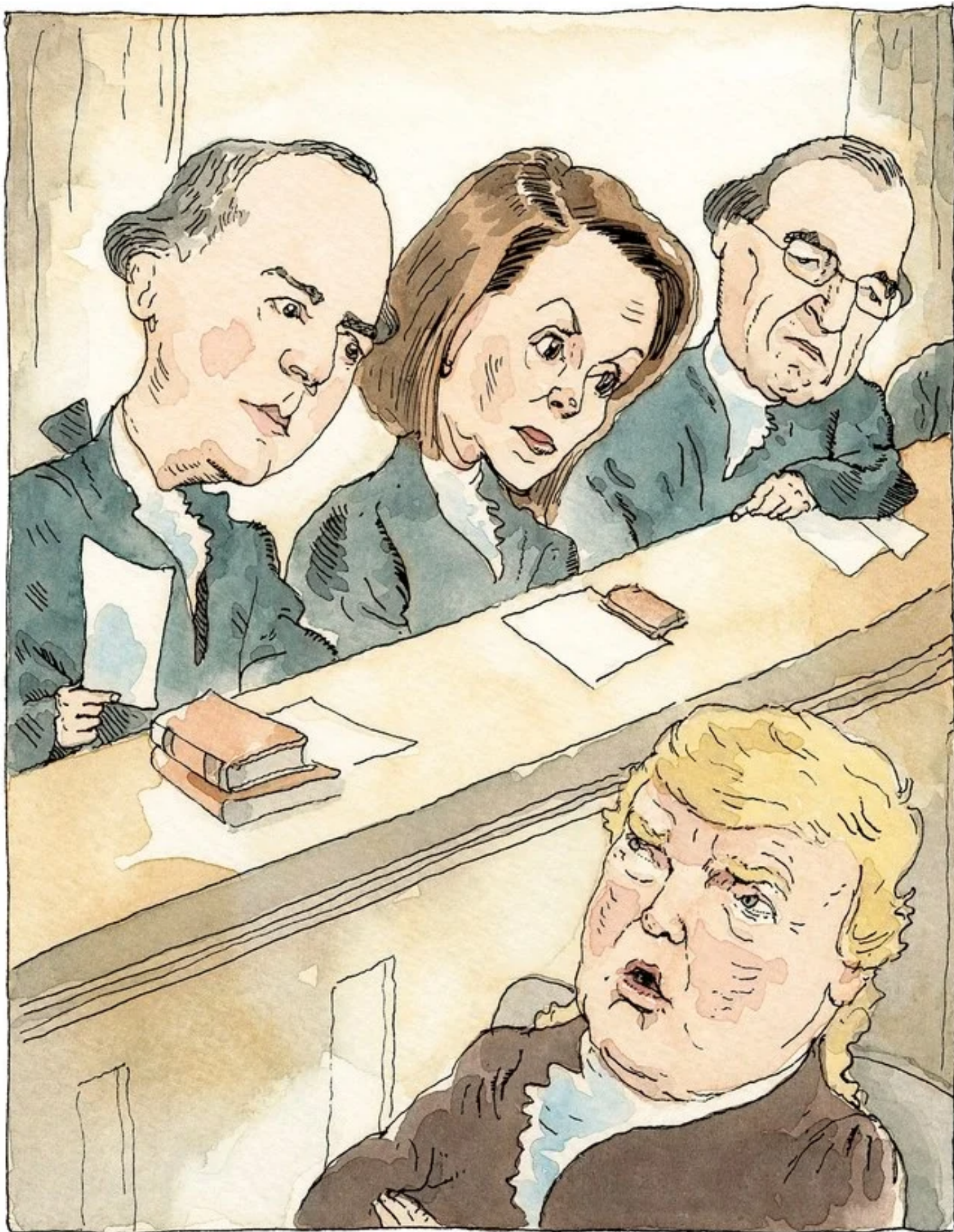


# THE INVENTION—AND REINVENTION—OF IMPEACHMENT

*It's the ultimate political weapon. But we've never agreed on what it's for.*

**By Jill Lepore** October 21, 2019



*Impeachment is a legal instrument first used in 1376. Has time dulled its blade?*

