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Introduction

I FIRST became interested in federal impeachments when I was working on my doctoral dissertation in the early 1990s. At the time, impeachments seemed like a particularly useful way to study how Congress exercised its constitutional responsibilities when it was working without a net. In an impeachment, the members of Congress have to take responsibility for their own actions because the Supreme Court is not going to bail them out if they make constitutional mistakes. Impeachments can reveal something about how Congress thinks about the Constitution when left to its own devices. Moreover, high-profile impeachments shed particular light on how the American constitutional system has developed over time. They mark moments when Congress—and America broadly—has contemplated the foundational principles that ought to guide government officials as they work in the public trust. They are moments of constitutional restoration, and sometimes of constitutional change.[1]

But no matter how interesting or illuminating such historical impeachments might be, they have been rare and seemed firmly anchored in the past. As with much scholarly work, my time spent studying impeachments seemed rewarding for its own sake but arcane and distant from ordinary political life. Of course, it has turned out that impeachments, even presidential impeachments, are not simply a thing of the past. We have lived through more

presidential impeachments than has any previous generation of Americans. We will probably live through some more.

We live in an age in which every succeeding presidential administration has bred its own cottage industry of critics and opponents calling for impeachment. Before Donald Trump was sworn into office as president, books were being written calling for his impeachment. Before Joe Biden was sworn into office as Trump's successor, a newly elected member of the House of Representatives promised to introduce articles of impeachment against him. Such has been the way of our political life for more than two decades.

My goal for this book is different. I come neither to bury Caesar nor to praise him. I do not mean to mount a prosecution of the current president and explain why he should be impeached and removed from office, nor do I mean to mount a defense of a former president and explain why his impeachment was unjust. Such works have their place, and there are examples of them aplenty. This is not one of those books.

Instead, I hope to illuminate the constitutional nature, purpose, and history of the federal impeachment power not from the perspective of how it might help or hurt a particular government official but from the perspective of how we have thought and should think about it over the long run. It can be a useful exercise when thinking about constitutional powers to consider how we should understand that power not only when it is being used by our friends but also when it is in the hands of our opponents. My views on the impeachment power were shaped from the study of our history, before impeachment politics entered contemporary American life. They have been deepened and informed by the events and controversies of the past quarter century as I have sought to apply those early lessons to emerging problems, but my view of the impeachment power was not developed in the heated partisan environment of a particular impeachment. I have been both critical of and sympathetic to aspects of every impeachment that has been pursued over the course of my adult life. I have tried during those controversies to share the lessons of my studies of the Constitution and

the impeachment power to improve the public understanding of the process and the political use of this important constitutional tool. I hope the reflections in this book can be helpful in thinking about the controversies yet to come, and that it can help shed light on the impeachment power without turning up the heat.

The conventional form of referring to the Senate when it tries an impeachment case is as the "high court of impeachment." This style is borrowed from the British practice, where the House of Lords sat as the "high court" in impeachments there. But the British Parliament was a high court in a broader sense as well since it traditionally exercised some judicial powers that were somewhat comparable to the role that the Supreme Court plays in the American system. Parliament was, quite simply, the highest court in the land. The U.S. Senate is not a high court in that sense. It only plays the role of a court in a single, special circumstance—when members of the House of Representatives come to the Senate chamber to impeach a federal officer.

The Senate has more rarely been referred to as the "constitutional court of impeachment," but that appellation has special significance. In the American context, the Senate sits as the *constitutionally specified* court of impeachment. When the Senate is gaveled to order as a court of impeachment, it does so under constitutional directive, in accordance with constitutional forms, and for designated constitutional purposes. It is a court specially constituted by the Constitution. Thus, advocates have sometimes referred to the constitutional court of impeachment in order to emphasize this constitutional form, and on occasion to question whether the Senate is living up to it in practice. The friends of President Andrew Johnson questioned whether it was even possible for the Senate in 1868 to "form a constitutional court of impeachment for its trial" because "almost one-third of its members [was] excluded" by the refusal of the Republicans to seat senators from the states of the former Confederacy that were still under Reconstruction.[2] His sympathizers wondered whether the Reconstruction Republicans appreciated that it was not the Senate *as a*

political body that should have been trying the case. Only a properly formed "constitutional court of impeachment" was authorized to play that role.[3] President Johnson's attorney general had earlier tried to emphasize to the justices of the Supreme Court that a sitting president "cannot be made subject to the jurisdiction of any court, while in office, except only the Senate of the United States, as the constitutional court of impeachment."[4]

When the Senate sits as the constitutional court of impeachment, it does so as the highest and final court under the Constitution and thereby exercises an especially solemn constitutional responsibility. The constitutional court of impeachment is empowered to resolve the gravest of constitutional questions and to hold accountable the highest governmental officers in the land. When the senators assume that mantle, only the people themselves stand above them. Not long after the drafting of the U.S. Constitution, a member of the British House of Commons rose from his seat to defend, for nearly the last time, "the existence of that great constitutional instrument of public safety," the impeachment power.[5] That instrument might not always be used wisely or well, but it should call legislators to recognize and assume their most solemn place in the constitutional order.

In the following pages, I develop an explanation of the scope and purpose of the impeachment provisions of the U.S. Constitution. We have to understand the nature of the impeachment power in order to answer pressing questions about how it should be used and what we can reasonably hope to accomplish by its use. Answering such questions might not have been considered pressing during the long periods in American history when federal impeachments were rare, but calls for the use of the impeachment power are no longer rare and no longer confined to the political fringes.

