CHAPTER ONE

Impeachment

Safeguard or Political Weapon?

In a democracy we trust the will of the people. If public officials betray the public's trust, there must be a mechanism to hold them to account. The obvious remedy is periodic elections. However, for those officials whose misbehavior is at the beginning or in the middle of their terms or for those officials, such as judges, who serve for life, there must be another remedy. That mechanism is provided for in the Constitution through impeachment.

The problem, however, with impeachment is that it is often a matter of opinion whether an alleged transgression is a betrayal of the public trust or simply a decision out of the ordinary. How can we be properly governed if leaders are limited to doing what is only conventional or popular? We must, after all, trust our elected and top appointed officials to do the right thing, even if it is unpopular in the moment. As Edmund Burke once said, "Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion." That is why James Madison made it very clear in the Federalist Papers that set terms between elections were essential because they would allow elected leaders sufficient time to make decisions that at the moment seemed mistaken, even negligent, but might in the long run be in the nation's interest.[1] This illustrates why impeachment under the Constitution is such a controversial procedure. Impeachment and removal at its most basic level represents no less than a subversion of the electoral will of the people, and it must be deployed rarely and judiciously if it is not to undermine the legitimacy of democratic governance.

Consequently, in the interim between elections, or after appointment in the case of federal judges, impeachment is the final resort to be used against treasonous, criminal acts or even gross negligence by elected officials.

But it is precisely because of periodic elections and the care with which we vet our appointed officials that actual impeachments are relatively rare.

Regardless of the original intent, impeachment has also been used as a political weapon. The ability to bring charges against an officeholder and force a trial for possible removal can be a devastating blow to a political opponent. An impeachment conviction is the equivalent of a political death sentence, and even the mere threat of impeachment can greatly weaken an adversary or affect their behavior. Thus, impeachment can be used to intimidate an otherwise powerful officeholder. In the intensely and increasingly combative conditions that frequent American politics, impeachment can even be used as a strategy to advance a political agenda.

Since impeachment is both a safeguard and a political weapon, an important question needs to be asked: Has the impeachment power been used in accordance with its original intent, or has it evolved into something far beyond the desires of the founders of our government?

The wording of the Constitution clearly indicates that impeachment is a method for protecting the American system of government from those who seek to abuse it. There is no question that the impeachment mechanisms created by the Constitution were designed to remove public officials who violated the public's trust by committing serious criminal acts; however, did the Constitution also intend that impeachment be used as a tool to incapacitate or harass a political opponent? Has the impeachment power been used as it was intended in American history?

Under the Constitution impeachment is described in the following manner:

> Article I, Section 2 (5)
>
> *The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.*
>
> Article II, Section 4
>
> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*
>
> Article I, Section 3 (6, 7)
>
> *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.*
>
> *Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*

As is the case in much of the Constitution, the wording in regard to impeachment is at times straightforward and in some instances vague, leaving room for interpretation. Impeachment, the power to bring charges for possible removal from office, is given solely to the House of Representatives in Article I, Section 2. If the House of Representatives, by a simple majority vote, approves the impeachment, Article I, Section 3 gives the Senate the sole authority to try the impeachment. The only requirements are that the senators, when sitting for the trial, must be under oath or affirmation[2] and that a two-thirds affirmative vote of the members present is necessary to convict. The same section also requires that, in the case of presidential impeachment, the chief justice of the United States Supreme Court presides over the trial. Additionally, Article II, Section 4 states that the president, vice president, and all civil officers of the United States can be removed from office if impeached and convicted, and that the impeachable offenses include "treason, bribery and other high crimes and misdemeanors."

The only other clarification in the Constitution concerning impeachment is in Article I, Section 3, which states that the punishment for conviction cannot extend beyond removal and disqualification in the future from holding public office.[3] However, once removed, the convicted individual could still be subject to criminal indictment, trial, and punishment in a court of law.

Since the ratification of Constitution in 1789, the House has impeached nineteen individuals: fifteen federal judges, one senator,[4] one cabinet member, and three presidents (Richard Nixon resigned before he was impeached). The Senate has conducted sixteen full impeachment trials. Of these, eight individuals, all federal judges, were convicted.[5]

These judicial precedents are important because they serve to clarify some of the ambiguous language about the impeachment process outlined in the Constitution. Among the issues resolved are which "officials" are subject to impeachment: basically, judges and federal officials with a policy-making portfolio.[6] It appears that impeachment can only relate to activities during

an individual's time in office and in relation to the official responsibilities of that office. So, for example, if an official engaged in a cover-up while in office of criminal activities that took place before he or she came into office that would be an impeachable offense. However, it is not the case that an official convicted of a crime committed before taking office would be subject to impeachment for that crime.[7] However, if individuals violate the law in pursuit of office, the question remains as to whether this would be grounds for impeachment.

