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Ensuring the President “shall take Care that the Laws be faithfully executed”

Risk-Risk Tradeoffs in Presidential Impeachment

David Pozen // 6/6/18 // In-Depth Analysis

Take Care is pleased to host a symposium (</blog/to-end-a-presidency>), on ***To End A Presidency: The Power of Impeachment*** (<https://www.amazon.com/End-Presidency-Power-Impeachment/dp/1541644883>),—a new book by Larry Tribe & Joshua Matz.

Laurence Tribe and Joshua Matz's *To End a Presidency* is not quite what it seems. Initially billed as “a helpful how-to for impeaching the president,” the book offers little in the way of practical pointers. Described by its publisher as advancing “a bold argument about [impeachment’s] proper role today,” the book for the most part eschews confident claims in favor of highly qualified, ambivalent assessments.* Written by prominent constitutional scholars, the book devotes greater attention to issues of political sociology than to constitutional law proper. *To End a Presidency* is neither a user’s guide to the impeachment process nor a polemic against President Trump nor a novel reinterpretation of the Constitution, but is instead something even rarer: an exceptionally balanced, wise, and wide-ranging exploration of the dynamics that shape presidential impeachment.

One theme that emerges is that, across many aspects of presidential impeachment, the law allows for a great deal of play in the joints. The relevant constitutional clauses are spare, and the key substantive phrase (“Treason, Bribery, or other high Crimes and Misdemeanors”) was deliberately left open-ended. The historical record of presidential impeachment is thin and dismal; lived experience has largely failed to fill in, or liquidate, what the text leaves open. Both chambers of Congress enjoy vast discretion in how they run impeachment proceedings. The House enjoys complete

discretion over whether to initiate them. Within broad legal limits, presidential impeachment is a fluid and ad hoc affair—a game with high stakes and few rules. Playing this sort of game well demands practical political judgment.

And yet, as Tribe and Matz emphasize, the strategic calculations that must inform such judgment will often be enormously challenging. A second major theme of *To End a Presidency*, and a subject on which the book is especially insightful, is that presidential impeachment decisions are made under conditions of extreme uncertainty and danger. On the one hand, efforts to impeach a wayward President run the risk of inflaming her and her supporters, unleashing social conflict, undercutting alternative accountability mechanisms, and normalizing what ought to be a tool of last resort. On the other hand, the failure to pursue a justified impeachment, or the failure to pursue it quickly or vigorously enough, runs the risk of legitimating presidential abuses and enabling grave damage to the constitutional system. It is perilous to impeach a demagogue, and it is perilous not to.

Presidential impeachment, in other words, involves *risk-risk tradeoffs*. There are serious risks on all sides of the situation. While some of these risks might be mitigated, and while all deserve to be identified and weighed, the basic dilemma is inescapable.

Open-ended as it is, the constitutional structure of impeachment—in particular, the two-stage decision procedure and the two-thirds requirement for Senate conviction—affects these tradeoffs. In some cases, for example, House leadership may feel all but certain that the Senate will acquit an individual, given partisan pressures and the supermajority voting rule in that body. Such cases present a very different risk profile, both for the House and for the nation as a whole, from scenarios where there is a reasonable chance of Senate conviction and removal from office.

When decisionmakers are confronted with risk-risk tradeoffs, policy theorists generally urge that they assess the probability, magnitude, and reversibility of the full range of potential adverse outcomes in search of “risk-superior” moves. But in the context of presidential impeachment, Tribe and Matz suggest, such predictions are not only empirically vexed but also normatively vexed—with any number of incommensurable values on the line and, in many cases, with deep disagreement over what constitutes an adverse outcome in the first place. Other theorists of risk management have proposed that special government committees be tasked with formulating responses to particular risk-risk tradeoffs. That proposal seems ill-suited to the politically supercharged field of presidential impeachment. Still other theorists defend the precautionary principle as the north star of risk regulation. While certain versions of the precautionary principle that would presumptively prohibit risk-

generating activities might be thought to counsel against impeachment, that way of thinking is unhelpful when risks are going to be generated regardless of what is done, as Cass Sunstein has observed in another context.

Add this all up, and the absence of a “bold” argument about impeachment’s proper role today turns out to be a virtue, not a vice, of *To End a Presidency*, as the complexities and contingencies of the phenomenon are apt to overwhelm general prescriptions. Tribe and Matz have provided an important service by illuminating the nature of the risk-risk tradeoffs that may be involved in presidential impeachment. When it comes to resolving such tradeoffs, however, analytical progress is going to prove much more difficult. If and when Robert Mueller issues a damning report on President Trump, let us hope that Trump’s congressional opponents carefully and conscientiously consider all the risks associated with impeaching and not impeaching him—and that they do something politically savvy when the experts’ understanding of those risks runs out.

* The book’s concluding argument is not just ambivalent but gnostic, with shades of Justice Kennedy. “Maybe impeachment should play a role in [the effort to save our democracy]; maybe it will only make things worse,” the authors reflect. “Either way, reversing the rot in our political system will require creative and heroic efforts throughout American life. And at the heart of those efforts will be the struggle to transcend our deepest divisions in search of common purpose and mutual understanding.”

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