

## Impeachment

**Elizabeth Joh:** When it comes to the topic of impeachment, most people know that Bill Clinton was impeached in 1998 and that Richard Nixon avoided impeachment by resigning in 1974.

**Roman Mars:** And you might remember from history class that Andrew Johnson was impeached, but you can't remember why. At least I can't remember why.

**Elizabeth Joh:** But you've probably never heard of West Humphreys'. Have you?

**Roman Mars:** No.

**Elizabeth Joh:** In 1853, President Franklin Pierce appointed West Humphreys to be a federal district court judge in Tennessee. That's a trial court judge. Humphreys' appointment was unsurprising. He was a successful lawyer and a state legislator in his home state.

**Roman Mars:** He probably would have faded into total obscurity, except for three things.

**Elizabeth Joh:** First, in 1861, Tennessee seceded from the Union, and Humphreys was a big supporter of that. Second, President Jefferson Davis nominated Humphreys to be a judge for the Confederate States of America, and the Confederate Congress approved the appointment. Third and most important, Humphreys never quit his old job as a federal judge. He just took the new job and didn't quit the old one. That set him apart from the other 13 federal judges who also joined the Confederacy.

**Roman Mars:** For a federal judge who has lifelong tenure, firing is not an option. Impeachment was the only way to get rid of him.

**Elizabeth Joh:** So, it's no surprise that in 1862, the House of Representatives of the Union, of course, issued seven articles of impeachment against Humphreys. That included one charge that he helped to, quote, "organize armed rebellion against the United States and levy war against them."

**Roman Mars:** Which is undeniably true. They were our enemies. They were enemies of America. Please remember this.

**Elizabeth Joh:** And while Humphreys wasn't required to show up in Washington to defend himself, Congress was determined to find him. The Senate's sergeant at arms was dispatched to Tennessee to look for him but failed. So, the Senate ordered notice of Humphreys impeachment proceedings to be published in the Tennessee and Washington newspapers.

**Roman Mars:** The Senate ultimately convicted Humphreys on June 26th, 1862, in the shortest impeachment trial in American history. It lasted just a couple of hours.

**Elizabeth Joh:** Afterwards, Humphreys continued to serve as a Confederate judge. So, you might think, "Why impeach Humphreys? The South had seceded, and the Union had some really important things to do, like win the Civil War." Part of the answer is that Humphreys' failure to quit as a federal judge was a threat to our system. How could he simultaneously serve the Union and the Confederacy? Not quitting his federal judgeship

meant that he could issue legal orders while being openly disloyal to the nation. Impeachment is a remedy for constitutional democracy that's built into our Constitution itself--an important legal process even in the midst of a national crisis.

**Roman Mars:** Congress had to get rid of him, and this was the way to do it.

**Elizabeth Joh:** And it's the possibility of impeachment, however remote, that is emerging again as a possibility for this unusual and norm breaking presidency of Donald Trump.

**Roman Mars:** Hey, everybody. He's still here. So, we're back. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the actions and swirling speculations about Trump and channel that noise into learning our Constitution like we never have before. Our music is courtesy of Doontree Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. It's the one you've been waiting for. The big I. Impeachment after this. So, what exactly is impeachment? And how does it work?

**Elizabeth Joh:** You can start with the Constitution itself. Article I--that's the part addressed to Congress--says that "the House of Representatives shall have the sole power of impeachment." It also says that "the Senate shall have the sole power to try all impeachments." So, what this means is that when we talk about impeachment, it's really a two-step process, divided between the House and the Senate. So, you can think of impeachment as the phase when someone is charged with wrongdoing. That's up to the House. If charges are brought--and these are called "articles of impeachment"--then it's the Senate's job to conduct a trial of the person subjected to impeachment.

**Roman Mars:** In the broad sense, we tend to use the word "impeachment" as meaning "being removed from office." But technically, as was the case with Bill Clinton and Andrew Johnson, they were impeached, they were charged with wrongdoing, but they were not convicted, and they both stayed on as president. But impeachment is not just for presidents.

**Elizabeth Joh:** According to Article II--that's the part that's usually addressed to the executive branch--the president, the vice president, and all civil officers of the United States can be removed from office by impeachment. The Constitution has a couple of other specifications, too, but it's silent on a lot of details. So, when it comes to the law of impeachment--when people talk about what that means--it's sort of a mix of what the Constitution says, plus some rules set forth by the House and Senate, some historical experience, and, well, a bunch of unknowns.

**Roman Mars:** And part of the reason we don't have answers to a lot of questions about impeachment is because we haven't used impeachment all that often.

**Elizabeth Joh:** The House of Representatives has only impeached--that means charged--19 people ever. There have only been 16 trials by the Senate ever. And only eight people have been actually convicted by the Senate and removed from office. All of those were federal judges, including West Humphreys.

