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Book Review - *Impeachment: A Citizen's Guide* by Cass R. Sunstein

To End a Presidency: The Power of Impeachment by Laurence Tribe and Joshua Matz

Reviewed by Marc Alexander



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Two timely books delve into the history, politics, and technical intricacies of impeachment: *Impeachment: A Citizen's Guide*, by Cass Sunstein, and *To End a Presidency: The Power of*

Impeachment, by Laurence Tribe and Joshua Matz.

Sunstein is clearly infatuated with the

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story of the American Revolution and the drafting of the Constitution. Early on, Sunstein discloses that he and his family have moved to “breathtakingly beautiful” Concord and purchased a house where munitions were stored during the Revolution. The pre-Revolutionary house is not the easiest to live in, but it is of great historical and sentimental value, and it has withstood the test of time. Is this the metaphor for the impeachment process?

Sunstein recounts and analyzes the debates surrounding the drafting of the impeachment provision and the ratification of the Constitution. He points out an interesting fact: the state legislators whose task it was to ratify the Constitution did not have access to a transcript of the debates concerning the drafting of the Constitution. And of course the phrase that sets the standard for impeachment, “high crimes and misdemeanors” is famously opaque. This legislative and linguistic muddle is a law professor’s delight.

Sunstein does shed light on the meaning of “high crimes and misdemeanors.” He rejects the notion, as put forth by President Gerald Ford, that there is no real standard, just a question of political ability to impeach. As Sunstein explains, “The idea of ‘great and dangerous offenses’ is an excellent shorthand for the views of the ratifiers—at least if we understand such offenses as including egregious abuses or misuses of official authority. At the same time, bad decisions, or politically objectionable decisions, are not sufficient grounds for impeachment, even if much of the nation is up in arms. The United States, unlike some other democracies, does not allow votes of no confidence.”

Sunstein’s review of legislative history and the fuzzy language of the impeachment clause provides him with a platform for dis-

cussing constitutional interpretation, and an opportunity to discuss Scalia’s originalism, Dworkin’s “moral reading,” Frankfurter’s “traditions as a gloss on the text,” Kennedy’s Constitution “set[ting] out broad principles whose particular content changes over time.”

Sunstein also has a chapter about 21 impeachment cases. No president has ever been convicted by the Senate after impeachment. Only Nixon resigned under the threat of impeachment. One Senator William Blount was expelled from the Senate for taking a bribe and conspiring with the British to help England conquer parts of Spanish Louisiana and Florida. He faced an impeachment proceeding that the Senate eventually dismissed, and Blount, who fled to his home state of Tennessee, remained popular there.

Thirteen federal judges have been impeached. The explanation for why mostly judges have been impeached lies in the facts that there are more judges than presidents, and “[i]f judges can be impeached only for the most horrific abuses, then the nation will be stuck with horrific judges for their whole lives.” In the cases of judges and presidents, the technical standard for impeachment is the same, but the practical application of that standard is different.

The reader seeking a crib sheet for answers to questions about impeachment can turn straight to chapter 9 of Sunstein’s book, “What Every American Should Know.” Sunstein addresses questions such as: can a president pardon himself, who can be impeached, who impeaches the president, why did the drafters of the Constitution choose the House, why a simple majority in the House and a 2/3rds majority in the Senate, and what is the purpose of the “pretty complicated institutional arrangements” and the “high crimes and misdemeanors” threshold. Evidently, the Framers wanted

impeachment to be, “Hard, but not too hard.” They wanted to guarantee a separation of powers, prevent the president from being the lackey of Congress, and prevent a monarch from ruling.

‘ ... Both books should be welcomed by anyone for whom Dr. Franklin’s famous answer still resonates: “A republic, if you can keep it.” ’

The most relevant question Sunstein poses is: “With respect to impeachment, what should contemporary Americans be worried about?” Two things: *First*, a combination of extreme partisanship and false information and confirmation bias will lead to unjustified and destabilizing efforts to impeach; *second*, a failure to use the impeachment mechanism “in circumstances in which it really is justified.”

