

10-2019

Developing a Law School Course on Presidential Impeachment

Gregory S. Crespi

Southern Methodist University, Dedman School of Law

Follow this and additional works at: <https://scholar.smu.edu/smulrforum>



Part of the [Legal Education Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Gregory S. Crespi, *Developing a Law School Course on Presidential Impeachment*, 72 SMU L. REV. F. 41 (2019)

<https://doi.org/10.25172/slrf.72.1.4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review Forum by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SMU Law Review Forum

Volume 72

October 2019

41–50

DEVELOPING A LAW SCHOOL COURSE ON PRESIDENTIAL IMPEACHMENT

*Gregory Scott Crespi**

ABSTRACT

This short essay discusses my motivation for and the process I went through over the past two years developing a law school course on presidential impeachment and related topics. I recommend that those law school faculty members who may have only a modest constitutional law background, but who feel as I do that more sustained discussion of the questions that would be presented by an attempt to remove President Trump from office through impeachment is called for, consider also developing and offering such a course.

I found that through reading a few accessible books and supervising a handful of students' individual research papers, one can fairly quickly develop sufficient command of the material to offer a valuable elective course on presidential impeachment and other non-electoral presidential removal procedures. But the proper scope of coverage of such a class in the current environment is a rapidly moving target, and the course that I am teaching this fall semester will have to be substantially restructured from my prior spring semester offering to reflect the damning findings of the Mueller Report, the Trump Administration's mischaracterization of that Report and subsequent stonewalling response to congressional oversight and testimony requests, the damning whistleblower complaint and revealed Administration cover-up efforts and subsequent near-universal embrace of impeachment by House Democrats, and the implications of the continued, ever more fervent, and cult-like partisan embrace of President Trump by Senate Republicans even after the Mueller Report and the whistleblower complaint.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. SUPERVISING STUDENT-DIRECTED RESEARCH PAPERS
- III. OFFERING A ONE-CREDIT IMPEACHMENT COURSE IN

* Homer R. Mitchell Endowed Professor in Commercial and Insurance Law and Professor of Law, Dedman School of Law, Southern Methodist University.

THE SPRING OF 2019

IV. MY CONCERNS REGARDING THE FALL 2019 COURSE

V. POST-WHISTLEBLOWER COMPLAINT ADDENDUM

I. INTRODUCTION

I am a long-time law professor. I was shocked by the election of Donald Trump to the Presidency in 2016, and I have since been appalled by the conduct of the President and his Administration and by the damning findings of the Mueller Report.¹ Every single day that President Trump and his minions are in office is a national embarrassment and subjects the country to further damage and risks, both foreign and domestic.

Waiting patiently for the opportunity to remove President Trump from office in the 2020 elections is, to me, highly irresponsible and may well lead to disaster, particularly if he is somehow reelected. Given the unwillingness of Robert Mueller (and of course Attorney General William Barr as well) to criminally indict the President, and given the remoteness of the possibility that Vice President Mike Pence and a majority of the cabinet officers will take the steps needed to bring about Trump's removal from office through invocation of the Twenty-Fifth Amendment,² the only other non-electoral option available under our Constitution to end this nightmare is his removal from office by the Senate after House impeachment. The merits and procedures of presidential impeachment therefore deserve much more informed and sustained discussion within the academic and legal communities, and among the broader public, than they have so far received. We need to foster broader public understanding of and support for impeachment, and sooner rather than later, in the (probably vain) hope that we can somehow encourage at least a couple dozen Republican senators to support presidential removal when the time comes to put the interests of the country ahead of narrow partisan considerations in a Senate trial, if one takes place.

So, what can a law professor with my views do to promote more informed and sustained consideration of impeachment? One can, of course, in one's capacity as a citizen, give money or other assistance to pro-impeachment civic organizations and also support those congressional candidates in their 2020 election campaigns who are now pressing for a House of Representatives Judiciary Committee impeachment inquiry to begin.³ One can also (or instead) participate in more

1. U.S. DEP'T OF JUSTICE, OFFICE OF SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION CAMPAIGN (2019) [hereinafter MUELLER REPORT].

2. U.S. CONST. amend. XXV. There is also only a remote possibility that the required two-thirds of both Houses of Congress called for by the Twenty-Fifth Amendment would oppose a subsequent attempt by the President to be returned to office.

