Missouri Law Review

Volume 87 | Issue 3 Article 6

Summer 2022

First Keynote Address: The Two Impeachments of Donald J. Trump

Congressman Jamie Raskin

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Congressman Jamie Raskin, Speaker

Professor Bowman, what a pleasure. What an honor it is to be with you and with the *Missouri Law Review*, and to be part of your symposium.

Thank you for all of your remarkable contributions to our public life, to our constitutional discourse and specifically to our understanding and knowledge of the impeachment process historically and today.

So, I have not yet written systematically about the impeachment trial in a law review context. Although, in my book, *Unthinkable*, which is out now, I do spend several chapters talking about some of the critical decisions that we made. I'm going to venture some thoughts here. Some of which appear in *Unthinkable*, some of which are not part of it, but some of which I'm hoping to be able to whip into shape as part of your symposium. So, I thank you for the opportunity to think through some of the reflections I'm going to offer here.

One thing is actually about the first impeachment, because I have a profound critique. Not of the Republicans, but of the Democrats here because I think that the majority failed. Here I'm not referring to Jerry Nadler, the Chair of the Judiciary Committee, or Adam Schiff, who ended up being the lead impeachment manager, or anyone involved with impeachment. But I say collectively we failed, and I would probably blame myself the most because I was in the best position to counter this. But we really fell down on the job in not placing the then president's profound and continuing violations of the Foreign and the Domestic Emoluments Clauses at the very center of that impeachment.

I believe that violation of the Emoluments Clauses was the original sin of the Trump Administration, and it began essentially on the first day of Trump in office when he said he was not going to give up his more than 150 businesses. He was not going to stop doing business with foreign governments, and he was not taking any pledge about refusing to take money from the federal government. The Foreign Emoluments Clause states that no president, no federal official, may accept presents or emoluments – which are payments – offices or titles of any kind

*On February 17–18, 2022, the *Missouri Law Review* and the Kinder Institute on Constitutional Democracy jointly presented a symposium discussing the facts, constitutional questions, and future implications of the two impeachments of President Donald J. Trump. These remarks have been annotated and edited by the Journal staff.

whatsoever from a foreign government without the consent of the Congress. And yet Donald Trump immediately began taking at the Trump Hotel in Washington, which I call the Washington Emolument, and at other hotels, and at the golf courses and in other business ventures around the world, all kinds of money from foreign governments. Hundreds of thousands of dollars, millions of dollars began to pour in from Saudi Arabia, the United Arab Emirates, from China, from a whole bunch of governments around the world. Because this was such a flagrant departure from U.S. history, we were unprepared to deal with it. We didn't have a process for dealing with it. I'm afraid a lot of the Democrats felt it was too complicated for people to understand. Some of it was even just the word "emoluments," which is multi-syllabic, and I think we foolishly succumb to the idea that it was too complicated for people to understand. When most Americans can understand a good scam and a good grift when they see it.

The Domestic Emoluments Clause limits the President to his salary while in office and says that the president may accept no other money from the federal government or from the states. Yet again, immediately, the Trump Hotels and other business ventures owned by Donald Trump and his family were collecting all kinds of money from government agencies, from the FBI, from the Secret Service, from the Department of Defense, on and on and on, which were either voluntarily signing up or being told by the President to sign up to do various events at various Trump properties, and so on. Donald Trump went around saying, "I don't even accept my salary. I'm not going to accept my $400,000 salary." So presumably, hey, it's okay to take millions of dollars from the federal government. Your salary is the only thing you are allowed to take as the President of the United States. You're not allowed to take the other stuff. None of that money was allowable.

In fact, it's categorically forbidden and proscribed. You can't do it. At least with the foreign emoluments, there is the out that you can accept it if the Congress consents. There's a long history of presidents going to Congress to ask for consent to keep this or that trinket or item that they got from a foreign government. Abraham Lincoln was given an elephant tusk by the king of Siam and wanted to keep it, and in the middle of the Civil War, went to the pains of writing to the Congress to ask if it was okay. The answer comes back from Congress, "No, you may not keep that." Compare that to Donald Trump, who is simply pocketing millions of dollars from foreign governments. Now, it is true that when public objections were raised, Trump decided that he was going to make voluntary repayments for what he described as "the profits" he was making from foreign governments. Then, he paid several hundred thousand here, several hundred thousand there. There was no accounting of it. There was no definition of where it was coming from. It wasn't ascribed to particular foreign governments. And so, there was no clarity around it at all.

In any event, the whole thing was an absolute departure from constitutional norms because Article 1, Section 9, Clause 8 doesn't say that the President can't accept profits from foreign governments. It says that he can't accept any emoluments of any kind at all—any payments, emoluments, offices or titles from kings, princes, or foreign governments. So, he of course didn't give us the accounting paperwork to see what he was describing, his profits or what not. You can only imagine what Donald Trump's accounting was like. The New York Attorney General is investigating that right now in terms of purported bank fraud and tax fraud and accounting fraud and so on. But in any event, none of that was consistent with constitutional norms.

