

# **Impeachment in a Nutshell**

## **David Schultz, Attorney, Professor**

School of Law  
University of Minnesota  
229 19th Ave S  
Minneapolis, MN 55455  
[schul123@umn.edu](mailto:schul123@umn.edu)

Department of Political Science  
Hamline University  
1536 Hewitt Ave  
MS B1805  
St. Paul, Minnesota 55104  
651.523.2858  
[dschultz@hamline.edu](mailto:dschultz@hamline.edu)  
<http://schultzstake.blogspot.com>

David Schultz is Hamline University Professor of Political Science and University of Minnesota Visiting Professor of Law. He is the author/editor of more than 35 books and 200+ articles on various aspects of American politics and law including *Constitutional Law in Contemporary America*; *Encyclopedia of American Law and Criminal Law*; *Encyclopedia of the First Amendment*; *Encyclopedia of the Supreme Court*; *Encyclopedia of Civil Liberties.*; and *Encyclopedia of the United States Constitution*.

### **I. Introduction**

- A. Historical Documents
- B. Law
  - 1. Operative Constitutional Clauses
  - 2. Congressional Rules/Resolutions
  - 3. Case Law
- C. Process
- D. Grounds
- E. Legal Issues
- F. History
  - 1. Andrew Johnson
  - 2. Richard Nixon
  - 3. Bill Clinton
- G. Timing Issues

### **II. Historical Documents**

- A. MADISON, JAMES, RECORDS OF THE FEDERAL CONVENTION (Friday July 20, 1787).
- B. HAMILTON, ALEXANDER, FEDERALIST , NO. 65, 66 (1937).

### **III. Law**

- A. Constitutional Clauses
  - 1. Article I, section 2, paragraph 5 House impeach
  - 2. Article I, section 3, paragraph 6, Senate trial
  - 3. Article I, Section 3, Paragraph 7. Punishment
  - 4. Article II, Sec 4, process

- B. Congressional Rules/Resolutions
  - 1. House of Representatives
    - a. *Jefferson's Manual*
      - (1) *Jefferson's Manual*, which is integral to the Rules of the House of Representatives, states that impeachment is set in motion by charges made on the floor, charges proffered by a memorial, a member's resolution referred to a committee, a message from the president, or from facts developed and reported by an investigating committee of the House. It further states that a proposition to impeach is a question of high privilege in the House and at once supersedes business otherwise in order under the rules governing the order of business.
    - b. *The House Practice: A Guide to the Rules, Precedents and Procedures of the House*
      - (1) *The House Practice: A Guide to the Rules, Precedents and Procedures of the House* is a reference source for information on the rules and selected precedents governing the House procedure, prepared by the House Parliamentarian. The manual has a chapter on the House's rules, procedures, and precedent for impeachment
    - c. 116<sup>th</sup> Congress, House Resolution 660 (October 31, 2019).
      - (1) Formally empowers several committees of the House or Representatives to undertake impeachment inquiry and provides rules for doing the investigation.
- C. Senate
  - 1. *Rules and Procedures of Practice in the Senate When Sitting on Impeachment Trials*
- D. Case Law
  - 1. *McGrain v. Daugherty*, 273 U.S. 135 (1927).
  - 2. *Nixon v. United States*, 506 U.S. 224 (1993).
    - a. Senate has broad constitutional authority to undertake trials on impeachment (political question doctrine).
  - 3. *In re Application of the Committee on the Judiciary, U . S House of Representatives, for an Order Authorizing the Release of Certain Grand Jury materials*, --- F.Supp.3d ----2019 WL 5485221

#### IV. Process

- A. House Impeaches
  - 1. House must find at least one Article of Impeachment and support it by a majority vote.
- B. Senate Trial
  - 1. Appointed team of House managers prosecute or present the case to the Senate.

2. President may appear in person or provide evidence and witnesses in defense.
3. Chief Justice presides over presidential impeachment.
4. Chief Justice makes rulings that a majority of the Senate can override.
5. Two-Thirds vote to convict on specific Article of Impeachment.
  - a. If two-thirds of the Senate upholds at least one Article of Impeachment then president immediately removed from office and ineligible to hold another Federal office.
    - (1) Federal office is in Executive or Judicial branch.
  - b. Punishment only extends to removal from office.
  - c. President could face criminal prosecution after impeachment.

