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Foreword Requiem for Impeachment?

Frank O. Bowman, III[*]

Impeachment was inserted into the Constitution of the United States as a tool of national self-preservation. Although its most common use has been as a quotidian house-cleaning device for dispensing with corrupt or egregiously unsuitable federal judges otherwise unfireable due to life tenure, the American framers conceived impeachment's real and essential function to be the ejection and permanent electoral disqualification of any president who proved grievously unfit or exhibited a dangerous disposition to autocracy.

This symposium was convened under the somewhat anodyne title, "The Two Impeachments of Donald J. Trump." But the central problem at the heart of our discussion is that, when confronted with a president who proved himself grossly unsuitable by temperament, capacity, and conduct for his office, who consistently abused its powers for personal and political gain, and who, at the last, overtly sought the overthrow of constitutional order, Congress flinched. Not once, but twice. In short, impeachment failed to accomplish the principal thing it was put in the Constitution to do.

At this point, a reader of an insistently non-partisan temper might contend that I am assuming a constitutional conclusion for which I ought to offer proof—to wit, that Donald Trump was factually guilty of "high Crimes and Misdemeanors" and ought to have been convicted, twice, by

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the United States Senate. To which hypothetical interlocutor I would have two responses:

First, I have laid out the case for convicting former President Trump in both of his impeachments at length in other venues, and I invite the curious reader to survey my reasons at leisure.[1] Second, given the undisputed facts of both cases, I have no patience with anyone who would now argue that Donald Trump ought not to have been convicted, excluded from the presidency, and disqualified from any future office of honor or profit under the government of the United States.

Not only did Mr. Trump employ the powers of the chief magistracy to extort personal political favors from an ally in peril of losing its national existence to a state long hostile to America itself, he then schemed for months to nullify the results of a properly-conducted national election he lost in order to make himself, literally, an unelected autocrat. Those are not tendentious partisan allegations. They are facts, indisputable by any candid mind.[2]

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[1] *See, e.g.*, Frank O. Bowman, III, *Trump's Extortion of Ukraine Is an Impeachable Abuse of Power*, JUST SECURITY (Oct. 3, 2019), https://www.justsecurity.org/66407/trumps-extortion-of-ukraine-is-an-impeachable-abuse-of-power/ [https://perma.cc/6QVK-NRLJ]; Frank O. Bowman, III, *Foreign Policy Has Always Been at the Heart of Impeachment*, FOREIGN AFFAIRS (Nov. 25, 2019), https://www.foreignaffairs.com/articles/2019-11-25/foreign-affairs-has-always-been-heart-impeachment [https://perma.cc/R25U-Y2KE]; Frank O. Bowman, III, *Constitutional Crabgrass: President Trump's Defenders Distort the Impeachment Clause*, JUST SECURITY (Jan. 24, 2020), https://www.justsecurity.org/68240/constitutional-crabgrass-president-trump-defenders-distort-the-impeachment-clauses-frank-bowman-high-crimes-misdemeanors/ [https://perma.cc/P2B9-VBGR]; Frank O. Bowman, III, *The Constitutional Case for Impeaching Donald Trump (Again)*, JUST SECURITY (Jan. 8, 2021), https://www.justsecurity.org/74127/the-constitutional-case-for-impeaching-donald-trump-again/ [https://perma.cc/Z772-D256]; Frank O. Bowman, III, *What the Founders Would Have Done With Trump*, WASHINGTON MONTHLY (Jan. 18, 2021), https://washingtonmonthly.com/2021/01/18/what-the-founders-would-have-done-with-trump/ [https://perma.cc/GAJ6-NMBQ]; *The Constitutionality of Trying a Former President Impeached While in Office*, LAWFARE (Feb. 3, 2021), https://www.lawfareblog.com/constitutionality-trying-former-president-impeached-while-office [https://perma.cc/7Z56-B7QB].