But while the text of the Constitution makes it plain that impeachment is designed to remove criminals and traitors ("treason and bribery") from the government, what constitutes "high crimes and misdemeanors" is not clear.

Is the meaning of high crimes and misdemeanors limited to criminal conduct or can other activities justify an impeachment (and conviction)? Alexander Hamilton fairly definitively answers this question in Federalist 65:

> 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.[8]

Furthermore, later in the same essay, he provides other reasons to regard impeachment as something other than a criminal procedure. First, the trial for impeachment is held not in the courts but in the Senate. Because of the partisan and ideological nature of this body, the standards by which the Senate decides will inevitably be political. In addition, an official who is impeached could still be subject to criminal charges. While the Constitution makes it clear that double jeopardy is not allowed in criminal cases, an official who has been impeached, removed, or even acquitted by the Senate can still be formally charged with a crime. Therefore, impeachment is, from a constitutional perspective, different from a criminal charge.

Thus, if an officeholder obtained his or her position through fraudulent means but broke no actual law, could that still be considered a political crime even if falling below the standard of a crime or a "misdemeanor"? If a president acted in a reckless manner that jeopardized the security of the United States or disregarded the Constitution, for example, in ignoring

a direct order of the court, would that individual be subject to impeachment? It appears that this judgment is at the discretion of the House of Representatives.

Obviously, the Constitution is relatively vague in this regard. But sometimes in that respect, vice is virtue. The Constitution is flexible enough to adapt over time. When the Constitutional Convention considered this provision, it used a phrase that was in common usage at the time. Impeachment had been in existence in England since the fourteenth century. There is some reason to believe that the "high" in high crimes and misdemeanors referred not to the classification of the crime, but to the position of the transgressor.[9] After all, impeachment was in form and substance not to be restricted to common crimes and misdemeanors. Those transgressions were handled in different venues, the common courts, and by different standards, requiring that a jury hold that a crime had occurred beyond a reasonable doubt. Whereas, as noted above, impeachments are tried in a different venue, by a different process, and conviction is based on a different standard.

High-ranking officials in the performance of their duties can commit "high crimes." "Crimes" obviously refers to criminal behavior including but also other than treason and bribery. "Misdemeanors" seems to refer to actions taken by officials that make them unfit to serve, for example in violation of their oath of office. In the modern context we have a rather narrow definition of the word "misdemeanor" (something in between a crime and a tort), but it is not the equivalent of what was meant by the Framers in the context of the impeachment clause.[10]

In his ""Notes of Debates in the Federal Convention of 1787," Madison recounts the convention's debate on July 20, 1787 on this provision:

> **Mr. MADISON** thought it indispensable that some provision should be made for defending the Community agst. the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distinguishable, from that of the Legislature or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the

> restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

The fact that Madison quotes himself gives particular weight to the sentiments expressed. He clearly meant the provision for "high crimes and misdemeanors" to mean something other than that to which we make modern reference in the classification of crimes (i.e., felonies and misdemeanors).

As a result, the House and Senate, as elected bodies, can be the judge of what constitutes a high crime or misdemeanor rising to the level of impeachment. Thus, impeachment, to a considerable extent, can be considered a political process. There are limits beyond which the House cannot go in initiating an impeachment if there is any hope for a conviction. After all, to convict in the Senate requires a two-thirds vote and that won't happen unless a considerable number of senators from the president's party are convinced to go along. Of course, as we shall see in the case of the impeachment of Bill Clinton, removal from office never seemed to be the intent of the congressional opposition at all. Rather impeachment, in this case, was applied, or more accurately misapplied, as a political tool.[11]

American Impeachment's English Roots

Impeachment is not a uniquely American constitutional artifact as impeachment had been a British governmental practice since the fourteenth century.[12] Impeachment was often deployed by the Parliament for partisan reasons and was seen as a practical instrument to be deployed in struggles for power. The British monarch could not be impeached, but impeachment was often used by Parliament at the behest of the king to remove and even punish political enemies. The king could order the House of Commons to initiate impeachments against anyone inside or outside the government, and then order the House of Lords to convict and punish the accused individual. The charges varied but often resembled the familiar American variant of "high crimes and misdemeanors."

Gradually, impeachment became a more formal power exercised independently by the British Parliament, with the House of Commons using the process to bring charges against a wide assortment of public and private citizens, often with little hard evidence. At times this was done to punish political enemies or in the battle between political parties. Indictments from the House of Commons were sent to the House of Lords, which had a higher standard for evidence and usually would only proceed if the case had a possibility of conviction. Often the House of Lords would disregard the House of Commons' indictment and not hold a trial at all.

