

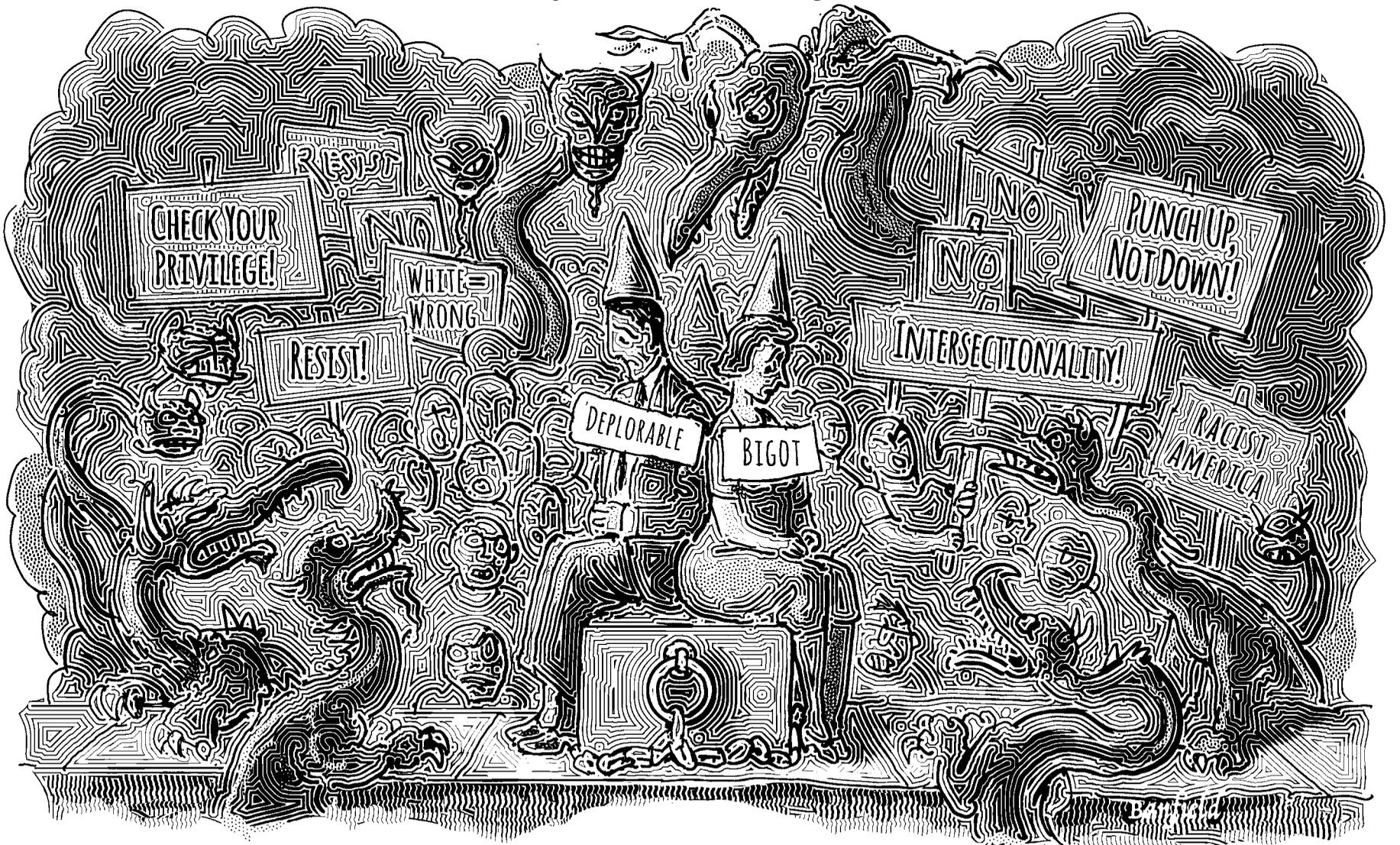
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# CLAREMONT