[2] For the facts underlying Trump's first impeachment, *see The Trump-Ukraine Impeachment Inquiry*, REPORT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, PURSUANT TO H. RES. 660 IN CONSULTATION WITH THE HOUSE COMMITTEE ON OVERSIGHT AND REFORM AND THE HOUSE COMMITTEE ON FOREIGN AFFAIRS 40–41 (Dec. 2019), https://ia803104.us.archive.org/15/items/6566077-House-Intelligence-Committee-impeachment-inquiry/6566077-House-Intelligence-Committee-impeachment-inquiry.pdf [https://perma.cc/B329-L8R3]. For the facts underlying the second Trump impeachment, *see* Jerrold Nadler, REPORT BY THE MAJORITY STAFF OF THE HOUSE COMMITTEE ON THE JUDICIARY, MATERIALS IN SUPPORT OF H. RES. 24, IMPEACHING DONALD JOHN TRUMP, PRESIDENT OF THE UNITED STATES FOR HIGH CRIMES AND MISDEMEANORS (Jan. 2021),

When all but one of the senators of his own party ignored the plain facts of the first impeachment case against President Trump, they opened the door to his entirely predictable effort at sedition following the 2020 election, of which the assault on the United States Capitol was only a dramatic, if tragic, incident. Given a second chance, all but seven senators of his own party ignored not merely President Trump's prolonged, overt, and unapologetic plot to subvert democracy, but an actual invasion of their own workplace that sent them fleeing for their lives.[3] The "not guilty" senators of the second impeachment tacitly (and in some cases explicitly) condoned Trump's behavior; they lent credence to the insidious lie that the 2020 election had been "stolen," thereby abetting the deeply corrosive campaign (ongoing to this day) to impugn the integrity of the American electoral system; and they left open the possibility that Donald Trump could again assume the presidency, an event American constitutional democracy would be unlikely to survive.[4]

At the time of his second impeachment, I wrote of Donald Trump that he was the demagogue for whom the Framers inserted impeachment into the constitution, and "the man against whom the founding generation armed the constitution with the disqualification clause."[5] Yet, even when wielded – precisely as the Framers intended – against the personification of the Framers' nightmares, impeachment failed.

The question is why. And what it means for our constitutional future.

What we have witnessed since Donald Trump gained the White House is a modern iteration of the ancient struggle that gave rise to the impeachment mechanism in Britain. The original contest pitted royalism – the rule of the one – against the emergent ideas of a dispersion of power among multiple centers of authority and of the supremacy of law. Impeachment was invented in 1376 to give the English Parliament a

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https://judiciary.house.gov/uploadedfiles/house_judiciary_committee_report_-_materials_in_support_of_h._res._24.pdf [https://perma.cc/97J5-LQFW].

[3] United States Senate, Roll Call Vote 117th Congress, 1st Session, Question: Guilty or Not Guilty (Article of Impeachment Against Former President Donald John Trump) (Feb. 13, 2021), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm [https://perma.cc/APX8-B6C5].

[4] I think it fair to add that, taken together, the failure of Trump's impeachments suggested to foreign observers both a nation in political decline and a political establishment that no longer shared a bipartisan commitment to America's European friends and allies, or indeed to the security structure that has maintained stability in Europe since 1945. It is not unreasonable to suppose that the perception of both national weakness and an isolationist mood contributed to Vladimir Putin's recent choice to challenge the West with his invasion of Ukraine.

[5] Frank O. Bowman, III, *What the Founders Would Have Done with Trump: An originalist case for trying, convicting and disqualifying a president after he or she leaves office*, WASH. MONTHLY (Jan. 16, 2021), https://washingtonmonthly.com/2021/01/18/what-the-founders-would-have-done-with-trump/ [https://perma.cc/TH3X-JFQQ].

weapon to counter the monarchy's will to absolute power. It played a central role in the 1600s, the era of the Stuart kings—whose theory of kingship was that the source of all law was the royal will. Lawyers and judges in Parliament (notably Sir Edward Coke) insisted to the contrary that the sources of law are reason and nature as expounded by judges, and the positive enactments of the legislature. When James I, and later his son Charles, insisted too stridently on royal absolutism, Parliament impeached the ministers who were the agents of that policy. When impeachments proved insufficient to dissuade Charles of his divine right to personal rule, Civil War followed, Charles knelt beneath the headsman's axe, and Cromwell's kingless Commonwealth arose.[6]

America's founders wanted no kings. They crafted a constitutional government with Congress at its center. They created the office of president, but expected it to be relatively weak and naturally subordinate to the legislature. However, they were wise enough to recognize that the presidency might swell beyond their original conception and that, in any case, a corrupt or demagogic president might arise and endanger constitutional order. Therefore, they created an array of constraints on presidential power. These were of two kinds: First, the institutional controls of our tripartite government and its checks and balances, and second, two mechanisms for presidential removal—elections as periodic popular judgments on presidential performance and impeachment for the rare case of grievous misconduct or a grasp for dictatorship.

