

## Introduction

My life in the law so far has spanned just over forty years. It is a curious fact, or so it seems to me, that the beginning, the middle, and the current autumn of my career have been defined by national battles over presidential impeachment.

I have often said that Richard Nixon made me a lawyer. In the Watergate summer of 1974, I was a college sophomore who thought he wanted to be a doctor. But I was enthralled by the steadily heightening drama of the struggle between the president and those in the Justice Department, the press, and Congress who were determined to discover whether he had abused the powers of his office and betrayed his trust. I followed every twist and turn of the byzantine legal maneuvering by which the truth was finally extracted. I watched the Senate Watergate hearings and the impeachment hearings in the House Judiciary Committee whenever I could.

I admired all the people one would expect a young idealist to admire. The president's interlocutors, to be sure – Archibald Cox, bow-tied, dignified, relentless special prosecutor; Senator Sam Ervin of North Carolina, avuncular, rapier-sharp, “simple country lawyer” from North Carolina; Congresswoman Barbara Jordan of Texas, brilliant, eloquent, stentorian, too soon taken from us, a woman of color in the vanguard of history; and Peter Rodino, the calm, modest, but dogged, New Jersey embodiment of the best in American politics who chaired the House Judiciary Committee. But I also admired those of the president's own party who did not let their partisan ties to Richard Nixon or the political disaster they feared would surely follow his removal deflect them from finding the facts and acting on them once known – Senator Howard Baker of Tennessee, determined to know what the president knew and when he knew it; Congressman Hamilton Fish of New York who voted to impeach because, “The evidence is clear”; and Senator Barry Goldwater of Arizona, the dean of American conservative Republicans, who, sadly but firmly, walked into the Oval Office and told Richard Nixon that his cause was lost and he ought to go.

I realized that long-ago summer that I was far more interested in what these people, and all those who worked with them, were doing than in the goings-on in any test tube or petri dish or operating theater. I wanted to be a part, however

insignificant, of the long story of American law and constitutionalism. So I switched majors from biology to political science, and in 1976 went off to law school.

Two decades or so later, after half a career as a federal and state prosecutor, I became a law teacher. And impeachment came knocking again. William Jefferson Clinton, that charismatic, canny, but deeply selfish man, was under siege from the not altogether imaginary “vast right-wing conspiracy” of Hillary Clinton’s nightmares – a brigade of muckraking political lawyers, Independent Counsel Kenneth Starr, and a ferocious new generation of conservative congressmen led by Newt Gingrich. I was asked to write testimony on behalf of a national lawyers’ group for the House Judiciary Committee on the meaning of “high Crimes and Misdemeanors.” That turned into a law review article, and then another, and over the years into occasional visits to impeachment land whenever the topic raised its head in the national press.

After Clinton escaped conviction in the Senate, stained but astoundingly buoyant, I never really expected to encounter in my lifetime another occasion when impeachment of a president would become a live topic of the American conversation. After all, until 1974, only one American president – Andrew Johnson in 1868 – had been impeached in the two centuries since the adoption of the constitution. From 1974 to date, one president has resigned in the face of certain impeachment and conviction, and another has been impeached and acquitted. A third serious impeachment controversy in only forty years seemed out of the question. Then came Donald Trump.

Mr. Trump’s eruption onto the national political scene and his stunning election to the presidency were unprecedented in a hundred ways. One of them was that his distressed political opponents began talking about impeaching him before he ever took office. To be frank, that sort of talk was really quite daft. Whatever Mr. Trump’s peculiarities, he won the presidency according to the constitutional rules (even if, as heartbroken Democrats never tire of mentioning, he lost the popular vote by a margin of almost 3 million). Accordingly, he is entitled to an uninterrupted tenure of office unless he dies, is stripped of his powers under the Twenty-fifth Amendment, or is impeached for committing “Treason, Bribery, or other high Crimes and Misdemeanors.” Absent compelling proof of the latter – as we will see, always a steep mountain to climb – he was certainly entitled to the benefit of the doubt as he shouldered the burdens of an almost impossible job.