REVIEW OF BOOKS

*A Journal of Political Thought and Statesmanship*

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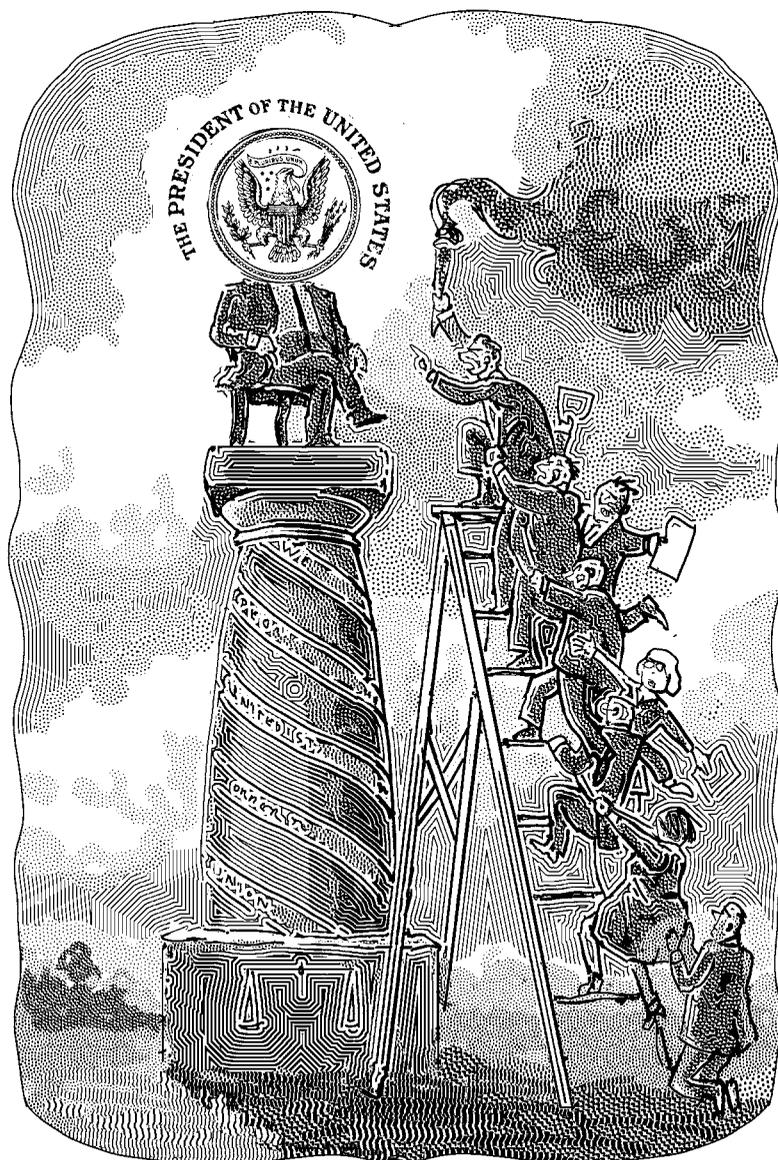
PRICE: \$6.95  
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Book Review by Andrew C. McCarthy

# High Crimes and Misdemeanors

*Impeachment: A Citizen's Guide*, by Cass R. Sunstein.  
Harvard University Press, 208 pages, \$7.95 (paper)

*To End a Presidency: The Power of Impeachment*, by Laurence Tribe and Joshua Matz.  
Basic Books, 304 pages, \$28



Collusion! obstruction! and what about the Emoluments Clause!