English impeachment practices had many similarities to the procedure eventually written into the United States Constitution, but there were several critical differences. The English version differed markedly from the process described in the Constitution because it could be used not only against judges, royal ministers, and other government officials but also against private individuals. While the Parliament usually preferred that commoners be tried in regular courts, there were many notable exceptions, usually involving political motives. Furthermore, English impeachment convictions could result in severe punishments, whereas American impeachments can only result in removal and disqualification from office. But English impeachment practices did provide the model for impeachments that took place in the American colonial period.

Colonial Impeachment

In the absence of any way to discipline, vote out of office, or remove colonial officials, Americans under British rule impeached the king's representatives with some regularity. As early as 1635, the Virginia General Assembly attempted to impeach its governor, John Harvey. After the General Assembly charged Harvey with malfeasance, he was sent to England for trial. However, King Charles's Privy Council refused to hold a trial and sent Harvey back to continue service.

Impeachments were common in colonial Maryland, which had a bicameral legislature. Similar to the English system, the legislature in Maryland accused officials of wrongdoing in one house and tried them in the other. However, these cases were again subject to appeal to the English authorities, who often reinstated the officials. Among the other colonies to have impeachment provisions in their colonial charters were Virginia, Rhode Island, and Pennsylvania.[13]

Despite these early colonial impeachments, the British government never completely accepted their legitimacy, but also never ordered their cessation. The colonists believed that these actions were their only recourse against corrupt or abusive officials, but they were also careful not to overstep their bounds. While the colonial governments adopted much of the British model, there were several significant modifications. Impeachments in the colonies were solely used against government officials with the only punishment, subject to the approval of the Crown, being removal from office. These early cases thus set the precedent that impeachments under the U.S. Constitution are also not to be used against private individuals and do not carry a penalty beyond removal and disqualification from office.

Several other colonial governments including Pennsylvania, Massachusetts, South Carolina, and North Carolina began conducting their own impeachments with the English Privy Council as a court of appeals.[14] As the Revolutionary War neared, impeachment was increasingly used as a means of protest against colonial rule. Efforts to oust objectionable royal appointees were seen as statements of the superiority of locally controlled representative governments over the distant Crown. Some colonies further defied the homeland government by refusing to implement decisions to reinstate impeached officeholders. Most colonial governments, however, eventually relented.

The last colonial impeachment before the Revolutionary War took place in the Massachusetts colony in 1774 when Chief Justice Peter Oliver was accused of accepting an illegal payment from the king. That payment was a supplement to his salary and was paid for by the Crown. Colonists were outraged that they were to be judged by a justice in the pay of someone other than themselves (other judges refused the pay). John Adams served as one of the principal prosecutors for impeachment, a role that helped establish his revolutionary credentials. He argued that even though the money came from the Crown, the judge should be removed from office for accepting it. This case illustrated how far colonial impeachment had evolved from its origins. American impeachment had now been transformed from a method to remove a government official for blatant malfeasance into a means of making a rebellious statement. In short, impeachment in America had become a political weapon.

After independence from England was secured, the newly formed states, which had previously used impeachment, continued the practice and included similar measures in their new state constitutions. Therefore, many of the delegates to the Constitutional Convention in Philadelphia in 1787 came to the Convention with experience from their states. These delegates

who were knowledgeable about the subtleties of impeachment in practice were also the individuals who took the lead in the debate.

In addition, at the time of the convention, a well-publicized impeachment case was taking place in England. Many Americans read the news accounts of this case, and it had considerable influence on the Constitution's authors. This impeachment charge was made against Warren Hastings, governor general of the East India Company, which had colonial authority over the Indian subcontinent. He was accused of having a corrupt administration and of having conducted an unauthorized war. To many, the case was viewed as a political witch hunt, a punishment for unpopular policies rather than actual malfeasance. The details of the trial tantalized the American public and made the newly independent American citizenry acutely aware of the use and potential misuse of impeachment.[15]

In following the Hastings trial, the authors of the Constitution, learning from the British example, were conscious of the abuse of impeachments for partisan purposes. Hastings, who was ostensibly on trial for personal malfeasance, was actually the subject of a political debate (orchestrated by Edmund Burke) over the policies of colonial administration in India.[16] Requiring a two-thirds vote in the Senate for conviction was a protection against that problem. But also, unlike the British system, the U.S. Constitution did not allow for the imposition of criminal or civil penalties. Hastings potentially had been facing substantial criminal penalties, and even though he was eventually acquitted, he bankrupted himself in his defense.

