Separation of Powers Law

Cases and Materials

FOURTH EDITION

Peter M. Shane
Jacob E. Davis and Jacob E. Davis II Chair in Law
The Ohio State University Moritz College of Law

Harold H. Bruff
Rosenbaum Professor of Law Emeritus and Dean Emeritus
University of Colorado Law School

Neil J. Kinkopf
Professor of Law
Georgia State University College of Law

Carolina Academic Press
Durham, North Carolina

ISBN 978-1-53100-259-6
eISBN 978-1-53100-260-2
LCCN 2017957040

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

This is not likely to be end of what President Trump has dismissively called "the Russia thing." For example, although not indicted as of early November, 2017, another campaign adviser, General Michael Flynn, is known to have held meetings—in potential violation of the Logan Act—with Russian officials during the transition period to set up a back channel for U.S.-Russian communications once President-elect Trump was inaugurated. General Flynn, who had been named to be Trump's National Security Adviser, applied for renewal of his security clearance in February 2017, but failed to disclose these contacts or to report income he had received from Russian sources. When reports to this effect began to surface, Flynn misled Trump Administration officials, including Vice President Mike Pence, regarding his connections with the Russian government. On February 13, President Trump fired General Flynn for lying to the Vice President.

Other associates of the Trump campaign with significant ties to the Russian government include advisers Carter Page and Roger Stone, and son-in-law Jared Kushner. In addition, the first Senator to endorse Donald Trump for president was now-Attorney General Jeff Sessions. During the campaign Sen. Sessions twice met with Russian Ambassador Sergey Kislyak. After President Trump nominated Senator Sessions to be Attorney General, Sessions testified at his confirmation hearings that he "did not have communications with the Russians." After the fact of his meetings with Ambassador Kislyak became public, Mr. Sessions recused himself from the investigation into Russian involvement in the 2016 presidential campaign.

At the time President Trump took office, the official in charge of the federal investigation of Russian influence in the 2016 presidential election was FBI Director James Comey. Director Comey had already achieved broad public notoriety. After George W. Bush appointed him to serve as Deputy Attorney General, Comey (along with Attorney General John Ashcroft and Assistant Attorney General Jack Goldsmith) stood up to the White House in refusing to re-authorize an aspect of the Administration's Terrorist Surveillance Program. This episode helped Comey solidify a reputation for integrity and non-partisanship and largely explains why President Obama appointed this Republican to be FBI Director.

In July 2016, Director Comey announced that the FBI was recommending that the Justice Department not pursue charges against Hillary Clinton for conducting official business as Secretary of State over a private email server she maintained in the basement of her home, even though classified material appeared on the server. The announcement had two unusual elements. First, the FBI typically does not make its recommendations public, but rather leaves the final decision and the announcement to one of the FBI director's superiors—the Attorney General or the Deputy Attorney General—at Main Justice. Second, Comey went beyond announcing that there would be no charges and criticized Secretary Clinton's carelessness in handling classified information. Such commentary is highly unusual under any circumstances, but especially so when the subject of the comments is a candidate for president. Then on October 28, 2016, as the presidential campaign was drawing to a close, Comey announced that the FBI was re-opening the investigation of Secretary Clinton

because of additional emails that were found in the course of an unrelated investigation into the husband of one of Secretary Clinton's advisers. On November 6, just days before the election, Comey announced that the reopened investigation was again being closed.

On May 9, 2017, President Trump fired James Comey as FBI Director. The initial White House announcement stated that the firing was because of a memorandum prepared by newly appointed Deputy Attorney General Rod Rosenstein. The memo recommended that Comey be terminated because of his mishandling of the Hillary Clinton email investigation. The memo specifically asserted that Comey had overstepped his authority making the July 2016 announcement recommending against prosecution and in commenting further on Clinton's carelessness. President Trump almost immediately undermined this narrative, however. In an interview, the President stated that he made his decision to fire Comey independently of the Deputy Attorney General's memorandum and that his reason for the firing had nothing to do with the Clinton email investigation. Rather, President Trump declared that he had fired Comey because of "this Russia thing."