The argument presented here draws on many sources. The constitutional text is an essential starting point, but the text by itself leaves us with many interpretive puzzles. The purpose and history behind that text is clarifying, as are our established practices in

making use of the impeachment power. The impeachment power is an important piece in the intricate structure and design of the Constitution, and it reflects not only the worries that the founding generation had when imagining how republican politics might work in a new nation but also our persistent fears about how government power can be abused and how those abuses might be remedied. The impeachment power sits at the intersection of our dual commitments to democratic self-government and constitutional restraints on political power. Making sense of that power and how it should be responsibly used requires thinking through both our democratic and our constitutional commitments and how they operate in our modern political world.

My perspective throughout is one informed by history and politics. The impeachment power is not just a legal instrument. It is also a political tool. There is a meaningful law of the impeachment power, rooted in our text and tradition, that bounds its use. Within those bounds, however, political judgment is required to know whether and when and how it should be used. The impeachment power is designed to remedy a distinctly political problem of the misconduct of an officeholder. It is exercised by political officials who must not only make contextualized assessments of whether another political official has engaged in grievous misconduct, but also consider the range of options that might be available to address that misconduct. When legislators reach for the impeachment power, they should know what they hope to accomplish and have some idea of how the impeachment power might be used to reach that goal. Exercising the impeachment power involves choices—choices about how politics is to be conducted, how misbehavior is best remedied, and how we can best secure our highest constitutional ideals.

Choosing well depends on the wisdom and experience of the elected members of the legislature who serve in the constitutional court of impeachment. Those choices can be informed by lawyers, scholars, and experts, but they cannot be dodged. Ultimately, legislators are held to account for how they make those choices by

their constituents, and they alone bear the burden of persuading their colleagues as to what actions are needed and of justifying to the voters what has been done. Legislators need to understand for themselves and be able to explain to others the reasons for their choices. Why did they act, or fail to act? Why did they pursue action in this way? What other options were available to them, and how did they assess the risks and rewards of the path that they chose? Were they satisfied with how events played out? Did the proper people learn the proper lessons, or were mistakes made along the way? Voters should demand answers to such questions, and members of the legislature should be confident in their ability to provide an adequate response.

In the following chapters, I both clarify the law of federal impeachments and illuminate the choices that political officials must make when contemplating whether to use the impeachment power. For the general reader, there are points explained here that are widely accepted by scholars on these topics. But there are many claims developed here that remain points of contention. If this book can help enlighten and inform our scholarly and political debates about how the impeachment power should be used, then it will have done its job.

1

What Is the Impeachment Process?

MORE THAN a century before the American Revolution, the impeachment power enjoyed its heyday in the House of Commons of the British Parliament. The memory of those days was fading but not yet forgotten when Americans were drafting their state and federal constitutions after shaking loose from the British empire. The Americans remained impressed with the parliamentary battles with the British monarch in the seventeenth century, and they were happy to borrow the weapons that Parliament had used in those battles in order to help defend their own republican aspirations.

In 1624, King James I gave a prophetic warning to a favorite courtier, George Villiers, the Duke of Buckingham; and to the prince, the future King Charles I. Both had encouraged the impeachment by the British Parliament of a rival at court, Lionel Cranfield, the Lord Treasurer. James was not pleased. Using his pet name for the duke, James declared, "By God, Stenny, you are a fool, and will shortly repent this folly, and will find, that, in this fit of popularity, you are making a rod, with which you will be scourged yourself." The prince was eight years the duke's junior, but old enough to anticipate wearing the crown himself. James had words for him as well. "That he would live to have his belly full of parliament impeachments: and when I shall be dead, you will have too much cause to remember, how much you had contributed to the weakening of the crown, by

the two precedents he was now so fond of."[1] Within just a few years, James would be dead and the freshly coronated King Charles I would have to dissolve Parliament in order to head off the impeachment of the Duke of Buckingham.

Two decades before issuing that warning to his son, James had unified the kingdoms of Scotland and England under his own rule. His reign saw the flowering of English literature and the arts, from the writing of the plays of William Shakespeare to the translation of the Bible into English. But not everything was running smoothly in England at the beginning of the seventeenth century. The Catholic terrorist Guy Fawkes had tried to blow up Parliament just after James had assumed the English Crown. While still ruling over Scotland alone, James had published a controversial tract laying out his theory of the divine right of kings and his expansive views of monarchical power. He had advised his eldest son, Henry, who was felled by typhoid fever as a young man, "hold no Parliaments, but for necessitie of new Lawes, which would be but seldome: for few Lawes and well put in execution, are best in a well ruled common-weale."[2] King James had never been a fan of quarrelsome legislatures.

James had offered that written advice when Prince Henry was still a small child and when James ruled only over Scotland. When Queen Elizabeth died in 1603, James united the two kingdoms under his own rule. It did not take long for the English Parliament to give James new reasons to wish them out of session. The first Parliament to meet under King James I wound up petitioning the king for permission to arrest and sue some of his minor functionaries, who the House of Commons thought were abusing their offices. James informed Parliament that only the king had the authority to punish his servants and would do so "as he saw fit."[3] Not long after, James dissolved the Parliament. When his other schemes to pay off the royal debt failed, James was obliged to call Parliament back into session but quickly dissolved it again when he thought he had found an alternative source of funds. Some members of Parliament were left to wonder whether they would

ever be called into session again or whether this was the end "not only of this, but of all parliaments."[4]

But eventually the king wanted money to raise an army, so he once again summoned Parliament to assemble. Rather than simply raising taxes and going home, that Parliament too began investigating abuses by friends of the king and questioning the king's foreign intrigues (including the negotiations with Spain's King Phillip III for a marriage between his daughter and Prince Charles). Such impertinence led James to issue a proclamation explaining to his Parliament that while he was an indulgent king who would "allow of convenient freedom of speech," his patience had limits and the parliamentarians should henceforth avoid an "excess of lavish speech" and stop talking "of matters above their reach or calling."[5] Sir Edward Coke, a famed jurist and now a member of Parliament, took the lead in developing a response, and eventually the House of Commons put before the king a bold assertion of a liberty to speak freely "as in their judgements shall seem fittest."[6] The king allowed the members to return home for Christmas, but when the festivities were over, he had the elderly Coke sent to the Tower of London (where he was held for nine months) and ordered the journal of the House of Commons brought to him so that he could personally rip out the page recording the Protestation. He then promptly dissolved the Parliament.

