# WALTER DELLINGER: THE LAWYER AS CONSUMMATE TEACHER*

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*In this short Essay, Professor Michael Gerhardt shares the ways in which Walter Dellinger was an exemplary teacher. As Professor Gerhardt explains through several interactions, Walter Dellinger's humility, intellectual curiosity, and insights were inspiring and contagious.*



## INTRODUCTION

I never took a course from Walter Dellinger, but I learned invaluable lessons from him, as did anyone who knew or worked with him during his illustrious career. He was a renowned constitutional scholar at Duke Law School for decades,[1] and he served with distinction as both the Assistant Attorney General in charge of the Office of Legal Counsel[2] and Acting Solicitor General in the Justice Department,[3] as well as the head of the appellate practice group at his beloved O'Melveny & Myers.[4] He was one of the nation's best lawyers in the course of his life. Yet, my primary interaction with Walter was in two of his other signature roles: as both a colleague and a teacher.

Of the many skills lawyers should have, perhaps none is more important—and more difficult to achieve—than being an educator. Walter was an example



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1. *Professor Walter Dellinger, Renowned Constitutional Lawyer and Scholar, Dies at 80*, DUKE UNIV. SCH. L. (Feb. 16, 2022), https://law.duke.edu/news/professor-walter-dellinger-renowned-constitutional-lawyer-and-scholar-dies-80 [https://perma.cc/AJ75-JM5v].

2. *See id.*; *see also* Clay Risen, *Walter Dellinger, 80, Scholar and Top Legal Aide Under Clinton, Dies*, N.Y. TIMES, https://www.nytimes.com/2022/02/16/us/walter-dellinger-dead.html [https://perma.cc/S36V-2SNY (staff-uploaded, dark archive)] (last updated Feb. 17, 2022).

3. DUKE UNIV. SCH. L., *supra* note 1.

4. *Id.*

of a great advocate and scholar—one who was able to educate his audience—whether it be in a tribunal, in a classroom, at a dinner, or in the persuasiveness and reasonableness of any argument or position. A great lawyer helps others to better understand the legal issues involved in complex problems. Anyone who spent time with Walter knew he was a consummate storyteller, with an encyclopedic knowledge of constitutional history and law. He embodied reasonableness and erudition. He taught not with a club but by example, patience, and gentle probing, while also sharing penetrating insights and perspectives that enriched understandings of the United States Constitution and the law. Walter could cut to the heart of an issue in a flash, but his cuts were meant not to wound but to illuminate. Whatever position Walter had, he clearly understood the strengths and weaknesses of both his perspective and that of his opponents or critics.

I encountered this side of Walter on numerous occasions. I discuss three of them briefly to illustrate his deftness and impact as the consummate teacher of constitutional law.

## I. WALTER'S LEADING QUESTIONS

I first met Walter Dellinger shortly after I had joined the faculty at the William & Mary Law School. He was a regular participant, as I became, at the law school's signature annual event, the Supreme Court Preview, at which journalists, scholars, and advocates gather to discuss major cases in the upcoming Supreme Court term.[5] The three-day event features panels and moot courts focusing on the big issues in cases pending before the Court.[6] I sat with Walter as a fellow judge in several moot courts and more than once as an advocate in several important cases that were pending before the Supreme Court during our program, including *Nixon v. United States* (argued 1992),[7] *Romer v. Evans* (argued 1995),[8] and *Clinton v. Jones* (argued 1997).[9]

What I remember most about arguing those cases was not whether I won or lost but instead how my interactions with Walter enriched my understanding of the issues, arguments, and challenges before the Supreme Court at the time. He helped me to mature both as a teacher and constitutional lawyer.

5. *See Supreme Court Preview*, WM. & MARY L. SCH., https://law.wm.edu/academics/intellectuallife/researchcenters/ibrl/programsandevents/scp/ [https://perma.cc/XEM7-5JR2]; *see also* Institute of Bill of Rights Law, *Supreme Court Preview: What To Expect from the 1990–91 Term*, WM. & MARY L. SCH. (1990), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1069&context=ibrlevents [https://perma.cc/5K3R-SF6D (staff-uploaded archive)].

6. *Supreme Court Preview*, *supra* note 5.

7. 506 U.S. 224 (1993).

8. 517 U.S. 620 (1996).

9. 520 U.S. 681 (1997).

In *Nixon*, I represented the Senate's position that judicial challenges to Senate impeachment trial procedures were nonjusticiable. In *Romer*, I represented the State of Colorado and defended the legitimacy of its constitutional referendum withdrawing all legal protections for gays and lesbians. And, in *Clinton*, I represented Paula Jones in arguing against any special immunity for the President from a civil lawsuit based on pre-presidential misconduct.