The Purpose of Impeachment

In order to better understand the role impeachment was supposed to play in American government, it is useful to look back at the deliberations of the Constitutional Convention of 1787 and other formative writings of the time. This convention created the basic governmental structure that remarkably still exists today and is a logical starting point for any effort to comprehend the intended purpose of impeachment. Convention proceedings were not open to the public and no official record exists, but numerous accurate reports and personal accounts of the deliberations were distributed and give valuable insights into the creation of American government and the intended function of impeachment. James Madison kept a journal of the convention, which has become one of the most valuable original sources of information on the thinking of the founders of American government.[17]

The authors of the Constitution clearly thought impeachment was a useful means of preventing high-ranking officials from abusing their authority. Like many features of the newly formed Constitution there was considerable discussion about the nature and extent of the impeachment power. During the constitutional debate, impeachment was a recurring subject that came up numerous times and went through several iterations. However, while there was some controversy over the structure of impeachment, there was little objection to including it in the final document. After all, given the fact that elected officials were allowed set terms and judges would potentially serve for life, there needed to be some method for a midterm corrective. Thus, even if impeachment hadn't existed in Britain and the states, it probably would have had to be invented.

Fortunately, as a point of reference, a variety of impeachment procedures were already in use in many states, so there was quite a bit of detailed knowledge about which features to retain and which to discard. As an essential component of checks and balances, many convention delegates were ardent supporters of impeachment. George Mason of Virginia, in particular, had an expansive view of impeachment and was instrumental in having the modifier "high crimes and misdemeanors" added to the charges of treason and bribery as a justification for impeachment. He further wanted to include "maladministration" as another charge. Mason believed that the new national government should have the means to remove incumbent officials who were grossly negligent or derelict in their duties. His underlying assumption was that blatantly inept officials could pose such a danger to the state that there had to be a means to remove them from office before the end of their terms.

While Mason contended that maladministration was a justifiable cause for removal from office and that this charge was necessary to protect the American people, others disagreed. Other delegates believed the problem with this rationale was that it was too subjective. Maladministration could be interpreted as simply performing a job poorly or even pursuing a policy that while unpopular in the short term was essential for the long-term public good. While committing a criminal or treasonous act could be proven beyond a reasonable doubt, poor performance in office was a matter of opinion. After considerable conversation, maladministration as a standard for impeachment was rejected as being too vague. Impeachment was to be reserved for criminals, traitors, and other miscreants.

Benjamin Franklin added his considerable prestige to the impeachment debate and was a strong supporter of an impeachment clause. He was quoted

by Madison as saying that he believed that impeachment was absolutely necessary because it would be a deterrent to assassination! History had taught him that if there were no means to remove an incumbent before the term of the office expired, some would be tempted to use extreme measures. He believed that the impeachment power was a reasonable alternative that even at the height of emotion would be enough of an alternative to prevent violent acts.[18] Franklin's argument was unusual, but it would have made sense to a student of the founding of the Roman Republic. In the rule of empire, the only remedy for misrule would be the death of the king. Therefore, impeachment makes quite a bit of sense if public officials are to serve for set terms or even for life, as is the case with the federal judiciary or for presidents who, under the original constitution, did not face term limits. Franklin's support for impeachment all but ensured that impeachment, in some form, would be included in the new American Constitution.

Other Early Opinions on the Proper Use of Impeachment

To more fully grasp the role impeachment was intended to play in the American government, it is important to examine the contemporary writings of the individuals who were instrumental in the Constitution's ratification. The Federalist Papers are the most frequently cited source of knowledge on the thoughts of the delegates who created our government.

Impeachment is discussed in a number of these papers.[19] While these papers give a lengthy discourse on some of the more troubling concerns about impeachment, they also make clear why it was necessary to include the provision in the Constitution. On the one hand, impeachment was a most serious recourse, only to be used as a last resort. After all, the effect of conviction and removal, particularly of an elected official, was a subversion of the will of the voters. On the other hand, for judges and for officials who serve lengthy terms protected from removal in any other way, impeachment is an essential check against the abuse of power.

As noted above, the most thorough discussion of impeachment was written by Hamilton in Federalist 65. In that essay, he makes a clear distinction between impeachment and a criminal trial, not just in the procedural sense, not just in the type of charges that could be brought, but also in the fact that the target of an impeachment could still be held over for a criminal trial. Thus, impeachments become under the Constitution an essential

check on the governing activities of the other branches of government by the legislature.