In addition to adopting its Protestation in defense of a freedom of speech in Parliament, the House of Commons made another bold move in 1621—it revived the impeachment power. Parliament had not impeached anyone since the reign of King Henry VI more than a century and a half earlier, and the possibility of such a power was barely remembered. The notorious outrages of Sir Giles Mompesson spurred Parliament to search its dusty records for a power to act. Mompesson had proven entrepreneurial in securing monopolies from the king that allowed him to harass and extort businessmen and enrich himself and members of the king's inner circle. Sir Edward Coke reported to the House of Commons that the "searchers have discharged their duties" and had discovered

that "according to former precedents" the House should "address ourselves to the Lords." And so "it was agreed to go to the Lords, and that the committee examine all his offenses."[7] The king chose not to waste political capital trying to protect Mompesson, and the disgraced knight fled to France before the House of Lords could pass sentence on him.

Having rediscovered this medieval power, the Commons became enthusiastic about its use. It is not clear that Coke or anyone else in 1621 had settled on a name for this practice of the Commons "acquainting the Lords that we had fallen upon some Grievances" that the two chambers together "might all join in the punishing," but at some point it began to be referred to as an impeachment.[8] John Pym, another leader in the House of Commons, boasted that "the high court of parliament is the great eye of the kingdom to find out offenses and punish them."[9] He was zealous in ferreting out those offenses, but his targets were rarely close to the king.

Indeed, the king held the trump cards in the game of impeachment, and Parliament's enthusiasm for it proved to be short-lived. In one of his last addresses to members of Parliament, King James I warned that they were treading on thin ice in impeaching the Lord of Middlesex. Parliament should remember that "they should make the punishment no greater than his crime." Ultimately, the king would have the last word. "And now how far I find they have proceeded according to my rules, so far I will punish; how far I find they have exceeded, I will add mercy. As for bribes, if he have taken any to the detriment of the party, I will punish it." The king cautioned the Commons as follows:

> But as it is lawful for grieved men to complain, so I would not have an inquisition of Spain raised in England that men should seek to inquire after faults; but if complaints come to you, judge of them accordingly but search not for them. . . . But I must warn you for the time to come of one thing. Men shall not give information against my officers without my leave. If there be cause, let them first complain to me, for I will not have any of my ser-

> vants and officers, from the greatest lord to the meanest scullion, complained on by any without my leave first asked but I will make them smart sorer that complain than he is complained of. Neither will I have any man to presume to go to complain as if there were no king in Parliament. I will not suffer it.[10]

Even Pym recognized that Parliament might be able to declare through the impeachment power that a punishment should take place, but "for execution, left to the king wholly, who hath the sword."[11] It was left to the king to strip an officer convicted in the court of impeachment of his titles and offices, imprison or exile him, or worse—and the king might instead choose not to follow up on Parliament's judgment at all. The king might pardon an individual who fell under the "great eye of the kingdom." The king might even suspend or dissolve the Parliament and put an end to its investigations.

When Parliament turned its sights on the Duke of Buckingham, the intimate friend of the king, in 1625, King Charles I played his card, informing Parliament that, "the king, perceiving the commons resolved . . . to reflect upon some great persons near himself . . . this parliament was declared to be dissolved."[12] When Charles called the Parliament back the next year, he gave them a stern reminder of where they sat in the British constitutional order as he understood it. "Parliaments are altogether in my power for the calling, sitting and dissolution. Therefore as I find the fruits of them to be good or evil, they are to continue or not to be."[13]

The conflict at the beginning of his reign between King Charles I and the Parliament did not bring an end to the British practice of impeachments, but its limitations were already visible. In the 1640s, the Commons attempted to take on "great persons" near the king, and the results were not encouraging. What the Parliament really wanted and needed was an instrument for taking control of the government, and the impeachment power was too crude a tool to serve that purpose. As the Commons pleaded with the king in the Great Remonstrance of 1641, it hoped that he would

"employ such Counselors, Ambassadors, and other Ministers in managing his business at home and abroad, as the Parliament have cause to confide in," even if "we may be unwilling to proceed against them in any legal way of charges or impeachment."[14] That conflict between king and Parliament degenerated into civil war and Charles lost his head in 1649.

In the century and a half before American independence, impeachments were part of the process by which Parliament tried to gain control over how public policy was formulated and administered, to realize in practice what one pamphleteer in the early eighteenth century said was a "noble Maxim of our Constitution, (which expressly makes the Ministers accountable for all Transactions contrary to the Interest and Honour of their Nation) by punishing those who have so many times brought Us to the brink of Ruin."[15] Convincing the king to adopt the practice of dismissing ministers who had lost the confidence of the Parliament realized that goal more effectively than did impeachment. The impeachment power was just a way station on the road to votes of no confidence.

When the first edition of what would become a classic treatise on the law and practices of Parliament appeared in 1844, its author could safely treat impeachments as a thing of the past. The power of parliamentary impeachment was, to be sure, "a safeguard to public liberty well worthy of a free country, and of so noble an institution as a free Parliament. But, happily, in modern times, this extraordinary judicature is rarely called into activity."[16] The British constitutional system had discovered better tools than impeachment for remedying most political ills.