On June 8, 2017, James Comey testified before the Senate Intelligence Committee, which had opened its own inquiry into possible Russian interference in the 2016 presidential election. Comey's dramatic testimony included a number of significant claims. First, at the conclusion of a national security briefing by top executive officials in the oval office, President Trump asked to speak to Director Comey alone. He specifically raised the FBI's reported investigation of General Flynn and said, "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go." Comey testified that, despite the "I hope" phrasing, he understood President Trump to be issuing an order to cease the investigation. For his part, President Trump denied making the statement or in any way indicating that Comey should stop the investigation. Second, in two subsequent telephone conversations with Director Comey, President Trump described the Russia investigation as "a cloud" that was impairing the President's ability to do his job. Previous to these discussions, President Trump had a private dinner with Comey in the White House at which time the President informed Comey that "I need loyalty, I expect loyalty." This pattern of conduct led Comey to conclude, "I was fired because of the Russia investigation. I was fired, in some way, to change, or the endeavor was to change, the way the Russia investigation was being conducted." President Trump has denied that he endeavored to affect the Russia investigation.

Further legal developments will no doubt continue to unfold even as this volume heads to publication, and it is far too early to predict specific outcomes. The investigations of the Department of Justice, which have been turned over to a Special Counsel, and the Senate and House Intelligence Committees remain in full force. Moreover, what evidence we have regarding the President's personal involvement—principally the Comey testimony—is contested. The matter nonetheless illuminates a number of important points and raises important questions about the impeachment power. Because of the incomplete and contested nature of the

information we have, we regard the following discussion as hypothetical and do not mean to express a view on the "Russia thing."

a. *Does an offense have to be a formal crime to be impeachable?* Much of the commentary on events recounted by former FBI Director Comey has focused on the issue of whether the President's conduct fits the legal definition of obstruction of justice. 18 U.S.C. § 1503 (prohibiting conduct that "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.") Suppose President Trump endeavored to impede the investigation but did not do so in a manner that falls within the statutory definition of "corrupt" or "threatening." Should the President then be insulated from impeachment or should Congress be understood to have the authority to protect the nation from a President who obstructs the due administration of justice?

b. *Can unintentional conduct be impeachable?* Aside from the President's conduct relating to the Russia investigation, it is clear that quite a few of the President's close advisers have had some contacts with the Russian government or individuals and entities connected with the Kremlin. Assuming the worst case with respect to these advisers—that they are willful agents of the Russian government—but that the President was unaware of these advisers' true motives, would such circumstances provide legal grounds for the House to initiate impeachment proceedings? In such an instance, the President lacks ill-intent and therefore, in all likelihood, the *mens rea* requisite to commit a significant crime. It is conceivable that the House would regard the President as having jeopardized the nation by employing a coterie of disloyal advisers and so to be unfit to remain in office—not because the President is personally endeavoring to do harm, but because the President cannot be trusted to protect the nation against the machinations of foreign powers. Should this be sufficient grounds for impeachment?

c. *The political safeguards of separation of powers.* The two preceding notes raise questions that might incline one to take a relatively expansive view of what constitutes "high crimes and misdemeanors." The concern about doing so is that an open-ended impeachment power could render the President subservient to Congress. James Madison raised this objection to an early draft of the Constitution, which empowered Congress to impeach the president for "maladministration." Madison considered maladministration "so vague a term [that it] will be equivalent to tenure during [the] pleasure of the Senate." 2 Max Farrand, Records of the Federal Convention of 1787, 550 (1911). The most practically significant check against congressional abuse of the impeachment power is not the legal definition of "high crimes and misdemeanors" but the impeachment process itself. While the House of Representatives holds the power to impeach a civil officer by a simple majority, no consequence follows from an impeachment vote. In order for an impeachment to have a legal consequence, it must be presented to the Senate for a trial and vote of conviction, which vote requires a two-thirds supermajority. This process has operated to ensure that an officer may be removed from office through impeachment

only where there is broad bipartisan agreement that the officer has actually engaged in conduct that justifies this sanction.

Consider what this means in the context of the Russia matter as set forth above. One of the more explosive charges leveled during Mr. Comey's testimony is that the President pressured him to drop the investigation of General Flynn (again, President Trump denies this). But note what Comey relates the President as having said: "I hope you can see your way to letting . . . Flynn go." Comey asserts that in context he understood this as conveying a clear order from the President. Be that as it may, the actual words the President used do not expressly issue an order, and getting to that conclusion requires construction that may or may not be justified. Faced with competing plausible constructions of the statements and events, is it not realistic to think members of the President's party in Congress will choose the innocent construction? Doesn't the constitutional process—especially the supermajority requirement—operate to establish a strong presumption of presidential innocence?

