

## IMPEACHMENT AND ACCOUNTABILITY: THE CASE OF THE FIRST LADY

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*The spouse of the President of the United States long has played an important role in the nation. The First Spouse's increasingly public involvement in policy matters, though, requires greater definition of the First Spouse's official status. Given the complex statutory framework regulating government operations, important legal questions may turn on whether the First Spouse is better characterized as an officer or as a mere unofficial adviser. Judges in three recent cases concluded that because of the First Spouse's significant duties, the spouse should be deemed a government official. The judicial and scholarly treatments of the First Spouse's position, however, so far have given little consideration to a key aspect of official status. If First Spouses are officers, how may they be removed from office? Method of removal plays an important role in defining an office. While two of the traditional methods of removal—resignation and discharge—seem available, this article discusses whether the First Spouse is subject to the third method of removal, impeachment. The authors examine the formal and functional arguments as to the impeachability of the First Spouse.*

Impeachment talk is in the air. Even before Monica Lewinsky became a household name, discussion about impeaching

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President Clinton abounded, from the pages of the *Wall Street Journal*<sup>1</sup> to websites<sup>2</sup> to the halls of Congress.<sup>3</sup> Vice President Gore also has been the target of impeachment interest.<sup>4</sup> Attorney General Janet Reno's rejection of an independent counsel to investigate White House fundraising led to calls for her impeachment.<sup>5</sup> Nor are impeachment targets solely in the Executive Branch. Critics of the federal judiciary have suggested impeaching certain "activist" judges.<sup>6</sup> Given the pervasive partisan atmosphere in Washington and the widespread discussion of impeachment, one omission appears surprising. One of the most popular target of the Clinton Administration's critics has remained generally immune from impeachment discussions. Not even Representative Bob Barr, the earliest congressional supporter of impeachment efforts, has sought to impeach First Lady Hillary Rodham Clinton. While other slogans have moved from bumper stickers<sup>7</sup> to policy proposals, so far it is only Clinton's husband (not Clinton's wife) who has inspired serious impeachment discussion. Given the virulence of the criticism directed at

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1. See, e.g., Mark Helprin, *Impeach*, Wall St. J. A22 (Oct. 10, 1997); Terry Eastland, *Starr's Exit Doesn't Preclude More Indictments*, Wall St. J. A16 (Feb. 19, 1997) (predicting that President Clinton would have to worry about "Charybdis" of impeachment for balance of his term).

2. See, e.g., <<http://www.impeachment.org>>, <<http://www.impeachclinton.org>>.

3. See, e.g., Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 Tex. Rev. L. & Pol. 1, 20-51 (1997) (describing allegations of impeachable offenses); *Lawmaker Seeks Impeachment Inquiry*, Chicago Tribune Sec. 1, 10 (Mar. 15, 1997); Mark Sherman, *Georgia Lawmaker Urges Impeachment Inquiry*, Atlanta J. & Const. A6 (May 19, 1997); *Will Congress Impeach Clinton?*, Idaho Statesman 6A (Dec. 15, 1997) (noting that at least seventeen members of Congress supported initiating an impeachment probe against President Clinton); see also Danny Westneat, *Why Pair Push Impeachment*, Seattle Times A2 (Nov. 7, 1997) (discussing a resolution introduced by seventeen Republicans on Nov. 5, 1997 directing the House of Representatives to begin investigations into the possibility of impeaching the President).

4. See, e.g., Barr, 2 Tex. Rev. L. & Pol. at 29-39 (cited in note 3) (describing Representative Barr's allegations against Vice President Gore); *Impeach Clinton Now! Interview with Congressman Bob Barr*, <[http://www.impeachment.org/record/frame\\_barr.htm](http://www.impeachment.org/record/frame_barr.htm)> (discussing Georgia Republican Bob Barr's letter of March 11, 1997 to House Judiciary Chairman Henry Hyde requesting a full committee meeting regarding the possibility of impeaching President Clinton and Vice President Gore).

5. See William Safire, *To Avoid Such a Disgrace*, N.Y. Times § 4 at 17 (Sept. 7, 1997). Reno recently opened preliminary investigations to determine if an independent counsel should be appointed to investigate White House fundraising. See David Johnston, *Reno Announces an Initial Inquiry into Clinton Ads*, N.Y. Times A1 (Sept. 9, 1998).

6. See, e.g., David Kairys, *Clinton's Judicial Retreat; When Naming Judges, He Is Quick to Cave*, Wash. Post C1, C2 (Sept. 7, 1997) (noting House Majority Whip Tom Delay's proposal that "activist" judges be impeached).

7. See Laura Ingraham, *The Folly of Impeachment Chic; Invoking the 'I' Word Only Hurts the GOP*, Wash. Post C1 (Oct. 26, 1997) (reporting bumper sticker "Impeach Clinton And Her Husband, Too").

Hillary Rodham Clinton<sup>8</sup> (along with suggestions of her possible indictment<sup>9</sup>), the absence of impeachment proposals likely does not reflect political restraint or lack of perceived grievance. Rather, one surmises that the limiting factor has been the assumed lack of constitutional authority. The point of this essay is to investigate the underpinnings of that assumption. As we will explain, while it might be obvious that the impeachment of Hillary Rodham Clinton would be substantively unjustified or politically unwise, in light of recent court decisions it is less obvious that impeachment would be legally impossible.

The Constitution provides that "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."<sup>10</sup> In certain respects, the First Spouse<sup>11</sup> clearly has some characteristics of an

8. See, e.g., Richard Grenier, *A Few Words of Advice for the First Lady*, Wash. Times A17 (Aug. 17, 1994) (criticizing Hillary Rodham Clinton); William Safire, *Blizzard of Lies*, N.Y. Times 27 (Jan. 8, 1996) (calling Hillary Rodham Clinton "congenital liar"); see also Henry Louis Gates, Jr., *Hating Hillary*, New Yorker 116 (Feb. 26 & Mar. 4, 1996) (discussing attacks on Hillary Rodham Clinton); Cheryl Lavin, *Hillary Clinton: From First Lady to Second Fiddle*, Chicago Tribune § 13, 1 (Mar. 30, 1997) (same).

9. See *Prosecutor is Taped Regarding First Lady*, N.Y. Times § 1, 19 (May 18, 1997) ("We certainly are investigating individuals, and those individuals—including Mrs. Clinton—could be indicted.") (quoting John Bates, deputy to Independent Counsel Kenneth Starr). Rumors continue to circulate about the possibility of Hillary Rodham Clinton's being indicted. Compare Jamie Detmer, *Less Than Stellar Verdicts Forecast in Starr Inquiry*, Insight Magazine 18 (Aug. 11, 1997) (sources predicting indictment unlikely) and Robert D. Novak, *To the Point*, Commercial Appeal A7 (Aug. 12, 1997) (same) with John Crudele, *Big Market Drop Had Reasons, Both Subtle and Silly*, Austin-American Statesman 24 (Aug. 23, 1997) (sources predicting indictments "probably including Hillary Clinton"). The grand jury operating in Little Rock, Arkansas disbanded without indicting Hillary Rodham Clinton. See Peter Baker and Susan Schmidt, *President is Denied Executive Privilege; Judge Says Aides Must Discuss Lewinsky Matter*, Wash. Post A1, A12 (May 6, 1998). A grand jury in Washington, D.C. continues to hear testimony, and the Independent Counsel could empanel a new grand jury in Little Rock. See id.; Peter Baker and Susan Schmidt, *Prosecutors Question First Lady at Length; Starr Prepares to End Ark. Phase of Probe*, Wash. Post A1 (Apr. 26, 1998).

An official subject to impeachment need not necessarily be impeached before being indicted. The question whether the President or Vice President may be indicted while still in office has produced scholarly controversy. See Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 Hastings Const. L.Q. 7, 9-12 & nn.5-12 (1992) (reviewing controversy). Recent historical precedent, however, supports the indictment of other officials. Secretary of Labor Raymond J. Donovan was indicted while in office. See *Donovan Quits and Prepares to Stand Trial*, N.Y. Times § 4, at 1 (Mar. 17, 1985). He subsequently was acquitted of the charges. See Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. Times A1 (May 26, 1987).

10. U.S. Const., Art. II, § 4.

11. The analysis in this essay applies to the spouse of the President, regardless of gender. We have, therefore, chosen to refer to that person as the "First Spouse," rather than "First Lady." "Spouse" does not correspond exactly to "Lady," but we rejected the

“officer.” As spouse of the head of state, the First Spouse helps represent the nation in ceremonial and symbolic capacities. A First Spouse may also assist the Chief Executive in accomplishing policy initiatives. By statute, First Spouses have a staff and budget to enable them to fulfill their tasks.<sup>12</sup> Indeed, Hillary Rodham Clinton has more senior aides than Vice President Al Gore.<sup>13</sup> The First Spouse’s official role recently received judicial recognition. In *Association of American Physicians and Surgeons v. Clinton*,<sup>14</sup> the applicability of the Federal Advisory Committee Act (FACA)<sup>15</sup> turned on whether Hillary Rodham Clinton was a government officer. Because of FACA’s provisions, it mattered whether Hillary Rodham Clinton was an official or merely a (very good) Friend of Bill. The Court of Appeals for the District of Columbia Circuit resolved this question by holding that the First Spouse should be deemed a government officer. In the recent controversy concerning the assertion of attorney-client privilege for communications between Hillary Rodham Clinton and the White House Counsel, a district court agreed that the First Spouse was a “de facto officer or employee of the White House.”<sup>16</sup> Concurring with this recognition of the First Spouse’s official status, the district court overseeing the grand jury’s investigations into the Monica Lewinsky matter held that executive privilege extended to conversations including Hillary Rodham Clinton.<sup>17</sup>

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more closely corresponding generic titles of “First Human” (too anthropological) and “First Person” (too grammatical).

12. 3 U.S.C. § 105(e) (1994).

