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Constitutional Grounds for Presidential Impeachment

Report by the Staff of the Committee on the Judiciary

I. Introduction

Our President holds the ultimate public trust. He is vested with powers so great that they frightened the Framers of our Constitution; in exchange, he swears an oath to faithfully execute the laws that hold those powers in check. This oath is no formality. The Framers foresaw that a faithless President could destroy their experiment in democracy. As George Mason warned at the Constitutional Convention, held in Philadelphia in 1787, "if we do not provide against corruption, our government will soon be at an end."[1] Mason evoked a well-known historical truth: when corrupt motives take root, they drive an endless thirst for power and contempt for checks and balances. It is then only the smallest of steps toward acts of oppression and assaults on free and fair elections. A President faithful only to himself—who will sell out democracy and national security for his own personal advantage—is a danger to every American. Indeed, he threatens America itself.

Impeachment is the Constitution's final answer to a President who mistakes himself for a monarch. Aware that power corrupts, our Framers built other guardrails against that error. The Constitution thus separates governmental powers, imposes an oath of faithful execution, prohibits profiting from office, and guarantees accountability through regular elections. But the Framers were not naïve. They knew, and feared, that someday a corrupt executive might claim he could do anything he wanted as President. Determined to protect our democracy, the Framers built a safety valve into the Constitution: A President can be removed from office if the House of Representatives approves articles of impeachment charging him with "Treason, Bribery, or other high Crimes and Misdemeanors," and if two-thirds of the Senate votes to find the President guilty of such misconduct after a trial.[2]

As Justice Joseph Story recognized, "the power of impeachment is not one expected in any government to be in constant or frequent exercise."[3] When faced with credible evidence of extraordinary wrongdoing, however, it is incumbent on the House to investigate and determine whether impeachment is warranted. On October 31, 2019, the House approved H. Res. 660, which, among other things, confirmed the preexisting inquiry "into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional

[1] Max Farrand, ed., *The Records of the Federal Convention of 1787*, 392 (1911) (hereinafter, "Records of the Federal Convention").
[2] U.S. CONST. Art. II, § 4; *id.* Art. I, § 5, cl. 5; *id.* Art. I, § 3, cl. 6.
[3] 2 Joseph Story, *Commentaries on the Constitution of the United States*, 221 (1833).

power to impeach Donald John Trump, President of the United States of America."[4]

The Judiciary Committee now faces questions of extraordinary importance. In prior impeachment inquiries addressing allegations of Presidential misconduct, the staff of the Judiciary Committee has prepared reports addressing relevant principles of constitutional law.[5] Consistent with that practice, and to assist the Committee and the House in working toward a resolution of the questions before them, this staff report explores the meaning of the words in the Constitution's Impeachment Clause: "Treason, Bribery, or other high Crimes and Misdemeanors." It also describes the impeachment process and addresses several mistaken claims about impeachment that have recently drawn public notice.

II. Summary of Principal Conclusions

Our principal conclusions are as follows.

The purpose of impeachment. As the Framers deliberated in Philadelphia, Mason posed a profound question: "Shall any man be above justice?"[6] By authorizing Congress to remove Presidents for egregious misconduct, the Framers offered a resounding answer. As Mason elaborated, "some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen."[7] Unlike Britain's monarch, the President would answer personally—to Congress and thus to the Nation—if he engaged in serious wrongdoing. Alexander Hamilton explained that the President would have no more resemblance to the British king than to "the Grand Seignior, to the khan of Tartary, [or] to the Man of the Seven Mountains."[8] Whereas "the person of the king of Great Britain is sacred and inviolable," the President of the United States could be "impeached, tried, and upon conviction . . . removed from office."[9] Critically, though, impeachment goes no further. It results only in loss of political power. This speaks to the nature of impeachment: it exists not to inflict punishment for past wrongdoing, but rather to save the Nation from misconduct that endangers democracy and the rule of law. Thus, the ultimate question in an impeachment is whether leaving the President in our highest office imperils the Constitution.[10]

Impeachable offenses. The Framers were careful students of history and knew that threats to democracy can take many forms. They feared would-be monarchs, but also warned against fake populists, charismatic demagogues, and corrupt kleptocrats. The Framers thus intended impeachment to reach the full spectrum of Presidential misconduct that menaced the Constitution. Because they could not anticipate and prohibit every threat a President might

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[4] H. Res. 660, 116th Cong. (2019).

[5] STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4 (Comm. Print 1974) (hereinafter "Constitutional Grounds for Presidential Impeachment (1974)"); STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS (Comm. Print 1998) (hereinafter "Constitutional Grounds for Presidential Impeachment: Modern Precedents (1998)").

[6] 2 Farrand, *Records of the Federal Convention*, at 65.

[7] 1 Farrand, *Records of the Federal Convention*, at 86.

[8] Alexander Hamilton, *Federalist No. 69*, 444 (Benjamin Fletcher Wright ed., 2004).

[9] *Id.*

[10] *See* Laurence H. Tribe, *American Constitutional Law* 155 (3d ed. 2000).

someday pose, the Framers adopted a standard sufficiently general and flexible to meet unknown future circumstances: "Treason, Bribery, or other high Crimes and Misdemeanors." This standard was proposed by Mason and was meant, in his words, to capture all manner of "great and dangerous offenses" against the Constitution.[11]

Treason and bribery. Applying traditional tools of interpretation puts a sharper point on this definition of "high Crimes and Misdemeanors." For starters, it is useful to consider the two impeachable offenses that the Framers identified for us. "Treason" is an unforgiveable betrayal of the Nation and its security. A President who levies war against the government, or lends aid and comfort to our enemies, cannot persist in office; a President who betrays the Nation once will most certainly do so again. "Bribery," in turn, sounds in abuse of power. Impeachable bribery occurs when the President offers, solicits, or accepts something of personal value to influence his own official actions. By rendering such bribery impeachable, the Framers sought to ensure that the Nation could expel a leader who would sell out the interests of "We the People" for his own personal gain.

In identifying "other high Crimes and Misdemeanors," we are guided by the text and structure of the Constitution, the records of the Constitutional Convention and state ratifying debates, and the history of impeachment practice. These sources demonstrate that the Framers principally intended impeachment for three overlapping forms of Presidential wrongdoing: (1) abuse of power, (2) betrayal of the nation through foreign entanglements, and (3) corruption of office and elections. Any one of these violations of the public trust justifies impeachment; when combined in a single course of conduct, they state the strongest possible case for impeachment and removal from office.

Abuse of power. There are at least as many ways to abuse power as there are powers vested in the President. It would thus be an exercise in futility to attempt a list of every abuse of power constituting "high Crimes and Misdemeanors." That said, impeachable abuse of power can be roughly divided into two categories: engaging in official acts forbidden by law and engaging in official action with motives forbidden by law. As James Iredell explained, "the president would be liable to impeachments [if] he had . . . acted from some corrupt motive or other."[12] This warning echoed Edmund Randolph's teaching that impeachment must be allowed because "the Executive will have great opportunitys of abusing his power."[13] President Richard Nixon's conduct has come to exemplify impeachable abuse of power: he acted with corrupt motives in obstructing justice and using official power to target his political opponents, and his decision to unlawfully defy subpoenas issued by the House impeachment inquiry was unconstitutional on its face.

Betrayal involving foreign powers. As much as the Framers feared abuse, they feared betrayal still more. That anxiety is shot

[11] 2 Farrand, *Records of the Federal Convention*, at 550.

[12] Quoted in *Background and History of Impeachment: Hearing before the Subcomm. On the Constitution of the H. Comm on the Judiciary,* 105th Cong. 49 (1999) (hereinafter "1998 Background and History of Impeachment Hearing").

[13] 2 Farrand, *Records of the Federal Convention* at 67.

through their discussion of impeachment—and explains why "Treason" heads the Constitution's list of impeachable offenses. James Madison put it simply: the President "might betray his trust to foreign powers."[14] Although the Framers did not intend impeachment for good faith disagreements on matters of diplomacy, they were explicit that betrayal of the Nation through schemes with foreign powers justified that remedy. Indeed, foreign interference in the American political system was among the gravest dangers feared by the Founders of our Nation and the Framers of our Constitution. In his farewell address, George Washington thus warned Americans "to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government."[15] And in a letter to Thomas Jefferson, John Adams wrote: "You are apprehensive of foreign Interference, Intrigue, Influence. So am I. But, as often as Elections happen, the danger of foreign Influence recurs."[16]

Corruption. Lurking beneath the Framers' discussion of impeachment was the most ancient and implacable foe of democracy: corruption. The Framers saw no shortage of threats to the Republic, and sought to guard against them, "but the big fear underlying all the small fears was whether they'd be able to control corruption."[17] As Madison put it, corruption "might be fatal to the Republic."[18] This was not just a matter of thwarting bribes; it was a far more expansive challenge. The Framers celebrated civic virtue and love of country; they wrote rules to ensure officials would not use public power for private gain.

Impeachment was seen as especially necessary for Presidential conduct corrupting our system of political self-government. That concern arose in multiple contexts as the Framers debated the Constitution. The most important was the risk that Presidents would place their personal interest in re-election above our bedrock national commitment to democracy. The Framers knew that corrupt leaders concentrate power by manipulating elections and undercutting adversaries. They despised King George III, who "resorted to influencing the electoral process and the representatives in Parliament in order to gain [his] treacherous ends."[19] That is why the Framers deemed electoral treachery a central ground for impeachment. The very premise of the Constitution is that the American people govern themselves, and choose their leaders, through free and fair elections. When the President concludes that elections might threaten his grasp on power and abuses his office to sabotage opponents or invite inference, he rejects democracy itself and must be removed.

Conclusions regarding the nature of impeachable offenses. In sum, history teaches that "high Crimes and Misdemeanors" referred mainly to acts committed by public officials, using their power or privileges, that inflicted grave harm on our political order.

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[14] *Id.*, at 65–66.

[15] George Washington Farewell Address (1796), *George Washington Papers, Series 2, Letterbooks 1754–1799: Letterbook 24, April 3, 1793–March 3, 1797*, Library of Congress.

[16] *To Thomas Jefferson from John Adams, 6 December 1787*, National Archives, Founders Online.

[17] Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* 57 (2014).

[18] 2 Farrand, *Records of the Federal Convention*, at 66.

[19] Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 33 (1998).

Such great and dangerous offenses included treason, bribery, serious abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. They were unified by a clear theme: officials who abused, abandoned, or sought personal benefit from their public trust—and who threatened the rule of law if left in power—faced impeachment. Each of these acts, moreover, should be plainly wrong to reasonable officials and persons of honor. When a political official uses political power in ways that substantially harm our political system, Congress can strip them of that power.

Within these parameters, and guided by fidelity to the Constitution, the House must judge whether the President's misconduct is grave enough to require impeachment. That step must never be taken lightly. It is a momentous act, justified only when the President's full course of conduct, assessed without favor or prejudice, is "seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office."[20] But when that high standard is met, the Constitution calls the House to action—and the House, in turn, must rise to the occasion. In such cases, a decision not to impeach can harm democracy and set an ominous precedent.

The criminality issue. It is occasionally suggested that Presidents can be impeached only if they have committed crimes. That position was rejected in President Nixon's case, and then rejected again in President Clinton's, and should be rejected once more. Offenses against the Constitution are different than offenses against the criminal code. Some crimes, like jaywalking, are not impeachable. And some forms of misconduct may offend both the Constitution and the criminal law. Impeachment and criminality must therefore be assessed separately—even though the President's commission of indictable crimes may further support a case for impeachment and removal. Ultimately, the House must judge whether a President's conduct offends and endangers the Constitution itself.

Fallacies about impeachment. In the final section of this Report, we briefly address six falsehoods about impeachment that have recently drawn public notice.

First, contrary to mistaken claims otherwise, we demonstrate that the current impeachment inquiry has complied in every respect with the Constitution, the Rules of the House, and historic practice and precedent of the House.

Second, we address several evidentiary matters. The House impeachment inquiry has compiled substantial direct and circumstantial evidence bearing on the issues at hand. Nonetheless, President Trump has objected that some of the evidence gathered by the House comes from witnesses lacking first-hand knowledge of his conduct. But in the same breath, he has unlawfully ordered many witnesses with first-hand knowledge to defy House subpoenas. As we show, President Trump's assertions regarding the evidence before the House are misplaced as a matter of constitutional law and common sense.

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[20] REPORT OF THE COMMITTEE ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93–1305 8 (1974) (hereinafter "Committee Report on Nixon Articles of Impeachment (1974)").

Third, we consider President Trump's claim that his actions are protected because of his right under Article II of the Constitution "to do whatever I want as president."[21] This claim is wrong, and profoundly so, because our Constitution rejects pretensions to monarchy and binds Presidents with law. That is true even of powers vested exclusively in the chief executive. If those powers are invoked for corrupt reasons, or wielded in an abusive manner harming the constitutional system, the President is subject to impeachment for "high Crimes and Misdemeanors." This is a core premise of the impeachment power.

Fourth, we address whether the House must accept at face value President Trump's claim that his motives were not corrupt. In short, no. When the House probes a President's state of mind, its mandate is to find the facts. That means evaluating the President's account of his motives to see if it rings true. The question is not whether the President's conduct could have resulted from permissible motives. It is whether the President's real reasons, the ones in his mind at the time, were legitimate. Where the House discovers persuasive evidence of corrupt wrongdoing, it is entitled to rely upon that evidence to impeach.

Fifth, we explain that attempted Presidential wrongdoing is impeachable. Mason himself said so at the Constitutional Convention, where he described "attempts to subvert the Constitution" as a core example of "great and dangerous offenses."[22] Moreover, the Judiciary Committee reached the same conclusion in President Nixon's case. Historical precedent thus confirms that ineptitude and insubordination do not afford the President a defense to impeachment. A President cannot escape impeachment just because his scheme to abuse power, betray the nation, or corrupt elections was discovered and abandoned.

Finally, we consider whether impeachment "nullifies" the last election or denies voters their voice in the next one. The Framers themselves weighed this question. They considered relying solely on elections—rather than impeachment—to remove wayward Presidents. That position was firmly rejected. No President is entitled to persist in office after committing "high Crimes and Misdemeanors," and no one who voted for him in the last election is entitled to expect he will do so. Where the President's misconduct is aimed at corrupting elections, relying on elections to solve the problem is no safeguard at all.

III. The Purpose of Impeachment

Freedom must not be taken for granted. It demands constant protection from leaders whose taste of power sparks a voracious need for more. Time and again, republics have fallen to officials who care little for the law and use the public trust for private gain.

The Framers of the Constitution knew this well. They saw corruption erode the British constitution from within. They heard kings boast of their own excellence while conspiring with foreign powers and consorting with shady figures. As talk of revolution

[21] *Remarks by President Trump at Turning Point USA's Teen Student Action Summit 2019*, July 23, 2019, THE WHITE HOUSE.

[22] Cass R. Sunstein, *Impeachment: A Citizen's Guide* 47 (2017).

spread, they objected as King George III used favors and party politics to control Parliament, aided by men who sold their souls and welcomed oppression.

The Framers risked their freedom, and their lives, to escape that monarchy. So did their families and many of their friends. Together, they resolved to build a nation committed to democracy and the rule of law—a beacon to the world in an age of aristocracy. In the United States of America, "We the People" would be sovereign. We would choose our own leaders and hold them accountable for how they exercised power.

As they designed our government at the Constitutional Convention, however, the Framers faced a dilemma. On the one hand, many of them embraced the need for a powerful chief executive. This had been cast into stark relief by the failure of the Nation's very first constitution, the Articles of Confederation, which put Congress in charge at the federal level. The ensuing discord led James Madison to warn, "it is not possible that a government can last long under these circumstances."[23] The Framers therefore created the Presidency. A single official could lead the Nation with integrity, energy, and dispatch—and would be held personally responsible for honoring that immense public trust.

Power, though, is a double-edged sword. "The power to do good meant also the power to do harm, the power to serve the republic also meant the power to demean and defile it."[24] The President would be vested with breathtaking authority. If corrupt motives took root in his mind, displacing civic virtue and love of country, he could sabotage the Constitution. That was clear to the Framers, who saw corruption as "the great force that had undermined republics throughout history."[25] Obsessed with the fall of Rome, they knew that corruption marked a leader's path to abuse and betrayal. Mason thus emphasized, "if we do not provide against corruption, our government will soon be at an end." This warning against corruption—echoed no fewer than 54 times by 15 delegates at the Convention—extended far beyond bribes and presents. To the Framers, corruption was fundamentally about the misuse of a position of public trust for any improper private benefit. It thus went to the heart of their conception of public service. As a leading historian recounts, "a corrupt political actor would either purposely ignore or forget the public good as he used the reins of power."[26] Because men and women are not angels, corruption could not be fully eradicated, even in virtuous officials, but "its power can be subdued with the right combination of culture and political rules."[27]

The Framers therefore erected safeguards against Presidential abuse. Most famously, they divided power among three branches of government that had the means and motive to balance each other. "Ambition," Madison reasoned, "must be made to counteract ambition."[28] In addition, the Framers subjected the President to election every four years and established the Electoral College (which,

[23] Quoted in *id.*, at 27.
[24] Arthur M. Schlesinger, Jr., *The Imperial Presidency* 415 (1973).
[25] Elizabeth B. Wydra & Brianne J. Gorod, *The First Magistrate in Foreign Pay,* THE NEW REPUBLIC, Nov. 11, 2019.
[26] Teachout, *Corruption in America,* at 48.
[27] *Id.,* at 47.
[28] James Madison, *Federalist No. 51,* at 356.

they hoped, would select virtuous, capable leaders and refuse to reelect corrupt or unpopular ones). Finally, the Framers imposed on the President a duty to faithfully execute the laws—and required him to accept that duty in a solemn oath.[29] To the Framers, the concept of faithful execution was profoundly important. It prohibited the President from taking official acts in bad faith or with corrupt intent, as well as acts beyond what the law authorized.[30]

A few Framers would have stopped there. This minority feared vesting any branch of government with the power to end a Presidency; as they saw it, even extreme Presidential wrongdoing could be managed in the normal course (mainly by periodic elections).

That view was decisively rejected. As Professor Raoul Berger writes, "the Framers were steeped in English history; the shades of despotic kings and conniving ministers marched before them."[31] Haunted by those lessons, and convening in the shadow of revolution, the Framers would not deny the Nation an escape from Presidents who deemed themselves above the law. So they turned to a mighty constitutional power, one that offered a peaceful and politically accountable method for ending an oppressive Presidency.

This was impeachment, a legal relic from the British past that over the preceding century had found a new lease on life in the North American colonies. First deployed in 1376—and wielded in fits and starts over the following 400 years—impeachment allowed Parliament to charge royal ministers with abuse, remove them from office, and imprison them. Over time, impeachment helped Parliament shift power away from royal absolutism and encouraged more politically accountable administration. In 1679, it was thus proclaimed in the House of Commons that impeachment was "the chief institution for the preservation of government."[32] That sentiment was echoed in the New World. Even as Parliamentary impeachment fell into disuse by the early 1700s, colonists in Maryland, Pennsylvania, and Massachusetts laid claim to this prerogative as part of their English birthright. During the revolution, ten states ratified constitutions allowing the impeachment of executive officials—and put that power to use in cases of corruption and abuse of power.[33] Unlike in Britain, though, American impeachment did not result in fines or jailtime. It simply removed officials from political power when their conduct required it.

Familiar with the use of impeachment to address lawless officials, the Framers offered a clear answer to Mason's question at the Constitutional Convention, "Shall any man be above justice"?[34] As Mason himself explained, "some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen."[35] Future Vice President Elbridge Gerry agreed, adding that impeachment repudiates the fallacy that our "chief magistrate could do no

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[29] U.S. CONST. Art. II, § 1, cl. 8.

[30] *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111–2121 (2019).

[31] Raoul Berger, *Impeachment: The Constitutional Problems* 4 (1974).

[32] *Id.*, at 1 n.2.

[33] Frank O. Bowman, III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* 72 (2019).

[34] 2 Farrand, *Records of the Federal Convention*, at 65–67.

[35] 1 Farrand, *Records of the Federal Convention*, at 66.

wrong."[36] Benjamin Franklin, in turn, made the case that impeachment is "the best way" to assess claims of serious wrongdoing by a President; without it, those accusations would fester unresolved and invite enduring conflict over Presidential malfeasance.[37]

Unlike in Britain, the President would answer personally—to Congress and thus to the Nation—for any serious wrongdoing. For that reason, as Hamilton later explained, the President would have no more resemblance to the British king than to "the Grand Seignior, to the khan of Tartary, [or] to the Man of the Seven Mountains."[38] Whereas "the person of the king of Great Britain is sacred and inviolable," the President could be "impeached, tried, and upon conviction . . . removed from office."[39]

Of course, the decision to subject the President to impeachment was not the end of the story. The Framers also had to specify how this would work in practice. After long and searching debate they made three crucial decisions, each of which sheds light on their understanding of impeachment's proper role in our constitutional system.

First, they limited the consequences of impeachment to "removal from Office" and "disqualification" from future officeholding.[40] To the extent the President's wrongful conduct also breaks the law, the Constitution expressly reserves criminal punishment for the ordinary processes of criminal law. In that respect, "the consequences of impeachment and conviction go just far enough, and no further than, to remove the threat posed to the Republic by an unfit official."[41] This speaks to the very nature of impeachment: it exists not to inflict personal punishment for past wrongdoing, but rather to protect against future Presidential misconduct that would endanger democracy and the rule of law.[42]

Second, the Framers vested the House with "the sole Power of Impeachment."[43] The House thus serves in a role analogous to a grand jury and prosecutor: it investigates the President's misconduct and decides whether to formally accuse him of impeachable acts. As James Iredell explained during debates over whether to ratify the Constitution, "this power is lodged in those who represent the great body of the people, because the occasion for its exercise will arise from acts of great injury to the community."[44] The Senate, in turn, holds "the sole Power to try all Impeachments."[45] When the Senate sits as a court of impeachment for the President, each Senator must swear a special oath, the Chief Justice of the United States presides, and conviction requires "the concurrence of two thirds of the Members present."[46] By designating Congress to accuse the President and conduct his trial, the Framers confirmed—in Hamilton's words—that impeachment concerns an

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[36] 2 Farrand, *Records of the Federal Convention,* at 66.
[37] James Madison, *Notes on Debates in the Federal Convention of 1787* 332 (1987).
[38] Alexander Hamilton, *Federalist No. 69,* at 444.
[39] *Id.*
[40] U.S. CONST. Art. I, § 43, cl. 7.
[41] John O. McGinnis, *Impeachment: The Structural Understanding,* 67 GEO. WASH. L. REV. 650, 650 (1999).
[42] *See* Tribe, *American Constitutional Law,* at 155.
[43] U.S. CONST. Art. I, § 2, cl. 5.
[44] 4 Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 113 (1861) (hereinafter "Debates in the Several State Conventions").
[45] U.S. CONST. Art. I, § 3, cl. 6.
[46] *Id.*

"abuse or violation of some public trust" with "injuries done immediately to the society itself."[47] Impeachment is reserved for offenses against our political system. It is therefore prosecuted and judged by Congress, speaking for the Nation.

Last, but not least, the Framers imposed a rule of wrongdoing. The President cannot be removed based on poor management, general incompetence, or unpopular policies. Instead, the question in any impeachment inquiry is whether the President has engaged in misconduct justifying an early end to his term in office: "Treason, Bribery, or other high Crimes and Misdemeanors."[48] This phrase had a particular legal meaning to the Framers. It is to that understanding, and to its application in prior Presidential impeachments, that we now turn.

IV. Impeachable Offenses

As careful students of history, the Framers knew that threats to democracy can take many forms. They feared would-be monarchs, but also warned against fake populists, charismatic demagogues, and corrupt kleptocrats. In describing the kind of leader who might menace the Nation, Hamilton offered an especially striking portrait:

> When a man unprincipled in private life[,] desperate in his fortune, bold in his temper . . . known to have scoffed in private at the principles of liberty
>
> —when such a man is seen to mount the hobby horse of popularity—to join in the cry of danger to liberty—to take every opportunity of embarrassing the General Government & bringing it under suspicion—to flatter and fall in with all the non sense [sic] of the zealots of the day—It may justly be suspected that his object is to throw things into confusion that he may ride the storm and direct the whirlwind.[49]

This prophesy echoed Hamilton's warning, in *Federalist No. 1*, that "of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants."[50]

The Framers thus intended impeachment to reach the full spectrum of Presidential misconduct that threatened the Constitution. They also intended our Constitution to endure for the ages. Because they could not anticipate and specifically prohibit every threat a President might someday pose, the Framers adopted a standard sufficiently general and flexible to meet unknown future circumstances. This standard was meant—as Mason put it—to capture all manner of "great and dangerous offenses" incompatible with the Constitution. When the President uses the powers of his high office to benefit himself, while injuring or ignoring the Amer-

[47] Alexander Hamilton, *Federalist No. 65,* at 426.
[48] U.S. CONST. Art. II, § 4.
[49] Alexander Hamilton, *"Objections and Answers respecting the Administration of the Government,"* Founders Online, National Archives.
[50] Alexander Hamilton, *Federalist No. 1,* at 91.

ican people he is oath-bound to serve, he has committed an impeachable offense.

Applying the tools of legal interpretation, as we do below, puts a sharper point on this definition of "high Crimes and Misdemeanors." It also confirms that the Framers principally aimed the impeachment power at a few core evils, each grounded in a unifying fear that a President might abandon his duty to faithfully execute the laws. Where the President engages in serious abuse of power, betrays the national interest through foreign entanglements, or corrupts his office or elections, he has undoubtedly committed "high Crimes and Misdemeanors" as understood by the Framers. Any one of these violations of the public trust is impeachable. When combined in a scheme to advance the President's personal interests while ignoring or injuring the Constitution, they state the strongest possible case for impeachment and removal from office.

A. Lessons From British and Early American History

As Hamilton recounted, Britain afforded "[t]he model from which the idea of [impeachment] has been borrowed."[51] That was manifestly true of the phrase "high Crimes and Misdemeanors." The Framers could have authorized impeachment for "crimes" or "serious crimes." Or they could have followed the practice of many American state constitutions and permitted impeachment for "maladministration" or "malpractice."[52] But they instead selected a "unique phrase used for centuries in English parliamentary impeachments."[53] To understand their choice requires a quick tour through history.

That tour offers two lessons. The first is that the phrase "high Crimes and Misdemeanors" was used *only* for parliamentary impeachments; it was never used in the ordinary criminal law.[54] Moreover, in the 400-year history of British impeachments, the House of Commons impeached many officials on grounds that did not involve any discernibly criminal conduct. Indeed, the House of Commons did so yet again just as the Framers gathered in Philadelphia. That same month, Edmund Burke—the celebrated champion of American liberty—brought twenty-two articles of impeachment against Warren Hastings, the Governor General of India. Burke charged Hastings with offenses including abuse of power, corruption, disregarding treaty obligations, and misconduct of local wars. Historians have confirmed that "none of the charges could fairly be classed as criminal conduct in any technical sense."[55] Aware of that fact, Burke accused Hastings of "[c]rimes, not against forms, but against those eternal laws of justice, which are our rule and our birthright: his offenses are not in formal, technical language, but in reality, in substance and effect, High Crimes and High Misdemeanors."[56]

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[51] Alexander Hamilton, *Federalist No. 65*, at 427.
[52] Bowman, *High Crimes and Misdemeanors*, at 65–72.
[53] Constitutional Grounds for Presidential Impeachment (1974), at 4.
[54] *See id.*
[55] Bowman, *High Crimes and Misdemeanors*, at 41.
[56] *Id.*

Burke's denunciation of Hastings points to the second lesson from British history: "high Crimes and Misdemeanors" were understood as offenses against the constitutional system itself. This is confirmed by use of the word "high," as well as Parliamentary practice. From 1376 to 1787, the House of Commons impeached officials on seven general grounds: (1) abuse of power; (2) betrayal of the nation's security and foreign policy; (3) corruption; (4) armed rebellion [a.k.a. treason]; (5) bribery; (6) neglect of duty; and (7) violating Parliament's constitutional prerogatives.[57] To the Framers and their contemporaries learned in the law, the phrase "high Crimes and Misdemeanors" would have called to mind these offenses against the body politic.

The same understanding prevailed on this side of the Atlantic. In the colonial period and under newly-ratified state constitutions, most impeachments targeted abuse of power, betrayal of the revolutionary cause, corruption, treason, and bribery.[58] Many Framers at the Constitutional Convention had participated in drafting their state constitutions, or in colonial and state removal proceedings, and were steeped in this outlook on impeachment. Further, the Framers knew well the Declaration of Independence, "whose bill of particulars against King George III modeled what [we would] now view as articles of impeachment."[59] That bill of particulars did not dwell on technicalities of criminal law, but rather charged the king with a "long train of abuses and usurpations," including misuse of power, efforts to obstruct and undermine elections, and violating individual rights.[60]

History thus teaches that "high Crimes and Misdemeanors" referred mainly to acts committed by public officials, using their power or privileges, that inflicted grave harm on society itself. Such great and dangerous offenses included treason, bribery, abuse of power, betrayal of the nation, and corruption of office. They were unified by a clear theme: officials who abused, abandoned, or sought personal benefit from their public trust—and who threatened the rule of law if left in power—faced impeachment and removal.

B. Treason and Bribery

For the briefest of moments at the Constitutional Convention, it appeared as though Presidential impeachment might be restricted to "treason, or bribery."[61] But when this suggestion reached the floor, Mason revolted. With undisguised alarm, he warned that such limited grounds for impeachment would miss "attempts to subvert the Constitution," as well as "many great and dangerous offenses."[62] Here he invoked the charges pending in Parliament against Hastings as a case warranting impeachment for reasons other than treason. To "extend the power of impeachments," Mason

[57] *Id.*, at 46; Berger, *Impeachment*, at 70.
[58] See Peter Charles Hoffer & N. E. H. Hull, *Impeachment in America, 1635–1805* 1–106 (1984).
[59] Laurence H. Tribe & Joshua Matz, *To End a Presidency: The Power of Impeachment* 7 (2018).
[60] The Declaration of Independence, *Thomas Jefferson, et al, July 4, 1776, Copy of Declaration of Independence,* Library of Congress.
[61] 2 Farrand, *Records of the Federal Convention,* at 550.
[62] Id.

initially suggested adding "or maladministration" after "treason, or bribery."[63] Madison, however, objected that "so vague a term will be equivalent to a tenure during the pleasure of the Senate."[64] In response, Mason substituted "*other* high Crimes and Misdemeanors."[65] Apparently pleased with Mason's compromise, the Convention accepted his proposal and moved on.

This discussion confirms that Presidential impeachment is warranted for all manner of great and dangerous offenses that subvert the Constitution. It also sheds helpful light on the nature of impeachable offenses: in identifying "*other* high Crimes and Misdemeanors," we can start with two that the Framers identified for us, "Treason" and "Bribery."

1. IMPEACHABLE TREASON

Under Article III of the Constitution, "treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[66] In other words, a person commits treason if he uses armed force in an attempt to overthrow the government, or if he knowingly gives aid and comfort to nations (or organizations) with which the United States is in a state of declared or open war. At the very heart of "Treason" is deliberate betrayal of the nation and its security. Such betrayal would not only be unforgivable, but would also confirm that the President remains a threat if allowed to remain in office. A President who has knowingly betrayed national security is a President who will do so again. He endangers our lives and those of our allies.