Yet, in each of these three cases, Walter, in his signature Southern accent that reminded me of my own upbringing in Alabama, led me through a series of questions to the same place—where the Supreme Court itself eventually would rule. For example, in *Nixon*, a basic concern was whether there was any place at all for judicial review of any aspect of the impeachment process.[10] In a series of questions, Walter focused on two matters that had to be resolved to answer this question. I had thought about each of these, but Walter gently pressed me to think more deeply about them.

The first issue involved reconciling the nonjusticiability of judicial challenges to Senate impeachment trial procedures with the Supreme Court's famous pronouncement in *Marbury v. Madison*[11] that the Court's job was to "say what the law is."[12] Walter was suggesting that the Court's job, therefore, was to determine the actual meaning of the word "try" in the constitutional directive that the Senate had the power to "try all [i]mpeachments."[13] I responded that the constitutional law governing this matter called for the Court to defer to the Senate's powers to "try" impeachments and, as set forth in Article I, section 5,[14] to "determine" how Senate impeachment trials should be conducted. In short, because the Senate was given the "sole" power to "try" impeachments, it, and it alone, had the authority to determine for itself what that directive entailed.

My response prompted Walter to press further, asking whether the Senate could abandon the requirement of at least two-thirds approval for conviction and removal—that is, whether judicial review might be needed at least in cases in which the Senate deviated from the constitutionally explicit threshold of two-thirds approval for conviction and removal. That, I argued, was a different case than the one pending before the Court.

*What about* Powell v. McCormack*?*,[15] Walter probed. This was the closest precedent on point, and therefore, any decision determining the

10. *Nixon*, 506 U.S. at 235.
11. 5 U.S. (1 Cranch) 137 (1803).
12. *Id.* at 177.
13. U.S. CONST. art. I, § 3, cl. 6.
14. *Id.* art. I, § 5.
15. 395 U.S. 486 (1969).

nonjusticiability of judicial challenges to Senate impeachment trial procedures had to be reconciled with *Powell*.[16]

In that case, the Court had exercised judicial review to overturn the decision of the House of Representatives to exclude Adam Clayton Powell from being seated in the House, given the fact that the House had not followed the explicit conditions set forth in the Constitution for membership.[17] The Court held, in other words, that the House did not have the discretion to deviate from, or abandon, the express criteria for House membership.[18]

Walter clearly wanted me to help the Court determine the outer boundaries of the political question doctrine as applied to the case at hand, but I resisted. *Powell* could be distinguished in a manner helpful to my side of the case—namely, as allowing for judicial review where there was an explicit limit on the Senate's "sole [p]ower to try all [i]mpeachments."[19] That argument could, however, be trouble for my main argument since it could be argued that "try" (as with other powers given to the Congress) was itself limiting insofar as Senate impeachment trial procedure was concerned. Hence, I returned to stubbornly maintaining that, even if the Senate deviated from the two-thirds of Senate approval as the threshold for convictions, the appropriate remedy was not judicial review but instead political outrage over what the Senate had done.

When the case came down later, the Court avoided that question. However, the exchange with Walter had given me cause to think further on how to reconcile the *Nixon* decision with *Powell* itself, as did later talks we had to discuss the Court's ruling further. Why, he asked, does the Congress's power to regulate interstate commerce contain a judicially enforceable limit but not the portion of the Constitution granting the Senate the "sole [p]ower to try all [i]mpeachments?"[20] This returned me to reemphasizing the importance of the fact that "sole" only appeared in two places in the Constitution: one granting the House "sole [p]ower of [i]mpeachment"[21] and the other vesting the Senate with the "sole [p]ower to try all [i]mpeachments."[22] "Sole," in my opinion, was about as clear direction as the Constitution could give that the Senate's power in this realm was exclusive, meaning there was no prospect of judicial review. That argument made even more sense to me because allowing for judicial review allowed the Court's Justices the power to review their own convictions, if those were ever to happen, in Senate impeachment trials. With help from Walter, I organized these thoughts into the article I subsequently published in his home

16. *Id.* at 513–14.
17. *Id.* at 549–50.
18. *Id.* at 522.
19. U.S. CONST. art. I, § 3, cl. 6.
20. *Id.*
21. *Id.* art. I, § 2, cl. 5.
22. *Id.* art. I, § 3, cl. 6.

law review, the *Duke Law Journal*, defending the Court's decision.[23] I do not know if I got the constitutional law on these questions right, but my interactions with Walter on them are but a small example of his skills as an interlocutor and teacher.

