



Episode 1,511: Impeachment: Trump Stonewalls, So What Happens Now?

Guest: Kevin Gutzman

WOODS: All right, glad to have you because we've got a topic that combines current events and history, and I always enjoy reading what you have to say on both things. So we're talking about impeachment. Let's actually start not with current events, but in history, and in particular with the Constitution. How are we to understand the high crimes and misdemeanors clause, and what kinds of things were thought to rise to that level?

GUTZMAN: Well, in the Philadelphia convention that wrote the Constitution, the original language of that clause referred to maladministration, and there was an objection that maladministration would be in the eye of the beholder, and so essentially any high official would be susceptible to being impeached at any moment. Then came back the alternative from George Mason of Virginia, the language "high crimes and misdemeanors", which had a long-established definition in the jurisprudence of the English House of Lords, British House of Lords. And so that ultimately was the language that was accepted by the full convention and found its way into the ratified Constitution.

In the case law in the English House of Lords, then British House of Lords, the key case is the impeachment of the Earl of Strafford, who was the chief advisor of King Charles I. People who are familiar with English history will know the name of Charles I. So essentially what happened was that Charles had come into a long-running spat with the English House of Commons over taxes, and finally the Earl of Strafford recommended that King Charles could bring his Irish army to England and use it to intimidate the English House of Commons. When the English Parliament found out about this, Strafford was impeached by the House of Commons and convicted and executed with corruption of the blood by the House of Lords.

So notice that this was not a criminal offense. There was no law in England against telling the king he could bring an Irish army to England. But what it was was an offense against the constitution of England, and of course, this is what I understand to have been meant by this language when this was George Mason's final proposal in the Philadelphia convention, that a high crime or high misdemeanor was an offense against the Constitution. So not just dodging one's taxes, but, say, for a federal judge to legislate or for him to refuse to enforce a constitutional provision in favor of a defendant.

WOODS: All right, so now starting to maybe, let's say, transition a little bit into our present day, is it therefore your opinion that impeachment should be, if anything – and not just of the president, by the way – but that impeachment should be much more feared as a potential penalty than it has turned out to be in practice.

GUTZMAN: Yes. Actually, I wrote my first master's thesis, which was for a Master of Public Affairs at the LBJ School, on the subject of "problems in federal judicial impeachment." And the conclusion I came to was that the impeachment power has been used far too seldom. It ought to be used more frequently until these rascallions in the federal government getting used to the idea that they ought to abide by the Constitution. So essentially, the Congress can make officials in either of the other two branches behave and just essentially has decided almost never to do so.

WOODS: Well, in recent years, though, at least with the President, we did have the impeachment of Bill Clinton in 1990. And now it looks like we're heading toward that with Donald Trump. So let's say something, then, about the specifics of these cases.

First of all, I find your Facebook timeline to be of immense value. The articles you post, the occasional comments help me to navigate a lot of important issues, so it's not surprising to me in light of all your commentary that you're well prepared to discuss what we're talking about today.

So let's talk about the circumstances here that led to all this hoo-ha about this telephone call with the Ukrainian president. So this is not the first time that one of his conversations, let's say, has not been kept private. What do we know about this?

GUTZMAN: Well, by my count, there have been three of President Trump's private conversations with foreign heads of government that have been disclosed to the public. This last one was I guess literally by his doing, but it was going to be made public by a 'whistleblower' anyway. And then we had two previous ones. And this seems to me of a piece with or part of an ongoing campaign by the Democratic Party and its adjuncts in the larger bureaucracy to oust Donald Trump from the White House.

We first had a large controversy over the fact that his Democratic opposite number in the 2016 presidential campaign, Hillary Clinton, had set up a private server, an email server that she had control of instead of leaving even the most highly classified email communications in the secured government system that she was given access to because she held one of the half-dozen top positions in the executive branch. And now we come to find out that here's the reason why Hillary Clinton wanted to have most of her communications be susceptible only of her own disclosure, that the 33,000 emails that were under subpoena, and were destroyed by her nonetheless, likely, one infers, included language at least as damaging as offhand questions about whether any Republican had committed any kind of crime in a foreign country.