The whole point of the Emoluments Clause is the President of the United States and other federal officials have to have complete, undivided fiduciary duty and responsibility and loyalty to the American people. Not to foreign governments, and not to their own money-making enterprises. And yet here was a president who overthrew all of that, and essentially transformed the presidency into a money-making operation. Which explains his determination, at all costs, to stay in office. The Ukraine venture, the Ukraine shakedown was, of course, an appalling violation of the President's responsibilities. But I think it was basically incomprehensible to people because they didn't understand why he wanted so badly to stay in power that he would shake down a foreign government, withhold foreign aid until the president of a foreign nation President Zelenskyy agreed to smear his likely opponent Joe Biden in the next election. I think that if we had told the story properly, we would have put the Emoluments Clause front and center.

So all of that is a little prefatory digression, so forgive me. Let me talk about the second impeachment. I just want to raise several different points. I'm going to begin with some things I fought myself for—things that I wanted to do that I failed to do, that I wish I had done. The reason I'm not a litigator is because I stay up all night thinking about the things I should have said and the things I ought to have done. The real litigators tell me that is not an uncommon syndrome. But I was up for weeks thinking about particular things I thought about doing, but I decided not to do, and so on. Let me just start with a couple of procedural motions that were in my mind that I was warned away from by people in the Senate who said this would not be a good way to introduce "Professor Raskin" to the U.S. Senate.

One of them, and this bugged me from the beginning, was to move that the Senate change its seating arrangements. When you go over there, it's like the House of Representatives in that if you're looking from the podium, if you're looking from the dais out there, you've got all the Republicans to the left, and you've got all the Democrats to the right, and the Independents who are caucusing with the Democrats. That's fine, I suppose, for a legislative assembly. One of the first things I learned in

Introduction to American Government is where you sit is where you stand. Legislative leaders love to have all of their people together, so they can communicate to them. But also, we know from the social psychologists that it promotes kind of collective thinking, shall we say. But that's not what a trial is. Imagine becoming a juror in a criminal trial and being seated according to your political party registration. It just doesn't make any sense at all. In order to get them to start thinking like jurors, people who had signed an independent oath beyond their original oath of office – to uphold and defend the Constitution against all enemies, foreign and domestic – but then to subscribe to another oath saying they would render impartial justice. In order to get them thinking along those lines, to break up that partisan assignment of seats and have people just sit alphabetically. I was told that this would be something that would be upsetting to the senators on both sides. A lot of the senators are older. They are creatures of habit. They've got their stuff in their desks. They don't want to be moved. Their possessions had just been rifled by the QAnon shaman and the insurrectionists who had broken into the chamber and they really didn't want to be moved like that. Essentially, it would have been taken as an insult, an indignity, by them. So, I withdrew on that.

Similarly, I withdrew on a proposal that I wanted to advance for a secret ballot. There's nothing saying that they've got to vote in public on it. That, of course, is the standard norm of Senate procedure generally. But we were being told by a lot of senators that there were two kinds of fears that made open voting a problem. One was the security fears. We had just suffered this terrible violence that had overcome the Capitol. They had laid siege to the Capitol. They'd invaded the Senate sanctum. The only thing that kept them from getting into the House was the police officer who fired the shot at Ashli Babbitt, which killed her. But that was when the mob turned around from storming the House Chamber. Multiple people died that day. Several officers took their lives afterward. There were 150 injured officers. Broken jaws, noses, necks, shoulders, arms, legs, missing fingers, traumatic brain injuries, post-traumatic stress syndrome, you name it. I still have constituents who are officers on the Capitol force or the Metropolitan Police Department force who are in physical or mental therapy because of the physical and psychological wounds inflicted on that day. There was a lot of violence in the air. There were continuing threats. There were domestic violent extremist groups that were calling for a re-run of the insurrection on Inauguration Day. We had National Guardsmen and women camped out all over the place to protect the Capitol. There were a lot of threats going on and there was this suggestion made by several senators and members of Congress that there needed to be a secret ballot so that people could at least theoretically vote in such a way not to subject themselves to potential violence and death threats and so on.