3. As of September 26, 2019, 224 members of the House of Representatives support "some kind of impeachment action" against President Trump, including (former) Republican Congressman Justin Amash. Dartunorro Clark et al., *Majority of House Members Now Back Some Type of Impeachment Action Against Trump*, NBC NEWS, <https://www.nbcnews.com/politics/congress/majority-house-members-now-back-some-type-impeachment-action-against-n1058596> (last updated Sept. 26, 2019,

direct forms of political action, such as organizing or joining public demonstrations, offering support for aligned public interest organizations, assisting in drafting amicus briefs in important impeachment-related court cases, writing blogs and newspaper editorials, etc. But suppose that one wants to go beyond these citizen efforts in the public square and also contribute to the Trump resistance and impeachment efforts while “at work”? Specifically, what can a law professor do in their pedagogical role as a teacher of future lawyers to encourage greater resistance to “Trumpism,” and wider embrace of the impeachment remedy, without compromising in any way one’s overriding professional and ethical obligation to further the legal education of their students in a comprehensive and balanced manner? There is a rather fine line to be walked here in an impeachment class between good teaching and inappropriate political advocacy, to be sure.

It would be helpful in facilitating more informed and sustained discussion of the impeachment option if all law schools began offering an upper-level elective course in presidential impeachment, a course that would ideally be taught by a person with significant constitutional law expertise. Due to the current severe financial constraints now faced by most law schools, however, and due to many other competing curricular requirements, as far as I know, the large majority of law schools are not (yet) doing this.⁴ In addition, many legal academics with an interest in impeachment may feel that they do not have sufficient constitutional law background to be able to adequately teach such a course. However, I have found a useful way to broaden and deepen one’s perhaps initially modest understanding of the relevant constitutional law doctrines to the point where one can then offer an adequate course on presidential impeachment and related issues. The approach I followed here was first to supervise a series of students’ independent research papers and then eventually step up to offer a regular one-credit and now two-credit writing class.

II. SUPERVISING STUDENT-DIRECTED RESEARCH PAPERS

My law school, like most if not all other law schools, allows students the option of taking a modest number of their required credits through individualized “directed research” projects done under a consenting faculty member’s supervision, culminating in a topical paper of appropriate length and scope given the number of credits for which the student has enrolled. In the spring semester of 2018, and again during the fall semester of 2018, I supervised about a half-

5:17 pm) [<https://perma.cc/HR3C-4JTF>]. This support for impeachment action comes on the heels of the whistleblower complaint controversy and Speaker Nancy Pelosi’s announcement to initiate an impeachment “inquiry.” See Rachael Bade et al., *Pelosi Announces Impeachment Inquiry, Says Trump’s Courting of Foreign Political Help is a “Betrayal of National Security,”* WASH. POST (Sept. 24, 2019), https://www.washingtonpost.com/powerpost/pelosi-top-democrats-privately-discuss-creation-of-select-committee-for-impeachment/2019/09/24/af6f735a-dedf-11e9-b199-f638bf2c340f_story.html [<https://perma.cc/ZR4X-FB6G>].

4. The only other presidential impeachment course that I know of that will be offered this fall is being taught at the Georgetown University School of Law by Professor Frank Bowman as a visitor. *Georgetown Law Curriculum Guide*, GEO. U. L. CTR., <https://curriculum.law.georgetown.edu/course-search/> (last visited Sept. 11, 2019) [<https://perma.cc/7Z2H-PR2R>].

dozen or so students each semester who expressed interest to me in the subject of presidential impeachment, broadly defined, and who then agreed to research and write a one-credit directed research paper under my supervision. I required each of these students, before they chose a specific research topic of manageable scope, to obtain and read for background the following three excellent books:

- (1) *Impeachment: A Handbook*, by Charles Black, Jr.⁵ This is a very short and succinct Nixon-era, pre-resignation book written by a noted constitutional law scholar. The book focuses primarily, but not exclusively, upon the procedural aspects of the then-envisioned Senate trial and upon determining the proper attitudes with which representatives and senators should approach the somber subject of impeachment of a president.
- (2) *Impeachment: A Citizen's Guide*, by Cass Sunstein.⁶ This is another relatively short and accessible book recently written by another noted scholar that broadly considers numerous procedural and substantive issues raised by the possibility of President Trump's impeachment, and which presents a large number of intriguing (and often realistic) hypothetical situations for consideration.
- (3) *To End a Presidency: The Power of Impeachment*, by Laurence Tribe and Joshua Matz.⁷ This is another recent book that is written by another constitutional law luminary, is somewhat longer than the other two books but still very accessible, and presents a broad and carefully balanced assessment of the merits of impeaching President Trump.