d. *Impeachment as a remedy for pre-presidential misconduct.* Imagine that a candidate for President colludes with a foreign power to hack into the United States's balloting system (which is not maintained by the federal government but rather is maintained by the states) in order to directly rig the outcome of the presidential election. This would seem to be clear grounds for impeachment. It is not clear, however, that the impeachment power extends to conduct undertaken by one who is not, at that time, a civil officer of the United States. Somewhat analogously, the Senate has twice refused to convict a former official who acted corruptly in office but who resigned before the Senate could conclude a trial of the matter. *See* Michael J. Gerhardt, The Federal Impeachment Process, *supra* at 79. It is noteworthy that conviction in this circumstance would not be a futile gesture because the punishment for conviction can, at the Senate's discretion, extend beyond removal from office to include a disability to hold office ever again. *See* U.S. Const. art. I, § 3, cl. 7. These precedents indicate a reluctance to apply the impeachment power in a way that covers consequences falling outside the term of office. Moreover, as discussed in note 3 *supra*, some commentators have argued that the scope of impeachable offenses should be limited to those that involve the abuse of official power. *See* Cass Sunstein, *Impeaching the President*, 147 U. Pa. L. Rev. 279 (1998), *but see* Neil J. Kinkopf, *The Scope of "High Crimes and Misdemeanors" after the Impeachment of President Clinton*, 63 Law & Contemp. Probs. 201 (2000). The presidential candidate we have hypothesized does not hold office and so cannot have engaged in conduct that abuses the power of office in conspiring with a foreign power to fix an election.

e. *Is Election-Related Misconduct a Special Case?* It is standard to note that the impeachment and removal power co-exists in serious tension with our democratic commitments, at least when applied to a sitting president, because the removal of a president undoes the result of an election and, in this very direct sense, subverts the will of the people. Congress has frequently cited this as a reason for being hesitant to pursue presidential impeachments. Should this impulse to defer to democracy, so to

speak, apply with equal force where the alleged misconduct goes to the legitimacy of the election itself?

b. A Judicial Role?

If a President contends that the "offenses" alleged against him are not "high crimes and misdemeanors" under the Constitution, should he be able to seek judicial review of that question? Before a Senate trial? After conviction? The following case, involving not President Nixon but a federal judge also named Nixon, clearly was decided with the former President's case in mind.

Nixon v. United States

506 U.S. 224 (1993)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison. The grand jury investigation stemmed from reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman's son. . . .

On May 10, 1989, the House of Representatives adopted three articles of impeachment for high crimes and misdemeanors. The first two articles charged Nixon with giving false testimony before the grand jury and the third article charged him with bringing disrepute on the Federal Judiciary. After the House presented the articles to the Senate, the Senate voted to invoke its own Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to "receive evidence and take testimony." The Senate committee held four days of hearings, during which 10 witnesses, including Nixon, testified. Pursuant to Rule XI, the committee presented the full Senate with a complete transcript of the proceeding and a report stating the uncontested facts and summarizing the evidence on the contested facts. Nixon and the House impeachment managers submitted extensive final briefs to the full Senate and delivered arguments from the Senate floor during the three hours set aside for oral argument in front of that body. Nixon himself gave a personal appeal, and several Senators posed questions directly to both parties. The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first

two articles. The presiding officer then entered judgment removing Nixon from his office as United States District Judge.

Nixon thereafter commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to "try" all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings. . . . The District Court held that his claim was nonjusticiable, and the Court of Appeals for the District of Columbia Circuit agreed.

A controversy is nonjusticiable—i.e., involves a political question—where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . ." *Baker v. Carr*, 369 U.S. 186, 217, (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. *Powell v. McCormack*, 395 U.S. 486, 519, (1969). As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. . . . The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform. . . . Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial . . . . The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it . . . . Based on the variety of definitions, . . . we cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments. . . .

[T]he first sentence of Clause 6 . . . provides that "the Senate shall have the sole Power to try all Impeachments." We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution—with respect to the House of Representatives' "*sole* Power of Impeachment." Art. I, § 2, cl. 5. The common sense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted . . . .

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. This silence is quite meaningful in light of the several explicit references to the availability of judicial review as a check on the Legislature's power with respect to bills of attainder, ex post facto laws, and statutes.

The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. *See* 1 Farrand 21–22 (Virginia Plan); *id.*, at 244 (New Jersey Plan). Indeed, Madison and the Committee of Detail proposed that the Supreme Court should have the power to determine impeachments. Despite these proposals, the Convention ultimately decided that the Senate would have [it]. According to Alexander Hamilton, the Senate was the "most fit depositary of this important trust" because its members are representatives of the people. *See* The Federalist No. 65, p. 440 (J. Cooke ed., 1961). The Supreme Court was not the proper body because the Framers "doubted whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task" or whether the Court "would possess the degree of credit and authority" to carry out its judgment if it conflicted with the accusation brought by the Legislature—the people's representative. *See id.*, at 441. . . .