Perhaps if the U.S. Constitution had been written a few decades later, the American founders would have emulated the system of ministerial accountability that eventually developed in England. In the mid-nineteenth century, the third Earl Grey could say the ministers of government exercised "the powers belonging to the Crown" but were "considered entitled to hold their offices only while they possess the confidence of Parliament, and more espe-

cially of the House of Commons."[17] No impeachment power was necessary if executive officers were understood to serve at the pleasure of the legislative majority.

But that was not the system that the American founders imagined or designed. Executive officers in the American system were to be independent agents of the people and were not mere instruments of the legislature. The founders imagined that the executive branch and the legislative branch of the American republic could clash as they had in seventeenth-century England (though hopefully without the necessity of the chief executive losing his head). The executive would not be subordinate to the legislature, but rather the executive and legislature would be yoked together in a system of checks and balances. The impeachment power was part of that system, helping to keep the executive under control.

Few principles were so central to the founding era thinking about constitutional design as that power ought to be made to check power. The records of the Philadelphia Convention, where the delegates met in the summer of 1787 to haggle over a new set of constitutional rules, are replete with discussions of how adequate checks on power were to be established. Although only thirty-four years of age, Edmund Randolph was one of the elder statesmen of the convention. He had served for a decade as the first attorney general of the state of Virginia, and he was taking a break from his duties as governor when he traveled north to lead his state's constitutional delegation. Once the delegates had assembled in Independence Hall, Randolph was chosen to launch the substantive business of the convention by introducing the Virginia Plan—the first outline for a new federal constitution. As the debate got under way, Randolph urged the convention to accept the proposal for a bicameral national legislature. The evils that plagued the United States since the end of the American Revolution could be attributed to "the turbulence and follies of democracy." "Some check therefore was to be sought for against this tendency of our Governments," and he hoped the Senate would do the trick. North Carolina's Hugh Williamson similarly

hoped that a legislature divided into two chambers could "serve as a mutual check," while James Madison hoped to provide Congress with a "check" against the "mischiefs" of the states. (The delegates would accept only a watered-down version of that particular check.)[18]

When the convention began to consider Virginia's proposal for a council of revision that could veto bills from the legislature, Elbridge Gerry of Massachusetts thought that judges should be left off any such council since they would already "have a sufficient check against [legislative] encroachments on their own department." The judges, Gerry thought, would hold a power of deciding on the constitutionality of legislation and would therefore be able to "set aside laws as being against the Constitution." Gerry thought there should be a check on both the constitutionality and the wisdom of legislative proposals, but that judges should concern themselves only with the former. Benjamin Franklin dissented from the council idea at least, which he thought "was a mischievous sort of check" that would encourage corrupt bargains between the legislature and the executive. His fellow Pennsylvanian, the future Supreme Court justice James Wilson, worried instead that if the legislature could override a presidential veto too easily, the "Executive check" might prove inadequate, in "tempestuous moments," to the task of allowing the executive "to defend itself" against an overweening legislature.[19] Checks had to be put in place everywhere, the Federalists believed, so that no actor or interest could become too powerful or abusive.

The ultimate and most powerful of these checks—the impeachment power—was entrusted to the Congress. With this power, the legislative branch alone was vested with the authority to remove, when necessary, members of the other branches of the federal government. Members of the legislature could themselves be removed by the chamber as a whole (through expulsion) or by their constituents at regular intervals (through elections). The other branches of government were designed to be powerful and independent, but the legislature held the trump card. Though

Madison was among those who worried about "a powerful tendency in the Legislature to absorb all power into its vortex," there was no other body that could be entrusted to exercise a power to impeach and remove misbehaving members of the judicial and executive branches.[20]

An extraordinary power, but how should it be used? Other checks within the American constitutional system get regular use. The impeachment power, as the constitutional framers probably expected or hoped, has been used far more sparingly. As a result, the impeachment power is less familiar than other aspects of our constitutional system. The threat of its use can be disconcerting. American politicians are perhaps not as bewildered by the ancient precedents as the English parliamentarians in the reign of King James I, but they too often struggle to understand the nature of the impeachment power and its uses. The stakes of its use might not be as high as they were when Britain teetered on the brink of civil war, but the impeachment power is too important to be neglected.

The impeachment power is also too important to be left to the lawyers. Central to this work is thinking about the impeachment power as a political tool. It is ultimately a constitutional power created by politicians for the use of politicians. It is a tool intended to solve political problems, and it both represents and helps secure the centrality of Congress in the constitutional enterprise.

The founders sought to create three branches of government, each independent of the others and enmeshed in a system of checks and balances. They thought that if government power rested with a single set of officials, civil liberty and political effectiveness would be compromised. Each branch of government was armed with its own set of powers and responsibilities and given sufficient tenure and resources to be able to act on its own judgment.

But the desire for independence had to be balanced against a concern for accountability. Government officials needed to be independent enough to be able to act in the public interest, but not so independent as to be able to exercise unchecked power.

When the founders wanted to ensure accountability, they mostly relied on elections and the voters to hold government officials responsible for their actions. But for cases in which abusive behavior could not be tolerated until the next election, they provided for the possibility of impeachment and removal. That power they were only willing to entrust to the most democratic branch of the government: the legislature.

There are risks associated with either a narrow or broad reading of impeachable offenses. A narrow reading of the power risks making the impeachment power inflexible and unable to respond to unanticipated bad behavior on the part of government officials. A broad reading of the power risks creating a partisan weapon that can be used by legislators to undermine the independence of other government officials.