Once the students had read through these three books and discussed them with me, they were ready to begin their research and writing. I then met with them individually to help each student select a particular impeachment-related topic of suitable scope. Those students were then asked to research and write a short law journal article-style paper of about fifteen to twenty double-spaced pages on a fairly narrow impeachment-related question.

The students had surprisingly little difficulty selecting interesting and promising topics to explore in their research. After students selected their paper topics, I then required them to eventually (after about another four or five weeks) submit to me either a comprehensive research outline or a decent first draft, at their choice, which I then commented on both substantively and stylistically. I then required the students to submit to me at least one (and sometimes two) additional drafts before I judged their work to be complete.

I am not a constitutional lawyer by any means; I teach and do my research and writing primarily in the areas of contract law, corporate law, law and economics, and legal education. But I found that after first reading through the Black, Sunstein, and Tribe books that I noted above, I was familiar enough with the various legal and political issues surrounding presidential impeachment to

5. CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974).

6. CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN'S GUIDE* (2017).

7. LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* (2018).

provide helpful supervision over the students' efforts and to provide some reflective balance as necessary in our occasional discussions to offset somewhat their initial enthusiastic inclinations, whether pro- or anti-impeachment. I believe that any other law professor who reads these excellent and broad-ranging books (and of course now the Mueller Report as well) would also be sufficiently prepared to supervise a student paper on an impeachment-related subject. When students asked me technical questions that went beyond my modest level of constitutional law expertise, as some did after digging more deeply into their topics, I directed them to one or another of our constitutional law faculty for more informed guidance.

When I first met with my students at the beginning of the semester, I was quite candid with them about my strongly pro-impeachment views with regard to President Trump. But I also made clear to them that there are a number of plausible political or prudential arguments that can be made against attempting to remove a president from office through impeachment—even a president such as Trump who, as both the Mueller Report and the later whistleblower complaint show, has clearly committed impeachable offenses—and that they were more than welcome to reach anti-impeachment conclusions if that is where their research and analysis led them. I let them know that I only expected them to explore in appropriate depth (sometimes rather briefly, given the short length constraints of most of the papers) all sides of any issues that they addressed in reaching their conclusions and that I would do my best to set aside my personal views on their topics and try to help them to do that.

The amount of time involved on my part in supervising a half-dozen or so students at any one time did not prove to be excessive, especially once I had finished my own background reading of the books during that first semester, and I greatly enjoyed working with these motivated students on such timely legal questions. More importantly, the students have all found the directed research projects to be worthwhile, both as a vehicle for learning a great deal about impeachment and more broadly as excellent practice in choosing and then defending a thesis in an area of law where there is not a great deal of legal precedent to work with, to say the least.

III. OFFERING A ONE-CREDIT IMPEACHMENT COURSE IN THE SPRING OF 2019

By the following spring 2019 semester, a number of additional students had expressed strong interest to me in learning more about impeachment, and by then I felt sufficiently prepared to offer a one-credit writing course for fifteen students or so that met regularly on a weekly basis and that covered the subject in a systematic and comprehensive fashion before the students began their research and writing efforts. I assigned the same three books I had used to provide background for my directed research students, as well as numerous articles and other handouts relating to what was in the virtual torrent of news regarding impeachment each week. I emphasized in that short course the following questions, among others:

- (1) The proper scope of the constitutional “high Crimes and Misdemeanors”

- standard;⁸
- (2) The nature of the obligations of congressmembers (mandatory or discretionary?) with regard to impeachment, given impeachable offenses;⁹
 - (3) The procedural framework of House impeachment and subsequent Senate trial, and the appropriate evidentiary standards of proof;¹⁰
 - (4) Relevant considerations for congressmembers if impeachment for impeachable offenses is regarded as a matter of their discretion (the prospects for success, possible later adverse social consequences of a bitterly controversial presidential removal, electoral consequences, etc.);¹¹
 - (5) Issues relating to the criminal indictment of a sitting president;¹² and
 - (6) Issues relating to the Twenty-Fifth Amendment¹³ removal of a president.

