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The Campaign to Impeach Justice William O. Douglas; Nixon, Vietnam, and the Conservative Attack on Judicial Independence

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The Supreme Court, the President and Impeachment

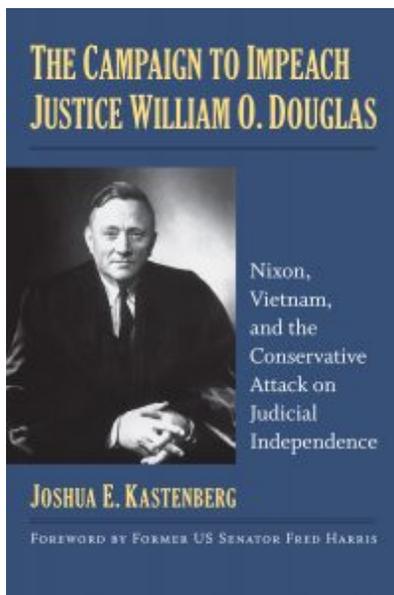
By Joshua E. Kastenberg

Author of *[The Campaign to Impeach Justice William O. Douglas; Nixon, Vietnam, and the Conservative Attack on Judicial Independence](#)*

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The Constitution does not expressly set out a specific legal standard for impeaching a president or judge, but it does use the term “high crimes and misdemeanors” as an operative reason for removal. Certainly, it is possible for the House of Representatives to impeach a president, cabinet official, judge, or Supreme Court justice for noncriminal behavior: Gerald Ford tried this against William O. Douglas.

Ford argued that “high crimes and misdemeanors” and “good behavior” was a malleable standard, one that was “whatever a majority of the House believes it to be at a given time.” In 1970, Ford failed to convince the House that Douglas merited impeachment.



It may be difficult to draw parallels between Justice Douglas and President Trump because Douglas had served on the Court for three decades and did not come into office with vast wealth (or the claim of vast wealth). Yet there is a parallel between then and now. Ford accused Douglas of unethical behavior, consorting with foreign entities, and misconduct by receiving money from the Mafia. However, there was no evidence to substantiate the latter two allegations. (Douglas may have crossed the line by publishing a book and several articles in a magazine reputed to be pornographic, and Douglas’s extramarital affairs were the basis for other impeachment demands).

Democrats who have argued for impeaching President Trump are alleging an abuse of power by coercing or aligning with the president of Ukraine to damage a political opponent. There are also investigations into his finances as well as payoffs to mistresses.

Thus there is a parallel of sorts. Of course, a president is commander in chief and generally gains office by an Electoral College vote; meanwhile, a Supreme Court justice gains office by a presidential nomination and Senate approval. But the standard for impeachment—notwithstanding Ford’s claims to the contrary—is the same. Ford acted on April 15, 1970, by demanding impeachment and claiming that the Central Intelligence Agency had “dirt” on Douglas’s foreign activities and that the Securities and Exchange Commission and Internal Revenue Services also had proof of Douglas’s malfeasance. None of these agencies produced evidence against Douglas. Nor did the Federal Bureau of Investigation or Justice Department provide evidence (even though Attorney General John Mitchell promised evidence would be forthcoming).

It appears to be the case that in our present circumstances there is evidence, by President Trump’s own admission, of seeking foreign help against a political rival. There’s also the questionable timing of President Trump withholding military aid, followed by the release of congressionally appropriated monies after the Ukrainian president promised that a new prosecutor might relook an investigation into Hunter Biden.

Bribery is a specified offense in the Constitution. There is a prima facie case of it in regard to the president. Douglas was unpopular with conservatives: he engaged in extrajudicial activities that are prohibited by codes of ethics today but were not at the time. Somewhere in all of this, it is time for the House to employ a constitutional, rather than Ford’s, standard.

Joshua E. Kastenberg is associate professor of law and the Lee and Leon Karelitz Professor in Evidence and Procedure at the University of New Mexico School of Law. His many books include To Raise and Discipline an Army: Major General Enoch Crowder, the Judge Advocate General’s Office, and the Realignment of Civil and Military Relations in World War I and Law in War, War as Law: Brigadier General Joseph Holt and the Judge Advocate General’s Department in the Civil War and Early Reconstruction, 1861-1865.

Tagged [Impeachment](#), [Justice Douglas](#), [Justice Kavanaugh](#), [Nixon](#), [Supreme Court](#), [Trump](#)

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