Donald J. Trump's antagonists began talking about impeaching him within days of his 2016 election victory. But on what grounds? Since "collusion with Russia" is not a crime, can the president "obstruct justice" by carrying out an undeniably constitutional act, such as firing the director of the FBI—the agency investigating the, er, collusion? Even if we assume, for argument's sake, that the president could be criminally charged for such an

act, isn't there some Justice Department rule against indicting a sitting president? If he may not be indicted at all, why is a special prosecutor investigating him? And if he may not be indicted for lawful exercises of his Article II prerogatives—dismissing subordinates, criticizing investigations' merits and investigators' motives, pardoning political allies—could he still be impeached over them?

These are difficult, important questions. In deliberating over the Constitution, nothing bedeviled the framers more than the new of-

ce they were creating, the presidency of the United States. If the nation were to survive and thrive, the chief executive would have to possess powers so awesome they could, if abused, destroy the nation, eviscerating its founding ideals of liberty and self-determination. With Americans having just thrown off one monarch, an essential objective of the Constitution was to forestall the rise of another. The president would have to be checked by powers commensurate with his own. Today, we metaphorically refer to the ultimate check,

impeachment, as a “nuclear option.” To James Madison it was, in a word, “indispensable.”

**N**O AMERICAN PRESIDENT HAS EVER been removed from office by the Constitution’s impeachment process, though Richard Nixon surely would have been convicted by the Senate and evicted from the White House had he not resigned. Andrew Johnson and Bill Clinton were impeached by the House, but the Senate could not muster the two-thirds supermajority to convict and remove them. Since Clinton kept his job in 1998, the prospect of impeaching presidents hangs more heavily than before in a coarsened culture, a fractious body politic, and a 24/7 media age that conflates news reporting with opinion journalism and fiery partisanship.

Yet, like fascism and the infield-fly rule, impeachment is a concept often invoked but poorly understood. There is excellent scholarship on the subject, Raoul Berger’s *Impeachment: The Constitutional Problems* (1973) being the modern standard. Still, there remains enough misinformation that a popular guide, attuned to modern conditions, would be welcome.

My own modest effort, *Faithless Execution*, was published in 2014. Alas, if the year does not explain why I was too early to the party, the subtitle will: *Building the Political Case for Obama’s Impeachment*. It was verboten to speak of impeaching President Barack Obama—which is why a political case for doing so was needed. (I’ll come back to that.) In today’s terrain, of course, even a well-reasoned polemical book is destined to be rejected out of hand by at least half the intended audience.

We still need that popular guide in the contentious circumstances of 2018. Some eminent scholars have produced a pair of books that attempt to answer the call: *Impeachment: A Citizen’s Guide* by Cass R. Sunstein, and *To End a Presidency: The Power of Impeachment*, a collaboration by Laurence Tribe and Joshua Matz.

Now at Harvard Law School after a stint running Obama’s Office of Information and Regulatory Affairs, Sunstein hits the sweet spot, supplementing his formidable gifts with salient experience. He recounts having been an “active participant” in impeachment proceedings, consulting closely with President Clinton’s legal team and testifying before Congress. Years earlier, after joining the Justice Department’s Office of Legal Counsel late in Jimmy Carter’s term in office, he stuck around for the Reagan transition. In the course of it, his prescient new boss, Theodore Olson, assigned Sunstein to write a guidance memo on the 25th Amendment, which lays

out the process for sidelining an incapacitated president. Within weeks, President Reagan had been shot by John Hinckley, Jr.

Fortunately, Reagan recovered well enough that there was no need to invoke the amendment, which may be done by the president if he is able, or by the vice president and the cabinet if he is not. Today, some of Trump’s enemies are discussing the 25th Amendment again, on the theory that advocating policies opposed by the Left, or a certain gauche disregard for time-honored presidential norms, might be spun as a mental breakdown justifying a declaration of incapacity. Sunstein refreshingly swats down this notion of the amendment as an alternative removal path that could sidestep impeachment’s steep hurdles. (Tribe and Matz seem to concur, albeit grudgingly.)