The Framers' impeachment is a curious construction. They defined the category of impeachable conduct broadly but limited the punishments narrowly—to mere removal and potential future disqualification. That should have made conviction easy. But they also imposed a two-thirds majority requirement in the Senate, which in practice raised a towering barrier to conviction, at least of presidents.[7]

In over two centuries of American history, only three presidents – Andrew Johnson, Bill Clinton, and Donald Trump – have ever been impeached, and not one has been convicted. That record of apparent impotence has led some to suggest that the impeachment mechanism written into the constitution was doomed from the start as a practical remedy for presidential misbehavior.

I think that overstates the case. For most of our history, impeachment, or the latent threat of its use, served a salutary restraining function. Only in the peculiar circumstances of our present era – to which we will return momentarily – has it become a hollow threat.

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[6] For a description of the development of impeachment in Great Britain, *see* FRANK O. BOWMAN, III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 22–49 (2019).

[7] For a discussion of the Framers' debates on impeachment, *see id.*, at 80–111.

It is true that, even at the Republic's beginning, presidential impeachment was a less efficacious tool than the Framers likely intended. The Framers' textual hurdle of a two-thirds vote to convict in the Senate very early combined with the emergence of a strong national two-party system in which members of Congress allied with presidents of their own party to make conviction of a president very difficult.

It is often noted that many of the constitution's drafters distrusted parties and party politics – which they were wont to disparage as the vice of "faction" – and hoped that national parties would not form or at least would not feature largely in national government. Of course, it is equally often observed that, within a handful of years after ratification, the Framers were nearly all neck-deep in party politics. Even so, the separation of powers design of the constitution rested in part on the prediction that, regardless of party affiliation, officers in each of the three branches would be jealous of the institutional prerogatives of their own branch and would therefore hasten to check overly exuberant assertions of authority by representatives of the other branches. Congress, in particular, was thought by the founding generation to be the naturally dominant institution, with the president as a dependent partner. The two-thirds rule for impeachment is a manifestation of concern that presidents not become mere creatures of the legislature, readily cowed by the threat of easy impeachment and removal.

However, the anticipated inter-branch power dynamic was long ago reversed, with presidents assuming both the mantle of national party leadership and ever-growing practical powers largely independent of Congress. This development made successful impeachment less likely. Presidential aspirants are unlikely be elected if the national balance of political forces is such that in the same election, or even in the ensuing midterm, the opposing party can secure a two-thirds supermajority in the Senate. The only instance of this alignment of which I am aware is the extraordinary situation of Andrew Johnson, who had been selected as Abraham Lincoln's running mate in 1864 precisely because he was not a Republican, but a so-called War Democrat. When he succeeded to the presidency after Lincoln's assassination, Republicans – of various idiosyncratic flavors – held roughly 80% of the seats in the Senate.[8]

Absent such a rare circumstance, an impeached president can only be convicted if all senators of the opposing party and a significant number of senators of his own party vote against him. And in Johnson' case, impeachment nonetheless failed, albeit by only a single vote.[9] That said,

[8] *See Impeachment Trial of President Andrew Johnson, 1868*, SENATE.GOV, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm [https://perma.cc/38K7-QZM2] (last visited Sept. 10, 2022).

[9] *Id*.

the two-thirds rule has not, in my view, been an insuperable barrier to conviction until our present unhappy era.

For example, Johnson's acquittal had nothing to do with sticky party loyalties. It was instead the result of a complex set of circumstances peculiar to the time and the case. And in any event, Johnson's impeachment accomplished a good deal from the point of view of his congressional opponents. The conduct that led to his impeachment alienated important figures like national hero General U.S. Grant. Facing removal, Johnson modified some of the most objectionable features of the Reconstruction policies that were the real cause of his impeachment. And the impeachment proceedings paralyzed the final year of Johnson's administration and put the quietus on his hopes of becoming a serious candidate for a second term.[10]