13. See Howard Fineman and Mark Miller, *Hillary’s Role*, *Newsweek* 18 (Feb. 15, 1993).

14. 997 F.2d 898 (D.C. Cir. 1993).

15. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. at 1175 (1988)).

16. Petition for certiorari 96-1783 at 71a, *Office of the President v. Office of Independent Counsel* (reprinting *In re Grand Jury Subpoena Duces Tecum to the White House* (E.D. Ark. Nov. 26, 1997), rev’d on other grounds, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997)). Although holding that the White House could not claim attorney-client privilege against the Independent Counsel, the Court of Appeals for the Eighth Circuit assumed for the sake of decision that Hillary Rodham Clinton enjoyed official status as a representative of the White House. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). The dissenting judge explicitly relied on *Association of American Physicians and Surgeons* in finding that Hillary Rodham Clinton should be treated as an official adviser to the President. *Id.* at 933 (Kopf, J., dissenting).

17. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 27-28 (D.D.C. 1998). Nevertheless, the district court compelled the testimony, finding that the need for the evidence overcame the privilege. *Id.* at 29. See also Jack Quinn and Jeff Connaughton, *Watergate Was Then, This Is Now*, *Legal Times* 23, 24 (Mar. 30, 1998) (defending assertion of executive privilege for conversations involving Hillary Rodham Clinton based on the First

If the First Spouse does occupy some kind of office, how does this position fit within our republican framework of government? The First Spouse attains office by means that are slightly unusual—by (usually pre-election) presidential designation<sup>18</sup> not subject to Senate confirmation.<sup>19</sup> But what about removal from office? The manner of removal plays an important role in defining an official's status in the government.<sup>20</sup> Presumably, as with other executive officials, resignation or discharge would be possible. The First Spouse could quit, by ceasing voluntarily from performing any ceremonial or administrative functions. In the alternative, the President could effectively relieve the First Spouse of all authority, indeed even revoke the accoutrements of office and banish the First Spouse from the White House and all official occasions. In short, the President could "fire" the First Spouse,<sup>21</sup> as leaders in other countries have done.<sup>22</sup> But what if the First Spouse refused to resign, and the

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Spouse's official status).

18. The designation may be post-election if the marriage takes place in office, as in the case of Grover Cleveland, or if the President designates someone other than a spouse because either the President remains unmarried or because the spouse is unable or unwilling to perform the duties of First Spouse. See Carl David Wasserman, Note, *Firing the First Lady: The Role and Accountability of the Presidential Spouse*, 48 Vand. L. Rev. 1215, 1243, n.117 (1995) (discussing historical examples of "surrogate" First Spouses); see also 3 U.S.C. § 105(e) (current statute setting forth President's authority to designate surrogate to receive assistance usually provided to First Spouse).

19. The statute allowing the President to designate a surrogate First Spouse does not require confirmation of the designee. See 3 U.S.C. § 105(e).

20. See *Bowsher v. Synar*, 478 U.S. 714, 731-32 (1986) (Comptroller General's manner of removal placed that office within legislative branch).

21. See Katha Pollitt, *The Male Media's Problem; First-Lady Bashing*, 256 Nation 657, 658 (1993). The supposed inability to fire Hillary Rodham Clinton is an issue frequently raised by her opponents. See, e.g., Mickey Kaus, *Thinking of Hillary*, New Republic 6 (Feb. 15, 1993). Whatever one thinks of Hillary Rodham Clinton's power or the manner of its exercise, for the reasons discussed in the text arguments based on the alleged inability to dismiss her rest on false foundations. In addition, this essay discusses other means of ensuring the First Spouse's accountability.

The current statutory framework presents some potential problems for a President seeking to replace a First Spouse. A statute authorizes assistance for the President's spouse or to a family member designated by the President "if the President does not have a spouse." 3 U.S.C. § 105(e). Arguably, short of death or divorce, this provision would limit the President's ability to supplant the current First Spouse. See *Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993); 48 Vand. L. Rev. at 1243-44 (cited in note 18). It is not clear, though, that this provision is meant to be restrictive, rather than merely enabling. Section 105(e) clarifies that the President may use government resources to assist the First Spouse or a surrogate if no spouse exists. The section does not necessarily prohibit assistance to someone else performing duties usually undertaken by the First Spouse.

22. In Peru, President Alberto Fujimori relieved his wife of her duties as First Lady. See Calvin Sims, *With Face-Off at a Fete, Peru's Election Race Begins*, N.Y. Times A3 (Aug. 29, 1994). Indeed, both President Fujimori and President Carlos Saul Menem of Argentina locked their wives out of the official residence and designated their daughters

President chose not to dismiss the First Spouse? Is the third option, removal by impeachment, available?

In constitutional terms, whatever formal or informal duties the First Spouse undertakes, does the First Spouse constitute a "civil Officer" for Impeachment Clause purposes? Commentators have suggested that this term should receive a broad interpretation,<sup>23</sup> but the question is how broad; as usual, the text itself provides few answers. We will suggest two possible ways of approaching this question. One method notes the formal characteristics of a constitutional "officer" and inquires whether the First Spouse fits the bill. Another, more functionalist, approach seeks to understand the purposes underlying the availability of impeachment of government officers and to inquire whether, given the First Spouse's duties, the availability of impeachment would serve those purposes.<sup>24</sup> In setting the background for this exploration, we turn first to an outline of impeachment and its history, with special attention to the impeachment of subordinate executive officials.

## I. IMPEACHMENT

Rooted in old English precedents, impeachment under the Constitution requires that the House of Representatives indict

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to perform the symbolic functions of First Ladies. See Calvin Sims, *El Presidente's New First Lady*, N.Y. Times § 4, at 5 (Apr. 23, 1995). A different situation arose in South Africa when President Nelson Mandela expelled his wife, Winnie Mandela, from the cabinet on grounds of insubordination. See Bill Keller, *Winnie Mandela out of Cabinet for Defying Presidential Orders*, N.Y. Times A1 (Mar. 28, 1995). After she challenged the legality of the dismissal, President Mandela revoked the discharge, then fired her again. *Mandela Ousts His Wife from Cabinet Again*, N.Y. Times § 1, at 2 (Apr. 15, 1995). The Mandela episode illustrates that presidential spouses clearly may be discharged if they hold standard governmental offices. The more difficult question this essay addresses concerns removal from the less well defined office of First Spouse.

After a divorce from Winnie Mandela, President Mandela was sometimes accompanied on official occasions by Graca Machel, who was referred to in press reports as "acting first lady." See, e.g., Beatrice Khadige, *Mandela Leaves on Tour of Southeast Asian "Success Stories"*, Agence France Press (Feb. 27, 1997). Mandela and Machel subsequently wed on Mandela's eightieth birthday. See Lynne Duke, *Mandela, Longtime Companion Wed*, Wash. Post A24 (July 19, 1998).

23. See, e.g., Joseph Story, 1 *Commentaries on the Constitution of the United States* § 792, at 550 (C.C. Little and J. Brown, 2d ed. 1851) ("All officers of the United States, therefore, who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.").

24. See Michael J. Gerhardt, *The Federal Impeachment Process* 65 (Princeton U. Press, 1996) (describing "formalist" and "functionalist" approaches to impeachment analysis).

and then prosecute an accused official, and that the Senate sit as judge and jury to decide guilt or innocence. As employed in seventeenth-century England, the impeachment procedure brought to justice those who, because of their power or station, could not be reached by ordinary judicial mechanism; it was in this capacity that impeachment came to be used as one of the means of removing judges and royal officials from their posts. In this form, it was incorporated into the Constitution by the Founders. Because the removal of a high official from a post has historically been an act of some political moment, surrounded by controversy, it requires the attention of both the House and the Senate in order to legitimate the resulting political upheaval.

#### A. HISTORICAL PRACTICE

In English practice, impeachment constituted a form of legislative trial not limited to officeholders. The House of Commons could impeach and the House of Lords try anyone, whether private citizen or government official; only members of the royal family were exempt.<sup>25</sup> Criminal penalties, up to and including death, could attach to the conviction.<sup>26</sup> After independence, the new American states transformed the British practice, generally confining impeachment to officials and limiting punishment to loss of office.<sup>27</sup> The framers relied on these state precedents in drafting the impeachment provisions of the Federal Constitution.<sup>28</sup> In modifying the British practice, the state and federal constitutions remade impeachment in a more republican image, no longer representing an exercise of unbridled legislative power, but instead realizing evolving notions of separation of powers.<sup>29</sup>

The commitment to republican principles led to a narrowing of the domain of impeachment, but also to preserving the practice as an important constitutional element. In its British form, impeachment had served as a means for the legislature to protect itself against perceived royalist threats.<sup>30</sup> The American states retained impeachment as a check against the potential corrup-

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25. *Id.* at 10; C.S. Potts, *Impeachment as a Remedy*, 12 St. Louis L. Rev. 15, 16 (1927).

26. See Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America, 1635-1805* at 3 (Yale U. Press, 1984).

27. See *id.* at 67.

28. See *id.* at 68.

29. See *id.* at 76-77.

30. See *id.* at 4-5, 68.

tion of public officials. In republics, as well as in monarchies, officers could abuse the public trust. The framers of state constitutions had doubts about relying solely on electoral protections, particularly because such democratic checks did not provide an adequate safeguard for curbing abuses between elections.<sup>31</sup> While state constitutions limited impeachments to government officials, they generally allowed impeachment of *any* official.<sup>32</sup> This model of impeachment conformed to republican notions of limited and separated powers: Governors could appoint officials, and legislatures could remove them. The division of authority protected against tyranny.<sup>33</sup> In addition to providing a means of dislodging particular, corrupt officials, impeachment also had a larger symbolic value, representing a public commitment to honest government.<sup>34</sup> After debating various possible impeachment arrangements, the delegates at the Constitutional Convention followed state practice and adopted language allowing the impeachment of all government officers.<sup>35</sup>

The constitutional text, along with contemporaneous state practice, demonstrates a belief in the need for impeachment to be available as an antidote to official corruption at all levels. Elections might not act soon enough to remove the canker from the body politic. Further, mere removal from office did not constitute a sufficient punishment for violating the public trust. Impeachment could include disqualification from future office, forever marking the offender with a badge of dishonor and banishing the convict from the republican community.<sup>36</sup> Impeachment thereby offered a sanction categorically greater than the mere loss of office that would follow from resignation or dismissal. Impeachment had an important place in the constitutional framework of the new states and the new nation.