The broader the category of impeachable offenses is understood to be, the easier it is for mere political disagreements to become grounds for impeachment investigations. It is all too common for partisans to believe that their political foes are not just wrong but dangerously wrong, not just mistaken but willfully mistaken, not just erroneous but abusive. If the impeachment power is used to settle political scores, then the independence of the separate branches of government is undermined. If routine impeachments were to become a tool for overcoming policy disputes and political obstructions, then political power would gradually be centralized in Congress, with the judiciary and the executive reduced to little more than extensions of the legislative will. The Constitution was not designed to have presidents and judges sit only at the pleasure of the Congress.

The founders left a powerful weapon in the hands of Congress in the form of the impeachment power. Like all powers, the impeachment power is subject to misuse and abuse. The ultimate check on how that power is used is public sentiment. The burden is on those who think that an impeachment is appropriate to persuade others that the circumstances warrant taking such drastic measures. Successfully exercising the impeachment power re-

quires the ability to reach across the political aisle and forge a consensus that the danger of leaving an individual in power is too great to be risked. In the absence of that consensus, legislators are forced to rely on the more mundane tools they have at their disposal to check abuses of power and advance the public welfare.

To understand the impeachment power, it helps to begin with the constitutional text. The text alone does not tell us what the impeachment power is for or how it is best used, but it does establish the basic framework within which we must operate. With that framework in place, we can begin to explore more controversial questions about the impeachment power in subsequent chapters.

Unfortunately, the constitutional text establishing the impeachment power in the federal constitution is remarkably scant. Worse yet, the drafters did not lay out the impeachment power in one compact constitutional provision. The constitutional language relating to impeachments is spread across the document. State constitutions are often much clearer than the federal constitution in how they describe the impeachment power. While the constitutional text tells us something about the impeachment power, a great deal of detail is left to historical background, structural logic, and congressional practice.

The Power to Impeach in the House

As the Constitution describes the House of Representatives in Section 2 of Article I, it simply concludes, "The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment." This is not terribly helpful, and it clearly leaves much to the congressional imagination.

Notably, this clause tells us nothing at all about what process the House must follow when it chooses to exercise its sole power of impeachment. We have to fill in the gaps by looking to a separate provision of Article I, which lays down the default rule that "Each house may determine the Rules of its Proceedings." Unless

the Constitution tells us otherwise, it is up to the House to determine for itself how to conduct its business. It is up to the House itself to determine whatever process the chamber will use to impeach a government official. The House makes up its own rules for impeachment. Those rules might be guided by earlier House precedents, but the House can always change its mind and adopt a new process if it so prefers. Just because the House has proceeded in one way in the past does not mean that it must proceed in the same way in the future.

The Constitution does not impose any procedural constraints on how the House exercises this power. A government official being impeached has no constitutional warrant for expecting that the House will proceed in any particular way. The House might grant an officer a hearing, or it might not. The House might hold a public impeachment inquiry, or it might not. The House might vote to launch an impeachment inquiry before it votes to impeach a government official, or it might not. The constraints on how the House manages an impeachment are not imposed by constitutional rules. They are imposed by politics. The House need not ask how the Constitution dictates that it pursue an impeachment, but the House will inevitably have to ask how it can win public support of and legitimacy for an impeachment, how it can best prepare for a Senate trial, and how it can accomplish the political objectives that an impeachment is attempting to advance.

Likewise, the Constitution does not specify what the House must do to secure an impeachment. By default, the House, like other legislative bodies, operates by simple majority rule. When the Constitution deviates from that default assumption, it does so explicitly. The Constitution informs us that two-thirds of the House is required to override a presidential veto or propose a constitutional amendment or expel a member. It is silent on how articles of impeachment are adopted, and thus they can be adopted by a bare majority of the House.

Similarly, the Constitution does not specify a burden of proof that the House must satisfy in order to impeach an officer or what

evidence it might consider. When exercising the impeachment power, the House is often likened to a grand jury. The comparison is helpful, even if not completely accurate. The House stands in the role of a prosecutor. It brings forth allegations of wrongdoing on the part of a government official. It need only satisfy itself that wrongdoing has occurred. The standard for doing so might be quite low. Like a grand jury in a criminal case, the House might think it sufficient that there is probable cause that impeachable offenses have been committed, or some House members might think that a somewhat greater showing of the preponderance of evidence is necessary to secure their vote to impeach. The House has generally not taken the view that any charges must be shown beyond a reasonable doubt. It is enough that allegations seem credible. Moreover, the House need not restrict itself to the kinds of evidence that might be admitted in a court of law, nor need it hear from the accused. The House could, in effect, impeach an officer in a summary proceeding with no real investigation or deliberation at all.

The House might be able to move precipitously to impeach an officer, but if it hopes to win its case in a Senate trial, it must anticipate what the Senate will need in order to be persuaded. Strictly speaking, an officer is impeached by the sole action of the House. President Bill Clinton was impeached by the House in 1998, and the fact that he was acquitted after a Senate trial does not change that fact. An officer can be impeached by the House even if the case never moves to a Senate trial at all, which might happen if the officer resigns after the impeachment and the House drops the case or even if the House just declines to move forward to a trial. But if the House wants to win a conviction in the Senate, it needs to assemble a case that will persuade the senators. At the very least, this means it needs to be prepared to present evidence to support its allegations; and it might be better situated to do that if it engages in a substantial impeachment inquiry that can gather evidence, and perhaps even if it allows the target of the impeachment inquiry to respond so that the House itself can assess the strength of its case.