**Roman Mars:** So how is impeachment supposed to work?

**Elizabeth Joh:** Well, the House has the power to issue articles of impeachment. And that can start in a number of different ways. But at some point, the House Judiciary Committee

or sometimes another House committee will look into the possibility of impeachment. They can decide to conduct an investigation and vote on whether to issue articles of impeachment. That leads to the full House voting on it or not.

**Roman Mars:** But it's tricky for the House to know if someone is impeachable.

**Elizabeth Joh:** The Constitution says that impeachment can be based on treason, bribery, or other high crimes and misdemeanors. It's that last part of the phrase--"high crimes and misdemeanors"--that can be misleading. It sometimes seems as though impeachment means that if you broke the law, then you should be impeached. But that's not how the phrase has been understood historically. It's pretty clear that high crimes and misdemeanors doesn't mean that a person can only be impeached for committing a crime. Remember, impeachment exists to protect our constitutional democracy. So even behavior that doesn't break the law but appears to Congress as something that's a threat to our system can count as impeachable behavior. And so, if breaking the law isn't necessary, it's also true that it's not sufficient either. So just because, for example, a president breaks the law, that doesn't mean he's automatically subject to impeachment. Ultimately, it's up to the House to decide what they think counts as a high crime or misdemeanor. And they only need a simple majority to decide to impeach.

**Roman Mars:** Once the House decides to issue articles of impeachment, they inform the Senate.

**Elizabeth Joh:** That's when the Senate formally tells a person that he or she is being impeached. That person can appear or not appear. It's up to them. The Senate is responsible for conducting the trial. And remember the Constitution's specific about this. There are opening arguments, presentation of evidence, witnesses, closing statements--it all looks very trial-like. The Senate can then convict that person with a two-thirds vote--the Constitution's specific about this, too. If the Senate convicts, the persons removed from federal office. That's it. There's no right to any appeal.

**Roman Mars:** But here's the funny thing about impeachment.

**Elizabeth Joh:** While it looks like a criminal trial, it's really not a criminal trial at all in lots of ways. So, think about some of the things that you associate with a criminal trial. A defendant is formally charged with a crime. So, in the ordinary world, you can only be charged for breaking a law that is defined ahead of time--tells you what the prohibited behavior is. So, in the real world, you can't be tried for generally bad stuff we think you did, but we'll decide on it right before the trial. But that's really what impeachment is. There's no clearly defined crime ahead of time. It's really up to the House of Representatives to decide. And if an ordinary criminal defendant is convicted of a crime, he gets the right to appeal. Impeachment has no appeal. And in fact, the court, and the Supreme Court in particular, generally doesn't get involved at all. The only real exception to this is when the president is subject to impeachment. When that happens, the Chief Justice of the Supreme Court presides over the Senate trial. In all other cases, the vice president presides over trial. Of course, there's the funny problem of what happens when the vice president is impeached. But we don't really have an answer to that either. And of course, there's the effect of impeachment. That's not like a criminal trial either. The worst thing that happens to you is that you're gone from office. It's not a prison sentence. In fact, the Senate actually has to vote separately if they want to disqualify you from ever holding office again. And they don't even have to do that if they don't want to.

**Roman Mars:** Take the case of Alcee Hastings.

**Elizabeth Joh:** In 1981, a federal grand jury indicted Hastings, who was a federal district court judge at the time, on charges related to bribery. He was acquitted. So, he's still a federal judge. There was some suspicion, though, that he had lied about the investigation and falsified evidence. So, a special committee in the judiciary concluded that Hastings had probably broken the law anyway and recommended to the House of Representatives that he should be impeached. The House obliged, Hastings was impeached, and he was convicted by the Senate in 1989--couldn't be a federal judge anymore. But the Senate chose not to vote to bar him from federal office. So, what does he do? Four years later, Hastings was elected to the House to represent Florida--Florida's 23rd district. And as a member of that body, Representative Alcee Hastings, the impeached judge, would later vote against impeaching president Bill Clinton in December of 1998.

**Roman Mars:** So, let's turn to Trump.

**Elizabeth Joh:** So, we want to be clear. At this point, there's nothing to suggest that impeachment proceedings are going to begin against President Trump. And remember, Congress has never successfully impeached and removed a president. But there are so many weird, unusual, unprecedented things that have happened since Trump became president that the idea of impeachment has been brought up a number of times.