Moreover, for much of the country's history, and certainly from the Reconstruction period following the Civil War until very recently, the opposing parties were not ideologically harmonious national bodies, but rather coalitions of regional and factional interests. The Democratic Party of the mid-to-late twentieth century was home to both white southern segregationists, large chunks of the urban working class, activist social democrats, and, increasingly, African Americans. Likewise, the Republican Party of the same period welcomed both insistent social conservatives like Barry Goldwater, centrist pragmatists like Dwight D. Eisenhower, and a large, influential moderate-to-liberal wing represented by figures like Oregon's Mark Hatfield, Maine's Margaret Chase Smith, New York's Jacob Javits, and Lowell Weicker of Connecticut. Moreover, the Congress of this long era was a practical, problem-solving body. Its members viewed themselves, not as solo media influencers – a category they could not in any case have imagined – but as practitioners of the art of legislation, a craft requiring practical knowledge of government and the world and skill in negotiation and compromise.

A Congress composed and operating in this way was capable of both impeaching *and* convicting an erring president of either party. We know this because, although Richard Nixon was neither formally impeached by the whole House nor convicted by the Senate, he resigned precisely because impeachment in the House was imminent, and the senior Republicans in Congress came down to the White House and told him he would be convicted by the Senate even though Democrats would cast only 56 of the 67 necessary votes.[11] Without impeachment, there would have

[10] *See* BRENDA WINEAPPLE, THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION 346, 404-05 (2019); Brian C. Kalt, *Impeachment vs. Censure: Constitutional Law, Politics, and the Art of the Possible*, THE CONSTITUTIONALIST (Jan. 19, 2021), https://theconstitutionalist.org/2021/01/19/impeachment-vs-censure-constitutional-law-politics-and-the-art-of-the-possible [https://perma.cc/VB2D-4DL3].

[11] *Id*.

been no mechanism to force Nixon's ouster, and that famously combative man would surely have clung to office. In sum, Nixon's case proved that, as recently as the early years of my young adulthood, impeachment could work exactly as the Framers intended. A crooked president who misused the powers of his office was evicted from the White House.

Nor is the acquittal of President William Jefferson Clinton in 1999 evidence of the necessary impotence of impeachment in the face of the two-thirds rule. Clinton was impeached by the House on two counts—one of perjury and the other of obstruction of justice. Neither count received even a majority in a Senate in which Republicans held a 55-45 majority. Ten Republicans voted to acquit on perjury and five on obstruction. In short, Clinton's impeachment was unsuccessful, not because the loyalty of his fellow Democrats prevented the accumulation of the two-thirds requirement of 67, but because the case against him failed to convince even many of his Republican political adversaries.

The Clinton affair, however, was an early marker of an incipient deterioration of American public life to its current condition of poisonous division and governmental dysfunction. To fully describe either our present distressing political circumstances or their causes is far beyond the scope of this brief essay. It may be sufficient to note three points.

First, the two contending national parties no longer resemble their historical, or even fairly recent, incarnations. They are, as has been often remarked, increasingly ideologically homogenous, with decreasing overlap between the policy positions of the centrists in the two parties. But even that characterization does not quite capture the nature of the transformation. The two groups have become not so much ideological as cultural affinities—increasingly visceral, increasingly emotional, increasingly tribal. This transformation extends into the elected representatives of the two groups, perhaps most corrosively into Congress. In the House of Representatives particularly the cultural movement to political tribalism is exacerbated by increasingly effective legislative gerrymandering that awards most members near-guaranteed incumbency vulnerable only to primary challengers from the extreme flanks of their own parties. The result is a Congress where the traditional ethos of negotiation and compromise in pursuit of legislative accomplishment has been replaced by ideological rigidity, reflexive intransigence, and rising personal rancor.

Second, the media are no longer an identifiable set of discrete national, regional, and local institutions with reasonably robust professional quality control mechanisms. Rather, in the internet age, information sources have proliferated, becoming decreasingly professional and increasingly partisan. The result is a public that increasingly experiences politics, and reality itself, from the inside of separate, non-intersecting informational silos.

The current media ecosystem may be the greatest contributor to our present political dysfunction. All effective government work in pursuit of the common good, particularly legislative action, depends at bottom on society's capacity to arrive at a general, if not necessarily unanimous, consensus about the real state of the world. Today's media not only present disparate realities to different audiences but have corroded public faith in the reliability of information from virtually every other institution. The elected leaders of tribal political parties are increasingly reluctant to make hard choices for the general good when the constituencies they represent acrimoniously disagree over both basic questions of fact and the trustworthiness of the institutions traditionally charged with resolving those questions. This is particularly true in the case of presidential impeachment, where congressional choices will either sustain or dismiss the head of one contending political tribe.