Because an impeachment is inevitably political and the House must eventually persuade a body of elected senators (not to mention the House members' own constituents at the next election), the House would be wise to be cognizant of public opinion. One way to convince the senators is to go over their heads and appeal to their bosses, the voters. In most impeachments, the electorate is unlikely to pay much attention. The fate of a corrupt district court judge does not command the attention of the average voter. In some high-profile impeachments, such as the impeachment of a president, the public will certainly be paying attention, and a successful impeachment process will require that the House build a public case that will win over that political audience. A grand jury might be able to indict a ham sandwich, and the House might be able to railroad a federal officer in an impeachment vote, but such a process is unlikely to end well or achieve the goals that the House is attempting to achieve. Successfully impeaching an officer and successfully accomplishing something are not necessarily the same thing.

One thing that the Senate will demand if it is to proceed to trial are articles of impeachment. Articles of impeachment are comparable to a grand jury bill of indictment, in that they detail the charges that are being levied against a government official. The articles identify specific acts of misconduct that the House believes constitute impeachable offenses. They have sufficient specificity that the Senate can evaluate them and the impeached officer can mount a defense against them. That list of impeachable offenses might be quite lengthy, or the House might levy only a single charge stated in a single article of impeachment. In order to proceed to trial, it is not enough for the House to impeach an officer; it must draft articles of impeachment that can form the basis for a trial. The House can vote to impeach before articles of impeachment have been drafted and even before an investigation has taken place. But if it wants to move to trial, it will need to draft and adopt articles of impeachment.

The drafters of the Constitution relied on an English legal context when composing constitutional language, and that is true in the impeachment context as well. The Sixth Amendment does not detail what an "impartial jury" is; it relies on American lawyers knowing what that term entails. Similarly, the Constitution does not tell us what an impeachment is; it only tells us that the House has the sole power to do it. The fact that the House alone possesses the power to impeach is itself significant. Only the U.S. House of Representatives can file the charges necessary to initiate a Senate trial. There is no path to circumventing the House and going directly to the Senate. If the House stubbornly refuses to impeach an officer that the Senate clearly thinks should be removed, the Senate cannot act alone, nor can it act on the basis of charges filed by the Department of Justice, or a petition submitted by a group of voters, or a resolution adopted by a state legislature. Action in the House is a necessary condition for launching a Senate trial. Impeachment politics could play out very differently if the House did not possess the *sole* power to impeach.

But what is the "power of impeachment" that the House possesses? As Sir Edward Coke informed the House of Commons in 1621, it is the power to "address ourselves to the Lords," or, in the American case, to the senators. The power of impeachment is the power to go to the Senate and demand that it conduct a trial to determine whether a specified federal officer should be removed for having committed a high crime and misdemeanor. Since the House has the sole power to impeach, no one else may go to the Senate and demand such a trial. Importantly, the power of impeachment also does not mean anything more than that under the federal constitution. The House can level accusations and demand a trial, and that is all.

The situation is a bit different in some of the American states, and that difference is both informative and consequential. Some state constitutions specify that when an individual is impeached by the lower legislative chamber that individual is also suspended

from exercising the powers of public office. Those powers are restored to the individual if the Senate acquits, but they are permanently removed if the Senate convicts. Note that this gives an important power to a single legislative chamber. By a bare majority vote, the House in some states can temporarily take away an officer's powers. If the Senate delays holding a trial, that temporary suspension can be quite lengthy. By statute, North Carolina has determined that "every officer impeached shall be suspended from the exercise of his office until his acquittal." When some Republicans were angered by rumors that the slim majority of Democrats on the state supreme court might vote to force two Republican justices to recuse themselves from participating in a case on a controversial voter ID law, they floated the possibility that state House Republicans might "effectively suspend those Democrat justices immediately and indefinitely by a simple majority vote." An impeachment vote could take justices out of play until they were acquitted in a Senate impeachment trial, and the House could take its time before bringing articles of impeachment to the Senate for trial or the Senate could delay beginning an impeachment trial in which the justices might win their acquittal. Indeed, a simple majority of the lower legislative chamber could deny the Democrats of their majority on the state supreme court until after the next election, when the voters themselves might hand control of the court to the Republicans.[21] Cooler heads prevailed in North Carolina in 2021. No justices were recused, and no justices were impeached. The voter ID law was struck down by the state supreme court, but Republicans won back the state supreme court in 2022 and the new majority reversed that decision. Pandora's box had been put in full view even if it had not been opened.

A legislative chamber with the power to suspend a judge or a governor can do quite a bit of mischief. On the other hand, a governor who deserves to be removed from office can do quite a bit of mischief while awaiting a trial. Some states have decided that the wiser course of action is to err on the side of suspension. The drafters of the federal constitution, probably without giving the

matter much thought and relying on the English practice, decided to err on the side of preserving the status quo. There is a genuine risk that a tyrannical president could do a great deal of damage between the time that the House has impeached him and the Senate has convicted him, and that includes the possibility of a president conspiring to use the powers of his office to avoid a Senate conviction. Under the federal constitution, there is nothing to be done to prevent such misbehavior besides moving expeditiously to get a conviction. If a Congress truly feared what such a president might do, the solution available is to impeach and convict as quickly as possible—and that could be quite quick indeed. To date, Congress has never moved that quickly, but that reflects a political judgment on the part of the House and the Senate and not anything about the constitutional power itself. It seems probable that the House thought that President Donald Trump had been practically stripped of power when it voted to impeach him for a second time in January 2021. The House did not move quickly to impeach the president after the events of January 6, and it waited until after Joe Biden was sworn in as president before getting around to demanding a trial in the Senate. One can only assume that the congressional leadership had received some assurances behind the scenes that President Trump would not misbehave in the nearly two weeks that he was allowed to continue to occupy the White House after the electoral votes had been counted. The second impeachment was not about incapacitating a dangerous president. It was about symbolically punishing an enfeebled president.