The course went well and was quite popular with the students, and they all wrote excellent papers. By the end of the course, I felt that my background was now sufficient to offer the course as a more comprehensive regular two-credit writing elective during the fall 2019 semester,¹⁴ which made the class even more popular and increased enrollment to approximately thirty students.

I strongly recommend that other law school faculty who agree that impeachment merits more attention from law students consider taking this tact in developing a course by first encouraging their interested students to read these several texts (and now of course the Mueller Report and the whistleblower complaint and related materials as well), and then encouraging them to research and write a one- or two-credit directed research paper on a related topic. Even a faculty member with limited constitutional law expertise can quickly and

8. See U.S. CONST. art. II, § 4.

9. See, e.g., Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 718–24 (2018) (book review).

10. See, e.g., J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment as Politics*, 68 CASE W. RES. L. REV. 275, 287–90, 297–311 (2017).

11. See, e.g., Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 582–86 (2019).

12. See, e.g., W. Burlette Carter, *Can a Sitting President Be Federally Prosecuted?: The Founders' Answer*, 62 HOW. L.J. 331, 387–96 (2019).

13. U.S. CONST. amend. XXV.

14. I also have assigned for this more comprehensive, two-credit course a fourth short book, JEFFREY A. ENGEL ET AL., *IMPEACHMENT: AN AMERICAN HISTORY* (2018), that provides excellent historical summaries of prior presidential impeachment proceedings, written by various authors. I have also assigned the full text of the Mueller Report, MUELLER REPORT, *supra* note 1. I also seriously considered assigning another excellent short book that gives an insightful overview of impeachment issues, GENE HEALY, *INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION'S IMPEACHMENT POWER* (2018), but ultimately decided that its coverage would be too duplicative of some of the other assigned works. Two other books that I have read in preparation for this class, and may later assign portions of to at least some of the students, are Raoul Berger's seminal 1973 work, *RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973), and a recent (though pre-Mueller Report) excellent and very comprehensive historical study by Frank Bowman of impeachment practice since its British origins and its application to the current situation, *FRANK O. BOWMAN, III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (2019).

sufficiently get up to speed to provide adequate student supervision by reading these books, and then eventually, as one learns more about impeachment-related criminal indictment and Twenty-Fifth Amendment issues, one can step up to offer a more conventional one- or two-credit writing class. Developing a presidential impeachment course in this gradual fashion is a manageable way to learn what one needs to know to help constructively stimulate and better inform debate around the law school on this important subject, and to offer as part of one's daily work some (hopefully) meaningful resistance to Trumpism.

Moreover, as an additional personal benefit, I found that by developing this course, it significantly reduced the temptation I faced that in my frustration with Trumpism I would load up my other, unrelated courses with a little too much of my own political opinions, doing so in an essentially captive audience context in which I would not have the time to provide the students with a meaningful opportunity to offer back their own different perspectives and conclusions. The initial directed research project-approach and the later and more structured classes built on that foundation allow students to first self-select as to their interest in and willingness to study and argue about impeachment issues, and then to engage with their teacher in an extended one-on-one dialogue over the semester where different views can be expressed and debated as the students choose their topics and research and write their papers. I think that, through this approach, I am now adequately able to broaden and deepen law students' understanding of impeachment, a matter of some urgency, while still avoiding letting my strong personal views slant my teaching efforts into indoctrination and abuse of my proper pedagogical role as a facilitator of the students' quest for greater legal and political understanding.

IV. MY CONCERNS REGARDING THE FALL 2019 COURSE¹⁵

As I now prepare to offer my fall 2019 two-credit presidential impeachment class, I have some new problems to deal with. The two-credit format will significantly help me in that it will allow for much broader and deeper coverage than did the prior one-credit format, enabling me to avoid some difficult trade-offs in topic selection. But on the other hand, the significant impeachment-related events taking place in recent months have essentially rendered moot some of my prior coverage, and I am not sure how best to restructure the class to reflect these events. I will definitely have to make several major changes of emphasis, reducing some areas of coverage and expanding other topics substantially. But while it is fairly obvious what aspects of impeachment now merit somewhat less coverage, it is not nearly as clear to me what topics to add or expand in scope and depth.