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31. See *id.* at 61-63.

32. See *id.* at 68-77.

33. See *id.* at 76, 97.

34. See *id.* at 78.

35. See U.S. Const., Art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); see also Joseph Story, 1 *Commentaries on the Constitution of the United States* at 550 (cited in note 23) (“All officers of the United States, therefore, who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.”).

36. See U.S. Const., Art. I, § 3, cl. 7.



## B. IMPEACHMENT OF SUBORDINATE OFFICERS

Under the United States Constitution, Cabinet members are executive officials responsible to the President. Because of the President's democratic accountability, it would not necessarily have been undemocratic to confer on the President the *sole* authority to remove subordinate executive officials. However, the framers chose otherwise. The President might not dismiss a corrupt official. Impeaching the President in such circumstances would likely represent an impractical and disproportionate response. Moreover, the President's refusing to remove a guilty official might not, in itself, constitute an impeachable offense subjecting the President to removal.<sup>37</sup> As Raoul Berger has explained, the framers were "fearful of the ministers and favorites whom Kings had refused to remove, and they dwelt repeatedly on the need of power to oust corrupt or oppressive ministers whom the President might seek to shelter."<sup>38</sup>

The impeachment authority stands in contrast to Congress's narrower involvement in the appointments process. Congress does not select officers; its role is confined to senatorial confirmation of presidential nominees.<sup>39</sup> The constitutional lines are thus sharply drawn: with regard to filling offices, Congress's role extends no further than "advice and consent";<sup>40</sup> in cases of official misconduct, Congress can act alone in impeaching and removing all officers.<sup>41</sup> Congress has a limited role in saying "hello," but it can always say "goodbye."<sup>42</sup> That removal power

37. See John R. Labovitz, *Presidential Impeachment* 170-72 (Yale U. Press, 1978) (discussing when misconduct by subordinates may be attributed to President); Charles L. Black, Jr., *Impeachment: A Handbook* 46-47 (Yale U. Press, 1974) (same).

38. Raoul Berger, *Impeachment: The Constitutional Problems* 101 (Harvard U. Press, 1973) (footnote omitted).

39. The Constitution confers on the President the authority to nominate all "Officers of the United States," with the exception of "inferior" officers, whose appointment Congress may vest in the "Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2. Congress may not vest the appointment power in itself. See *Buckley v. Valeo*, 424 U.S. 1, 127-36 (1976) (per curiam).

40. With regard to "inferior Officers," Congress might not even have a confirming role, if it chooses to vest appointment authority in the President alone, in courts of law, or in heads of departments. See U.S. Const., Art. II, § 2, cl. 2.

41. Congress's impeachment authority is essentially unreviewable. The President cannot grant a pardon in cases of impeachment, see U.S. Const., Art. II, § 2, and the courts will apparently treat impeachment issues as nonjusticiable, see *Nixon v. United States*, 506 U.S. 224 (1993).

42. Impeachment is generally the exclusive means for Congress to remove a particular official. Once it has approved a nominee, Congress cannot revoke the confirmation. See *United States v. Smith*, 286 U.S. 6, 48-49 (1932). Through its appropriation authority, Congress could abolish an office. However, constitutional questions might arise if Congress used this power to circumvent impeachment. See *Constitutionality of*

is not unlimited. It is carefully cabined both procedurally<sup>43</sup> and substantively.<sup>44</sup> Nevertheless, the impeachment power remains a crucial aspect of our system of separated powers. Separation of powers may require that the subordinate executive officials be answerable in the first instance to the President, not to Congress. If the Executive abuses its power, however, Congress retains the right to remove executive officials, including both the Chief Executive and subordinate officers. Separation of powers allows energetic government, but it also shields us against tyranny. Impeachment is an important part of avoiding tyranny.<sup>45</sup>

### C. IMPEACHMENT PRECEDENTS

Federal judges, who enjoy life tenure and guaranteed salaries, have incentives not to resign, but to instead force Congress to resort to impeachment. By contrast, executive officers who commit impeachable offenses almost inevitably resign or are dismissed; they are usually not provided the luxury of an impeachment trial.<sup>46</sup> Indeed, impeachment of a subordinate executive officer has occurred only once,<sup>47</sup> as political pressure by members of Congress generally has proved sufficient to precipitate resignation or dismissal.

In the nation's history, there have been fifteen impeachments of federal officials: a President, a Cabinet member, a Supreme Court Justice, a Senator, a court of appeals judge and ten district court judges.<sup>48</sup> Thirteen of these impeachments have

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*Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers upon the Expiration of a Presidential Term*, 11 United States Dept. of Justice Office of Legal Counsel, 25, 26 (1987); Richard A. Cirillo, Comment, *Abolition of Federal Offices as an Infringement on the President's Power to Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines*, 42 Fordham L. Rev. 562 (1974). An example of such constitutionally questionable conduct would be removing a particular official by abolishing the office and simultaneously re-establishing it as a now vacant position.

43. See, e.g., U.S. Const., Art. I, § 3, cl. 6 (requiring two thirds vote of Senate to impeach and that Senate be sitting "on oath or affirmation").

44. See U.S. Const., Art. II, § 4 (limiting impeachable offenses to "Treason, Bribery, or other high Crimes and Misdemeanors").

45. See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and The Separation of Powers*, 11 Yale L. & Pol'y Rev. 361, 382-83 (1993) (impeachment creates "important institutional check upon official corruption").

46. Indeed, one of us has argued that it is in itself scandalous that federal judges are provided that luxury when a crime has been committed. See Michael J. Broyde, *Expediting Impeachment: Removing Article III Federal Judges After Criminal Conviction*, 17 Harv. J.L. & Pub. Pol'y 157, 168-69 (1994).

47. See notes 49-56 and accompanying text (discussing impeachment of William W. Belknap).

48. For two excellent and comprehensive examinations of the history of impeach-

been followed by trial in the Senate, resulting in seven convictions and removals from office. However, only two members of the executive branch have been impeached—President Andrew Johnson and William W. Belknap, President Grant’s Secretary of War. Belknap’s case represents the sole instance of the impeachment of a subordinate executive official.

A House Ways and Means Committee investigation revealed that Belknap had accepted money in exchange for an appointment to an Army post tradership.<sup>49</sup> The Committee report recommended that Belknap be impeached immediately, and he was.<sup>50</sup> Belknap resigned on the same day the House report was released.<sup>51</sup> The House Managers nevertheless pressed on with Belknap’s impeachment trial. On the floor of the Senate, those advocating that the trial proceed asserted that officials who abused the public trust deserved the punishment of disqualification from future office. Further, they argued, impeachment branded the wrongdoers with a permanent mark of shame and provided an important deterrent to others who might yield to the temptations of tyranny or corruption.<sup>52</sup>

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ment of American judges, see Eleanore Bushnell, *Crimes, Follies, Misfortunes: The Federal Impeachment Trials* (U. of Illinois Press, 1992) and Mary L. Volcansek, *Judicial Impeachment: None Called for Justice* (U. of Illinois Press, 1993).

49. See John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *Fordham L. Rev.* 1, 36-37 (1970).

50. *Id.* at 36.

51. *Id.*

52. J. Proctor Knott, Chair of the House Judiciary Committee and one of the Managers of the impeachment stated:

Was the only purpose of this disqualification simply to preserve the Government from the danger to be apprehended from the single convicted criminal? Very far from it, sir! That in reality constituted but a very small part of the design. The great object, after all, was that his infamy might be rendered conspicuous, historic, eternal, in order to prevent the occurrence of like offenses in the future. The purpose was not simply to harass, to persecute, to wantonly degrade, or to take vengeance upon a single individual; but it was that other officials through all time might profit by his punishment, might be warned by his political ostracism, by the everlasting stigma fixed upon his name by the most august tribunal on earth, to avoid the dangers upon which he wrecked, and withstand the temptations under which he fell; to teach them that if they should fall under like temptations they will fall, like Lucifer, never to rise again.

*Proceedings of the Senate Sitting for the Trial of William W. Belknap* 203 (Government Printing Office, 1876) (statement of Manager Knott) (May 8, 1876). Senator Maxey of Texas voiced similar sentiments:

We know not what is the unpardonable sin which excludes its perpetrator from all hope of entering the portals of heaven, but this we do know, that a man who stands convicted of high crimes and misdemeanors committed while in office, and is sentenced by the court of impeachment to perpetual disqualification, is held by public opinion to be a living, moving infamy, a moral leper, shunned by his fellow-man and without hope of pardon this side the grave.

And this supreme punishment is, in my judgment, inflicted not only to get rid of a bad man in office, not only to prevent that man ever being restored to

When the House Managers brought the case to the bar of the Senate, Belknap challenged the Senate's jurisdiction. He claimed that because of his resignation, he was no longer a civil officer at the time the charges were brought against him.<sup>53</sup> The Senate as a body rejected that defense by a vote of 37 to 29.<sup>54</sup> The votes on the articles of impeachment achieved similar majorities,<sup>55</sup> but fell short of the two thirds necessary for conviction. Of the 25 Senators who voted for acquittal, 22 rested their votes on the view that Belknap's resignation deprived the Senate of jurisdiction.<sup>56</sup> The Belknap episode left an ambiguous precedent on the impeachability of former officials. A majority of the Senate supported the impeachability of former officials, but the argument against Senate jurisdiction resulted in Belknap's acquittal.<sup>57</sup> Scholars today generally agree that in principle former officials are subject to impeachment.<sup>58</sup> Clearly, impeachment remains a possibility for current executive officers.<sup>59</sup>

## II. ANALYZING THE LEGAL POSITION OF THE FIRST SPOUSE

The constitutional question whether the First Spouse is subject to impeachment turns on the definition of "civil Officer"

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office, but chiefly, by fearful example, to teach all men that American institutions and the perpetuation of free government, of the people, by the people, and for the people, demand purity in office.