**T**HE BEST THING ABOUT SUNSTEIN’S engaging treatment is its rigor. While accessible, this book attempts a clinical rather than partisan explanation of impeachment, one based on America’s deep republican roots. The author examines why the framers included it, how it fits logically in the constitutional framework, what degree of misconduct triggers it, and how its errant invocation can damage the nation. He grapples with challenging constitutional issues that plainly bear on misconduct claims currently under investigation by special counsel Robert Mueller, but the book’s subject is impeachment, not the incumbent president. The word “trump” appears once. As a verb.

By Sunstein’s lights, impeachment is the process by which “We the People,” through our elected representatives in Congress, assert sovereignty by removing the chief executive, as well as other executive or judicial officers, who egregiously abuse their official authority. (Legislators are subject to expulsion by their fellow legislators, not impeachment.) Notwithstanding that this divestiture of political power is carried out by the Article I political branch without the possibility of judicial review, the author maintains that there are binding legal strictures.

The most essential of these is “high crimes and misdemeanors.” Though treason and bribery are also grounds for impeachment and removal, their meaning is more apodictic. Moreover, after some debate about whether it was necessary or appropriate to include an impeachment remedy at all, the framers concluded that the ballot box was an insufficient check. They settled on “high crimes and misdemeanors” to capture the misconduct that was most likely and most perilous.

The fact that “high crimes and misdemeanors” is a more elastic term than the Consti-

tution’s other impeachment grounds does not, Sunstein maintains, render it uncertain, limitless, or the instrument of inevitable political caprice. In connection with a failed effort to cashier Justice William O. Douglas in 1970, Representative Gerald Ford asserted that an impeachable offense is “whatever a majority of the House” believes it “to be at a given moment in history.” Ironically, Ford ascended to the presidency because the specter of impeachment forced the resignation of Richard Nixon. (He had previously ascended to the vice-presidency because the specter of impeachment forced the resignation of Spiro Agnew.) He then courted impeachment himself by pardoning Nixon for the grievous offenses outlined in the articles of impeachment voted by the House of Representatives.

**S**UNSTEIN FINDS IN FORD’S CLAIM OF congressional omnipotence a defiance of the framers’ rationale in adopting “high crimes and misdemeanors” as the standard. The term had a rich British pedigree. Plus, decades of colonial practice had given impeachment a distinctly American cast—a weapon against imperial affronts. “High crimes and misdemeanors” was adopted in favor of the more ambiguous “maladministration” to underscore its focus on true outrages, not trifling misfeasance.

Sunstein is sympathetic to the progressive view that our fundamental law evolves with the times, but his “living Constitution” is a disciplined one. He gives respectful consideration to originalism, the theory that constitutional provisions should be interpreted in accordance with their publicly understood meaning at the time of their adoption, without treating it as dispositive, in the manner of Justice Antonin Scalia. Sunstein nods as well to Justice Felix Frankfurter’s construction of the document in light of American traditions as they unfold over time; to Justice Stephen Breyer’s theory of “active liberty,” which imbues constitutional provisions with the jurist’s (supposedly objective) deduction of democratic ideals; and to legal ethics expert Ronald Dworkin’s argument for a “moral reading” of the Constitution. For Sunstein, however, there is an overarching legitimacy principle: *We are bound by the Constitution’s terms*—the text may be supple, but evolution must take place within the Constitution’s stated provisions, not supersede them.

This leads the author to conclude that high crimes and misdemeanors involve, as Alexander Hamilton observed in *The Federalist*,

the abuse or violation of some public trust. They are of a nature which may



with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

With respect to impeachment, as opposed to individual liberties, Sunstein sees originalism as the soundest course. Since we have paltry history and tradition with impeachment, democratizing the meaning of high crimes and misdemeanors would lead to impeachment over intense political disagreements—exactly what the framers were seeking to avoid. Moreover, a sprawling, diverse, dynamic nation’s moral consensus is apt to be so weak and tentative that the quest for a moral component of impeachment would inevitably devolve into disagreements about the president’s character, not his conduct.