2. IMPEACHABLE BRIBERY

The essence of impeachable bribery is a government official's exploitation of his or her public duties for personal gain. To the Framers, it was received wisdom that nothing can be "a greater Temptation to Officers [than] to abuse their Power by Bribery and Extortion."[67] To guard against that risk, the Framers authorized the impeachment of a President who offers, solicits, or accepts something of personal value to influence his own official actions. By rendering such "Bribery" impeachable, the Framers sought to ensure that the Nation could expel a leader who would sell out the interests of "We the People" to achieve his own personal gain.

Unlike "Treason," which is defined in Article III, "Bribery" is not given an express definition in the Constitution. But as Justice Joseph Story explained, a "proper exposition of the nature and limits of this offense" can be found in the Anglo-American common law tradition known well to our Framers.[68] That understanding, in turn, can be refined by reference to the Constitution's text and the records of the Constitutional Convention.[69]

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[63] Id.
[64] Id
[65] Id.
[66] U.S. CONST. Art. III, 3, cl. 1.
[67] William Hawkins, *A Treatise of Pleas to the Crown, ch.* 67, §3 (1716).
[68] 2 Story, *Commentaries,* at 263; *see also* H.R. REP. No. 946, at 19 (1912).
[69] For example, while the English common law tradition principally addressed itself to *judicial* bribery, the Framers repeatedly made clear at the Constitutional Convention that they intended

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To start with common law: At the time of the Constitutional Convention, bribery was well understood in Anglo-American law to encompass *offering, soliciting*, or *accepting* bribes. In 1716, for example, William Hawkins defined bribery in an influential treatise as "the receiving or offering of any undue reward, by or to any person whatsoever . . . in order to incline him to do a thing against the known rules of honesty and integrity."[70] This description of the offense was echoed many times over the following decades. In a renowned bribery case involving the alleged solicitation of bribes, Lord Mansfield agreed that "[w]herever it is a crime to take, it is a crime to give: they are reciprocal."[71] Two years later, William Blackstone confirmed that "taking bribes is punished," just as bribery is punishable for "those who offer a bribe, though not taken."[72] Soliciting a bribe—even if it is not accepted—thus qualified as bribery at common law. Indeed, it was clear under the common law that "the *attempt* is a crime; it is complete on *his* side who *offers* it."[73]

The Framers adopted that principle into the Constitution. As Judge John Noonan explains, the drafting history of the Impeachment Clause demonstrates that "'Bribery' was read both actively and passively, including the chief magistrate bribing someone and being bribed."[74] Many scholars of Presidential impeachment have reached the same conclusion.[75] Impeachable "Bribery" thus covers—inter alia—the *offer*, *solicitation*, or *acceptance* of something of personal value by the President to influence his own official actions.

This conclusion draws still more support from a closely related part of the common law. In the late-17th century, "bribery" was a relatively new offense, and was understood as overlapping with the more ancient common law crime of "extortion."[76] "Extortion," in turn, was defined as the "abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more

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to subject the President to impeachment for bribery. They confirmed this intention in the Impeachment Clause, which authorizes the impeachment of "[t]he President, Vice President and all civil Officers of the United States" for "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST., Art. 2, §4. It is therefore proper to draw upon common law principles and to apply them to the office of the Presidency.

[70] Hawkins, *A Treatise of Pleas to the Crown*, ch. 67, §2 (1716).

[71] *Rex v. Vaughan*, 98 Eng. Rep. 308, 311 (K.B. 1769).

[72] William Blackstone, *Commentaries on the Laws of England, Vol. 2, Book 4, Ch. 10, §17* (1771).

[73] *Rex v. Vaughan*, 98 Eng. Rep. 308, 311 (K.B. 1769). American courts have subsequently repeated this precise formulation. *See, e.g., State v. Ellis*, 33 N.J.L. 102, 104 (N.J. Sup. Ct. 1868) ("The offence is complete when an offer or reward is made to influence the vote or action of the official."); *see also* William O. Russell, *A Treatise on Crimes and Misdemeanors* 239–240 (1st American Ed) (1824) ("The law abhors the least tendency to corruption; and up on the principle which has been already mentioned, of an attempt to commit even a misdemeanor, being itself a misdemeanor, (f) attempts to bribe, though unsuccessful, have in several cases been held to be criminal.").

[74] John T. Noonan, Jr., *Bribes: The Intellectual History of a Moral Idea*, 430 (1984).

[75] As Professor Bowman writes, bribery was "a common law crime that developed from a narrow beginning" to reach "giving, and offering to give, [any] improper rewards." Bowman, *High Crimes & Misdemeanors*, at 243; *see also, e.g.*, Tribe & Matz, *To End A Presidency*, at 33 ("The corrupt exercise of power in exchange for a personal benefit defines impeachable bribery. That's self-evidently true whenever the president receives bribes to act a certain way. But it's also true when the president offers bribes to other officials—for example, to a federal judge, a legislator, or a member of the Electoral College . . . In either case, the president is fully complicit in a grave degradation of power, and he can never again be trusted to act as a faithful public servant.").

[76] *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 839 (1988).

than is due, or before it is due."[77] Under this definition, both bribery *and* extortion occurred when an official used his public position to obtain private benefits to which he was not entitled. Conduct which qualified as bribery was therefore "routinely punished as common law extortion."[78] To the Framers, who would have seen bribery and extortion as virtually coextensive, when a President acted in his official capacity to offer, solicit, or accept an improper personal benefit, he committed "Bribery."[79]

Turning to the nature of the improper personal benefit: because officials can be corrupted in many ways, the benefit at issue in a bribe can be anything of subjective personal value to the President. This is not limited to money. Indeed, given their purposes, it would have made no sense for the Framers to confine "Bribery" to the offer, solicitation, or acceptance of money, and they expressed no desire to impose that restriction. To the contrary, in guarding against foreign efforts to subvert American officials, they confirmed their broad view of benefits that might cause corruption: a person who holds "any Office of Profit or Trust," such as the President, is forbidden from accepting "any present, Office or Tile, of any kind whatever, from . . . a foreign State."[80] An equally pragmatic (and capacious) view applies to the impeachable offense of "Bribery." This view is further anchored in the very same 17th and 18th century common law treatises that were well known to the Framers. Those authorities used broad language in defining what qualifies as a "thing of value" in the context of bribery: "any undue reward" or any "valuable consideration."[81]

To summarize, impeachable "Bribery" occurs when a President offers, solicits, or accepts something of personal value to influence his own official actions. Bribery is thus an especially egregious and specific example of a President abusing his power for private gain. As Blackstone explained, bribery is "the genius of despotic countries where the true principles of government are never understood"—and where "it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed."[82] In our democracy, the Framers understood that there is no place for Presidents who would abuse their power and betray the public trust through bribery.

Like "Treason," the offense of "Bribery" is thus aimed at a President who is a continuing threat to the Constitution. Someone who would willingly assist our enemies, or trade public power for personal favors, is the kind of person likely to break the rules again if they remain in office. But there is more: both "Treason" and "Bribery" are serious offenses with the capacity to corrupt constitutional governance and harm the Nation itself; both involve wrong-

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[77] Blackstone, *Commentaries,* Vol. 2, Book 4, Ch. 10, §22 (1771) (citing 1 Hawk. P. C. 170); *accord* Giles Jacob, A New Law-Dictionary 102 (1782) (defining "Extortion" as "an unlawful taking by an officer, &c. by colour of his office, of any money, or valuable thing, from a person where none at all is due, or not so much is due, or before it is due").

[78] Lindgren, *The Elusive Distinction,* 35 UCLA L. REV. at 839.

[79] For all the reasons given below in our discussion of the criminality issue, impeachable "Bribery" does not refer to the meaning of bribery under modern federal criminal statutes. *See also* Bowman, *High Crimes & Misdemeanors,* at 243–44; Tribe & Matz, *To End A Presidency,* at 31–33.

[80] U.S. CONST, art. I, §9, cl.8.

[81] Hawkins, *A Treatise of Pleas to the Crown,* ch. 67, §2 (1716).

[82] Blackstone, *Commentaries on the Laws of England,* Book 4, Ch. 10 "Of Offenses Against Public Justice" (1765–1770).

doing that reveals the President as a continuing threat if left in power; and both offenses are "plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books."[83] Looking to the Constitution's text and history—including the British, colonial, and early American traditions discussed earlier—these characteristics also define "other high Crimes and Misdemeanors."

C. Abuse, Betrayal & Corruption

With that understanding in place, the records of the Constitutional Convention offer even greater clarity. They demonstrate that the Framers principally intended impeachment for three forms of Presidential wrongdoing: serious abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. When the President engages in such misconduct, and does so in ways that are recognizably wrong and injurious to our political system, impeachment is warranted. That is proven not only by debates surrounding adoption of the Constitution, but also by the historical practice of the House in exercising the impeachment power.

1. ABUSE OF POWER

As Justice Robert Jackson wisely observed, "the purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."[84] Nowhere is that truer than in the Presidency. As the Framers created a formidable chief executive, they made clear that impeachment is justified for serious abuse of power. Edmund Randolph was explicit on this point. In explaining why the Constitution must authorize Presidential impeachment, he warned that "the Executive will have great opportunitys of abusing his power."[85] Madison, too, stated that impeachment is necessary because the President "might pervert his administration into a scheme of . . . oppression."[86] This theme echoed through the state ratifying conventions. Advocating that New York ratify the Constitution, Hamilton set the standard for impeachment at an "abuse or violation of some public trust."[87] In South Carolina, Charles Pinckney agreed that Presidents must be removed who "behave amiss or betray their public trust."[88] In Massachusetts, Reverend Samuel Stillman asked, "With such a prospect [of impeachment], who will dare to abuse the powers vested in him by the people."[89] Time and again, Americans who wrote and ratified the Constitution confirmed that Presidents may be impeached for abusing the power entrusted to them.

There are at least as many ways to abuse power as there are powers vested in the President. It would thus be an exercise in futility to attempt a list of every conceivable abuse constituting "high Crimes and Misdemeanors." That said, abuse of power was no

[83] Charles L. Black Jr. & Philip Bobbitt, *Impeachment: A Handbook, New Edition* 34 (2018).
[84] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 640 (Jackson, J., concurring).
[85] 2 Farrand, *Records of the Federal Convention,* at 67.
[86] *Id.,* at 65–66.
[87] Alexander Hamilton, *Federalist No. 65,* at 426.
[88] Berger, *Impeachment,* at 89.
[89] 2 Elliot, *Debates in the Several State Conventions,* at 169.

vague notion to the Framers and their contemporaries. It had a very particular meaning to them. Impeachable abuse of power can take two basic forms: (1) the exercise of official power in a way that, on its very face, grossly exceeds the President's constitutional authority or violates legal limits on that authority; and (2) the exercise of official power to obtain an improper personal benefit, while ignoring or injuring the national interest. In other words, the President may commit an impeachable abuse of power in two different ways: by engaging in forbidden acts, or by engaging in potentially permissible acts but for forbidden reasons (e.g., with the corrupt motive of obtaining a personal political benefit).

The first category involves conduct that is inherently and sharply inconsistent with the law—and that amounts to claims of monarchical prerogative. The generation that rebelled against King George III knew what absolute power looked like. The Framers had other ideas when they organized our government, and so they placed the chief executive within the bounds of law. That means the President may exercise only the powers expressly or impliedly vested in him by the Constitution, and he must also respect legal limits on the exercise of those powers (including the rights of Americans citizens). A President who refuses to abide these restrictions, thereby causing injury to society itself and engaging in recognizably wrongful conduct, may be subjected to impeachment for abuse of power.

That principle also covers conduct grossly inconsistent with and subversive of the separation of powers. The Framers knew that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."[90] To protect liberty, they wrote a Constitution that creates a system of checks and balances within the federal government. Some of those rules are expressly enumerated in our founding charter; others are implied from its structure or from the history of inter-branch relations.[91] When a President wields executive power in ways that usurp and destroy the prerogatives of Congress or the Judiciary, he exceeds the scope of his constitutional authority and violates limits on permissible conduct. Such abuses of power are therefore impeachable. That conclusion is further supported by the British origins of the phrase "high Crimes and Misdemeanors": Parliament repeatedly impeached ministers for "subvert[ing] its conception of proper constitutional order in favor of the 'arbitrary and tyrannical' government of ambitious monarchs and their grasping minions."[91]

The Supreme Court advanced similar logic in *Ex Parte Grossman*, which held the President can pardon officials who defy judicial orders and are held in criminal contempt of court.[93] This holding raised an obvious concern: what if the President used "successive pardons" to "deprive a court of power to enforce its orders"?[94] That could fatally weaken the Judiciary's role under Article III of the Constitution. On behalf of a unanimous Court, Chief Justice

[90] James Madison, *Federalist No. 47*, at 336.
[91] *See generally National Labor Relations Board v. Noel Canning, et al.*, 573 U.S. 513 (2014).
[92] Bowman, *High Crimes and Misdemeanors*, at 109.
[93] *Ex Parte Grossman*, 267 U.S. 87 (1925).
[94] *Id.*, at 121.

William Howard Taft—who had previously served as President—explained that "exceptional cases like this . . . would suggest a resort to impeachment."[95]

Two impeachment inquiries have involved claims that a President grossly violated the Constitution's separation of powers. The first was in 1868, when the House impeached President Andrew Johnson, who had succeeded President Abraham Lincoln following his assassination at Ford's Theatre. There, the articles approved by the House charged President Johnson with conduct forbidden by law: in firing the Secretary of War, he had allegedly violated the Tenure of Office Act, which restricted the President's power to remove cabinet members during the term of the President who had appointed them.[96] President Johnson was thus accused of a facial abuse of power. In the Senate, though, he was acquitted by a single vote largely because the Tenure of Office Act was viewed by many Senators as likely unconstitutional (a conclusion later adopted by the Supreme Court in an opinion by Chief Justice Taft, who described the Act as "invalid"[97]).

Just over 100 years later, this Committee accused a second chief executive of abusing his power. In a departure from prior Presidential practice—and in contravention of Article I of the Constitution—President Nixon had invoked specious claims of executive privilege to defy Congressional subpoenas served as part of an impeachment inquiry. His obstruction centered on tape recordings, papers, and memoranda relating to the Watergate break-in and its aftermath. As the House Judiciary Committee found, he had interposed "the powers of the presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to exercise the sole power of impeachment vested by the Constitution in the House of Representatives.[98] Put simply, President Nixon purported to control the exercise of powers that belonged solely to the House and not to him—including the power of inquiry that is vital to any Congressional judgments about impeachment. In so doing, President Nixon injured the constitutional plan: "Unless the defiance of the Committee's subpoenas under these circumstances is considered grounds for impeachment, it is difficult to conceive of any President acknowledging that he obligated to supply the relevant evidence necessary for Congress to exercise its constitutional responsibility in an impeachment proceeding."[99] The House Judiciary Committee therefore approved an article of impeachment against President Nixon for abuse of power in obstructing the House impeachment inquiry.

But that was only part of President Nixon's impeachable wrongdoing. The House Judiciary Committee also approved two additional articles of impeachment against him for abuse of power, one for obstruction of justice and the other for using Presidential power to target, harass, and surveil his political opponents. These articles

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[95] *Id.*

[96] *Articles of Impeachment Exhibited By The House Of Representatives Against Andrew Johnson, President of the United States*, 40th Cong. (1868).

[97] *Myers v. United States*, 272 U.S. 52, 108 (1926).

[98] *Committee Report on Nixon Articles of Impeachment (1974)*, at 188.

[99] *Id.*, at 213.

demonstrate the second way in which a President can abuse power: by acting with improper motives.

This understanding of impeachable abuse of power is rooted in the Constitution's text, which commands the President to "faithfully execute" the law. At minimum, that duty requires Presidents "to exercise their power only when it is motivated in the public interest rather than in their private self-interest."[100] A President can thus be removed for exercising power with a corrupt purpose, even if his action would otherwise be permissible. As Iredell explained at the North Carolina ratifying convention, "the president would be liable to impeachments [if] he had . . . acted from some corrupt motive or other," or if he was "willfully abusing his trust."[101] Madison made a similar point at Virginia's ratifying convention. There, he observed that the President could be impeached for abuse of the pardon power if there are "grounds to believe" he has used it to "shelter" persons with whom he is connected "in any suspicious manner."[102] Such a pardon would technically be within the President's authority under Article II of the Constitution, but it would rank as an impeachable abuse of power because it arose from the forbidden purpose of obstructing justice. To the Framers, it was dangerous for officials to exceed their constitutional power, or to transgress legal limits, but it was equally dangerous (perhaps more so) for officials to conceal corrupt or illegitimate objectives behind superficially valid acts.

Again, President Nixon's case is instructive. After individuals associated with his campaign committee committed crimes to promote his reelection, he used the full powers of his office as part of a scheme to obstruct justice. Among many other wrongful acts, President Nixon dangled pardons to influence key witnesses, told a senior aide to have the CIA stop an FBI investigation into Watergate, meddled with Justice Department immunity decisions, and conveyed secret law enforcement information to suspects. Even if some of this conduct was formally within the scope of President Nixon's authority as head of the Executive Branch, it was undertaken with illegitimate motives. The House Judiciary Committee therefore included it within an article of impeachment charging him with obstruction of justice. Indeed, following President Nixon's resignation and the discovery of additional evidence concerning obstruction, all eleven members of the Committee who had originally voted against that article joined a statement affirming that "we were prepared to vote for his impeachment on proposed Article I had he not resigned his office."[103] Of course, several decades later, obstruction of justice was also the basis for an article of impeachment against President Clinton, though his conduct did not involve official acts.[104]

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[100] Kent et al., *Faithful Execution*, at 2120, 2179.

[101] 1998 Background and History of Impeachment Hearing, at 49.

[102] 3 Elliott, *Debates in the Several State Conventions*, at 497–98.

[103] Committee Report on Nixon Articles of Impeachment (1974), at 361.

[104] In President Clinton's case, the House approved the article of impeachment for obstruction of justice. There was virtually no disagreement in those proceedings over whether obstructing justice can be impeachable; scholars, lawyers, and legislators on all sides of the dispute recognized that it can be. *See* Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV 1277, 1305–1307 (2018).

Publicly available evidence does not suggest that the Senate's acquittal of President Clinton was based on the view that obstruction of justice is not impeachable. Rather, Senators who voted for acquittal appear to have concluded that some of the factual charges were not supported

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Yet obstruction of justice did not exhaust President Nixon's corrupt abuse of power. He was also accused of manipulating federal agencies to injure his opponents, aid his friends, gain personal political benefits, and violate the constitutional rights of American citizens. For instance, President Nixon improperly attempted to cause income tax audits of his perceived political adversaries; directed the FBI and Secret Service to engage in targeted (and unlawful) surveillance; and formed a secret investigative unit within the White House—financed with campaign contributions—that utilized CIA resources in its illegal covert activities. In explaining this additional article of impeachment, the House Judiciary Committee stated that President Nixon's conduct was "undertaken for his personal political advantage and not in furtherance of any valid national policy objective."[105] His abuses of executive power were thus "seriously incompatible with our system of constitutional government" and warranted removal from office.[106]

With the benefit of hindsight, the House's decision to impeach President Johnson is best understood in a similar frame. Scholars now largely agree that President Johnson's impeachment was motivated not by violations of the Tenure of Office Act, but on his illegitimate use of power to undermine Reconstruction and subordinate African-Americans following the Civil War.[107] In that period, fundamental questions about the nature and future of the Union stood unanswered. Congress therefore passed a series of laws to "reconstruct the former Confederate states into political entities in which black Americans enjoyed constitutional protections."[108] This program, however, faced an unyielding enemy in President Johnson, who declared that "white men alone must manage the south."[109] Convinced that political control by African-Americans would cause a "relapse into barbarism," President Johnson vetoed civil rights laws; when Congress overrode him, he refused to enforce those laws.[110] The results were disastrous. As Annette Gordon-Reed writes, "it would be impossible to exaggerate how devastating it was to have a man who affirmatively hated black people in charge of the program that was designed to settle the terms of their existence in post-Civil War America."[111] Congress tried to compromise with the President, but to no avail. A majority of the House finally determined that President Johnson posed a clear and present danger to the Nation if allowed to remain in office.

Rather than directly target President Johnson's faithless execution of the laws, and his illegitimate motives in wielding power, the House resorted to charges based on the Tenure of Office Act. But in reality, "the shaky claims prosecuted by [the House] obscured a far more compelling basis for removal: that Johnson's virulent use

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and that, even if Presidential perjury and obstruction of justice might in some cases justify removal, the nature and circumstances of the conduct at issue (including its predominantly private character) rendered it insufficiently grave to warrant that remedy.

[105] Committee Report on Nixon Articles of Impeachment (1974), at 139.

[106] *Id.*

[107] *See generally* Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (1999).

[108] Jeffrey A. Engel, Jon Meacham, Timothy Naftali, & Peter Baker, *Impeachment: An American History* 48 (2018).

[109] *Id.* at 49.

[110] *Id.*

[111] *See* Annette Gordon-Reed, *Andrew Johnson: The American Presidents Series: the 17th President, 1865–1869* 12 (2011).

of executive power to sabotage Reconstruction posed a mortal threat to the nation—and to civil and political rights—as reconstituted after the Civil War . . . [T]he country was in the throes of a second founding. Yet Johnson abused the powers of his office and violated the Constitution to preserve institutions and practices that had nearly killed the Union. He could not be allowed to salt the earth as the Republic made itself anew."[112] Viewed from that perspective, the case for impeaching President Johnson rested on his use of power with illegitimate motives.

Pulling this all together, the Framers repeatedly confirmed that Presidents can be impeached for grave abuse of power. Where the President engages in acts forbidden by law, or acts with an improper motive, he has committed an abuse of power under the Constitution. Where those abuses inflict substantial harm on our political system and are recognizably wrong, they warrant his impeachment and removal.[113]

2. BETRAYAL OF THE NATIONAL INTEREST THROUGH FOREIGN ENTANGLEMENTS

It is not a coincidence that the Framers started with "Treason" in defining impeachable offenses. Betrayal was no abstraction to them. They had recently waged a war for independence in which some of their fellow citizens remained loyal to the enemy. The infamous traitor, Benedict Arnold, had defected to Britain less than a decade earlier. As they looked outward, the Framers saw kings scheming for power, promising fabulous wealth to spies and deserters. The United States could be enmeshed in such conspiracies: "Foreign powers," warned Elbridge Gerry, "will intermeddle in our affairs, and spare no expense to influence them."[114] The young Republic might not survive a President who schemed with other nations, entangling himself in secret deals that harmed our democracy.

That reality loomed over the impeachment debate in Philadelphia. Explaining why the Constitution required an impeachment option, Madison argued that a President "might betray his trust to foreign powers."[115] Gouverneur Morris, who had initially opposed allowing impeachment, was convinced: "no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay, without being able to guard against it by displacing him."[116] In the same vein, Franklin noted "the case of the Prince of Orange during the late war," in which a Dutch prince

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[112] Tribe & Matz, *To End a Presidency,* at 55.

[113] In President Clinton's case, it was debated whether Presidents can be impeached for acts that do not involve their official powers. *See Constitutional Grounds for Presidential Impeachment: Modern Precedents (1998),* at 6–7; Minority Staff of H. Comm. on the Judiciary, 105th Cong., Constitutional Grounds for Presidential Impeachment: Modern Precedents Minority Views 3–4, 8–9, 13–16 (Comm. Print 1998. Many scholars have taken the view that such private conduct may be impeachable in extraordinary circumstances, such as where it renders the President unviable as the leader of a democratic nation committed to the rule of law. *See, e.g.,* Tribe & Matz, *To End A Presidency,* at 10, 51; Black & Bobbitt, *Impeachment,* at 35. It also bears mention that some authority supports the view that Presidents might be subject to impeachment not for *abusing* their official powers, but by *failing* to use them and thus engaging in gross dereliction of official duty. *See, e.g.,* Tribe & Matz, *To End A Presidency,* at 50; Akhil Reed Amar, *America's Constitution: A Biography* 200 (2006); Black & Bobbitt, *Impeachment,* at 34.

[114] Wydra & Gorod, *The First Magistrate in Foreign Pay.*

[115] 2 Farrand, *Records of the Federal Convention,* at 65.

[116] *Id.,* at 68.

reneged on a military treaty with France.[117] Because there was no impeachment power or other method of inquiry, the prince's motives were secret and untested, drastically destabilizing Dutch politics and giving "birth to the most violent animosities and contentions."[118]

Impeachment for betrayal of the Nation's interest—and especially for betrayal of national security and foreign policy—was hardly exotic to the Framers. "The history of impeachment over the centuries shows an abiding awareness of how vulnerable the practice of foreign policy is to the misconduct of its makers."[119] Indeed, "impeachments on this ground were a constant of parliamentary practice," and "a string of British ministers and royal advisors were impeached for using their official powers contrary to the country's vital foreign interests."[120] Although the Framers did not intend impeachment for genuine, good faith disagreements between the President and Congress over matters of diplomacy, they were explicit that betrayal of the Nation through plots with foreign powers justified removal.

In particular, foreign interference in the American political system was among the gravest dangers feared by the Founders of our Nation and the Framers of our Constitution. For example, in a letter to Thomas Jefferson, John Adams wrote: "You are apprehensive of foreign Interference, Intrigue, Influence. So am I.—But, as often as Elections happen, the danger of foreign Influence recurs."[121] And in *Federalist No. 68*, Hamilton cautioned that the "most deadly adversaries of republican government" may come "chiefly from the desire in foreign powers to gain an improper ascendant in our councils.[122]

The President's important role in foreign affairs does not disable the House from evaluating whether he committed impeachable offenses in that field. This conclusion follows from the Impeachment Clause itself but is also supported by the Constitution's many grants of power to Congress addressing foreign affairs. Congress is empowered to "declare War," "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces."[123] Congress also has the power to set policy, define law, undertake oversight and investigations, create executive departments, and authorize government funding for a slew of national security matters.[124] In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate.[125] In those respects and many others, constitutional authority over the "conduct of the foreign relations of

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[117] *Id.*, at 67–68.

[118] *Id.*

[119] Frank O. Bowman, III, *Foreign Policy Has Always Been at the Heart of Impeachment,* Foreign Affairs (Nov 2019).

[120] Bowman, *High Crimes & Misdemeanors,* at 48, 106.

[121] *To Thomas Jefferson from John Adams, 6 December 1787,* National Archives, Founders Online.

[122] Alexander Hamilton, *Federalist No. 68,* at 441.

[123] U.S. Const., Art. I, §8.

[124] See Lawrence Friedman & Victor Hansen, *There Is No Constitutional Impediment to an Impeachment Inquiry that Concerns National Security,* Just Security, Oct. 1, 2019.

[125] U.S. Const., Art. II, §2, cl. 2.

our Government" is shared between "the Executive and Legislative [branches]."[126] Stated simply, "the Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[127] In these realms, as in many others, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[128]

Accordingly, where the President uses his foreign affairs power in ways that betray the national interest for his own benefit, or harm national security for equally corrupt reasons, he is subject to impeachment by the House. Any claims to the contrary would horrify the Framers. A President who perverts his role as chief diplomat to serve private rather than public ends has unquestionably engaged in "high Crimes and Misdemeanors"—especially if he invited, rather than opposed, foreign interference in our politics.

3. CORRUPTION OF OFFICE OR ELECTIONS

As should now be clear, the Framers feared corruption most of all, in its many and shifting manifestations. It was corruption that led to abuse of power and betrayal of the Nation. It was corruption that ruined empires, debased Britain, and menaced American freedom. The Framers saw no shortage of threats to the Republic, and fought valiantly to guard against them, "but the big fear underlying all the small fears was whether they'd be able to control corruption."[129] This was not just a matter of thwarting bribes and extortion; it was a far greater challenge. The Framers aimed to build a country in which officials would not use public power for personal benefits, disregarding the public good in pursuit of their own advancement. This virtuous principle applied with special force to the Presidency. As Madison emphasized, because the Presidency "was to be administered by a single man," his corruption "might be fatal to the Republic."[130]

The Framers therefore sought to ensure that "corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed."[131] Impeachment was central to that plan. At one point the Convention even provisionally adopted "treason, bribery, or corruption" as the standard for impeaching a President. And no fewer than four delegates—Morris, Madison, Mason, and Randolph—listed corruption as a reason why Presidents must be subject to removal. That understanding followed from history: "One invariable theme in [centuries] of Anglo-American impeachment practice has been corruption."[132] Treason posed a threat of swift national extinction, but the steady rot of corruption could destroy us from within. Presidents who succumbed to that instinct, serving themselves at the Nation's expense, forfeited the public trust.

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[126] *Medellin v. Texas,* 552 U.S. 491, 511 (2008).

[127] *Zivotofsky v. Kerry,* 135 S. Ct. 2076 (2015).

[128] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[129] Teachout, *Corruption in America,* at 57.

[130] Jonathan Elliot ed., *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia,* in 1787 341 (1861) (hereinafter "Debates on the Adoption of the Federal Constitution").

[131] 4 Elliot, *Debates in the Several State Conventions,* at 302.

[132] Bowman, *High Crimes & Misdemeanors,* at 277.

Impeachment was seen as especially necessary for Presidential conduct corrupting our system of political self-government. That concern arose in two contexts: the risk that Presidents would be swayed to prioritize foreign over domestic interests, and the risk that they would place their personal interest in re-election above our abiding commitment to democracy. The need for impeachment peaks where both threats converge at once.

First was the risk that foreign royals would use wealth, power, and titles to seduce American officials. This was not a hypothetical problem. Just a few years earlier, and consistent with European custom, King Louis XVI of France had bestowed on Benjamin Franklin (in his capacity as American emissary) a snuff box decorated with 408 diamonds "of a beautiful water."[133] Magnificent gifts like this one could unconsciously shape how American officials carried out their duties. To guard against that peril, the Framers adopted the Foreign Emoluments Clause, which prohibits Presidents—among other federal officials—from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" unless Congress affirmatively consents.[134]

The theory of the Foreign Emoluments Clause, based in history and the Framers' lived experience, "is that a federal officeholder who receives something of value from a foreign power can be imperceptibly induced to compromise what the Constitution insists be his exclusive loyalty: the best interest of the United States of America."[135] Rather than scrutinize every exchange for potential bribery, the Framers simply banned officials from receiving anything of value from foreign powers. Although this rule sweeps broadly, the Framers deemed it central to American self-governance. Speaking in Philadelphia, Charles Pinckney "urged the necessity of preserving foreign ministers, and other officers of the United States, independent of external influence."[136] At Virginia's convention, Randolph elaborated that "[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any *emoluments* from foreign states."[137] Randolph added that if the President violated the Clause, "he may be impeached."[138]

The Framers also anticipated impeachment if a President placed his own interest in retaining power above the national interest in free and fair elections. Several delegates were explicit on this point when the topic arose at the Constitutional Convention. By then, the Framers had created the Electoral College. They were "satisfied with it as a tool for picking presidents but feared that individual electors might be intimidated or corrupted."[139] Impeachment was their answer. William Davie led off the discussion, warning that a President who abused his office might seek to escape accountability by interfering with elections, sparing "no efforts or means whatever to get himself re-elected."[140] Rendering the President "impeachable

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[133] Teachout, *Corruption in America,* at 1.
[134] U.S. CONST., Art. I, § 9, cl. 8.
[135] Norman L. Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, And Application To Donald J. Trump,* BROOKINGS, Dec. 16, 2016.
[136] Elliot, *Debates on the Adoption of the Federal Constitution* at 467.
[137] 3 Elliot, *Debates in the Several State Conventions,* at 465.
[138] *Id.,* at 201.
[139] Tribe & Matz, *To End A Presidency,* at 4.
[140] 2 Farrand, *Records of the Federal Convention,* at 64.

whilst in office" was thus "an essential security for the good behaviour of the Executive."[141] The Constitution thereby ensured that corrupt Presidents could not avoid justice by subverting elections and remaining in office.