That state practice is also informative of what the "power of impeachment" even means. In December 2019, the House voted to adopt articles of impeachment against President Trump but was in no hurry to initiate a Senate trial. Apparently hoping that the House could influence the Senate's decision about what trial procedures to adopt, Speaker Nancy Pelosi decided to wait until after the holidays to present those articles to the Senate. This raised the interesting, but legally meaningless, question of whether President

Trump could celebrate the holidays without yet having the stain on his record of having been impeached, and the president took some joy in telling his supporters during those weeks that, "In fact, there's no impeachment." Pelosi, for her part, insisted that the House had ruined the president's holidays by having already impeached him. The answer as to when the impeachment of an officer by the House technically occurs is not entirely obvious, but there seems to be good reason for thinking that Pelosi was wrong and that Trump's record was unblemished when he enjoyed his Christmas feast in 2019.[22]

Nonetheless, it should be noted that Speaker Pelosi's view does reflect modern congressional practice, which began in 1912. In that year, for the first time, the House did not send one of its members to the Senate to demand that a trial be conducted to impeach an officer. Instead, the House simply gave directions to the clerk of the House "that a message be sent to the Senate to inform them that this House has impeached, for high crimes and misdemeanors, Robert W. Archbald, circuit judge of the United States." After 1912, the House voted on resolutions specifying that an officer "is impeached," and then simply sent a written notice to the Senate informing them of what the House had done. The modern *House Practice Manual* specifies that "the respondent in an impeachment proceeding is impeached by the adoption of the House of articles of impeachment." Since 1912, the Senate has learned about an impeachment in the past tense. If we think the constitutional meaning of the "power of impeachment" is something that evolves with congressional practice or is simply subject to congressional definition, then our current practice under the federal constitution dictates that an officer is impeached the moment the House adopts a resolution declaring that the officer is impeached. Once that is done, the House just sends the paperwork to the Senate letting them know what has happened. By that logic, Donald Trump was impeached for the first time on December 18, 2019.[23]

The modern view is not, however, consistent with the early historical practice and likely the original public meaning of the im-

peachment power. William Blackstone, the English jurist whom many early Americans relied upon for understanding English law, defined an impeachment as "a prosecution" and "being a presentment to the most high and supreme court of criminal jurisdiction by the solemn grand inquest of the whole kingdom." An early American constitutional commentator, William Rawle, thought it clear that the power "to impeach" simply is the power "to exhibit articles of accusation against a public officer before a competent tribunal."[24] When the U.S. House of Representatives decided to exercise its power of impeachment for the first time against Senator William Blount in 1797, it searched the English precedents for guidance as to how to do it. It concluded that it needed to pass a resolution designating someone to walk over to the Senate and impeach Senator Blount. The Senate journal records that the following message was delivered by Representative Samuel Sitgreaves from the House:

> Mr. President: I am commanded, in the name of the House of Representatives, and of all the people of the United States, to impeach William Blount, a Senator of the United States, of high crimes and misdemeanors; and to acquaint the Senate, that the House of Representatives will, in due time, exhibit particular articles against him, and make good the same.[25]

The House had commanded Sitgreaves to go to the Senate and impeach Blount. Once that was done, then the Senate could send notice to Blount that he had been impeached and could prepare for trial. The House would later draft and exhibit in the Senate articles of impeachment. This was the form that the House used to impeach officers all through the nineteenth century. An impeachment occurred when the Senate sergeant-at-arms announced the presence of a member of the House, who then addressed the Senate chamber and declared that "in obedience to the order of the House of Representatives we do appear before you, and in the name of the House of Representatives and all the people of the United States of America we do impeach" some miscreant federal

officer. Up through 1904, an impeachment was an act performed by the House on the floor of the Senate. By that logic, Donald Trump was impeached on January 16, 2020.

The Power to Try All Impeachments in the Senate

In describing the Senate in Section 3 of Article I, the Constitution again concludes with the impeachment power, but here the text is somewhat more fulsome:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The constitutional text is more robust in regard to the Senate, and for good reason. Note that here the Constitution specifically departs from the default of simple majority rule. In order to do so, the text is explicit that conviction in a Senate trial requires more than a bare majority. Conviction requires a supermajority, in this case a supermajority of two-thirds. The constitutional drafters built in a bias toward acquittal and of leaving impeached officers in place, and a distinct minority of the senators can force that result. At the same time, the only votes that count are those of senators who are present to vote. Senators cannot impede a conviction by removing themselves from the Senate floor and refusing to be counted.

As it did with the House, the Constitution entrusts a "sole power" to try impeachments in the Senate. Just as the Senate cannot circumvent the House in order to launch an impeachment process, so the House cannot circumvent the Senate to secure a removal of a disfavored officer. There is only one constitutional court of impeachment, and that is the Senate. As we discuss further in chapter 6, this textual delegation arguably excludes the

Supreme Court from reviewing the actions of the Senate when it tries an impeachment. In this unusual class of cases, the Senate is the court of last resort.