Perhaps more importantly, there was the threat of political retaliation because Donald Trump had made it clear that he wanted to exact retribution against anyone who maintained their oath to the Constitution and acted loyally as an independent dispassionate juror rendering impartial justice. As opposed to simply declaring publicly in advance, "I'm going to be voting for Donald Trump," as it were an election instead of a trial. That was the genesis of the idea of asking for a secret ballot. Again, in practical terms, various people we spoke to in the Senate on both sides of the aisle said that it wouldn't work. Everybody understood that fifty Democratic senators were going to be voting to convict. I think that was a fair supposition. It would not be too difficult to determine which Republican senators voted to convict. These people would come out and say how they voted. Of course, they could have lied, but again, they saw this as essential insult to their dignity and the dignity of their chamber. I have maybe somewhat fewer regrets about letting go on that one, as opposed to the seating arrangements. But again, I still feel that it was the wrong thing not to have opened up a conversation about it.

You've got to understand, when we started that trial, there was a lot of skepticism about us. The last trial had not left a good taste in their mouth. We were being lectured before we had done anything about what they didn't want us to do. They did not want sermonizing. They did not want long speeches. They did not want long political science lectures. They did not want long quoting from the Federalist Papers. They felt as if all of that was condescending and patronizing to them. That was one reason why I decided, I resolved very early on, that we were going to place overwhelming emphasis on the facts of what had happened. We were going to tell one story, and this was the very first speech that I gave to the remarkable impeachment managers who were part of my team. We were not going to have a collection of speeches. It was not going to be one person makes a speech, another person makes a speech. We were going to have one complete story that theoretically could be told by one person, but it would be much more effectively told by many people as long as we were working together to have a beginning, a middle, and an end. Then, we would address the legal dimensions and ramification of it through the telling of the story, rather than saying, "okay, and now we're going to have 45 minutes, or an hour and a half where were going to talk about the First Amendment," or "we're going to talk about Due Process." We would integrate the constitutional and legal arguments into the elucidation of the facts, or we would deal with them in the question-and-answer period that came after the openings of our arguments.

I think that we succeeded in having a very dramatic and vivid telling of the facts as we understood them. There was a remarkable job done by our staff and by the members and the lawyers. Barry Berke, who was our chief counsel in collecting, pouring over literally tens of thousands of images, photographs, and videos to try to put the story together as quickly

as possible. Then, we arranged it into an overall narrative, again incorporating the legal components along the way. That was what we did to try to win over a Senate that was very skeptical. They felt exhausted from the last one which had deepened partisan animosity.

People were saying when we started, "there's no way you're going to get any Republican votes, or any more than possibly Mitt Romney," who had voted with us the last time because there was such a sense of embitterment left over from the prior trial and exhaustion. We resolved there was going to be nothing boring about what we did. We were not going to be condescending or patronizing to them in any way. I know our colleagues were not acting that way to them and yet they interpreted the whole thing like that. So we resolved to have a much shorter, much more compact and dense, factually dense, presentation to them.

People ask me the question though, did I really think that we could win? Did I think that we could get 67 votes? And actually, I thought right up until the votes were taken that we had a chance of getting 100 votes. I thought that the presentation of the facts was so overwhelming, and so irrefutable, and certainly so unrefuted, that there was really nothing to be said on the other side. And clearly the lawyers for Trump had very little to say on the other side. Their presentation of course inspired a lot of humor, a lot of levity, a lot of comedy, a lot of ridicule. Even Trump's strongest supporters basically abandoned his legal team and said that they were just doing a terrible job. In the end, it kind of helped Trump because they became a magnet for so much hostility and ridicule that it took people's eyes off of Trump's own conduct and his own actions. Of course, I felt bad for them because they didn't have really anything to go on because Trump's conduct was so overwhelmingly culpable. He so clearly had incited a violent insurrection, and so clearly had been running an inside political coup against the 2020 Election in order to overthrow Biden's electoral college majority.

In the final analysis, there were some habits of partisanship and habits of obedience to Donald Trump that prevented us from getting to 100, or prevented us from getting a 67. I actually thought that 76 was a far more likely number than 67, and I'll tell you why. I felt like we could not get – we couldn't win – unless McConnell was on our side, and McConnell would not vote to convict unless there was a majority of the Republican caucus with him. There was no way he was going to be voting with a minority of the GOP caucus because that, of course, is his future. He wanted to make sure that a majority was going to be with him. I always felt that 67 was an unlikely number. That is 50 Democrats and 17 Republicans. Certainly less likely than 76, which would have been 50 plus 26, an exact 50 plus 1 percent majority of the Republican caucus: 25 senators plus 1. That would have guaranteed his continuity in his position as leader of the Republicans. When you listen to McConnell's speech that he made after the trial was over, it sounded like it had been written to

explain a vote to convict. Then, he said Donald Trump was singularly, factually, morally responsible for everything that took place on January 6th. He had a number of very condemnatory statements that he made about Trump that, I was seated with other impeachment managers when people were absolutely astonished at what he was saying. Everybody was saying he sounded like a member of the impeachment team itself.

