

8-5-2020

## WAS IMPEACHMENT DESIGNED TO FAIL?

Doni Gewirtzman

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a magazine of ideas, arts, and scholarship

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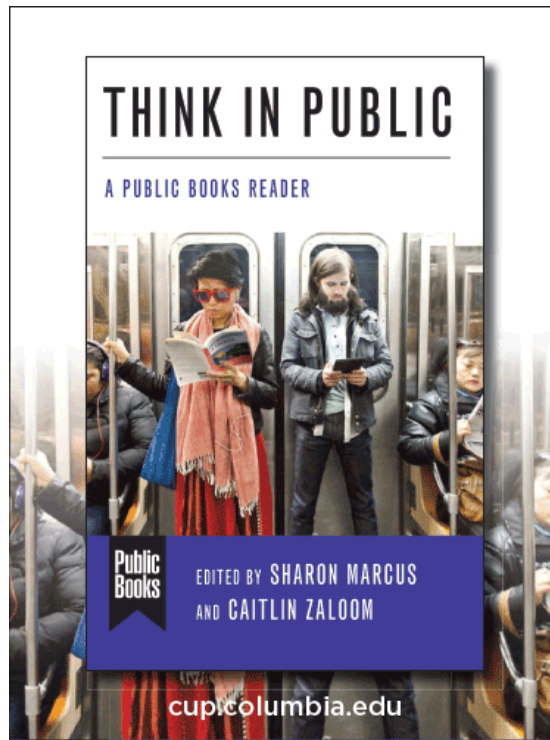
POLITICS



BY DONI GEWIRTZMAN

**T**he failed impeachment of Donald J. Trump has receded into distant memory, and with it any immediate hopes of meaningful executive-branch oversight. In the few short months since his acquittal, the president has been remarkably effective at withholding information from Congress, stifling whistleblowers, and shifting the Department of Justice's focus away from the administration's misdeeds. In the midst of an unprecedented pandemic, we confront an environment where many of the institutions we rely on to check presidential power don't seem up to the task. Perhaps now, on the six-month anniversary of Trump's acquittal, is a good time for a postmortem on impeachment design: Did the process work the way it was supposed to, and if not, how could we make it better?

A good place to start is two books that appeared in the aftermath of the Mueller investigation (that is, even before anyone knew about the administration's efforts to delay foreign aid to Ukraine). An accessible overview written for a lay audience, Laurence Tribe and Joshua Matz's *To End a Presidency: The Power of Impeachment* offers a broad account of impeachment's core functions and procedures, as well as the political dynamics that determine how it operates in practice. Meanwhile, Frank Bowman III's *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* provides a deeply researched historical account, beginning with impeachment's origins in the British Parliament and ending with detailed case studies of every American impeachment and trial.



The portrait of impeachment that emerges is one of an 18th-century governance procedure running up against the reality of 21st-century politics. While Trump’s failed trial concluded with plenty of blame to go around, the process worked exactly as the Framers intended it to, following the design choices they encoded into the Constitution. So if your 2020 Impeachment Wall of Shame includes plaques for Mitch McConnell, Susan Collins, and John Bolton, save some room for Alexander Hamilton and James Madison as well.

Tribe and Matz show some sympathy for the Framers and acknowledge the daunting design challenge they confronted once they decided to create an executive branch with a custom-built presidential ejection seat.

The Framers knew they had created a presidency with considerable power: a single individual vested with the ability to command the army, veto legislation, and implement the laws enacted by Congress. They were fully aware how much was on the line if those powers were wielded by a president who was corrupt or in the pocket of a foreign government, and wanted to design an eviction process that didn’t involve an assassination, a coup, or a civil war.

At the same time, the Framers also believed that regularly scheduled elections should be the primary mechanism for checking presidential behavior. They were concerned about an impeachment process that would allow a president’s political enemies to undo an election outcome based on simple policy disagreements or partisan considerations. And they worried, of course, about the polarization, divisiveness, and chaos that might accompany an impeachment trial.

The result of these conflicting instincts is a Constitution that, by design, stacks the impeachment deck strongly in the president’s favor. And it’s those 233-year-old design choices—more than anything President Trump actually did, or the modern Republican Party’s moral failings, or the polarized dynamics of contemporary American politics—that dictated the Trump impeachment trial’s eventual outcome. Presidential impeachments are never a fair fight, and they weren’t meant to be.