illustration by Barry Blitt

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**B**ird-eyed Aaron Burr was wanted for murder in two states when he presided over the impeachment trial of Supreme Court Justice Samuel Chase in the Senate, in 1805. The House had impeached Chase, a Marylander, on seven articles of misconduct and one article of rudeness. Burr had been indicted in New Jersey, where, according to the indictment, “not having the fear of God before his eyes but being moved and seduced by the instigation of the Devil,” he’d killed Alexander Hamilton, the former Secretary of the Treasury, in a duel. Because Hamilton, who was shot in the belly, died in New York, Burr had been indicted there, too. Still, the Senate met in Washington, and, until Burr’s term expired, he held the title of Vice-President of the United States.

The public loves an impeachment, until the public hates an impeachment. For the occasion of Chase’s impeachment trial, a special gallery for lady spectators had been built at the back of the Senate chamber. Burr, a Republican, presided over a Senate of twenty-five Republicans and nine Federalists, who sat, to either side of him, on two rows of crimson cloth-covered benches. They faced three rows of green cloth-covered benches occupied by members of the House of Representatives, Supreme Court Justices, and President Thomas Jefferson’s Cabinet. The House managers (the impeachment-trial equivalent of prosecutors), led by the Virginian John Randolph, sat at a table covered with blue cloth; at another blue table sat Chase and his lawyers, led by the red-faced Maryland attorney general, Luther Martin, a man so steady of heart and clear of mind that in 1787 he’d walked out of the Constitutional Convention, and refused to sign the Constitution, after objecting that its countenancing of slavery was “inconsistent with the principles of the Revolution and dishonorable to the American character.” Luther (Brandybottle) Martin had a weakness for liquor. This did not impair him. As a wise historian once remarked, Martin “knew more law drunk than the managers did sober.”

Impeachment is an ancient relic, a rusty legal instrument and political weapon first wielded by the English Parliament, in 1376, to wrest power from the King by charging his ministers with abuses of power, convicting them, removing them from office, and throwing them in prison. Some four hundred years later, impeachment had all but

vanished from English practice when American delegates to the Constitutional Convention provided for it in 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.”

It’s one thing to know this power exists. It’s another to use it. In one view, nicely expressed by an English solicitor general in 1691, “The power of impeachment ought to be, like Goliath’s sword, kept in the temple, and not used but on great occasions.” Yet this autumn, in the third year of the Presidency of Donald J. Trump, House Democrats have unsheathed that terrible, mighty sword. Has time dulled its blade?

**I**mpeachment is a terrible power because it was forged to counter a terrible power: the despot who deems himself to be above the law. The delegates to the Constitutional Convention included impeachment in the Constitution as a consequence of their knowledge of history, a study they believed to be a prerequisite for holding a position in government. From their study of English history, they learned what might be called the law of knavery: there aren’t any good ways to get rid of a bad king. Really, there were only three ways and they were all horrible: civil war, revolution, or assassination. England had already endured the first and America the second, and no one could endorse the third. “What was the practice before this in cases where the chief Magistrate rendered himself obnoxious?” Benjamin Franklin asked at the Convention. “Recourse was had to assassination, in which he was not only deprived of his life but of the opportunity of vindicating his character.”

But the delegates knew that Parliament had come up with another way: clipping the King’s wings by impeaching his ministers. The House of Commons couldn’t attack the King directly because of the fiction that the King was infallible (“perfect,” as Donald Trump would say), so, beginning in 1376, they impeached his favorites, accusing Lord William Latimer and Richard Lyons of acting “falsely in order to have advantages for their own use.” Latimer, a peer, insisted that he be tried by his peers—that is, by the House of Lords, not the House of Commons—and it was his peers who convicted him and sent him to prison. That’s why, today, the House is preparing articles of impeachment against Trump, acting as his accusers, but it is the Senate that will judge his innocence or his guilt.