George Mason built on Davie's position, directing attention to the Electoral College: "One objection agst. Electors was the danger of their being corrupted by the Candidates; & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?"[142] Mason's concern was straightforward. He feared that Presidents would win election by improperly influencing members of the Electoral College (*e.g.,* by offering them bribes). If evidence of such wrongdoing came to light, it would be unthinkable to leave the President in office—especially given that he might seek to avoid punishment by corrupting the next election. In that circumstance, Mason concluded, the President should face impeachment and removal under the Constitution. Notably, Mason was not alone in this view. Speaking just a short while later, Gouverneur Morris emphatically agreed that "the Executive ought therefore to be impeachable for . . . Corrupting his electors."[143] Although not articulated expressly, it is reasonable to infer that the concerns raised by Davie, Mason, and Morris were especially salient because the Constitution—until ratification of the Twenty-Second Amendment in 1951—did not limit the number of terms a President could serve in office.[144] A President who twisted or sabotaged the electoral process could rule for life, much like a king.

This commitment to impeaching Presidents who corruptly interfered with elections was anchored in lessons from British rule. As historian Gordon Wood writes, "[t]hroughout the eighteenth century the Crown had slyly avoided the blunt and clumsy instrument of prerogative, and instead had resorted to influencing the electoral process and the representatives in Parliament in order to gain its treacherous ends."[145] In his influential *Second Treatise on Civil Government*, John Locke blasted such manipulation, warning that it serves to "cut up the government by the roots, and poison the very fountain of public security."[146] Channeling Locke, American revolutionaries vehemently objected to King George III's electoral shenanigans; ultimately, they listed several election-related charges in the Declaration of Independence. Those who wrote our Constitution knew, and feared, that the chief executive could threaten their plan of government by corrupting elections.

The true nature of this threat is its rejection of government by "We the People," who would "ordain and establish" the Constitution.[147] The beating heart of the Framers' project was a commitment to popular sovereignty. At a time when "democratic self- gov-

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[141] *Id.*
[142] *Id.*, at 65.
[143] *Id.*, at 69.
[144] U.S. CONST. Amend. XXII.
[145] Wood, *The Creation of the American Republic,* at 33.
[146] John Locke, *Second Treatise of Government* 112 (C.B. Macpherson ed. 1980).
[147] U.S. CONST. Pmbl.

ernment existed almost nowhere on earth,"[148] the Framers imagined a society "where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people."[149] That would be possible only if "those entrusted with [power] should be kept in dependence on the people."[150] This is why the President, and Members of Congress, must stand before the public for re-election on fixed terms. It is through free and fair elections that the American people protect their right to self-government, a right unforgivably denied to many as the Constitution was ratified in 1788 but now extended to all American citizens over the age of 18. When the President concludes that elections threaten his continued grasp on power, and therefore seeks to corrupt or interfere with them, he denies the very premise of our constitutional system. The American people choose their leaders; a President who wields power to destroy opponents or manipulate elections is a President who rejects democracy itself.

In sum, the Framers discussed the risk that Presidents would improperly conspire with foreign nations; they also discussed the risk that Presidents would place their interest in retaining power above the integrity of our elections. Both offenses, in their view, called for impeachment. That is doubly true where a President conspires with a foreign power to manipulate elections to his benefit—conduct that betrays American self-governance and joins the Framers' worst nightmares into a single impeachable offense.[151]

D. Conclusion

Writing in 1833, Justice Joseph Story remarked that impeachable offenses "are of so various and complex a character" that it would be "almost absurd" to attempt a comprehensive list.[152] Consistent with Justice Story's wisdom, "the House has never, in any impeachment inquiry or proceeding, adopted either a comprehensive definition of 'high Crimes and Misdemeanors' or a catalog of offenses that are impeachable."[153] Rather than engage in abstract, advisory or hypothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers, the House has awaited a "full development of the facts."[154] Only then has it weighed articles of impeachment.

In making such judgments, however, each Member of the House has sworn an oath to follow the Constitution, which sets forth a

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[148] Amar, *America's Constitution,* at 8.

[149] 4 Elliot, *Debates in the Several State Conventions,* at 331; *see also* James Madison, *Federalist No. 14.*

[150] James Madison, *Federalist No. 37,* at 268.

[151] 151 In fact, the Framers were so concerned about improper foreign influence in the Presidency that they restricted that position to natural born citizens. U.S. Const. Art. II, § 1. As one commentator observed, "Considering the greatness of the trust, and that this department is the ultimately efficient power in government, these restrictions will not appear altogether useless or unimportant. As the President is required to be a native citizen of the United States, ambitious foreigners cannot intrigue for the office, and the qualification of birth cuts off all those inducements from abroad to corruption, negotiation, and war, which have frequently and fatally harassed the elective monarchies of Germany and Poland, as well as the pontificate at Rome." 1 James Kent, *Commentaries on American Law* 255 (1826).

[152] 2 Story, *Commentaries,* at 264.

[153] 1998 Background and History of Impeachment Hearing, at 2.

[154] Constitutional Grounds for Presidential Impeachment (1974), at 2.

legal standard governing when Presidential conduct warrants impeachment. That standard has three main parts.

First, as Mason explained just before proposing "high Crimes and Misdemeanors" as the basis for impeachment, the President's conduct must constitute a "great and dangerous offense" against the Nation. The Constitution itself offers us two examples: "Treason" and "Bribery." In identifying "other" offenses of the same kind, we are guided by Parliamentary and early American practice, records from the Constitutional Convention and state ratifying conventions, and insights from the Constitution's text and structure. These sources prove that "high Crimes and Misdemeanors" involve misconduct that subverts and injures constitutional governance. Core instances of such misconduct by the President are serious abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. The Framers included an impeachment power in the Constitution specifically to protect the Nation against these forms of wrongdoing.

Past practice of the House further illuminates the idea of a "great and dangerous offense." President Nixon's case is most helpful. There, as explained above, the House Judiciary Committee approved articles of impeachment on three grounds: (1) obstruction of an ongoing law enforcement investigation into unlawful acts by his presidential re-election campaign; (2) abuse of power in targeting his perceived political opponents; and (3) improper obstruction of a Congressional impeachment inquiry into his obstruction of justice and abuse of power. These articles of impeachment, moreover, were not confined to discrete acts. Each of them accused President Nixon of undertaking a course of conduct or scheme, and each of them supported that accusation with a list of discrete acts alleged to comprise and demonstrate the overarching impeachable offense.[155] Thus, where a President engages in a course of conduct involving serious abuse of power, betrayal of the national interest through foreign entanglements, or corruption of office and elections, impeachment is justified.

Second, impeachable offenses involve wrongdoing that reveal the President as a continuing threat to the constitutional system if he is allowed to remain in a position of political power. As Iredell remarked, impeachment does not exist for a "mistake."[156] That is why the Framers rejected "maladministration" as a basis for impeachment, and it is why "high Crimes and Misdemeanors" are not simply unwise, unpopular, or unconsidered acts. Like "Treason" and "Bribery," they reflect decisions by the President to embark on a course of conduct' or to act with motives—inconsistent with our plan of government. Where the President makes such a decision, Congress may remove him to protect the Constitution, especially if there is reason to think that he will commit additional offenses if left in office (*e.g.,* statements by the President that he did nothing

[155] Consistent with that understanding, one scholar remarks that it is the "repetition, pattern, [and] coherence" of official misconduct that "tend to establish the requisite degree of seriousness warranting the removal of a president from office." John Labovitz, *Presidential Impeachment* 129–130 (1978); *see also, e.g.,* McGinnis, *Impeachment,* at 659 ("[I]t has been well understood that the official's course of conduct as a whole should be the subject of judgment."); *Debate On Articles Of Impeachment: Hearing before the H. Comm. On the Judiciary,* 93rd Cong. (1974) (hereinafter "Debate on Nixon Articles of Impeachment (1974)") (addressing the issue repeatedly from July 24, 1974 to July 30, 1974).

[156] Sunstein, *Impeachment,* at 59.

wrong and would do it all again). This forward-looking perspective follows from the limited consequences of impeachment. The question is not whether to punish the President; that decision is left to the criminal justice system. Instead, the ultimate question is whether to bring an early end to his four-year electoral term. In his analysis of the Constitution, Alexis de Tocqueville thus saw impeachment as "a preventive measure" which exists "to deprive the ill-disposed citizen of an authority which he has used amiss, and to prevent him from ever acquiring it again."[157] That is particularly true when the President injures the Nation's interests as part of a scheme to obtain personal benefits; someone so corrupt will again act corruptly.

Finally, "high Crimes and Misdemeanors" involve conduct that is recognizably wrong to a reasonable person. This principle resolves a potential tension in the Constitution. On the one hand, the Framers adopted a standard for impeachment that could stand the test of time. On the other hand, the structure of the Constitution—including its prohibition on bills of attainder and the Ex Post Facto Clause—implies that impeachable offenses should not come as a surprise.[158] Impeachment is aimed at Presidents who believe they are above the law, and who believe their own interests transcend those of the country and Constitution. Of course, as President Nixon proved, Presidents who have committed impeachable offenses may seek to confuse the public through manufactured ambiguity and crafty pretexts. That does not shield their misconduct from impeachment. The principle of a plainly wrong act is not about academic technicalities; it simply focuses impeachment on conduct that any person of honor would recognize as wrong under the Constitution.

To summarize: Like "Treason" and "Bribery," and consistent with the offenses historically considered by Parliament to warrant impeachment, "high Crimes and Misdemeanors" are great and dangerous offenses that injure the constitutional system. Such offenses are defined mainly by abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. In addition, impeachable offenses arise from wrongdoing that reveals the President as a continuing threat to the constitutional system if allowed to remain in a position of power. Finally, they involve conduct that reasonable officials would consider to be wrong in our democracy.

Within these parameters, and guided by fidelity to the Constitution, the House must judge whether the President's misconduct is grave enough to require impeachment. That step must never be taken lightly. It is a momentous act, justified only when the President's full course of conduct, assessed without favor or prejudice, is "seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office."[159] When that standard is met, however, the Constitution calls the House to action. In such cases, a decision *not* to impeach has grave consequences and sets

[157] Alexis de Tocqueville, *Democracy in America and Two Essays on America* 124–30 (Gerald E. Bevan, tr., 2003).

[158] *See* Black & Bobbitt, *Impeachment,* at 29–30.

[159] Constitutional Grounds for Presidential Impeachment (1974), at 27.

an ominous precedent. As Representative William Cohen remarked in President Nixon's case, "It also has been said to me that even if Mr. Nixon did commit these offenses, every other President . . . has engaged in some of the same conduct, at least to some degree, but the answer I think is that democracy, that solid rock of our system, may be eroded away by degree and its survival will be determined by the degree to which we will tolerate those silent and subtle subversions that absorb it slowly into the rule of a few."[160]

V. The Criminality Issue

It is occasionally suggested that Presidents can be impeached only if they have committed crimes. That position was rejected in President Nixon's case, and then rejected again in President Clinton's, and should be rejected once more.[161]

Offenses against the Constitution are different in kind than offenses against the criminal code. Some crimes, like jaywalking, are not impeachable. Some impeachable offenses, like abuse of power, are not crimes. Some misconduct may offend both the Constitution and the criminal law. Impeachment and criminality must therefore be assessed separately—even though the commission of crimes may strengthen a case for removal.

A "great preponderance of authority" confirms that impeachable offenses are "not confined to criminal conduct."[162] This authority includes nearly every legal scholar to have studied the issue, as well as multiple Supreme Court justices who addressed it in public remarks.[163] More important, the House itself has long treated "high Crimes and Misdemeanors" as distinct from crimes subject to indictment. That understanding follows from the Constitution's history, text, and structure, and reflects the absurdities and practical difficulties that would result were the impeachment power confined to indictable crimes.

A. History

"If there is one point established by . . . Anglo-American impeachment practice, it is that the phrase 'high Crimes and Misdemeanors' is not limited to indictable crimes."[164] As recounted above, impeachment was conceived in Parliament as a method for controlling abusive royal ministers. Consistent with that purpose,

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[160] Debate on Nixon Articles of Impeachment (1974), at 79.

[161] Report of the Committee on the Judiciary, House of Representatives, Together with Additional, Minority, and Dissenting Views to Accompany H. Res. 611, Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105–830 (1998) (hereinafter "Committee Report on Clinton Articles of Impeachment (1998)"), at 64 ("Although, the actions of President Clinton do not have to rise to the level of violating the federal statute regarding obstruction of justice in order to justify impeachment."). Constitutional Grounds for Presidential Impeachment (1974), at 22–26.

[162] Berger, *Impeachment*, at 58.

[163] *See, e.g.*, Black & Bobbitt, *Impeachment*, at 33–37, 559–565; Bowman, *High Crimes and Misdemeanors*, at 244–252; Tribe & Matz, *To End A Presidency*, at 43–53; Sunstein, *Impeachment*, at 117–134; Amar, *America's Constitution*, at 200–20; Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 Harv. J. L. & Pub. Pol'y 619, 620 (1998–1999); Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 105–113 (3rd ed. 2019); Berger, *Impeachment*, at 58 (collecting sources); Merrill Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 Kan. City. L. Rev. 3, 22 (1938) (quoting Chief Justice Taft); Charles E. Hughes, *The Supreme Court of the United States* 19 (1928) (Chief Justice Hughes); 2 Henry Adams, *History of the United States of America* 223 (1962).

[164] Bowman, *High Crimes and Misdemeanors*, at 44.

it was not confined to accusations of criminal wrongdoing. Instead, it was applied to "many offenses, not easily definable by law," such as abuse of power, betrayal of national security, corruption, neglect of duty, and violating Parliament's constitutional prerogatives.[165] Many officials were impeached for non-criminal wrongs against the British system of government; notable examples include the Duke of Buckingham (1626), the Earl of Strafford (1640), the Lord Mayor of London (1642), the Earl of Orford and others (1701), and Governor General Warren Hastings (1787).[166] Across centuries of use, the phrase "high Crimes and Misdemeanors" thus assumed a "special historical meaning different from the ordinary meaning of the terms 'crimes' and 'misdemeanors.'"[167] It became a term of art confined to impeachments, without "relation to whether an indictment would lie in the particular circumstances."[168]

That understanding extended to North America. Here, the impeachment process was used to address diverse misconduct by public officials, ranging from abuse of power and corruption to bribery and betrayal of the revolutionary cause.[169] As one scholar reports, "American colonists before the Revolution, and American states after the Revolution but before 1787, all impeached officials for non-criminal conduct."[170]

At the Constitutional Convention itself, no delegate linked impeachment to the technicalities of criminal law. On the contrary, the Framers invoked an array of broad, adaptable terms as grounds for removal—and when the standard was temporarily narrowed to "treason, or bribery," Mason objected that it must reach "great and dangerous" offenses against the Constitution. Here he cited Burke's call to impeach Hastings, whose acts were not crimes, but instead violated "those eternal laws of justice, which are our rule and our birthright."[171] To the Framers, impeachment was about abuse of power, betrayal of nation, and corruption of office and elections. It was meant to guard against these threats in every manifestation—known and unknown—that might someday afflict the Republic.

That view appeared repeatedly in the state ratifying debates. Delegates opined that the President could be impeached if he "deviates from his duty" or "dare[s] to abuse the power vested in him by the people."[172] In North Carolina, Iredell noted that "the person convicted [in an impeachment proceeding] is further liable to a trial at common law, and may receive such common-law punishment . . . *if it be punishable by that law*" (emphasis added).[173] Similarly, in Virginia, George Nicholas declared that the President "will be absolutely disqualified [by impeachment] to hold any place of profit, honor, or trust, and liable to further punishment *if he has committed such high crimes as are punishable at common law*" (emphasis added).[174] The premise underlying this statement—and

[165] 2 Story, *Commentaries*, at 268.
[166] *See* Bowman, *High Crimes and Misdemeanors*, at 44–47.
[167] Constitutional Grounds for Presidential Impeachment (1974), at 22.
[168] Berger, *Impeachment*, at 62.
[169] Hoffer & Hull, *Impeachment in America*, at 1–95.
[170] Bowman, *High Crimes and Misdemeanors*, at 244.
[171] Edmund Burke, *Reflections on the Revolution in France and Other Writings* 409 (2015).
[172] Quoted in Michael J. Gerhardt, *Impeachment: What Everyone Needs to Know* 60 (2018).
[173] Constitutional Grounds for Presidential Impeachment (1974), at 23.
[174] *Id.*

Iredell's—is that some Presidential "high Crimes and Misdemeanors" were *not* punishable by common law.

Leading minds echoed that position through the Nation's early years. In *Federalist No. 65*, Hamilton argued that impeachable offenses are defined by "the abuse or violation of some public trust."[175] In that sense, he reasoned, "they are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[176] A few years later, Constitutional Convention delegate James Wilson reiterated Hamilton's point: "Impeachments, and offences and offenders impeachable, come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different objects."[177] Writing in 1829, William Rawle described impeachment as reserved for "men whose treachery to their country might be productive of the most serious disasters."[178] Four years later, Justice Story emphasized that impeachable offenses ordinarily "must be examined upon very broad and comprehensive principles of public policy and duty."[179]

The American experience with impeachment confirms that lesson. A strong majority of the impeachments voted by the House since 1789 have included "one or more allegations that did not charge a violation of criminal law."[180] Several officials, moreover, have subsequently been convicted on non-criminal articles of impeachment. For example, Judge Robert Archbald was removed in 1912 for non-criminal speculation in coal properties, and Judge Halsted Ritter was removed in 1936 for the non-criminal offense of bringing his court "into scandal and disrepute."[181] As House Judiciary Committee Chairman Hatton Sumners stated explicitly during Judge Ritter's case, "We do not assume the responsibility . . . of proving that the respondent is guilty of a crime as that term is known to criminal jurisprudence."[182] The House has also applied that principle in Presidential impeachments. Although President Nixon resigned before the House could consider the articles of impeachment against him, the Judiciary Committee's allegations encompassed many non-criminal acts.[183] And in President Clinton's case, the Judiciary Committee report accompanying articles of impeachment to the House floor stated that "the actions of President Clinton do not have to rise to the level of violating the federal statute regarding obstruction of justice in order to justify impeachment."[184]

History thus affords exceptionally clear and consistent evidence that impeachable "high Crimes and Misdemeanors" are not limited to violations of the criminal code.

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[175] Alexander Hamilton, *Federalist No. 65*, at 426.

[176] *Id.*

[177] James Wilson, *Collected Works of James Wilson* 736 (Kermit L. Hall and Mark David Hall ed. 2007).

[178] William Rawle, *A View of the Constitution of the United States of America* 218 (1829).

[179] 2 Story, *Commentaries*, at 234.

[180] Constitutional Grounds for Presidential Impeachment (1974), at 24.

[181] REPORT OF THE COMMITTEE ON THE JUDICIARY, ROBERT W. ARCHBALD, JUDGE OF THE UNITED STATES COMMERCE COURT, H.R. REP. NO. 62–946 (1912); H. Res. 422, 74th Cong. (1936) (enacted).

[182] Berger, *Impeachment*, at 57.

[183] *See generally* Committee Report on Nixon Articles of Impeachment (1974).

[184] Committee Report on Clinton Articles of Impeachment (1998), at 66.

B. Constitutional Text and Structure

That historical conclusion is bolstered by the text and structure of the Constitution. Starting with the text, we must assign weight to use of the word "high." That is true not only because "high Crimes and Misdemeanors" was a term of art with its own history, but also because "high" connotes an offense against the State itself. Thus, "high" treason in Britain was an offense against the Crown, whereas "petit" treason was the betrayal of a superior by a subordinate. The Framers were aware of this when they incorporated "high" as a limitation on impeachable offenses, signifying only constitutional wrongs.

That choice is particularly noteworthy because the Framers elsewhere referred to "crimes," "offenses," and "punishment" without using this modifier—and so we know "the Framers knew how to denote ordinary crimes when they wanted to do so."[185] For example, the Fifth Amendment requires a grand jury indictment in cases of a "capital, or otherwise infamous crime."[186] The Currency Clause, in turn, empowers Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States."[187] The Law of Nations Clause authorizes Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[188] And the Interstate Extradition Clause provides that "[a] Person charged in any State with Treason, Felony, or other Crime" who flees from one state to another shall be returned upon request.[189] Only in the Impeachment Clause did the Framers refer to "high" crimes. By adding "high" in this one provision, while excluding it everywhere else, the Framers plainly sought to capture a distinct category of offenses against the state.[190]

That interpretation is also most consistent with the structure of the Constitution. This is true in three respects.

First, as explained above, the Impeachment Clause restricts the consequences of impeachment to removal from office and disqualification from future federal officeholding. That speaks to the fundamental character of impeachment. In Justice Story's words, it is "a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity."[191] Given that impeachment exists to address threats to the political system, applies

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[185] Tribe & Matz, *To End a Presidency*, at 40.

[186] U.S. Const. Amend. V, § 1.

[187] U.S. Const. Art. I, § 8, cl. 6.

[188] U.S. Const. Art. I, § 8, cl. 10.

[189] U.S. Const. Art. IV, § 2, cl. 2.

[190] One might object that since "Treason" and "Bribery" are indictable crimes, the same must be true of "other high Crimes and Misdemeanors." But this argument would fail. Although it is true that "other high Crimes and Misdemeanors" share certain characteristics with "Treason" and "Bribery," the key question is *which* characteristics unify them. And for all the reasons given here, it is wrong to conclude that criminality is the unifying principle of impeachable offenses. Moreover, if the Framers' goal was to limit impeachment to violations of the criminal law, it is passing strange that the Impeachment Clause uses a term of art—"high Crimes and Misdemeanors"—that appears neither in the criminal law itself nor anywhere else in the Constitution (which *does* elsewhere refer both to "crimes" and "offenses"). It would have been easy to write a provision limiting the impeachment power to serious crimes, and yet the Framers pointedly did not do so.

[191] 2 Story, *Commentaries*, at 272.

only to political officials, and responds only by stripping political power, it makes sense to infer that "high Crimes and Misdemeanors" are offenses against the political system rather than indictable crimes.

Second, if impeachment were restricted to crimes, impeachment proceedings would be restricted to deciding whether the President had committed a specific crime. Such a view would create tension between the Impeachment Clause and other provisions of the Constitution. For example, the Double Jeopardy Clause protects against being tried twice for the same crime. Yet the Impeachment Clause contemplates that an official, once removed, can still face "Indictment, Trial, Judgment and Punishment, according to Law." It would be strange if the Framers forbade double jeopardy, yet allowed the President to be tried in court for crimes after Congress convicted him in a proceeding that necessarily (and exclusively) decided whether he was guilty of those very same crimes.[192] That oddity is avoided only if impeachment proceedings are seen "in noncriminal terms," which occurs if impeachable offenses are understood as distinct from indictable crimes.[193]

Finally, the Constitution was originally understood as limiting Congress's power to create a federal law of crimes. It would therefore be strange if the Framers restricted impeachment to criminal offenses, while denying Congress the ability to criminalize many forms of Presidential wrongdoing that they repeatedly described as requiring impeachment.

To set this point in context, the Constitution expressly authorizes Congress to criminalize only a handful of wrongful acts: "counterfeiting, piracy, 'offenses against the law of nations,' and crimes that occur within the military."[194] Early Congresses did not tread far beyond that core category of crimes, and the Supreme Court took a narrow view of federal power to pass criminal statutes. It was not until much later—in the twentieth century—that the Supreme Court came to recognize that Congress could enact a broader criminal code. As a result, early federal criminal statutes "covered relatively few categories of offenses."[195] Many federal offenses were punishable only when committed "in special places, and within peculiar jurisdictions, as, for instance, on the high seas, or in forts, navy-yards, and arsenals ceded to the United States."[196]

The Framers were not fools. They authorized impeachment for a reason, and that reason would have been gutted if impeachment were limited to crimes. It is possible, of course, that the Framers thought the common law, rather than federal statutes, would define criminal offenses. That is undeniably true of "Bribery": the Framers saw this impeachable offense as defined by the common law of bribery as it was understood at the time. But it is hard to believe that the Framers saw common law as the sole measure of impeachment. For one thing, the common law did not address itself to many wrongs that could be committed uniquely by the President in our republican system. The common law would thus have been

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[192] See Berger, *Impeachment*, at 80.
[193] *Id.*
[194] William J. Stuntz, *The Collapse of American Criminal Justice* 99 (2011).
[195] Tribe & Matz, *To End a Presidency*, at 48.
[196] 2 Story, *Commentaries*, at 264.

an extremely ineffective tool for achieving the Framers' stated purposes in authorizing impeachment. Moreover, the Supreme Court held in 1812 that there is no federal common law of crimes.[197] If the Framers thought only crimes could be impeachable offenses, and hoped common law would describe the relevant crimes, then they made a tragic mistake—and the Supreme Court's 1812 decision ruined their plans for the impeachment power.[198]

Rather than assume the Framers wrote a Constitution full of empty words and internal contradictions, it makes far more sense to agree with Hamilton that impeachment is not about crimes. The better view, which the House itself has long embraced, confirms that impeachment targets offenses against the Constitution that threaten democracy.[199]

C. The Purpose of Impeachment

The distinction between impeachable offenses and crimes also follows from the fundamentally different purposes that impeachment and the criminal law serve. At bottom, the impeachment power is "the first step in a remedial process—removal from office and possible disqualification from holding future office."[200] It exists "primarily to maintain constitutional government" and is addressed exclusively to abuses perpetrated by federal officeholders.[201] It is through impeachment proceedings that "a President is called to account for abusing powers that only a President possesses."[202] The criminal law, in contrast, "sets a general standard of conduct that all must follow."[203] It applies to all persons within its compass and ordinarily defines acts forbidden to everyone; in our legal tradition, the criminal code "does not address itself [expressly] to the abuses of presidential power."[204]

Indeed, "the early Congresses—filled with Framers—didn't even *try* to create a body of criminal law addressing many of the specific abuses that motivated adoption of the Impeachment Clause in the first place."[205] This partly reflects "a tacit judgment that it [did] not deem such a code necessary."[206] But that is not the only explanation. The Constitution vests "the sole Power of Impeachment" in the House; it is therefore doubtful that a statute enacted by one Congress (and signed by the President) could bind the House at a later date.[207] Moreover, any such effort to define and criminalize all impeachable offenses would quickly run aground. As Justice

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[197] *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812).

[198] In the alternative, one might say that "high Crimes and Misdemeanors" occur when the president violates *state* criminal law. But that turns federalism upside down: invoking state criminal codes to supply the content of the federal Impeachment Clause would grant states a bizarre and incongruous primacy in the constitutional system. Especially given that impeachment is crucial to checks and balances *within* the federal government, it would be nonsensical for states to effectively control when this power may be wielded by Congress.

[199] Article III of the Constitution provides that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Article III, §2. This provision recognizes that impeachable conduct *may* entail criminal conduct—and clarifies that in such cases, the trial of an impeachment still occurs in the Senate, not by jury.

[200] Constitutional Grounds for Presidential Impeachment (1974), at 24.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] Tribe & Matz, *To End a Presidency*, at 48–49.

[206] Berger, *Impeachment*, at 78.

[207] Committee Report on Nixon Articles of Impeachment (1974), at 25.

Story cautioned, impeachable offenses "are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."[208]

There are also general characteristics of the criminal law that make criminality inappropriate as an essential element of impeachable conduct. For example, criminal law traditionally forbids acts, rather than failures to act, yet impeachable conduct "may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution."[209] In addition, unlike a criminal case focused on very specific conduct and nothing else, a Congressional impeachment proceeding may properly consider a broader course of conduct or scheme that tends to subvert constitutional government.[210] Finally, the application of general criminal statutes to the President may raise constitutional issues that have no bearing on an impeachment proceeding, the whole point of which is to assess whether the President has abused power in ways requiring his removal from office.[211]

For all these reasons, "[a] requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable."[212]

D. The Limited Relevance of Criminality

As demonstrated, the President can commit "high Crimes and Misdemeanors" without violating federal criminal law. "To conclude otherwise would be to ignore the original meaning, purpose and history of the impeachment power; to subvert the constitutional design of a system of checks and balances; and to leave the nation unnecessarily vulnerable to abusive government officials."[213] Yet the criminal law is not irrelevant. "Our criminal codes identify many terrible acts that would surely warrant removal if committed by the chief executive."[214] Moreover, the President is sworn to uphold the law. If he violates it while grossly abusing power, betraying the national interest through foreign entanglements, or corrupting his office or elections, that weighs in favor of impeaching him.

VI. Addressing Fallacies About Impeachment

Since the House began its impeachment inquiry, a number of inaccurate claims have circulated about how impeachment works under the Constitution. To assist the Committee in its deliberations, we address six issues of potential relevance: (1) the law that governs House procedures for impeachment; (2) the law that gov-

[208] 2 Story, *Commentaries*, at 264.
[209] Constitutional Grounds for Presidential Impeachment (1974), at 24
[210] *Id.*, at 24–25.
[211] Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Vol. II at 170–181 (March 2019).
[212] Constitutional Grounds for Presidential Impeachment (1974), at 25.
[213] Keith E. Whittington, *Must Impeachable Offenses Be Violations of the Criminal Code?*, LAWFARE, Nov. 19, 2019.
[214] Tribe & Matz, *To End a Presidency*, at 51.

erns the evaluation of evidence, including where the President orders defiance of House subpoenas; (3) whether the President can be impeached for the abuse of his executive powers; (4) whether the President's claims regarding his motives must be accepted at face value; (5) whether the President is immune from impeachment if he attempts an impeachable offense but is caught before he completes it; and (6) whether it is preferable to await the next election when a President has sought to corrupt that very same election.

A. The Impeachment Process

It has been argued that the House has not followed proper procedure in its ongoing impeachment inquiry. We have considered those arguments and find that they lack merit.

To start with first principles, the Constitution vests the House with the "sole Power of Impeachment."[215] It also vests the House with the sole power to "determine the Rules of its Proceedings."[216] These provisions authorize the House to investigate potential "high Crimes and Misdemeanors," to draft and debate articles of impeachment, and to establish whatever rules and procedures it deems proper for those proceedings.[217]

When the House wields its constitutional impeachment power, it functions like a grand jury or prosecutor: its job is to figure out what the President did and why he did it, and then to decide whether the President should be charged with impeachable offenses. If the House approves any articles of impeachment, the President is entitled to present a full defense at trial in the Senate. It is thus in the Senate, and *not* in the House, where the President might properly raise certain protections associated with trials.[218]

Starting in May 2019, the Judiciary Committee undertook an inquiry to determine whether to recommend articles of impeachment against President Trump. The Committee subsequently confirmed, many times, that it was engaged in an impeachment investigation. On June 11, 2019, the full House approved a resolution confirming that the Judiciary Committee possessed "any and all necessary authority under Article I of the Constitution" to continue its investigation; an accompanying Rules Committee Report emphasized that the "purposes" of the inquiry included "whether to approve 'articles of impeachment with respect to the President.'"[219] As the Judiciary Committee continued with its investigation, evidence came to light that President Trump may have grossly abused the power of his office in dealings with Ukraine. At that point, the House Permanent Select Committee on Intelligence, and the House Oversight and Foreign Affairs Committees, began investigating potential of-

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[215] U.S. Const. Art. I, §2, cl. 5.