Id. (opinion of Senator Maxey) (May 17, 1876).

53. See Feerick, 39 *Fordham L. Rev.* at 37 (cited in note 49).

54. Asher C. Hinds, 3 *Precedents of the House of Representatives of the United States* § 2459 at 934; *Proceedings of the Senate Sitting for the Trial of William W. Belknap* at 239 (1876) (cited in note 52).

55. Hinds, § 2647 at 945 (cited in note 54).

56. See Irving Brant, *Impeachment Trials and Errors* 160 (Alfred A. Knopf, 1972). Because not all Senators voted on all articles, the votes for conviction ranged from 35 to 37, while the same 25 Senators voted for acquittal on each article. See *Proceedings of the Senate Sitting for the Trial of William W. Belknap* at 1165-66 (1876) (cited in note 52).

57. See Gerhardt, *The Federal Impeachment Process* at 52 (cited in note 24).

58. See *id.* at 79 (citing "surprising consensus among commentators that resignation does not necessarily preclude impeachment and disqualification"); Potts, 12 *St. Louis L. Rev.* at 23 (cited in note 25); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 *Ky. L.J.* 707, 716-17 (1987/1988).

59. Although the Belknap episode took place during a time when the Tenure of Office Act purported to limit presidential removal of executive officials, the precedent of impeaching subordinate officials clearly is not so limited. Belknap's impeachment had nothing to do with any potential difficulties in removing him by other means. After all, he had resigned before the House vote on impeachment. More generally, the language allowing the impeachment of all officers was placed in the Constitution at a time when it was generally believed that the President could remove executive officials. See Jack N. Rakove, *Original Meanings* 347-50 (Alfred A. Knopf, 1996). This prerogative was subsequently affirmed in *Myers v. United States*, 272 U.S. 52 (1926).

in the Impeachment Clause. Questions of "officer" status generally arise when the method of selecting a particular official arguably violates the standards set out in the Appointments Clause.<sup>60</sup> Under that clause, an "officer" can be appointed only by the President, the "Heads of Departments," or the "Courts of Law." The definition of an "officer" in the Appointments Clause context illuminates the scope of the "officers" subject to impeachment. Though the equation is not beyond dispute, it would make textual sense to give the word the same meaning in the two clauses, and it would make sense from a structural perspective that the same accountability concerns underlying impeachability also would require adherence to the strict procedural requirements of the Appointments Clause.<sup>61</sup> In discussing

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60. The Appointments Clause states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2.

61. Other commentators have suggested that "officers" should have the same meaning in both the Appointments Clause and the Impeachment Clause. See, e.g., *Communications Satellite Corporation*, 42 U.S. Op. Att'y Gen. 165, 172 (1962) (asserting that status as "officer" under Appointments Clause would render official subject to impeachment); A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 594-95 (discussing impeachability of directors of federal government corporations); cf. Gerhardt, *The Federal Impeachment Process at 75-77* (cited in note 24) (suggesting that "Officers of the United States," though not necessarily inferior officers, are subject to impeachment). An argument could be made, though, that the set of "civil Officers" liable to impeachment might be construed more broadly than the category of "officers" covered by the Appointments Clause. Broad construction of the impeachment power enhances democratic control over all those performing government duties, whatever their technical denomination. See *Reuss v. Balles*, 584 F.2d 461, 468 n.21 (D.C. Cir. 1978) (raising possibility in dicta that "de facto civil officers" might be subject to impeachment). The extraordinary remedy of impeachment poses little danger of congressional micromanagement of executive personnel. On the other hand, the designation as an "officer" for Appointments Clause purposes means that Congress may require Senate confirmation (for "inferior" officers) or that Senate confirmation is a constitutional necessity (for other officers). In either case, the President's control over the appointment process may be constrained. Accordingly, some commentators have suggested that the Appointments Clause be construed narrowly as not covering personal presidential aides, such as "Assistants to the President." The purpose of such a narrow construction would be to prevent Congress from imposing a requirement of Senate confirmation that would restrict the President's flexibility in choosing key aides. See Cirillo, 42 Fordham L. Rev. at 595 (cited in note 42); see also Douglas S. Onley, Note, *Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation*, 37 Wm. & Mary L. Rev. 1183, 1202 (1996) (arguing that separation of powers principles prohibit Congress from setting conditions on removal of personal presidential assistants, even if assistants are "inferior officers"). These commentators limit their analysis to the Appointments Clause context and do not question the breadth of Congress's impeachment

which positions are subject to the constraints of the Appointments Clause, the Supreme Court has stated that “any appointee exercising significant authority pursuant to the laws of the United States” is an “officer.”<sup>62</sup> Excluded from this definition—and the accompanying constitutional strictures—are certain “lesser functionaries,”<sup>63</sup> particularly those whose positions lack “tenure, duration, continuing emolument, or continuous duties.”<sup>64</sup> Though unremunerated,<sup>65</sup> the position of First Spouse does appear to have tenure, duration, and continuous duties. The key, and difficult, question is whether the First Spouse exercises significant governmental authority. In a formal sense, no action that the First Spouse takes has, by itself, binding legal consequences. On the other hand, whatever may have been the case in the past, contemporary First Spouses function continuously in important public roles. Their influence extends much more widely than the “lesser functionaries” who constitute mere employees, rather than officers. Though the fit is not perfect,

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authority. Holding an official liable to impeachment, with its procedural and substantive safeguards, would constitute a much lower level of intrusion into executive discretion than would requiring an official to undergo Senate confirmation. See footnotes 43-44 and accompanying text (describing impeachment safeguards). Little legal authority currently exists to define the status of personal presidential assistants. Though we focus more narrowly on the special issues posed by the role of the First Spouse, the accountability concerns discussed in this essay certainly suggest that officials in the Office of the President should be subject to impeachment.

62. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

63. *Id.* at 126 n.162.

64. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (merchant appraiser not “officer”); see also *United States v. Germaine*, 99 U.S. 508, 511 (1879) (surgeon appointed by Commissioner of Pensions not an “officer”); *United States v. Hartwell*, 73 U.S. 385, 393 (1867); *Proposed Commission on Deregulation of International Ocean Shipping*, 7 U.S. Op. Off. Legal Counsel 202, 202-03 (1983) (members of commission with purely advisory functions need not be “officers”); *The Constitutional Separation of Powers Between the President and Congress*, United States Dept. of Justice Office of Legal Counsel, (preliminary print May 7, 1996) (available on WESTLAW 1996 WL 876050) (discussing distinction between “officers” and “employees”).

In applying the constitutional standard, the Attorney General has opined that an “officer” also must fulfill primarily public, rather than private functions. *Communications Satellite Corporation*, 42 U.S. Op. Att’y Gen. 165, 169 (1962) (incorporator and director of Communications Satellite Corporation not “officer” because tasks temporary and more private than public).

65. Although the Supreme Court does mention emolument as one factor in the test of a constitutional “officer,” its significance is not entirely clear. The Court distinguishes constitutional “officers” from mere “employees.” *Buckley*, 424 U.S. at 126 n.162. However, as Judge Buckley of the Court of Appeals noted, in general, “An ‘unpaid employee’ is an oxymoron, although an ‘unpaid officer’ is not.” *Ass’n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 920 (D.C. Cir. 1993) (Buckley, J., concurring in the judgment). Thus, perhaps paradoxically, while mere occasional compensation might suggest a person is an “employee” rather than an “officer,” the complete absence of payment might not. The Constitution, itself, recognizes the possibility of offices of “Honor” or “Trust,” as well as offices of “Profit.” See U.S. Const., Art. I, § 3, cl. 7.

the First Spouse also could find a place in the Appointments Clause framework as an "inferior officer" whose appointment Congress has vested in the President alone. Ultimately, the question of officer status depends on whether one emphasizes the formal or the functional characteristics of the First Spouse's office.

In addressing separation of powers issues, the Supreme Court has employed both formal and functional approaches.<sup>66</sup> The Court sometimes insists on clearly defining the location of an official, based on the formal characteristics of the office, then zealously scrutinizing the officer's duties to ensure that they do not cross into territory reserved for other branches of government.<sup>67</sup> In other cases, the Court instead focuses on the practical operation of an office and whether the particular duties, however characterized, represent a threat to the principles underlying the constitutional division of governmental authority.<sup>68</sup> The outcome of a specific case may well turn on which framework the Court chooses to apply. Similarly, the legal definition of the First Spouse's position largely depends on whether one adopts a formal or a functional perspective, that is, whether one focuses on the statutory or constitutional definition of an officer or instead examines how the First Spouse functions in the Administration and interacts with government officials. Though the evidence is mixed, formal arguments tend to suggest that the First Spouse is not a "civil Officer." The functional arguments, on the other hand, generally support the characterization of the First Spouse as a "civil Officer" for purposes of the Impeachment Clause.

#### A. FORMAL ARGUMENTS

The formal arguments against the First Spouse's being con-

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66. See, e.g., Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L.J. 679, 689-716 (1997); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987); Keith Werhan, *Normalizing the Separation of Powers*, 70 Tul. L. Rev. 2681 (1996).

67. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (holding Gramm-Rudman-Hollings Act unconstitutional based on characteristics of office of Comptroller General); Strauss, 72 Cornell L. Rev. at 496-502 (cited in note 66) (discussing formalism in *Bowsher*).

68. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding Independent Counsel statute as not causing impermissible interference with executive duties); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding sentencing scheme involving United States Sentencing Commission); Fitzgerald, 46 Duke L.J. at 702-03 (cited in note 66) (discussing functionalism in *Morrison*).

sidered an officer are substantial. The First Spouse is not elected or formally appointed. Neither the Constitution nor any statute sets out duties for the First Spouse. The First Spouse does not take the oath constitutionally required for officers of the United States. The First Spouse receives no salary, and the Anti-Nepotism Act suggests that the First Spouse cannot be employed in the White House.<sup>69</sup> The senior officials in the Office of the First Lady are technically Assistants to the President, appointed by the President.<sup>70</sup>

Arguments for the First Spouse's official position do find support in 3 U.S.C. § 105(e), a provision authorizing assistance to the President's spouse when the spouse is helping the President to discharge official duties.<sup>71</sup> This statute effectively recognizes the important role of the First Spouse and provides public support for the spouse's activities in assisting the President. The statute also authorizes an unmarried President to designate another family member to act as a surrogate First Spouse. The allowance of a substitute demonstrates that the First Spouse is more than just the spouse of the President, for the position exists in some form even in the absence of a spouse.<sup>72</sup> Even § 105(e), however, shows the difficulty in assimilating the First Spouse's role to that of a traditional officer. The President has little discretion in choosing who will receive the designated assistance. The President's spouse automatically assumes that role. Only if the President has no spouse can the President designate who will be entitled to government assistance, and even then, the statute specifies that the person be a "member of the President's family."<sup>73</sup> Moreover, the statute does not even directly authorize the First Spouse to assist the President. Rather, the statute provides

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69. See 5 U.S.C. § 3110(a),(b) (1994).

70. See Wasserman, 48 Vand. L. Rev. at 1247 nn.136-37 (cited in note 18) (citing Federal Yellow Book, § I at I-7, I-13 (Leadership Directories, Winter 1995)).

71. 3 U.S.C. § 105(e) provides:

Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities. If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.

72. The possibility of the President's choosing a substitute presents another line of reasoning supporting the First Spouse's official position. Method of selection provides a strong indication of status. Because the surrogate is formally designated by the President, pursuant to statutory authority, the surrogate has a powerful claim to official status. If the surrogate First Spouse is an officer, moreover, that would suggest that a genuine First Spouse also would have officer status.

73. 3 U.S.C. § 105(e).



that federal employees may assist the First Spouse.<sup>74</sup>

## B. FUNCTIONAL ARGUMENTS

The strongest arguments for the First Spouse's official status are functional, recognizing the reality of the First Spouse's important role. The First Spouse undertakes duties corresponding to the dual role of the American Presidency. As head of state, the President embodies the nation and represents it in formal and symbolic capacities. In performing their extensive social and ceremonial functions, heads of state require assistants and sometimes surrogates. Such duties often devolve upon relatives of the Head of State, and the First Spouse traditionally has performed these functions in the United States.<sup>75</sup> The significant position of the spouse of the head of state has long been recognized in the United States, and the title "First Lady"<sup>76</sup> evidences the perceived importance of this role.<sup>77</sup> Under international law, as well, the spouse of the head of state enjoys a special status.<sup>78</sup> As head of government, the President formulates and executes particular partisan policies. Generally enjoying unlimited access to the President and serving as the President's most trusted adviser, the spouse may work with the Chief Executive in designing and im-

74. See *Ass'n of American Physicians v. Clinton*, 997 F.2d 898, 920 (D.C. Cir. 1993) (Buckley, J., concurring in the judgment).

75. See Myra G. Gutin, *The President's Partner* 2 (Greenwood Press, 1989).

76. The title "First Lady" apparently dates from the Civil War era. A newspaper column in 1870 used the term to refer to President Grant's wife Julia. Earlier, Jefferson Davis's wife, Varina, was reportedly called the "first lady of the Confederacy." Betty Boyd Caroli, *First Ladies* xv (Oxford U. Press, 1995).

77. Recent controversy in England confirms the powerful symbolism of the title. An opposition Member of Parliament accused Prime Minister Tony Blair of allowing his wife to be called "First Lady." Blair angrily denied the charge. The implication of the exchange was that in England, only the Queen should be referred to as "First Lady." See James Landale, *Labour Rejects 'First Lady' Charge*, *Times* (London) 11 (June 5, 1997); see also Piers Morgan, *Tony Blair: His First Interview as Prime Minister*, *Mirror* (London) 7 (July 19, 1997) (quoting Prime Minister Blair's rejecting "First Lady" as title for his wife).

Similarly, the controversy in Israel concerning Prime Minister Benjamin Netanyahu's attempts to transform his office into an "American-style" presidency has focused in part on Netanyahu's wife and her displacement of President Ezer Weizman's wife from the role of "First Lady." See Susan Hattis Rolef, *Lock, Stock and Barrel*, *Jerusalem Post* 6 (July 8, 1996); see also Anton La Guardia, *Israel's First Lady*, *Daily Telegraph* 30 (Mar. 29, 1997) (discussing Sara Netanyahu's embracing term "first lady," despite criticism).

78. See, e.g., *Kline v. Kaneko*, 535 N.Y.S.2d 303, 305 (N.Y. Sup. Ct. 1988) (granting immunity at behest of State Department to wife of Mexican President) *aff'd sub. nom. Kline v. Cordero De La Madrid*, 546 N.Y.S.2d 506 (N.Y. App. Div. 1989); Restatement (Third) of Foreign Relations Law § 464 cmt. a & reporters' note 14 (explaining that immunity extends to heads of state and spouses).

plementing the Administration's political agenda.<sup>79</sup>

First Spouses have always wielded a great deal of power. They have often influenced the President's appointments of cabinet and diplomatic officials, and many have undertaken other tasks as well. Abigail Adams ventured into political disputes on her husband's behalf.<sup>80</sup> Sarah Polk edited her husband's speeches.<sup>81</sup> Eleanor Roosevelt influenced her husband's policies,<sup>82</sup> performed a variety of advisory tasks, and served in the Office of Civilian Defense.<sup>83</sup> Betty Ford carried weight with her husband on various topics including the controversial pardon of former President Richard Nixon.<sup>84</sup> Rosalynn Carter sat in on cabinet meetings<sup>85</sup> and conducted substantive talks with Latin American officials.<sup>86</sup> The First Spouse who undoubtedly exercised the most power was Edith Wilson. After Woodrow Wilson suffered a debilitating stroke, she became his surrogate, determining whom and what he saw.<sup>87</sup> Hillary Rodham Clinton's activities represent a break with the past chiefly in that she has assumed a more formal, and thus more public, policy making role, most notably heading the Task Force for National Health Care Reform.<sup>88</sup>

79. For a discussion of the implications for the President's spouse of the dual presidential roles of head of state and head of government, see Caroli, *First Ladies* at xviii (cited in note 76); Anne Morris, *Professor's Fascination with Presidential Wives Leads to Reference Book*, Austin American-Statesman G1 (Mar. 10, 1996) (quoting Professor Lewis Gould).

80. See Paul F. Boller, Jr., *Presidential Wives* 18-19 (Oxford U. Press, 1988); Edwards Park, *Around the Mall and Beyond*, Smithsonian 22, 23 (Mar. 1992).

81. See Park, Smithsonian at 24 (cited in note 80).

82. See Boller, *Presidential Wives* at 297 (cited in note 80); Lewis L. Gould, *First Ladies*, Am. Scholar 528, 532 (Autumn 1986).

83. See Gil Troy, *Affairs of State: The Rise and Rejection of the Presidential Couple Since World War II* at 7 (The Free Press, 1997).

84. See Caroli, *First Ladies* at xviii (cited in note 76).

85. See Boller, *Presidential Wives* at 442 (cited in note 80); Park, Smithsonian at 25 (cited in note 80).

86. See Caroli, *First Ladies* at xix (cited in note 76).

87. See Boller, *Presidential Wives* at 227 (cited in note 80); Park, Smithsonian at 22 (cited in note 80); Karl E. Meyer, *The President's Other Running Mate*, N.Y. Times A22 (Jan. 27, 1993).

88. As one commentator has argued:

Hillary Rodham Clinton had broken new ground as First Lady—not because she usurped power but because she admitted to using the power that the presidential system had always permitted spouses. The candor—not the power—was new. . . . This was no new game in which she had altered the rules. She [had merely taken] up the cards that any First Lady was dealt. Her novelty lay in the fact that . . . she played them with competence and confidence.

Caroli, *First Ladies* at 307-08 (cited in note 76); see also Susan Faludi, *The Power Laugh*, N.Y. Times § 4, at 13 (Dec. 20, 1992) (Hillary Rodham Clinton differs with her predecessors not in exercising power, but in obviously enjoying her independent role); Wasserman, 48 Vand. L. Rev. at 1229 (cited in note 18) ("Mrs. Clinton is not the first First Lady

Of course, whether or not a government officer, the First Spouse is clearly one of a number of unelected assistants. Presidents long have had "kitchen cabinets" of unofficial advisers.<sup>89</sup> The question is whether the nature and extent of the First Spouse's duties have taken the spouse out of the kitchen.<sup>90</sup> Relying on the functional characteristics of the position, the courts in *American Physicians* and two subsequent cases came to the conclusion that the First Spouse was an official.<sup>91</sup>

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to take an active political role—or to face criticism for doing so."); Transcript #264, CNN Talk Back Live, Nov. 1, 1995 available in LEXIS, NEWS Library, Transcripts file (historian Doris Kearns Goodwin commenting that novelty lies not in Hillary Rodham Clinton's exercising power, but in her visibility).

Hillary Rodham Clinton also brought with her substantial qualifications for public office in any administration. She served on the board of the Legal Services Corporation, as well as Wal-Mart and TCBY, and was named as one of the hundred most influential attorneys in the United States. She has also written articles on the legal treatment of children and worked on education standards in Arkansas. See Lewis L. Gould, *Hillary Rodham Clinton* 630-50 in Lewis L. Gould, ed., *American First Ladies* 630-50 (Garland Publishing, 1996); see also Richard P. Wulwick and Frank J. Macchiarola, *Congressional Interference with the President's Power to Appoint*, 24 *Stetson L. Rev.* 625, 650 n.122 (reviewing Hillary Rodham Clinton's accomplishments and concluding that she is qualified to be attorney general).