Parliament used impeachment to thwart monarchy's tendency toward absolutism, with mixed results. After conducting at least ten impeachments between 1376 and 1450, Parliament didn't impeach anyone for more than a hundred and seventy years, partly because Parliament met only when the King summoned it, and, if Parliament was going to impeach his ministers, he'd show them by never summoning it, unless he really had to, as when he needed to levy taxes. He, or she: during the forty-five years of Elizabeth I's reign, Parliament was in session for a total of three. Parliament had forged a sword. It just couldn't ever get into Westminster to take it out of its sheath.

The Englishman responsible for bringing the ancient practice of impeachment back into use was Edward Coke, an investor in the Virginia Company who became a Member of Parliament in 1589. Coke, a profoundly agile legal thinker, had served as Elizabeth I's Attorney General and as Chief Justice under her successor, James I. In 1621—two years after the first Africans, slaves, landed in the Virginia colony and a year after the Pilgrims, dissenters, landed at a place they called Plymouth—Coke began to insist that Parliament could debate whatever it wanted to, and soon Parliament began arguing that it ought to meet regularly. To build a case for the supremacy of Parliament, Coke dug out of the archives a very old document, the Magna Carta of 1215, calling it England's "ancient constitution," and he resurrected, too, the ancient right of Parliament to impeach the King's ministers. Parliament promptly impeached Coke's chief adversary, Francis Bacon, the Lord Chancellor, for bribery; Bacon was convicted, removed from office, and reduced to penury. James then dissolved Parliament and locked up Coke in the Tower of London.

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VIDEO FROM THE NEW YORKER

President Trump Is Impeached

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Something of a political death match followed between Parliament and James and his Stuart successors Charles I and Charles II, over the nature of rule. In 1626, the House of Commons impeached the Duke of Buckingham for “maladministration” and corruption, including failure to safeguard the seas. But the King, James’s son, Charles I, forestalled a trial in the House of Lords by dismissing Parliament. After Buckingham died, Charles refused to summon Parliament for the next eleven years. In 1649, he was beheaded for treason. After the restoration of the monarchy, in 1660, under Charles II, Parliament occasionally impeached the King’s ministers, but in 1716 stopped doing so altogether. Because Parliament had won. It had made the King into a flightless bird.

Why the Americans should have resurrected this practice in 1787 is something of a puzzle, until you remember that all but one of England’s original thirteen American colonies had been founded before impeachment went out of style. Also, while Parliament had gained power relative to the King, the Colonial assemblies remained virtually powerless, especially against the authority of Colonial governors, who, in most colonies, were appointed by the King. To clip their governors’ wings, Colonial assemblies impeached the governors’ men, only to find their convictions overturned by the Privy Council in London, which acted as an appellate court. Colonial lawyers pursuing these cases dedicated themselves to the study of the impeachments against

the three Stuart kings. John Adams owned a copy of a law book that defined “impeachment” as “the Accusation and Prosecution of a Person for Treason, or other Crimes and Misdemeanors.” Steeped in the lore of Parliament’s seventeenth-century battles with the Stuarts, men like Adams considered the right of impeachment to be one of the fundamental rights of Englishmen. And when men like Adams came to write constitutions for the new states, in the seventeen-seventies and eighties, they made sure that impeachment was provided for. In Philadelphia in 1787, thirty-three of the Convention’s fifty-five delegates were trained as lawyers; ten were or had been judges. As Frank Bowman, a law professor at the University of Missouri, reports in a new book, “High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump,” fourteen of the delegates had helped draft constitutions in their own states that provided for impeachment. In Philadelphia, they forged a new sword out of very old steel. They Americanized impeachment.

**T**his new government would have a President, not a king, but Americans agreed on the need for a provision to get rid of a bad one. All four of the original plans for a new constitution allowed for Presidential impeachment. When the Constitutional Convention began, on May 25, 1787, impeachment appears to have been on nearly everyone’s mind, not least because Parliament had opened its first impeachment investigation in more than fifty years, on April 3rd, against a Colonial governor of India, and the member charged with heading the investigation was England’s famed supporter of American independence, Edmund Burke. What with one thing and another, impeachment came up in the Convention’s very first week.