It seems to me that, first of all, what Trump is accused of having done, as long as there was no quid pro quo involved, and perhaps even if there, was not any kind of offense. So I have distaste for his public rhetoric, to put it mildly, but I don't think that for the President, especially in communication with the head of state of a foreign country with which we actually have a new treaty about cooperating and enforcing each other's laws, I don't think there's anything that's a constitutional violation of what he's been accused of, in this instance, even if he had done it, which, it doesn't seem clear to me he had done it. So I think maybe it's a unique case in which the impeachment powers are being abused for partisan purposes.

WOODS: Hmm. Okay. Now, that was more or less what I expected you to say, but I wasn't sure exactly how you were going to arrive there. Again, I'm kind of using you not just for your

legal knowledge, but also to supply some of the background into the situation we're in. What is your impression of the so called whistleblower, who is our source, I guess?

GUTZMAN: Well, we don't know his identity for certain, but the most recent information I've seen about him in the press is that he had some formal relationship in the administration of Barack Obama to John Brennan. John Brennan, of course, was the CIA Director who has come out as a full-throated opponent of Donald Trump and just a highly partisan fellow, who's now giving regular commentary on one of the openly partisan television networks. And it's unsurprising that this guy also turns out to be a registered Democrat and is really the kind of person you would have thought would fall under the umbrella of what the Trump people during the campaign were referring to as the "deep state."

WOODS: You referred to, just in private correspondence with me, the "House's investigation" as a publicity stunt. What do you mean by that?

GUTZMAN: Well, there hasn't been a formal resolution to initiate an impeachment process, an impeachment investigation. And more importantly, I don't think that the instances of supposed misdoing with which Trump is being charged or of which he's being accused really amounts to anything. So even if he had done these two things at issue now, my response would be: well, so what? There are many things you could find in the records of virtually all the presidents in my lifetime that I think would qualify as actual impeachable offenses, and these are not among them. So it just looks to me like a new aspect of what's currently going to be the permanent Democratic presidential campaign that's bled over from 2016 into 2020, and it's never stopped.

WOODS: What do you think about Nancy Pelosi's position in all this? I mean, she had been against moving toward impeachment, obviously before this whole thing blew up. But this whole thing, you could imagine a world in which this didn't lead to such a hysterical response. How do you feel like she is positioning herself here? I mean, she is in favor of impeachment, it looks like now, but she's got a delicate balancing act here. What do you think about it?

GUTZMAN: Well, it's a funny thing that in our day, Nancy Pelosi has come to be a kind of symbol of moderation in the Democratic Party, because I for one can remember when Jeane Kirkpatrick, when speaking at the Republican National Convention, referred to "San Francisco Democrats," and that was a successor term from Tim McGovern Democrats. In other words, the most left part of the party. Nancy Pelosi has not moved to the right since then. What's happened is that the Democratic Party has moved substantially even further to the left.

But it is true that she apparently thought that tactically it was an unwise idea to pursue impeachment of Trump, because what happened in the Clinton instance was that impeachment meant that Democrats were mobilized at the succeeding election. But I should note, of course, that one significant difference between the Clinton incident and this Trump matter is that in Clinton's case, there actually was an Independent Counsel under the old, now-lapsed Independent Counsel statute, whose report found and said forthrightly that Clinton had committed crimes and named them. So there's nothing like that in connection with Trump. There was a long-running investigation by an independent counsel, which is not the same thing as the old Special Counsel. And its report, the Mueller report, concluded that there weren't any such instances of Trump's having committed specific crimes. So it makes some sense that Pelosi would say, well, I don't want to pursue an impeachment when we don't really have misdeeds to which we're going to end up being able to point, and we're likely just

to make more of Trump's supports manifest at the polls in 2020. That I think is where she stood.

On the other hand, it seems that over time, people who identify as Democrats or who are Democratic-likely voters have become more and more convinced that there just has to be an impeachment vote in the House. So here we are. They're pursuing a kind of kangaroo investigation, which unlike previous impeachment investigations of presidents, has not provided for any subpoena power in the minority or any rule of the out party, that is the off party, the President's party in investigating the matters of issue. And I guess Pelosi must think, well, even if this leads to high Republican turnout, I can't resist it because we have more than a majority of the House now saying that it wants an impeachment vote. What can she do? So, again, Jeane Kirkpatrick I think would be surprised to see Nancy Pelosi as the voice of moderation in the Democratic Party.