IMPEACHMENT, THEN, MUST BE RESERVED chiefly for appalling abuses of official authority. It also reaches misconduct committed in seeking office, and is especially watchful against foreign intrigue, two of the framers’ chief concerns. It is not hard to see the Clinton fact pattern, or the fanciful but uncorroborated suspicions about Trump. Sunstein gives the former a pass because Clinton’s conduct, however reprehensible, was remote from his official duties. For Sunstein, even obstructing the investigation of such “private” transgressions is not impeachable. By contrast, a president who conspired with a foreign power against American interests, or who abused his powers to conceal wrongful exercises of presidential authority, should be ousted.

Notice I said *should* be ousted, not *could* be. Sunstein posits that because high crimes and misdemeanors is a concrete, readily applicable legal standard, Congress is obliged to enforce it. Otherwise, We the People would effectively submit to an imperial ruler.

Though impeachment cannot work as intended without a solid standard, Professor

Sunstein’s admirable enterprise puts the cart before the horse. Fundamentally, impeachment is a political process, not a legal one. One need not endorse Gerald Ford’s “anything goes” depiction of congressional supremacy to grasp that politics drives the impeachment train. Yes, it is profoundly influenced by the legal standard. Congress needs to demonstrate that fidelity to the Constitution’s conception of high crimes and misdemeanors determines which impeachments are possible. But it does not control which impeachments *will be pursued*. That, inexorably, is a political calculation.

ON THAT SCORE, LAURENCE TRIBE AND Joshua Matz posit the more practical thesis. Unfortunately, they present it in a way so unappealing that it is highly doubtful anyone not sharing their loathing of Donald Trump will be convinced.

Like Sunstein, Tribe is a professor at the Harvard Law School, and Matz, a graduate of the law school, is a constitutional lawyer. The dystopia into which Tribe and Matz say the country is sinking under the president will be unrecognizable to most. No one, however, will be surprised at the authors’ boast that they are suing Trump for violating the Emoluments Clause, which bars presidents from taking benefits from foreign states, as they allege Trump is doing through his business conglomerate. By design, however, no American president will ever be removed from power absent a popular consensus that cuts across partisan, ideological, and sociological fault lines. Only reasoned polemic will forge such a consensus.

In the end, because such a popular consensus cannot be formed, Tribe and Matz stop short of advocating Trump’s impeachment, though there is no doubt that they deem it utterly justified. For the same reason, they peremptorily dismiss my aforementioned book, *Faithless Execution*, for concluding that “Obama could be impeached for nearly every-

thing he had said or done since taking office.” In reality, I contended that Obama was exactly the president the framers feared because he was governing outside the Constitution’s restraints, usurping the other branches’ powers, running roughshod over presidential norms, lying to the public about such crucial matters as Obamacare and Benghazi, and compromising American interests in clandestine dealings with such hostile foreign powers as Iran and the Taliban.

Yet, like Tribe and Matz, and *pace* Sunstein, I argued that Obama could commit a thousand high crimes and misdemeanors, but the question of whether to impeach him would still be a *political judgment* for Congress to make, based on such considerations as the likelihood of convicting and removing him, the certainty that the effort would tear the country apart, and the prospect that an unsuccessful attempt would encourage more executive excess. Furthermore, impeachment makes sense only after having made a sustained political case for removal.

Tribe and Matz demand that “when faced with an aspiring tyrant, it is essential to call evil by its name.” Although it is unlikely that they and I would ever agree on who the real tyrants are, it is incontestable that no president can be impeached and removed unless the hard work of persuasion is done. Tribe and Matz conclude:

Ending a presidency requires months or years of concerted political and investigative activity. It also requires substantial public deliberation over the legal, factual, and political case against the chief executive.

Just so.

*Andrew C. McCarthy is a senior fellow at the National Review Institute and a contributing editor of National Review.*

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