

CONTENTS

Introduction	1
1 What Is the Impeachment Process?	7
2 What Is a Fair Impeachment Process?	40
3 What Is the Impeachment Power For?	78
4 What Are High Crimes and Misdemeanors?	116
5 When Does Abuse of Power Justify Impeachment?	150
6 Can the Supreme Court Intervene in an Impeachment?	186
Conclusion	204
<i>Further Reading</i>	217
<i>Acknowledgments</i>	221
<i>Notes</i>	223
<i>Index</i>	239

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.

I N D E X

- abuse, impeachment power, 16–17, 176
- abuse of power: abuses of discretion and, 181–82; boundaries of political power and, 117, 161; Congressional tools for addressing, 181–84; constitutional culture and, 160; elections for addressing, 179–81; exercising unlawful power as, 165–75; James Madison on, 159–60; judicial review and, 172–74, 178–79; lessons from Europe on, 150–52; question of most effective remedies for, 152–59; remedies for, 175–85
- abuses of discretion, 181–82
- acceptable political behavior, impeachment establishing norms of, 105–8
- accountability, 15–16
- Adams, John, 41–43
- Alien and Sedition Act of 1798, 166
- American government: accountability in, 15–16; checks and balances in, 14–16, 108–15, 180, 204–5, 207–8; Congressional tools in, 181–84; impeachment power in, 3–4, 12–14; political parties and, 40–42. *See also* Constitution, U.S.; House of Representatives, U.S.; Senate, U.S.
- anti-Federalists, 132, 205
- Archbald, Robert W., 24, 32–33, 34, 93, 225n23
- Articles of Confederation, 132
- articles of impeachment, 18, 20, 22, 24–25
- authorization votes, 52–55
- autogolpe, 77
- Belknap, William, 34
- Biden, Joe, 2, 23, 75, 95, 187
- bills of attainder, 47, 98
- Black, Charles, 139, 142, 146, 168
- Blackmun, Harry, 193
- Blackstone, William, 25, 129
- Blount, Thomas, 70
- Blount, William, 25, 43–45, 61, 70, 166
- Bork, Robert, 120–21
- boundaries of political power, 117, 161
- Boyce, William, 57
- break glass in case of emergency, impeachment power, 138–49
- bribery, 30–31
- British Parliament, impeachment in the: abuse of, 128–29; definition of, 21; as model for the U.S. Constitution, 7–13, 150–52, 176–77; punishments following, 37, 38; scope of, 34–35
- Buchanan, James, 205, 212, 214
- Burke, Edmund, 150, 176–77
- Bush, George W., 143
- Bush v. Gore*, 191–92
- Butler, Benjamin, 70

- Charles I, King, 7–12
Chase, Salmon, 197
Chase, Samuel, 90, 107, 123, 143
checks and balances in American government, 14–16, 108–15, 180, 204–5, 207–8
Cipollone, Pat, 51, 53, 112, 113, 114
Claiborne, Harry, 92
Clay, Henry, 163–64
Clinton, Bill, 145, 161, 209; impeachment of, 19, 51, 61, 79–82; independent counsel report on, 186; partisanship and, 211, 213
Coke, Edward, 9–10, 21
consequences of impeachment, 36–39
Constitution, U.S., 3–4, 12–17; abuse of power addressed by, 151–52, 160–65; checks and balances in, 14–16, 108–15, 204–5, 207–8; on consequences of impeachment, 36–37; giving power to impeach to the House, 3–4, 17–26, 205–6; on impeaching former officers, 31–36; judicial review and, 172–74, 178–79, 191; language used in, 21; on limits of presidential power, 168–69; Senate impeachment trials under, 3–4, 19–22; text on impeachment power in, 26–29; timing of violations to, 174–75; on who can be impeached, 29–31. *See also* House of Representatives, U.S.; Senate, U.S.
constitutional culture, 160
constitutions, state, 21–24, 129–30
Cooley, Thomas, 105–6, 134, 177
Corwin, Edward, 177
Cranfield, Lionel, 7