WOODS: Yeah, no kidding. No kidding. All right, let's talk about Trump's response to all this, which has been — I guess stonewalling? I don't know what word we want to use. But just noncooperation. So elaborate on that a bit. And is he within his rights to do that?

GUTZMAN: Okay, well, there are several issues here. One is his public response has been just more and more kind of unhinged-seeming tweets and public statements about treason and so on in his opposition. I find it, I'll say off-putting, but actually at some point it could be considered kind of startling that the President says the kinds of things that one finds on this President's twitter feed from time to time.

Now, as to whether he's going to cooperate in this investigation, the argument that Republicans are making and the argument the Trump administration is making is that it's not actually an impeachment investigation until there's a vote of the whole House to have an impeachment investigation. There's an argument here. One side, the Republican side says every past impeachment investigation into a president has begun with the vote of the whole House to have an impeachment investigation. And that's when, as I mentioned before, the rights of the minority to subpoena and to be present for depositions of witnesses and so on kick in. On the other hand, although it's true that these things have been done in the past, there's no constitutional requirement of them. The Constitution just says that the House can impeach by a minority vote. So I think there's not a very strong legal argument that the minority has a right to be involved in the investigation in the ways that it's been in past instances. But I suppose, perhaps, eventually the House will have to take the administration to court to win compliance with its various subpoenas out of it.

Now, the other thing to notice about this is there was, decades ago, a book by Raoul Berger, one of my very favorite historians, about what he called the constitutional myth of executive privilege. His argument was there's no such thing in the Constitution as executive privilege. The executive is just supposed to execute the policies made by the legislature and says the President doesn't have ultimately a right to keep information from the Congress if the Congress insists on having it. I actually find this a pretty appealing argument, myself. So I think when it comes down to it, the executive branch is going to end up having to comply with what the House is insisting that it cooperate in. However, whether that will take us beyond the 2020 election is a different question, because federal courts move exceedingly slowly.

WOODS: What exactly is it that they're demanding at this point?

GUTZMAN: Well, they want various people to come testify. They want various people to provide documents. They've demanded lots of documents and several people to testify. And the White House's position is, no, we're not coming. No, we're not sending anything. Until you have a vote of the whole House of Representatives, we're not going to do it. If you were actually — quote, unquote, "actually" — moving on impeachment, that would be one thing, but you don't have the right just to conduct a fishing expedition.

As I was saying before, there's no constitutional warrant in the idea that the House can't investigate pursuant to its impeachment power before it has a full vote of the House to have an impeachment investigation. All the Constitution says is that it can be can impeach by majority vote. So I read it as meaning that, in this instance, the House has the same investigatory powers, all the committees have the same investigatory powers in relation to the impeachment investigation that they have at any other time without having a special vote. And I bet you that eventually a federal court will say the same thing. So now, the Trump people are just flouting these subpoenas, but in the end, they're going to have to comply with them.

WOODS: Now, the question becomes the timeframe involved here. I mean, the courts move slowly, but maybe in a case like this, they might speed it up, given the gravity of the situation. But you've got an election right around the corner, and so is this going to be dragging on all the way through that? And then secondly, there is this strategy, it seems, that I think the Democrats are at least implicitly pursuing, whereby they feel like if they can just keep up the constant barrage of attacks and accusations, that the country will just get exhausted and say, *All right, all right, already. Look, just get a new president. I can't live like this all the time, on edge.* And like people's mental health, for some reason they're allowing their mental health to be damaged by what's going on in Washington. That's scary in itself. But I think the strategy, especially now with this impeachment thing, it just becomes, *All right, all right, look, just give us Pence or give us a Democrat or whatever. Just get this thing over with.*

GUTZMAN: Well, actually, some of it is intentionally calibrated to yield that result. So for example, last week, Chairman Schiff of the Intelligence Committee in the House issued a subpoena for one of the many ambassadors in Europe to come testify and bring particular documents. And he had two business days' lead time on this. Well, anybody who's ever had anything to do with a trial or with testifying in court or any such thing knows that two days to prepare for testimony and assemble a large number of documents is a joke. That's impossible.