Hamilton, reflecting his own worries and those of others, attempted to allay grave concerns about the improper use of impeachment. In Federalist 66, Hamilton reassures the readers that the Constitution has provisions that will prevent the abuse of the impeachment power by any particular faction. He describes how the more judicious Senate will need to have a two-thirds vote before an official is convicted of any charge, saying, "As the two thirds of the Senate will be required to a condemnation, the security to innocence, from this additional circumstance will be as complete as itself can desire."[20] In Hamilton's mind, the supermajority requirement in the Senate would prevent a large, even majority, faction or party in the House from dominating the government and abusing the impeachment power.

Besides Federalist 65, in Federalist 69 Hamilton discusses impeachment specifically as one of the most significant checks on the president. In other essays, Federalist 47, for example, Madison mentions impeachment as an example of how the checks and balances would be expected to work in the new American government.

The concerns expressed in Federalist 65 leave no doubt that Hamilton worried extensively about the misuse of impeachment. His writings in this paper clearly illustrate that he had grave concerns about impeachment being used as a political weapon by factions in Congress seeking domination. Hamilton believed, however, that impeachment was absolutely necessary to protect against corruption and treason, and that the constitutional provision mandating a trial by the more judicious Senate with a two-thirds majority needed to convict was a sufficient protection.

While there were no presidential impeachments until after the Civil War, judicial impeachments in the early years of the Republic seemed to indicate what was the proper use of that power by Congress. The first ever impeachment and removal of a public official was in 1804. Prior to that time, District Judge John Pickering had been showing signs of mental deterioration for several years. The Senate voted to convict and remove Pickering for drunkenness and unlawful rulings. While drunkenness was one of the charges, it may well have been that Pickering suffered from dementia, but the Senate couldn't use that as an excuse for removal. Mere incompetence doesn't seem to qualify as a given reason for impeachment. Because Pickering had been appointed by President John Adams, Federalists still howled in protest over what they saw as a partisan prosecution, but nevertheless there seemed to be real evidence of incompetence in that case.

On the other hand, the same year there was a failed attempt to remove (Federalist) Supreme Court justice Samuel Chase from the bench. At Representative William Randolph's urging (Randolph had been a strong advocate of impeachment at the Constitutional Convention), the House adopted eight articles of impeachment, all of which were based on fairly frivolous claims.[21] Despite the fact that the Senate had more than a sufficient number of Democratic Republicans to convict, Chase was acquitted even though a majority of the Senate voted to convict on three out of eight of the charges but by less than a two-thirds vote. Being a political opponent of the administration was not, it seems, enough for a number of Democratic senators to convict.

Presidential Impeachment

The impeachment power vested in the legislative branch by the Constitution can be used against any officeholder in the executive or judicial branch. It was even briefly considered as an appropriate way for the legislative branch to remove one of its own members, but this was quickly rejected in the early years of the republic in favor of expulsion.[22] While the most frequent use of impeachment in American history has been against federal judges, its most critical and controversial uses have been against sitting presidents.

The significance of a presidential impeachment is undeniable. A successful impeachment and conviction can overturn the outcome of a legitimate presidential election, so the stakes are enormously high. A presidential impeachment grips the nation and brings into focus all the prevailing political emotions of the time. Even an effort in the House of Representatives to adopt articles of impeachment is filled with intense drama, only to be exceeded by an impeachment trial in the Senate. The spare description of impeachment in the Constitution is laid bare as trials are not conducted behind closed doors but are visible to the entire nation. Presidential impeachments therefore are not only a vital function of government; they are also a fascinating and passionate public spectacle. When they have occurred, they have been some of the most critical events in American history.

The power to impeach, convict, and remove a president from office gives Congress the potential ability to dominate the nation's chief executive *as long as Congress is strongly united in opposition to the president.* While that kind of unity in Congress is exceptionally rare, the use and even the threat of this awesome power against a sitting president has become much

more common in the modern political context. With increasing partisan polarization, in the case of divided government (one party controlling the presidency and the opposite party controlling one or both chambers of Congress) it is much easier to conceive of the possibility of impeachment if not removal. It is not enough to just stand in opposition, it is tempting and quite common in the modern era to criminalize the actions of the other party. And while in a polarized political environment it is much less likely for the Senate to convict, with a two-thirds vote being required, it is much more likely for the House to impeach. Such were the conditions that led to the impeachment and trial of President Bill Clinton. The Republican House was anxious to impeach, but given the nature of the charges (which did not involve gross abuse of the power of the office) it was quite unlikely that the Senate would ever vote to convict.

In the first fifty-three years of the House of Representatives, there was not a single attempt to pass articles of impeachment against a sitting president. By the 1840s, however, as partisan divisions began to harden, some members of Congress began considering the use of impeachment as a political weapon.