Third, candor compels me to note that the degeneration of American political culture, though by no means confined entirely to one side of the spectrum, is markedly more advanced on the political right. The sad truth is that, since the election of Donald Trump to the presidency, the Republican Party has become not so much a narrowly ideological party as a cult of personality. As illustrated by the current travails of Congresswoman Liz Cheney – dynastic successor to the legacy of her pugilistic hard-right father, Dick Cheney, and herself one of the most fervent ideological conservatives in public life – loyalty to the leader is now almost all that matters among Republicans. And as one looks beyond the Trump period, the behavior and pronouncements of his would-be successors suggest a movement far advanced on the path to a more general authoritarianism. I do not ascribe this fact to any inherent disparity in virtue between liberals and conservatives. If modern history teaches anything, it is that dictatorships spring equally nimbly from left and right. But, for now, the acute danger comes from the right.

What does all this have to do with impeachment?

First, the degraded state of American political culture explains the two acquittals of Donald Trump. Impeachment is not, and never has been, a self-contained automatic mechanism that, once provided with the required type and quantum of data (proof of "Treason, Bribery, or other high Crimes and Misdemeanors"), will autonomously remove the diseased and dangerous member of the national government. Impeachment is not even a legal process in the sense that criminal or civil trials in the regular courts are legal.

Rather, impeachment is, and was designed to be, a political remedy for the quintessentially political problem presented by the ascension to the presidency of a grievous misfit, a criminal, or an aspiring autocrat. Because the Framers judged that not all variations of presidential misconduct could be either foreseen or meticulously described in constitutional language, the definition of impeachable behavior was

consciously made both broad and elastic. Still more critically, the Framers also recognized that the choice to remove a head of state is not like a criminal jury's decision on whether a list of designated elements has been proven. Rather, presidential impeachment necessarily requires balancing the many considerations beyond evidentiary proof that go into deciding whether presidential removal serves the national interest. Therefore, the constitution confides the power to impeach and later to convict in political bodies.

The oft-expressed resistance to idea that the constitutional device of impeachment is "political" is quite silly. A constitution is, after all, merely a set of mechanisms and governing principles for ordering politics. Impeachment is a political tool for correcting a particular type of political disorder. But, that being so, impeachment's latent flaw is that, precisely because it is a political mechanism, it cannot overcome a fundamentally fractured political culture.

The comparatively sound political culture of late 1970s America – which included a healthy Republican Party – could wield the threat of impeachment to remove Richard Nixon. In today's environment, that result would be improbable. Nixon would have denied wrongdoing and claimed political persecution. The (then-nonexistent) right-wing media machine would have picked up the cry and convinced the Republican base that the president was a victim of Democratic schemes. Republicans and pro-Nixon southern Democrats in the Senate would have been afraid to fight the tempest. And Nixon would have served out his term.

Even the increasingly fractious political culture of the late 1990s performed better than we might now expect. True, the Republican majority in the House engaged in the wasteful frivolity of impeaching President Clinton for lying about sex, but a bipartisan majority of the Senate was still sound enough to pause, cogitate, and ultimately reject the extreme sanction of conviction and removal.

The simple explanation of the failure of the two Trump impeachments is that the corroded, tribal political culture of 2020 and 2021 featured a debased Republican Party subservient to Donald Trump and to the symbiotic right-wing media complex that upheld him (and still does). A few principled souls of the President's party were stout enough to vote for impeachment or conviction. But not enough. And of those few, many are now being rewarded for their rectitude with expulsion from office.[12]

The second point is that, just as the parlous condition of American political culture explains the results of the two Trump impeachments, so,

[12] Joseph Gedeon, *10 House Republicans voted to impeach Trump. Cheney's loss means only 2 made it past their primaries.*, POLITICO (Aug. 13, 2022), https://www.politico.com/news/2022/08/13/cheney-10-house-republicans-trump-impeachment-00050991 [https://perma.cc/28XZ-X4BP].

too, is the failure of those impeachments an ominous sign for the near future of American constitutionalism. What we think of as the American constitutional system extends far beyond the constitutional document and judicial interpretations of it to embrace all the institutions, laws, customs, and behavioral expectations that over two centuries grew up around the textual core to shape and regulate public and private life. Indeed, much of what we instinctively regard as right, proper, or even "constitutional" rests not on some immutable law, but on norms neither codified nor formally enforceable.

