleaded with the House of Representatives to avoid forcing Chief Justice Rehnquist to decide on the constitutional validity of lame-duck impeachments. He testified that:

the constitutionality of a lame-duck impeachment will be the first question confronting Chief Justice Rehnquist, the designated presiding officer at the Senate trial. Following the precedent established by Chief Justice Chase before and during the trial of President Andrew Johnson, the Chief Justice will rightly assert his authority to rule on all procedural issues.

And the first of these should undoubtedly be a motion by the President’s lawyers to quash the lame-duck impeachment as constitutionally invalid unless reaffirmed by the 106th House. Now Chief Justice Rehnquist is in fact a scholar on the impeachment process, having written an entire book on the subject. I am sure that he will be fully aware of the historical importance of his conduct of the proceeding, and will quickly grasp the obvious dangers of lame-duck impeachment. . . . Without any hint of partisanship, he would be well within his rights to quash the lame-duck impeachment and remand the matter back to the House.

Because the status of lame-duck impeachments has never before been


133 See POSNER, supra note 2, at 129-30.

134 See Testimony of Professor Bruce Ackerman, supra note 23; see also generally BRUCE A. ACKERMAN, The Case Against Lame Duck Impeachment (2000).

135 See Testimony of Professor Bruce Ackerman, supra note 23.
briefed and argued in the modern era inaugurated by the Twentieth Amendment, it is impossible to make a firm guess as to the way the Chief Justice will rule on the matter. Only one thing is clear. It would be far better for the country and the Constitution if the Chief Justice is never put to this test.\footnote{Id.}

Chief Judge Posner disagrees strenuously with the idea that the Chief Justice could rule on such a matter of substance,\footnote{POSNER, supra note 2, at 130.} but the more robust conception of the Chief Justice’s impeachment power would welcome such a motion.

If, as Chief Judge Posner indicates, Professor Ackerman’s point is without merit, is there a disadvantage to permitting the Chief Justice to so decide? Chief Justice Rehnquist would declare that lame-duck impeachments are either constitutionally valid or constitutionally defective and provide reasons for the decision. The Senate would then review the Chief Justice’s decision and his reasons for that decision, and it would approve or reject the Chief Justice’s opinion. Ultimately, the only difference between this outcome and the outcome that Chief Judge Posner seeks is that the Chief Justice’s participation would prompt more deliberation, provide more information to the Senate and grant the Senators a baseline to guide their vote.

How did Chief Justice William Rehnquist perform against this dynamic standard? Rehnquist’s passive participation in the impeachment trial drew plaudits from commentators who agreed with a minimalist conception of his responsibility. Professor Amar, for example, proclaimed before the impeachment trial that “[h]istory confirms the wisdom of judicial modesty,” and he cautioned Chief Justice Rehnquist against participating too actively in the proceedings.\footnote{Amar, supra note 50, at 312.} Similarly Professor Bloch gave the Chief Justice “an A+ [recognizing] his responsibility was fairly limited.”\footnote{Bloch, supra note 2, at 159.}

Under the dynamic standard, Chief Justice Rehnquist’s performance could be called an unmitigated disaster. As several scholars have observed, the Chief Justice failed to resolve independently any procedural question pertaining to the Senate trial.\footnote{See Charles Tiefer, The Senate Impeachment Trial, 28 HOFSTRA L. REV. 407, 417 n.59 (2000).} While Chief Justice Salmon P. Chase faced parliamentary rejection of several of his rulings on procedural or evidentiary matters,\footnote{See BERGER, supra note 5, at 268-69.} Rehnquist did not provide any rulings to provoke a Senate reaction. Indeed, the Senate transcript is rife with unfortunate references in which the Chief Justice unabashedly describes his abject reliance on the Senate Parliamentarian for guidance in resolving procedural questions.\footnote{See e.g., Senate Impeachment Trial of President Clinton, Feb. 9, 1999, 1999 WL 57254 (REHNQUIST: “The parliamentarian tells me this is all out of order. / (LAUGHTER) / LOTT:}
ception on its head: rather than deferring to the will of the Senate after informing and guiding the senators, the Chief Justice repeatedly deferred to the instruction of an unelected official, with the substance of Senate rules, rather than their fairness or propriety, serving as the focus of his inquiry. Chief Justice Rehnquist was a passive participant in the impeachment trial of President Clinton, and it is unlikely that his performance fulfilled the constitutional duty to preside over impeachment trials.

V. CONCLUSIONS

Although this Article addresses a momentous question—the participation of the judiciary in the removal of the President—it is motivated by a modest ambition. The article seeks to prompt a debate within the legal academy on the proper role of the Chief Justice in presidential impeachment trials and to prompt an inquiry among scholars and public officials about whether Chief Justices have comported with that role.

Chief Justice Rehnquist was a passive participant in the impeachment trial of President Clinton. He did not provide an independent ruling on any procedural question. He did not involve himself in the Senate’s deliberations. When the leaders of the parties in the Senate decided that the President’s trial would not feature witnesses, the Chief Justice assented without discussion. In sum, the Chief Justice did not attempt to ensure the fairness or integrity of the impeachment trial, and while he may receive praise from some quarters of the legal academy for his performance, Chief Justice Rehnquist’s conduct fell short of the ideal that the Framers may have envisioned for his post.

If, as this Article posits, the Chief Justice’s duty to preside over presidential impeachment trials is an integral aspect of the balance between the branches of the federal government, Chief Justice Rehnquist’s performance provides an unfortunate precedent. In subsequent impeachment trials, future Chief Justices may be reluctant to shape the proceedings, even in the face of unfairness or confusion on the part of the Senate, as a result of the shadow cast by Chief Justice Rehnquist’s conduct in President Clinton’s impeachment trial. Inactivity is almost always more politically palatable than activism, particularly when the actor is an unelected official in a democratic government.

However, presidential impeachment is an extraordinary event, and Chief Justice Rehnquist’s impact on history is likely to be slight. If more than a century passes between the impeachment trial of President Clinton and the next presidential trial, it is possible that the legal academy and the Supreme Court will have recognized the virtue of a judicial influence in the impeachment proceedings. And a future Chief Justice will assert himself or herself into the politically daunting maelstrom of impeachment questions, improving the quality of the discourse therein and, perhaps, returning to a forgotten design of the Constitution’s Framers.