So then, of course, when it turned out that he answered that he couldn't make that date, then Schiff made a public statement about how he's going to read a failure to appear or failure to provide the documents as more obstruction. You may have seen that in the news last night, right, that it's more obstruction. Of course, they didn't give this explanation for the "obstruction." I think, then, that the Democrats' main aim here is to whip up fervor in their own supporters, which of course is a time-honored tactic for the out party to adopt in opposition to the President.

WOODS: Do you think, even though we're already seeing Biden slipping in the polls, do you think he winds up being harmed by this? The media is really going out of its way to not mention that, you know, you might be wondering what it was that Trump was asking about with the Ukraine president, but they have no curiosity about this whatsoever. It's the fact

that Trump did it as opposed to, *Well, what is the it that he's trying to investigate or talk about*, is just like gone. But do you think eventually this hurts somebody? I mean, that's assuming that something disreputable was done, which by the way, seems fairly likely given his son's complete lack of credentials.

GUTZMAN: Right. Well, you and I have discussed the prevalence of this kind of arrangement repeatedly over the years. The outstanding example of this kind of thing that comes to mind to me is that, immediately after the Gulf War in the earliest '90s now, which was of course during the presidency of George H.W. Bush, the emir of Bahrain gave an oil partnership headed by Neil Bush an oil lease. Well, Neil Bush was not even in the oil and gas business. So what does that have to do with anything? And of course, the answer was he was giving money to the Bush family for throwing Saddam Hussein out of Kuwait. And nobody said anything about this being inappropriate, and we have this kind of thing I think throughout our government. Foreigners know this, right? So America's government is – I'm not saying it's true of every individual in it, but a lot of people in our government are corrupt and take this kind of payment.

And this particular Biden seems an especially egregious example. It's not just that he's getting money for something that's not really in his bailiwick, but apparently, he's not the kind of person that you would interest with any serious endeavor. So, yeah [laughing]. Yeah, whether Democrats will decide this is important is an interesting issue. We've seen significant poll slippage for Biden in the last few weeks. I think it's probably mainly because Democrats at large had not realized or remembered what a doofus he is, and now they're starting to notice.

WOODS: Yeah.

GUTZMAN: So yeah, I think that's probably the main explanation, but it could be that this has something to do with it, too.

WOODS: Yeah, I mean, who knows? I think probably mind, or I think it is more a matter of he doesn't have the energy, he's not progressive enough, he slips up all the time, he looks like a fool.

GUTZMAN: He's a fool.

WOODS: He's never been an impressive figure. Yeah, he's not smart.

GUTZMAN: No, not at all. Actually, you're being too kind [laughing].

WOODS: I mean, he's there just to open his mouth and repeat platitudes all day. That's what some people want in a president. That's what they want.

GUTZMAN: Right. Well, you can tell that he's just not sharp when he comes out and make statements about how in the good old days, he used to cooperate to good effect with Jim Eastland and Herman Talmadge. Who says that in 2019? You'd think, well, not a politician. But there he was. "He's a dear friend of mine," he said. Okay. "Strom Thurmond was a dear friend of mine." Maybe he was, but pretty dumb politics. People don't remember, either, that Joe

Biden is the guy who cheated his way into the bottom seventh of his class at Syracuse law school, so that's a pretty spectacular accomplishment, I think.

WOODS: [laughing] That is a spectacular accomplishment, indeed. So I hate making historians predict things, because normally we post-dict things, right? I can tell you for sure what happened in 1888, but I don't know what's going to happen in the future. But I mean, look, obviously they vote to impeach him, and then they fail to get the votes to remove him from office, and that's the end of it. I mean, I already know that's what's going to happen, unless there is some absolute bombshell that's hidden somewhere. But geez, some whistleblower would have found that by now. If there were any, it would have been found. Given that the whole apparatus is against him and spying on him and listening in on his conversations, we would probably know about it by now.

