

Originally published in

New York Law Journal

Perspective

December 20, 2019

Impeachment Sidebar: High Crimes and Misdemeanors

Jerry Goldfeder's Impeachment Sidebar addresses various legal issues relating to the impeachment process. This is his third installment.



By [Jerry H. Goldfeder](#)

Ben Franklin's [famous admonition](#) to a passerby as he left Independence Hall in 1787 was simple, yet it still resonates. When asked, "Well, Doctor, what have we got—a Republic or a Monarchy?," his response was, "A Republic, if you can keep it."

His trepidation was understandable. After all, the United States was a new kind of government—a bifurcated national legislature alongside a unitary chief executive, subject to a system of checks and balances. Given their experience under King George III, the Founders included two additional protections against a President who may be tempted to abuse his powers: recurring elections and impeachment. Presidential elections have worked relatively well—we have not skipped any, even during wars or catastrophic events. Impeachment has also been invoked, though only rarely. See [Impeachment Sidebar: Historical Context](#), NYLJ, Nov. 13, 2019.

Ever since President Trump's phone call with Ukraine President Volodymyr Zelensky became public, the House has inexorably moved toward exercising its impeachment power once again. Although they were stymied by the President's direction to subpoenaed fact-witnesses not to appear and to agencies not to produce subpoenaed documents, a majority of Congress members determined they had sufficient evidence to find the President had committed impeachable offenses.

So, for the third (almost fourth) time in the life of our 232-year old constitutional republic, a President has been impeached by the House. Each time, the alleged offense has been one of "high crimes and misdemeanors," not treason or bribery. See [Impeachment Sidebar: Bribery](#), NYLJ, Dec. 3, 2019. As lawyers, we are particularly attuned to the meaning of words and the elements of a civil or criminal offense. The term "high crimes and misdemeanors," however, is neither specific nor unambiguous. Rather, this term was meant to describe a generalized set of offenses. Used by our forebears in England since the 1300s, the term was adopted by the Founders *because* of its general and flexible nature. [But there is no doubt what they intended.](#)

To the Founders, and to the House of Representatives during the four presidential impeachment inquiries, high crimes and misdemeanors has generally been understood as encompassing an abuse of power; a betrayal of or threat to our constitutional republic; a corruption of the office of the presidency or subversion of our electoral process; or improper foreign entanglements. There has been almost universal agreement that a specific criminal act is not necessary to find an impeachable offense.

In the current impeachment, President Trump is charged with having directly, and through his agents, abused his power as President by soliciting a foreign government to compromise a domestic political opponent for his own personal political benefit, thus intentionally and corruptly undermining our free and fair democratic elections, and, in so doing, injuring our national security interests. He was also impeached for obstructing Congress's sole power to investigate impeachable offenses. As such, he was impeached for acting "in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States."

In reviewing the [Report of the Committee on the Judiciary](#) regarding the impeachment of President Trump, one is struck by how its language echoes previous impeachments. President Clinton was impeached for having "undermined the integrity of his office, [having] brought disrepute on the Presidency, ... [and] betrayed his trust as President." His offenses were, of course, different from President Trump's: President Clinton "willfully provided perjurious, false and misleading testimony to [a] grand jury," suborned perjury, and "conceal[ed] the existence of evidence and testimony related to a Federal civil rights action brought against him" But the [House's conclusion in 1998](#) was essentially the same as the House's current determination: President Clinton "acted in a manner subversive to the rule of law and justice, to the manifest injury of the people of the United States."

Similarly, though President Nixon resigned before the full House could vote on impeachment, the House Judiciary Committee [passed three articles of impeachment](#) against him for abuse of power—obstructing the investigation of the illegal break-in of the Democratic National Committee by providing false statements to investigators, suborning perjury, and paying hush-money to silence or influence the testimony of witnesses. He, like President Trump, was also impeached for obstruction of the House’s impeachment inquiry by failing to produce subpoenaed documents, thereby also unconstitutionally interfering with the House’s impeachment power. The House Judiciary Committee determined in 1974, as it did in 1998 and 2019, that the President had acted “in a manner contrary to his trust as president and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.”

The [impeachment of President Andrew Johnson](#) also adhered to the Founders’ framework. Although nine of the articles of impeachment concerned his firing of his Secretary of War and related acts in violation of a specific law, the House deemed this conduct “unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed”

Thus, in each case, the House of Representatives fulfilled its constitutional duty as it perceived it—exercising its authority and obligation to impeach a President for his high crimes and misdemeanors, and thus responding to Ben Franklin’s plea to preserve the republic.

Next: The Senate Trial.

Jerry H. Goldfeder is special counsel at Stroock & Stroock & Lavan LLP, and teaches Election Law and the Presidency at Fordham Law School.

Reprinted with permission from the December 20, 2019 edition of the NEW YORK LAW JOURNAL © 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com.