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Coming to Terms with the Impeachment Process: The Case for Starting a Formal Inquiry

Bob Bauer

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The day after Donald Trump's inauguration, Peter Wehner wrote with some restraint that the new president "is unlikely to be contained by norms"— that is, by those practices or customs that politicians are expected to observe for the good of the constitutional order and typically held to account for disregarding. He saw Trump's predictable shattering of norms as the consequence of his "temperament and character." A politician who "thrives on creating disorder, in violating rules, or provoking outrage," and whose fixed point of reference is his own self-interest, will not adhere to norms. Wehner had it right, of course. Whether a norm calls for preserving the integrity of federal law enforcement, or avoiding the appearance of profiting off public service, or taking seriously the obligation to speak truthfully to the public, Trump can be counted on to treat it with contempt if doing so serves his immediate political or personal purposes.

Not all norms get in Trump's way, and one of them is now working in his favor. This norm—a constitutional process norm— holds that impeachment of a president is a constitutional remedy for use only in "break-the-glass," extreme cases. Cass Sunstein has referred to impeachment as nothing less than a "national nightmare, a body blow to the republic," even in cases where it may be necessary. He contends that the "limited use of impeachment is as important as any other instruction from the founding period." What for Sunstein is a "national nightmare" is to others, framing their concern in similar dire terms, a "constitutional crisis."

Defined either way, this norm puts into roughly equal balance the dangers of Trump and the dangers of the impeachment process. It is not surprising, then, that there is broad hesitation over even a formal inquiry into the commission of Trump's potential impeachable offenses. It is widely assumed that impeachment proceedings should be undertaken only when there is already overwhelming evidence of extreme —usually taken to mean the most serious legal— wrongdoing. In all other cases, it is feared, the impeachment process risks becoming a show trial, one in which partisan prejudgment of guilt can yield only a sham process. So, as Congress did when looking to Ken Starr to make the legal case for impeachment against Bill Clinton, now many believe that it is all up to Robert Mueller.

The anxiety that builds up over the impeachment process is vividly illustrated by the response to Trump associate and former personal lawyer Michael Cohen's recent plea agreement for criminal violations of the federal campaign finance laws, soon followed by the National Enquirer parent company's acceptance of responsibility for its role in the crime. The president appears in the prosecution's court filings as the key person directing the conspiracy, readily identifiable as "Individual 1." As soon this deeply disturbing news broke, reasons were given why the

development did not support even an inquiry into impeachment. The president may have been involved in breaking the law, but it is was not, some argued, a law anyone should care all that much about. "[Since] when," Christopher Buskirk asked readers of *The New York Times*, "did campaign finance violations become the country's idea of an impeachable offense?" In addition to shrugging off this portion of the United States Code, critics warned about the unsuitability for an impeachment process of the underlying subject matter of alleged extramarital affairs. By loose analogy to the Clinton impeachment, such matters were deemed too personal—without regard to whether criminal conduct to influence the outcome of an election was involved.

Given the reasonable belief that impeachment standards ought to be defined and enforced with the highest possible degree of rigor and impartiality, some uncertainty and debate is to be expected. The Founders did not say much about impeachment. They devoted relatively little time to it in either deliberation or constitutional text. Much of the attempt to derive their intent rests on putting enormous weight on whatever snippets in the constitutional record can be found. Nevertheless, the available history and the best constitutional scholarship suggests that a president should not be subject to removal for just any offense, or, for that matter, even any allegedly criminal offense.

At the same time it is useful for all participants in this debate to step back and acknowledge the implications of conceding that a president may well be a criminal. This seems sufficient to justify at least *an inquiry*. Yet the mere possibility that the Congress would begin to ask questions that could lead to impeachment sends a shudder through much of the punditocracy and scholarly community.

This anxiety about any impeachment process gives rise almost imperceptibly to another problem. It distorts understanding of what constitutes impeachable "high Crimes and Misdemeanors." If the impeachment of the president is seen to be a source of intolerable constitutional harm, the tendency is to raise, and keep raising, the bar for removal. A president can be an outright demagogue, lying all the time on matters big and small and committing crimes along the way: and still there is fear that the cost to the nation of impeachment outweighs whatever benefits to the polity it will bring.

An example of how the current norms governing resort to the impeachment process seep into our understanding of the constitutional standards is the often-repeated view that "maladministration" is not a ground for either inquiry or removal. Much is made of very little constitutional history on this point. And some scholars, like the Cato Institute's Gene Healy in his recently published study of impeachment, conclude on a close examination that this history has been badly misconstrued. While it is true the president should not be subject to impeachment over policy disagreements, or even administrative shortcomings, it is also true that extraordinary incompetence or gross irresponsibility can support impeachment. James Madison referred to impeachment as "indispensable… for defending the community "against the incapacity [or] negligence" and not only the "perfidy" of a president.