The Constitution once again leaves to the Senate a great deal of discretion over what procedures it might choose to adopt when exercising its share of the impeachment power, but unlike with the House, the Constitution describes the Senate's role in a way that is pregnant with meaning. What happens in the Senate is described as a trial and the potential results as a conviction. The senators, unlike the House members, are instructed to take an oath when sitting for an impeachment trial. In at least one situation, the chief justice is instructed to preside over the trial. Such markers have long been understood to suggest that the Senate plays a more judicious role than the House. If the House acts like a prosecutor in leveling accusations, the Senate acts as a court in evaluating those allegations. In that impeachment trial, the House plays the role of prosecutor by sending a delegation of representatives to serve as "managers" of the case in the Senate. The impeached official is entitled to bring lawyers of his own to mount a defense. The Constitution itself does not specify what oath the senators will take, but the Senate has adopted a rule specifying that the senators will pledge themselves to "do impartial justice according to the Constitution and laws." Unlike the House, the Senate gavels itself in and out of its session as a court of impeachment. As a formal and procedural matter, the Senate exists as two separate bodies, one legislative and one judicial.

The Senate is a court of a very peculiar sort. The senators do not believe themselves to be bound by the federal rules of evidence that would apply in an ordinary court. They determine their own burden of proof for justifying a verdict, and some senators have preferred a very high standard comparable to criminal trials while others have preferred a lower bar. The senators need not accept defenses and immunities that are appropriately recognized in a criminal court. If senators wish to draw inferences from a witness's refusal to answer questions or wish to dismiss an officer's defense

that his speech is protected from criminal punishment by the First Amendment, they have the freedom to do so. The senators are not passive jurors watching a trial and rendering a judgment at the end. They are also the judges, and judges of an extraordinary sort. The Senate as a body sets the rules for the trial and acts on motions from the parties to the case. The presiding officer, whether the chief justice, the vice president, or the president pro tempore, makes an initial ruling on motions, but ultimately the presiding officer has no power to substitute his or her will for the will of the Senate majority. The role of Chief Justice John Roberts in the impeachment trial of President Donald Trump was to do no more than interpret and implement the rules of the Senate, and his judgment could be overridden at any moment. The presiding officer in a Senate trial is more ceremonial than consequential. But the presiding officer does set a tone, and the fact that the Constitution designates the chief justice to preside over at least some Senate trials has emphasized that what the Senate is doing on those occasions is conducting a trial and acting in a solemn judicial capacity, not in a purely political one. The senators might not have to do what the chief justice says, but the chief justice's presence is a reminder of their oath.

The text of the Constitution empowers the Senate to hold an impeachment trial, but it does not mandate that the Senate have a trial. To impeach an officer, the House sends a representative to the Senate to demand a trial, but the constitutional text does not require any particular response to that demand from the Senate. The current Senate rules anticipate that the Senate will move to a trial when the House exhibits articles of impeachment, but such rules can be changed. If the Senate wants to take action against an officer, it must go through the constitutionally specified process of holding a trial; but if the Senate is content to allow an officer to remain in place, it is not clear that the Senate needs to follow any particular procedure. The status quo can be preserved by the Senate acquitting an impeached officer, but it can also be preserved by the Senate just never holding an impeachment trial. Moreover, the

fact that the Senate has the "sole Power" to try impeachments emphasizes that the impeachment process is a cooperative one. There is no way to end-run a Senate that does not want to remove an individual from office. If the argument above is correct that the power to impeach is the power to address the Senate, then the Senate may decline to hold a trial—but it may not bar the doors to a delegation from the House seeking to impeach an officer. The House's power to impeach requires that the Senate hear the grievances, even if the Senate does not want to take any action to remedy those grievances. Of course, if Nancy Pelosi is correct that the impeachment is complete when the House has voted on a resolution, then the Senate could theoretically refuse to allow the House even to exhibit the articles of impeachment on the chamber floor. The constitutional power of the House to impeach is exhausted within its own chamber.

The fact that the Senate must conduct a trial in order to convict and remove an impeached official raises some important questions about what procedures might satisfy that constitutional requirement. We consider that in more detail in the next chapter.

Who Can Be Impeached and For What?

Oddly, the constitutional drafters tucked the scope of the impeachment power at the end of Article II, which describes the executive branch. Separating the provisions of the impeachment power in this way introduces some unfortunate ambiguities that a more compact impeachment clause might have avoided. Section 4 of Article II states, "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."

This clause is generally understood to define the jurisdiction of federal impeachment power. It is possible that the text simply tells us what happens when a civil officer is impeached and convicted but does not tell us that *only* civil officers can be impeached and

convicted. Congress has refused to go down that path. Military officers, members of Congress, state officials, and private individuals who have never held federal office are understood to be beyond the reach of the federal impeachment power. Even if that result is not textually required, it is a less dangerous interpretation. If Congress could proactively impeach and convict private individuals who might someday become rivals for political power, it tilts the balance of power too far in favor of incumbent politicians. Private individuals are ill situated to defend themselves against an overreaching Congress. State government officials might have more political resources to mount a vigorous defense against an impeachment, but intruding into the operation of the state governments in such a way would mark a sharp departure from traditional principles of American federalism. If the Senate were asked to take jurisdiction of such an impeachment case, it would be expected to dismiss the charges as beyond the reach of the constitutional impeachment power. It has been long held by the Senate itself that only presidents, vice presidents, and federal civil officers are subject to impeachment.

It is also here that the Constitution seems to specify the scope of impeachable offenses. It is evident from the debates in the Philadelphia Convention and the earliest commentary that this language was meant to establish the possible grounds for impeachment. To the extent that the "power of impeachment" as it was inherited from England encompassed a broader range of possible offenses, the text of the Constitution imposes a restraint. The American House of Representatives cannot impeach individuals for everything that the English House of Commons could. This limitation is part of the taming of the impeachment power as it was carried over into republican government.

The offenses of treason and bribery are familiar enough, but the phrase *high crimes and misdemeanors* is unique to the impeachment context. In practice, it has been those high crimes that have generated impeachment inquiries, and it has been high crimes that have generated controversy over the range of impeachable of-

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