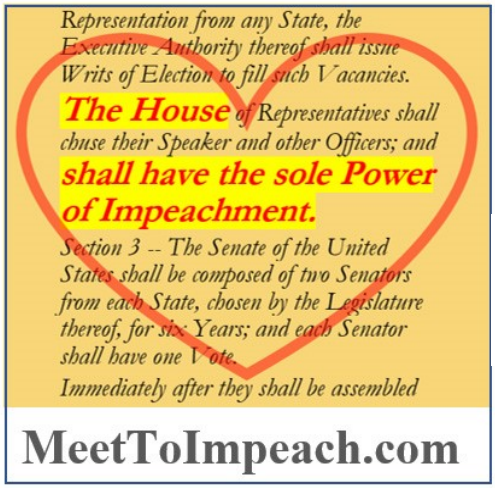

FEATURE:
Impeachment: week in review

A weekly one paragraph summary report and analysis, followed by recaps (with links) of representative on-line articles and essays – typically 800 to 1,600 words.

Week ending 5/27/2018 (~ 3,420 words)

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Minneapolis 5/28/18 Edition – (**Note**: distribution of this week's Feature was delayed due to Memorial Day.) There was another relative lull in impeachment news this week – enough so to allow for publishing a critique (not a review per se) of To End a Presidency, a long-awaited book by Harvard Law Professor Lawrence Tribe and Joshua Matz (Tribe's former student.) This book appears destined to become the current "Gold Standard" for a comprehensive, book-length survey of the subject – supplanting the original Watergate Classic– Impeachment: a Handbook by Charles Blatz. Although this book has been out long enough to qualify for its first week on best seller lists, it was (perhaps surprisingly) not among the top twenty five for Publishers Weekly (indicating first week sales were apparently lower than 3,121 (the total for #25.) As a perspective on sales, A Higher Loyalty by fired FBI Director James Comey was reported to have sold 357,000 print copies its first week; this week was week five for it, with sales for the week of 16,451, and cumulative sales of 530,282. Compare these results to about 2.6 million copies sold in the first week for a recent book in the Harry Potter series, and you have some idea of the level of interest among the greater reading public regarding impeachment topics. Meanwhile, the on-again-off-again summit between North Korea's Kim Jong Un and President Donald Trump appears to be waxing from an astrological point of view. Since there are a number of book reviews appearing for To End a Presidency, the editor of this Feature offers something a little different: a "Book Critique" focused on what appears to manifestly be a major error in the

Tribe/Matz/Conventional Wisdom account of impeachment.

Book Critique – To End a Presidency by: Lawrence Tribe and Joshua Matz

To End a Presidency, a long-awaited book by Harvard Law Professor Lawrence Tribe and Joshua Matz has been published. The *Washington Post's* Jennifer Rubin description: "The most important book on impeachment in decades" – typifies the general reaction. When comparing this new book to a previous "Gold Standard" and original Watergate Classic– Impeachment: a Handbook by Charles Blatz – Tribe and Matz affirm the quality and value of the earlier work, but see their approach as timely for the needs of today's readers. As described by Rubin's e-mail interview/exchange, Tribe and Matz go beyond the question of what offenses are impeachable, saying those offenses are: "… just the tip of an iceberg. We offer a thorough explanation of why the Framers created an impeachment power, what role they imagined for Congress and how they forced us to make tough political judgments. We also offer a guided tour through those judgments, examining Congress's power not to impeach and the vast discretion it exercises throughout an impeachment process. More broadly, we survey the history of impeachment campaigns in U.S. politics, drawing lessons for the present and emphasizing impeachment's vital (but limited) role in protecting our democracy. Although Black's book is authoritative on the topics it covers, we conclude that it offers too narrow a vision of the dynamics that shape impeachment."

As a "nutshell summary" of the book, that statement covers the content – Rubin's whole article is recommended for more pithy details. But further consequence and conclusion must be emphasized: Tribe and Matz hold that because impeachment is both so powerful and so cumbersome – a kind of "Constitutional Sledgehammer" if you will – and because our present political environment is so extremely polarized along partisan lines, launching the impeachment process has a real and paradoxical danger of making our situation even worse than it already is. And this danger increases in direct proportion to the very real dangers they see present in the Trump Presidency. Their overarching conclusion is that a long process is required -- to both educate the public and to work through a list of necessarily sequential steps for the most thorough and diligent possible operation of the complicated impeachment machinery. In today's environment this offers the only hope of a good end result.