A President is not a king; his power would be checked by submitting himself to an election every four years, and by the separation of powers. But this did not provide “sufficient security,” James Madison said. “He might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers.” Also, voters might make a bad decision, and regret it, well in advance of the next election. “Some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen,” the Virginia delegate George Mason said.

How impeachment actually worked would be hammered out through cases like the impeachment of Samuel Chase, a Supreme Court Justice, but, at the Constitutional

Convention, nearly all discussion of impeachment concerned the Presidency. (“Vice President and all civil Officers” was added only at the very last minute.) A nation that had cast off a king refused to anoint another. “No point is of more importance than that the right of impeachment should continue,” Mason said. “Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?”

Most of the discussion involved the nature of the conduct for which a President could be impeached. Early on, the delegates had listed, as impeachable offenses, “mal-practice or neglect of duty,” a list that got longer before a committee narrowed it down to “Treason & bribery.” When Mason proposed adding “maladministration,” Madison objected, on the ground that maladministration could mean just about anything. And, as the Pennsylvania delegate Gouverneur Morris put it, it would not be unreasonable to suppose that “an election of every four years will prevent maladministration.” Mason therefore proposed substituting “other high crimes and misdemeanors against the State.”

The “high” in “high crimes and misdemeanors” has its origins in phrases that include the “certain high treasons and offenses and misprisons” invoked in the impeachment of the Duke of Suffolk, in 1450. Parliament was the “high court,” the men Parliament impeached were of the “highest rank”; offenses that Parliament described as “high” were public offenses with consequences for the nation. The phrase “high crimes and misdemeanors” first appeared in an impeachment in 1642, and then regularly, as a catchall for all manner of egregious wrongs, abuses of authority, and crimes against the state.

In 1787, the delegates in Philadelphia narrowed their list down to “Treason & bribery, or other high crimes & misdemeanors against the United States.” In preparing the final draft of the Constitution, the Committee on Style deleted the phrase “against the United States,” presumably because it is implied.

“What, then, is an impeachable offense?” Gerald Ford, the Michigan Republican and House Minority Leader, asked in 1970. “The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” That wasn’t an honest answer; it was a depressingly cynical one. Ford had moved to impeach Supreme Court Justice William O. Douglas,



accusing him of embracing a “hippie-yippie-style revolution,” indicting him for a decadent life style, and alleging financial improprieties, charges that appeared, to Ford’s critics, to fall well short of impeachable offenses. In 2017, Nancy Pelosi claimed that a President cannot be impeached who has not committed a crime (a position she would not likely take today). According to “Impeachment: A Citizen’s Guide,” by the legal scholar Cass Sunstein, who testified before Congress on the meaning of “high crimes and misdemeanors” during the impeachment of William Jefferson Clinton, both Ford and Pelosi were fundamentally wrong. “High crimes and misdemeanors” does have a meaning. An impeachable offense is an abuse of the power of the office that violates the public trust, runs counter to the national interest, and undermines the Republic. To believe that words are meaningless is to give up on truth. To believe that Presidents can do anything they like is to give up on self-government.

**T**he U.S. Senate has held only eighteen impeachment trials in two hundred and thirty years, and only twice for a President. Because impeachment happens so infrequently, it’s hard to draw conclusions about what it does, or even how it works, and, on each occasion, people spend a lot of time fighting over the meaning of the words and the nature of the crimes. Every impeachment is a political experiment.

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The ordeal of Samuel Chase is arguably the most significant but least studied impeachment in American history. The Chase impeachment was only the third ever attempted. In 1797, the House had impeached the Tennessee senator William Blount, who stood accused of scheming to conspire with the British and to enlist the Creek

and Cherokee Nations to attack the Spanish, all with the design of increasing the value of his highly speculative purchase of Western lands. (“Whether the scheme was merely audacious or just plain crazy remains debatable,” Bowman writes, darkly foreshadowing more recent shenanigans, involving the possible acquisition of Greenland.) The case rested on a letter allegedly written by Blount, describing this plan; after two senators said they recognized Blount’s handwriting, the Senate expelled him in a vote of 25–1, and he slinked off to Tennessee. The House had voted to impeach, but Blount’s lawyers argued that senators are not “civil officers,” and so can’t be impeached.