## II. WALTER'S HUMILITY

It did not take long after the Supreme Court's decision in *Clinton v. Jones* for Bill Clinton to put his presidency in peril. In that case, the Court rejected Clinton's claim that a sitting president should be immune to a civil lawsuit based on his pre-presidential misconduct.[24] The decision thus allowed for discovery to proceed in the underlying sexual harassment lawsuit filed by Paula Jones, a former Arkansas state employee.[25] Already under investigation by an independent counsel for possible legal violations pertaining to an investment deal his wife Hillary had arranged when she was a lawyer in Arkansas,[26] President Clinton lied under oath and attempted to hide evidence in response to a new independent counsel, Ken Starr, investigating his relationship with a former White House employee, Monica Lewinsky.[27] Starr's office assembled a report, which it distributed to Congress and the media.[28]

Because impeachment had been a principal focus of my legal scholarship, I was quickly contacted by both the media and members of Congress on various legal issues regarding the possible removal of the President. Soon after I spoke to the House of Representatives on the law of presidential impeachment in October 1998, I testified as a joint witness in the House Judiciary Committee's hearing on the background and history of the federal impeachment process.[29] Shortly thereafter, I became CNN's resident expert on impeachment.

23. Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 236–37 (1994).

24. Clinton v. Jones, 520 U.S. 681, 692–95 (1997).

25. *Id.* at 684.

26. Stephen Labaton, *Hillary Clinton Turned $1,000 into $99,540, White House Says*, N.Y. TIMES (Mar. 30, 1994), https://www.nytimes.com/1994/03/30/us/hillary-clinton-turned-1000-into-99540-white-house-says.html [https://perma.cc/R87E-HW8K (staff-uploaded, dark archive)].

27. *See* Michael J. Gerhardt, *The Story of* Clinton v. Jones*: Presidential Promiscuity and the Paths of Constitutional Retribution*, *in* CONSTITUTIONAL LAW STORIES 119, 127 (Michael C. Dorf ed., 2004).

28. *Id.* at 133.

29. *Background and History of Impeachment: Hearing Before the Subcomm. on the Const., House Comm. on the Judiciary*, 106th Cong. 45–57 (1998) (statement of Michael J. Gerhardt, Professor of Law, William & Mary School of Law), https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-20.pdf [https://perma.cc/W2A4-P8W8]; Linda Greenhouse, *Testing of a President: The Constitution; It's Impeachment or Nothing Panel Is Told by Experts*, N.Y. TIMES (Nov. 10, 1998), https://www.nytimes.com/1998/11/10/us/testing-president-constitution-it-s-impeachment-nothing-panel-told-experts.html [https://perma.cc/GG59-23W9 (staff-uploaded, dark archive)]; Emily Cochrane, *Who Is Michael J. Gerhardt? Professor Made Impeachment His Specialty*, N.Y. TIMES (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/us/politics/michael-gerhardt.html [https://perma.cc/FZ9M-YFBN (staff-uploaded, dark archive)].

In the midst of the constitutional storm surrounding President Clinton's misconduct, I rarely had the time to discuss the issues with other scholars in advance of any of my appearances on CNN, as a consultant in the House, and as a witness before the House Judiciary Committee's hearing on President Clinton's possible impeachable misconduct. One scholar who reached out to me was Walter. He and I arranged to have dinner with his dear friend and colleague of many years, Chris Schroeder.

Both Walter and Chris were encouraging but, perhaps more importantly, asked lots of questions about how the federal impeachment process worked, including the scope of impeachable misconduct set forth in the Constitution.

One thing led to another. Walter and Chris arranged for me to speak with then-Senator Joe Biden. For more than two hours, Senator Biden and his counsel peppered me with questions. Soon thereafter, I spoke with then-Majority Leader Trent Lott and his then-counsel Tom Griffith about options for the trial of President Clinton in the Senate if he were impeached as, indeed, he was on December 19, 1998.[30]

I mention these interactions because they demonstrate yet another side of Walter as the consummate lawyer and teacher—his humility. He probably knew more than he said, but he was not afraid to seek more information and greater clarity on a subject he was not (at least yet) an expert on.

Usually, arrogance is the coin of the realm in legal academia. A rarer occurrence was to encounter someone who had taken to heart one of the great lessons of the gadfly philosopher Socrates—that the wise man is the person who knows that he knows nothing.[31] To see one of the nation's greatest constitutional scholars do this in my presence was humbling for both him and me. A great teacher is unafraid to be educable and Walter Dellinger was consistently fearless in his search for knowledge.