Healy is not alone in his view. Charles Black in his famous "handbook" on impeachment conjures up the hypothetical of a president appropriately impeached for relocating to Saudi Arabia so that he can marry multiple wives while conducting business from abroad. Black assumed for purposes of this hypothetical an eccentric or willful, not necessarily insane, president who would be properly impeachable for "gross and wanton neglect" of his constitutional duties. This example might strike us today as more illuminating on the subject of

the 25th Amendment and its application to presidential disabilities, such as psychological impairment. But, we should be able to reach the same conclusion about "gross and wanton neglect" in the case of a president who radically lies freely about everything, because he sees it in his narrow self-interest to do so. Yes, politicians lie, and some politicians have trouble knowing when to stop. But a president for whom, in Wehner's words, "the truth is malleable, instrumental, subjective," is, of course, exceedingly dangerous. On this point, Sunstein is among those commentators who would agree that impeachment may be the appropriate constitutional response to a president who lies, at least about significant affairs of state, as a matter of course.

Does the impeachment process remain on hold until such time as a president who displays pathological mendacity tells a lie with calamitous consequences? To take this view is to relegate impeachment to the function of an after-the-fact remedy, a cleaning of the barn after the horse is long gone. This is conceivably the result of a fundamental confusion over the function of impeachment. If a president is removed from office, the Senate must vote to "convict." Impeachment then assumes the look and feel of a punishment, just desserts for offenses committed, rather than, in Madison's words, a defense of the community against negligence, incapacity or perfidy. In fact, impeachment is a measure to protect against harm, not to exact rough constitutional justice for damage already done.

At the root of the problem is the wrong lesson learned from the constitutional history. The Founders did not bequeath a fixed conception of the role of impeachment, nor could they have done so. While preoccupied with abuse of power, the Founders were concerned less about the presidency than about the Congress. They took the legislative branch to be the "dangerous branch." They did not and could not look ahead to the time when that would be far from true. They did not imagine a legislature so widely noted for its impotence and fecklessness, or an executive glorying in its massive powers and regularly and with considerable success asserting claims to still more. The process norms governing resort to impeachment have to be revised to meet the actual structure and relationship of our governing institutions. Impeachment is a defense against a dangerous presidency and it is in 21st century terms, not those of the 18th or 19th century, that the potential danger is best understood.

Adding to the urgency of this task is the combination of expanded presidential power with a wide open, some would say broken, selection process. Experience no longer controls entry to the presidential race, and the vetting of candidates is haphazard and unfocused. In fact, in political terms, lack of experience and an unknown personal history have become political assets. The self-styled "outsiders," disdaining government in Washington, have the upper hand. Indeed, as Trump demonstrated, they can make much of the perverse political virtue of having no experience whatsoever, at any level of government. Upon inauguration, they come into possession of enormous authority but have little, if any, conception of how to exercise it.

This does not mean that they lack self-regard—or that they do not suffer from self-delusion. So we come, inevitably, to the point where a president is so oblivious to his own limitations that he rejects—even appears to resent— experienced counsel and surrounds himself with family members, enablers, and others he screens for personal loyalty; who breaks laws and norms; who lies constantly, and who proudly announces that he is ready to put more confidence in his "gut" than in "anyone else's brain." It is peculiar for commentators, and self-destructive for the polity, to worry in these circumstances that an impeachment inquiry would precipitate a national nightmare or crisis. Which is the nightmare, which is the source of the crisis?

It is fine, as some do, to repose confidence in the sturdiness of institutions that stand their ground against a wayward, impulsive chief executive. The courts, the press, conscientious public servants and an articulate and committed opposition have put up a good fight. This president has not always had his way. But, a committed demagogue, he keeps trying.

In critical respects, he is getting results. He is hobbling the senior levels of key departments and agencies, striving to bend them to his personal and political purposes, by firing or driving out officials lacking the personal loyalty he craves and replacing them with the supine and unqualified. He has worked toward the moment when he is now firmly in charge, and neither expertise nor—as officials like former Secretary of State Rex Tillerson have attested—the details of policymaking hold much sway. The state of the Trump government at the present time was on display in the first Cabinet meeting of 2019, held in the middle of a government shutdown. With a mock Game of Thrones poster laid out before him, the president misrepresented facts relevant to American national security policy, lied about the reasons for the departure of his former Secretary of Defense, and commended the Soviet Union for invading Afghanistan in 1979. His Cabinet members sat mutely by, mostly limiting their remarks to gratitude for his leadership on "the wall."

Two years into this presidency, it appears foolhardy to gamble that, because our governing institutions will do what they can, Congress may safely keep its impeachment power in indefinite reserve. In these circumstances, for Congress to hold off on even a formal inquiry and hope for the best, is inconsistent with the defense of the national community, as Madison described that responsibility

Moreover, as Jack Goldsmith has pointed out, the institutions resisting this president's excesses have indulged in more than a few of their own. Norms are now under pressure from all quarters as Trump's adversaries "fight fire with fire." Government officials concerned about executive misconduct leak sensitive national security information; the press struggles to adapt the ethos of objectivity to the coverage of a president who routinely lies; and the courts are under pressure to push the boundaries of jurisdiction and precedent in the service of the rule of law overall. This is Trump's dark gift: he manages to goad those around him, his critics included, to join him in the weakening of norms.