The persistent lesson of the Trump years was that if a sufficiently unscrupulous man captures the presidency, and if his subordinates and political allies are unwilling to restrain him by demanding adherence to traditional standards of political propriety, then even very old norms can prove tenuous obstacles to accelerating misconduct. The fact that Trump's party could not summon the fortitude to expel him from office during the first impeachment, or to purge him from public life (and thus from leadership of their party) the second time around, signaled to a big chunk of the populace that Trump's egregious behavior was acceptable for an American president. And that signal not only weakens the deterrent force of impeachment, but corrodes the web of personal, popular, and institutional norms that are, in all but extraordinary cases, the real restraint on presidential abuses of power.

The deleterious effect of the two acquittals was most acute in the second case. For months, Trump schemed to reverse the results of a valid election to keep himself in power. His objective was nothing less than subversion of the electoral foundation of American constitutional democracy. Yet his party not only failed to convict – or even rebuke – him, but has since inverted reality and adopted as credal convictions that the 2020 election was stolen from Trump, that he was right to seek to remain in office, and, worst of all, that election results generally are suspect unless Republicans win.

I am not optimistic that a truly healthy politics can be revived in America anytime soon. Too many of us have traveled too far down diverging roads into alternate realities and mutual incomprehension. That certainly does not mean that we should abandon the effort to heal ourselves. But it will be a long struggle with an uncertain prospect, and one in which all of us, Republicans, Democrats and independents alike, will be obliged to do more than merely snipe at our countrymen.

As for impeachment, until we travel a good distance toward restoring our national political community, I do not believe that venerable process is likely to resume its original constitutional function as a practical mode of presidential removal and thus as the ultimate legislative check on presidential misconduct. It may, as several participants in this symposium suggest, remain an occasionally valuable instrument for investigating and publicizing presidential misconduct. But it may also become a drearily

familiar avenue for presidential harassment by congressional majorities of the opposing party (about which more below).

But let me turn from my own dolorous predictions to briefly introducing the terrific contributions to this volume by our stellar cast of guest thinkers.

It is only right that I should begin with the thoughts of Michael Gerhardt, who is surely the dean of impeachment scholars in the United States.[13] His scholarship on impeachment was deeply influential in the Clinton imbroglio and in both Trump impeachments. Moreover, he has a unique insider's perspective, having served as an advisor to elements of both the House and Senate, not only during three presidential impeachments, but also the impeachments of several judges.

Professor Gerhardt takes a rather more hopeful view of impeachment's future than I have done. He acknowledges the failure of the two Trump impeachments, and astutely identifies several factors in addition to those discussed above that contributed to Trump's acquittal and may diminish the likelihood of conviction for future presidents. Of special note is his discussion of the adoption of the unitary executive theory of presidential power by conservative lawyers and presidents.[14]

Nonetheless, he views impeachment as having continued utility even in an era when the chances of conviction are vanishingly small. He emphasizes that impeachment, even without conviction, is likely to damage a president's political standing, not to speak of his historical legacy, and suggests that these consequences may well serve as a material deterrent to presidential misconduct.

Of course, deterrence is a subjective phenomenon. Whether the prospect of impeachment deters depends on lessons future presidents draw from limited past precedent. For example, the lesson of the Clinton case is assuredly mixed. On the one hand, President Clinton's personal popularity actually rose during his impeachment ordeal. On the other hand, I have always suspected that this polling result expressed not increased admiration of a dishonest, philandering president, but a comparative judgment by the public of Clinton and his Republican pursuers. Once Clinton was acquitted, there remained an undoubted stigma. And I have also long suspected that the stain leached onto Clinton's Vice President, Al Gore, and contributed to his razor thin, and deeply controversial, loss in the presidential election of 2000. What conclusion future presidents will draw from this tangled skein is anybody's guess.

Likewise, the magnitude of any deterrent effect will depend mightily on the psychology of particular presidents. Some will be intensely sensitive to the anticipated judgment of history. Others will be far more

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[13] Michael Gerhardt, *How Impeachment Works*, 87 MO. L. REV. 743 (2022).

