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A LAW PROFESSOR'S MODEST RESPONSE TO TRUMPISM:
SUPERVISING STUDENT DIRECTED RESEARCH
PAPERS ON IMPEACHMENT

by

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ABSTRACT

This short essay discusses my motivation for and the reading materials and procedures I use when offering about a half-dozen law students each semester a Directed Research option to research and write papers on the topic of Presidential impeachment. I recommend that those faculty members who may have only a modest Constitutional Law background, but who feel as I do that greater understanding and more sustained discussion among lawyers and others of the merits and drawbacks of removal of President Trump from office through impeachment is called for, and who wish to facilitate such greater understanding and discussion without compromising their overriding professional and ethical obligations to their students, consider trying this approach.

I am a long-time law professor. I and many others were 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 investigation as they gradually become public. 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 2020 elections for the opportunity to remove President Trump from office is to me highly irresponsible, and may well lead to disaster. The only other potentially viable political option under our Constitution to end this nightmare is his removal from office by the Senate after House impeachment. Given this situation, the merits and drawbacks of Presidential impeachment deserve more informed and sustained discussion within the academic

and legal communities, and among the broader public, than they have received thus far. We need to foster broader public understanding of and support for impeachment, and sooner rather than later, so as to encourage at least a couple dozen wavering Republican Senators to support Presidential removal when the time comes to put the interest of the country ahead of narrow partisan considerations in the likely looming impeachment trial.

So what can a law professor with my personal 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 Tom Steyer's pro-impeachment organization, and also support those Congressional candidates in their 2018 election campaigns who will promise to oppose this Administration on all fronts, and who are at least open to pressing for impeachment should the eventual Mueller Report prove sufficiently damning. One can also (or instead) participate in more 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 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, but without compromising in any way one's overriding professional and ethical obligations to further the legal sophistication and personal growth of their students? There is a rather fine line to be walked here between teaching and political advocacy, to be sure.

It would surely 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 obviously should be taught in as comprehensive and balanced and non-partisan a manner as possible by a person with significant Constitutional Law expertise. Due to the current severe financial constraints now faced by legal education, however, and due to the many other competing curricular requirements, the large majority of law schools are not (yet) doing this.¹ Even if such electives were made more broadly available, most legal academics do not have sufficient Constitutional Law background to be able to adequately teach such a course. However, I have found another feasible and professionally and ethically defensible way for a professor to contribute to a more informed understanding of the impeachment process and its merits and

¹ This may change over time as support for impeachment grows and students show more interest in the topic. Due to popular demand from additional students whom I could not accommodate for the Directed Research class I have sought and received law school approval to offer on a regular basis a one-credit course titled Presidential Impeachment, starting during the spring, 2019 semester. I plan to cover much the same material that I now do in my Directed Research class, which this course will replace, but now with regular weekly meetings to discuss the material during the first 2/3 of the semester, and with a paper requirement comparable to what I now require for the Directed Research class. I plan to limit enrollment to 12 students so that I can still give the student papers proper individual attention.

drawbacks on the part of law students that does not require that he or she have a great deal of Constitutional Law expertise, nor that they convince their faculty and Dean to add an impeachment elective, and I recommend to other law professors that they consider the approach that I will now describe.

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 the appropriate length and scope given the number of credits for which the student has enrolled. In the spring semester of 2018, and again this fall 2018 semester and probably during next spring 2019 semester as well, I am supervising about a half-dozen or so students each semester who have expressed interest in the subject of Presidential impeachment, broadly defined, and who have each agreed to research and write a Directed Research paper in that area. I require each of these students, before they choose a specific research topic of manageable scope, to first obtain and read for background the following three excellent and very readable books:

- 1) Impeachment: A Handbook (1974) by Charles Black, Jr. This is a very short and succinct Nixon-era, pre-resignation book written by a noted Constitutional scholar. The book focuses primarily but not exclusively upon the procedural aspects of the then-envisioned Senate impeachment 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 (2017) by Cass Sunstein. 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 the impeachment of President Trump, and which presents a large number of intriguing (and often realistic) hypothetical situations for consideration.

3) To End a Presidency (2018) by Laurence Tribe and Joshua Metz. This is another recent book by another Constitutional Law luminary, somewhat longer than the other two books assigned but still very accessible, and which presents a broad and carefully balanced assessment of the merits of impeaching President Trump.