An impeachment inquiry attacks this problem at its source. The initiation of the process is only that—a first step. But it is a step toward clearly and unapologetically framing the constitutional issues presented by this presidency. It also sends a clear message to the president. For Congress to launch an inquiry at least establishes that, whatever the outcome of the proceeding, this president's conduct is not just his unique brand of politics but raises questions of a constitutional dimension. To pass over those questions out of misguided fear of the impeachment process risks setting a "precedent" of sorts: an invitation to a future president who is motivated to carry on in this fashion to do so, through the end of the term, without fear of constitutional accountability. Trump's presidency would then be treated as an exceptional political challenge but nothing more, and the nation would be left to contain the damage in the coming years by counting on everyday politics and on the continuing capacity of institutions to hold their own under unprecedented stress.

At first, facing impeachment, Trump may well relish the battle or imagine that he does. But it plainly also worries him, as his agitated tweets and press reports make clear. Whether over time,

in the course of an inquiry, the politics plays out in his favor is unpredictable, as he no doubt understands.

It is this politics that drives some part of the worry about an impeachment process. The picture of public opinion is complex. A recent Quinnipiac poll reveals a solid majority for these propositions: that the president does not respect the rule of law, that he allows his business interests to affect U.S. policy toward Russia and Saudi Arabia, that he does not choose "the best people" to run the government. Yet a 60 percent majority opposes the initiation of impeachment proceedings. A public with these doubts will not relinquish them easily. The segment of the electorate that voted for Trump, and those of his supporters under bombardment from Fox News and other wings of the Trump defense network, will be especially unreceptive. So it is natural to ask how an impeachment process ever gets off the ground with sufficiently wide public acceptance.

The answer lies in how the House goes about the business of inquiry—whether it proceeds methodically and transparently, with apparent care and seriousness of purpose. It can begin with consideration of the structure of the process and the elaboration and discussion of standards. The Watergate experience supplies guidance. The House Judiciary Committee staff then put out a document explicating the scope of "high Crimes and Misdemeanors," a text that is consulted to this day. In addition, the Committee elicited the assistance of notable historians in mapping the American experience with impeachment. The Committee today can follow its predecessors in these and other ways to lay a foundation for substantive inquiry. It can do much of the preliminary work behind closed doors, limiting if not extinguishing the opportunities for political grandstanding, and then release procedural and other documents for public discussion and debate before proceeding to call witnesses and gather testimony.

All of these steps serve to build gradual public trust in and understanding of the process and should help counter the shrill complaints of the president on Twitter and his most dedicated supporters. It also assures that a responsibly crafted process is in place to respond to further, even likely, developments as a result of the Mueller investigation, congressional investigations, and ongoing litigation over the president's continuing private business interests. Of central importance is the credibility of the process, and it would be significantly enhanced if it is directed to fundamental features of this demagogic presidency, rather than apparently hurried into service by one or the other eruptions in the 24-hour, breaking news cycle.

Already we have a fresh example of the risks that public interest in impeachment will spike in immediate reaction to events but without any agreed framework or common vocabulary in place. The method by which the president made his decision for a sudden and complete withdrawal from Syria, followed by the former Secretary of Defense James Mattis' resignation, raised wholly legitimate concerns about his ability to carry out the affairs of state on matters of vital national security. But some of the most vocal critics seem to have been moved primarily by disagreement with the substance of the decision. This and similar responses to questionable or bad policy will open up the impeachment process to the charge that it is motivated by policy differences. The best protection against this criticism is to establish a principled, well-structured framework for bona fide deliberation and debate.

In the end, it is up to the president's detractors and defenders to make the case for or against impeachment on the record that is established. If we have confidence in institutions to do the work of upholding the law and norms against the attacks from this president, we then should

have confidence, as a basic tenet of democratic self-rule, for the public to render a judgment, on the evidence and the arguments, that are presented over time. This is what the public did in the case of Bill Clinton, and what it can be expected to do in a Trump impeachment process. Congress weighing impeachment is always and inescapably sensitive to public opinion, as it was in the Clinton matter. But that is no reason to allow highly premature forecasts of public judgment to delay the start of the constitutional process.

Out of this first step can emerge the elements of a new and badly needed set of ground rules that shapes a fresh understanding of the appropriate triggers for an impeachment process and its opening stages. Other norms are in place to guide the later phases. For example, the Constitution does not require the Senate to act on the House's vote to impeach, but it is the norm that it should. If the House impeaches, it would follow that the Senate should take the matter and resolve it with an up-or-down vote on acquittal. In the Clinton impeachment trial, the Senate proceeded to a final vote even though it became clear in an early stage, in a vote on a motion to dismiss, that support for a conviction fell far short of the necessary supermajority. Yet both parties agreed to press on to the inevitable conclusion. The question now is when an inquiry should start and in what ways.

So far the consideration of impeachment has been mistakenly overwhelmed by the fear that it is so potent a remedy that it is to be avoided, except in cases where it is effectively the only alternative to an indictment that the Department of Justice will not bring until a president has left office. In effect, it is a remedy some imagine is only rarely worth the costs. On the other side of the balance, the costs are heavy and mounting.