**Roman Mars:** A number of times, like from Day One, basically.

**Elizabeth Joh:** Since the election.

**Roman Mars:** Okay.

**Elizabeth Joh:** But we want to be clear that these are merely theoretical speculations.

**Roman Mars:** Twitter speculating type stuff. Yeah. Okay.

**Elizabeth Joh:** There are no actual secret proceedings about impeachment. So, there are a lot of questions and possibilities. So, one possibility starts with special counsel Robert Mueller. Remember that Mueller has been charged with investigating if there are any connections between the Trump campaign and Russian interference in the 2016 election. Mueller himself was appointed by Deputy Attorney General Rod Rosenstein and not by Attorney General Sessions. That's because Sessions recused himself from the investigation. That, in turn, reportedly infuriated President Trump and led him to call Sessions "beleaguered" in a tweet. And Trump has already lashed out at Mueller, tweeting in June that the investigation was, quote, "the single greatest witch hunt in American political history." So, Mueller, let's say, might find evidence of some very serious wrongdoing on the part of President Trump. Again, we don't know. But let's entertain that thought. This could be turned over to the House, just as independent counsel Kenneth Starr did in his investigation of Bill Clinton. Now, the House, currently controlled by Republicans, would have to decide whether any information they had would be enough to merit at least one article--that's a charge--of impeachment. And even if they did that, and that's a pretty big if, there's also the matter of a Senate trial. Would two-thirds of the Senate--that's the necessary number needed--vote to convict Trump? At this point, it's really hard to imagine. Another thing--keep in mind that Trump can't pardon his way out of this.

**Roman Mars:** Even with the theoretical but super crazy idea of presidential self-pardon. Go download Episode #3 for more information on that one.

**Elizabeth Joh:** While the president's pardon power is really broad, the Constitution is actually specific in saying that the president's ability to pardon exists except in cases of impeachment. So that's not going to work. If the Senate acquitted Trump, he remains in office just like Bill Clinton did. If the Senate convicted Trump, he'd be removed from office in theory. Of course, this presumes that Trump would go along with all of this--that he'd presume the legitimacy of the institutions and the process itself. At this point, I'm not even sure that that's a given. And if the Senate convicted Trump and he were removed from office and Trump indeed left the White House, would the Senate separately vote to bar him from any future office? And if they didn't, could Trump come back as Senator or Representative Trump. Again, I don't know if it's realistic, but it's theoretically possible. So, to sum it up, impeachment is a check on the presidency. But there are a lot of hurdles to the process, which explains why we haven't done it very often.

**Roman Mars:** Can I ask you a question then? Here's a big hypothetical. If he was convicted and removed from office and not barred from future office, could he actually become the president again?

**Elizabeth Joh:** Oh, that's a good question. That's a head scratcher. I mean, presumably he could. That is definitely at least some possibility because it is removal from that particular office. So yeah, the Senate presumably would have to ensure by saying you are barred from all future federal offices if they wanted to be specific about that.

**Roman Mars:** We have a bit more of the story and the end of what actually happened to Confederate Judge West Humphreys after this.

**Elizabeth Joh:** So, remember, West Humphreys is removed as a federal judge.

**Roman Mars:** Because he took a job as a Confederate judge.

**Elizabeth Joh:** He is barred from holding federal office in the future. He still faced criminal conspiracy charges. For obvious reasons, he did oppose the Union. So, in 1865, Humphreys asked for a pardon. In his pardon request, Humphreys made some unusual arguments, including one that he'd said, well, he "wasn't a disunionist per se." But he appealed for a chance to "live and die in my native state." President Andrew Johnson pardoned Humphreys in 1865. And as a result, the Federal Court dismissed the criminal charges against him. President Johnson himself would be impeached and acquitted a few years later in 1868. The normal run of the mill way of getting rid of elected politicians is to vote them out of office. But impeachment is supposed to be like a crisis mode. This is the safety valve. This is breaking the glass, saying, "We've got to get rid of this person." But it is so difficult. That's why it hardly ever happens. And the only time we've ever successfully removed people are in cases of federal judges. So, yeah, we don't really have any experience with this, you know, hardly in the nation's history.

**Roman Mars:** Do you think it's only successful with the wrong judges because people don't care because there's no big opposition--political opposition--on the other side, probably?

**Elizabeth Joh:** Yeah, I think that's right. I mean, I think it's less in the public's eye when there's a federal judge who gets in trouble. And in the case of Alcee Hastings, it's not even

that much of a black mark. You get to represent the people in just a different capacity if the Senate isn't careful about it.

**Roman Mars:** This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [trumpconlaw.com](http://trumpconlaw.com), on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. The music in this specific episode is from Dangerous Jumps, the forthcoming full-length album from SHREDDERS, the new group consisting of P.O.S., Sims, Paper Tiger and Lazerbeak. I have an advance copy. It is so, so good. The album will be released on November 3rd. You can find out all about Doomtree Records, get merch, and learn about current tours at [doomtree.net](http://doomtree.net). All through the fall and into the new year, Trump Con Law will come out every two weeks. So, keep looking for us. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.