But so failing that, it seems likely that what I've just described is likely to happen. So then, what's the result? The Democrats rile up their base. Trump riles up his. The difficulty with Trump is that ,over the past four years, I don't think he's done very much to expand that base. And he's irritated the base with an issue here there, but I don't think he's reached out – I mean, I hate to sound like some wimpy, "you have to reach out to other people." But I just mean he could have appeal beyond his base, because there are plenty of people on the other side of the aisle who will agree with him on certain things, if only they knew he believed in them. And he really has made no effort to reach to them. So I feel like his base has stayed the same or shrunk, and the Democrats, I don't know how big they are, but I know they're loud, and they'll have a lot of money. So what do you think comes from all this?

GUTZMAN: Well, it really is surprising. I think one thing that strikes me about the Trump presidency is he's the first Republican since Reagan who's become president and then actually tried to keep his campaign promises. That's something. And actually, if you look at the particular campaign promises he has been trying to keep, they hit not only a wide array of Republican Party groups, but also some constituencies that typically are highly opposed to Republicans. So yeah, even a competent political manager in the White House could be winning him more plaudits than he's receiving, but I guess Kellyanne Conway is not the sharpest, at best. So I don't know. I don't know how he's actually going to end up being reelected, myself. I can't see how somebody with such abysmal popularity figures does that.

On the other hand, we do have a situation in which it seems – we were talking earlier about how Nancy Pelosi has come to seem a paragon of moderation in the Democratic Party, but look at the presidential candidates. Virtually all the people who would strike you as somewhat moderate, the ones who would say they're capitalists, these people have dropped out already, and now we're down to a full array of people Alexander Ocasio-Cortez can improve of. So if it's Elizabeth Warren, it's not going to be hard for Trump to say, in black constituencies, especially in the South and Midwest: look what she's done with affirmative action. What do you think of that? So I guess I could see how Trump could be reelected, even though he remains as unappealing a candidate as he was last time.

WOODS: Yeah, I think what could happen is he winds up going up against somebody like Elizabeth Warren. And at this point, the Democratic constituencies are requiring of their candidates that they believe increasingly bizarre things. And these are things that are believed in fervently by 15% of the public and reluctantly, foot-draggingly-ish by another maybe 20%, but if they had their way, they probably wouldn't. And all he needs to do is just hammer away and hammer away and hammer away. And they'll be trivial issues, but when

have we had an election not on trivial issues in our lifetimes? I mean, okay, I'm probably overstating it, but you know what I mean? It'll be based on that. And I think that's where he shines. He very good at picking out the crazy, wacko things that they've committed themselves to, and he just hammers them home and hammers them home and hammers them home.

GUTZMAN: I think that's entirely possible.

WOODS: So that's his path. That's the only path. That's the only path I see.

GUTZMAN: But well, actually, within the last week, he has made some progress on keeping one of his significant promises, which is not marginal, and that is taking American forces out of Syria. That could actually happen. This is one reason – I think the two main reasons the establishment opposes Trump are that he wants to bring soldiers home from specific theaters. Not just a few guys here and there, but he wants to denude Syria of American military men. That's one thing. Another thing is he's doing things that are contrary to their just fervent religious devotion to abortion. I think the one ground on which people become Democrats is the fear that somehow, somewhere, somebody might be having one less abortion. And Trump has taken an array of measures that are likely to lead to that result, even if some of them, like appointing originalist judges, aren't intended to lead to that end. So this, I think, is a reason why your typical activist Democrat or your typical career-federal bureaucrats are going to dislike him.

WOODS: All right, I think I've put you through enough talking about all this stuff.

GUTZMAN: [laughing]

WOODS: But I just wanted to get your impressions of the situation. And as I say, 2020, who even knows what's going to happen, but with the impeachment thing, it seems like an inevitability. We know what will happen; we know what the result will be. The question is: does it really weaken him or not? I don't know. You can argue both ways. It could prove definitively to his people that, when somebody gets elected who says he's going to help the public, this is what happens. I mean, he can play that card forever, and maybe that does help. I don't know. But in any case, KevinGutzman.com is where you should go to find out more about, Kevin Gutzman. I'll link to Kevin's books. Kevin is a prolific and important historian. I'll link to them at TomWoods.com/1511. You should check those out, and, Kevin, thanks very much.

GUTZMAN: You're welcome.