**WHILE TRUMP’S FAILED TRIAL  
CONCLUDED WITH PLENTY OF BLAME  
TO GO AROUND, THE PROCESS WORKED**

## EXACTLY AS THE FRAMERS INTENDED IT TO.



Presidents threatened with impeachment should be deeply thankful for at least two of the Framers' design choices. First, the Constitution vests Congress with the sole responsibility for impeachment, turning other players in our political system—including the courts and the public—into passive onlookers. Second, impeachment trials require a two-thirds majority in the Senate for conviction, enabling a relatively small group of the president's supporters in Congress to stop the process dead in its tracks.

Consider how each of these structural features played out during the Trump impeachment. The Framers' most critical choice was designating Congress as the sole institution responsible for impeachment. It's politicians—not prosecutors or judges—who serve as the finders of fact, the interpreters of law, the lawyers, and the jury. As Tribe and Matz note, members of Congress aren't elected "because they possess the skills, training, or temperament we'd expect of prosecutors and judges."

Moreover, the Constitution doesn't offer much in the way of concrete guidelines or limitations on how Congress does its job. These politicians are given carte blanche to set the procedural rules, establish their own precedents, and bring partisan considerations into every stage of the process.

It did not have to be this way: many other countries with constitutional impeachment processes assign a significant role for courts, prosecutors, or the public to play. [Countries like South Korea and Lebanon actively bring judges into the process, while Austria and the Gambia involve the public through referenda.](#) Notably, ours does neither.

During the Trump impeachment, Congress's institutional limitations as a fact finder were on full display. Compared with the investigative resources of the FBI or a federal prosecutor, Congress is far more circumscribed in its ability to uncover facts. As Tribe and Matz note, "the House is not a district attorney's office," which is why the Nixon and Clinton impeachment efforts were heavily dependent on Congress receiving cooperation from the Department of Justice. When Attorney General William Barr refused to investigate President Trump's involvement with Ukraine, a thwarted House of Representatives was left to its own devices, and it showed.

Once the trial began, nothing prevented a partisan Senate from proceeding with a limited factual record, or ignoring late-breaking information that might damage the president's case. If the goal was to design a process that would expose the truth about presidential misdeeds, the Framers chose the wrong institution for the job.

When it comes to interpreting law, Congress is most certainly not a court. When judges try to make meaning out of ambiguous constitutional provisions, like "high crimes and misdemeanors," they use established interpretive methods that rely heavily on text, history, and structure. Congress does not. While courts issue written opinions that produce fixed accounts of binding law and the relevant facts, Congress generates no binding precedents about what constitutes a "high crime and misdemeanor," and past impeachment proceedings leave an incomplete record of Congress's factual and legal determinations. While judges and jurors operate under rules that dictate the burden of proof, regulate their contact with the parties, and limit the role of personal biases in their decision making, Congress has no such restrictions.

None of this is a function of politics; it is a function of design.

## IF THERE'S ONE AREA WHERE CONSTITUTIONAL DESIGN PROVED DECISIVE, IT WAS THE FRAMERS' CHOICE TO REQUIRE A TWO-THIRDS

## SUPERMAJORITY VOTE FOR A CONVICTION IN THE SENATE.



The Framers' design choices benefited Donald Trump as soon as his Senate trial got underway. While there was a lot of talk about "impeachment law," almost none of that law was binding on the senators who made up the judge and jury.

For example, Bowman provides pages and pages of comprehensive historical evidence to show that the term "high crimes and misdemeanors" allows Congress to impeach a president for noncriminal offenses. Yet members of Congress repeatedly insisted that the Constitution requires proof that the president violated a federal criminal statute.

Similarly, while impeachment is widely accepted as a procedure designed to deal with the larger systemic threats presented by a corrupt or disloyal chief executive, the discussion in Congress was dominated by the minutiae of various phone-call transcripts, debates on the capacity of the judicial system to enforce congressional subpoenas, and allegations that the House impeachment was an illegal effort to cancel the results of an election. Direct legal analogies between Trump's and Nixon's behavior had little noticeable impact, and the Senate had limited interest in wrestling with how the administration's actions might present real risks to the integrity of our constitutional system.

If there's one area where constitutional design proved decisive, it was the Framers' choice to require a two-thirds supermajority vote for a conviction in the Senate. With good reason, Bowman describes this rule as "by far the most important component of the entire impeachment structure." To check against the possibility that Congress would use the Constitution's indeterminate impeachment standards to settle political scores, the Framers intentionally made it hard to remove a president from office, requiring a broad bipartisan consensus in the Senate for conviction. It should therefore come as no surprise that the three successful presidential impeachments—Johnson, Clinton, and Trump—have all ended in acquittal.


The rules—by design—enable a small fraction of United States senators, representing an even smaller fraction of the American population, to block a good-faith effort to remove a president. These same rules make impeachment a practical impossibility when the president's political party controls a majority in the Senate. The Trump impeachment was effectively over before it even started.