Those issues that should worry contemporary Americans conflict somewhat with Sunstein’s lofty description of impeachment

as “our fail-safe, our shield, our sword—our ultimate weapon of self defense”—and a symbol of sovereignty residing in We the People. In fact, the accretion of evidence in *Impeachment: A Citizen’s Guide* points to the conclusion that impeachment of presidents is of limited usefulness, particularly, to the average citizen. Among a list of the fifteen worst presidents, according to a survey of presidential historians in 2017, only Johnson and Tyler had to deal with impeachment inquiries. Of those two, Tyler was not impeached, and Johnson beat the rap by one vote in the Senate. “Despised presidents, and bad presidents,” writes Sunstein, “have hardly ever been impeached, which is a tribute to the Rule of Law.” And, as all the writers on the subject are at pains to point out, our “Rule of Law” does not include a vote of no confidence. Consequently, and practically, our shield and sword turns out to be the vote, the courts, and congressional restraint - problematic protections for democracy whenever there is a president with authoritarian tendencies, one-party rule in a climate of extreme partisanship, Gerrymandering, and voter suppression.

Unlike a CEO who is incompetent and mismanages the business, but can be removed by a vote of the Board, the President of the United States is secure for at least four years, absent impeachment and conviction for “high crimes and misdemeanors,” resignation, or invocation of the 25th Amendment. A vote of no confidence simply is not a remedy for mismanagement and unpopularity under our form of constitutional government. But how exactly does the “shield and sword” of impeachment protect We the People more than a vote of no confidence in a parliamentary system?

Showing that Tribe and Matz have read Sunstein’s book, they mildly criticize

Sunstein’s Panglossian vision of the Framers’ work, while lauding the book: “[W]e emphasize the constant importance of exercising good judgment in the here and now ... but a great deal of writing about impeachment implies that the Framers, the Constitution, the criminal code, Congress, or someone else has already made the judgment calls that truly matter. For example, in a generally excellent book about impeachment, Professor Cass Sunstein writes: ‘[The Framers] knew what they were doing. They threaded a needle. They accomplished a miracle. There’s no reason to depart from their understanding of their framework. We can’t do better than they did, and if we tried, we probably would do worse.’ Language like this comes awfully close to misty-eyed Framer worship.”

Despite the poke at Sunstein, Tribe and Matz reach largely the same sober conclusions: that impeachment poses extraordinary danger, and that it “should be invoked only under dire circumstances,” adding: “And even then, it must be handled with care.” Impeachment efforts, which generally fail, and have never led to a successful trial of a president in the Senate, can backfire, leaving the president empowered. After the successful impeachment of Bill Clinton, followed by a failed effort to convict him in the Senate, his popularity rose. Political adversaries will only get one shot at impeachment. As Edmund Burke wrote in *Reflections on the Revolution in France*, “A king is not to be deposed by halves.” Impeachment efforts risk “unleashing outrage and aftershocks that exacerbate our system’s underlying dysfunctions.” Other political options, such as the vote and exercise of congressional restraint, must be considered first, before turning to the nuclear option.

Despite the similar cautionary tale told by Sunstein, Tribe, and Matz, the flavor of their books is different. Thus, Trump is mentioned

once in a footnote in Sunstein’s book. By contrast, he is mentioned 315 times by Tribe and Matz, who write, “If you’re reading this book in 2018, you’re probably thinking about Trump. So are we.” As Tribe and Matz readily admit, their views on Trump are no secret, as they are “among the lawyers suing him for accepting illegal emoluments.” More recently, Tribe has criticized the effort by Rep. Jim Jordan and other members of the House Freedom Caucus to impeach Deputy Attorney General Rod Rosenstein, saying that it will contribute “to the degradation of the impeachment power, making it harder to use when it is truly needed to rein in a would-be dictator.”

While both books explore law, history, and politics, the emphasis is not the same. Sunstein’s book is more weighted toward exploring the history and politics of the Founders, while Tribe & Matz, as they themselves write, are more likely to be focused on the exercise of judgment “in the here and now.” Consequently, Tribe and Matz are more likely to reference contemporary journalists and media voices, ranging from Ross Douthat to Ezra Klein. Tribe and Matz mention Fox News 11 times and CNN 9 times.

Both books are excellent, accessible, and engrossing primers on impeachment. Sunstein begins with the question put to Ben Franklin at the close of the Constitutional Convention of 1787: “Dr. Franklin, what have you given us—a monarchy or a republic?” And both books should be welcomed by anyone for whom Dr. Franklin’s famous answer still resonates: “A republic, if you can keep it.”

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