EXTENSIONS OF REMARKS

CLINTON AFFAIR WITH LEWINSKY NOT SUBJECT TO IMPEACHMENT

HON. CHAKA FATTAH

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Monday, October 19, 1998

Mr. FATTAH. Mr. Speaker, I submit the following speech for the RECORD.

CLINTON AFFAIR WITH LEWINSKY NOT SUBJECT TO IMPEACHMENT

(By Burton Caine)[1]

Debate on the meaning of impeachable offenses must start with the wording of Article II, Section 4 of the Constitution, which provides:

''The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.''

The word ''other'' before ''high Crimes and Misdemeanors''—often overlooked—is important, for it serves to define impeachable offenses: first, by listing treason and bribery as primary illustrations. Secondly, by demonstrating that only serious derelictions of comparable gravity in the performance of the duties of office are grounds for impeachment. Treason, obviously, is the ultimate betrayal of official duty. And bribery has been condemned as least as far back as the Biblical injunction against judicial bribe-taking in Deuteronomy, Chapter 16:19.

Article I, Section 3, of the Constitution provides that upon conviction, removal from office is the sole remedy, and there is no immunity from subsequent criminal punishment. Reading the two impeachment clauses together, it is clear that their only purpose is to protect the nation, not to punish the offender.

For this reason, articles of impeachment against President Nixon all related to grave and corrupt misuse of the powers of government, including conspiracies to deprive individuals of their civil rights guaranteed under the Constitution. In contrast, the House Judiciary Committee refused to impeach Nixon for fraudulent evasion of $576,000 in income taxes, unlawfully using government funds to renovate private residences, and even lying to Congress about bombing Cambodia.

The assertion of then Representative Gerald Ford, and now Senator Trent Lott, that an impeachable offense is whatever the House of Representatives says it is, is contradicted by the debates at the Constitutional Convention which made clear that Congressional disapproval of the President could not serve as the basis for impeachment. Ford and Lott seem to be confusing the standard for impeachment with the lesser standard of ''disorderly Behaviour'' for which a member of Congress may be expelled, as provided in Article I, Sec. 5. There is no trial and a two-thirds vote is required. The House attempted to exclude Adam Clayton Powell on grounds of misconduct but the Supreme Court reversed on grounds that he met the qualifications of age and residency, the Constitutional criteria. One wonders whether the result would be the same had the House admitted Powell, then expelled him for ''disorderly Behaviour.''

Kenneth Starr's view of impeachment also contradicts the language of the Constitution. In arguing before the Supreme Court in the impeachment of federal Judge Walter Nixon, Starr told the justices that one could even be impeached for poisoning the neighbor's cat, advice the Supreme Court ignored.

From Starr's chamber also came the preposterous claim that the President could be impeached for asserting executive privilege later rejected by lower courts. On that basis, Starr himself could be impeached for asserting in court that the lawyer-client privilege of Vincent Foster expired upon the death of the client. That claim was rejected by the Supreme Court. More serious grounds of impeachment against Starr arise from his official conduct as so-called Independent Counsel, a badly disguised campaign to remove President Clinton and reverse the process of election by the people in two national elections. Most egregiously, perhaps, is his wiring Linda Tripp to record Monica Lewinsky in violation of the law of Maryland. This was precisely what Justice Louis Brandeis condemned in his historic rebuke of the overzealous prosecutor:

''Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy.''

At best, the notion that anything can be an impeachable offense and that Congress can act as outrageously as politics permits, is idle talk based upon the prediction that the Supreme Court could never review a Congressional impeachment or conviction. Since the issue has never come up, one is free to wonder. The only President who was impeached was Andrew Johnson. Since he was not convicted, there could be no judicial ruling on whether it was an impeachable offense to disobey a law of Congress the President believed was unconstitutional. Judges have been convicted upon impeachment, but never for personal misconduct unrelated to the conduct of their offices.

The last impeachment case to come before the Supreme Court involved Judge Walter Nixon who complained that the Senate did not ''try'' him, as required by the Constitution, because it delegated the gathering of evidence to a committee of senators, upon which the Senate convicted him. He lost on the ground that that was all the trial the Constitution required. Some cite the case for the proposition that the Senate is free to conduct any type of trial it wants. That is doubtful because the Court considered the trial fair. Justice Souter made it clear that the Senate had no right to decide ''upon a coin-toss'' or a summary determination that defendant ''was simply 'a bad guy' ''

Those who would rely upon the Walter Nixon Case for the proposition that Congress can impeach for any reason at all are really contending that Congress may totally and blatantly ignore their sworn oath to obey the Constitution.

Never in the history of the republic, has Congress ever dared to take that route. In the case of President Richard Nixon, all articles of impeachment related to substantial and corrupt misuse of the powers of government, including conspiracies to deprive individuals of their rights guaranteed under the Constitution. The House Judiciary Committee refused to impeach Nixon for evading $576,000 in federal income taxes, unlawfully using government funds to renovate private residences and even lying to Congress about the bombing of Cambodia.

There was no move to impeach President Reagan for violating an act of Congress and then lying about it both to Congress and the public in the Iran-Contra affair. And no President—Thomas Jefferson, Franklin Roosevelt, Warren Harding, and John Kennedy, included—has been impeached for adultery in office. Nor was Alexander Hamilton, President George Washington's Secretary of the Treasury, impeached by the Founding Fathers themselves for carrying on an adulterous affair with the wife of a convicted securities swindler and making secret payments to cover it up. The matter was deemed private.

There is a mischievous irony in the zealous pursuit by Congressional leaders to impeach the President. Even under the relaxed standard of ''disorderly Behaviour'' for expelling members of Congress—far less demanding than ''high Crimes and Misdemeanors''—admitted adulterers, including Rep. Henry J. Hyde, Chair of the Judiciary Committee, and fellow Republicans critical of the President's marital infidelity, have not been expelled, or rebuked, or punished in any way

And in the case of Newt Gingrich, Speaker of the House and third in line for the presidency, lying to Congress and the American people on matters of official duties, and ethical transgressions, did not prompt the House to expel, or even demote him from leadership. A fine with extended payment terms was considered enough. Nor does history record the expulsion of a single member of Congress for extra-marital sex, even with the prevarioation that goes with concealment.

Kenneth Starr himself, as a ''Civil Officer of the United States,'' is also subject to impeachment for numerous acts—in addition to illegal wiretapping. Under the Ford-Trent Lott standard of impeaching for whatever displeases Congress, why has not Starr been impeached, for example, for the many leaks of grand jury testimony for which he was admonished by the district court? Or issuing a subpoena to a book seller to ascertain what books Monica Lewinsky purchased. This evidences a contempt for First Amendment liberties of the people reminiscent of Richard Nixon, and for which that President faced impeachment.

The devastation that Starr has inflicted upon our Constitutional democracy is in marked contrast to Clinton's private sexual trysts with all the lying that marked the cover-up. None of our rights under the Charter of Liberty were eviscerated.

The Constitution, history, and common sense teach the same lesson. Impeachable offenses are limited to the serious corrupt misuse of the powers of government, that is, grave derelictions of official duty. That excludes private adulterous affairs even if the President lies about them and urges others to do likewise. Punishment for sin—and even crime—belongs elsewhere, and are not subject to impeachment under the Constitution of the United States.

[1] Professor of Law, Temple Law School, and Past President American Civil Liberties Union, Greater Philadelphia Chapter.