For one example, the Black, Sunstein, and Tribe texts that I will again assign¹⁶ all understandably spend a lot of time discussing what presidential actions would

15. The following portion of this article was written prior to the September 2019 release of the whistleblower complaint and its dramatic consequences. I have added a short addendum that reflects those events. See *infra* Part V.

16. And now the Engel text and the Mueller Report as well. See *supra* note 14.

constitute impeachable offenses.¹⁷ Sunstein in particular presents many close and interesting hypotheticals for discussion.¹⁸ I spent a lot of time last semester discussing these and other hypotheticals to help clarify the contours of impeachable offenses. However, the Mueller Report now makes clear beyond reasonable argument that Trump has committed at least several impeachable offenses of an obstruction-of-justice nature,¹⁹ rendering somewhat less relevant, at least with regard to this President, more theoretical discussions of what other possible presidential actions (or inaction) might qualify as impeachable offenses. Therefore, as a result of the Report's clear findings as to obstruction of justice, I will significantly shorten the general, theoretical coverage of the constitutional impeachment standard. I will instead distribute full copies of the (redacted) Mueller Report to the students and then spend a couple of weeks closely going through the Report to understand the various impeachable offenses there identified.

Second, it is now even clearer to me than it was before the release of the Mueller Report that the Republican senators are going to “go-down-with-the-ship,” so to speak, in that few (if any) of them will vote for Trump's removal under any circumstances. The Republican Party has become the cult-like party of Trump, end of story. Therefore, the class discussions of what actions members of the House of Representatives should take, once they are convinced that impeachable offenses have taken place (if they first conclude that they have the discretion under the Constitution as to whether or not to file Articles of Impeachment under those circumstances), will be based on the plausible (although of course not entirely certain) assumption that filing Articles of Impeachment will lead to, at most, only a failed Senate trial, with Trump, his minions, and the “Trump TV” (Fox News) hosts surely braying loudly and misleadingly about his “exoneration” for the rest of the 2020 presidential campaign. Our discussion of the wisdom of the very cautious approach to initiating impeachment proceedings currently being taken by House Speaker Pelosi will need to be clearly situated in the current context of implacable partisan opposition that would almost certainly prevent an impeachment effort from resulting in the President being removed from office.²⁰

Third, the fact that Robert Mueller chose to regard the 1973 and 2000 Department of Justice Office of Legal Counsel (OLC) memos as definitive impediments to filing a criminal indictment, and the extreme unlikelihood that Attorney General William Barr will ever depart from that OLC guidance and indict the President, suggest that I should probably give less emphasis than I did this past spring semester to the close legal questions presented by the two OLC memos that took this position and by the 1974 Special Counsel and 1998 Independent Counsel memos on this subject that reached opposite conclusions.

17. See BLACK, *supra* note 5; SUNSTEIN, *supra* note 6; TRIBE, *supra* note 7.

18. E.g., SUNSTEIN, *supra* note 6, at 50–62.

19. See MUELLER REPORT, *supra* note 1.

20. See Daniel W. Drezner, *The Strategic Case for Impeaching President Trump*, WASH. POST (Sept. 23, 2019), <https://www.washingtonpost.com/outlook/2019/09/23/strategic-case-impeaching-donald-trump/> [https://perma.cc/8P25-N4D7].

²¹ Finally, given the supine nature of Vice President Mike Pence and the existing (mostly acting) cabinet heads, as well as the implacable Republican Senate, the prospects for Twenty-Fifth Amendment removal of Trump on the basis of “inability” due to his emotional and cognitive impairments seems vanishingly small, suggesting that I should also reduce coverage of the Twenty-Fifth Amendment procedures.²²

As I have noted, while it is fairly clear to me what aspects of my prior coverage should be somewhat curtailed in light of recent events, it is not nearly as clear to me what impeachment-related topics now merit greater coverage. With two class meetings per week, instead of only one meeting per week to work with now, and with the prior coverage now reduced in some areas, there is significant room to add some new material.

One obvious area for exploration is whether Attorney General Barr’s misleading Mueller Report pronouncements, the Trump Administration’s post-Mueller Report refusal to respect congressional oversight subpoenas, and its invocation of implausible claims of absolute witness privilege to block meaningful witness testimony may together rise to another obstruction-of-justice offense on the part of Trump. Another question here that perhaps merits more discussion than during the prior semester is whether any of the harsh (and in some cases illegal) immigration measures taken by the Administration rise to the level of impeachable offenses by the President. And Trump’s recent turn towards increasingly explicitly racist appeals to his base suggests the possibility that an Article of Impeachment could be grounded primarily or even solely on character concerns. And I am pretty sure that sometime during this fall, the Trump Administration will do something else untoward of an impeachable character that will further complicate my class preparation!