(“#IMPEACHMITTROMNEY,” Trump tweeted recently. The Blount precedent went some way toward establishing that this is an impossibility.) The motion to dismiss was read aloud in the Senate by Jefferson, who was Vice-President at the time.

Samuel Chase’s troubles began when Congress passed the 1798 Sedition Act, aimed at suppressing Republican opposition to John Adams’s Federalist Administration. Chase, riding circuit (which Supreme Court Justices used to do), had presided over the most notorious persecutions of Republican printers on charges of sedition, including the conviction of the printer James Callender. The Sedition Act expired on March 3, 1801, the day before Jefferson’s Inauguration, but, through a series of midnight appointments, Adams had connived to insure that Jefferson inherited a Federalist Supreme Court. Chase had actively campaigned for Adams and spoke intemperately for the bench, denouncing Republicans. In an overheated charge to a grand jury in Baltimore, he attacked Republicanism, describing it as “mobocracy.” Jefferson set an impeachment in motion when he wrote to House Republicans, “Ought this sedition and official attack on the principles of our Constitution . . . go unpunished?”

If the proceedings against Blount tested whether senators could be impeached, the proceedings against Chase tested a new theory of executive power—that Supreme Court Justices serve at the pleasure of the President. This test came in the wake of *Marbury v. Madison*, in 1803, in which John Marshall’s Supreme Court exercised a prerogative not specified in the Constitution: the Court had declared an act of Congress unconstitutional. A Republican leader of the Senate told the Massachusetts senator John Quincy Adams that he hoped to impeach the entire court. Judicial independence? Judicial review? No. “If the Judges of the Supreme Court should dare, AS THEY HAD DONE, to declare an act of Congress unconstitutional . . . it was the undoubted right of the House of Representatives to remove them, for giving such

opinions,” he said. “A removal by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation.”

John Randolph, a steadfast Republican but no lawyer, drafted the articles of impeachment against Chase, which broadly charged him with prostituting his high office to the low purpose of partisanship but, narrowly, rested on all manner of pettiness, including the charge that during Callender’s trial Chase had used “unusual, rude, and contemptuous expressions toward the prisoner’s counsel” and had engaged in “repeated and vexatious interruptions.” Notwithstanding the weakness of the charges, not to say their vexatiousness, the House voted to impeach. The trial in the Senate opened on February 4, 1805.

An impeachment trial is a medieval play, with its mummers and its costumes and its many-colored cloth-covered tables. Chase’s trial lasted a month. Burr ran a well-ordered court. He warned the senators not to eat apples and cake while in session. He censured them for leaving their seats. He hushed the spectators in the galleries.

The trial turned less on what Chase had done than on whether he could be impeached for having done those things. John Randolph, though, didn’t really have a theory of impeachment. He had a theory of vengeance. His arguments, a distressed John Quincy Adams wrote in his diary, consisted “altogether of the most hackneyed commonplaces of popular declamation, mingled up with panegyrics and invectives.” Randolph called eighteen witnesses, few of whom aided his case, and some of whom aided Chase’s. “Saw nothing that struck me as remarkable,” one witness, who had attended Callender’s trial, said. As an observer put it, “I swear if they go on much farther, they will prove Judge Chase an angel.”

Chase’s defense called thirty-one witnesses, including some of Randolph’s. Chase’s attorneys said the charges were plainly silly, and they didn’t much bother to refute them, especially since Randolph had done that job so well himself. Instead, they argued about the nature of impeachment. One of Chase’s younger lawyers, Joseph Hopkinson, insisted that “no judge can be impeached and removed from office for any act or offense for which he could not be indicted.” In other words, an impeachable offense has to be an indictable offense: a crime. “High crimes and misdemeanors,” Hopkinson argued, meant “high crimes” and “high misdemeanors.”