[216] U.S. Const. Art. I, §5, cl. 2.

[217] *See* David Pozen, *Risk-Risk Tradeoffs in Presidential Impeachment*, Take Care, Jun. 6, 2018 ("Both chambers of Congress enjoy vast discretion in how they run impeachment proceedings.").

[218] *Contra* Letter from Pat A. Cipollone, Counsel to the President, to Hon. Nancy Pelosi, Speaker of the House, Hon. Adam B. Schiff, Chairman, H. Perm. Select Comm. on Intelligence, Hon. Eliot L. Engel, Chairman, H. Foreign Affairs Comm., and Hon. Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform (Oct. 8, 2019); *Leader McCarthy Speech Against the Sham Impeachment Vote*, Kevin McCarthy, Republican Leader, Oct. 31, 2019.

[219] H. Res. 430, 116th Cong. (2019); Authorizing the Committee on the Judiciary to Initiate or Intervene in Judicial Proceedings to Enforce Certain Subpoenas and for Other Purposes To Accompany H. Res. 430, H.R. Rep. 116–108, at 21 (2019).

fenses relating to Ukraine. On September 24, 2019, House Speaker Nancy Pelosi directed these committees, as well as the House Judiciary, Financial Services and Ways and Means Committees, to "proceed with their investigations under that umbrella of [an] impeachment inquiry."[220] Finally, on October 31, 2019, the full House approved H. Res. 660, which directed the six committees "to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America."[221]

This approach to investigating potential impeachable offenses adheres to the Constitution, the Rules of the House, and historical practice.[222] House Committees have frequently initiated and made substantial progress in impeachment inquiries before the full House considered a resolution formalizing their efforts. That is what happened in the cases of Presidents Johnson and Nixon, as well as in many judicial impeachments (which are subject to the same constitutional provisions).[223] Indeed, numerous judges have been impeached without any prior vote of the full House authorizing a formal inquiry.[224] It is both customary and sensible for committees—particularly the Judiciary Committee—to investigate evidence of serious wrongdoing before decisions are made by the full House.

In such investigations, the House's initial task is to gather evidence. As is true of virtually any competent investigation, whether governmental or private, the House has historically conducted substantial parts of the initial fact-finding process out of public view to ensure more accurate and complete testimony.[225] In President Nixon's case, for instance, only the Judiciary Committee Chairman, Ranking Member, and Committee staff had access to material gathered by the impeachment inquiry in its first several months.[226] There was no need for similar secrecy in President Clinton's case, but only because the House did not engage in a substantial investigation of its own; it largely adopted the facts set forth in a report by Independent Counsel Kenneth Starr, who had spent years investigating behind closed doors.[227]

When grand juries and prosecutors investigate wrongdoing by private citizens and public officials, the person under investigation has no right to participate in the examination of witnesses and evidence that precedes a decision on whether to file charges. That is

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[220] *Pelosi Remarks Announcing Impeachment Inquiry*, Sep. 24 2019, NANCY PELOSI, SPEAKER OF THE HOUSE.

[221] H. Res. 660, 116th Cong. (2019).

[222] *See generally* H.R. REP. NO. 116–108.

[223] *See* 3 Hinds Ch. 75 § 2400 (President Johnson); 3 Deschler Ch. 14, § 15 (President Nixon); H.R. REP. NO. 101–36, at 13–16 (1988) (Judge Walter Nixon); H.R. Res. 320, 100th Cong. (Judge Alcee Hastings); H.R. REP. NO. 99–688, at 3–7 (1986) (Judge Harry Claiborne); 3 Deschler Ch. 14 § 5 (Justice William O. Douglas).

[224] *See* H. Res. 87, 101st Cong. (1989) (impeaching Judge Nixon); H. Res. 499, 100th Cong. (1988) (impeaching Judge Hastings); H. Res. 461, 99th Cong. (1986) (impeaching Judge Claiborne).

[225] *See* Tribe & Matz, *To End A Presidency*, at 92 ("Historically, the House and Senate have investigated through their committees . . . Critically, although they may involve occasional public hearings, most investigatory activities must be kept secret until they have nearly reached an end.").

[226] Debate on Nixon Articles of Impeachment (1974), at 86.

[227] Committee Report on Clinton Articles of Impeachment (1998), at 300.

black letter law under the Constitution, even in serious criminal cases that threaten loss of life or liberty. The same is true in impeachment proceedings, which threaten only loss of public office. Accordingly, even if the full panoply of rights held by criminal defendants hypothetically were to apply in the non-criminal setting of impeachment, the President has no "due process right" to interfere with, or inject himself into, the House's fact-finding efforts. If the House ultimately approves articles of impeachment, any rights that the President might hold are properly secured at trial in the Senate, where he may be afforded an opportunity to present an evidentiary defense and test the strength of the House's case.

Although under no constitutional or other legal obligation to do so, but consistent with historical practice, the full House approved a resolution—H. Res. 660—that ensures transparency, allows effective public hearings, and provides the President with opportunities to participate. The privileges afforded under H. Res. 660 are even greater than those provided to Presidents Nixon and Clinton. They allow the President or his counsel to participate in House Judiciary Committee proceedings by presenting their case, responding to evidence, submitting requests for additional evidence, attending hearings (including non-public hearings), objecting to testimony, and cross-examining witnesses. In addition, H. Res. 660 gave the minority the same rights to question witnesses that the majority has, as has been true at every step of this impeachment proceeding.

The impeachment inquiry concerning President Trump has thus complied in every respect with the Constitution, the Rules of the House, and historic practice of the House.

B. Evidentiary Considerations and Presidential Obstruction

The House impeachment inquiry has compiled substantial direct and circumstantial evidence bearing on the question whether President Trump may have committed impeachable offenses. President Trump has objected that some of this evidence comes from witnesses lacking first-hand knowledge of his conduct. In the same breath, though, he has ordered witnesses with first-hand knowledge to defy House subpoenas for testimony and documents—and has done so in a categorical, unqualified manner. President Trump's evidentiary challenges are misplaced as a matter of constitutional law and common sense.

The Constitution does not prescribe rules of evidence for impeachment proceedings in the House or Senate. Consistent with its sole powers to impeach and to determine the rules of its proceedings, the House is constitutionally authorized to consider any evidence that it believes may illuminate the issues before it. At this fact-finding stage, "no technical 'rules of evidence' apply," and "[e]vidence may come from investigations by committee staff, from grand jury matter made available to the committee, or from any other source."[228] The House may thus "subpoena documents, call witnesses, hold hearings, make legal determinations, and undertake any other activities necessary to fulfill [its] mandate."[229] When deciding whether to bring charges against the President, the

[228] Black & Bobbitt, *Impeachment*, at 9.
[229] Tribe & Matz, *To End a Presidency*, at 129.

House is not restricted by the Constitution in deciding which evidence to consider or how much weight to afford it.

Indeed, were rules of evidence to apply anywhere, it would be in the Senate, where impeachments are tried. Yet the Senate does not treat the law of evidence as controlling at such trials.[230] As one scholar explains, "rules of evidence were elaborated primarily to hold *juries* within narrow limits. They have no place in the impeachment process. Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to 'hearsay' evidence; they cannot be sequestered and kept away from newspapers, like a jury."[231]

Instead of adopting abstract or inflexible rules, the House and Senate have long relied on their common sense and good judgment to assess evidence in impeachments. When evidence is relevant but there is reason to question its reliability, those considerations affect how much weight the evidence is given, not whether it can be considered at all.

Here, the factual record is formidable and includes many forms of highly reliable evidence. It goes without saying, however, that the record might be more expansive if the House had full access to the documents and testimony it has lawfully subpoenaed from government officials. The reason the House lacks such access is an unprecedented decision by President Trump to order a total blockade of the House impeachment inquiry.

In contrast, the conduct of prior chief executives illustrates the lengths to which they complied with impeachment inquiries. As President James Polk conceded, the "power of the House" in cases of impeachment "would penetrate into the most secret recesses of the Executive Departments," and "could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge."[232] Decades later, when the House conducted an impeachment inquiry into President Johnson, it interviewed cabinet officials and Presidential aides, obtained extensive records, and heard testimony about conversations with Presidential advisors.[233] Presidents Grover Cleveland, Ulysses S. Grant, and Theodore Roosevelt each confirmed that Congress could obtain otherwise-shielded executive branch documents in an impeachment inquiry.[234] And in President Nixon's case—where the President's refusal to turn over tapes led to an article of impeachment—the House Judiciary Committee still heard testimony from his chief of staff (H.R. Haldeman), special counsel

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[230] Gerhardt, *The Federal Impeachment Process*, at 42 ("[E]ven if the Senate could agree on such rules for impeachment trials, they would not be enforceable against or binding on individual senators, each of whom traditionally has had the discretion in an impeachment trial to follow any evidentiary standards he or she sees fit.").

[231] Black & Bobbitt, *Impeachment*, at 18. *see also* Gerhardt, The *Federal Impeachment Process*, at 117 ("Both state and federal courts require special rules of evidence to make trials more efficient and fair or to keep certain evidence away from a jury, whose members might not understand or appreciate its reliability, credibility, or potentially prejudicial effect.").

[232] H.R. Jour., 29th Cong., 1st Sess., 693 (1846); 4 James D. Richardson ed., *Messages and Papers of Presidents* 434–35 (1896).

[233] *See generally* Reports of Committees, Impeachment Investigation, 40th Cong., 1st Sess. 183–578 (1867).

[234] *See* Jonathan David Shaub, *The Executive's Privilege: Rethinking the President's Power to Withhold Information,* LAWFARE (Oct. 31, 2019).

(Charles Colson), personal attorney (Herbert Kalmbach), and deputy assistant (Alexander Butterfield). Indeed, with respect to the Senate Watergate investigation, President Nixon stated: "All members of the White House Staff will appear voluntarily when requested by the committee. They will testify under oath, and they will answer fully all proper questions."[235] President Trump's categorical blockade of the House impeachment inquiry has no analogue in the history of the Republic.[236]

As a matter of constitutional law, the House may properly conclude that a President's obstruction of Congress is relevant to assessing the evidentiary record in an impeachment inquiry. For centuries, courts have recognized that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."[237] Moreover, it is routine for courts to draw adverse inferences where a party acts in bad faith to conceal or destroy evidence or preclude witnesses from testifying.[238] Although those judicial rules do not control here, they are instructive in confirming that parties who interfere with fact-finding processes can suffer an evidentiary sanction. Consistent with that commonsense principle, the House has informed the administration that defiance of subpoenas at the direction or behest of the President or the White House could justify an adverse inference against the President. In light of President Trump's unlawful and unqualified direction that governmental officials violate their legal responsibilities to Congress, as well as his pattern of witness intimidation, the House may reasonably infer that their testimony would be harmful to the President—or at least not exculpatory. If this evidence were helpful to the President, he would not break the law to keep it hidden, nor would he engage in public acts of harassment to scare other witnesses who might consider coming forward.[239]

One noteworthy result of President Trump's obstruction is that the House has been improperly denied testimony by certain government officials who could have offered first-hand accounts of relevant events. That does not leave the House at sea: there is still robust evidence, both documentary and testimonial, bearing di-

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[235] *The President's Remarks Announcing Developments and Procedures to be Followed in Connection with the Investigation,* THE WHITE HOUSE Apr. 17, 1973. President Nixon initially stated that members of his "personal staff" would "decline a request for a formal appearance before a committee of the Congress," but reversed course approximately one month later., *Statement by the President, Executive Privilege* THE WHITE HOUSE Mar. 12, 1973.

[236] *See* Tribe & Matz, *To End A Presidency,* at 129 ("Congress's investigatory powers are at their zenith in the realm of impeachment. They should ordinarily overcome almost any claim of executive privilege asserted by the president.").

[237] *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.,* 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also Interstate Circuit v. United States,* 306 U.S. 208, 225–26 (1939); *Rossi v. United States,* 289 U.S. 89, 91–92 (1933); *Mammoth Oil Co. v. United States,* 275 U.S. 13, 51–53 (1927); *Burdine v. Johnson,* 262 F.3d 336, 366 (5th Cir. 2001) (collecting cases); *United States v. Pitts,* 918 F.2d 197, 199 (D.C. Cir. 1990) (holding that, where a missing witness has "so much to offer that one would expect [him] to take the stand," and where "one of the parties had some special ability to produce him," the law allows an inference "that the missing witness would have given testimony damaging to that party").

[238] *See, e.g., Bracey v. Grondin,* 712 F.3d 1012, 1018 (7th Cir. 2013); *Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 107 (2d Cir. 2002); *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.,* 692 F.2d 214, 217 (1st Cir. 1982); *see also 2 Jones on Evidence* § 13:12 & § 13:15 (7th ed. 2019 update).

[239] If the President could order all Executive Branch agencies and officials to defy House impeachment inquiries, and if the House were unable to draw any inferences from that order with respect to the President's alleged misconduct, the impeachment power would be a nullity in many cases where it plainly should apply.

rectly on his conduct and motives. But especially given the President's obstruction of Congress, the House is free under the Constitution to consider reliable testimony from officials who overheard—or later learned about—statements by the President to witnesses whose testimony he has blocked.[240]

To summarize: just like grand jurors and prosecutors, the House is not subject to rigid evidentiary rules in deciding whether to approve articles. Members of the House are trusted to fairly weigh evidence in an impeachment inquiry. Where the President illegally seeks to obstruct such an inquiry, the House is free to infer that evidence blocked from its view is harmful to the President's position. It is also free to rely on other relevant, reliable evidence that illuminates the ultimate factual issues. The President has no right to defy an impeachment inquiry and then demand that the House turn back because it lacks the very evidence he unlawfully concealed. If anything, such conduct confirms that the President sees himself as above the law and may therefore bear on the question of impeachment.[241]

C. Abuse of Presidential Power is Impeachable

The powers of the President are immense, but they are not absolute. That principle applies to the current President just as it applied to his predecessors. President Nixon erred in asserting that "when the President does it, that means it is not illegal."[242] And President Trump was equally mistaken when he declared he had "the right to do whatever I want as president."[243] The Constitution always matches power with constraint. That is true even of powers vested exclusively in the chief executive. If those powers are invoked for corrupt reasons, or in an abusive manner that threatens harm to constitutional governance, the President is subject to impeachment for "high Crimes and Misdemeanors."

This conclusion follows from the Constitution's history and structure. As explained above, the Framers created a formidable Presidency, which they entrusted with "the executive Power" and a host

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[240] Under the Federal Rules of Evidence—which, again, are not applicable in Congressional impeachment proceedings—judges sometimes limit witnesses from offering testimony about someone else's out-of-court statements. They do so for reasons respecting reliability and with an eye to the unique risks presented by unsophisticated juries that may not properly evaluate evidence. But because hearsay evidence can in fact be highly reliable, and because it is "often relevant," *Tome v. United States*, 513 U.S. 150, 163 (1995), there are many circumstances in which such testimony is admissible in federal judicial proceedings. Those circumstances include, but are by no means limited to, recorded recollections, records of regularly conducted activity, records of a public office, excited utterances, and statements against penal or other interest. Moreover, where hearsay evidence bears indicia of reliability, it is regularly used in many other profoundly important contexts, including federal sentencing and immigration proceedings. *See, e.g., Arrazabal v. Barr*, 929 F.3d 451, 462 (7th Cir. 2019); *United States v. Mitrovic*, 890 F.3d 1217, 1222 (11th Cir. 2018); *United States v. Woods*, 596 F.3d 445, 448 (8th Cir. 2010). Ironically, although some have complained that hearings related to the Ukraine affair initially occurred out of public sight, one reason for that measure was to ensure the integrity of witness testimony. Where multiple witnesses testified to the same point in separate, confidential hearings, that factual conclusion may be seen as corroborated and more highly reliable.

[241] The President has advanced numerous arguments to justify his across-the-board defiance of the House impeachment inquiry. These arguments lack merit. As this Committee recognized when it impeached President Nixon for obstruction of Congress, the impeachment power includes a corresponding power of inquiry that allows the House to investigate the Executive Branch and compel compliance with its subpoenas.

[242] *Document: Transcript of David Frost's Interview with Richard Nixon, 1977*, Teaching American History.

[243] Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him "The Right To Do Whatever I Want"*, The Washington Post, July 23, 2019.

of additional authorities. For example, the President alone can confer pardons, sign or veto legislation, recognize foreign nations, serve as Commander in Chief of the armed forces, and appoint or remove principal officers. The President also plays a significant (though not exclusive) role in conducting diplomacy, supervising law enforcement, and protecting national security. These are daunting powers for any one person to wield. If put to nefarious ends, they could wreak havoc on our democracy.

The Framers knew this. Fearful of tyranny in all its forms, they saw impeachment as a necessary guarantee that Presidents could be held accountable for how they exercised executive power. Many delegates at the Constitutional Convention and state ratifying conventions made this point, including Madison, Randolph, Pinckney, Stillman, and Iredell. Their view was widely shared. As James Wilson observed in Pennsylvania, "we have a responsibility in the person of our President"—who is "possessed of power"—since "far from being above the laws," he is "amenable to them . . . by impeachment."[244] Hamilton struck the same note. In *Federalist No. 70,* he remarked that the Constitution affords Americans the "greatest securities they can have for the faithful exercise of any delegated power," including the power to discover "with facility and clearness" any misconduct requiring "removal from office."[245] Impeachment and executive power were thus closely intertwined in the Framers' constitutional plan: the President could be vested with awesome power, but only because he faced removal from office for grave abuses.

The architects of checks and balances meant no exceptions to this rule. There is no power in the Constitution that a President can exercise immune from legal consequence. The existence of any such unchecked and uncheckable authority in the federal government would offend the bedrock principle that nobody is above the law. It would also upend the reasons why our Framers wrote impeachment into the Constitution: the *exact* forms of Presidential wrongdoing that they discussed in Philadelphia could be committed through use of executive powers, and it is unthinkable that the Framers left the Nation defenseless in such cases. In fact, when questioned by Mason in Virginia, Madison expressly stated that the President could be impeached for abuse of his exclusive pardon power—a view that the Supreme Court later echoed in *Ex Parte Grossman.*[246] By the same token, a President could surely be impeached for treason if he fired the Attorney General to thwart the unmasking of an enemy spy in wartime; he could impeached for bribery if he offered to divulge state secrets to a foreign nation, conditioned on regulatory exemptions for his family business.[247]

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[244] 2 Elliot, *Debates in the Several State Conventions*, at 480.

[245] Alexander Hamilton, *Federalist No. 70*, at 456.

[246] 3 Elliot, *Debates in the Several State Conventions*, 497–98; *Ex Parte Grossman,* 267 U.S. at 121. Madison adhered to this understanding after the Constitution was ratified. In 1789, he explained to his colleagues in the House that the President would be subject to impeachment for abuse of the removal power—which is held by the President alone—"if he suffers [his appointees] to perpetrate with impunity High crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses." 1 *Annals of Congress* 387 (1789).

[247] Scholars have offered many examples and hypotheticals that they see as illustrative of this point. *See* Bowman, *High Crimes and Misdemeanors*, at 258; Black & Bobbitt, *Impeachment*, 115; Hemel & Posner, *Presidential Obstruction of Justice*, at 1297; Tribe & Matz, *To End a Presidency*, at 61.

Simply put, "the fact that a power is exclusive to the executive—that is, the president alone may exercise it—does not mean the power cannot be exercised in clear bad faith, and that Congress cannot look into or act upon knowledge of that abuse."[248]

The rule that abuse of power can lead to removal encompasses all three branches. The Impeachment Clause applies to "The President, Vice President and all civil Officers of the United States," including Article III judges.[249] There is no exception to impeachment for misconduct by federal judges involving the exercise of their official powers. In fact, the opposite is true: "If in the exercise of the powers with which they are clothed as ministers of justice, [judges] act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment."[250] Similarly, if Members of Congress exercise legislative power abusively or with corrupt purposes, they may be removed pursuant to the Expulsion Clause, which permits each house of Congress to expel a member "with the Concurrence of two thirds."[251] *Nobody* is entitled to wield power under the Constitution if they ignore or betray the Nation's interests to advance their own.

This is confirmed by past practice of the House. President Nixon's case directly illustrates the point. As head of the Executive Branch, he had the power to appoint and remove law enforcement officials, to issue pardons, and to oversee the White House, IRS, CIA, and FBI. But he did not have any warrant to exercise these Presidential powers abusively or corruptly. When he did so, the House Judiciary Committee properly approved multiple articles of impeachment against him. Several decades later, the House impeached President Clinton. There, the House witnessed substantial disagreement over whether the President could be impeached for obstruction of justice that did *not* involve using the powers of his office. But it was universally presumed—and never seriously questioned—that the President could be impeached for obstruction of justice that *did* involve abuse of those powers.[252] That view rested firmly on a correct understanding of the Constitution.

Our Constitution rejects pretensions to monarchy and binds Presidents with law. A President who sees no limit on his power manifestly threatens the Republic.

D. Presidential Pretexts Need Not Be Accepted at Face Value

Impeachable offenses are often defined by corrupt intent. To repeat Iredell, "the president would be liable to impeachments [if] he had acted from some corrupt motive or other," or if he was "willfully abusing his trust."[253] Consistent with that teaching, both "Treason" and "Bribery" require proof that the President acted with an improper state of mind, as would many other offenses described as impeachable at the Constitutional Convention. Contrary to occa-

[248] Jane Chong, *Impeachment-Proof? The President's Unconstitutional Abuse of His Constitutional Powers*, LAWFARE, Jan. 2 2018.
[249] U.S. CONST. Art. II, 4.
[250] *Bradley v. Fisher* 80 U.S. 335, 350 (1871).
[251] U.S. CONST. Art. I, § 5, cl. 2.
[252] *See generally* 1998 Background and History of Impeachment Hearing.
[253] *Id.*, at 49.

sional suggestions that the House may not examine the President's intent, an impeachment inquiry may therefore require the House to determine *why* the President acted the way he did. Understanding the President's motives may clarify whether he used power in forbidden ways, whether he was faithless in executing the laws, and whether he poses a continuing danger to the Nation if allowed to remain in office.

When the House probes a President's state of mind, its mandate is to find the facts. There is no room for legal fictions or lawyerly tricks that distort a clear assessment of the President's thinking. That means evaluating the President's explanations to see if they ring true. The question is not whether the President's conduct *could have* resulted from innocent motives. It is whether the President's *real reasons*—the ones actually in his mind as he exercised power—were legitimate. The Framers designed impeachment to root out abuse and corruption, even when a President masks improper intent with cover stories.

Accordingly, where the President's explanation of his motives defies common sense, or is otherwise unbelievable, the House is free to reject the pretextual explanation and to conclude that the President's false account of his thinking is itself evidence that he acted with corrupt motives. The President's honesty in an impeachment inquiry, or his lack thereof, can thus shed light on the underlying issue.[254]

President Nixon's case highlights the point. In its discussion of an article of impeachment for abuse of power, the House Judiciary Committee concluded that he had "falsely used a national security pretext" to direct executive agencies to engage in unlawful electronic surveillance investigations, thus violating "the constitutional rights of citizens."[255] In its discussion of the same article, the Committee also found that President Nixon had interfered with the Justice Department by ordering it to cease investigating a crime "on the pretext that it involved national security."[256] President Nixon's repeated claim that he had acted to protect national security could not be squared with the facts, and so the Committee rejected it in approving articles of impeachment against him for targeting political opponents.

Testing whether someone has falsely characterized their motives requires careful attention to the facts. In rare cases, "some implausible, fantastic, and silly explanations could be found to be pretextual without any further evidence."[257] Sifting truth from fiction, though, usually demands a thorough review of the record—and a healthy dose of common sense. The question is whether "the evidence tells a story that does not match the explanation."[258]

Because courts assess motive all the time, they have identified warning signs that an explanation may be untrustworthy. Those red flags include the following:

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[254] *See* Tribe & Matz, *To End A Presidency*, at 92 ("Does the president admit error, apologize, and clean house? Does he prove his innocence, or at least his reasonable good faith? Or does he lie and obstruct until the bitter end? Maybe he fires investigators and stonewalls prosecutors? . . . These data points are invaluable when Congress asks whether leaving the president in office would pose a continuing threat to the nation.").

[255] Committee Report on Nixon Articles of Impeachment (1974), at 146.

[256] *Id.*, at 179.

[257] *Purkett v. Elem*, 514 U.S. 765, 776–77 (1995) (Stevens, J., dissenting).

[258] *Dep't of Commerce v. N.Y.*, No. 18–966, at 27 (U.S. Jun. 27, 2019).

First, *lack of fit between conduct and explanation*. This exists when someone claims they were trying to achieve a specific goal but then engaged in conduct poorly tailored to achieving it.[259] For instance, imagine the President claims that he wants to solve a particular problem—but then he ignores many clear examples of that problem, weakens rules meant to stop it from occurring, acts in ways unlikely to address it, and seeks to punish only two alleged violators (both of whom happen to be his competitors). The lack of fit between his punitive conduct and his explanation for it strongly suggests that the explanation is false, and that he invented it as a pretext for corruptly targeting his competitors.

Second, *arbitrary discrimination*. When someone claims they were acting for a particular reason, look to see if they treated similarly-situated individuals the same.[260] For example, if a President says that people doing business abroad should not engage in specific practices, does he punish everyone who breaks that rule, or does he pick and choose? If he picks and chooses, is there a good reason why he targets some people and not others, or does he appear to be targeting people for reasons unrelated to his stated motive? Where similarly-situated people are treated differently, the President should be able to explain why; if no such explanation exists, it follows that hidden motives are in play.

Third, *shifting explanations*. When someone repeatedly changes their story, it makes sense to infer that they began with a lie and may still be lying.[261] That is true in daily life and it is true in impeachments. The House may therefore doubt the President's account of his motives when he first denies that something occurred; then admits that it occurred but denies key facts; then admits those facts and tries to explain them away; and then changes his explanation as more evidence comes to light. Simply stated, the House is "not required to exhibit a naiveté from which ordinary citizens are free."[262]

Fourth, *irregular decisionmaking*. When someone breaks from the normal method of making decisions, and instead acts covertly or strangely, there is cause for suspicion. As the Supreme Court has reasoned, "[t]he specific sequence of events leading up the challenged decision" may "shed some light on the decisionmaker's purposes"—and "[d]epartures from the normal procedural sequence" might "afford evidence that improper purposes are playing a role."[263] There are many personnel and procedures in place to ensure sound decisionmaking in the Executive Branch. When they are ignored, or replaced by secretive irregular channels, the House must closely scrutinize Presidential conduct.

Finally, *explanations based on falsehoods*. Where someone explains why they acted a certain way, but the explanation depends

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[259] *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Miller-El v. Dretke*, 545 U.S. 231, 260 (2005).

[260] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2249 (2019); *Miller-El v. Cockrell*, 537 U.S. 322, 345 (2003).

[261] *See Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016); *Evans v. Sebelius*, 716 F.3d 617, 620–21 (D.C. Cir. 2013); *Geleta v. Gray*, 645 F.3d 408, 413–14 (D.C. Cir. 2011); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir.2001); *Domínguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996).

[262] *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.) (making a similar point about federal judges).

[263] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

on demonstrably false facts, then their explanation is suspect.[264] For example, if a President publicly states that he withheld funds from a foreign nation due to its failure to meet certain conditions, but the federal agencies responsible for monitoring those conditions certify that they were satisfied, the House may conclude that the President's explanation is only a distraction from the truth.

When one or more of these red flags is present, there is reason to doubt that the President's account of his motives is accurate. When they are all present simultaneously, that conclusion is virtually unavoidable. Thus, in examining the President's motives as part of an impeachment inquiry, the House must test his story against the evidence to see if it holds water. If it does not, the House may find that he acted with corrupt motives—and that he has made false statements as part of an effort to stymie the impeachment inquiry.

E. Attempted Presidential Misconduct Is Impeachable

As a matter of settled constitutional law, and contrary to recent suggestions otherwise, attempted Presidential wrongdoing can be impeachable. This is clear from the records of the Constitutional Convention. In the momentous exchange that led to adoption of the "high Crimes and Misdemeanors" standard, Mason championed impeaching Presidents for any "great and dangerous offenses." It was therefore necessary, he argued, to avoid a narrow standard that would prevent impeachment for "*attempts* to subvert the Constitution" (emphasis added). Then, only minutes later, it was Mason himself who suggested "high Crimes and Misdemeanors" as the test for Presidential impeachment. The very author of the relevant constitutional text thus made clear it must cover "attempts."

The House Judiciary Committee reached this conclusion in President Nixon's case. Its analysis is compelling and consistent with Mason's reasoning:

> In some of the instances in which Richard M. Nixon abused the powers of his office, his unlawful or improper objective was not achieved. But this does not make the abuse of power any less serious, nor diminish the applicability of the impeachment remedy. The principle was stated by Supreme Court Justice William Johnson in 1808: "If an officer attempt[s] an act inconsistent with the duties of his station, it is presumed that the failure of the attempt would not exempt him from liability to impeachment. Should a President head a conspiracy for the usurpation of absolute power, it is hoped that no one will contend that defeating his machinations would restore him to innocence." *Gilchrist v. Collector of Charleston, 10 F.* Cas. 355, 365 (No. 5, 420) (C.C.D.S.C. 1808).

Adhering to this legal analysis, the Committee approved articles of impeachment against President Nixon that encompassed acts of attempted wrongdoing that went nowhere or were thwarted. That in-

[264] *See, e.g., Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 147 (2000); *Geleta v. Gray*, 645 F.3d 408, 414 (D.C. Cir. 2011); *Czekalski v. Peters*, 475 F.3d 360, 366 (D.C. Cir. 2007); *Murray v. Gilmore*, 406 F.3d 708, 716 (D.C. Cir. 2005); *Salazar v. Wash. Metro. Transit Auth.*, 401 F.3d 504, 511–12 (D.C. Cir. 2005); *Anderson v. Zubieta*, 180 F.3d 329, 348 (D.C. Cir. 1999).

cludes President Nixon's attempt to block an investigation by the Patman Committee into the Watergate break-ins,[265] his attempt to block testimony by former aides,[266] his attempt to "narrow and divert" the Senate Select Committee's investigation,[267] and his attempt to have the IRS open tax audits of 575 members of George McGovern's staff and contributors to his campaign, at a time when McGovern was President Nixon's political opponent in the upcoming 1972 presidential election.[268] Moreover, the article of impeachment against President Nixon for abuse of power charged that he "attempted to prejudice the constitutional right of an accused to a fair trial."[269]

History thus confirms that defiance by his own aides do not afford the President a defense to impeachment. The Nation is not required to cross its fingers and hope White House staff will persist in ignoring or sidelining a President who orders them to execute "high Crimes and Misdemeanors." Nor can a President escape impeachment just because his corrupt plan to abuse power or manipulate elections was discovered and abandoned. It is inconceivable that our Framers authorized the removal of Presidents who engage in treason or bribery, but disallowed the removal of Presidents who attempt such offenses and are caught before they succeed. Moreover, a President who takes concrete steps toward engaging in impeachable conduct is not entitled to any benefit of the doubt. As one scholar remarks in the context of attempts to manipulate elections, "when a substantial attempt is made by a candidate to procure the presidency by corrupt means, we may presume that he at least thought this would make a difference in the outcome, and thus we should resolve any doubts as to the effects of his efforts against him."[270]

Common sense confirms what the law provides: a President may be impeached where he attempts a grave abuse of power, is caught along the way, abandons his plan, and subsequently seeks to conceal his wrongdoing. A President who attempts impeachable offenses will surely attempt them again. The impeachment power exists so that the Nation can remove such Presidents from power before their attempts finally succeed.