Debs, Eugene, 141
dereliction of duty, 138–49
Dershowitz, Alan, 123, 125–26, 187, 189–93, 196, 198, 202–3
Dicey, A. V., 106
discretion, abuses of, 181–82
disqualification from public office, 92–97
Douglas, William O., 121–22

ejusdem generis, 124
elections, for addressing abuse of power, 179–81
elective despotism, 116
English, George, 61
Evans, Lemuel, 57

fast impeachments, 72–77
Fawkes, Guy, 8
Federalists, 14, 45, 90, 109, 116, 132, 213
Fifth Amendment, 47, 68
First Amendment, 166
Ford, Gerald, 121–22, 123
former officers, impeachment of, 31–36
Fourteenth Amendment, 94
Franklin, Benjamin, 14, 40–41, 119
future officeholders, impeachment sending messages to, 103–5

George III, King, 151
Gerry, Elbridge, 14, 119
Glorious Revolution of 1688, 150
Goldwater, Barry, 71
Gordon, Thomas, 151
Graham, Lindsey, 51, 69
grand inquests, 97–103
Granger, Amos, 212
Grant, Ulysses S., 68
Great Remonstrance of 1641, 11–12
Green, Al, 73–74

Hamilton, Alexander, 40, 117, 130, 131, 170, 177
Hannity, Sean, 209
Hastings, Warren, 129, 176
Healy, Gene, 103
Henry, Patrick, 132–33
high crimes and misdemeanors, 119, 142; inkblot theory of, 120–22;

- ordinary crimes answer to, 123–27;
political offenses answer to, 127–38
- House of Commons, British, 7–13, 21,
34–35, 102, 176–77. *See also* Britain,
impeachment in
- House of Lords, British, 37. *See also*
Britain, impeachment in
- House of Representatives, U.S.:
authorization votes in, 52–55;
cooperation with the Senate in
impeachments, 19–26; grand jury
analogy of process in, 55–56; im-
peachment investigations in, 55,
97–103; impeachment process in,
51–59; Judiciary Committee, 205–6;
as partisan institution, 57–59,
210–211; power to impeach in,
17–26, 162–63; prosecutor role of,
27; U.S. Supreme Court and, 188.
See also Senate, U.S.
- House Practice Manual*, 24, 158–59,
166
- Hume, David, 171
- Humphreys, West, 35, 90, 92, 93,
144
- impeachable offenses, 16, 30–31, 70–71,
73–74, 79–81, 109–10, 155–59, 177–78,
214–15; abuse of power (*See* abuse
of power); break glass in case of
emergency, 138–49; inkblot theory
of, 120–22; maladministration,
129–30, 131, 135, 137, 138; ordinary
crimes answer to, 123–27; political
offenses answer to, 127–38; U.S.
Supreme Court and questions of,
188–92
- impeachable persons, 29–31
- impeachment, 1–6; allowed under the
Constitution, 3–4, 12–17; articles
of, 20; in Britain (*See* British Parlia-
ment, impeachment in the); burden
of proof for, 18–19; consequences
of, 36–39, 104; cooperation between
the House and Senate in, 19–26;
danger of frequent, 176; decisions
to pursue, 81–82, 157–58; as effective
remedy for abuse of power, 152–59,
167; end goals of, 78–79; establishing
norms of acceptable political behav-
ior, 105–8; first trial in U.S., 43–45;
of former officers, 31–36; judicial
review and, 172–74, 178–79; misuse
and abuse of, 16–17; as political tool,
15, 20, 57–59, 84–86, 154–55, 207;
power in the House, 17–26; power
in the Senate, 3–4, 26–29; proce-
dural constraints on, 18; public
skepticism about, 210–11; for
removal of misbehaving individu-
als, 86–92, 155–56; for removing
individuals from public life, 92–97;
sending a message to future office-
holders, 103–5; state constitutions
and, 21–24; when accomplished,
23–26; who can be subject to, 29–31
- impeachment process: amount of
procedure due in, 66–69; conflicts
of interest and, 69–70; duty of
impartiality in, 70–71; fast trials
in, 72–77; grand inquests in,
97–103; in the House, 51–59; limits
of judicial supremacy and, 196–203;
partisanship in, 40–42, 57–59,
136–37, 210–14; for political mis-
deeds, 46–50; political parties
and, 40–42; removal by address
and, 46; in the Senate, 59–72; trial
of William Blount and, 43–45
- inkblot theory of impeachable
offenses, 120–22
- investigations, impeachment, 55
- Iredell, James, 132
- Jackson, Andrew, 163–64
- Jackson, Robert, 168
- James I, King, 7–12, 15
- James II, King, 150
- January 6, 2021, attacks, 23, 75–76, 94,
95, 100, 162, 184