[14] *Id.*

focused on the imperatives of attaining policy goals in the short run, and, if eligible for reelection, winning the next campaign. For a hard-nosed pragmatist with a short-term focus, impeachment in an era when conviction is nearly inconceivable is only likely to deter if it has short-term political costs. This raises the much-debated question of the political effect of Trump's first impeachment. At the time, many observers suggested that impeachment would, in an echo of the Clinton experience, help Trump's political fortunes. At a minimum, grave doubts were expressed about whether impeachment would do Trump any electoral damage. Such doubts contributed to reservations, even among Trump's most ardent critics, about the merits of proceeding with impeachment at all when the chances of conviction were so remote.

To this day, one cannot say with certainty whether Trump's first impeachment contributed to his defeat in 2020. But he was impeached, and thereafter he did lose. That is an undeniable fact that future presidents may consider.

Professor Gerhardt next provides an admirable discussion of the persistent misconduct by the lawyers defending President Trump. I cannot commend it too strongly, particularly to student or young lawyer readers of this issue.

Finally, Professor Gerhardt gives us the benefit of his unmatched personal familiarity with the internal congressional dynamics of impeachment in the form of a set of reforms to the process that might improve both outcomes and public perception of the impeachment process. One can only hope that Congress will have the foresight to consider these proposals before the next impeachment storm is upon us.

In light of Professor Gerhardt's modest optimism about the utility of even unsuccessful presidential impeachments, it is appropriate to mention next Professor Brian Kalt's disenchanted discussion of what he calls "futile impeachments"—those where the prospect of conviction is recognized to be *de minimis* from the outset.

Professor Kalt's academic work was notably influential during the second Trump impeachment crisis, in no small measure because he had previously explored the seemingly abstruse question of whether a federal civil officer could be impeached, tried, or convicted after having left office. (His views were also much sought-after at the end of President Trump's term because, while still in law school, he had presciently published on the question of whether a president can pardon himself.[15])

In this issue, Professor Kalt criticizes "failed and futile presidential impeachments, but find[s] defensible principles at their core and suggest[s] that censure offers a better way to vindicate those principles."[16]

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[15] Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996).

[16] Brian C. Kalt, *Impeachment and Its Discontents*, 87 MO. L. REV. 781 (2022).

While Professor Kalt offers a characteristically measured, persuasive, and scholarly argument for his view, I am left with some reservations.

As noted above, I agree with Professor Kalt's conclusion that successful impeachment in the sense of an impeachment producing conviction in the Senate is nearly inconceivable in the present era, which he admirably characterizes as not a two-party system, but a "two-reality system."[17] But I am troubled by the plain implication of his opposition to even initiating impeachment proceedings in such an era—which is that if the members of president's party simply declare unwavering allegiance to their leader, and preemptively announce their refusal to consider impeachment regardless of the merits of the case, then impeachment must not even be ventured.

I do not believe that recalcitrance of that sort should be rewarded. And I do believe that even "unsuccessful" impeachment proceedings can have salutary effects, not the least of which is that invocation of the impeachment power strengthens congressional investigative authority. That said, Professor Kalt's argument for censure as a plausible alternative to failed impeachment merits careful consideration.

In a sense, Gene Healy's contribution to this volume provides some additional grist for the mill of Professor Kalt's skepticism about the utility of impeachments without convictions.[18] Mr. Healy, a distinguished scholar at the Cato Institute, has long expressed a refreshing enthusiasm for more, not fewer, presidential impeachments. His view, with which I generally concur, is that presidents ought to be a great deal less imperial and a good deal more disposable than the encrustations of historical mythology have made them.

Nonetheless, he notes ruefully that the Senate's failure to convict a president impeached for what impartial observers would consider grave constitutional offenses, can create bad precedent. At a minimum, this can mean that, in future impeachment cases, the defenders of misbehaving presidents will claim that the past acquittal represents a senatorial judgment that the charged conduct was of the wrong type or of insufficient gravity to constitute impeachable wrongdoing under the constitution. More generally, and as I observed above, acquittal can be touted to the general public as not merely technical vindication, but as endorsement of the view that the president's charged behavior was no wrong at all, but a perfectly proper exercise of presidential authority.

Mr. Healy nonetheless retains a somewhat chastened enthusiasm for impeachment and concludes that impeachment remains an important tool for restraining presidential overreach.

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[17] *Id.* at 789.