## V. Grounds

- A. Article II, section four outlines the process for impeaching and removing a president from office. It declares that the president, vice-president, and other civil officers of the United States can be removed from office by “impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”
  1. Treason is the first, and the Constitution defines that to be engaging war against the United States or giving our enemies Aid and Comfort. Treason is a high bar to meet, really historically requiring something where it involves military action or issues that directly address national security. It is possible that his campaign’s or staff’s collusion with the Russian government is treason but we do not know that yet. That is why there was the FBI investigation and therefore efforts to impede it might be efforts to obstruct justice.
  2. The second possibility is bribery. Bribery would be accepting payments in return for the performance or conveyance of government services or favors. Given Trump’s extensive business holdings and refusal to divest himself of them, there is a possibility that the conflicts of interest that he personally has could rise to a constitutional level problem that would merit an impeachable offense. For example, allegations of Russian business connections and how they might be impacting Trump’s foreign policy decisions might be a form of bribery.
- B. High crimes and misdemeanors? What does that mean? In adopting this phrase the constitutional framers employed language that had existed in England since 1386 when the Parliament used the term to refer to a variety of actions including the misappropriation of funds or dereliction in the performance of official duties.
  1. Mal-administration comes to mind as a close meaning, although when that word was proposed at the Constitutional Convention by George Mason, James Madison objected to it and substituted high crimes and misdemeanors in its place (Madison). Mal-administration is not simple policy disagreement or even sloppy administration, it needs to rise to perhaps a constitutional level, perhaps even including something approaching gross negligence and dereliction of duty.

- C. An alternative meaning for the phrase was offered in 1970 when the House of Representatives tried to impeach Supreme Court Justice William Douglas. The Congressman Gerald Ford said an impeachable offense was “whatever a majority of the House of Representatives considers it to be at a given moment in history.”
  - 1. In truth, Ford is partially correct—impeachment is a matter of political judgment where Congress ultimately decides the fitness of a person to serve in office, such as president (Hamilton).
- D. Must an impeachable offense be a real crime?
  - 1. No (Madison, Story), but in the three previous impeachments violations of the law were critical component of the Articles of Impeachment.
  - 2. Black and Bobbitt see it as not completely open-ended as did Gerald Ford, but seeing high crimes and misdemeanors as having a serious constitutional aspect about the charges.
    - a. Not all crimes are impeachable and a real crime is not essential to impeach (Tribe and Matz)

## VI. Legal Issues

- A. Is impeachment a legal or political issue?
  - 1. A little of both (Blackstone). It is a political decision regarding whether a president has acted so badly that he has failed to fulfill or live up to constitutional duties. (Hamilton, Story, Tribe and Matz).
  - 2. “A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.” HAMILTON, FEDERALIST NO. 65.
  - 3. Language of Constitution suggests Senate trial is quasi-judicial.
    - a. Until very last minute at the Constitutional Convention impeachment trials resided with the Supreme Court.
- B. Is impeachment a criminal matter?
  - 1. No. Because it is not a criminal process rules and rules of criminal procedure do not apply (Hamilton, Story, Black and Bobbitt, Tribe and Matz).
  - 2. High crimes and misdemeanors is broader than simply a regular crime.
- C. Evidentiary Issues
  - 1. Is this a civil procedure rule rules of civil procedure and evidence apply?
    - a. No (Black and Bobbitt)
    - b. Senate gets to decide on rules of evidence and could admit hearsay or other information normally excluded from criminal or civil courts.
- D. Due Process
  - 1. No evidence that authors of the Bill of Rights intended Fifth Amendment Due Process clause to apply to impeachment or trial (Black and Bobbitt)..

2. Burdens of Proof/Persuasion
  - a. Preponderance of evidence, clear and convincing, and beyond a reasonable doubt do not apply. Given the rarity of impeachment and no convictions, presume de facto high burden of proof/persuasion.
- E. Appeals
  1. No indication that impeachment is appealable to the courts (political question doctrine) (Black and Bobbitt).
  2. Scholars agree not appealable.
    - a. Hamilton sees impeachment as a political issue about public trust that is not appealable to the courts.
    - b. Exception
      - (1) RAOUL BERGER, IMPEACHMENT.
- F. Double Jeopardy
  1. There is no double jeopardy issue here; Senate can remove a person from office and then ex-president can still face indictment for the same offense I criminal. This is also why impeachments not appealable and why Supreme Court did not have power to try impeachments, in cases of criminal appeals (Hamilton, Story, Tribe and Matz).

## **VII. History**

- A. English origins for impeachment
  1. Dates to 1386 (Bowman).
  2. Tool used by Parliament to limit the power of the king's ministers (Bowman).
  3. Blackstone saw it as a tool combining legislative and judicial power together.
- B. Colonies used impeachment to check colonial governors and states Had impeachments in place prior to constitutional convention (Gerhardt).
- C. Constitutional framers adopt impeachment from the British model (Hamilton, Story).
  1. As an alternative to indictment (Madison).
- D. Impeachment proceedings against three presidents prior to Trump.
- E. Two impeached, neither convicted.
- F. One president leaves office/resigns.
- G. Timing issues
  1. Impeachment process is not quick and can take time
  2. No constitutional requirement that House must formally vote on doing impeachment process.

## **VIII. Andrew Johnson**

- A. Dateline
  1. February 24, 1868, House votes to begin impeachment proceedings.
  2. March 3, 1868, House votes to impeach.
  3. March 6, 1868, Senate trial begin.
  4. May 16, 2018, Senate acquits (by one vote).
- B. Articles of Impeachment.