## III. INSPIRING INTELLECTUAL CURIOSITY

As anyone who spent time with Walter knows, he was a seemingly endless fount of knowledge about and insight into the foundations of our Constitution. Whether it was at dinner, moot courts, a drink at the end of the day, chance meetings at CNN, or walks through the city or on hiking trails, Walter generously shared his encyclopedic knowledge and curiosity about the Constitution. There was always something behind his questions, as, for example, when he wondered about the ancient roots of impeachment, not only

30. Peter Baker & Juliet Eilperin, *Clinton Impeached: House Approves Articles Alleging Perjury, Obstruction*, WASH. POST (Dec. 20, 1998, 12:00 AM), https://www.washingtonpost.com/politics/clinton-impeachment/clinton-impeached-house-approves-articles-alleging-perjury-obstruction/ [https://perma.cc/W2TV-9FM9 (dark archive)].

31. *See* PLATO, THE APOLOGY 83 (Harold North Fowler trans., Harvard Univ. Press 1966) (1914).

back to William Blackstone's commentaries on the British law of impeachment but also to the Magna Carta as the foundation for the principle that no one is above the law.

Of course, it was not just impeachment that intrigued Walter. Virtually everything did, and perhaps nowhere was he more enthusiastic than when rooting for his Tar Heels, having gone to college at the University of North Carolina at Chapel Hill. He knew the history of UNC perhaps better than anyone else I know; he loved to share it and, having chosen to live near the campus for many years, he kept a watchful eye on a place he clearly loved. He was as much at ease in talking about sports enthusiastically as he was about the books or briefs he had just read. He was not just interested in what was happening, but why it was happening and what it meant for the future.

Walter's intellectual curiosity was inspiring and infectious. It knew no bounds. No matter how busy, Walter always made time to explore a wide range of interests. Like many Americans and constitutional scholars, Walter was endlessly fascinated with the life of Abraham Lincoln, and he often spoke of Lincoln as America's greatest lawyer, including in a series of lectures from 2015 until his death in 2022.[32] Whenever Walter spoke or inquired about the subjects that interested him (and they seemed endless), you could not help but be caught up in his enthusiasm and wonder.

When I asked Walter about his Lincoln lectures, he shared them with me. It so happened that the timing was perfect, since I received them while I was in the middle of writing a book on Lincoln's life as shaped through his interactions with a handful of his mentors.[33] Walter knew of the book, and it was one of the last things he read before he left us. The night before he died, he sent me two emails, both praising the biography I had written about Lincoln's political education. He asked to meet for lunch to discuss the book further. I was eager to see him and learn about what he was thinking.

We never met again. I never got to talk with Walter about our mutual interests, including Lincoln. Yet, his high praise meant more to me than words can adequately express. If Walter tipped his hat to you or told you job well done, there could be no higher praise—and no stronger motivation to maintain one's confidence in the work ahead.

32. *See, e.g.*, Duke University School of Law, *Walter E. Dellinger III, America's Greatest Lawyer: Abraham Lincoln in Private Law and Public Life*, YOUTUBE (Apr. 22, 2015), https://www.youtube.com/watch?v=HhUfvw_OKWk [https://perma.cc/RC4U-HA3X]; Judith Ferster, *Walter Dellinger: Lincoln*, CAROLINA MEADOWS, https://carolinameadows.org/walter-dellinger-lincoln/ [https://perma.cc/TXH4-CGGD].

33. *See generally* MICHAEL J. GERHARDT, LINCOLN'S MENTORS: THE EDUCATION OF A LEADER (2020) (discussing how Abraham Lincoln mastered the art of leadership through lessons from his five mentors).

## CONCLUSION

A great teacher leaves a legacy in not only the knowledge they convey to their students but also in the enthusiasm for learning they inculcate in their students. To me, Walter always seemed like the proverbial kid in the candy store when it came to constitutional history—or any other subject in which he was deeply interested.

As the Symposium participants acknowledge, Walter was the consummate public servant, but he did not limit his public service to the federal government. He was a student and teacher of the law and enjoyed sharing his reverence for the law with everyone with whom he came into contact.

I was fortunate to be one of those people. His enthusiasm for the law, fearless intellectual curiosity, humor, thoughtful and provocative questions, and humility are enduringly inspiring. The inspiration Walter found in Lincoln's career as a lawyer, the lessons he taught, and the example he set for those around him are Walter's gift to current and future generations of American lawyers. I will miss him every day.