- Jay Treaty of 1795, 110–11
- Jefferson, Thomas, 213; on democracy, 116; impeachment trial of William Blount and, 43–45; political parties and, 41–43; as vice president, 42–43; worries about impeachment as a weapon, 136, 211
- Johnson, Andrew, 3–4, 122, 143, 166, 177; conflicts of interest of Senators during trial of, 69–70; eleven articles of impeachment against, 60–61; impeachable offenses of, 80, 90, 125, 127, 135–36; Reconstruction Acts and, 197; Republican National Convention during impeachment trial of, 68; on right to free speech, 161; term finished out by, 75, 107
- Jones, Isaac, 85
- judicial review, 172–74, 178–79, 191
- Kennedy, Edward, 164–65
- Kent, Samuel, 92
- late impeachments, 31–36
- legislative tools, Congressional, 182–83
- Lincoln, Abraham, 69–70
- Maclaine, Archibald, 132
- Madden, John, 78
- Madison, James, 88, 113, 115, 142, 151, 177, 205; on abuse of power, 159–60, 163–65; on boundaries of government, 117; on constitutional rights and responsibilities of various branches of government, 111–12; criticism of George Washington, 41; on defending the community against the chief executive, 130–31; desire to provide Congress with check against mischief of the states, 14, 108–9; on impeachable offenses, 169–70; on impeachment power, 84; on presidential responsibility, 100; on the republican principle, 180; worries about Legislature tendencies to absorb power, 15
- maladministration, 129–30, 131, 135, 137, 138
- Mann Act, 146
- Marbury v. Madison*, 191
- Marshall, John, 165–66, 190–91
- Mason, George, 118, 130–31, 138
- Massachusetts Bay Colony, 171
- Mayhew, David, 183
- McCarthy, Kevin, 51–52
- Mississippi v. Johnson*, 4, 197
- Mompesson, Giles, 9–10
- Montesquieu, 151
- Mueller, Robert, 101, 186
- Mueller Report, 186–87
- Nadler, Jerry, 209, 210
- Neustadt, Richard, 183
- Nicholas, George, 133
- Nietzsche, Friedrich, 121
- Ninth Amendment, 120–21
- Nixon, Richard, 35–36, 51, 71, 164–65, 213
- Nixon, Walter, 192–96, 202
- Nixon v. United States*, 192–196, 201–202
- Obama, Barack, 143
- O'Donnell, Guillermo, 210
- ordinary crimes answer, 123–27
- Palmer, Henry W., 127–28
- pardon power, presidential, 38
- partisanship, 40–42, 57–59, 136–37, 210–14
- Pelosi, Nancy, 23–24, 29, 51, 113–14
- Pence, Mike, 91
- persuasion, 82–83
- Philadelphia Convention, 13, 30, 87, 116, 130–31
- Phillip II, King, 9
- Pickering, John, 90, 98, 143, 213
- Pinckney, Charles, 131–32