The trial reached its climax on February 23rd, when a red-faced Luther Martin rose from behind the defense's table. He spoke for a day and a half, expounding on his own theory of impeachment. A judge could commit a crime, like hitting someone, for which he could not be impeached. He could even commit a high crime for which he could not be impeached. All that he could be impeached for were crimes "such as relate to his office, or which tend to cover the person, who committed them, with *turpitude* and *infamy*; such as show there can be no dependence on that integrity and honor which will secure the performance of his official duties." To be impeached, Martin said, a judge had to commit crimes that either derived from his judicial power or were so horrible, so grotesquely unethical, that they disqualified him from holding a position of public trust.

Republicans outnumbered Federalists in the Senate 25–9. On March 1st, for each article, Burr asked of each senator, "Is Samuel Chase, Esq., guilty or not guilty of a high crime or misdemeanor in the article of impeachment just read?" A majority voted guilty for three articles. None earned the required two-thirds super-majority. Six Republicans broke ranks on all eight articles. By a vote of 19–15, the Senate came closest to convicting Chase on the article regarding his partisan zeal in his charge to the Baltimore grand jury. Burr stood up. "It becomes my duty to pronounce that Samuel Chase, Esq., is acquitted," he said. Then he bowed to Chase and left the chamber. As for Burr, he was never convicted of killing Alexander Hamilton. (Two years later, in an unrelated incident of amazing sneakiness, he was tried for treason, and acquitted.)

The acquittal of Samuel Chase established the independence of the judiciary. It also established another principle, as Bowman argues: "The price of the independence granted by life tenure is abstention from party politics." It did not, however, establish a lasting theory of impeachment. Brandybottle Martin had stated his case beautifully, and easily defeated the hapless John Randolph, but Martin's argument was wrong. Nothing in American history, from the founding of its earliest colonies, suggests that an impeachable offense has to be an indictable crime, not for the King's men, not for judges and Justices, and not for the President of the United States. Presidents can be impeached for actions that are not crimes, not least because the criminal code was not written with Presidents in mind. Most of us cannot commit such staggering outrages as to direct the F.B.I. to spy on our enemies or enlist foreign powers to interfere in our elections. The President has powers that only a President can exercise, or abuse. Were

these powers beyond the reach of the people's power, impeachment would be a dead letter.

**I**f the House votes to impeach Donald Trump, it is by no means clear that the Senate will hold a trial. And, if the Senate does hold a trial, the likelihood that it will convict is small. Impeachment is a tall and rickety ladder; conviction is a tiny window, barely cracked open. It's difficult and dangerous to climb the ladder, and no one who has made it to the top has ever managed to crawl in through the window.

After the acquittal of Samuel Chase, in 1805, the House, in the next decades, impeached two more judges, one in 1830 and one in 1862; the Senate acquitted the first and convicted the second. The first real attempt to impeach a President came in 1843, when a Virginia congressman accused John Tyler of "corruption, misconduct, high crimes and misdemeanors," but the House voted down a motion to investigate, 127–83.

In 1868, "out of the midst of political gloom, impeachment, that dead corpse, rose up and walked forth again!" Mark Twain wrote. Republicans in the House impeached President Andrew Johnson by a vote of 126–47. They were desperate, as Brenda Wineapple chronicles in her gripping new book, "The Impeachers: The Trial of Andrew Johnson and the Dream of a Just Nation." Johnson, a Tennessee Democrat who didn't free his slaves until 1863, after the Emancipation Proclamation, had been Abraham Lincoln's improbable Vice-President, and had assumed the office of the Presidency after his assassination, in 1865. Lincoln and congressional Republicans had one plan for Reconstruction: it involved welcoming the freedmen into the political community of the nation. Johnson, who believed that, "in the progress of nations, negroes have shown less capacity for government than any other race of people," betrayed that vision. "Slavery is not abolished until the black man has the ballot," Frederick Douglass declared. But granting the franchise to black men was the last thing Johnson intended to allow. While Congress was out of session, he set in motion a Reconstruction plan that was completely at variance with what Congress had proposed: he intended to return power to the very people who had waged war against the Union, and he readmitted the former Confederate states to the Union. "No power but Congress had any right to say whether ever or when they should be admitted to the Union as States and entitled to the privileges of the Constitution," the Pennsylvania

representative Thaddeus Stevens said during Johnson's impeachment proceedings. (Stevens, ailing, had to be carried into the Capitol on a chair.) "And yet Andrew Johnson, with unblushing hardihood, undertook to rule them by his own power alone." Johnson vetoed the 1866 Civil Rights Bill and nearly every other congressional attempt to reassert authority over the law of the United States. But the Republicans' strategy, to pass a law they expected Johnson to break, so that they could impeach him, backfired.