F. Impeachment is Part of Democratic Governance

As House Judiciary Committee Chairman Peter Rodino emphasized in 1974, "it is under our Constitution, the supreme law of our land, that we proceed through the sole power of impeachment."[271] Impeachment is part of democratic constitutional governance, not an exception to it. It results in the President's removal from office only when a majority of the House, and then a super-majority of the Senate, conclude that he has engaged in sufficiently grave misconduct that his term in office must be brought to an early end. This process does not "nullify" the last election. No President is entitled to persist in office after committing "high Crimes and Mis-

[265] Committee Report on Nixon Articles of Impeachment (1974), at 64.
[266] *Id.*, at 120.
[267] *Id.*
[268] *Id.*, at 143.
[269] *Id.*, at 3.
[270] Black & Bobbitt, *Impeachment*, at 93.
[271] Debate on Nixon Articles of Impeachment (1974), at 2.

demeanors," and no voter is entitled to expect that their preferred candidate will do so. Under the Constitution, when a President engages in great and dangerous offenses against the Nation—thus betraying their Oath of Office—impeachment and removal by Congress may be necessary to protect our democracy.

The Framers considered relying solely on elections, rather than impeachment, to remove wayward Presidents. But they overwhelmingly rejected that position. As Madison warned, waiting so long "might be fatal to the Republic."[272] Particularly where the President's misconduct is aimed at corrupting our democracy, relying on elections to solve the problem is insufficient: it makes no sense to wait for the ballot box when a President stands accused of interfering with elections and is poised to do so again. Numerous Framers spoke directly to this point at the Constitutional Convention. Impeachment is the remedy for a President who will do anything, legal or not, to remain in office. Allowing the President a free pass is thus the wrong move when he is caught trying to corrupt elections in the final year of his first four-year term—just as he prepares to face the voters.

Holding the President accountable for "high Crimes and Misdemeanors" not only upholds democracy, but also vindicates the separation of powers. Representative Robert Kastenmeier explained this well in 1974: "The power of impeachment is not intended to obstruct or weaken the office of the Presidency. It is intended as a final remedy against executive excess . . . [a]nd it is the obligation of the Congress to defend a democratic society against a Chief Executive who might be corrupt."[273] The impeachment power thus restores balance and order when Presidential misconduct threatens constitutional governance.

VII. Conclusion

As Madison recognized, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it control itself."[274] Impeachment is the House's last and most extraordinary resort when faced with a President who threatens our constitutional system. It is a terrible power, but only "because it was forged to counter a terrible power: the despot who deems himself to be above the law."[275] The consideration of articles of impeachment is always a sad and solemn undertaking. In the end, it is the House—speaking for the Nation as a whole—that must decide whether the President's conduct rises to the level of "high Crimes and Misdemeanors" warranting impeachment.

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[272] Elliot, *Debates on the Adoption of the Federal Constitution,* at 341.
[273] Debate on Nixon Articles of Impeachment (1974), at 16.
[274] James Madison, *Federalist No. 51,* at 356.
[275] Jill Lepore, *The Invention—And Reinvention—Of Impeachment,* THE NEW YORKER, Oct. 21 2019.

Minority Views

Voluminous academic writings and government publications have addressed standards of impeachment under the Constitution. The hearing of December 4, 2019, held by this committee, featured four academic witnesses, only one of whom (Professor Jonathan Turley) contributed something of significant substance to the record. Professor Turley's submitted written testimony is attached at the end of these views.[276]

Regarding the current impeachment proceedings directed at President Donald J. Trump, because the Committee invited no fact witnesses to testify, its Majority Views add nothing to the factual record—a record which the Republican Staff Report[277] amply shows is based on nothing other than hearsay, opinion, and speculation. As a result, the Majority Views necessarily fail to make any plausible case for impeachment.

[276] *See also* Written Statement of Jonathan Turley, H. Comm. on Judiciary hearing, "The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment," December 4, 2019, *available at* https://docs.house.gov/meetings/JU/JU00/20191204/110281/HHRG-116-JU00-Wstate-TurleyP-20191204.pdf.

[277] *See* Report of Evidence in the Democrats' Impeachment Inquiry in the House of Representatives, December 2, 2019, available at https://republicans-oversight.house.gov/wp-content/uploads/2019/12/2019-12-02-Report-of-Evidence-in-the-Democrats-Impeachment-Inquiry-in-the-House-of-Representatives.pdf.

Written Statement

Jonathan Turley,
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"The Impeachment Inquiry Into President Donald J. Trump: The Constitutional Basis For Presidential Impeachment"

1100 House Office Building
United States House of Representatives
Committee on the Judiciary

December 4, 2019

I. INTRODUCTION

Chairman Nadler, ranking member Collins, members of the Judiciary Committee, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.[1] It is an honor to appear before you today to discuss one of the most solemn and important constitutional functions bestowed on this House by the Framers of our Constitution: the impeachment of the President of the United States.

Twenty-one years ago, I sat here before you, Chairman Nadler, and other members of the Judiciary Committee to testify on the history and meaning of the constitutional impeachment standard as part of the impeachment of President William Jefferson Clinton. I never thought that I would have to appear a second time to address the same question with regard to another sitting president. Yet, here we are. Some elements are strikingly similar. The intense rancor and rage of the public debate is the same. It was an atmosphere that the Framers anticipated. Alexander Hamilton warned that charges of impeachable conduct "will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused."[2] As with the Clinton impeachment, the Trump impeachment has again proven Hamilton's words to be prophetic. The stifling intolerance for opposing views is the same. As was the case two decades ago, it is a perilous environment for a legal scholar who wants to

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[1] I appear today in my academic capacity to present views founded in prior academic work on impeachment and the separation of powers. My testimony does not reflect the views or approval of CBS News, the BBC, or the newspapers for which I write as a columnist. My testimony was written exclusively by myself with editing assistance from Nicholas Contarino, Andrew Hile, Thomas Huff, and Seth Tate.

[2] ALEXANDER HAMILTON, FEDERALIST NO. 65 (1788), *reprinted in* THE FEDERALIST PAPERS 396, 396-97 (Clinton Rossiter ed., 1961).

explore the technical and arcane issues normally involved in an academic examination of a legal standard ratified 234 years ago. In truth, the Clinton impeachment hearing proved to be an exception to the tenor of the overall public debate. The testimony from witnesses, ranging from Arthur Schlesinger Jr. to Laurence Tribe to Cass Sunstein, contained divergent views and disciplines. Yet the hearing remained respectful and substantive as we all grappled with this difficult matter. I appear today in the hope that we can achieve that same objective of civil and meaningful discourse despite our good-faith differences on the impeachment standard and its application to the conduct of President Donald J. Trump.

I have spent decades writing about impeachment[3] and presidential powers[4] as an academic and as a legal commentator. My academic work reflects the bias of a Madisonian scholar. I tend to favor Congress in disputes with the Executive Branch and I have been critical of the sweeping claims of presidential power and privileges made by modern Administrations. My prior testimony mirrors my criticism of the expansion of executive powers and privileges.[5] In truth, I have not held much fondness for any

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[3] *See, e.g.*, Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Symposium, Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); Symposium, Jonathan Turley, *Reflections on Murder. Misdemeanors. and Madison*, 28 HOFSTRA L. REV. 439 (1999).

[4] *See, e.g.*, Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Function Follows Form in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records*, 88 CORNELL L. REV. 651 (2003); Jonathan Turley, *The Military Pocket Republic*, 97 NW. L. REV. 1 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002).

[5] *See* United States House of Representatives, Committee on the Judiciary, "Executive Privilege and Congressional Oversight," May 15, 2019 (testimony of Professor Jonathan Turley); United States House of Representatives, House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *The National Emergencies Act of 1976*, Feb. 28, 2019 (testimony of Professor Jonathan Turley); United States Senate, Committee on the Judiciary, *The Confirmation of William Pelham Barr As Attorney General of the United States Supreme Court*, Jan. 16, 2019 (testimony of Professor Jonathan Turley); United States Senate, Committee on Homeland Security and Governmental Affairs Committee, Subcommittee on Federal Spending Oversight and Emergency Management, "*War Powers and the Effects of Unauthorized Military*

president in my lifetime. Indeed, the last president whose executive philosophy I consistently admired was James Madison.

In addition to my academic work, I am a practicing criminal defense lawyer. Among my past cases, I represented the United States House of Representatives as lead counsel challenging payments made under the Affordable Care Act without congressional authorization. I also served as the last lead defense counsel in an impeachment trial in the Senate. With my co-lead counsel Daniel Schwartz, I argued the case on behalf of federal judge Thomas Porteous. (My opposing lead counsel for the House managers was Adam Schiff). In addition to my testimony with other constitutional scholars at the Clinton impeachment hearings, I also represented former Attorneys General during the Clinton impeachment litigation over privilege disputes triggered by the investigation of Independent Counsel Ken Starr. I also served as lead counsel in a bill of attainder case, the sister of impeachment that will be discussed below.[6]

Engagements on Federal Spending", June 6, 2018 (testimony of Professor Jonathan Turley); United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, Mar. 21, 2017 (testimony of Professor Jonathan Turley); United States House of Representatives, House Committee on Science, Space, and Technology, "*Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*," Sept. 14, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"* June 22, 2016 (testimony and prepared statement of Jonathan Turley); United States Senate, Committee on Homeland Security and Governmental Affairs, "*The Administrative State: An Examination of Federal Rulemaking*," Apr. 20, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," Mar. 15, 2016 (testimony and prepared statement of Jonathan Turley); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law); *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley). Parts of my testimony today is taken from this prior work.

[6] Foretich v. United States, 351 F.3d 1198 (D.C. Cir. 2003).

I would like to start, perhaps incongruously, with a statement of three irrelevant facts. First, I am not a supporter of President Trump. I voted against him in 2016 and I have previously voted for Presidents Clinton and Obama. Second, I have been highly critical of President Trump, his policies, and his rhetoric, in dozens of columns. Third, I have repeatedly criticized his raising of the investigation of the Hunter Biden matter with the Ukrainian president. These points are not meant to curry favor or approval. Rather they are meant to drive home a simple point: one can oppose President Trump's policies or actions but still conclude that the current legal case for impeachment is not just woefully inadequate, but in some respects, dangerous, as the basis for the impeachment of an American president. To put it simply, I hold no brief for President Trump. My personal and political views of President Trump, however, are irrelevant to my impeachment testimony, as they should be to your impeachment vote. Today, my only concern is the integrity and coherence of the constitutional standard and process of impeachment. President Trump will not be our last president and what we leave in the wake of this scandal will shape our democracy for generations to come. I am concerned about lowering impeachment standards to fit a paucity of evidence and an abundance of anger. If the House proceeds solely on the Ukrainian allegations, this impeachment would stand out among modern impeachments as the shortest proceeding, with the thinnest evidentiary record, and the narrowest grounds ever used to impeach a president.[7] That does not bode well for future presidents who are working in a country often sharply and, at times, bitterly divided.

Although I am citing a wide body of my relevant academic work on these questions, I will not repeat that work in this testimony. Instead, I will focus on the history and cases that bear most directly on the questions facing this Committee. My testimony will first address relevant elements of the history and meaning of the impeachment standard. Second, I will discuss the past presidential impeachments and inquiries in the context of this controversy. Finally, I will address some of the specific alleged impeachable offenses raised in this process. In the end, I believe that this process has raised serious and legitimate issues for investigation. Indeed, I have previously stated that a quid pro quo to force the investigation of a political rival in exchange for military aid can be impeachable, if proven. Yet moving forward primarily or exclusively with the Ukraine controversy on this record would be as precarious as it would premature. It comes down to a type of constitutional architecture. Such a slender foundation is a red flag for architects who operate on the accepted 1:10 ratio between the width and height of

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[7] The only non-modern presidential impeachment is an outlier in this sense. As I discussed below, the impeachment of Andrew Johnson was the shortest period from the underlying act (the firing of the Secretary of War) to the adoption of the articles of impeachment. However, the House had been preparing for such an impeachment before the firing and had started investigations of matters referenced in the articles. This was actually the fourth impeachment, with the prior three attempts extending over a year with similar complaints and inquiries. Thus, the actual period of the impeachment of Johnson and the operative record is debatable. I have previously discussed the striking similarities between the Johnson and Trump inquiries in terms of the brevity of the investigation and narrowest of the alleged impeachable offenses.

a structure. The physics are simple. The higher the building, the wider the foundation. There is no higher constitutional structure than the impeachment of a sitting president and, for that reason, an impeachment must have a wide foundation in order to be successful. The Ukraine controversy has not offered such a foundation and would easily collapse in a Senate trial.

Before I address these questions, I would like to make one last cautionary observation regarding the current political atmosphere. In his poem "The Happy Warrior," William Wordsworth paid homage to Lord Horatio Nelson, a famous admiral and hero of the Napoleonic Wars. Wordsworth began by asking "Who is the happy Warrior? Who is he what every man in arms should wish to be?" The poem captured the deep public sentiment felt by Nelson's passing and one reader sent Wordsworth a gushing letter proclaiming his love for the poem. Surprisingly, Wordsworth sent back an admonishing response. He told the reader "you are mistaken; your judgment is affected by your moral approval of the lines."[8] Wordsworth's point was that it was not his poem that the reader loved, but its subject. My point is only this: it is easy to fall in love with lines that appeal to one's moral approval. In impeachments, one's feeling about the subject can distort one's judgment on the true meaning or quality of an argument. We have too many happy warriors in this impeachment on both sides. What we need are more objective noncombatants, members willing to set aside political passion in favor of constitutional circumspection. Despite our differences of opinion, I believe that this esteemed panel can offer a foundation for such reasoned and civil discourse. If we are to impeach a president for only the third time in our history, we will need to rise above this age of rage and genuinely engage in a civil and substantive discussion. It is to that end that my testimony is offered today.

II. A BRIEF OVERVIEW OF THE HISTORY AND MEANING OF THE IMPEACHMENT STANDARD

Divining the intent of the Framers often borders on necromancy, with about the same level of reliability. Fortunately, there are some questions that were answered directly by the Framers during the Constitutional and Ratification Conventions. Any proper constitutional interpretation begins with the text of the Constitution. Indeed, such interpretations ideally end with the text when there is clarity as to a constitutional standard or procedure. Five provisions are material to impeachment cases, and therefore structure our analysis:

> *Article I, Section 2:* The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. U.S. Const. art. I, cl. 8.
>
> *Article I, Section 3:* The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or

[8] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 2 (Yale, 1962).

> Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. U.S. Const. art. I, 3, cl. 6.
>
> *Article I, Section 3:* Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to the Law. U.S. Const. art. I, 3, cl. 7.
>
> *Article II, Section 2:* [The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. U.S. Const., art. II, 2, cl. 1.
>
> *Article II, Section 4:* The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. U.S. Const. art. II, 4.

For the purposes of this hearing, it is Article II, Section 4 that is the focus of our attention and, specifically, the meaning of "Treason, Bribery, or other high Crimes and Misdemeanors." It is telling that the actual constitutional standard is contained in Article II (defining executive powers and obligations) rather than Article I (defining legislative powers and obligations). The location of that standard in Article II serves as a critical check on service as a president, qualifying the considerable powers bestowed upon the Chief Executive with the express limitations of that office. It is in this sense an executive, not legislative, standard set by the Framers. For presidents, it is essential that this condition be clear and consistent so that they are not subject to the whim of shifting majorities in Congress. That was a stated concern of the Framers and led to the adoption of the current standard and, equally probative, the express rejection of other standards.

A. Hastings and the English Model of Impeachments

It can be fairly stated that American impeachments stand on English feet.[9] However, while the language of our standard can be directly traced to English precedent, the Framers rejected the scope and procedures of English impeachments. English impeachments are actually instructive as a model rejected by the Framers due to its history of abuse. Impeachments in England were originally quite broad in terms of the basis for impeachment as well as those subject to impeachments. Any citizen could be

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[9] Much of this history is taken from earlier work, including Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999).

impeached, including legislators. Thus, in 1604, John Thornborough, Bishop of Bristol, was impeached for writing a book on the controversial union with Scotland.[10]

Thornborough was a member of the House of Lords, and his impeachment proved one of the many divisive issues between the two houses that ended in a draw. The Lords would ultimately rebuke the Bishop, but the House of Commons failed to secure a conviction. Impeachments could be tried by the Crown, and the convicted subjected to incarceration and even execution. The early standard was breathtakingly broad, including "treasons, felonies, and mischiefs done to our Lord, The King" and "divers deceits." Not surprisingly, critics and political opponents of the Crown often found themselves the subject of such impeachments. Around 1400, procedures formed for impeachment but trials continued to serve as an extension of politics, including expressions of opposition to Crown governance by Parliament. Thus, Michael de la Pole, Earl of Suffolk, was impeached in 1386 for such offenses as appointing incompetent officers and "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws." Others were impeached for "giving pernicious advice to the Crown" and "malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad."[11]

English impeachments were hardly a model system. Indeed, they were often not tried to verdict or were subject to a refusal to hold a trial by the House of Lords. Nevertheless, there was one impeachment in particular that would become part of the constitutional debates: the trial of Governor General Warren Hastings of the East India Company.[12] The trial would captivate colonial figures as a challenge to Crown authority while highlighting all of the flaws of English impeachments. Indeed, it is a case that bears some striking similarities to the allegations swirling around the Ukrainian controversy.

Hastings was first appointed as the Governor of Bengal and eventually the Governor-General in India. It was a country like Ukraine, rife with open corruption and bribery. The East India Company held quasi-governing authority and was accused of perpetuating such corruption. Burisma could not hold a candle to the East India Company. Hastings imposed British control over taxation and the courts. He intervened in military conflicts to secure concessions. His bitter feuds with prominent figures even led to a duel with British councilor Philip Francis, who Hastings shot and wounded. The record was heralded by some and vilified by others. Among the chief antagonists was Edmund Burke, one of the intellectual giants of his generation. Burke despised Hastings, who he described as the "captain-general of iniquity" and a "spider of Hell." Indeed, even with the over-heated rhetoric of the current hearings, few comments have reached the level of Burke's denouncement of Hastings as a "ravenous vulture devouring the

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[10] *See* COLIN G.C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 57 (1974).

[11] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 798, at 268-69 (rev. ed. 1991).

[12] *See* Turley, *Senate Trials*, *supra* note 3. *See also* Jonathan Turley, *Adam Schiff's Capacious Definition Of Bribery Was Tried In 1787*, WALL ST. J., Nov. 28, 2019.

carcasses of the dead." Burke led the impeachment for bribery and other forms of abuse of power – proceedings that would take seven years. Burke made an observation that is also strikingly familiar in the current controversy. He insisted in a letter to Francis that the case came down to intent and Hastings' defenders would not except any evidence as incriminating:

> "Most of the facts, upon which we proceed, are confessed; some of them are boasted of. The labour will be on the criminality of the facts, where proof, as I apprehend, will not be contested. Guilt resides in the intention. But as we are before a tribunal, which having conceived a favourable opinion of Hastings (or what is of more moment, very favourable wishes for him) they will not judge of his intentions by the acts, but they will qualify his Acts by his presumed intentions. It is on this preposterous mode of judging that he had built all the Apologies for his conduct, which I have seen. Excuses, which in any criminal court would be considered with pity as the Straws, at which poor wretches drowning will catch, and which are such as no prosecutor thinks is worth his while to reply to, will be admitted in such a House of Commons as ours as a solid defence ... We know that we bring before a bribed tribunal a prejudged cause. In that situation all that we have to do is make a case strong in proof and in importance, and to draw inferences from it justifiable in logick, policy and criminal justice. As to all the rest, it is vain and idle."[13]

That is an all-too-familiar refrain for the current controversy. Impeachment cases often come down to a question of intent, as does the current controversy. It also depends greatly on the willingness of the tribunal to consider the facts in a detached and neutral manner. Burke doubted the ability of the "bribed tribunal" to guarantee a fair trial—a complaint heard today on both sides of the controversy. Yet, ultimately for Burke, the judgment of history has not been good. While many of us think Burke truly believed the allegations against Hastings, Hastings was eventually acquitted and Burke ended up being censured after the impeachment.

Ultimately, the United States would incorporate the language of "high crimes and misdemeanors" from English impeachments, but fashion a very different standard and process for such cases.

B. The American Model of Impeachment

Colonial impeachments did occur with the same dubious standards and procedures that marked the English impeachments. Indeed, impeachments were used in the absence of direct political power. Much like parliamentary impeachments, the colonial impeachments became a way of contesting Crown governance. Thus, the first colonial impeachment in 1635 targeted Governor John Harvey of Virginia for

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[13] Letter from Edmund Burke to Philip Frances, *in* 5 THE CORRESPONDENCE OF EDMUND BURKE 241 (Holden Furber ed., 1965).

misfeasance in office, including tyrannical conduct in office. Likewise, the 1706 impeachment of James Logan, Pennsylvania provincial agent and secretary of the Pennsylvania council, was based largely on political grievances including "a wicked intent to create Divisions and Misunderstandings between him and the people." These colonial impeachments often contained broad or ill-defined grounds for impeachment for such things as "loss of public trust." Some impeachments involved Framers, from John Adams to Benjamin Franklin, and most were certainly known to the Framers as a whole.

Given this history, when the Framers met in Philadelphia to craft the Constitution, impeachment was understandably raised, including the Hastings impeachment, which had yet to go to trial in England. However, there was a contingent of Framers that viewed any impeachment of a president as unnecessary and even dangerous. Charles Pinckney of South Carolina, Gouverneur Morris of Pennsylvania, and Rufus King of Massachusetts opposed such a provision.[14] That opposition may have been due to the history of the use of impeachment for political purposes in both England and the colonies that I just discussed. However, they were ultimately overruled by the majority who wanted this option included into the Constitution. As declared by William Davie of North Carolina, impeachment was viewed as the "essential security for the good behaviour of the Executive."

Unlike the English impeachments, the American model would be limited to judicial and executive officials. The standard itself however led to an important exchange between George Mason and James Madison:

> "Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offense. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined - As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.
>
> He movd. to add after "bribery" "or maladministration."
>
> Mr. Gerry seconded him -
>
> Mr. Madison[.] So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr Morris[.] It will not be put in force & can do no harm - An election of every four years will prevent maladministration.
>
> Col. Mason withdrew "maladministration" & substitutes "other high crimes & misdemeanors" ("agst. the State").

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[14] Turley, *Senate Trials, supra* note 3, at 34.

On the question thus altered [Ayes - 8; Noes - 3]"[15]

In the end, the Framers would reject various prior standards including "corruption," "obtaining office by improper means", betraying his trust to a foreign power, "negligence," "perfidy," "peculation," and "oppression." Perfidy (or lying) and peculation (self-dealing) are particularly interesting in the current controversy given similar accusations against President Trump in his Ukrainian comments and conduct.

It is worth noting that, while Madison objected to the inclusion of maladministration in the standard in favor of the English standard of "high crimes and misdemeanors," he would later reference maladministration as something that could be part of an impeachment and declared that impeachment could address "the incapacity, negligence or perfidy of the chief Magistrate."[16] Likewise, Alexander Hamilton referred to impeachable offenses as "those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[17] These seemingly conflicting statements can be reconciled if one accepts that some cases involving high crimes and misdemeanors can include such broader claims. Indeed, past impeachments have alleged criminal acts while citing examples of lying and violations of public trust. Many violations of federal law by presidents occur in the context of such perfidy and peculation – aspects that help show the necessity for the extreme measure of removal. Indeed, such factors can weigh more heavily in the United States Senate where the question is not simply whether impeachable offenses have occurred but whether such offenses, if proven, warrant the removal of a sitting president. However, the Framers clearly stated they adopted the current standard to avoid a vague and fluid definition of a core impeachable offense. The structure of the critical line cannot be ignored. The Framers cited two criminal offenses—treason and bribery—followed by a reference to "other high crimes and misdemeanors." This is in contrast to when the Framers included "Treason, Felony, or other Crime" rather than "high crime" in the Extradition Clause of Article IV, Section 2. The word "other" reflects an obvious intent to convey that the

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[15] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 550 (Max Farrand ed., 1937).

[16] Madison noted that there are times when the public should not have to wait for the termination of a term to remove a person unfit for the office. Madison explained:

> "[It is] indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression... In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic."

See 2 RECORDS, *supra* note 15, at 65-66. Capacity issues however have never been the subject of presidential impeachments. That danger was later address in the Twenty-Fifth Amendment.

[17] THE FEDERALIST NO. 65, *supra* note 2, at 396.

impeachable acts other than bribery and treason were meant to reach a similar level of gravity and seriousness (even if they are not technically criminal acts). This was clearly a departure from the English model, which was abused because of the dangerous fluidity of the standard used to accuse officials. Thus, the core of American impeachments was intended to remain more defined and limited.

It is a discussion that should weigh heavily on the decision facing members of this House.

III. PRIOR PRESIDENTIAL IMPEACHMENTS AND THEIR RELEVANCE TO THE CURRENT INQUIRY

As I have stressed, it is possible to establish a case for impeachment based on a non-criminal allegation of abuse of power. However, although criminality is not required in such a case, clarity is necessary. That comes from a complete and comprehensive record that eliminates exculpatory motivations or explanations. The problem is that this is an exceptionally narrow impeachment resting on the thinnest possible evidentiary record. During the House Intelligence Committee proceedings, Democratic leaders indicated that they wanted to proceed exclusively or primarily on the Ukrainian allegations and wanted a vote by the end of December. I previously wrote that the current incomplete record is insufficient to sustain an impeachment case, a view recently voiced by the New York Times and other sources.[18]

Even under the most flexible English impeachment model, there remained an expectation that impeachments could not be based on presumption or speculation on key elements. If the underlying allegation could be non-criminal, the early English impeachments followed a format similar to a criminal trial, including the calling of witnesses. However, impeachments were often rejected by the House of Lords as facially inadequate, politically motivated, or lacking sufficient proof. Between 1626 and 1715, the House of Lords only held trials to verdict in five of the fifty-seven impeachment cases brought. For all its failings, The House of Lords still required evidence of real offenses supported by an evidentiary record for impeachment. Indeed, impeachments were viewed as more demanding than bills of attainder.

A bill of attainder[19] involves a legislative form of punishment. While a person could be executed under a bill of attainder, it was still more difficult to sustain an

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[18] Editorial, *Sondland Has Implicated the President and His Top Men*, N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/opinion/sondland-impeachment-hearings.html ("It is essential for the House to conduct a thorough inquiry, including hearing testimony from critical players who have yet to appear. Right now, the House Intelligence Committee has not scheduled testimony from any witnesses after Thursday. That is a mistake. No matter is more urgent, but it should not be rushed — for the protection of the nation's security, and for the integrity of the presidency, and for the future of the Republic.").

[19] I also litigated this question as counsel in the successful challenge to the Elizabeth Morgan Act, which was struck down as a bill of attainder. *See* Foretich v. United States., 351 F.3d 1198 (D.C. Cir. 2003).

impeachment action. That difficulty is clearly shown by the impeachment of Thomas Wentworth, Earl of Strafford. Strafford was a key advisor to King Charles I, and was impeached in 1640 for the subversion of "the Fundamental Laws and Government of the Realms" and endeavoring "to introduce Arbitrary and Tyrannical Government against Law." Strafford contested both the underlying charges and the record. The House of Commons responded by dropping the impeachment and adopting a bill of attainder. In doing so, the House of Commons avoided the need to establish a complete evidentiary record and Stafford was subject to the bill of attainder and executed. Fortunately, the Framers had the foresight to prohibit bills of attainder. However, the different treatment between the two actions reflects the (perhaps counterintuitive) difference in the expectations of proof. Impeachments were viewed as requiring a full record subjected to adversarial elements of a trial.

In the current case, the record is facially insufficient. The problem is not simply that the record does not contain direct evidence of the President stating a quid pro quo, as Chairman Schiff has suggested. The problem is that the House has not bothered to subpoena the key witnesses who would have such direct knowledge. This alone sets a dangerous precedent. A House in the future could avoid countervailing evidence by simply relying on tailored records with testimony from people who offer damning presumptions or speculation. It is not enough to simply shrug and say this is "close enough for jazz" in an impeachment. The expectation, as shown by dozens of failed English impeachments, was that the lower house must offer a complete and compelling record. That is not to say that the final record must have a confession or incriminating statement from the accused. Rather, it was meant to be a complete record of the key witnesses that establishes the full range of material evidence. Only then could the body reach a conclusion on the true weight of the evidence—a conclusion that carries sufficient legitimacy with the public to justify the remedy of removal.

The history of American presidential impeachment shows the same restraint even when there were substantive complaints against the conduct of presidents. Indeed, some of our greatest presidents could have been impeached for acts in direct violation of their constitutional oaths of office. Abraham Lincoln, for example, suspended habeas corpus during the Civil War despite the fact that Article 1, Section 9, of the Constitution leaves such a suspension to Congress "in Cases of Rebellion or Invasion the public Safety may require it." The unconstitutional suspension of the "Great Writ" would normally be viewed as a violation of the greatest constitutional order. Other presidents faced impeachment inquires that were not allowed to proceed, including John Tyler, Grover Cleveland, Herbert Hoover, Harry Truman, Richard Nixon, Ronald Reagan, and George Bush. President Tyler faced some allegations that had some common elements to our current controversy. Among the nine allegations raised by Rep. John Botts of Virginia, Tyler was accused of initiating an illegal investigation of the custom house in New York, withholding information from government agents, withholding actions necessary to "the just operation of government" and "shameless duplicity, equivocation, and falsehood, with his late cabinet and Congress." Likewise, Cleveland was accused of high crimes and misdemeanors that included the use of the appointment power for political purposes (including influencing legislation) against the nation's interest and "corrupt[ing] politics through the interference of Federal officeholders." Truman faced an impeachment call over a variety of claims, including "attempting to disgrace the Congress of the United

States"; "repeatedly withholding information from Congress"; and "making reckless and inaccurate public statements, which jeopardized the good name, peace, and security of the United States."

These efforts reflect the long history of impeachment being used as a way to amplify political differences and grievances. Such legislative throat clearing has been stopped by the House by more circumspect members before articles were drafted or passed. This misuse of impeachment has been plain during the Trump Administration. Members have called for removal based on a myriad of objections against this President. Rep. Al Green (D-Texas) filed a resolution in the House of Representatives for impeachment after Trump called for players kneeling during the national anthem to be fired.[20] Others called for impeachment over President Trump's controversial statement on the Charlottesville protests.[21] Rep. Steve Cohen's (D-Tenn.) explained that "If the president can't recognize the difference between these domestic terrorists and the people who oppose their anti-American attitudes, then he cannot defend us."[22] These calls have been joined by an array of legal experts who have insisted that clear criminal conduct by Trump, including treason, have been shown in the Russian investigation. Professor Lawrence Tribe argued that Trump's pardoning of former Arizona sheriff Joe Arpaio is clearly impeachable and could even be overturned by the courts.[23] Richard Painter, chief White House ethics lawyer for George W. Bush and a professor at the University of Minnesota Law School, declared that President Trump's participation in fundraisers for Senators, a common practice of all presidents in election years, is impeachable. Painter insists that any such fundraising can constitute "felony bribery" since these senators will likely sit in judgment in any impeachment trial. Painter declared "This is a bribe. Any other American who offered cash to the jury before a trial would go to prison for felony

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[20] Nicole Cobler, *Texas lawmaker calls for impeachment vote over Trump's NFL Remarks*, DALLAS MORNING NEWS (Sept. 26, 2017, 12:08 PM), https://www.dallasnews.com/news/politics/2017/09/26/texas-lawmaker-calls-for-impeachment-vote-over-trump-s-nfl-remarks/.