[18] Gene Healy, *Be Careful What You Wish for: Impeachment in the Trump Era*, 87 MO. L. REV. 769 (2022).

Professor Victoria Nourse adds to this symposium a bracing discussion of the political character of impeachment and its place in what she calls the "constitutive constitution," that is, a constitution whose function is both to create – to constitute – the structure of national government as well as to erect "a set of restraints on Congress and the Presidency."[19] Professor Nourse's subtle theoretical understanding of the constitution, together with her own long practical experience working in Congress, leads her to conclude that there is relatively little danger of a proliferation of frivolous impeachments. She emphasizes the collective action problem that confronts Congress when attempting even ordinary legislative work and emphasizes how much more acute this becomes in an extraordinary event like an impeachment. She goes on to observe that even active and aggressive partisans who want either legitimate executive oversight or politicized show hearings can employ ordinary committee powers to achieve their ends with far less trouble than is involved in impeachment. She concludes by summarizing the structural constitutional disincentives to profligate use of impeachment, including the importance of geographic representation in the makeup of Congress and, of course, the two-thirds rule in the Senate.

I confess myself somewhat less sanguine than my good friend, Professor Nourse. There is a particular vitriol abroad in the land that seems to reward extremes of rhetoric and political conduct. For those simmering in that poisonous cauldron, the idea of impeachment of the other side's president has a special appeal. Nonetheless, I hope she is right and that Congress will avoid diverting its scarce resources into vain and profitless pursuits.

Professor Keith Whittington focuses us on more foundational questions about impeachment.[20] He first lends his considerable erudition to the conclusion that impeachable "high Crimes and Misdemeanors" are not limited to indictable crimes, but extend to the conduct of a president who "egregiously misuses the powers of his office or engages in conduct grossly incompatible with the dignity of his office."[21] For what little it may be worth, I could not agree more. And I also share Professor Whittington's concern that the Senate's acquittal verdicts on Trump's conduct could have the effect of undercutting the long-existing consensus on this point.[22]

Professor Whittington also addresses the constitutional propriety of the second article of President Trump's first impeachment which

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[19] Victoria Nourse, *The Constitutional (and Political) Safeguards Against Impeachment*, 87 MO. L. REV. 819 (2022).

[20] Keith E. Whittington, *Impeachment in a System of Checks and Balances*, 87 MO. L. REV. 835 (2022).

[21] *Id.* at 848–49.

[22] *Id.* at 859–60.

considered his refusal to comply with congressional demands for material related to its impeachment inquiry. If I read his excellent analysis correctly, Professor Whittington appears to conclude that impeachment is constitutionally permissible on this ground, but is also a remedy to be employed only with careful circumspection and as a last resort.

Finally, Professor Whittington implicitly disagrees with Professor Kalt's categorical rejection of impeachments in which the prospect of conviction and removal is remote. While recognizing the drawbacks of proceeding in such cases, he also acknowledges other legitimate purposes for even an unsuccessful venture. As he says, "If President Trump's actions were properly within the scope of the impeachment power, then the House could reasonably decide using the impeachment process to condemn the President's actions could be productive even if the President could not be removed."[23]

Finally, I commend the reader's attention to the finely-wrought discussion by Professor Michael McConnell of the question much discussed in President Trump's second impeachment: whether a civil officer, including the President, can be impeached or tried, convicted, and disqualified from future federal service after he or she has left office. Drawing on careful analysis of the text, structure, and drafting history of the Constitution, as well as later congressional practice, Professor McConnell concludes that a constitutional officer can be impeached by the House while in office, but not after leaving office, and that the Senate can try – and thus convict – any constitutional officer properly impeached by the House while he or she was in office.[24]

I end this introduction to the written portion of the *Missouri Law Review* symposium on "The Two Impeachments of Donald Trump" where I began my oral introduction to our parade of panels months ago, with an expression of my gratitude to the remarkably distinguished group that graced our Zoom screens and, now, the pages of this volume. As I said then, it is no exaggeration to say that this symposium boasted the most distinguished array of impeachment experts assembled in any venue since the House Judiciary Committee hearings on the impeachment of President Clinton in 1998. For their presence, their insights, and the wisdom they imparted, I offer my thanks.

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[23] *Id*. at 860.

[24] Michael W. McConnell, *Impeachment and Trial After Officials Leave Office*, 87 MO. L. REV. 793 (2022).