

Lecture

IMPEACHMENT: ADVICE AND DISSENT

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In planning my contribution to the Van Alstyne celebration, I knew I wanted to do something challenging, but I was unsure whether to discuss Professor William Van Alstyne's significant contributions to First Amendment analysis, his terrific articles on *Marbury v. Madison*¹ and *Ex Parte McCordle*,² or the myriad of other amazing works that he has produced.³ Then, it hit me: I would try to say something nice—and short—about Bill personally. Now that's challenging!

After all this high-powered discussion of Professor Van Alstyne's extensive and impressive scholarship, I want to round out the conference with some personal observations about Bill as a wonderful colleague and charming antagonist. Although Bill and I were never on the same faculty at the same time, I have been privileged to share many informative and enjoyable experiences with him over the years.

I first met Bill at a Federalist Society debate at Wayne State Law School in Detroit. Our colleague, the late Professor Joe Grano, had invited us to discuss whether one can sue a sitting president. Of course, this debate was not merely academic. Paula Jones had begun her sexual harassment suit against President Clinton and the suit was on its way to the Supreme Court.⁴ Bill and I got together before the

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1. 5 U.S. (1 Cranch) 137 (1803).
2. 74 U.S. (7 Wall.) 506 (1868).
3. *E.g.*, WILLIAM W. VAN ALSTYNE, *THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY* (2002); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 [hereinafter Van Alstyne, *Marbury*]; William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539 (1978).
4. Jones filed suit on May 6, 1994. The Supreme Court decided the case on May 27, 1997.

debate and walked around the campus. I was nervous. Naturally, I thought that the president could not be sued while in office. (I still believe that.) Although I did not know at that point that the Supreme Court would unanimously reject my position,⁵ I did know that Bill disagreed with me and that he was a formidable debater. And, of course, I knew that the audience members—Federalists all—were predisposed toward his side. But he was very gracious and reassuring. Even during the debate, he was constructive and supportive—not the combatant whom I had feared. He won, of course. But I felt comfortable and unembarrassed. Disagreeing with Bill was most agreeable—even though I lost.

Bill and I next crossed swords testifying in front of the House Judiciary Committee, debating whether what President Clinton was alleged to have done constituted an impeachable offense.⁶ Again our views differed, but this time less substantially. We both agreed that a president's lying to a grand jury *could* constitute a "high crime or misdemeanor." We agreed, as well, that the House had discretion to decide whether Clinton's actions in fact warranted impeachment and removal. We differed only subtly in our advice to the members of the Judiciary Committee. I opined that the House should exercise its discretion and not impeach; Bill was somewhat more circumspect, but essentially he agreed. After making it clear that the allegations against President Clinton could be impeachable events, Bill nonetheless urged the Judiciary Committee to find another means of expressing a sense of disappointment in the President's conduct. He urged the committee not to be "cozened out of it on some rhetoric that [an alternative was somehow beyond Congress's constitutional reach]."⁷ I looked up Bill's word "cozened"—it means beguiled. Bill was suggesting that the House find some remedy less drastic than impeachment, presumably some form of censure. Bill and I were equally unsuccessful with the House, which did impeach President Clinton. But the Senate refused to convict and remove Clinton. I guess that I would score that encounter with Bill a "tie."

Clinton v. Jones, 520 U.S. 681, 684 (1997).

5. See *id.* at 694, 705–06 (rejecting presidential immunity for unofficial acts and finding that "the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office").

6. *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 230–37 (1998) (statement of Prof. Susan Low Bloch); *id.* at 237–44 (statement of Prof. William Van Alstyne).

7. *Id.* at 239 (statement of Prof. William Van Alstyne).

After the impeachment, Bill and I met again at a Duke Law School conference addressing the constitutional issues raised by the Clinton administration.⁸ I offered the conference my “Report Card on the Impeachment of President Clinton.”⁹ In general, my assessment was quite negative, although the Senate and the Chief Justice got good marks.¹⁰ Bill, very wisely, stayed out of this fray. I would like to think that his silence meant that he agreed with me, but I suspect that he was just otherwise engaged. Although I would like to score that occasion as a victory for me, honesty dictates that I call it at most a forfeit.

Believe it or not, not all of my debates and discussions with Bill have concerned President Clinton’s misbehavior. Bill and I also disagree on such old classics as *Marbury v. Madison*. Actually, that is an overstatement. We agree on most aspects of *Marbury*. Indeed, Bill’s landmark “A Critical Guide to *Marbury v. Madison*,” published in the 1969 *Duke Law Journal*,¹¹ has been a cornerstone of my own research. In both my 1989 article on *Marbury*¹² and my more recent article regarding the “*Marbury* Mystery” published in the 2003 *Constitutional Commentary*,¹³ I relied heavily on Bill’s “Critical Guide.” Moreover, after my 2003 article was published, Bill offered some very welcome comments. Indeed, Bill and I are still debating the *Marbury* mystery. You will recall John Marshall’s marvelous tour de force in *Marbury*: He asserted the power of the federal judiciary to review the constitutionality of executive and legislative acts. At the same time, he avoided a confrontation with President Jefferson by concluding that the Supreme Court had no jurisdiction to issue a remedy in this particular suit by *Marbury*. In the “*Marbury* Mystery,” I suggested that William *Marbury* sued in the Supreme Court—instead of what I showed to be an available alternative forum, the D.C. Circuit—for the explicit purpose of giving the Supreme Court the opportunity to reach this precise result: namely, asserting power

8. Symposium, *The Constitution Under Clinton: A Critical Assessment*, 63 LAW & CONTEMP. PROBS. 1 (Winter/Spring 2000).

9. Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143 (Winter/Spring 2000).

10. *Id.* at 154, 159.

11. Van Alstyne, *Marbury*, *supra* note 3.

12. Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WISC. L. REV. 301.

13. Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607 (2001).

without exercising it.¹⁴ I have not yet convinced Bill that this strategy was Marbury's intent, but I am not giving up. Therefore, I am not scoring this debate yet.

Probably most importantly, Bill and I disagree as to whether my husband, Rich, should get a motorcycle.¹⁵ So far, I am winning that battle. Obviously, I have more leverage here. Or at least I thought so until recently, when I found that Rich had hidden a Kawasaki catalogue inside a copy of the *Federalist Papers*.

Our honoree at this conference stands as proof that academic debates can be constructive, interesting, valuable, and collegial. Winning is truly not everything. The academic community would be better off if others—both inside and outside the academy—would learn from the warm, charming, intelligent, generous style of the venerable and genuinely civil William Van Alstyne.

14. *Id.* at 623.

15. To those who have not witnessed Bill riding around campus in his leathers and Kawasaki, trust me: Bill is a "motorcycle aficionado." He even wrote me a letter urging me to allow my husband to join the club.