The Senate acquitted Johnson, falling short by a single vote of the two-thirds majority necessary to convict. Stevens died a couple of months later, "the bravest old ironclad in the Capitol," Twain wrote. The Republicans had tried to save the Republic by burying the Confederacy for good. They failed.

Every impeachment reinvents what impeachment is for, and what it means, a theory of government itself. Every impeachment also offers a chance to establish a new political settlement in an unruly nation. The impeachment of Samuel Chase steered the United States toward judicial independence, and an accommodation with a party system that had not been anticipated by the Framers. Chase's acquittal stabilized the Republic and restored the balance of power between the executive and the judicial branches. The failed impeachment of Andrew Johnson steered the United States toward a regime of racial segregation: the era of Jim Crow, which would not be undone until the Civil Rights Act of 1964 and the Voting Rights Acts of 1965 were passed, a century later, in the Administration of another Johnson. Johnson's acquittal undid the Union's victory in the Civil War, allowed the Confederacy to win the peace, and nearly destroyed the Republic.

Johnson's acquittal also elevated the Presidency by making impeachment seem doomed. Jefferson once lamented that impeachment had become a "mere scarecrow." That's how it worked for much of the twentieth century: propped up in a field, straw poking out from under its hat. A Republican congressman from Michigan called for the impeachment of F.D.R., after the President tried to pack the Court. Nothing but another scarecrow.

The impeachment of Richard Nixon, in 1974, which, although it never went to trial, succeeded in the sense that it drove Nixon from office, represented a use entirely consistent with the instrument's medieval origins: it attempted to puncture the swollen power of the Presidency and to reassert the supremacy of the legislature. Nixon's



Presidency began to unravel only after the publication of the Pentagon Papers, in 1971—which indicted not Nixon but Lyndon Johnson, for deceiving the public about Vietnam—and the public anger that made impeachment possible had to do not only with Nixon’s lies and abuses of power but also with Johnson’s. But a new settlement, curtailing the powers of the President, never came. Instead, the nation became divided, and those divisions widened.

The wider those divisions, the duller the blade of impeachment. Only very rarely in American history has one party held more than two-thirds of the seats in the Senate (it hasn’t happened since 1967), and the more partisan American politics the less likely it is that sixty-seven senators can be rounded up to convict anyone, of anything. And yet the wider those divisions the more willing Congress has been to call for impeachment. Since Ronald Reagan’s Inauguration in 1981, members of the House have introduced resolutions for impeachment during every Presidency. And the people, too, have clamored. “Impeach Bush,” the yard signs read. “Impeach Obama.”

Not every impeachment brings about a political settlement, good or bad. The failed impeachment of Bill Clinton, in 1999, for lying about his sexual relationship with Monica Lewinsky, settled less than nothing, except that it weakened Americans’ faith in impeachment as anything other than a crudely wrought partisan hatchet, a prisoner’s shiv.

Clinton’s impeachment had one more consequence: it got Donald Trump, self-professed playboy, onto national television, as an authority on the sex lives of ego-mad men. “Paula Jones is a loser,” Trump said on CNBC. “It’s a terrible embarrassment.” Also, “I think his lawyers . . . did a terrible job,” Trump said. “I’m not even sure that he shouldn’t have just gone in and taken the Fifth Amendment.” Because why, after all, should any man have to answer for anything?

“Heaven forbid we should see another impeachment!” an exhausted Republican said at the end of the trial of Samuel Chase. The impeachment of an American President is certain to lead to no end of political mischief and almost certain to fail. Still, worse could happen. Heaven forbid this Republic should become one man’s kingdom. ♦

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