This off-center and unconventional critique will now focus on an extended analysis of

one of the foundational claims made by Tribe and Matz that is both representative of "Conventional Wisdom" about impeachment and removal from office, and… hold onto your hat! – *simply wrong* … based on a careful analysis of what the Constitution actually says. This error is a proximate cause of many of the formidable problems with the impeachment process that Tribe and Matz lament and warn of us. Fortunately, the error is correctible.

Their erroneous but almost universally accepted claim is that a President (and all civil officers) can only be impeached for "high Crimes and Misdemeanors." A closely related (in fact logically contingent) claim is that no one other than civil Officers can be impeached at all (Judges are in the category of civil Officers, but members of Congress are not.)

Granted … other than "Treason" and "Bribery" no "high Crimes and Misdemeanors" are defined in the Constitution. But – lucky for us -- Tribe and Matz hold that careful analysis (and implicitly, this can only be undertaken by learned people … let's be sure we keep the elite in charge of everything!) can discern whether a given fact situation is … or is not … within the ambit of "high Crimes and Misdemeanors." However, we'll leave that assertion aside for the moment … to consider the more fundamental question: why Tribe and Matz (and "Conventional Wisdom" generally) hold "high and Crimes and Misdemeanors" is actually a requirement at all.

When we read Article II Section 4 we can readily see how this error came about. Here's the famous but error-spawning text:

> *"The President, Vice President and all civil Officers of the United States shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."*

It's easy enough (but wrong and dangerous!) to simply assume that – since "high Crimes and Misdemeanors" are the only grounds for Impeachment mentioned anywhere in the Constitution– therefore they must be a minimum requirement for impeachment. But on closer analysis, that conclusion doesn't hold up.

First, we need to understand that collectively the Founders understood that in English history, anyone (but the King!) could be impeached – and for any reason. In one famous case, the Rev. Dr. Henry Sacheverell was impeached by the House of Commons in 1708 although he held no secular office (he was a high Church Anglican.) As punishment, his sermons were publicly burned, and he was banned from preaching for three years.

Second, the Founders also understood that the removal process in English history was far

more powerful – and dangerous – then our current process. As one alternative to impeachment, the English Parliament could pass a Bill of Attainder – with which, in one fell swoop, they first declared retrospectively that something was a crime, second, convicted the accused of that crime, and finally (by definition) imposed a death sentence. (The English Bill of Pains and Penalties was identical except for the penalty, which could be anything short of a death sentence.) The Founders were so fearful that such vast power might be misused that our original Constitution prohibits any America Bill of Attainder at both the federal and the state level.

Third, the Founders took a crucial idea from impeachment processes that States had enacted in their own Constitution. They implemented the idea of a separate kind of trial – a decriminalized impeachment trial as distinct from a criminal trial – with judgment limited to removal and disqualification from office.

Finally, we need to consider how wary and fearful the Founders were generally – from their own recent and bitter experience – of the inherent danger of entrusting the powers of government to *any* individual or group. Maybe they didn't go so far as to think that fallible and corruptible people are the *only* kind we've got – but at a minimum the realized how corrupting power can be.

Giving this knowledge and awareness, we can understand why the Founders, in the end, concluded that a kind of Constitutional "safety value" was a necessary part of the machinery of government they were designing. They realized that it was impossible to imagine, let alone describe within a Constitution, the multitude of possible circumstances under which – at some future time – it might become both obvious and necessary to remove a President from office.

And that is part of what the raw impeachment powers of Congress amount to – a safety valve --always available for emergency use. Regarding the House, the Constitution says only "the House … shall have the sole power of Impeachment." There is no mention of who, why, or when. The raw power of the House allows them to impeach anyone, at any time, and for any reason.

But, following the principle of checks and balances, while a House Impeachment is a necessary trigger for a Senate Impeachment Trial, once that trigger is pulled the Senate has a very wide range of discretion as to how that trial might proceed … or if it proceeds at all. There is nothing in the Constitution that requires the Senate to even hold an Impeachment Trial if the House impeaches someone. Although it goes beyond the scope of this critique – for any civil

Officer but the President and the Vice President who is impeached for a high Crime or Misdemeanors, the Senate can simply wait, and allow the supreme Court to conduct an original jurisdiction criminal Trial of a Case of Impeachment *without a jury* – something Article III of the Constitution specifically provides for. If the result is a conviction, then whatever else happens, removal from office is a minimum consequence, based on Article II. (This is the topic of another article – for now, just go read the 373 words of Article III – and be prepared to be shocked!)