Once the students have read through these three books² they are then ready to begin their research and writing. I then meet with them individually to help each student select a particular impeachment-related topic of suitable scope to work on. Those students that have enrolled for only one credit hour (most of the students choose this option) are expected to eventually write a short journal article-style

² I also suggest to the students that they obtain and selectively read the relevant portions of Impeachment : The Constitutional Process (1974), a longer and more difficult Nixon-era treatment of the subject by Raoul Berger. I also suggest that they peruse the web for current and interesting blog postings, book reviews, and other short articles on the subject, which appear regularly.

research paper of about 10 to 15 pages in length (double-spaced) on a fairly narrow impeachment-related question, and those few students who have elected instead to enroll instead for two credit hours strive for a 25 to 30 page or so more ambitious paper of somewhat broader scope and/or of greater depth.

My students thus far have had surprisingly little difficulty selecting interesting and promising topics to explore in their research. Some example of topics that students have written on, or at least seriously considered before choosing another topic, include the following:

- 1) Does President Trump's currently known conduct satisfy the Constitutional "high crimes and misdemeanors" impeachment standard?
- 2) Is commission of a crime necessary for impeachment?
- 3) Should impeachment be avoided on prudential grounds, even if it is Constitutionally justified, if it appears that removal of the President would be too socially divisive?
- 4) What should be the procedures followed by the Senate in an impeachment trial?
- 5) What should the evidentiary standard be in a Senate impeachment trial, and should the proceedings be open to the public?
- 6) Does the Supreme Court have the right to review (and perhaps overturn) the Senate resolution of an impeachment trial, regardless of the outcome?
- 7) Could the 25th Amendment removal procedure be successfully invoked if an arguably deserving impeachment is blocked by partisan gridlock in Congress?
- 8) A historical analysis of the political dynamics of the Andrew Johnson impeachment
- 9) A historical analysis of the political dynamics of the Richard Nixon near-impeachment
- 10) Comparison of the US and South Korean impeachment procedures, given the recent 2017 impeachment of the South Korean President Park Guen-hye.

After students have selected their paper topic I then require them to eventually (after about another four or five weeks or so) submit to me either a comprehensive research outline or a decent first draft, at their choice, which I then comment upon both substantively and stylistically. I then require students to submit to me at least one (and sometimes two) additional drafts before I judge 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, Tribe and Berger works that I have noted above I was then familiar enough with the various legal and political issues surrounding Presidential impeachment to helpfully supervise 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, and to effectively play Devil's Advocate when necessary to help them reconsider and revise or strengthen their arguments. I believe that any other law professor who read these books would also be sufficiently prepared to supervise a student paper on the subject. When students have 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 then direct them to one or another of our Constitutional Law faculty for more informed guidance.³

When I first meet with my students at the outset of their efforts at the beginning of the semester I am quite candid with them about my pro-impeachment views with regard to President Trump, but I also make clear to them that there are a number of plausible legal or prudential arguments that can be made against removal of a President from office through impeachment, even President Trump, and that they are more than welcome to reach anti-impeachment conclusions if that is where their research and analysis leads them. I let them know that I only expect 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 address in reaching their conclusions, and that I will 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 has not proven to be excessive, especially once I had finished my own background reading of the books the first semester, and I have greatly enjoyed working with these motivated students on these timely legal questions. More importantly, I believe that the students have all found the projects to be worthwhile, both as a vehicle for learning a great deal about impeachment,

³ My Constitutional Law faculty colleagues have always been more than willing to provide these students with feedback on their ideas when consulted.

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. The papers have generally been quite good, mostly meriting “A” grades by the time they were complete, and several of the students have further extended and polished their papers and have submitted them in law school writing competitions or to law journals for possible publication.

I strongly recommend that other law school faculty consider encouraging their students to think about writing a possible one- or two-credit Directed Research paper on the topic of impeachment, and then supervising at least a few such student projects, even those faculty who have, as I do, limited Constitutional Law expertise. It is a way to help stimulate and better inform debate around the law school and elsewhere on this important subject, and to offer as part of one’s daily work some (hopefully) somewhat meaningful resistance to Trumpism. And it is a way to do this without taking the risk, one that surely should concern all teachers, that in our frustration with the powers that be we will load up our lectures in our other courses with a little too much of our own political opinions, doing so in essentially a captive audience context where we usually cannot provide our students with a comfortable and meaningful opportunity to offer back their own different perspectives and conclusions. The Directed Research approach allows students to first self-select as to their interest in and willingness to argue

impeachment issues, and then to engage with their faculty supervisor in an extended one-on-one dialogue over the semester where different views can be expressed and debated as the students choose their topic and research and write their papers. I think that this approach is an adequate way to broaden and deepen law students' understanding of impeachment, a matter of some urgency, while addressing legitimate concerns about the need to avoid letting one's strong personal views on a matter subtly slant their teaching efforts into indoctrination and an abuse of one's proper pedagogical role as a facilitator of the students' quest for greater understanding.