The emergence of political parties and the aggressive presidency of Andrew Jackson began to create a climate wherein conflicts between the president and the leaders of Congress were more intense. Novel assertions of presidential authority over Congress with the use, for example, of the veto intensified a hostile partisan environment, which gradually resulted in serious congressional consideration of impeachment. By the mid-nineteenth century, with the rise of divisive partisan feelings in both the electorate and their congressional representatives, presidential impeachment seemed to become a more acceptable option. While an actual attempt to remove a president from office was at first more of a subtle threat than a serious possibility, as circumstances compounded partisan differences, impeachment seemed to become more likely.

The presidency of John Tyler marked the first attempt at presidential impeachment. Tyler, the tenth president of the United States, was the first vice president to assume the presidency as the result of the death in office of the president. Just weeks after he was inaugurated as president, William Henry Harrison died in 1841. Because Tyler was picked as a running mate by Harrison primarily to create regional balance on the ticket, Whig leaders were neither familiar nor comfortable with the possibility of Tyler actually serving as president. Tyler had been chosen because he, like Thomas Jefferson, James Madison, and James Monroe, was a Virginia planter. But the Virginia

planters had been Democrats, in opposition to the Whigs. Therefore, to the Whigs, Tyler was suspect.[23]

While historians have mixed opinions on Tyler's performance in office, there is little doubt that he attempted to be a strong president in the mold of Andrew Jackson. But he never managed to be as popular as Jackson. The fact that Tyler managed to antagonize nearly everyone in Washington in just a couple of years meant that he was destined to serve no more than the rest of Harrison's term.[24]

Tyler antagonized Congress right from the start. A president had never died in office before, and the Constitution was ambiguous as to presidential succession. With no prior precedent, congressional leaders believed that Tyler was to be no more than a caretaker until such time as the next election. Tyler, however, interpreted the Constitution differently, believing he was the new president, with full power and authority, and he acted accordingly. He insisted on being called "Mr. President" and moved into the presidential mansion even though his detractors constantly complained that he had never been elected to the presidency. Furthermore, in his first year as president he vetoed attempts by the Whigs in Congress to reinstate a national bank (abolished by Democrat Andrew Jackson) and aggressively promoted policy objectives such as the annexation of Texas, which many Whig leaders opposed. Eventually all of his cabinet members, Harrison appointees, resigned with the exception of Daniel Webster, who stayed on as secretary of state.[25]

The filing of articles of impeachment against President Tyler took place in 1843 after his veto of a tariff bill supported by the Whigs. He was never actually accused of treason, bribery, or any other criminal behavior, but the impeachment articles accused him of corruption and misconduct. In reality, however, Tyler's actual transgression was his antagonism to the majority party in the House.

In the meantime, the Whig Party had suffered badly in the midterm election of 1842, losing almost half, sixty-nine, of its 142 seats. Consequently, the Democrats would, as of March 1843, hold a majority in the new House of Representatives. Despite their losses, the lame-duck Whigs moved quickly, and articles of impeachment were introduced during the last few months of the lame-duck congressional session as a final attack on Tyler. Clearly, this impeachment was an effort to discipline Tyler for political actions and was not in any way motivated by a desire to remove a criminal or traitor from office. Furthermore, even though the Whigs held a comfortable majority in the Senate, thirty of fifty-two, they could command nowhere near the

two-thirds majority to convict. Thus, the first use of presidential impeachment was simply an exercise in raw power politics and in no way resembled the use of impeachment according to the founders' intent. After a raucous debate, the House of Representatives voted 127 to 83 against impeachment, as even many Whigs sided with Tyler.

The Tyler impeachment was the only example of an attempted presidential impeachment before the Civil War. Congress's use of the impeachment power to attempt to remove Tyler, however, set the stage for the more contentious impeachment of Andrew Johnson. The Tyler impeachment, if anything, set the precedent of an attempt by Congress to remove a president over basic policy disagreements. But it wasn't until the Johnson impeachment that a policy dispute as the basis of an impeachment fell into disrepute.

The Johnson impeachment took place under far more strained circumstances created by the lingering bitterness over the Civil War and the shocking assassination of Abraham Lincoln. Johnson, like Tyler, was never elected president, taking office on the death of a sitting president. Like Tyler, the tragedy of his succession to office tended to delegitimize Johnson's presidential authority. And, also like Tyler, Johnson's primary problem was a set of significant policy disputes with congressional leaders over matters mainly associated with Reconstruction. Johnson, however, also suffered the disadvantage of being a lifelong Democrat serving concurrently with an overwhelmingly Republican Congress. And while his impeachment has other minor similarities to the Tyler case, it was complicated by the extremely harsh feelings that were ugly remnants of the war. The Republicans in Congress were in no mood to moderate their policies of Reconstruction. What had the war been fought for, anyhow, if not to reform the South? Johnson's subversion of policies of Reconstruction, along with his evident Southern roots (regardless of his support for the Union), explains why the move against Johnson was so much more successful than the one against Tyler.