[21] Jessica Estepa, *Democratic lawmaker to file articles of impeachment over Trump's Charlottesville response*, USA TODAY (Aug. 17, 2017, 11:58 AM), https://www.usatoday.com/story/news/politics/onpolitics/2017/08/17/democratic-lawmaker-to-file-articles-of-impeachment-over-trump-charlottesville-response/575892001/.

[22] Michael Collins & Daniel Connolly, *Rep. Cohen to file articles of impeachments against Trump*, THE TENNESSEAN (Aug. 17, 2017. 9:21 AM), https://www.tennessean.com/story/news/2017/08/17/steve-cohen-impeach-president-trump-charlottesville/575764001/.

[23] Laurence H. Tribe & Ron Fein, '*Sheriff Joe' is back in court. The impeachment inquiry should pay attention*, BOS. GLOBE (Oct. 23, 2019, 3:30 PM), https://www.bostonglobe.com/opinion/2019/10/22/sheriff-joe-back-court-the-impeachment-inquiry-should-pay-attention/1Yv9YZmzwL93wP9gYIFj7J/story.html.

bribery. But he can get away with it?"[24] CNN Legal Analyst Jeff Toobin declared, on the air, that Trump could be impeached solely on the basis of a tweet in which Trump criticized then Attorney General Jeff Sessions for federal charges brought against two Republican congressman shortly before the mid-term elections.[25] CNN Legal Analyst and former White House ethics attorney Norm Eisen claimed before the release of the Mueller report (which ultimately rejected any knowing collusion or conspiracy by Trump officials with Russian operatives) that the criminal case for collusion was "devastating" and that Trump is "colluding in plain sight."[26] I have known many of these members and commentators for years on a professional or personal basis. I do not question their sincere beliefs on the grounds for such impeachments, but we have fundamental differences in the meaning and proper use of this rarely used constitutional device.

As I have previously written,[27] such misuses of impeachment would convert our process into a type of no-confidence vote of Parliament. Impeachment has become an impulse buy item in our raging political environment. Slate has even featured a running "Impeach-O-Meter." Despite my disagreement with many of President Trump's policies and statements, impeachment was never intended to be used as a mid-term corrective option for a divisive or unpopular leader. To its credit, the House has, in all but one case, arrested such impulsive moves before the transmittal of actual articles of impeachment to the Senate. Indeed, only two cases have warranted submission to the Senate and one was a demonstrative failure on the part of the House in adhering to the impeachment standard. Those two impeachments—and the third near-impeachment of Richard Nixon—warrant closer examination and comparison in the current environment.

A. The Johnson Impeachment

The closest of the three impeachments to the current (Ukrainian-based) impeachment would be the 1868 impeachment of Andrew Johnson. The most obvious point of comparison is the poisonous political environment and the controversial style of

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[24] Jason Lemon, *Trump Is Committing "Felony Bribery' By Giving Cash To GOP Senators Ahead Of Impeachment Trial: Ex-Bush Ethics Lawyer*, NEWSWEEK (Oct. 31, 2019, 10:28 AM), https://www.newsweek.com/trump-committing-felony-bribery-giving-fundraising-cash-gop-senators-ahead-impeachment-trial-1468946.

[25] Veronica Stracqualursi, *Toobin: 'Trump's attack against Sessions "an 'impeachable offense'*, CNN (Sept. 4, 2018, 11:09 AM), https://www.cnn.com/2018/09/04/politics/jeffrey-toobin-trump-sessions-tweet-cnntv/index.html.

[26] Ronn Blitzer, *Former Obama Ethics Lawyer Says Trump is Now 'Colluding In Plain Sight'*, LAW & CRIME (Feb. 27, 2018, 9:40 AM), https://lawandcrime.com/high-profile/fmr-obama-ethics-lawyer-says-trump-is-now-colluding-in-plain-sight/.

[27] Jonathan Turley, *What's worse than leaving Trump in office? Impeaching him*, WASH. POST (Aug. 24, 2017. 11:05 AM), https://www.washingtonpost.com/news/posteverything/wp/2017/08/24/whats-worse-than-leaving-trump-in-office-impeaching-him/.

the president. As a Southerner who ascended to the presidency as a result of the Lincoln assassination, Johnson faced an immediate challenge even before his acerbic and abrasive personality started to take its toll. Adding to this intense opposition to Johnson was his hostility to black suffrage, racist comments, and occupation of Southern states. He was widely ridiculed as the "accidental President" and specifically described by Representative John Farnsworth of Illinois, as an "ungrateful, despicable, besotted, traitorous man." Woodrow Wilson described that Johnson "stopped neither to understand nor to persuade other men, but struck forward with crude, uncompromising force for his object, attempting mastery without wisdom or moderation."[28] Johnson is widely regarded as one of the worst presidents in history—a view that started to form significantly while he was still in office.

The Radical Republicans in particular opposed Johnson, who was seen as opposing retributive measures against Southern states and full citizenship rights for freed African Americans. Johnson suggested hanging his political opponents and was widely accused of lowering the dignity of his office. At one point, he even reportedly compared himself to Jesus Christ. Like Trump, Johnson's inflammatory language was blamed for racial violence against both blacks and immigrants. He was also blamed for reckless economic policies. He constantly obstructed the enforcement of federal laws and espoused racist views that even we find shocking for that time. Johnson also engaged in widespread firings that were criticized as undermining the functioning of government—objections not unlike those directed at the current Administration.

While Johnson's refusal to follow federal law and his efforts to disenfranchise African Americans would have been viewed as impeachable (Johnson could not have worked harder to counterpunch his way into an impeachment), the actual impeachment proved relatively narrow. Radical Republicans and other members viewed Secretary of War Edwin M. Stanton as an ally and a critical counterbalance to Johnson. Johnson held the same view and was seen as planning to sack Stanton. To counter such a move (or lay a trap for impeachment), the Radical Republicans passed the Tenure of Office Act to prohibit a President from removing a cabinet officer without the appointment of a successor by the Senate. To facilitate an impeachment, the drafters included a provision stating that any violation of the Act would constitute a "high misdemeanor." Violations were criminal and punishable "upon trial and conviction . . . by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both."[29] The act was repealed in 1887 and the Supreme Court later declared that its provisions were presumptively constitutionally invalid.

Despite the facially invalid provisions, Johnson was impeached on eleven articles of impeachment narrowly crafted around the Tenure in Office Act. Other articles added intemperate language to unconstitutional limitations, impeaching Johnson for such grievances as trying to bring Congress "into disgrace, ridicule, hatred, contempt, and reproach" and making "with a loud voice certain intemperate, inflammatory, and scandalous harangues ...." Again, the comparison to the current impeachment inquiry is

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[28] WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE, vol. 5 (New York: Harper and Bros., 1903).

[29] Tenure in Office Act, ch. 154, 14 Stat. 430, 431 (1867).

obvious. After two years of members and commentators declaring a host of criminal and impeachable acts, the House is moving on the narrow grounds of an alleged quid pro quo while emphasizing the intemperate and inflammatory statements of the president. The rhetoric of the Johnson impeachment quickly outstripped its legal basis. In his presentation to the Senate, House manager John Logan expressed the view of President Johnson held by the Radical Republicans:

> Almost from the time when the blood of Lincoln was warm on the floor of Ford's Theatre, Andrew Johnson was contemplating treason to all the fresh fruits of the overthrown and crushed rebellion, and an affiliation with and a practical official and hearty sympathy for those who had cost hecatombs of slain citizens, billions of treasure, and an almost ruined country. His great aim and purpose has been to subvert law, usurp authority, insult and outrage Congress, reconstruct the rebel States in the interests of treason... and deliver all snatched from wreck and ruin into the hands of unrepentant, but by him pardoned, traitors.

The Senate trial notably included key pre-trial votes on the evidentiary and procedural rules. The senators unanimously agreed that the trial should be judicial, not political, in character, but Johnson's opponents set about stacking the rules to guarantee easy conviction. On these votes, eleven Republicans broke from their ranks to insist on fairness for the accused. They were unsuccessful. Most Republican members turned a blind eye to the dubious basis for the impeachment. Their voters hated Johnson and cared little about the basis for his removal. However, Chief Justice Chase and other senators saw the flaws in the impeachment and opposed conviction. This included seven Republican senators—William Pitt Fessenden, James Grimes, Edmund Ross, Peter Van Winkle, John B. Henderson, Joseph Fowler, and Lyman Trumbull—who risked their careers to do the right thing, even for a president they despised. They became known as the "Republican Recusants." Those seven dissenting Republicans represented a not-insignificant block of the forty-two Republican members voting in an intensely factional environment. Taking up the eleventh article as the threshold vote on May 16, 1868, 35 senators voted to convict while 19 voted to acquit—short of the two-thirds majority needed. Even after a ten-day delay with intense pressure on the defecting Republican members, two additional articles failed by the same vote and the proceedings were ended. The system prevailed despite the failure of a majority in the House and a majority of the Senate.

The comparison of the Johnson and Trump impeachment inquiries is striking given the similar political environments and the controversial qualities of the two presidents. Additionally, there was another shared element: speed. This impeachment would rival the Johnson impeachment as the shortest in history, depending on how one counts the relevant days. In the Johnson impeachment, Secretary of War Edwin Stanton was dismissed on February 21, 1868, and a resolution of impeachment was introduced that very day. On February 24, 1868, the resolution passed and articles of impeachment prepared. On March 2-3, 1868, eleven articles were adopted. The members considered the issue to be obvious in the Johnson case since the President had openly violated a statute that expressly defined violations as "high misdemeanors." Of course, the scrutiny

of the underlying claims had been ongoing before the firing and this was the third attempted impeachment. Indeed, Congress passed legislation on March 2, 1867—one year before the first nine articles were adopted. Moreover, Johnson actually relieved Stanton of his duties in August 1867, and the House worked on the expected impeachment during this period. In December 1867, the House failed to adopt an impeachment resolution based on many of the same grievances because members did not feel that an actual crime had been committed. There were three prior impeachments with similar elements. When Stanton was actually fired, Johnson's leading opponent Rep. Thaddeus Stevens of Pennsylvania (who had been pushing for impeachment for over a year) confronted the House members and demanded "What good did your moderation do you? If you don't kill the beast, it will kill you." With the former termination and the continued lobbying of Stevens, the House again moved to impeach and secured the votes. Thus, the actual resolution and adoption dates are a bit misleading. Yet, Johnson may technically remain the shortest investigation in history. However, whichever impeachment deserves the dubious distinction, history has shown that short impeachments are generally not strong impeachments.

While generally viewed as an abusive use of impeachment by most legal and historical scholars, the Johnson impeachment has curiously been cited as a basis for the current impeachment. Some believe that it is precedent that presidents can be impeached over purely "political disagreements."[30] It is a chilling argument. Impeachment is not the remedy for political disagreement. The Johnson impeachment shows that the system can work to prevent an abusive impeachment even when the country and the Congress despise a president. The lasting lesson is that in every time and in every Congress, there remain leaders who can transcend their own insular political interests and defy the demands of some voters to fulfill their oaths to uphold the Constitution. Of course, the Constitution cannot take credit for such profiles of courage. Such courage rests within each member but the Constitution demands that each member summon that courage when the roll is called as it was on May 16, 1868.

B. The Nixon Inquiry

The Nixon "impeachment" is often referenced as the "gold standard" for impeachments even though it was not an actual impeachment. President Richard Nixon resigned before the House voted on the final articles of impeachment. Nevertheless, the Nixon inquiry was everything that the Johnson impeachment was not. It was based on an array of clearly defined criminal acts with a broad evidentiary foundation. That record was supported by a number of key judicial decisions on executive privilege claims. It is a worthy model for any presidential impeachment. However, the claim by Chairman Schiff that the Ukrainian controversy is "beyond anything Nixon did" is wildly at odds with the

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[30] *See generally* Jonathan Turley, *What's worse than leaving Trump in office? Impeaching him*, WASH. POST (Aug. 24, 2017. 11:05 AM), https://www.washingtonpost.com/news/posteverything/wp/2017/08/24/whats-worse-than-leaving-trump-in-office-impeaching-him/.

historical record.[31] The allegations in Nixon began with a felony crime of burglary and swept to encompass an array of other crimes involving political slush funds, payments of hush money, maintenance of an enemies list, directing tax audits of critics, witness intimidation, multiple instances of perjury, and even an alleged kidnapping. Ultimately, there were nearly 70 officials charged and four dozen of them found guilty. Nixon was also named as an unindicted conspirator by a grand jury. The convicted officials include former Attorney General John N. Mitchell (perjury); former Attorney General Richard Kleindienst (contempt of court); former Deputy Director of the Committee to Re-elect The President Jeb Stuart Magruder (conspiracy to the burglary); former Chief of Staff H.R. Haldeman (conspiracy to the burglary, obstruction of justice, and perjury); former counsel and Assistant to the President for Domestic Affairs to Nixon John Ehlichman (conspiracy to the burglary, obstruction of justice, and perjury); former White House Counsel John W. Dean II (obstruction of justice); and former special counsel to the President Charles Colson (obstruction of justice). Many of the Watergate defendants went to jail, with some of the defendants sentenced to as long as 35 years. The claim that the Ukrainian controversy eclipses Watergate is unhinged from history.

While the Ukrainian controversy could still establish impeachable conduct, it undermines that effort to distort the historical record to elevate the current record. Indeed, the comparison to the Nixon inquiry only highlights the glaring differences in the underlying investigations, scope of impeachable conduct, and evidentiary records with the current inquiry. It is a difference between the comprehensive and the cursory; the proven and the presumed. In other words, it is not a comparison the House should invite if it is serious about moving forward in a few weeks on an impeachment based primarily on the Ukrainian controversy. The Nixon inquiry was based on the broadest and most developed evidentiary in any impeachment. There were roughly 14 months of hearings – not 10 weeks. There were scandalous tape recordings of Nixon and a host of criminal pleas and prosecutions. That record included investigations in both the House and the Senate as well as investigations by two special prosecutors, Archibald Cox and Leon Jaworski, including grand jury material. While the inquiry proceeded along sharply partisan lines, the vote on the proposed articles of impeachment ultimately included the support of some Republican members who, again, showed that principle could transcend politics in such historic moments.

Three articles were approved in the Nixon inquiry alleging obstruction of justice, abuse of power, and defiance of committee subpoenas. Two articles of impeachment based on usurping Congress, lying about the bombing of Cambodia, and tax fraud, were rejected on a bipartisan basis. While the Nixon impeachment had the most developed record and comprehensive investigation, I am not a fan of the structure used for the articles. The Committee evaded the need for specificity in alleging crimes like obstruction of justice while listing a variety of specific felonies after a catchall line declaring that "the means used to implement this course of conduct or plan included one

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[31] *See* Jonathan Turley, *Watergate line speaks volumes about weak impeachment case*, THE HILL (Nov. 30, 2019, 10:00 AM), https://thehill.com/opinion/judiciary/472461-watergate-line-speaks-volumes-about-weak-impeachment-case.

or more of the following." Given its gravity, impeachment should offer concrete and specific allegations in the actual articles. This is the case in most judicial impeachments.

The impeachment began with a felony when "agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence." The first article of impeachment reflected the depth of the record and scope of the alleged crimes in citing Nixon's personal involvement in the obstruction of federal and congressional investigations. The article included a host of specific criminal acts including lying to federal investigators, suborning perjury, and witness tampering. The second article of impeachment also alleged an array of criminal acts that were placed under the auspices of abuse of power. The article addressed Nixon's rampant misuse of the IRS, CIA, and FBI to carry out his effort to conceal the evidence and crimes following the break-in. They included Nixon's use of federal agencies to carry out "covert and unlawful activities" and how he used his office to block the investigation of federal agencies. The third article concerned defiance of Congress stemming from his refusal to turn over material to Congress.

These articles were never subjected to a vote of the full House. In my view, they were flawed in their language and structure. As noted earlier, there was a lack of specificity on the alleged acts due to the use of catch-all lists of alleged offenses. However, my greatest concern rests with Article 3. That article stated:

> "In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives."

This Article has been cited as precedent for impeaching a president whenever witnesses or documents are refused in an impeachment investigation, even under claims of executive immunities or privileges. The position of Chairman Peter Rodino was that Congress had the sole authority to decide what material had to be produced in such an investigation. That position would seem to do precisely what the article accused Nixon of doing: "assuming to [itself] functions and judgments" necessary for the Executive Branch. There is a third branch that is designated to resolve conflicts between the two political branches. In recognition of this responsibility, the Judiciary ruled on the Nixon disputes. In so doing, the Supreme Court found executive privilege claims are legitimate grounds to raise in disputes with Congress but ruled such claims can be set aside in the balancing of interests with Congress. What a president cannot do is ignore a final judicial order on such witnesses or evidence.

Putting aside my qualms with the drafting of the articles, the Nixon impeachment remains well-supported and well-based. He would have been likely impeached and removed, though I am not confident all of the articles would have been approved. I have particular reservations over the third article and its implications for presidents seeking judicial review. However, the Nixon inquiry had a foundation that included an array of criminal acts and a record that ultimately reached hundreds of thousands of pages. In the

end, Nixon was clearly guilty of directing a comprehensive conspiracy that involved slush funds, enemy lists, witness intimidation, obstruction of justice, and a host of other crimes. The breathtaking scope of the underlying criminality still shocks the conscience. The current controversy does not, as claimed, exceed the misconduct of Nixon, but that is not the test. Hopefully, we will not face another president responsible for this range of illegal conduct. Yet, that does not mean that other presidents are not guilty of impeachable conduct even if it does not rise to a Nixonian level. In other words, there is no need to out-Nixon Nixon. Impeachable will do. The question is whether the current allegation qualifies as impeachable, not uber-impeachable.

C. The Clinton Impeachment.

The third and final impeachment is of course the Clinton impeachment. That hearing involved 19 academics and, despite the rancor of the times, a remarkably substantive and civil intellectual exchange on the underlying issues. These are issues upon which reasonable people can disagree and the hearing remains a widely cited source on the historical and legal foundations for the impeachment standard. Like Johnson's impeachment, the Clinton impeachment rested on a narrow alleged crime: perjury. The underlying question for that hearing is well suited for today's analysis. We focused on whether a president could be impeached for lying under oath in a federal investigation run by an independent counsel. There was not a debate over whether Clinton lied under oath. Indeed, a federal court later confirmed that Clinton had committed perjury even though he was never charged. Rather, the issue was whether some felonies do not "rise to the level of impeachment" and, in that case, the alleged perjury and lying to federal investigators concerning an affair with White House intern, Monica Lewinsky.

My position in the Clinton impeachment hearing was simple and remains unchanged. Perjury is an impeachable offense. Period. It does not matter what the subject happened to be. The President heads the Executive Branch and is duty bound to enforce federal law including the perjury laws. Thousands of citizens have been sentenced to jail for the same act committed by President Clinton. He could refuse to answer the question and face the consequences, or he could tell the truth. What he could not do is lie and assume he had license to commit a crime that his own Administration was prosecuting others for. Emerging from that hearing was an "executive function" theory limiting "high crimes and misdemeanors" to misconduct related to the office of the President or misuse of official power.[32] While supporters of the executive function theory recognized that this theory was not absolute and that some private conduct can be impeachable, it was argued that Clinton's conduct was personal and outside the realm of "other high crimes and misdemeanors."[33] This theory has been criticized in other articles. This threshold

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[32] Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999).

[33] Floor Debate, Clinton Impeachments, December 18, 1998 ("Perjury on a private matter, perjury regarding sex, is not a great and dangerous offense against the nation. It is not an abuse of uniquely presidential power. It does not threaten our form of government. It is not an impeachable offense.") (statement Rep. Jerrold Nadler, D., N.Y.).

argument, however, would appear again in the Senate trial. Notably, the defenders of the President argued that the standard of "high crimes and misdemeanors" should be treated differently for judicial, as opposed to presidential, officers. This argument was compelled by the fact that the Senate had previously removed Judge Claiborne for perjury before a grand jury and removed Judge Hastings, who had actually been acquitted on perjury charges by a court. I have previously written against this executive function theory of impeachable offenses.[34]

The House Judiciary Committee delivered four articles of impeachment on a straight partisan vote. Article One alleged perjury before the federal grand jury. Article Two alleged perjury in a sexual harassment case. Article Three alleged obstruction of justice through witness tampering. Article Four alleged perjury in the President's answers to Congress. On December 19, 1998, the House approved two of the four articles of impeachment: perjury before the grand jury and obstruction of justice. In both votes, although Republicans and Democrats crossed party lines, the final vote remained largely partisan. The impeachment was technically initiated on October 8, 1998 and the articles approved on December 19, 1998.

The Senate trial of President Clinton began on January 7, 1999, with Chief Justice William H. Rehnquist taking the oath. The rule adopted by the Senate created immediate problems for the House managers. The rules specifically required the House managers to prove their case for witnesses and imposed a witness-by-witness Senate vote on the House managers. Because the Independent Counsel had supplied an extensive record with testimony from key witnesses, the need to call witnesses like the Nixon hearings was greatly reduced. For that reason, the House moved quickly to the submission of articles of impeachment after the hearing of experts. However, the Senate only approved three witnesses, described by House manager and Judiciary Committee Chairman Henry Hyde as "a pitiful three." It proved fateful. One of the witnesses not called was Lewinsky herself. Years later, Lewinsky revealed (as she might have if called as a witness) that she was told to lie about the relationship by close associates of President Clinton. In 2018, Lewinsky stated Clinton encouraged her to lie to the independent counsel, an allegation raising the possibility of a variety of crimes as well as supporting the articles of impeachment.[35] The disclosure many years after the trial is a cautionary tale for future impeachments, as the denial of key witnesses from the Senate trial can prove decisive.

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[34] Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999).

[35] Jonathan Turley, *Lewinsky interview renews questions of Clinton crimes,* THE HILL (Nov. 26, 2018, 12:00 PM), https://thehill.com/opinion/white-house/418237-lewinsky-interview-renews-questions-of-clinton-crimes. Lewinsky said on the A&E documentary series "The Clinton Affair" that Clinton phoned her at 2:30 a.m. one morning in late 1997 to tell her she was on witness list for Jones' civil suit against him. She said she was "petrified" and that "Bill helped me lock myself back from that and he said I could probably sign an affidavit to get out of it." While he did not directly tell her to lie, she noted he did not tell her to tell the truth and that the conversation was about signing an affidavit "to get out of it." Lewinsky went into details on how Clinton arranged for Lewinsky to meet with his close adviser and attorney Vernon Jordan. Jordan then

The Clinton impeachment was narrow but based on underlying criminal conduct largely investigated by an Independent Counsel. The allegation of perjury of a sitting president was supported by a long investigation and extensive record. Indeed, the perjury by Clinton was clear and acknowledged even by some of his supporters. The flaws in the Clinton impeachment emerged from the highly restrictive and outcome determinative rules imposed by the Senate. In comparison, the Trump impeachment inquiry has raised a number of criminal acts but each of those alleged crimes are undermined by legal and evidentiary deficiencies. As discussed below, the strongest claim is for a non-criminal abuse of power if a quid pro quo can be established on the record. That deficiency should be addressed before any articles are reported to the floor of the House.

D. Summary

A comparison of the current impeachment inquiry with the three prior presidential inquiries puts a few facts into sharp relief. First, this is a case without a clear criminal act and would be the first such case in history if the House proceeds without further evidence. In all three impeachment inquiries, the commission of criminal acts by Johnson, Nixon, and Clinton were clear and established. With Johnson, the House effectively created a trapdoor crime and Johnson knowingly jumped through it. The problem was that the law—the Tenure in Office Act—was presumptively unconstitutional and the impeachment was narrowly built around that dubious criminal act. With Nixon, there were a host of alleged criminal acts and dozens of officials who would be convicted of felonies. With Clinton, there was an act of perjury that even his supporters acknowledged was a felony, leaving them to argue that some felonies "do not rise to the level" of an impeachment. Despite clear and established allegations of criminal acts committed by the president, narrow impeachments like Johnson and Clinton have fared badly. As will be discussed further below, the recently suggested criminal acts related to the Ukrainian controversy are worse off, being highly questionable from a legal standpoint and far from established from an evidentiary standpoint.

Second, the abbreviated period of investigation into this controversy is both problematic and puzzling. Although the Johnson impeachment progressed quickly after the firing of the Secretary of War, that controversy had been building for over a year and was actually the fourth attempted impeachment. Moreover, Johnson fell into the trap laid a year before in the Tenure of Office Act. The formal termination was the event that triggered the statutory language of the act and thus there was no dispute as to the critical facts. We have never seen a controversy arise for the first time and move to an

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arranged for Lewinsky to be represented by Frank Carter, who drafted a false affidavit denying any affair. Lewinsky, who had virtually no work history or relevant background, was offered a job with Revlon, where Jordan was a powerful member of the board of directors. Lewinsky said, "Frank Carter explained to me that if I signed an affidavit denying having had an intimate relationship with the president it might mean I would not have to be deposed in the Paula Jones case." Those details – including Clinton's encouragement for her to sign the affidavit and contracts after she became a witness – were never shared at the Senate trial.

impeachment in such a short period. Nixon and Clinton developed over many months of investigation and a wide array of witness testimony and grand jury proceedings. In the current matter, much remains unknown in terms of key witnesses and underlying documents. There is no explanation why the matter must be completed by December. After two years of endless talk of impeachable and criminal acts, little movement occurred toward an impeachment. Suddenly the House appears adamant that this impeachment must be completed by the end of December. To be blunt, if the schedule is being accelerated by the approach of the Iowa caucuses, it would be both an artificial and inimical element to introduce into the process. This is not the first impeachment occurring during a political season. In the Johnson impeachment, the vote on the articles was interrupted by the need for some Senators to go to the Republican National Convention. The bifurcated vote occurred in May 1868 and the election was held just six months later.

Finally, the difference in the record is striking. Again, Johnson's impeachment must be set aside as an outlier since it was based on a manufactured trap-door crime. Yet, even with Johnson, there was over a year of investigations and proceedings related to his alleged usurpation and defiance of the federal law. The Ukrainian matter is largely built around a handful of witnesses and a schedule that reportedly set the matter for a vote within weeks of the underlying presidential act. Such a wafer-thin record only magnifies the problems already present in a narrowly constructed impeachment. The question for the House remains whether it is seeking simply to secure an impeachment or actually trying to build a case for removal. If it is the latter, this is not the schedule or the process needed to build a viable case. The House should not assume that the Republican control of the Senate makes any serious effort at impeachment impractical or naïve. All four impeachment inquiries have occurred during rabid political periods. However, politicians can on occasion rise to the moment and chose principle over politics. Indeed, in the Johnson trial, senators knowingly sacrificed their careers to fulfill their constitutional oaths. If the House wants to make a serious effort at impeachment, it should focus on building the record to raise these allegations to the level of impeachable offenses and leave to the Senate the question of whether members will themselves rise to the moment that follows.

IV. THE CURRENT THEORIES OF IMPEACHABLE CONDUCT AGAINST PRESIDENT DONALD J. TRUMP

While all three acts in the impeachment standard refer to criminal acts in modern parlance, it is clear that "high crimes and misdemeanors" can encompass non-criminal conduct. It is also true that Congress has always looked to the criminal code in the fashioning of articles of impeachment. The reason is obvious. Criminal allegations not only represent the most serious forms of conduct under our laws, but they also offer an objective source for measuring and proving such conduct. We have never had a presidential impeachment proceed solely or primarily on an abuse of power allegation, though such allegations have been raised in the context of violations of federal or criminal law. Perhaps for that reason, there has been a recent shift away from a pure abuse of power allegation toward direct allegations of criminal conduct. That shift,

however, has taken the impeachment process far outside of the relevant definitions and case law on these crimes. It is to those allegations that I would now like to turn.

At the outset, however, two threshold issues are worth noting. First, this hearing is being held before any specific articles have been proposed. During the Clinton impeachment hearing, we were given a clear idea of the expected articles of impeachment and far greater time to prepare analysis of those allegations. The House leadership has repeatedly indicated that they are proceeding on the Ukrainian controversy and not the various alleged violations or crimes alleged during the Russian investigation. Recently, however, Chairman Schiff indicated that there might be additional allegations raised while continuing to reference the end of December as the working date for an impeachment vote. Thus, we are being asked to offer a sincere analysis on the grounds for impeachment while being left in the dark. My testimony is based on the public statements regarding the Ukrainian matter, which contain references to four alleged crimes and, most recently, a possible compromise proposal for censure.

Second, the crimes discussed below were recently raised as part of the House Intelligence Committee hearings as alternatives to the initial framework as an abuse of power. There may be a desire to refashion these facts into crimes with higher resonance with voters, such as bribery. In any case, Chairman Schiff and committee members began to specifically ask witnesses about elements that were pulled from criminal cases. When some of us noted that courts have rejected these broader interpretations or that there are missing elements for these crimes, advocates immediately shifted to a position that it really does not matter because "this is an impeachment." This allows members to claim criminal acts while dismissing the need to actually support such allegations. If that were the case, members could simply claim any crime from treason to genocide. While impeachment does encompass non-crimes, including abuse of power, past impeachments have largely been structured around criminal definitions. The reason is simple and obvious. The impeachment standard was designed to be a high bar and felonies often were treated as inherently grave and serious. Legal definitions and case law also offer an objective and reliable point of reference for judging the conduct of judicial and executive officers. It is unfair to claim there is a clear case of a crime like bribery and simultaneously dismiss any need to substantiate such a claim under the controlling definitions and meaning of that crime. After all, the common mantra that "no one is above the law" is a reference to the law applied to all citizens, even presidents. If the House does not have the evidence to support a claim of a criminal act, it should either develop such evidence or abandon the claim. As noted below, abandoning such claims would still leave abuse of power as a viable ground for impeachment. It just must be proven.

A. Bribery

While the House Intelligence Committee hearings began with references to "abuse of power" in the imposition of a quid pro quo with Ukraine, it ended with repeated references to the elements of bribery. After hearing only two witnesses, House Speaker Nancy Pelosi declared witnesses offered "devastating" evidence that "corroborated" bribery. This view was developed further by House Intelligence Committee Chairman Adam Schiff who repeatedly returned to the definition of bribery

while adding the caveat that, even if this did not meet the legal definition of bribery, it might meet a prior definition under an uncharacteristically originalist view: "As the founders understood bribery, it was not as we understand it in law today. It was much broader. It connoted the breach of the public trust in a way where you're offering official acts for some personal or political reason, not in the nation's interest."

The premise of the bribery allegations is that President Trump was soliciting a bribe from Ukraine when he withheld either a visit at the White House or military aid in order to secure investigations into the 2016 election meddling and the Hunter Biden contract by Ukraine. On its face, the bribery theory is undermined by the fact that Trump released the aid without the alleged pre-conditions. However, the legal flaws in this theory are more significant than such factual conflicts. As I have previously written,[36] this record does not support a bribery charge in either century. Before we address this bribery theory, it is important to note that any criminal allegation in an impeachment must be sufficiently clear and recognized to serve two purposes. First, it must put presidents on notice of where a line exists in the range of permissible comments or conduct in office. Second, it must be sufficiently clear to assure the public that an impeachment is not simply an exercise of partisan creativity in rationalizing a removal of a president. Neither of these purposes was satisfied in the Johnson impeachment where the crime was manufactured by Congress. This is why past impeachments focused on establishing criminal acts with reference to the criminal code and controlling case law. Moreover, when alleging bribery, it is the modern definition that is the most critical since presidents (and voters) expect clarity in the standards applied to presidential conduct. Rather than founding these allegations on clear and recognized definitions, the House has advanced a capacious and novel view of bribery to fit the limited facts. If impeachment is reduced to a test of creative redefinitions of crimes, no president will be confident in their ability to operate without the threat of removal. Finally, as noted earlier, dismissing the need to establish criminal conduct by arguing an act is "close enough for impeachment," is a transparent and opportunistic spin. This is not improvisational jazz. "Close enough" is not nearly enough for a credible case of impeachment.