89. Criticism of Hillary Rodham Clinton's influence on the ground that she is neither elected nor officially appointed thus ignores the important role long played by such informal presidential advisers. See Gary Wills, *A Doll's House?*, *New York Rev. Books* 6, 9-10 (Oct. 22, 1992); Anna Quindlan, *The (New) Hillary Problem*, *N.Y. Times* § 4 at 17 (Nov. 8, 1992).

90. Questions of the boundaries between formal and informal advisers have arisen in other contexts as well. In 1977, the Justice Department's Office of Legal Counsel addressed the issue whether conflict-of-interest statutes applied to someone not on the government payroll who "advises the President almost daily, principally on an informal basis." 1 *Op. Off. Legal Counsel* 20 (1977). The Office of Legal Counsel concluded that such a person was not an employee for conflict-of-interest purposes. *Id.* However, when the person undertook additional work on a "current social issue," which involved coordinating governmental activities and chairing meetings attended by government employees, the opinion concluded that the person should be deemed a government official. *Id.*

Being a government official would seem to be a necessary, though perhaps not a sufficient condition for impeachability. See notes 61-65 and accompanying text (discussing distinction between "official" and "officer").

91. The discussion of the legal position of the First Spouse helps to demonstrate how the First Spouse differs categorically from other nominal "firsts" associated with the presidency. By analogy to the First Spouse, commentators may refer to Roger Clinton as the "first brother," see, e.g., Tony Allen-Mills, *Oh Brother, It's That Roger Clinton Again*, *Sunday Times* 19 (Mar. 16, 1997), to Chelsea Clinton as the "first daughter," see, e.g., Ann Gerhart and Annie Groer, *Chelsea Clinton, Neat Sixteen*, *Wash. Post* C1 (Aug. 29, 1996), and even to Socks as the "First Cat," see, e.g., Bill Locey, *Outings; Animal Attraction; Tippi Hedren's Acton Preserve Provides A Haven for Abandoned Big Cats and Other Game*, *L.A. Times* F34, F35 (June 19, 1997), and to Buddy as the "first dog," see, e.g., Elizabeth Shogren, *Clinton 'Inclination' Excludes Little Buddys From First Dog*, *L.A. Times* A5 (March 11, 1998); see also Roy Rowan and Brooks Janis, *First Dogs: American Presidents and Their Best Friends* 144 (Algonquin Books of Chapel Hill, 1997). No other relationship, though, rivals that of the First Spouse in the level of significant public functions. Children, brothers, and sisters may undertake particular official duties,

### 1. First Spouse as Close Adviser

In view of the increasingly open policy role of the First Spouse and the increasing concern with regularizing governmental power, it was inevitable that a court would be called upon to define the role of the First Spouse. That moment came in a challenge under FACA. FACA requires that the meetings of a federal advisory committee, along with its records and reports, be open to the public.<sup>92</sup> The statute defines “advisory committee” broadly to include any group “established or utilized” by the President or an agency “in the interest of obtaining advice or recommendations.”<sup>93</sup> However, the Act exempts from its requirements any committee “composed wholly of full-time officers or employees of the Federal Government.”<sup>94</sup> Groups seeking access to the deliberations of the President’s Task Force on National Health Care Reform argued that the Task Force was an advisory committee subject to FACA’s regulations. The groups asserted that the governmental committee exemption could not apply to the Task Force because of the membership of Hillary Rodham Clinton. They insisted that she was not an “officer or employee” of the Federal Government.

The district court agreed with the plaintiffs’ construction of the statute.<sup>95</sup> The court interpreted FACA by reference to other sections of Title 5 of the United States Code, which provided definitions of the terms “officer” and “employee.” These sections defined an “officer” as a person “required by law to be appointed in the civil service”<sup>96</sup> and an “employee” as an individual “appointed in the civil service.”<sup>97</sup> Because Hillary Rodham Clinton was not appointed in the civil service or required to be appointed in the civil service, the court concluded that she fell outside the statutory definition of officer or employee.<sup>98</sup> The court also noted the absence of other indicia of employment,

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but they never assume the full panoply of ceremonial and administrative functions that help to define the First Spouse as a public officer. See also Federal Yellow Book, § I at I-1 to I-13 (Leadership Directories, Winter 1995) (including listing for Hillary Rodham Clinton and for Office of the First Lady, but no entry for Chelsea Clinton, Roger Clinton, or Socks).

92. 5 U.S.C. App., §§ 10(a)(1), 10(c) (1994).

93. *Id.* § 3(2).

94. *Id.*

95. *Ass’n of American Physicians and Surgeons v. Clinton*, 813 F. Supp. 82 (D.D.C. 1993).

96. 5 U.S.C. § 2104(a)(1) (1994).

97. *Id.* § 2105(a)(1).

98. 813 F. Supp. at 87.

such as the taking of an oath of office.<sup>99</sup> Having held that FACA, by its terms, did apply to the Task Force, the court went on to consider the effect of FACA on the President's ability to obtain candid advice. The court reasoned that access to the confidential deliberations of advisers was essential to enable Presidents to fulfill their Article II duties.<sup>100</sup> With regard to meetings at which the Task Force formulated recommendations for the President, the court found that the statute would frustrate the President's constitutional interest in obtaining confidential, hence candid, advice. Accordingly, as applied to such meetings, the court held FACA an unconstitutional intrusion by Congress into the prerogatives of the Executive Branch.<sup>101</sup>

Like the district court, the court of appeals showed great concern with FACA's potential for interfering with the President's ability to obtain candid advice.<sup>102</sup> The court of appeals sought to avoid the "difficult"<sup>103</sup> constitutional issue by construing FACA not to apply to the Task Force. While the court acknowledged that Hillary Rodham Clinton did not fit within the definition of officer or employee in Title 5 of the United State Code, the court noted that another part of the Code that contained a more expansive definition of an "officer" as "any person authorized by law to perform the duties of the office."<sup>104</sup> The court asserted that this definition might include someone not "formally" an officer, who was authorized to perform federal duties.<sup>105</sup> The court further relied on 3 U.S.C. § 105(e), the statutory authorization of aid to the President's spouse in connection with the spouse's assistance of the President.<sup>106</sup> This congressional acknowledgment that the President might enlist the First Spouse in the discharge of the President's duties suggested that Congress intended the First Spouse to be treated as an "officer or employee" for purposes of the FACA exemption.<sup>107</sup> By allowing public money to be used to assist the First Spouse in aiding the President, § 105(e) indicated that Congress viewed the First Spouse as a government "insider," rather than the sort of outside

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99. *Id.*

100. *Id.* at 90-91.

101. *Id.* at 93. The court upheld FACA as applied to other functions of the Task Force and enjoined further meetings until the FACA requirements were fulfilled. *Id.*

102. *Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993).

103. *Id.*

104. *Id.* at 904 (quoting 1 U.S.C. § 1).

105. *Id.*

106. *Id.* (citing 3 U.S.C. § 105(e)).

107. *Id.* at 905.

interest whose influence on government FACA was intended to regulate.<sup>108</sup>

The key to the court's analysis was its discussion of the serious constitutional issues that would arise from interpreting FACA to apply to the Task Force. The court emphasized the President's need for confidential discussions with senior advisers<sup>109</sup> and noted that the President's spouse "typically, would be regarded as among those closest advisers."<sup>110</sup> Although the court cast its opinion as merely applying the canon of construing statutes to avoid difficult constitutional questions,<sup>111</sup> the court strongly implied that the exemption for the First Spouse was constitutionally required.<sup>112</sup> Concurring in the judgment, Judge Buckley agreed that an exemption for the First Spouse was constitutionally mandated. Like the district court, though, Judge Buckley concluded that the language of the statute did not exempt the First Spouse. Accordingly, he asserted that FACA was unconstitutional as applied to the Task Force.<sup>113</sup>

While ostensibly raising an issue of statutory construction, then, *American Physicians* was essentially a case about the constitutional position of the First Spouse.<sup>114</sup> Although they followed

108. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 112-13 (1994); Richard O. Levine, *The Federal Advisory Committee Act*, 10 Harv. J. on Legis. 217, 225 (1973) (discussing background and purposes of FACA); Andrea L. Wolff, Comment, *The Federal Advisory Committee Act and the Executive Privilege: Resolving the Separation of Powers Issue*, 5 Seton Hall Const. L.J. 1023, 1027-28 (1995) (same).

109. 997 F.2d at 909-10.

110. *Id.* at 910.

111. *Id.* at 910-11.

112. Cf. *id.* at 910 (discussing situations in which FOIA exemption may be constitutionally required to protect President's powers). Under the court's analysis, the application of FACA to the Task Force might raise serious constitutional issues even if some of its members were concededly private citizens, far removed from the President's inner circle. The functional importance of the First Spouse's position, however, clearly magnified the potential intrusion into the President's protected sphere:

A statute interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns. This is all the more so when the sole ground for asserting that the statute applies is that the President's own spouse, a member of the Task Force, is not a government official. For if the President seeks advice from those closest to him, whether in or out of government, the President's spouse, typically, would be regarded as among those closest advisers.

*Id.*; see also Bybee, 104 Yale L.J. at 122-28 (cited in note 108) (discussing arguments for FACA's unconstitutionality); cf. *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 482-89 (1989) (Kennedy, J., concurring in the judgment) (arguing that FACA unconstitutional as applied to American Bar Association committee advising President on judicial nominations).

113. 997 F.2d at 925 (Buckley, J., concurring in the judgment).

114. See Bybee, 104 Yale L.J. at 95 (cited in note 108) (arguing that court "did not

somewhat different paths, all four judges who addressed the issue concluded that for constitutional purposes, the spouse should be treated as a close adviser to the President and, accordingly, that the principle of separation of powers protected the First Spouse's consultations with the President and with other executive officials.