Here's what all of this boils down to. Rather than choosing to follow Tribe and Matz (and Conventional Wisdom" generally) in their leap to this conclusion: because "high Crimes and Misdemeanors" is the only grounds for impeachment mentioned anywhere in the Constitution; therefore those grounds are required for impeachment, another perfectly good explanation for the Article II term – and one consistent with English history – is that the raw power of Congress to impeach and try anyone – for any reason – is unlimited in scope. However, per Article I, the Senate's Judgment after any conviction for a House Article of Impeachment is limited to – at a maximum – removal from office and disqualification. Looked at this way, Article II changes removal from office for "high Crimes and Misdemeanors" from a maximum consequence of Judgment after conviction (per Article I) to a minimum *requirement* of conviction – in either a Judicial or the Senate venue – on any Article of Impeachment. In other words, Article II establishes "high Crimes and Misdemeanors" as a special *category* of crimes – with a required higher standard for post-conviction judgment than for any impeachment that does *not* involve "high Crimes and Misdemeanors.) That's *what* Article II Section 4 does – and that's *all* it does.

Does this have any practical effect? Yes … it has immense consequences, for three major reasons.

First, it frees us from the wrongly assumed necessity of trying to twist and bend any "impeachable problem" into something that can be branded -- or spun -- or somehow passed off as a "high Crime or Misdemeanor." Let's recall the idea of impeachment as a "Constitutional Safety Valve." Suppose that a President proves to be dangerously, disastrously incompetent … or negligent … or both. That's not a crime – but it could lead directly to nuclear war. Let's further assume that it has become obvious to a solid majority of Americans that the President simply has to go – for the safety and wellbeing of the country and the world. There's no inherent difficulty that would prevent the House from drafting an Article of Impeachment for this

situation. Based on an Article of Impeachment that is explicitly not for a "high Crime or Misdemeanor" the Senate can then hold an Impeachment trial -- and can both remove from office and disqualify from holding future office – just as they can for a case of "high Crimes and Misdemeanors." Aside from the fact that no one is saying any "high Crime or Misdemeanor" is involved, everything could go forward following the examples of previous impeachments and Trials.

Alternatively, let's consider the Clinton situation. This was a somewhat plausible effort by the House and Independent Counsel Kenneth Starr to first go through an elaborate legal process – with the result that embarrassing and wrongful conduct by President Clinton eventually became sufficiently "twisted and bent into shape" -- using the "mold" of "high Crimes and Misdemeanors" prescribed by the "Conventional Wisdom" mandate. What started as an improper relationship with an intern was eventually shipped to the Senate as a picture of "perjury" and "obstruction of justice."

Suppose instead that the House had included one simple and additional Article of Impeachment, saying: "President Clinton is impeached for wrongful sexual relationship with an intern; while this is not a high Crime or Misdemeanor, it has brought disgrace and disrepute on himself, the Presidency, and our country." Could the House do that? Sure … the Constitution simply says: "The House… shall have the sole power of impeachment." It says nothing about who can be impeached, why they can be impeached, or when they can be impeached."

What might the Senate do with such an Article of Impeachment?

As already noted, they would have the option to do nothing. Some Senators would almost certainly have argued that would be the best option. But let's consider an alternative scenario … that they decide to proceed with an Impeachment Trial based on that Article alone … while simply postponing the other Articles based on "high Crimes and Misdemeanors." Again, the Constitution clearly gives the Senate the discretion to take that course of action.

They would first have the Constitutional power (and I would argue the duty) to convict based on the House's charge – which many Senators would certainly acknowledge to be true. But then they would have choices. One element of Judgment could be to remove from office. But many Senators – and most Americans – would probably conclude that the wrongdoing wasn't bad enough to justify removal from office. And here we come to the key point – and the reason that the error of Tribe and Matz is so catastrophic. Since we're *not* talking about an

alleged "high Crimes and Misdemeanors" then removal from office is *not* a required consequence of conviction. The Senate has the power to, first, simply be honest in convicting -- affirming that the House charge is true – but, second, to use its own good Judgment as to what the appropriate consequence should be. In this case a Resolution of Censure would probably satisfy a vast majority of Americans.