As the risks of an imperial presidency have grown over the past several decades, the need for an effective impeachment process has never been greater. Since the New Deal, Congress has delegated enormous powers to the executive branch, leaving us with a supercharged presidency capable of things the Framers never could have imagined.

At the same time, partisan polarization and institutional dysfunction have made it almost impossible for Congress to use its legislative and oversight powers to effectively check the president's actions. Without a credible threat of impeachment from Congress (or a credible threat of investigation or indictment from the Department of Justice), a president with no attachment to democratic norms is free to push at the limits of their power with little fear of the consequences.

If we can't fix the politics, then maybe it's time to revisit the design. Imagine an impeachment process where judges and professional prosecutors play a greater role, assisting Congress in the job of gathering facts and interpreting law while adhering to ethical norms that govern the legal profession. Or a process that makes it easier for Congress to remove a president (as parliaments do with prime ministers, through votes of no confidence), which might discourage brazen presidential power grabs and nudge the political center of gravity from the White House back to Congress.

With six months of hindsight, we can easily see how Trump-era politics made the impeachment result inevitable. But when it comes to the Constitution, process drives outcomes just as much as politics. While Mitch McConnell's fingerprints were all over the trial, the dead hands of the Framers were there as well, guiding the process each and every step of the way.

This article was commissioned by [Sharon Marcus](#). 

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Featured image: *House of Representatives Votes to Adopt the Articles of Impeachment against Donald Trump* (detail) (2019). Photograph by House Floorcast / Wikimedia Commons

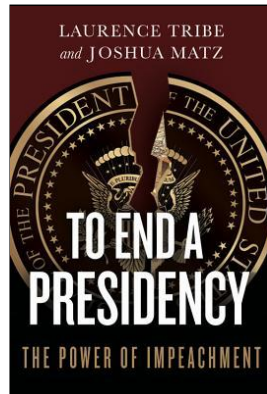
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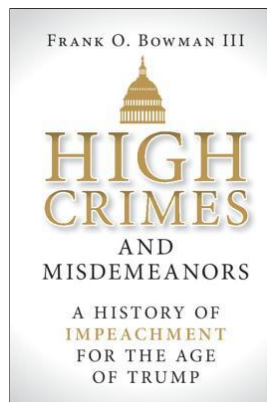


**To End a Presidency: The Power of  
 Impeachment**

Laurence Tribe and Joshua Matz

Basic, 2018

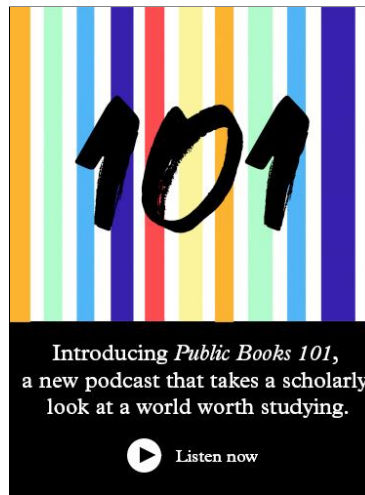
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**High Crimes and Misdemeanors: A  
 History of Impeachment for the Age  
 of Trump**


Frank O. Bowman III

Cambridge University Press, 2019

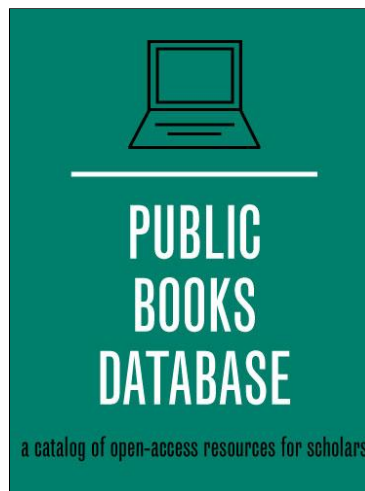



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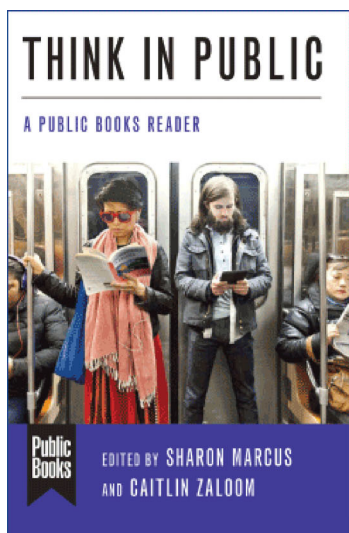


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