1. The Eighteenth-Century Case For Bribery

The position of Chairman Schiff is that the House can rely on a broader originalist understanding of bribery that "connoted the breach of the public trust in a way where you're offering official acts for some personal or political reason, not in the nation's interest." The statement reflects a misunderstanding of early sources. Indeed, this interpretation reverses the import of early references to "violations of public trust." Bribery was cited as an example of a violation of public trust. It was not defined as any violation of public trust. It is akin to defining murder as any violence offense because it is listed among violent offenses. Colonial laws often drew from English sources which barred the "taking of Bribes, Gifts, or any unlawful Fee or Reward, by Judges, Justices of

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[36] Jonathan Turley, *Adam Schiff's Capacious Definition of Bribery Was Tried in 1787*, WALL ST. J. (Nov. 28, 2019, 1:49 PM), https://www.wsj.com/articles/adam-schiffs-capacious-definition-of-bribery-was-tried-in-1787-11574966979.

the Peace, or any other Officers either magisterial or ministerial."[37] Not surprisingly, these early laws categorized bribery as one of the crimes that constituted a violation of public trust. The categorization was important because such crimes could bar an official from holding public office. Thus, South Carolina's colonial law listed bribery as examples of acts barring service "[f]or the avoiding of corruption which may hereafter happen to be in the officers and ministers of those courts, places, or rooms wherein there is requisite to be had the true administration of justice or services of trust ...."[38]

The expansion of bribery in earlier American law did not stem from the changing of the definition as much as it did the scope of the crime. Bribery laws were originally directed at judicial, not executive officers, and the receiving as opposed to the giving of bribes. These common law definitions barred judges from receiving "any undue reward to influence his behavior in office."[39] The scope of such early laws was not broad but quite narrow.[40] Indeed, the narrow definition of bribery was cited as a reason for the English adoption of "high crimes and misdemeanors" which would allow for a broad base for impeachments. Story noted:

> "In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office; but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power."[41]

Thus, faced with the narrow meaning of bribery, the English augmented the impeachment standard with a separate broader offense.[42]

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[37] ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY, ch. XLI 23 (Samuel Allinson ed., Burlington, Isaac Collins 1776).

[38] THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA FROM ITS ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE 14648 (John F. Grimke ed., Philadelphia, R. Aitken 1790).

[39] IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND: IN FOUR BOOKS 129 (1765-69).

[40] CONG. RESEARCH SERV., IMPEACHMENT AND THE CONSTITUTION, 43 (2019).

[41] II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 798 (1833).

[42] Indeed, Chairman Schiff may be confusing the broader treatment given extortion in early laws, not bribery. *See generally* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 875 (1988) ("Since bribery law remained undeveloped for so long, another crime was needed to fill the gap-especially against corruption by nonjudicial officers.").

This view of bribery was also born out in the Constitutional Convention. As noted earlier, the Framers were familiar with the impeachment of Warren Hastings which was pending trial at the time of the drafting of the Constitution. The Hastings case reflected the broad impeachment standard and fluid interpretations applied in English cases. George Mason wanted to see this broader approach taken in the United States. Mason specifically objected to the use solely of "treason" and "bribery" because those terms were too narrow—the very opposite of the premise of Chairman Schiff's remarks. Mason ultimately failed in his effort to adopt a tertiary standard with broader meaning to encompass acts deemed as "subvert[ing] the Constitution." However, both Mason and Madison were in agreement on the implied meaning of bribery as a narrow, not broad crime. Likewise, Gouverneur Morris agreed, raising bribery as a central threat that might be deterred through the threat of impeachment:

> "Our Executive was not like a Magistrate having a life interest, much less like one having a hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. One would think the King of England well secured agst bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV."[43]

Bribery, as used here, did not indicate some broad definition of, but a classic payment of money. Louis XIV bribed Charles II to sign the secret Treaty of Dover of 1670 with the payment of a massive pension and other benefits kept secret from the English people. In return, Charles II not only agreed to convert to Catholicism, but to join France in a wartime alliance against the Dutch.[44]

Under the common law definition, bribery remains relatively narrow and consistently defined among the states. "The core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised."[45] The definition does not lend itself to the current controversy. President Trump can argue military and other aid is often used to influence other countries in taking domestic or international actions. It might be a vote in the United Nations or an anti-corruption investigation within a nation. Aid is not assumed to be "gratuitously exercised" but rather it is used as part of foreign policy discussions and international relations. Moreover, discussing visits to the White House is hardly the stuff of bribery under any of these common law sources. Ambassador Sondland testified that the President expressly denied there was a quid pro quo and that he was never told of such preconditions. However, he also testified that he came to believe there was a quid pro quo, not for military aid, but rather for the visit to the White House: "Was there a 'quid pro quo? With regard to the requested White House call and White House meeting,

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[43] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 68-69 (Max Farrand ed., 1937).

[44] GEORGE CLARK, THE LATER STUARTS (1660-1714) 86-87, 130 (2d ed. 1956).

[45] J. NOONAN, BRIBES xi (1984).

the answer is yes." Such visits are routinely used as bargaining chips and not "gratuitously exercised." As for the military aid, the withholding of the aid is difficult to fit into any common law definition of a bribe, particularly when it was ultimately provided without the satisfaction of the alleged pre-conditions. Early bribery laws did not even apply to executive officials and actual gifts were regularly given. Indeed, the Framers moved to stop such gifts separately through provisions like the Emoluments Clause. They also applied bribery to executive officials. Once again Morris' example is illustrative. The payment was a direct payment to Charles II of personal wealth and even a young French mistress.

The narrow discussion of bribery by the Framers stands in stark contrast to an allegedly originalist interpretation that would change the meaning of bribery to include broader notions of acts against the public trust. This is why bribery allegations in past impeachments, particularly judicial impeachments, focused on contemporary understandings of that crime. To that question, I would like to now turn.

2. The Twenty-First Century Case For Bribery

Early American bribery followed elements of the British and common law approach to bribery. In 1789, Congress passed the first federal criminal statute prohibiting bribing a customs official[46] and one year later Congress passed "An Act for the Punishment of Certain Crimes against the United States" prohibiting the bribery of a federal judge.[47] Various public corruption and bribery provisions are currently on the books, but the standard provision is found in 18 U.S.C. § 201 which allows for prosecution when "[a] public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for ... being influenced in the performance of any official act." While seemingly sweeping in its scope, the definition contains narrowing elements on the definition of what constitutes "a thing of value," an "official act," and "corrupt intent."

The Supreme Court has repeatedly narrowed the scope of the statutory definition of bribery, including distinctions with direct relevance to the current controversy. In *McDonnell v. United States*,[48] the Court overturned the conviction of former Virginia governor Robert McDonnell. McDonnell and his wife were prosecuted for bribery under the Hobbs Act, applying the same elements as found in Section 201(a)(3). They were accused of accepting an array of loans, gifts, and other benefits from a businessman in return for McDonnell facilitating key meetings, hosting events, and contacting government officials on behalf of the businessman who ran a company called Star Scientific. The benefits exceeded $175,000 and the alleged official acts were completed. Nevertheless, the Supreme Court unanimously overturned the conviction. As explained by Chief Justice Roberts:

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[46] Act of July 31, 1789, ch. 5, 34-35, 1 Stat. 29.

[47] Act of April 30, 1790. ch. 9, 1, 1 Stat. 112.

[48] McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016).

> "[O]ur concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless intrepretation of the federal bribery statute. A more limited interpretation of the term 'official act' leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court."[49]

The opinion is rife with references that have a direct bearing on the current controversy. This includes the dismissal of meetings as insufficient acts. It also included the allegations that "recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs." While the meeting and contacts discussed by Ambassador Sondland as a quid pro quo are not entirely the same, the Court refused to recognize that "nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*."[50] The Court also explained why such "boundless interpretations" are inimical to constitutional rights because they deny citizens the notice of what acts are presumptively criminal: "[U]nder the Government's interpretation, the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement.'"[51] That is precisely the danger raised earlier in using novel or creative interpretations of crimes like bribery to impeach a president. Such improvisational impeachment grounds deny presidents notice and deny the system predictability in the relations between the branches.

The limited statements from the House on the bribery theory for impeachment track an honest services fraud narrative. These have tended to be some of the most controversial fraud and bribery cases when brought against public officials. These cases are especially difficult when the alleged act was never taken by the public official. *McDonnell* resulted in the reversal of a number of convictions or dismissal of criminal counts against former public officials. One such case was *United States v. Silver* involving the prosecution of the former Speaker of the New York Assembly. Silver was accused of an array of bribes and kickbacks in the form of referral fees from law firms. He was convicted on all seven counts and sentenced to twelve years of imprisonment. It was overturned because of the same vagueness that undermined the conviction in *McDonnell*. The Second Circuit ruled the "overbroad" theory of prosecution "encompassed any action taken or to be taken under color of official authority."[52] Likewise, the Third Circuit reversed conviction on a variety of corruption

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[49] *Id.* at 2375.

[50] *Id.* at 2372.

[51] *Id.* at 2373.

[52] United States v. Silver, 864 F.3d 102, 113 (2d Cir. 2017).

counts in *Fattah v. United States*.[53] Former Rep. Chaka Fattah (D-Penn.) was convicted on all twenty-two counts of corruption based on an honest services prosecution. The case also involved a variety of alleged "official acts" including the arranging of meetings with the U.S. Trade Representative. The Third Circuit ruled out the use of acts as an "official act." As for the remanded remainder, the court noted it might be possible to use other acts, such as lobbying for an appointment of an ambassador, to make out the charge but stated that "[d]etermining, for example, just how forceful a strongly worded letter of recommendation must be before it becomes impermissible 'pressure or advice' is a fact-intensive inquiry that falls within the domain of a properly instructed jury."[54] Faced with the post-*McDonnell* reversal and restrictive remand instructions, the Justice Department elected not to retry Fattah.[55] Such a fact-intensive inquiry would be far more problematic in the context of a conversation between two heads of state where policy and political issues are often intermixed.[56]

The same result occurred in the post-*McDonnell* appeal by former Rep. William Jefferson. Jefferson was convicted of soliciting and receiving payments from various sources in return for his assistance. This included shares in a telecommunications company and the case became a classic corruption scandal when $90,000 in cash was found in Jefferson's freezer. The money was allegedly meant as a bribe for the Nigerian Vice President to secure assistance in his business endeavors. Jefferson was convicted on eleven counts and the conviction was upheld on ten of eleven of those counts. *McDonnell* was then handed down. The federal court agreed that the case imposed more limited definitions and instructions for bribery.[57] The instruction defining the element of "official acts" is notable given recent statements in the House hearings: "An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position." The court agreed that such definitions are, as noted in *McDonnell*, unbounded. The court added:

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[53] United States v. Fattah, 902 F.3d 197, 240 (3d Cir. 2018) ("in accordance with *McDonnell*, that Fattah's arranging a meeting between Vederman and the U.S. Trade Representative was not itself an official act. Because the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt.").

[54] *Id.* at 241.

[55] Griffin Connolly, *DOJ Won't Re-Try Ex-Rep Fatah*, ROLL CALL (May 2, 2019), https://www.rollcall.com/news/congress/doj-wont-retry-ex-rep-fattah-overturned-convictions-wont-reduce-prison-time. Rep. Fatah's sentencing on other counts however left a ten-year sentence in place.

[56] The convictions of former New York Majority Leader Dean Skelos and his son for bribery or corruption were also vacated by Second Circuit over the definition of "official act." United States v. Skelos, 707 Fed. Appx. 733, 733-36 (2d Cir. 2017). They were later retried and convicted.

[57] United States v. Jefferson, 289 F. Supp. 3d. 717, 721 (E.D. Va. 2017).

> "the jury instructions in Jefferson's case did not explain that to qualify as an official act 'the public official must make a decision or take an action on that question, matter, cause, suit, proceeding or controversy, or agree to do so.' The jury charge in Jefferson's case did not require the jury to consider whether Jefferson could actually make a decision on a pending matter, nor did the instructions clarify that Jefferson's actions could include "using [an] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." Without these instructions, the jury could have believed that any action Jefferson took to assist iGate or other businesses was an official act, even if those acts included the innocent conduct of attending a meeting, calling an official, or expressing support for a project."[58]

Accordingly, the court dismissed seven of ten of the counts, and Jefferson was released from prison.[59]

McDonnell also shaped the corruption case against Sen. Robert Menendez (D-N.J.) who was charged with receiving a variety of gifts and benefits in exchange for his intervention on behalf of a wealthy businessman donor. Both Sen. Menendez and Dr. Salomon Melgen were charged in an eighteen-count indictment for bribery and honest services fraud in 2015.[60] The jury was given the more restrictive post-*McDonnell* definition and proceeded to deadlock on the charges, leading to a mistrial. As in the other cases, the Justice Department opted to dismiss the case—a decision attributed by experts to the view that *McDonnell* "significantly raised the bar for prosecutors who try to pursue corruption cases against elected officials."[61]

Applying *McDonnell* and other cases to the current controversy undermines the bribery claims being raised. The Court noted that an "official act"

> "is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something

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[58] *Id.* at 735 (internal citations omitted).

[59] Rachel Weiner, *Judge lets former Louisiana congressman William Jefferson out of prison*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d_story.html.

[60] United States v. Menendez, 132 F. Supp. 3d 635 (D.N.J. 2015).

[61] Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html.

> specific and focused that is 'pending' or 'may by law be brought' before a public official."

The discussion of a visit to the White House is facially inadequate for this task, as it is not a formal exercise of governmental power. However, withholding of military aid certainly does smack of a "determination before an agency." Yet, that "quo" breaks down on closer scrutiny, even before getting to the question of a "corrupt intent." Consider the specific act in this case. As the Ukrainians knew, Congress appropriated the $391 million in military aid for Ukraine and the money was in the process of being apportioned. Witnesses before the House Intelligence Committee stated that it was not uncommon to have delays in such apportionment or for an Administration to hold back money for a period longer than the 55 days involved in these circumstances. Acting Chief of Staff Mike Mulvaney stated that the White House understood it was required to release the money by a date certain absent a lawful reason barring apportionment. That day was the end of September for the White House. Under the 1974 Impoundment Control Act (ICA), reserving the funds requires notice to Congress. This process has always been marked by administrative and diplomatic delays. As the witnesses indicated, it is not always clear why aid is delayed. Arguably, by the middle of October, the apportionment of the aid was effectively guaranteed. It is not contested that the Administration could delay the apportionment to resolve concerns over how the funds would be effectively used or apportioned. The White House had until the end of the fiscal year on September 30 to obligate the funds. On September 11, the funds were released. By September 30, all but $35 million in the funds were obligated. However, on September 27, President Trump signed a spending bill that averted a government shutdown and extended current funding, specifically providing another year to send funds to Ukraine.[62]

It is certainly fair to question the non-budgetary reasons for the delay in the release of the funds. Yet, the White House was largely locked into the statutory and regulatory process for obligating the funds by the end of September. Even if the President sought to mislead the Ukrainians on his ability to deny the funding, there is no evidence of such a direct statement in the record. Indeed, Ambassador Taylor testified that he believed the Ukrainians first raised their concerns over a pre-condition on August 28 with the publication of the Politico article on the withholding of the funds. The aid was released roughly ten days later, and no conditions were actually met. The question remains what the "official act" was for this theory given the deadline for aid release. Indeed, had a challenge been filed over the delay before the end of September, it would have most certainly been dismissed by a federal court as premature, if not frivolous.

Even if the "official act" were clear, any bribery case would collapse on the current lack of evidence of a corrupt intent. In the transcript of the call, President Trump

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[62] Caitlin Emma, *Trump signs stopgap spending bill to avoid a shutdown,* POLITICO (Sept. 27, 2019, 6:26 PM), https://www.politico.com/news/2019/09/27/trump-signs-spending-bill-007275; Joe Gould, *Senate passes Ukraine aid extension, averts government shutdown for now*, DEFENSENEWS (Sept. 26, 2019), https://www.defensenews.com/congress/2019/09/26/senate-passes-ukraine-aid-extension-stopgap-spending-bill/.

pushes President Zelensky for two investigations. First, he raises his ongoing concerns over Ukrainian involvement in the 2016 election:

> "I would like you to do us a favor though because our country has been through a lot and Ukraine knows a lot about it. I would like you to find out what happened with this whole situation with Ukraine, they say Crowdstrike ... I guess you have one of your wealthy people ... The server, they say Ukraine has it. There are a lot of things that went on, the whole situation ... I think you're surrounding yourself with some of the same people. I would like to have the Attorney General call you or your people and I would like you to get to the bottom of it. As you saw yesterday, that whole nonsense. It ended with a very poor performance by a man named Robert Mueller, an incompetent performance, but they say a lot of it started with Ukraine. Whatever you can do, it's very important that you do it if that's possible."[63]

Many have legitimately criticized the President for his fixation on Crowdstrike and his flawed understanding of that company's role and Ukrainian ties. However, asking for an investigation into election interference in 2016 does not show a corrupt intent. U.S. Attorney John Durham is reportedly looking into the origins of the FBI investigation under the Obama Administration. That investigation necessarily includes the use of information from Ukrainian figures in the Steele dossier. Witnesses like Nellie Ohr referenced Ukrainian sources in the investigation paid for by the Democratic National Committee and the campaign of Hillary Clinton. While one can reasonably question the significance of such involvement (and it is certainly not on the scale of the Russian intervention into the election), it is part of an official investigation by the Justice Department. Trump may indeed be wildly off base in his concerns about Ukrainian efforts to influence the election. However, even if these views are clueless, they are not corrupt. The request does not ask for a particular finding but cooperation with the Justice Department and an investigation into Ukrainian conduct. Even if the findings were to support Trump's view (and there is no guarantee that would be case), there is no reason to expect such findings within the remaining time before the election. Likewise, the release of unspecified findings from an official investigation at some unspecified date are not a "thing of value" under any reasonable definition of the statute.

The references to investigating possible 2016 election interference cannot be the basis for a credible claim of bribery or other crimes, at least on the current record. That, however, was not the only request. After President Zelensky raised the fact that his aides had spoken with Trump's counsel, Rudy Giuliani, and stated his hope to speak with him directly, President Trump responded:

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[63] *Telephone Conversation with President Zelenskyy of Ukraine on July 25, 2019* (Sept. 24, 2019) (available at https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf).

> "Good because I heard you had a prosecutor who was very good and he was shut down and that's really unfair. A lot of people are talking about that, the way they shut your very good prosecutor down and you had some very bad people involved. Mr. Giuliani is a highly respected man. He was the mayor of New York City, a great mayor, and I would like him to call you. I will ask him to call you along with the Attorney General. Rudy very much knows what's happening and he is a very capable guy. If you could speak to him that would be great. The former ambassador from the United States, the woman, was bad news and the people she was dealing with in the Ukraine were bad news so I just want to let you know that. The other thing, there's a lot of talk about Biden's son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it. It sounds horrible to me."[64]

This is clearly the most serious problem with the call. In my view, the references to Biden and his son were highly inappropriate and should not have been part of the call. That does not, however, make this a plausible case for bribery. Trump does not state a quid pro quo in the call. He is using his influence to prompt the Ukrainians to investigate both of these matters and to cooperate with the Justice Department. After President Zelensky voiced a criticism of the prior U.S. ambassador, President Trump responded:

> "Well, she's going to go through some things. I will have Mr. Giuliani give you a call and I am also going to have Attorney General Barr call and we will get to the bottom of it. I'm sure you will figure it out. I heard the prosecutor was treated very badly and he was a very fair prosecutor so good luck with everything. Your economy is going to get better and better I predict. You have a lot of assets. It's a great country. I have many Ukrainian friends, they're incredible people."[65]

Again, the issue is not whether these comments are correct, but whether they are corrupt. In my view, there is no case law that would support a claim of corrupt intent in such comments to support a bribery charge. There is no question that an investigation of the Bidens would help President Trump politically. However, if President Trump honestly believed that there was a corrupt arrangement with Hunter Biden that was not fully investigated by the Obama Administration, the request for an investigation is not corrupt, notwithstanding its inappropriateness. The Hunter Biden contract has been widely criticized as raw influence peddling. I have joined in that criticism. For many years, I have written about the common practice of companies and lobbyists attempting to curry favor with executive branch officials and members of Congress by giving windfall contracts or jobs to their children. This is a classic example of that corrupt practice. Indeed, the glaring appearance of a conflict was reportedly raised by George Kent, the

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[64] *Id.* at 3-4.

[65] *Id.* at 4.

Deputy Assistant Secretary of State for European and Eurasian Affairs during the Obama Administration.

The reference to the Bidens also lacks the same element of a promised act on the part of President Trump. There is no satisfaction of a decision or action on the part of President Trump or an agreement to make such a decision or action. There is a presumption by critics that this exists, but the presumption is no substitute for proof. The current lack of proof is another reason why the abbreviated investigation into this matter is so damaging to the case for impeachment. In the prior bribery charges in *McDonnell* and later cases, benefits were actually exchanged but the courts still rejected the premise that the meetings and assistance were official acts committed with a corrupt intent. Finally, the "boundless interpretations of the bribery statutes" rejected in *McDonnell* pale in comparison to the effort to twist these facts into the elements of that crime. I am not privy to conversations between heads of state, but I expect many prove to be fairly freewheeling and informal at points. I am confident that such leaders often discuss politics and the timing of actions in their respective countries. If this conversation is a case of bribery, we could have marched every living president off to the penitentiary. Presidents often use aid as leverage and seek to advance their administrations in the timing or content of actions. The media often discusses how foreign visits are used for political purposes, particularly as elections approach. The common reference to an "October surprise" reflects this suspicion that presidents often use their offices, and foreign policy, to improve their image. If these conversations are now going to be reviewed under sweeping definitions of bribery, the chilling effect on future presidents would be perfectly glacial.

The reference to the Hunter Biden deal with Burisma should never have occurred and is worthy of the criticism of President Trump that it has unleashed. However, it is not a case of bribery, whether you are adopting the view of an eighteenth century, or of a twenty-first century prosecutor. As a criminal defense attorney, I would view such an allegation from a prosecutor to be dubious to the point of being meritless.

B. Obstruction of Justice

Another crime that was sporadically mentioned during the House Intelligence hearings was obstruction of justice or obstruction of Congress.[66] Once again, with only a

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[66] It is important to distinguish between claims of "obstruction of justice," "obstruction of Congress," and "contempt of Congress" – terms often just loosely in these controversies. Obstruction of Congress falls under the same provisions as obstruction of justice, specifically, 18 U.S.C. §1505 (prohibiting the "obstruction of proceedings before … committees"). However, the Congress has also used its contempt powers to bring both civil and criminal actions. The provision on contempt states:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, … or any committee of either House of Congress, willfully makes default, or who, having

few days to prepare this testimony and with no public report on the specific allegations, my analysis remains mired in uncertainty as to any plan to bring such a claim to the foundational evidence for the charge. Most of the references to obstruction have been part of a Ukraine-based impeachment plan that does not include any past alleged crimes from the Russian investigation. I will therefore address the possibility of a Ukraine-related obstruction article of impeachment.[67] However, as I have previously written,[68] I believe an obstruction claim based on the Mueller Report would equally at odds with the record and the controlling case law.[69] The use of an obstruction theory from the Mueller Report

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> appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [$ 100,000] nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2 U.S.C.§§192, 194. Thus, when the Obama Administration refused to turn over critical information in the Fast and Furious investigation, the Congress brought a contempt not an impeachment action against Attorney General Eric Holder. In this case, the House would skip any contempt action as well as any securing any order to compel testimony or documents. Instead, it would go directly to impeachment for the failure to turn over material or make available witnesses – a conflict that has arisen in virtually every modern Administration.

[67] For the record, I previously testified on obstruction theories in January in the context of the Mueller investigation before the United States Senate Committee of the Judiciary as part of the Barr confirmation hearing. United States Senate, Committee on the Judiciary, *The Confirmation of William Pelham Barr As Attorney General of the United States Supreme Court* (Jan. 16, 2019) (testimony of Professor Jonathan Turley).

[68] *See, e.g.*, Jonathan Turley, *Mueller's end: A conclusion on collusion but confusion on Obstruction*, THE HILL (March 24, 2019, 8:30 PM), https://thehill.com/opinion/white-house/435553-muellers-end-a-conclusion-on-collusion-but-confusion-on-obstruction.

[69] I have previously criticized Special Counsel Mueller for his failure to reach a conclusion on obstruction as he did on the conspiracy allegation. *See* Jonathan Turley, *Why Mueller may be fighting a public hearing on Capitol Hill*, THE HILL (May 5, 2019, 10:00 AM), https://thehill.com/opinion/judiciary/445534-why-mueller-may-be-fighting-a-public-hearing-on-capitol-hill. However, the report clearly undermines any credible claim for obstruction. Mueller raises ten areas of concern over obstruction. The only substantive allegation concerns his alleged order to White House Counsel Don McGahn to fire Mueller. While the President has denied that order, the report itself destroys any real case for showing a corrupt intent as an element of this crime. Mueller finds that Trump had various non-criminal motivations for his comments regarding the investigation, including his belief that there is a deep-state conspiracy as well as an effort to belittle his 2016 election victory. Moreover, the Justice Department did what Mueller should have done: it reached a conclusion. Both Attorney General Bill Barr and Deputy Attorney General Rod Rosenstein reviewed the Mueller Report and concluded that no

would be unsupportable in the House and unsustainable in the Senate. Once again, the lack of information (just weeks before an expected impeachment vote) on the grounds for impeachment is both concerning and challenging. It is akin to being asked to diagnose a patient's survivability without knowing his specific illness.

Obstruction of justice is a more broadly defined crime than bribery and often overlaps with other crimes like witness tampering, subornation, or specific acts designed to obstruct a given proceeding. There are many federal provisions raising forms of obstruction that reference parallel crimes. Thus, influencing a witness is a standalone crime and also a form of obstruction under 18 U.S.C. 1504. In conventional criminal cases, prosecutions can be relatively straightforward, such as cases of witness intimidation under 18 U.S. 1503. Of course, this is no conventional case. The obstruction claims leveled against President Trump in the Ukrainian context have centered on two main allegations. First, there was considerable discussion of the moving of the transcript of the call with President Zelensky to a classified server as a possible premeditated effort to hide evidence. Second, there have been repeated references to the "obstruction" of President Trump by invoking executive privileges or immunities to withhold witnesses and documents from congressional committees. In my view, neither of these general allegations establishes a plausible case of criminal obstruction or a viable impeachable offense.

The various obstruction provisions generally share common elements. 18 U.S.C. § 1503, for example, broadly defines the crime of "corruptly" endeavoring "to influence, obstruct or impede the due administration of justice." This "omnibus" provision, however, is most properly used for judicial proceedings such as grand jury investigations, and the Supreme Court has narrowly construed its reach. There is also 18 U.S.C. § 1512(c), which contains a "residual clause" in subsection (c)(2), which reads:

> (c) Whoever corruptly-- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added].

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cognizable case was presented for an allegation of obstruction of justice. Many members of this Committee heralded the selection of Rosenstein as a consummate and apolitical professional who was responsible for the appointment of the Special Counsel. He reached this conclusion on the record sent by Mueller and, most importantly, the controlling case law. As with the campaign finance allegation discussed in this testimony, an article based on obstruction in the Russian investigation would seek the removal of a President on the basis of an act previously rejected as a crime by the Justice Department. Many of us have criticized the President for his many comments and tweets on the Russian investigation. However, this is a process that must focus on impeachable conduct, not imprudent or even obnoxious conduct.

This residual clause has long been the subject of spirited and good-faith debate, most recently including the confirmation of Attorney General Bill Barr. The controversy centers on how to read the sweeping language in subsection (c)(2) given the specific listing of acts in subsection (c)(1). It strains credulity to argue that, after limiting obstruction with the earlier language, Congress would then intentionally expand the provision beyond recognition with the use of the word "otherwise." For that reason, it is often argued that the residual clause has a more limited meaning of other acts of a similar kind. As with the bribery cases, courts have sought to maintain clear and defined lines in such interpretations to give notice of citizens as to what is criminal conduct under federal law. The purpose is no less relevant in the context of impeachments.

The danger of ambiguity in criminal statutes is particularly great when they come into collision with constitutional functions or constitutional rights like free speech. Accordingly, federal courts have followed a doctrine of avoidance when ambiguous statutes collide with constitutional functions or powers. In *United States ex rel. Attorney General v. Delaware & Hudson Co.*,[70] the Court held that "Under that doctrine, when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"[71] This doctrine of avoidance has been used in conflicts regarding proper the exercise of executive powers. Thus, when the Supreme Court considered the scope of the Federal Advisory Committee Act ("FACA") it avoided a conflict with Article II powers through a narrower interpretation. In *Public Citizen v. U.S. Department of Justice*,[72] the Court had a broad law governing procedures and disclosures committees, boards, and commissions. However, when applied to consultations with the American Bar Association regarding judicial nominations, the Administration objected to the conflict with executive privileges and powers. The Court adopted a narrow interpretation: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[73] These cases would weigh heavily in the context of executive privilege and the testimony of key White House figures on communications with the President.

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[70] 213 U.S. 366 (1909).

[71] *Id.* at 408; *see also* Op. Off. Legal Counsel 253, 278 (1996) ("It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it.").

[72] 491 U.S. 440 (1989).

[73] *Id.*; *see also Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes.").

There is no evidence that President Trump acted with the corrupt intent required for obstruction of justice on the record created by the House Intelligence Committee. Let us start with the transfer of the file. The transfer of the transcript of the file was raised as a possible act of obstruction to hide evidence of a quid pro quo. However, the nefarious allegations behind the transfer were directly contradicted by Tim Morrison, the former Deputy Assistant to the President and Senior Director for Europe and Russia on the National Security Council. Morrison testified that he was the one who recommended that the transcript be restricted after questions were raised about President Trump's request for investigations. He said that he did so solely to protect against leaks and that he spoke to senior NSC lawyer John Eisenberg. When Morrison learned the transcript was transferred to a classified server, he asked Eisenberg about the move. He indicated that Eisenberg was surprised and told him it was a mistake. He described it as an "administrative error." Absent additional testimony or proof that Morrison has perjured himself, the allegation concerning the transfer of the transcript would seem entirely without factual support, let alone legal support, as a criminal obstructive act.