1. Dismissing Edwin Stanton from office after the Senate had voted not to concur with his dismissal and had ordered him reinstated.
2. Appointing Thomas Secretary of War ad interim despite the lack of vacancy in the office, since the dismissal of Stanton had been invalid.
3. Appointing Thomas without the required advice and consent of the Senate.
4. Conspiring, with Thomas and "other persons to the House of Representatives unknown", to unlawfully prevent Stanton from continuing in office.
5. Conspiring to unlawfully curtail faithful execution of the Tenure of Office Act.
6. Conspiring to "seize, take, and possess the property of the United States in the Department of War".
7. Conspiring to "seize, take, and possess the property of the United States in the Department of War" with specific intent to violate the Tenure of Office Act.
8. Issuing to Thomas the authority of the office of Secretary of War with unlawful intent to "control the disbursements o, f the moneys appropriated for the military service and for the Department of War".
9. Issuing to Major General William H. Emory orders with unlawful intent to violate federal law requiring all military orders to be issued through the General of the Army.
10. Making three speeches with intent to "attempt to bring into disgrace, ridicule, hatred, contempt and reproach, the Congress of the United States".
11. Bringing disgrace and ridicule to the presidency by his aforementioned words and actions.

## IX. Richard Nixon

### A. Dateline

1. October 30, 1973 Impeachment process against Richard Nixon began in the United States House of Representatives following the "Saturday Night Massacre" episode of the Watergate scandal. The House Judiciary Committee set up an impeachment inquiry staff and began investigations into possible impeachable offenses
2. February 6, 1974, House granted its Judiciary Committee authority to investigate whether sufficient grounds existed to impeach President Nixon.
3. July 27, 29, and 30, 1974, the Judiciary Committee approved three articles of impeachment against Nixon.
4. August 9, 1974, Nixon resigns.

### B. Articles of Impeachment

1. **Article I, charging Nixon with obstruction of justice**, alleged in part that: On June 17, 1972, and prior thereto, agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M.

Nixon, using the powers of his high office, engaged personally and through his close subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such illegal entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

2. **Article II, charging Nixon with abuse of power**, alleged in part that: Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.
3. **Article III, charging Nixon with contempt of Congress**, alleged in part that:
4. In his conduct of the office of President of the United States, Richard M. Nixon, contrary to his oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas. The subpoenaed papers and things were deemed necessary by the Committee in order to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President. In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.

## **X. Bill Clinton**

### **A. Dateline**

1. August, 1994, appointed as special prosecutor to investigate Clintons and Whitewater.
2. October 8, 1998, United States House of Representatives voted to commence impeachment proceedings against Bill Clinton.
3. December 19, 1998, House votes to impeach the president.

4. January 7, 1999, Senate trial begins.
  5. February 9, 1999, Senate begins closed door deliberations.
  6. February 12, 1999, Senate votes not to convict the president.
- B. Articles of Impeachment
1. Article I charged that Clinton lied to the grand jury concerning:
    - a. The nature and details of his relationship with Lewinsky
    - b. Prior false statements he made in the Jones deposition
    - c. Prior false statements he allowed his lawyer to make characterizing Lewinsky's affidavit
    - d. Attempts to tamper with witnesses
  2. Article III charged Clinton with attempting to obstruct justice in the Jones case by:
    - a. Encouraging Lewinsky to file a false affidavit
    - b. Encouraging Lewinsky to give false testimony if and when she was called to testify
    - c. Concealing gifts he had given to Lewinsky that had been subpoenaed
    - d. Attempting to secure a job for Lewinsky to influence her testimony
    - e. Permitting his lawyer to make false statements characterizing Lewinsky's affidavit
    - f. Attempting to tamper with the possible testimony of his secretary Betty Currie
    - g. Making false and misleading statements to potential grand jury witnesses

## **XI. Conclusions and Final Thoughts**

- A. Donald Trump and Impeachment
  1. Possible charges
  2. Possible timing and the 2020 elections.
  3. Court challenges

## **References**

- BERGER, RAOUL, *IMPEACHMENT: THE CONSTITUTIONAL QUESTIONS* (1973).
- BLACK, CHARLES, AND PHILLIP BOBBITT, *IMPEACHMENT: A HANDBOOK* (2018).
- BLACKSTONE, WILLIAM, *COMMENTARIES ON THE LAWS OF ENGLAND*, v. 4 (1979)
- BOWMAN, FRANK O., *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (2019).
- GERHARDT, MICHAEL J., *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2019).
- HAMILTON, ALEXANDER, *FEDERALIST*, NO. 65, 66 (1937).
- MADISON, JAMES, *RECORDS OF THE FEDERAL CONVENTION* (Friday July 20, 1787).
- STORY, JOSEPH, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1987).
- TRIBE, LAURENCE, AND JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* (2018).