- political misdeeds, impeachment
 process for, 46–50
- political offenses answer, 127–38
- political parties, 40–42
- political question doctrine, 102, 149,
 188–202, 236n15
- political speeches, 139–41
- political tool, impeachment as, 15, 20,
 57–59, 84–86, 207
- Pomeroy, John Norton, 135–36, 177–78
- Porteous, G. Thomas, Jr., 86, 93
- Posner, Richard, 161
- power of the purse, 182–83
- presidential powers, 182–83; for
 pardons, 38
- Pym, John, 10–11
- Randolph, Edmund, 13, 119, 130, 133
- Rawle, William, 25, 134
- Reconstruction Act, 197
- Rehnquist, William, 192–96, 201, 203,
 236n15
- removal by address, 46
- removal of misbehaving individuals by
 impeachment, 86–92
- republican principle, 180
- Roberts, John, 28
- Rutledge, Edward, 132
- Scott, Hugh, 71
- Senate, U.S.: amount of procedure
 due in, 66–69; conducting normal
 legislative business alongside trials,
 68–69; conflicts of interest in, 69–70;
 cooperation with the House in
 impeachments, 19–26; court role
 of, 27–28; duty to impartial justice
 in, 70–71; as empowered, not man-
 dated to have trials, 60; impeach-
 ment process in, 59–72; power to
 reject impeachment charges, 62–65;
 power to try all impeachments in,
 3–4, 26–29; procedural bar for
 conviction in, 56; quick convictions
 in, 65–66; special committees for
 hearing evidence in, 71–72; U.S.
 Supreme Court and, 188–92. *See also*
 House of Representatives, U.S.
- Shakespeare, William, 8
- Sitgreaves, Samuel, 25
- Sixth Amendment, 21
- social media, 76, 187
- Souter, David, 193, 198, 201–2
- Starr, Kenneth, 82, 186
- Stephens, Alexander, 141
- Stevens, John Paul, 202
- Story, Joseph, 47, 125–28, 134, 153,
 177
- Sunstein, Cass, 146
- Supreme Court, U.S.: Donald Trump
 and, 187, 190; limits of judicial
 supremacy and, 196–203; political
 questions on impeachable offenses
 and, 188–92; U.S. district judge
 Walter Nixon and, 192–96
- suspension powers, 22–23
- Swayne, Charles, 85, 127–28
- Sydney, Algonon, 171
- Tacitus, 151
- Taft, William Howard, 177
- Texas Revolution, 56–57
- Third Amendment, 168
- Thomas, Clarence, 193
- treason, 30–31
- Trump, Donald, 2, 28, 31, 53, 68, 69, 80,
 82, 113; abbreviated trial of, in the
 Senate, 61; Charlottesville riots and,
 140–41; fast second impeachment
 and trial of, 75–76; grand inquest
 into, 101–2; impeachable offenses of,
 73–74, 90–91, 125; January 6, 2021,
 attacks and, 23, 75–76, 94, 95, 100,
 184; Mueller Report on, 186–87;
 norms broken by, 162; ordinary
 crimes answer to impeachable
 offenses of, 123–24; partisanship and,
 59, 211, 213; response to congressional

- Trump, Donald (*continued*)
inquiry, 109–10, 113–15; Sean
Hannity on, 209; single article of
impeachment against, 94–95; social
media use by, 76, 187; timing of
impeachment of, 23–24; U.S.
Supreme Court and, 187, 190
- Tucker, John Randolph, 136, 177
- Tucker, St. George, 47, 133, 171, 177
- Twenty-Fifth Amendment, 76,
138–39
- Twitter, 76, 187
- Tyler, John, 61–62, 85
- Ukraine, 186–87
- Villiers, George, 7
- Virginia Plan, 13
- voter ID law, 22
- votes, authorization, 52–55
- Wade, Benjamin, 69
- Warren, Elizabeth, 69
- Washington, George, 41, 103, 111–12
Washington Post, 168
- Watrous, John, 56–57
- White, Byron, 193, 198, 201–3
- White, Edward Douglass, 195
- Williamson, Hugh, 13–14
- Wilson, James (Supreme Court
justice), 14, 133
- Wilson, James F. (member of
Congress), 122, 124, 127
- Winthrop, John, 171
- Zelensky, Volodymyr, 186–87