The significance of the Court of Appeals' constitutional analysis should not, however, be overstated. The court seemed primarily concerned with protecting the President's consultations with any advisers, whether in or out of government.<sup>115</sup> To avoid the constitutional question, the court happily reached out for the statutory exemption for committees composed entirely of government officials. The desire to avoid the constitutional question clearly drove the court's analysis of the First Spouse.

## 2. First Spouse as Confidential Agent

In a subsequent case, involving the Independent Counsel's investigation of Whitewater, the question of the First Spouse's legal status arose in a context that did not involve a stretch to avoid constitutional questions. The Independent Counsel subpoenaed notes of conversations between Hillary Rodham Clinton and attorneys acting as Counsel to the President. Resisting the subpoena, the White House and Hillary Rodham Clinton asserted that the conversations were shielded by the attorney-client privilege. A central issue in the dispute was whether the First Spouse was a White House official. Her official status was an important premise of the argument that the White House Counsel represented her and that her conversations with White House lawyers were therefore privileged.<sup>116</sup>

The district court recognized that this privilege issue arose in a context far removed from the interpretation of FACA. Nevertheless, the court found that the holding in *American Physicians* could not be limited to that specific statutory setting. In view of the broad acknowledgment of the First Spouse's important governmental role in *American Physicians*, the district court found that the First Spouse was a "de facto officer or employee

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avoid the constitutional question").

115. See note 112.

116. See Ronald D. Rotunda, *Lips Unlocked; Attorney-Client Privilege and the Government Lawyer*, Legal Times 21, 28 (June 30, 1997) (criticizing privilege based on Hillary Rodham Clinton's not being government official); Stuart Taylor, Jr., *The President and the Privilege*, Legal Times 27 (May 12, 1997) (asserting, in defense of privilege, that "every first lady functions as an official").

of the White House.”<sup>117</sup> Although the majority in the court of appeals did not reach the question, reversing on other grounds, the dissenting judge agreed with the district court that the First Spouse’s official status followed from *American Physicians*.<sup>118</sup>

Most recently, the question of the First Spouse’s official position arose in the course of the Independent Counsel’s investigation of matters concerning Monica Lewinsky. White House officials refused to answer certain questions before a grand jury, citing executive privilege.<sup>119</sup> The officials claimed that executive privilege extended to conversations with Hillary Rodham Clinton, and they relied on *American Physicians* in support of their argument.<sup>120</sup> The district court agreed, citing *American Physicians* for the proposition that the First Spouse should be treated as “the functional equivalent of an assistant to the President.”<sup>121</sup>

### 3. The Running Mate

The decisions in *American Physicians* and the two privilege cases recognize the close policy-making relationship between the President and the First Spouse. The contemporary First Spouse functions as a key policy adviser. Moreover, this important role for the First Spouse is widely recognized by the public and discussed during presidential elections. During their first campaign for the White House, Bill Clinton and Hillary Rodham Clinton emphasized their shared qualifications and their close working relationship. Comments such as “Buy one, get one free” and “It’s a two-for-one, blue plate special”<sup>122</sup> stressed the couple’s intended political partnership. In the 1996 presidential race, both

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117. *Office of the President v. Office of Independent Counsel*, petition for cert., 96-1783, 71a (reprinting *In re Grand Jury Subpoena Duces Tecum to the White House* (E.D. Ark. Nov. 26, 1996), rev’d on other grounds, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997)).

118. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 933 (D.C. Cir. 1997) (Kopf, J., dissenting); see also Martha Ezzard, *First Lady an Easier Target*, Atlanta Constitution 8A (May 19, 1997) (arguing in support of privilege that “[p]rior cases make it clear the first lady is an ‘official’”).

119. See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 27 (D.D.C. 1998).

120. *Id.*

121. *Id.* (quoting *Ass’n of American Physicians v. Clinton*, 997 F.2d 898, 904 (D.C. Cir. 1993)) (internal quotations omitted). Although finding that executive privilege covered conversations involving Hillary Rodham Clinton, the district court nevertheless granted the Independent Counsel’s motion to compel the testimony. The court concluded that the Independent Counsel had shown sufficient need to overcome the privilege. *Id.* at 29.

122. Kate Muir, *All Things to All America*, Times (London) 4 (Jan. 19, 1993) (quoting Bill Clinton and Hillary Rodham Clinton) (internal quotation marks omitted).



Hillary Rodham Clinton and Elizabeth Hanford Dole played very public roles, including giving major speeches at the nominating conventions. Some commentators even proposed that, in light of the important position of the First Spouse, the two should have a formal debate.<sup>123</sup> The electorate knew what kind of policy roles the prospective First Spouses would play and could vote accordingly. Indeed, the views of the First Spouses and their likely roles in the administration are much better known to the voters than are the opinions, or even the identities, of other prospective executive officials, including possible cabinet members.<sup>124</sup> The electoral system thus has acknowledged and accommodated the official position of the First Spouse. The "First Team" does enjoy a kind of electoral mandate, conferring a democratic imprimatur on the First Spouse's official activities.

#### 4. Summary

The opinions in *American Physicians* and the two privilege cases give rise to two important principles. First, it is clear that although *American Physicians* arose in a narrow statutory context, its implications cannot be so limited. The driving force behind the majority opinion was its understanding of the First Spouse's place within the constitutional framework of the Presidency. For the majority, the First Spouse functioned as a senior presidential aide, whose confidential advisory role required constitutional protection from even congressionally authorized intrusion. The district court opinions in the privilege cases confirmed the expansive nature of the majority's reasoning. Those rulings applied the tenet that *American Physicians* established: The First Spouse enjoys an official position in the executive branch, independent of any particular statutory framework. Second, the cases make clear that important issues of privilege may turn on the question of the First Spouse's position. Relying at least in part on the First Spouse's official position, *American Physicians* effectively cloaked the First Spouse with a kind of executive privilege. The district court supervising the Monica Lewinsky grand jury made that implication explicit by holding

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123. See, e.g., Francis L. Loewenheim, *Why Not a (Hillary) Clinton vs. (Liddy) Dole Debate?*, *Houston Chron.* A4 (Sept. 1, 1996); Caroline Schomp, *Let Hillary and Liddy Debate*, *Denver Post* 11B (Oct. 11, 1996).

124. See Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 *Const. Comm.* 183, 185 (1995) (criticizing "pernicious practice of candidates feeling no need whatsoever to identify anyone who would occupy high positions in their administrations").

that executive privilege extends to the First Spouse. In the Whitewater case, the district court similarly included the First Spouse within the White House for purposes of the attorney-client privilege.

By recognizing the First Spouse's important duties, these court decisions provide support for including the First Spouse within a functional understanding of the Impeachment Clause. If the purpose of impeachment is to allow Congress to exercise a check over powerful officials in the executive branch, then including the First Spouse within the scope of impeachable officials furthers this purpose. More specifically, these decisions emphasize that with the First Spouse's official status comes a panoply of non-statutory privileges shielding the First Spouse's conduct from congressional and judicial scrutiny. The privileges afforded to members of the executive branch suggest that impeachment may be a necessary check on those who fall within this protected sphere. Membership has its privileges, but also its responsibilities, and impeachment allows Congress to police misconduct by those enjoying the privileges.<sup>125</sup>

Of course, if government abuse is the target, impeachment could be part of the problem, rather than part of the solution. Unscrupulous politicians have abused the impeachment process in the past to advance partisan political goals.<sup>126</sup> The impeachment trials of Justice Samuel Chase and President Andrew Johnson arguably threatened, rather than advanced, important principles of separation of powers.<sup>127</sup> The movements to impeach Chief Justice Earl Warren and Justice William Douglas also exposed the potential of impeachment to undermine the independence of the judiciary.<sup>128</sup> The possibility of impeaching the First

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125. An alternative approach would simply assert that the courts erred in finding the First Spouse to be a government official. The decision in *American Physicians* has received scholarly criticism. See Anessa Abrams, *The First Lady: Federal Employee or Citizen-Representative Under FACA*, 62 *Geo. Wash. L. Rev.* 855 (1994); see also Wasserman, 48 *Vand. L. Rev.* 1215 (cited in note 18).

126. See Potts, 12 *St. Louis L. Rev.* at 35-36 (cited in note 24) (noting that impeachment process is "often subject to partisan prejudices").

127. See William H. Rehnquist, *Grand Inquests 276-78* (William Morrow & Co., Inc., 1992).

128. See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 *Ky. L. J.* 643, 650 (1987/1988); see also Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 *U. Ill. L. Rev.* 809, 849 & n.210 (citing attempt to impeach Justice Douglas as among "the most overt threats to judicial independence"); Gordon Bermant and Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *Mercer L. Rev.* 835, 840 (1995) (noting that opponents of Chief Justice Warren and Justice Douglas were accused of "using impeachment to curtail independence").

Spouse could certainly lend itself to such misuse. The likelihood that in the near future First Spouses will continue to be women presents another ground for caution. At least some criticism of Hillary Rodham Clinton reflects mere hostility to the notion of a powerful woman, and impeachment would provide an additional outlet for such pernicious sentiments.<sup>129</sup> As all power can be abused, the possibility of abuse does not dispose of arguments for the impeachment power. In analyzing impeachment from the functional perspective, though, it is relevant to consider whether in practical application impeachment is likely to further or to retard the proper functioning of the political system. The Constitution embodies a judgment that in general the need for subordinate officers to be removable by Congress is worth the risk of abuse of the impeachment process. In exploring how that principle applies to a particular extraordinary situation, it may well be worth an independent weighing of the need and the risks.

### III. IMPEACHMENT APPLIED TO FIRST SPOUSE

What would it mean if the First Spouse were impeached and convicted? The political fallout would likely be great, but the practical consequences would be slight. The Constitution provides two punishments that impeachment may entail: removal from office and disqualification from holding future office. Impeachment would not entail divorce: the spouse would remain married to the President. Like other members of the President's family, the impeached spouse could continue to live at the White House.<sup>130</sup> At the other end of the spectrum, the impeached spouse could not be considered a government official for constitutional purposes.