And yet, as time passed, the impeachment talk never waned. Some of the talk is still just partisan resentment. Some of it is still just wishful thinking, a desperate hope of reversing the results of a stunning electoral defeat. But not all the talk has been frivolous. Indeed, as the months march by and Mr. Trump’s approach to his office and to American constitutionalism has become clearer, the conversation has taken a more serious turn. I entered the debate first through that quintessentially twenty-first-century expedient of the loquacious intellectual, a blog.<sup>1</sup> For nearly a year, I wrote about the controversies of the day – the Mueller investigation, alleged abuses of the pardon power, possible violations of the emoluments clauses of the

constitution, Russian meetings and federal election law, payoffs to mistresses, the gamut. As I wrote, I also read, or reread, the available studies of impeachment. I concluded that, while much ground had been covered over the years, there was no comprehensive treatment of impeachment running from its ancient roots in medieval England through the entire American experience to the present day. Certainly, no one had attempted to write a work that combined a comprehensive scholarly examination of the field with sober analysis of the present political moment. I set out to write that book. Whether I have succeeded, well, you will judge for yourself.

A few introductory thoughts before you plunge in:

There is a lot of history here. There are multiple reasons for that. Impeachment is a mechanism written into the American constitution in 1787 by the crew of renegade Englishmen we have since deified into Founding Fathers. In writing the constitution, they could not help but be influenced by the history and politics of the ancient kingdom they had just left. Their observations about the strengths and weaknesses of Great Britain's parliamentary monarchy infused all the choices they made about both the overall structure and working details of the new government they were imagining. They generally shared Montesquieu's enthusiasm for a government in which power was separated, as in Great Britain it mostly was, between the executive, judicial, and legislative branches. However, they were particularly focused on the problem of how to balance the need for a vigorous executive and an independent judiciary with the fear that either might become abusive, corrupt, or even tyrannical. They saw the legislature as the central organ of a republican government and as the source of necessary checks on the possible excesses of the other two branches. Their immersion in the political culture of the mother country and, for many of them, their deep study of British history, naturally disposed them to think of impeachment, a very old parliamentary institution, as one of those checks. So the first reason we need to know a good deal about British political history is that it informed everything the American Founders did, particularly the choices they made about impeachment.

The second reason for our forced immersion in "olde" parliamentary lore is that, once the framers decided that they were going to put impeachment in the constitution, they also decided, at the very last moment, to define the scope of impeachable conduct with a very "olde" phrase, "high Crimes and Misdemeanors." As we will see, that phrase came from British impeachments. It was first used in Parliament to describe impeachable offenses in the 1300s and became a staple of parliamentary impeachment talk for the next four centuries. Even if you are not already familiar with the furious arguments that swirl around the meaning of these four words, you would immediately grasp that they are not self-explanatory. What, after all, is a "high" crime? Does "crime" in this setting mean crime in the ordinary sense, or just really bad behavior? What does "misdemeanor" mean in this special setting? Surely we are not going to be impeaching people for jaywalking or overtime parking. Does "high" modify "misdemeanor," and if so, what the heck is a "high

misdemeanor”? It turns out that “high Crimes and Misdemeanors” is not so much a pair of individual nouns with a single modifier, but a unitary term of art that can be understood only in the historical setting where it arose. As we will discuss at great length in Chapter 4, that is certainly how the men who wrote and ratified the constitution understood it. So we have to go back into history to find out what they meant.

The need for historical knowledge does not end with a foray into the halls of Parliament. It turns out that American colonists before the Revolution and the inhabitants of the new states created after the Declaration of Independence in 1776 knew something about their British constitutional roots. The colonists used impeachment both to rid themselves of troublesome government officials and sometimes to assert the independence of the colonial assemblies from royal government. The new states almost all wrote impeachment into their constitutions and many used it. All that history on this side of the Atlantic was part of the framers’ heritage. It affected their thinking about impeachment. So we need to know something about it, too.

Finally, we cannot stop our historical exploration with the Constitutional Convention of 1787 and the impeachment provisions the delegates wrote into the constitution. Although “high Crimes and Misdemeanors” is a term of art derived from British and (some) early American practice, all constitutional language is subject to interpretation through later usage in particular cases, a process that sometimes produces quite radical shifts in meaning. What is more, this particular phrase is more malleable than most because it is mostly just a label for what Parliament and some early American legislatures did as they decided individual cases. They impeached people for this or that, and then called the resulting bag of this-and-that “high Crimes and Misdemeanors.” Lawyers call this mode of lawmaking the “common law” method. Put simply, it means that courts, and here legislatures, make decisions in particular cases looking to what they have done in the past for guidance about the best rule, but not being absolutely bound by what they decided before. It is a flexible way of making law, always keeping an eye over one’s shoulder for old wisdom while shaping the law to the needs of the present. As we will see, the evidence is very strong that the framers intended impeachments to be decided in just this way.