The Johnson impeachment was another example of impeachment used as a political tool. It was used by congressional leaders to try to remove an obstacle to their policy objectives, in this instance the aggressive pursuit of Reconstruction. As was the case with Tyler, there was never any hint that Johnson had committed any real criminal act or engaged in any treasonous behavior. Ostensibly, the articles of impeachment against Johnson were based primarily on his failure to abide by the recently passed Tenure of Office Act. Johnson thought that the law, which forbade him from firing his appointees, was unconstitutional. It turns out he was right.[26] Nevertheless, even if congressional leaders disagreed, this type of dispute should have been

settled in the courts. But, in reality, the Tenure of Office Act was only an excuse. Congressional leaders wanted to remove Johnson from office for policy reasons. They weren't willing to give Johnson the kind of authority wielded by Lincoln, especially after the end of the war.[27] The fact was that Johnson was not Lincoln, and maybe Lincoln was the only leader who could have had the moral authority to go easy on the South. But Johnson was no Lincoln. He didn't have the stature, wasn't even elected, and was suspect because of his Democrat leanings and the fact that he was from the South. In Johnson's conduct of Reconstruction, Republican leaders could see the sacrifice of the war slipping away (and it turns out they were right). They were desperate to remove Johnson and, short of waiting until the next election, impeachment was all they had.

The articles of impeachment against Johnson passed the House of Representatives by a wide margin, despite every Democrat voting against them. The Senate trial was a battle for the votes of moderate Republicans against the Radical Republicans. With every Democratic senator voting to acquit, Johnson was successful in getting enough moderate Republican votes to avoid conviction and removal by a single vote.

The actual prospect of removing a president from office over what was obviously a policy disagreement again brought into stark contrast the intent of the Framers and the goals of the congressional leadership. While political disagreements can rise to the level of heated debate or even adjudication in the courts, impeachment is not the solution to problems that clearly do not involve criminal, negligent, or treasonous behavior. Even though Johnson was wildly unpopular in Congress and in the North, his removal from office could await the next election. Moderate Republicans who voted against impeachment realized this and allowed Johnson to continue, albeit without support in Congress and, thus, severely handicapped in office. Ultimately, Johnson, who wanted to run for president in his own right in 1868, was denied the nomination by *both* the Republican and Democratic Parties. With his political career in tatters, on the day of the inauguration, Johnson boycotted the ceremony, got in his carriage, and returned to Tennessee. It was a fitting end to an unpopular presidency.

After being dormant for over a century, presidential impeachment reemerged in the 1970s with the contentious Nixon presidency. While the proposed Nixon impeachment had some similarities to the Johnson case, it had significant differences as well. Richard Nixon is the only American president to be forced from office because of an impeachment investigation. Nixon, like Andrew Johnson, served in tumultuous times under difficult

circumstances with the opposing party firmly in control of the Congress. But unlike the nineteenth-century presidential impeachment cases, Nixon had been elected first by a narrow margin and then reelected by a landslide. There was no sense that he was an illegitimate president in any way. Rather, Nixon was charged by the House Judiciary Committee with criminal acts and his fate was sealed with his own words, by the release of tape recordings of conversations in the Oval Office.[28]

Richard Nixon was the only American president to resign from office because of the political fallout from the impeachment effort, but, ironically, he was never impeached or convicted. In the Nixon case there was an actual crime: a break-in and burglary of a political party office. Nixon, however, was not a participant in the original criminal act. He did not plan it, nor was he even aware of it before it happened. Impeachment charges were brought against Nixon because he was accused of withholding crucial evidence related to the crime. Articles of impeachment were approved by the House Judiciary Committee, but Nixon resigned before the articles were even voted on by the full House of Representatives. By the time he decided to step down, Nixon knew that the articles would certainly pass the House and that two-thirds of the Senate probably would vote to convict.

But there were still those who saw the Nixon impeachment as a partisan witch hunt. As such, the episode left a bitter residue that set the stage for another impeachment years later. Bitter enmity associated with the impeachment of President Bill Clinton exists to this day and was reflected in the confirmation hearings of Supreme Court justice Brett Kavanaugh who had served on the staff of Whitewater prosecutor Kenneth Starr.[29]

The Nixon case opened a floodgate with the once unmentionable use of impeachment becoming far more plausible and more common. In some ways the Nixon hearings set a pattern for contemporary presidential impeachments. In the decades following the Nixon experience, a president was actually impeached and tried, while another president labored under its shadow and evaded it only through skillful maneuvering. During the second term of the presidency of Bill Clinton, articles of impeachment were approved by the House of Representatives and the case actually went to trial. In his second term, Ronald Reagan had to confront a scandal that burst forth with many of the same conditions that characterized Nixon's Watergate. In both cases, history seemed to be repeating itself.