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. *See* Art. I, § 3, cl. 7. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments. . . . Certainly judicial review of the Senate's "trial" would introduce the same risk of bias as would participation in the trial itself. Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.*" *Id.*, No. 79, pp. 532–33 (emphasis added).

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. . . . The Framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge.

This split of authority "avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches." The second safeguard is the two-thirds supermajority vote requirement. . . .

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. We agree with the Court of Appeals that opening the door of judicial review . . . would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim? . . .

For the foregoing reasons, the judgment of the Court of Appeals is Affirmed.

Justice WHITE, with whom Justice BLACKMUN joins, concurring in the judgment.

. . . [I would] reach the merits of the claim. I concur in the judgment because the Senate fulfilled its constitutional obligation to "try" petitioner. It should be said at the outset that, as a practical matter, it will likely make little difference whether the Court's or my view controls this case. This is so because the Senate has very wide discretion in specifying impeachment trial procedures and because it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. . . . When asked at oral argument whether [the Constitution] would be satisfied if, after a House vote to impeach, the Senate, without any procedure whatsoever, unanimously found the accused guilty of being "a bad guy," counsel for the United States answered that the Government's theory "leads me to answer that question yes." . . . I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process. . . .

[T]here can be little doubt that the Framers came to the view at the Convention that the trial of officials' public misdeeds should be conducted by representatives of the people; that the fledgling judiciary lacked the wherewithal to adjudicate political intrigues; that the judiciary ought not to try both impeachments and subsequent criminal cases emanating from them; and that the impeachment power must reside in the Legislative Branch to provide a check on the largely unaccountable judiciary.

The majority's review of the historical record . . . does not explain, however, the sweeping statement that the judiciary was "not chosen to have any role in impeachments." Not a single word in the historical materials . . . addresses judicial review of the Impeachment Trial Clause. . . . What the relevant history mainly reveals is deep ambivalence among many of the Framers over the very institution of impeachment,

Suppose, as was once proposed, that former Justice Douglas had been impeached for marrying too often and writing leftish books. Should the Court have reviewed whether those are impeachable offenses? That is, are both procedural and substantive issues about impeachments now political questions?

3. *Committee Process.* What do you think of the use of a committee to perform part of the impeachment process? Are there substantial arguments that this delegation is bad *per se*, or should one's view depend on how it operates? For a critique of the current procedures as unfair, see Note, *Committee Impeachment Trials: The Best Solution?* 80 Geo. L.J. 163 (1991).

4. *Disciplining Federal Judges.* The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035, codified at 28 U.S. Code §§ 331–32, 372, 604, created a mechanism to consider and respond to complaints against federal judges. If a complaint about a judge's conduct is filed with the appropriate court of appeals, the judicial council of the circuit is empowered, after various preliminary investigative steps, to punish the judge by means such as a reprimand, a temporary suspension, or a transfer of the judge's cases. If the situation appears to warrant removal, the inquiry moves to the Judicial Conference of the United States for reporting to the House of Representatives. For analysis of the Act, see Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 100–102 (2d ed. 2000); Robert W. Kastenmeier & Michael Remington, *Judicial Discipline: A Legislative Perspective*, 76 Ky. L.J. 763 (1987–88).

After having impeached and removed three federal judges within just over two years, Congress decided broadly to address issues of judicial discipline. It created a National Commission on Judicial Discipline and Removal to study the problems and report recommendations (Pub. L. No. 101-650, 104 Stat. 5124). The Commission, a distinguished group chaired by former Congressman Robert W. Kastenmeier, issued its Report of the National Commission on Judicial Discipline and Removal (1993). The Commission did not recommend constitutional reform. It concluded that federal judges could constitutionally be prosecuted, convicted, and jailed by federal or state authorities, but that statutes attempting to provide for removal of federal judges by means other than impeachment would be unconstitutional. The Commission thought that the circuit councils could control the caseload of judges under inquiry, but that a statute suspending compensation in the event of a conviction would be unconstitutional. Regarding impeachment proceedings, the Commission urged better cooperation between executive and congressional authorities in potential removal situations and suggested some ways to streamline and to ensure the fairness of the process. It did not call for abandonment of the Senate's Rule XI process for delegating trial responsibilities to a committee. *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. Pa. L. Rev. 209 (1993); Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. Ill. L. Rev. 809.