V. POST-WHISTLEBLOWER COMPLAINT ADDENDUM

The September 2019 public release of the whistleblower complaint²³ and of the associated Inspector General’s cover letter and “transcript” of the July 25, 2019 phone call between President Trump and Ukrainian President Zelenskyy was, of course, a dramatic game-changer. It is clear now from the statements and actions of House Speaker Pelosi and the House Democrats that Articles of Impeachment will be passed by the House and submitted to the Senate for a trial, probably by the end of 2019 or soon thereafter. These events raise several interesting and difficult new issues that now need to be featured in a class on presidential impeachment.

21. Whether Mueller, in his Special Counsel role, had the legal discretion to indict the President is an open question. For a cogent argument that Mueller had the right to indict the President, see Anthony Crespo, *Is Mueller Bound by OLC’s Memos on Presidential Immunity?*, LAWFARE (July 25, 2017, 9:00 am), <https://lawfareblog.com/mueller-bound-olcs-memos-presidential-immunity> [<https://perma.cc/6Q94-CTE2>].

22. U.S. CONST. amend. XXV, § 4.

23. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, UNCLASSIFIED REPORT TO CONGRESS ON WHISTLEBLOWER COMPLAINT (2019), available at https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf [<https://perma.cc/A6EA-934L>].

One important question is how many Articles of Impeachment should be included in the submission to the Senate, as a matter of strategy? Would the Democrats be better served by focusing only on the Ukraine-related events that have generated the most public outrage, or should they also include several more Articles based upon the obstruction-of-justice actions detailed by the Mueller Report, and perhaps also an Article based upon the campaign finance hush money payment violations and an Article based upon Emoluments Clause violations? How important is the speed with which they deliver the Articles of Impeachment to the Senate, as compared to the comprehensiveness of and underlying evidentiary support provided for the Articles? Is there a real chance that the Senate will vote to remove the President from office, or does the seemingly implacable Republican opposition here instead call for an impeachment strategy designed primarily to have maximum positive electoral impact for Democrats in the 2020 elections? Does Senate Majority Leader McConnell have the ability under Senate rules to prevent Articles of Impeachment from even coming to the Senate floor for a trial, as he often does with routine House-passed legislation?²⁴

And finally, and very interestingly, given constitutional silence on most aspects of the Senate trial's procedure, is there a chance that Senate Democrats, working together with only a handful of Republican allies, could force the use of a secret ballot vote on the ultimate removal question, thus making it far easier for those (numerous) Republican senators who have privately expressed unhappiness with Trump's conduct, but who fear ballot box retribution from his fervent voter base should they publicly oppose him in any substantial way, to vote for presidential removal?²⁵ There are, of course, advantages in having senators publicly declare themselves on matters of great concern, but we now face an emergency situation where the advantages of having a secret ballot may well outweigh any concerns as to the longer-term dangers of setting a troubling precedent. These are all most interesting questions that I will now explore in class.

24. See Bob Bauer, *Can the Senate Decline to Try an Impeachment Case?*, LAWFARE (Jan. 21, 2019, 11:10 am), <https://www.lawfareblog.com/can-senate-decline-try-impeachment-case> [<https://perma.cc/MDN2-SP4N>]; see also Natalie Andrews & Georgi Kantchev, *McConnell Envisions Senate Trial if House Passes Articles of Impeachment*, WALL ST. J. (Sept. 30, 2019, 1:36 pm), <https://www.wsj.com/articles/mcconnell-envisions-senate-trial-if-house-passes-articles-of-impeachment-11569865002> [<https://perma.cc/KA2K-C62R>] (reporting that Senate Majority Leader McConnell stated he would have “no choice” but to take up Articles of Impeachment passed by the House of Representatives and hold a Senate trial).

25. See generally CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R42106, SECRET SESSIONS OF THE HOUSE AND SENATE: AUTHORITY, CONFIDENTIALITY, AND FREQUENCY (2014), <https://crsreports.congress.gov/product/pdf/R/R42106> [<https://perma.cc/Z93W-RDSX>].