The Senate could take up the other House Articles – which did involve allegations of "high Crimes and Misdemeanors" – at any later time. Thus, President Clinton would be on a kind of "Constitutional probation" – if he didn't "shape up and fly right" then a second Senate Impeachment Trial could be launched.

This brings us to the major fear that Tribe and Matz dwell on at length -- what an awesome kind of Constitutional Sledgehammer impeachment is – they claim it's so inherently divisive and powerful that we must exercise great caution even to start the process. But as soon as we realize that for anything that isn't a high Crime and Misdemeanor the Senate has far more flexibility – that whole argument simply evaporates.

Let's now return to our earlier hypothetical example – which may realistically emerge after the mid-term elections – especially if Democrats win control of the House. Let's assume that sometime during the second half of his first term, while a combination of senior staff and Cabinet members is still grimly battling to hold President Trump precariously in check, many people, including a lot of Republicans, have come to conclude that due to a catastrophic level of maladministration and neglect, President Trump simply must be removed from office. Let's also assume that the Mueller investigation is still on-going. Finally, suppose the House Judiciary Committee recommends the House approve an Article of Impeachment (we'll leave out what the many "Whereas" clauses might be) that simply states that maladministration and neglect is the basis for impeachment, while also explicitly saying that no "high Crime or Misdemeanor" is alleged.

At that point, there is a real possibility of a negotiated deal: President Trump could agree to resign if it was understood that he … and his family … would receive the kind of full and unconditional pardon that Nixon received from President Ford after Nixon resigned. Here's a crucial piece of information: once a President is impeached, we have a "Case of Impeachment" – and the President's pardon power does not extend to a Case of Impeachment. According to this scenario, Trump may agree to resign, and both Congress and the American people may come to

conclude that, under the circumstances, simply getting him out of the White House is the fundamental priority – if a "pardon deal" can accomplish that, then it's worth it.

However, even if Trump did not agree to resign at the point, several options remain. Let's assume that the House then proceeds to impeach. As noted, the Senate has significant discretion as to how it conducts any Impeachment Trial. Suppose that they decided to proceed with a Trial, and then voted quickly and overwhelmingly to convict on the House Article. Because no "high Crime or Misdemeanor" is alleged, removal from office is *not* Constitutionally required -- so some significant new options emerge. As one example, the Senate could decide to vote separately on the questions of removal from office and disqualification – and could vote on disqualification first. If they voted to disqualify, that would keep Trump off the ballot in 2020 – so America could begin to focus immediately on the "post-Trump" era. They could also postpone the question of removal – with the option to take it up at any time. As with the Clinton scenario, this would be another kind of "Constitutional probation" – President Trump's White House staff and Cabinet "handlers" could continue to restrain him either until the clock runs out on his first term, or until some further development prompts the Senate to again take up the question of removal from office as an additional Judgment following his conviction – and that could happen on a few hours' notice, if it was clearly and suddenly urgent.

In conclusion, we see that the Tribe/Matz/Conventional Wisdom error -- leaping from Article II Section 4 to a conclusion that impeachment can only be for "high Crimes and Misdemeanors" -- is a wrongful, improper limit on what Impeachment can and should be, and has dangerous consequences. This error transforms impeachment from a flexible Constitutional remedy – something that gives both *We the People* and Congress many options… something that can be calibrated for a wide range of circumstances -- into a Constitutional Sledgehammer that always has some unknown but inherent risk of provoking a new American Civil War whenever it's used.

As a postscript – this analysis is derived from a more comprehensive Constitutional Theory of Impeachment that I've developed at book length. Additional topics include a fuller consideration of how and why Congress can enact a comprehensive "Law of Impeachment and Removal" that can both define "high Crimes and Misdemeanors" and that can provide for original jurisdiction Criminal trials -- to be conducted by the Supreme Court without a Jury – whenever a civil Officer other than the President or Vice President is impeached. I call the

overall system a “Constitutional Immune System” – designed and intended from the get-go in 1787 to protect the “body politic” of We the People from a wide range of wrongful and corrupt behavior that is currently not being addressed in meaningful and successful ways.

At a very fundamental level, we need to reexamine the entire Constitutional topic of Impeachment and removal from office. Unfortunately, by further entrenching and fortifying some major errors with long pedigrees, To End a Presidency has the unintended consequence of making our challenges and our problems worse.

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