Reagan had been reelected by a wide majority, just like Nixon, and he also was burdened with at least one house of Congress controlled by rival Democrats. The Iran-Contra Affair seemed enough like Watergate to

prompt some journalists to refer to it as "Contragate," and while impeachment articles were introduced but never acted upon, they seemed a plausible outcome.[30] Reagan, however, handled the situation with greater political dexterity than Nixon. In addition, the national mood was much different in the 1980s than during Nixon's second term. Nevertheless, after Nixon, the Iran-Contra Affair demonstrated that presidential impeachment, even when merely implied, was now a real weapon that members of Congress were no longer afraid to use.

The presidency of Bill Clinton, however, showed that impeachment could be more than just a mere threat. Ironically, when President Clinton was impeached by the House of Representatives in 1998, some of the same circumstances that surrounded both the Nixon and Reagan cases were evident, but in reverse. Instead of a Republican president being investigated by a Democratically controlled Congress, a Democratic president was under the scrutiny of a Republican controlled House. Also, ironically, unlike Nixon and Reagan, Clinton actually was impeached and tried before the Senate, a dubious honor he shared (until the recent impeachment of President Trump) only with Andrew Johnson. Also, like Johnson, while both men were acquitted, unlike Johnson, the fate of Clinton's Senate trial was never in doubt. While the House of Representatives had a Republican majority at the time and the Senate was also firmly in the hands of the GOP but with only fifty-five votes, the Clinton defense team made sure that the trial was "spun" as a partisan affair. Consequently, as the Senate vote was largely along party lines, Clinton was easily acquitted and served out the remainder of his term. Clinton, never accused of treason or bribery, was impeached for lying under oath. While he had been investigated extensively by a special prosecutor, the only wrongdoing alleged was a charge of lying in his sworn testimony to a grand jury about an extramarital affair and obstruction of justice in trying to cover up his lie. Ironically, even with the scandal, Clinton, like Reagan, but unlike Nixon, remained popular with his supporters and a majority of the general public.

The virtually predetermined outcome of the Clinton trial made many political observers come to the conclusion that his impeachment was more of an effort to embarrass and to gain a measure of revenge against the Democrats for their actions taken against Nixon and Reagan. This case, however, clearly illustrated how impeachment has become firmly established in the modern partisan arsenal. Unlike the century that followed the Johnson case, when impeachment went dormant, impeachment has become a fact of political life in the twenty-first century.

Impeachment Today

The debate surrounding a presidential impeachment has always been characterized by high-sounding rhetoric claiming that impeachments are intended to protect the people from an incumbent who grossly and unscrupulously misuses the powers of office. Upon reflection, however, the truth is generally more complex. Almost always, presidential impeachment is driven by partisan or ideological animosity. And with increasing partisan polarization, the potential for presidential impeachment, once extremely rare, is likely today to be a recurring element of modern American politics.[31] In fact, as we will point out, polarization is likely to make impeachments at the same time more likely and less formidable.

While the founders had grave concerns that the impeachment power could be misused or abused, they still believed that impeachment was a necessary safeguard. The impeachment actions against recent American presidents clearly show that the framers' fears were not without foundation. The examples of presidential impeachment discussed above indicate that impeachment has never been used to remove an incumbent because of treachery or treason. It is abundantly clear that the most likely context for a presidential impeachment has never been overt criminal behavior, but instead has been a hostile partisan division between the president and Congress.

After the Nixon, Reagan, and Clinton experiences, it is apparent that presidential impeachment will remain a feature of American politics for the foreseeable future. The likely possibility of presidential impeachment will continue for as long as divided government, enhanced by partisan polarization, continues to be the rule. There is an irony in this situation, however. While the chances of impeachment are higher, so is the likelihood of acquittal. In a sharply divided political environment, it is that much easier to convince members of the opposition party to charge a president with malfeasance than it is to convince a significant number of senators from the president's own party to convict. Thus, while there was some concern at the Constitutional Convention that the impeachment power might be abused, it was never anticipated that the impeachment power might become irrelevant.

Throughout much of the twentieth century when presidential impeachment was dormant, single-party government, with the same party in control of both executive and legislative branches, was the norm. Presidents could reasonably expect that their party would have the majority of seats in both the House of Representatives and the Senate. Presidents typically had long coattails as voters would cast their ballots for a presidential candidate and