Therefore, our trip through history must continue. To understand how impeachment should be employed today, we need to examine all the, surprisingly few, times it has been used from the ratification of the constitution in 1788 to the present day. So we will consider the impeachments of federal judges and cabinet officers (actually only one of those, Secretary of War William Belknap), the attempted impeachment of a U.S. senator, and of course the three presidents who have been impeached or nearly so – Andrew Johnson, Richard Nixon, and Bill Clinton.

As we go, we will be looking for patterns and precedents. We will answer questions about who can be impeached, who does the impeaching, what rules there may be

about the procedure, and what consequences can be visited on the convicted. We will consider how and by whom investigations of impeachable behavior should be conducted, particularly in the case of presidents. We will think a lot about how impeachment fits into the overall structure of the American national government. We will spend a good deal of time figuring out the kinds of behavior for which an erring official may constitutionally be impeached. We will take especial note of the high procedural barrier the framers erected with the requirement of a two-thirds majority for conviction in the Senate. Finally, we will examine the case for and against impeaching President Donald Trump.

A brief word about how to use this book: of course, like all authors, I fondly hope that you will hurry on from this Introduction and read the entire opus in a single fevered rush. I will give friendly warning, however, that Chapters 2 and 3 may be a little heavy going for those not historically inclined. I think it is all fascinating stuff, and I also think that no respectable constitutional argument about the place of impeachment in the constitution or the meaning of “high Crimes and Misdemeanors” can be made without a solid understanding of what Parliament and pre-1788 Americans were up to. But if you find it all a bit too antiquarian, I will forgive you for dashing through it quickly to get to the chaps assembled at Independence Hall in Chapter 4. After that, if you are really interested in impeachment in America, the rest of the book is pretty plain sailing.

I will offer a final thought before sending you on your way. My study of some 700 years of Anglo-American practice suggests that impeachments have been of three broad types. The first is impeachment as governmental house-cleaning device. The legislature has often used impeachment to force out of office (and in Britain to punish criminally) crooks, swindlers, traitors, petty despots, gross incompetents, and others who infest the middle reaches of government and cannot be induced to go by other means. Most American impeachments have been of this kind – impeachments of misbehaving federal judges with life tenure otherwise removable only by retirement or death. Second, in both Britain and the United States, impeachment is also a political tool, used or threatened as a means of expressing profound legislative displeasure with another branch of government by evicting officials who are the fount or instruments of its policies.

Finally, there is a third, rarer but far more important, class of impeachments. As we will see, impeachment was invented and wielded by the British Parliament through centuries of difficult evolution from absolute monarchy toward the parliamentary democracy that was beginning to take shape in the eighteenth century. It was, from its inception, a revolutionary device. A declaration by the assembled nobles and commons of England that the monarch had limits, that even though the nation was generally loyal to, and deeply reluctant to remove, the king, Parliament would guard against a drift or rush to absolutism by striking at the king’s human instruments. These were the great impeachments of British history in which, as Parliament commonly phrased it, the defendant was charged with “the crime of

subverting the laws, and introducing an arbitrary and tyrannical government.” The essence of these cases was that Parliament was defending its vision of the proper constitutional order. In some cases, these impeachments were genuinely defensive in the sense of sending a sharp and sometimes deadly signal that traditional rights and privileges must not be invaded. In other cases, Parliament’s project was more creative. At critical junctures in the nation’s history, when fundamental choices about the kingdom path had to be made, Parliament used impeachment to declare in favor of its vision of the constitutional future.

American presidential impeachments by their nature tend to fall into this third category. Great Britain could not impeach its monarch, only his or her minions. In the United States, we can take down the official who is, for an elected time at least, both head of state and head of government. We contemplate that only rarely. We tend to do so when the country is unusually quarrelsome and discontented with itself, when our settled expectations about the constitutional order are shaken, when we fear the shape of things to come, when as Hamlet put it, “The time is out of joint.”<sup>2</sup> We are in such a time now. It behooves us to examine, debate, and understand one tool the Founders gave us for defending the constitution.