To the extent that a constitutional privilege may shield communications among the President's advisers or between the advisers and the President, an impeached spouse would no longer fall under this protective mantle. Separation of powers

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129. See Faludi, *The Power Laugh* at 13 (cited in note 88); Quindlan, *The (New) Hillary Problem*, § 4 at 17 (cited in note 89); Anne Reifenberg and Kathy Lewis, *Mrs. Clinton's Defenders Call Attacks Sexist*, Dallas Morning News 1A (Mar. 12, 1994); Ruth Rosen, Editorial, *Weak Men Hate Hillary Because She's Strong*, Buff. News F9 (Feb. 11, 1996).

130. President Franklin Roosevelt's unofficial adviser Harry Hopkins lived at the White House, see Naftali Bendavid, *The First Lady and the Law*, Legal Times 1, 23 (Mar. 15, 1993), as did Jimmy Carter's adult son. See Lynn Smith, *In the Spotlight at a Tender Age Chelsea Clinton Won't Find It Easy Being a Kid in the White House*, K.C. Star F1 (Dec. 15, 1992).

might require that the executive enjoy a sphere of deliberation immune from investigative intrusion undertaken or authorized by other branches. However, impeachment gives Congress the power to determine which persons have abused the public trust and rendered themselves unsuitable for such participation in governance. These disabilities, though, would likely have little practical import. Impeachment would not remove all constitutional protection from deliberations involving the spouse. Consultations with private citizens might enhance the performance of the President's duties, and some have argued that such discussions should enjoy a measure of executive privilege.<sup>131</sup> The spouse's conversations with other policy makers also might fall under the privilege protecting the deliberative processes of government officials.<sup>132</sup> Along similar lines, communications between an impeached spouse and government lawyers could not be shielded by the attorney-client privilege based on the First Spouse's official position, but other privileges likely would apply; spousal privilege might protect communications directly with the President.<sup>133</sup>

Like many functions related to the President's position as head of state, an impeached spouse's ceremonial role would be governed more by rules of etiquette than by rules of law. As a matter of constitutional etiquette, it might be inappropriate for

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131. See Bybee, 104 Yale L.J. at 122-28 (cited in note 108). President Nixon, for example, claimed executive privilege for conversations with John Mitchell at the time he headed Nixon's re-election campaign. However, a recent decision of the Court of Appeals for the District of Columbia Circuit suggests limits to the scope of the privilege for presidential communications. See *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (asserting that "presidential communications privilege . . . should not extend to staff outside the White House in executive branch agencies"); see also 26A Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5673, at 49-50 (West Publishing, 1992) (discussing scope of executive privilege). For an overview of executive privilege and a review of arguments endorsing and opposing it, see Mark J. Rozell, *Executive Privilege* (Johns Hopkins U. Press, 1994).

Courts have held that the Freedom of Information Act exemption for internal government communications extends to reports prepared by outside advisers. See *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). Judge MacKinnon relied on this FOIA case law in asserting that executive privilege extends to communications with private citizens. See *Nixon v. Sirica*, 487 F.2d 700, 755 n.112 (D. C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part).

132. See Russell L. Weaver and James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279 (1989) (discussing deliberative process privilege generally).

133. The attorney-client privilege might be available based on theories, such as common interest, that do not depend on the government's lawyers serving as counsel for the spouse. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997) (discussing common interest doctrine). For a discussion of spousal privileges, see Christopher B. Mueller and Laird C. Kirkpatrick, 2 *Federal Evidence* §§ 206, 207, at 425-46 (Lawyers Cooperative Publishing, 2d. ed 1994).

the impeached spouse to represent the United States in official capacities: impeachment entails the judgment that a person has abused the public trust, and the people of the United States deserve a more fitting representative.

Similarly, an impeached spouse should no longer enjoy the official assistance provided by 3 U.S.C. § 105(e). The statute authorizes aid for the First Spouse to enable the spouse to help the President perform official duties. As the impeached spouse would no longer provide such officially sanctioned assistance to the President, aid for the impeached spouse would not further the statutory purpose.<sup>134</sup>

One consequence of impeachment that would have significant legal import would be the disqualification provision, though it is of course highly speculative whether a First Spouse would seek any further office.<sup>135</sup> The application of the disqualification provision is relatively straightforward. Congress could—though need not<sup>136</sup>—specify that the impeachment conviction includes a prohibition from holding office in the future. The Constitution

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134. The question then arises whether the President could replace the impeached spouse and thereby continue to receive the assistance formerly provided by the First Spouse. The language of § 105(e) appears to preclude such a replacement. The statute grants the President power to designate a substitute First Spouse only if the President has no spouse. Because impeachment is not divorce, the impeached spouse remains married to the President, and the replacement provision does not apply. A less wooden reading of the statute, though, yields a contrary, and more reasonable, conclusion. The statute embodies congressional recognition that the President needs assistance of the kind usually provided by the First Spouse. Whether or not Congress wished to limit the President's discretion to replace the First Spouse unilaterally, impeachment represents a congressional judgment of the spouse's unfitness. In such a circumstance, in which Congress both has recognized a need and found the usual assistant unfit, the statute could be read by implication to authorize assistance to a replacement designated by the President.

135. Hillary Rodham Clinton certainly has the traditional qualifications for high government office. See, e.g., Wulwick and Macchiarola, 24 Stetson L. Rev. at 650 n.122 (cited in note 88) (reviewing Hillary Rodham Clinton's accomplishments and concluding that she is qualified to be attorney general). A New Yorker article touched off a flurry of speculation about Hillary Rodham Clinton's presidential ambitions. See Connie Bruck, *Hillary the Pol*, New Yorker 58, 91-95 (May 30, 1994) (discussing possibility of Hillary Rodham Clinton's running for President). But see *Hillary Clinton for President? New Yorker Article Brings Denials*, Washington Post A9 (May 23, 1994). The other possible First Spouse in the 1996 election, Elizabeth Dole, also has strong credentials for high office, including prior service as Secretary of Labor and Secretary of Transportation. See Robert P. Sigman, *The Doles' White House Banter Makes You Wonder*, K.C. Star C7 (Jan. 2, 1998).

136. See *Procedure and Guidelines for Impeachment Trials in the United States Senate (Revised Ed.)*, S. Doc. No. 33, 99th Cong., 2d Sess. 95, 99, 101 (Government Printing Office, 1986). Alcee Hastings, for example, held office in the House of Representatives following his impeachment from a federal judgeship. See *Waggoner v. Hastings*, 816 F. Supp. 716, 719 (S.D. Fla. 1993) (ruling that disqualification from office was not necessary consequence of congressional impeachment).

permits Congress to make the judgment that a person who has once breached the public trust is unfit for any further government service.

In sum, the impeached spouse could act as an unofficial advisor, but no more. Such an informal advisory role traditionally has been an important part of the First Spouse's position. Impeachment would not prevent the spouse from influencing the President's policies, editing the President's speeches, or engaging in political debates in the media, as former First Spouses have done.<sup>137</sup> By contrast, the more formal roles that recent First Spouses have assumed might well be prohibited to an impeached spouse. The propriety of attending cabinet meetings and of holding official talks with foreign leaders, for example, reflects the official position of the First Spouse. An impeached Rosalynn Carter could not have undertaken these responsibilities. Nor could an impeached spouse serve as the official in charge of a government task force, unless the President formally appointed the spouse to the position, in the same manner as the President would appoint any other private citizen.<sup>138</sup>

#### IV. CONCLUSION

The idea of impeaching the First Spouse may seem far-fetched, but should seem no more odd than treating the First Spouse as a government officer. First Spouses have always played some role in a presidential administration, and the recent growth in the spouse's public advisory role will likely continue. This greater public visibility, along with increased concern about regulating the operations of government officials, has demanded a clarification of the First Spouse's position. Is the First Spouse an officer or merely a member of the kitchen cabinet? Influenced by the functional importance of the position, recent court rulings confer official status on the First Spouse. These decisions raise various questions concerning how the First Spouse fits within other laws governing officials, such as the Anti-Nepotism Act<sup>139</sup> and conflict-of-interest laws.<sup>140</sup> Other questions include

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137. See text accompanying notes 80-87.

138. If an impeached spouse is not disqualified from future office, the spouse could become a government officer and engage in all manner of official duties. The spouse would, though, have to comply with relevant statutory requirements, such as the strictures of the Anti-Nepotism Act. See 5 U.S.C. § 3110 (1992).

139. 5 U.S.C. § 3110 (1992).

140. See, e.g., Wasserman, 48 Vand. L. Rev. 1250-59 (cited in note 18) (discussing how various statutory provisions should apply to First Spouse).

whether the First Spouse should take the constitutionally required oath.

A more fundamental characteristic of an office is the manner of removal. The means by which the public may assert control over its officers plays an important role in determining the level of government accountability. The nation is fortunate to have had very capable spouses to assist its Presidents. In view of the important advisory and ceremonial role of the First Spouse, it may make sense to treat the spouse as a federal officer. However, it would be an intolerably Imperial Presidency if marriage to the President made one not only an officer, but an unimpeachable one. In this essay, we have explored what impeachment would entail. Because the practical consequences would be slight and the perils of partisan politicking great, impeaching the First Spouse in any circumstances might be a very bad idea. Such pragmatic concerns may figure into a constitutional analysis of the possibility of impeachment.<sup>141</sup> Our constitutional guarantees of government accountability, though, also must figure into the analysis. If impeachment is intolerable because of the high possibility of abuse, then perhaps, at a minimum, the courts should rethink the question of the First Spouse's official status.

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141. See *Clinton v. Jones*, 117 S. Ct. 1636, 1651 (1997) (considering argument that possibility of "politically motivated harassing and frivolous litigation" justified constitutional privilege for the President).