Most recently, the members have focused on an obstruction allegation centering on the instructions of the White House to current and former officials not to testify due to the expected assertions of executive privilege and immunity. Notably, the House has elected not to subpoena core witnesses with first-hand evidence on any quid pro quo in the Ukraine controversy. Democratic leaders have explained that they want a vote by the end of December, and they are not willing to wait for a decision from the court system as to the merits of these disputes. In my view, that position is entirely untenable and abusive in an impeachment. Essentially, these members are suggesting a president can be impeached for seeking a judicial review of a conflict over the testimony of high-ranking advisers to the President over direct communications with the President. The position is tragically ironic. The Democrats have at times legitimately criticized the President for treating Article II as a font of unilateral authority. Yet, they are now doing the very same thing in claiming Congress can demand any testimony or documents and then impeach any president who dares to go to the courts. Magnifying the flaws in this logic is the fact that the House has set out one of the shortest periods in history for this investigation—a virtual rocket docket for impeachment. House leaders are suggesting that they will move from notice of an alleged impeachable act at the beginning of September and adopt articles of impeachment based on controversy roughly 14 weeks later. On this logic, the House could give a president a week to produce his entire staff for testimony and then impeach him when he seeks review by a federal judge.

As extreme as that hypothetical may seem, it is precisely the position of some of those advancing this claim. In a recent exchange on National Public Radio with former Rep. Liz Holtzman, I raised the utter lack of due process and fairness in such a position.[74] Holtzman, one of the House Judiciary Committee members during the Nixon impeachment, insisted that a president has no right to seek judicial review and that he must turn over everything and anything demanded by Congress. Holtzman insisted that

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[74] Public Impeachment Hearing Analysis From Nixon, Clinton Figures, WBUR (Nov. 14, 2019), https://www.wbur.org/onpoint/2019/11/14/first-impeachment-hearing-congress-trump-taylor-kent.

the position of her Chairman, Peter Rodino, was that the House alone dictates what must be produced. That is a position this Committee should not replicate. This returns us to the third article of impeachment against Nixon discussed earlier. That article stated:

> "In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives... [i]n all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States."[75]

Once again, I have always been critical of this article. Nixon certainly did obstruct the process in a myriad of ways, from witness tampering to other criminal acts. However, on the critical material sought by Congress, Nixon went to Court and ultimately lost in his effort to withhold the evidence. He had every right to do so. On July 25, 1974, the Court ruled in *United States v. Nixon*[76] that the President had to turn over the evidence. On August 8, 1974, Nixon announced his intention to resign. Notably, in that decision, the Court recognized the existence of executive privilege—a protection that requires a balancing of the interests of the legislative and executive branches by the judicial branch. The Court ruled that "[n]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[77] Yet, the position stated in the current controversy is perfectly Nixonian. It is asserting the same "absolute, unqualified" authority of Congress to demand evidence while insisting that a president has no authority to refuse it. The answer is obvious. A President cannot "substitute[] his judgment" for Congress on what they are entitled to see and likewise Congress cannot substitute its judgment as to what a President can withhold. The balance of those interests is performed by the third branch that is constitutionally invested with the authority to review and resolve such disputes.

The recent decision by a federal court holding that former White House Counsel Don McGahn must appear before a House committee is an example of why such review is so important and proper.[78] I criticized the White House for telling McGahn and others not to appear before Congress under a claim of immunity. Indeed, when I last appeared before this Committee as a witness, I encouraged that litigation and said I believed the

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[75] WATERGATE.INFO, https://watergate.info/impeachment/articles-of-impeachment.

[76] *United States v. Nixon*, 418 U.S. 683, 706 (1974).

[77] *Id.*

[78] Committee on the Judiciary v. McGahn, Civ. No. 19-cv-2379 (KBJ), 2019 U.S. Dist. LEXIS 203983 (D.D.C. 2019).

Committee would prevail.[79] Notably, the opinion in *Committee on the Judiciary v. McGahn* rejected the immunity claims of the White House but also reaffirmed "the Judiciary's duty under the Constitution to interpret the law and to declare government overreaches unlawful."[80] The Court stressed that

> "the Framers made clear that the proper functioning of a federal government that is consistent with the preservation of constitutional rights hinges just as much on the intersectionality of the branches as it does on their separation, and it is the assigned role of the Judiciary to exercise the adjudicatory power prescribed to them under the Constitution's framework to address the disputed legal issues that are spawned from the resulting friction."[81]

The position of this Committee was made stronger by allowing the judiciary to rule on the question. Indeed, that ruling now lays the foundation for a valid case of obstruction. If President Trump defies a final order without a stay from a higher court, it would constitute real obstruction. Just yesterday, in *Trump v. Deutsche Bank*, the United States for the Second Circuit became the latest in a series of courts to reject the claims made by the President's counsel to withhold financial or tax records from Congress.[82] The Court reaffirmed that such access to evidence is "an important issue concerning the investigative authority."[83] With such review, the courts stand with Congress on the issue of disclosure and ultimately obstruction in congressional investigations. Moreover, such cases can be expedited in the courts. In the Nixon litigation, courts moved those cases quickly to the Supreme Court. In contrast, the House leaderships have allowed two months to slip away without using its subpoena authority to secure the testimony of critical witnesses. The decision to adopt an abbreviated schedule for the investigation and not to seek to compel such testimony is a strategic choice of the House leadership. It is not the grounds for an impeachment.

If the House moves forward with this impeachment basis, it would be repeating the very same abusive tactics used against President Andrew Johnson. As discussed earlier, the House literally manufactured a crime upon which to impeach Johnson in the Tenure in Office Act. This was a clearly unconstitutional act with a trap-door criminal provision (transparently referenced as a "high misdemeanor") if Johnson were to fire the Secretary of War. Congress created a crime it knew Johnson would commit by using his recognized authority as president to pick his own cabinet. In this matter, Congress set a

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[79] *See* United States House of Representatives, Committee on the Judiciary, "Executive Privilege and Congressional Oversight" (May 15, 2019) (testimony of Professor Jonathan Turley).

[80] *McGahn*, 2019 U.S. Dist. LEXIS 203983, at *11.

[81] *Id.* at 98.

[82] Trump v. Deutsche Bank, No. 19-1540-cv (2d Cir. Dec. 3, 2019) (available at https://www.documentcloud.org/documents/6565847-Deutsche-Bank-20191203.html).

[83] *Id.*

short period for investigation and then announced Trump would be impeached for seeking, as other presidents have done, judicial review over the demand for testimony and documents.

The obstruction allegation is also undermined by the fact that many officials opted to testify, despite the orders from the President that they should decline. These include core witnesses in the impeachment hearings, like National Security Council Director of European Affairs Alexander Vindman, Ambassador William Taylor, Ambassador Gordon Sondland, Deputy Assistant Secretary of State George Kent, Acting Assistant Secretary of State Philip Reeker, Under Secretary of State David Hale, Deputy Associate Director of the Office of Management and Budget Mark Sandy, and Foreign Service Officer David Holmes. All remain in federal service in good standing. Thus, the President has sought judicial review without taking disciplinary actions against those who defied his instruction not to testify.

If this Committee elects to seek impeachment on the failure to yield to congressional demands in an oversight or impeachment investigation, it will have to distinguish a long line of cases where prior presidents sought the very same review while withholding witnesses and documents. Take the Obama administration position, for instance, on the investigation of "Fast and Furious," which was a moronic gunwalking operation in which the government arranged for the illegal sale of powerful weapons to drug cartels in order to track their movement. One such weapon was used to murder Border Patrol Agent Brian Terry, and Congress, justifiably so, began an oversight investigation. Some members called for impeachment proceedings. But President Obama invoked executive privilege and barred essential testimony and documents. The Obama Administration then ran out the clock in the judiciary, despite a legal rejection of its untenable and extreme claim by a federal court. During its litigation, the Obama Administration argued the courts had no authority over its denial of such witnesses and evidence to Congress. In *Committee on Oversight & Government Reform v. Holder,*[84] Judge Amy Berman Jackson, ruled that "endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers." The position of the Obama Administration was extreme and absurd. It was also widely viewed as an effort to run out the clock on the investigation. Nevertheless, President Obama had every right to seek judicial review in the matter and many members of this very Committee supported his position.

Basing impeachment on this obstruction theory would itself be an abuse of power . . . by Congress. It would be an extremely dangerous precedent to set for future presidents and Congresses in making an appeal to the Judiciary into "high crime and misdemeanor."

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[84] 979 F. Supp. 2d 1, 3-4 (D.D.C. 2013).

C. Extortion.

As noted earlier, extortion and bribery cases share a common law lineage. Under laws like the Hobbs Act, prosecutors can allege different forms of extortion. The classic form of extortion is coercive extortion to secure property "by violence, force, or fear."[85] Even if one were to claim the loss of military aid could instill fear in a country, that is obviously not a case of coercive extortion as that crime has previously been defined. Instead, it would presumably be alleged as extortion "under color of official right."[86] Clearly, both forms of extortion have a coercive element, but the suggestion is that Trump was "trying to extort" the Ukrainians by withholding aid until they agreed to open investigations. The problem is that this allegation is no closer to the actual crime of extortion than it is to its close cousin bribery. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right."[87]
As shown in cases like *United States v. Silver*,[88] extortion is subject to the same limiting definition as bribery and resulted in a similar overturning of convictions. Another obvious threshold problem is defining an investigation into alleged corruption as "property." Blackstone described a broad definition of extortion in early English law as "an abuse of public, justice which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due him, or more than is due, or before it is due."[89] The use of anything "of value" today would be instantly rejected. Extortion cases involve tangible property, not possible political advantage.[90] In this case, Trump asked for cooperation with the Justice Department in its investigation into the origins of the FBI investigation on the 2016 election. As noted before, that would make a poor basis for any criminal or impeachment theory. The Biden investigation may have tangible political benefits, but it is not a form of property. Indeed, Trump did not know when such an investigation would be completed or what it might find. Thus, the request was for an investigation that might not even benefit Trump.

The theory advanced for impeachment bears a close similarity to one of the extortion theories in *United States v. Blagojevich* where the Seventh Circuit overturned an extortion conviction based on the Governor of Illinois, Rod Blagojevich, pressuring then Sen. Barack Obama to make him a cabinet member or help arrange for a high-paying job in exchange for Blagojevich appointing a friend of Obama's to a vacant Senate seat. The prosecutors argued such a favor was property for the purposes of extortion. The court dismissed the notion, stating "The President-elect did not have a

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[85] 18 U.S.C. §§ 1951 (2018).

[86] *Id.*

[87] 18 U.S.C. § 1951(b)(2).

[88] 864 F.3d 102 (2d Cir. 2017).

[89] 4 WILLIAM BLACKSTONE, COMMENTARIES 141 (1769).

[90] *See* Scheidler v. Nat'l Org. for Women, 537 U.S. 393, 404 (2003) (citing United States v. Enmons, 410 U.S. 396, 400 (1973)).

property interest in any Cabinet job, so an attempt to get him to appoint a particular person to the Cabinet is not an attempt to secure 'property' from the President (or the citizenry at large)."'[91] In the recent hearings, witnesses spoke of the desire for "deliverables" sought with the aid. Whatever those "deliverables" may have been, they were not property as defined for the purposes of extortion any more than the "logrolling" rejected in *Blagojevich*.

There is one other aspect of the *Blagojevich* opinion worth noting. As I discussed earlier, the fact that the military aid was required to be obligated by the end of September weakens the allegation of bribery. Witnesses called before the House Intelligence Committee testified that delays were common, but that aid had to be released by September 30th. It was released on September 11th. The ability to deny the aid, or to even withhold it past September 30th is questionable and could have been challenged in court. The status of the funds also undermines the expansive claims on what constitutes an "official right" or "property":

> "The indictment charged Blagojevich with the 'color of official right' version of extortion, but none of the evidence suggests that Blagojevich claimed to have an 'official right' to a job in the Cabinet. He did have an 'official right' to appoint a new Senator, but unless a position in the Cabinet is 'property' from the President's perspective, then seeking it does not amount to extortion. Yet a political office belongs to the people, not to the incumbent (or to someone hankering after the position). *Cleveland v. United States*, 531 U.S. 12 (2000), holds that state and municipal licenses, and similar documents, are not 'property' in the hands of a public agency. That's equally true of public positions. The President-elect did not have a property interest in any Cabinet job, so an attempt to get him to appoint a particular person to the Cabinet is not an attempt to secure 'property' from the President (or the citizenry at large)."[92]

A request for an investigation in another country or the release of money already authorized for Ukraine are even more far afield from the property concepts addressed by the Seventh Circuit.

The obvious flaws in the extortion theory were also made plain by the Supreme Court in *Sekhar v. United States*,[93] where the defendant sent emails threatening to reveal embarrassing personal information to the New York State Comptroller's general counsel in order to secure the investment of pension funds with the defendant. In an argument analogous to the current claims, the prosecutors suggested political or administrative support was a form of intangible property. As in *McDonnell*, the Court was unanimous in rejecting the "absurd" definition of property. The Court was highly dismissive of such convenient linguistic arguments and noted that "shifting and imprecise characterization of

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[91] United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015).

[92] *Id.*

[93] 570 U.S. 729 (2013).

the alleged property at issue betrays the weakness of its case."[94] It concluded that "[a]dopting the Government's theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress's choice to penalize one but not the other. That we cannot do."[95] Nor should Congress. Much like such expansive interpretations would be "absurd" for citizens in criminal cases, it would be equally absurd in impeachment cases.

To define a request of this kind as extortion would again convert much of politics into a criminal enterprise. Indeed, much of politics is the leveraging of aid or subsidies or grants for votes and support. In *Blagojevich*, the court dismissed such "logrolling" as the basis for extortion since it is "a common exercise."[96] If anything of political value is now the subject of the Hobbs Act, the challenge in Washington would not be defining what extortion is, but what it is not.

D. Campaign Finance Violation

Some individuals have claimed that the request for investigations also constitutes a felony violation of the election finance laws. Given the clear language of that law and the controlling case law, there are no good-faith grounds for such an argument. To put it simply, this dog won't hunt as either a criminal or impeachment matter. U.S.C. section 30121 of Title 52 states: "It shall be unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election."

On first blush, federal election laws would seem to offer more flexibility to the House since the Federal Election Commission has adopted a broad interpretation of what can constitute a "thing of value" as a contribution. The Commission states "'Anything of value' includes all 'in-kind contributions,' defined as 'the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.'"[97] However, the Justice Department already reviewed the call and correctly concluded it was not a federal election violation. This determination was made by the prosecutors who make the decisions on whether to bring such cases. The Justice Department concluded that the call did not involve a request for a "thing of value" under the federal law. Congress would be alleging a crime that has been declared not to be a crime by career prosecutors. Such a decision would highlight the danger of claiming criminal acts, while insisting that impeachment does not require actual crimes. The "close enough for impeachment" argument will only undermine the legitimacy of the

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[94] *Id.* at 737.

[95] *Id.*

[96] *Blagojevich*, 794 F.3d at 735.

[97] FEDERAL ELECTION COMMISSION, THE LAW OF A 'THING OF VALUE' (Oct. 2019), https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf.

impeachment process, particularly if dependent on an election fraud allegation that itself is based on a demonstrably slipshod theory.

The effort to pound these facts into an election law violation would require some arbitrary and unsupported findings. First, to establish a felony violation, the thing of value must be worth $25,000 or more. As previously mentioned, we do not know if the Ukrainians would conclude an investigation in the year before an election. We also do not know whether an investigation would offer a favorable or unfavorable conclusion. It could prove costly or worthless. In order for the investigation to have value, you would have to assume one of two acts were valuable. First, there may be value in the announcement of an investigation, but an announcement is not a finding of fact against the Bidens. It is pure speculation what value such an announcement might have had or whether it would have occurred at a time or in a way to have such value. Second, you could assume that the Bidens would be found to have engaged in a corrupt practice and that the investigation would make those findings within the year. There is no cognizable basis to place a value on such unknown information that might be produced at some time in the future. Additionally, this theory would make any encouragement (or disencouragement) of an investigation into another county a possible campaign violation if it could prove beneficial to a president. As discussed below, diplomatic cables suggest that the Obama Administration pressured other countries to drop criminal investigations into the U.S. torture program. Such charges would have proven damaging to President Obama who was criticized for shifting his position on the campaign in favor of investigations.[98] Would an agreement to scuttle investigations be viewed as a "thing of value" for a president like Obama? The question is the lack of a limiting principle in this expansive view of campaign contributions.

There is also the towering problem of using federal campaign laws to regulate communications between the heads of state. Any conversation between heads of state are inherently political. Every American president facing reelection schedules foreign trips and actions to advance their political standing. Indeed, such trips and signing ceremonies are often discussed as transparently political decisions by incumbents. Under the logic of this theory, any request that could benefit a president is suddenly an unlawful campaign finance violation valued arbitrarily at $25,000 or more. Such a charge would have no chance of surviving a threshold of motion to dismiss.

Even if such cases were to make it to a jury, few such cases have been brought and the theory has fared poorly. The best-known usage of the theory was during the prosecution of former Sen. John Edwards. Edwards was running for the Democratic nomination in 2008 when rumors surfaced that he not only had an affair with filmmaker Rielle Hunter but also sired a child with her. He denied the affair, as did Hunter. Later it

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[98] Adam Serwer, *Obama's Legacy of Impunity For Torture*, THE ATLANTIC (Mar. 14, 2018), https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/; Kenneth Roth, *Barack Obama's Shaky Legacy on Human Rights*, FOREIGN POLICY (Jan. 4, 2017), https://foreignpolicy.com/2017/01/04/barack-obamas-shaky-legacy-on-human-rights/; *CIA Off The Hook For Past Waterboarding*, CBS NEWS (Apr. 16, 2009, 2:43 PM), https://www.cbsnews.com/news/cia-off-the-hook-for-past-waterboarding/.

was revealed that Fred Baron, the Edwards campaign finance chairman, gave money to Hunter, but he insisted it was his own money and that he was doing so without the knowledge of Edwards. Andrew Young, an Edwards campaign aide, also obtained funds from heiress Rachel Lambert Mellon to pay to Hunter. In the end, Mellon gave $700,000 in order to provide for the child and mother in what prosecutors alleged as a campaign contribution in violation of federal campaign-finance law.[99] The jury acquitted Edwards and the Justice Department dropped all remaining counts.[100]

Although the Edwards case involved large quantities of cash the jury failed to convict because they found the connection to the election too attenuated. The theory being advanced in the current proceedings views non-existent information that may never be produced as a contribution to an election that might occur before any report is issued. That is the basis upon which some would currently impeach a president, under a standard that the Framers wanted to be clear and exacting. Framers like Madison rejected "vague" standards that would "be equivalent to a tenure during pleasure of the Senate." The campaign finance claim makes "maladministration" look like the model of clarity and precision in the comparison to a standard based on an assumption of future findings to be delivered at an unknown time.

E. Abuse of Power

The Ukraine controversy was originally characterized not as one of these forced criminal allegations, but as a simple abuse of power. As I stated from the outset of this controversy, a president can be impeached for abuses of power. In Federalist #65, Alexander Hamilton referred to impeachable offenses as "those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[101] Even though every presidential impeachment has been founded on criminal allegations, it is possible to impeach a president for non-criminal acts. Indeed, some of the allegations contained in the articles of impeachment against all three presidents were distinctly non-criminal in character. The problem is that we have never impeached a president solely or even largely on the basis of a non-criminal abuse of power allegation. There is good reason for that unbroken record. Abuses of power tend to be even less defined and more debatable as a basis for impeachment than some of the crimes already mentioned. Again, while a crime is not required to impeach, clarity is necessary. In this case, there needs to be clear and unequivocal proof of a quid pro quo. That is why I have been critical of how this impeachment has unfolded. I am particularly

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[99] Manuel Roig-Franzia, *John Edwards trial: Jurors seek information on "Bunny' Mellon's Role*, WASH. POST (May 23, 2012), https://www.washingtonpost.com/politics/john-edwards-trial-jurors-seek-information-on-bunny-mellons-role/2012/05/23/gJQAtiFzkU_story.html.

[100] Dave Levinthal, *Campaign cash laws tough to enforce*, POLITICO (June 1, 2012, 1:47 PM), http://www.politico.com/news/stories/0612/76961.html.

[101] ALEXANDER HAMILTON, FEDERALIST NO. 65 (1788), *reprinted in* THE FEDERALIST PAPERS 396, 396 (Clinton Rossiter ed., 1961).

concerned about the abbreviated schedule and thin record that will be submitted to the full house.

Unlike the other dubious criminal allegations, the problem with the abuse of power allegation is its lack of foundation. As I have previously discussed, there remain core witnesses and documents that have not been sought through the courts. The failure to seek this foundation seems to stem from an arbitrary deadline at the end of December. Meeting that deadline appears more important than building a viable case for impeachment. Two months have been wasted that should have been put toward litigating access to this missing evidence. The choice remains with the House. It must decide if it wants a real or recreational impeachment. If it is the former, my earlier testimony and some of my previous writing show how a stronger impeachment can be developed.[102]

The principle problem with proving an abuse of power theory is the lack of direct evidence due to the failure to compel key witnesses to testify or production of key documents. The current record does not establish a quid pro quo. What we know is that President Trump wanted two investigations. The first investigation into the 2016 election is not a viable basis for an abuse of power, as I have previously addressed. The second investigation into the Bidens would be sufficient, but there is no direct evidence President Trump intended to violate federal law in withholding the aid past the September 30th deadline or even wanted a quid pro quo maintained in discussions with the Ukrainians regarding the aid. If Trump encouraged an investigation into the Bidens alone, it would not be a viable impeachment claim. The request was inappropriate, but it was not an offer to trade public money for a foreign investigation. President Trump continued to push for these investigations but that does not mean that he was planning to violate federal law. Indeed, Ambassador Sondland testified that, when he concluded there was a quid pro quo, he understood it was a visit to the White House being withheld. White House visits are often used as leverage from everything from United Nations votes to domestic policy changes. Trump can maintain he was suspicious about the Ukrainians in supporting his 2016 rival and did not want to grant such a meeting without a demonstration of political neutrality. If he dangled a White House meeting in these communications, few would view that as unprecedented, let alone impeachable.

Presidents often put pressure on other countries which many of us view as inimical to our values or national security. Presidents George W. Bush and Barack Obama reportedly put pressure on other countries not to investigate the U.S. torture program or seek the arrest of those responsible.[103] President Obama and his staff also reportedly pressured the Justice Department not to initiate criminal prosecution stemming

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[102] Jonathan Turley, *How The Democrats can build a better case to impeach President Trump,* THE HILL (Nov. 25, 2019, 12:00 PM), https://thehill.com/opinion/judiciary/471890-how-democrats-can-build-a-better-case-to-impeach-president-trump.

[103] David Corn, *Obama and GOPers Worked Together to Kill Bush Torture Probe,* MOTHER JONES (Dec. 1, 2010), https://www.motherjones.com/politics/2010/12/wikileaks-cable-obama-quashed-torture-investigation/ (discussing cables pressuring the Spanish government to shut down a judicial investigation into torture).

from the torture program.[104] Moreover, presidents often discuss political issues with their counterparts and make comments that are troubling or inappropriate. However, contemptible is not synonymous with impeachable. Impeachment is not a vehicle to monitor presidential communications for such transgressions. That is why making the case of a quid pro quo is so important – a case made on proof, not presumptions. While critics have insisted that there is no alternative explanation, it is willful blindness to ignore the obvious defense. Trump can argue that he believed the Obama Administration failed to investigate a corrupt contract between Burisma and Hunter Biden. He publicly called for the investigation into the Ukraine matters. Requesting an investigation is not illegal any more than a leader asking for actions from their counterparts during election years.

Trump will also be able to point to three direct conversations on the record. His call with President Zelensky does not state a quid pro quo. In his August conversation with Sen. Ron Johnson (R., WI.), President Trump reportedly denied any quid pro quo. In his September conversation with Ambassador Sondland, he also denied any quid pro quo. The House Intelligence Committee did an excellent job in undermining the strength of the final two calls by showing that President Trump was already aware of the whistleblower controversy emerging on Capitol Hill. However, that does not alter the fact that those direct accounts stand uncontradicted by countervailing statements from the President. In addition, President Zelensky himself has said that he did not discuss any quid pro quo with President Trump. Indeed, Ambassador Taylor testified that it was not until the publication of the *Politico* article on August 28th that the Ukrainians voiced concerns over possible preconditions. That was just ten days before the release of the aid. That means that the record lacks not only direct conversations with President Trump (other than the three previously mentioned) but even direct communications with the Ukrainians on a possible quid pro quo did not occur until shortly before the aid release. Yet, just yesterday, new reports filtered out on possible knowledge before that date—highlighting the premature move to drafting articles of impeachment without a full and complete record.[105]

Voters should not be asked to assume that President Trump would have violated federal law and denied the aid without a guarantee on the investigations. The current narrative is that President Trump only did the right thing when "he was caught." It is possible that he never intended to withhold the aid past the September 30th deadline while also continuing to push the Ukrainians on the corruption investigation. It is possible that Trump believed that the White House meeting was leverage, not the military aid, to push for investigations. It is certainly true that both criminal and impeachment cases can be

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[104] Glenn Greenwald, *Obama's justice department grants final immunity to Bush's CIA torturers*, THE GUARDIAN (Aug. 31, 2012 12:00PM) https://www.theguardian.com/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer.

[105] Andrew Kramer, *Ukraine Knew Of Aid Freeze in July, Says Ex-Top Official In Kyiv*, N.Y. TIMES (Dec. 3, 2019, 7:59 am), https://www.nytimes.com/2019/12/03/world/europe/ukraine-impeachment-military-aid.html.

based on circumstantial evidence, but that is less common when direct evidence is available but unsecured in the investigation. Proceeding to a vote on this incomplete record is a dangerous precedent to set for this country. Removing a sitting President is not supposed to be easy or fast. It is meant to be thorough and complete. This is neither.

F. The Censure Option

Finally, there is one recurring option that was also raised during the Clinton impeachment: censure. I have been a long critic of censure as a part of impeachment inquiries and I will not attempt to hide my disdain for this option. It is not a creature of impeachment and indeed is often used by members as an impeachment-lite alternative for those who do not want the full constitutional caloric load of an actual impeachment. Censure has no constitutional foundation or significance. Noting the use of censure in a couple of prior cases does not make it precedent any more than Senator Arlen Specter's invocation of the Scottish "Not Proven" in the Clinton trial means that we now have a third option in Senate voting. If the question is whether Congress can pass a resolution with censure in its title, the answer is clearly yes. However, having half of Congress express their condemnation for this president with the other half opposing such a condemnation will hardly be news to most voters. I am agnostic about such extra-constitutional options except to caution that members should be honest and not call such resolutions part of the impeachment process.

V. CONCLUSION

Allow me to be candid in my closing remarks.

I get it. You are mad. The President is mad. My Democratic friends are mad. My Republican friends are mad. My wife is mad. My kids are mad. Even my dog is mad . . . and Luna is a golden doodle and they are never mad. We are all mad and where has it taken us? Will a slipshod impeachment make us less mad or will it only give an invitation for the madness to follow in every future administration?

That is why this is wrong. It is not wrong because President Trump is right. His call was anything but "perfect" and his reference to the Bidens was highly inappropriate. It is not wrong because the House has no legitimate reason to investigate the Ukrainian controversy. The use of military aid for a quid pro quo to investigate one's political opponent, if proven, can be an impeachable offense.

It is not wrong because we are in an election year. There is no good time for an impeachment, but this process concerns the constitutional right to hold office in this term, not the next.

No, it is wrong because this is not how an American president should be impeached. For two years, members of this Committee have declared that criminal and impeachable acts were established for everything from treason to conspiracy to obstruction. However, no action was taken to impeach. Suddenly, just a few weeks ago, the House announced it would begin an impeachment inquiry and push for a final vote in just a matter of weeks. To do so, the House Intelligence Committee declared that it would

not subpoena a host of witnesses who have direct knowledge of any quid pro quo. Instead, it will proceed on a record composed of a relatively small number of witnesses with largely second-hand knowledge of the position. The only three direct conversations with President Trump do not contain a statement of a quid pro quo and two expressly deny such a pre-condition. The House has offered compelling arguments why those two calls can be discounted by the fact that President Trump had knowledge of the underlying whistleblower complaint. However, this does not change the fact that it is moving forward based on conjecture, assuming what the evidence would show if there existed the time or inclination to establish it. The military aid was released after a delay that the witnesses described as "not uncommon" for this or prior Administrations. This is not a case of the unknowable. It is a case of the peripheral. The House testimony is replete with references to witnesses like John Bolton, Rudy Giuliani, and Mike Mulvaney who clearly hold material information. To impeach a president on such a record would be to expose every future president to the same type of inchoate impeachment.

Principle often takes us to a place where we would prefer not to be. That was the place the "Republican Recusants" found themselves in 1868 when sitting in judgment of a president they loathed and despised. However, they took an oath not to Andrew Johnson, but to the Constitution. One of the greatest among them, Lyman Trumbull (R-Ill.) explained his fateful decision to vote against Johnson's impeachment charges even at the cost of his own career:

> "Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes ... no future President will be safe who happens to differ with the majority of the House and two-thirds of the Senate ...
>
> I tremble for the future of my country. I cannot be an instrument to produce such a result; and at the hazard of the ties even of friendship and affection, till calmer times shall do justice to my motives, no alternative is left me..."[106]

Trumbull acted in the same type of age of rage that we have today. He knew that raising a question about the underlying crime or the supporting evidence would instantly be condemned as approving of the underlying conduct of a president. In an age of rage, there seems to be no room for nuance or reservation. Yet, that is what the Constitution expects of us. Expects of you.

For generations, the seven Republicans who defected to save President Johnson from removal have been heralded as profiles of courage. In recalling the moment he was called to vote, Senator Edmund Ross of Kansas said he "almost literally looked down into my open grave." He jumped because the price was too great not to. Such moments are easy to celebrate from a distance of time and circumstance. However, that is precisely the moment in which you now find yourself. "When the excitement of the hour [has]

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[106] WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 243-44 (1992).

subsided" and "calmer times" prevail, I do not believe that this impeachment will be viewed as bringing credit upon this body. It is possible that a case for impeachment could be made, but it cannot be made on this record. To return to Wordsworth, the Constitution is not a call to arms for the "Happy Warriors." The Constitution calls for circumspection, not celebration, at the prospect of the removal of an American president. It is easy to allow one's "judgment [to be] affected by your moral approval of the lines" in an impeachment narrative. But your oath demands more, even personal and political sacrifice, in deciding whether to impeach a president for only the third time in the history of this Republic.

In this age of rage, many are appealing for us to simply put the law aside and "just do it" like this is some impulse-buy Nike sneaker. You can certainly do that. You can declare the definitions of crimes alleged are immaterial and this is an exercise of politics, not law. However, the legal definitions and standards that I have addressed in my testimony are the very thing dividing rage from reason. Listening to these calls to dispense with such legal niceties, brings to mind a famous scene with Sir Thomas More in "A Man For All Seasons." In a critical exchange, More is accused by his son-in-law William Roper of putting the law before morality and that More would "give the Devil the benefit of law!" When More asks if Roper would instead "cut a great road through the law to get after the Devil?," Roper proudly declares "Yes, I'd cut down every law in England to do that!" More responds by saying "And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"

Both sides in this controversy have demonized the other to justify any measure in defense much like Roper. Perhaps that is the saddest part of all of this. We have forgotten the common article of faith that binds each of us to each other in our Constitution. However, before we cut down the trees so carefully planted by the Framers, I hope you consider what you will do when the wind blows again . . . perhaps for a Democratic president. Where will you stand then "the laws all being flat?"[107]

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.[108]

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[107] R. BOLT, A MAN FOR ALL SEASONS 37-38 (Vintage ed. 1962).

[108] As discussed above, I have been asked to include some of my relevant scholarship: Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of*

Presidential Privilege, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents,* 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation,* 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation,* 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies,* 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President,* 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison,* 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 145 (1992).