After going through all of that, he went back and he hung his hat on the jurisdictional argument that we had disposed of on the very first day of the trial where we considered the claim that the Senate did not have jurisdiction to try an impeachment of a president if that president had left office in the meantime. There's no doubt that Donald Trump had been properly impeached by the House of Representatives for conduct undertaken while he was president and at a time when he was still president, but then he left office because they decided to conduct the trial later. So, the claim was: you can't try someone who has left office. Unfortunately for him, that claim had been made repeatedly throughout American history, and it had always been rejected by the Senate going back to the very first Congress where there was an official impeached and convicted. This question was heavily adjudicated, if you will, in the Senate in the Belknap case after the Civil War where a corrupt Secretary of War had been taking bribes and kickbacks, quickly resigned and submitted his resignation to Andrew Johnson. Yet, the House said, "We still have the authority to impeach him for crimes conducted and committed while he was in office." And then the Senate said, "Of course. After debating this for two weeks, of course we have the power to try all impeachments under Article 2, including those of officials who have since left office." If we didn't, it would mean anybody could just resign and escape accountability for the criminal actions they took in office.

In any event, we dealt with that, we won on that question 54 to 46 the very first day of the trial, and yet McConnell went back to that and hung his hat on this argument, saying "so I'd love to convict him, but we can't because we don't have jurisdiction over the matter." That was one of several very weak technical arguments that were put out there to give people some cover for making an essentially political judgement. If you think about that as an analogy to a criminal trial, Professor Bowman, your students will know that that is absolutely illegitimate. If somebody makes an argument in a murder case, you can't use this gun against me because it was seized in violation of the Fourth Amendment and the person loses on that argument—that's thrown out. At that point, the constitutional argument is over, the trial proceeds on the facts and you can't go back to it. If the jury goes back to it, that is an instance of jury nullification. And that's precisely what McConnell was doing, he was engaged in jury nullification. Of course, the ambiguity is that the senators have to operate both as judges and also as jurors, and so he simply conflated the roles at that point.

Let me just make two final points if I can. I want to make a point about the First Amendment. Here, I've got to give a lot of praise to my Constitutional Law professor, Larry Tribe, who I've stayed in close touch with and who's been a great help. But we have this ambiguity because they kept saying, "Well, under *Brandenburg*, he's not guilty." And I wanted to say, "Under *Brandenburg*, he absolutely can be found guilty. He incited imminent lawless action in a way that was likely to produce the imminent lawless action, and it happened, and everybody could see it." It's one of the rare cases where the *Brandenburg* standard is actually met, and yet, I kept wanting to say, "that's the wrong standard for thinking about it." He's not just a guy in a crowd, and he's not being criminally prosecuted. This has to do with the proper standards for presidential conduct and misconduct. This is about high crimes and misdemeanors and violation of the oath of office. And so, he doesn't even get the benefit of the *Brandenburg* standard, although we have no problem meeting that. Then, I called up Larry Tribe to start kicking it around, and he kind of engaged in the Socratic dialogue with me. He started saying, "Don't think of him as a guy who yells 'fire' in a crowded theater. Think of him as the fire chief who sends the crowd to burn the theater down." I thought that was a perfect way of making this point that you don't treat him like an arsonist in the crowd, you treat him like the fire chief who is supposed to be defending us against fire, who sends the mob to burn the theatre down. Then, when the calls start pouring in that there's a fire, does nothing but sit on his hands for three hours, watch it on tv, and delight in all of the chaos. I was very happy to have that breakthrough with my Con Law professor and I was able to elaborate with him. I think that metaphor became a central metaphor for understanding what took place in the trial.

Let me just say, finally, we ended up with a 57 to 43 vote. It was the most sweeping bipartisan vote in the history of presidential impeachments. As you know, there have just been four trials in American history in the Senate of presidents: Andrew Johnson, Bill Clinton – that one was ridiculous – Trump One and Trump Two. This was by far the most sweeping bipartisan result. We ended up getting all of the Democrats, seven Republicans from New England, from the Mid-Atlantic, from the Midwest, from the South, from the West, from Alaska, and yet, alas, we ended up ten votes short. Trump beat the constitutional spread as we like to say. There's never been a conviction of a president. I think the framers probably understated the hold that partisanship would have on us. If you go back and read the Federalist Papers, they really predicted that members of Congress would identify not with their political party, but with their branch of government, or with their institution with the House or with the Senate. If that were true, of course, the votes would have been 435 to zero and 100 to zero, because his violent mob attacked us. We all could have died that day. Senator Lindsey Graham said, "They could have brought a bomb in," because they avoided the metal detectors. There were 900

people in the building who had gone through no security screening at all. But we didn't identify with our branches uniformly—we identified far more with our political parties, which is a statement not necessarily about the flaws of our system – although we could talk about adjustments – but something about human nature and the human psyche and human cognition.

Professor Bowman, I think I'll stop there.