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## Be Careful What You Wish For: Impeachment in the Trump Era

Gene Healy

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# Be Careful What You Wish for: Impeachment in the Trump Era

*Gene Healy\**

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## I. INTRODUCTION

Having now gotten some distance and perspective on the head-spinning Trump presidency, what have we learned about the way presidential impeachments are likely to work in the future?

Presumably, we've learned a lot over the last few years, thanks to Donald Trump. Say what you will about the man, but he single-handedly doubled the number of presidential impeachments. As he might put it, were he inclined to boast in this case: "Nobody's ever done that before, Greatest president for impeachments ever. Many people are saying."

Whenever you get a wealth of new data, you should assess it carefully to see if you need to update your views. Some of my hypotheses about presidential impeachment have weathered the Trump storm better than others. For instance, our recent experience provides further evidence that impeachment isn't nearly as destabilizing or dangerous as conventional wisdom has long held. However, the mechanism's manifest failure to discipline an out-of-control president has made me less exuberant than before about impeachment's upside. Two impeachment acquittals in one term should counsel us to not to place too much hope in the Constitution's ultimate remedy as an effective check on abuse of power by rogue presidents.

## II. IMPEACHMENT HISTORICALLY: SAFE, LEGAL, AND ALL TOO RARE

My longtime view – one I'd arrived at well before Trump rose to office<sup>1</sup> – was that we don't impeach presidents *enough*.<sup>2</sup> After all, the Framers described impeachment as an essential check on presidential misconduct. For Hamilton, it was "a bridle in the hands of the legislative body upon the executive servants of the government."<sup>3</sup> Madison called it

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<sup>1</sup> Gene Healy, "Impeachment' Is Not a Four-Letter Word," WASH. EXAM'R, (May 21, 2013, 12:00 AM), <https://www.washingtonexaminer.com/tag/barack-obama?source=%2Fgene-healy-impeachment-is-not-a-four-letter-word> [<https://perma.cc/DTJ5-U6EM>] ("Given the massive abuses of power and public trust that modern presidents have committed, we've had far too few presidential impeachments. We should stop treating the 'I-word' like it's a curse.").

<sup>2</sup> See GENE HEALY, INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION'S IMPEACHMENT POWER (2018); See also Gene Healy, *Presidential Impeachments Should be Normalized*, in DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM (5th ed. Washington, D.C. CQ Press 2020).

<sup>3</sup> THE FEDERALIST NO. 65, at 339 (Alexander Hamilton) (The Gideon ed., 2001).

the “indispensable” provision for “defending the Community against the incapacity, negligence, or perfidy of the chief Magistrate.”<sup>4</sup>

And yet, leading up to the Trump presidency, we’d all but dispensed with it. Over some 230 years of our constitutional history, we’d made only three serious attempts at removing an American president via the impeachment process: Andrew Jackson in 1868, Richard Nixon in 1974 – who was never formally impeached, having quit before the full House could vote – and Bill Clinton in 1998.

That’s roughly one in fifteen presidents at a pace averaging once every seventy-five years. While any member of the House can introduce articles of impeachment, it’s vanishingly rare that anyone tries.<sup>5</sup> Historically, three quarters of American presidents never faced more than the *theoretical* threat of removal. Before the Trump presidency, in our entire constitutional history, only eleven of forty-four presidents had articles formally drawn up against them.<sup>6</sup>

We’ve had no shortage of “incapacity, negligence, or perfidy” in the Oval Office.<sup>7</sup> Meanwhile, over the past century, the American presidency has grown vastly more powerful – and more dangerous – than the Framers could have imagined.<sup>8</sup> Given the damage an unfit president can do, the ultimate check on presidential abuse is even more indispensable today.

And yet, American political culture has long seemed profoundly uncomfortable with the idea of firing the federal chief executive before his term is up. NYU Law’s Bob Bauer terms this orientation “Impeachment Anxiety Syndrome,” a coinage that, if anything, understates its intensity.<sup>9</sup>

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<sup>4</sup> ELLIOT’S DEBATES, VOL. III: DEBATES IN THE FEDERAL CONVENTION OF 1787 317 (James McClellan and M. E. Bradford, eds., 1989) (Richmond: James River Press, 1989).

<sup>5</sup> STEPHEN W. STATHIS & DAVID C. HUCKABEE, CONG. RES. SERV. GOV 98–763, CONGRESSIONAL RESOLUTIONS ON PRESIDENTIAL IMPEACHMENT: A HISTORICAL OVERVIEW (1998).

<sup>6</sup> *See id.*

<sup>7</sup> Indeed, many of the charges contained in Nixon’s articles of impeachment—criminal misuse of the CIA, IRS, and FBI, for example—were business as usual for his predecessors. JFK had his CIA director wiretap members of the DC press corps; LBJ had the agency bug Barry Goldwater’s campaign plane. And as Americans learned from the mid-70s Senate special committee investigation of intelligence abuses led by Senator Frank Church (D-ID), nearly every post-WWII president used FBI wiretaps to keep tabs on political opponents. *Church Committee*, WIKIPEDIA (May 9, 2022), [https://en.wikipedia.org/wiki/Church\\_Committee](https://en.wikipedia.org/wiki/Church_Committee) [<https://perma.cc/KN2U-NUEE>].

<sup>8</sup> Gene Healy, *Don’t Freak Out About Impeachment*, CATO INSTITUTE (Dec. 20, 2019), <https://www.cato.org/commentary/dont-freak-out-aboutimpeachment#barriers-nowhere-constitution> [<https://perma.cc/S5VT-F53M>].

<sup>9</sup> Bob Bauer, *Senator Graham’s Proposed Return to the Independent Counsel Statute and the Problem of Impeachment Anxiety Syndrome*, LAWFARE (July 31, 2017, 10:05 AM), <https://www.lawfareblog.com/senator-grahams-proposed-return->

In 2017, the *Oxford English Dictionary* (“OED”) blog noted the rise of a “curious circumlocution” in the late 1980s: the use of the phrase “I-word” in place of “impeachment.”<sup>10</sup> That euphemism, *OED*’s Katherine Connor Martin explains, reflects the fact that “earnest discussion of the possibility of impeachment is still regarded by many politicians and journalists as a bridge too far, putting the speaker in danger of being considered reckless, disloyal, or overly partisan . . . . The momentous impact on the government and the nation of a decision to impeach [is] regarded as extending even to broaching the topic.”<sup>11</sup> Well before Trump came on the scene, impeachment had become the Voldemort of constitutional remedies: we dare not speak its name.

On the rare occasions when presidential impeachment became a live possibility, public discussion was inevitably tinged with suggestions of blasphemy and violence. Normally sober and judicious scholars could be heard comparing it to capital punishment,<sup>12</sup> or a “constitutional nuclear weapon.”<sup>13</sup> Pundits and pols were given to conjuring up dark specters of economic turmoil, government paralysis, and possible constitutional collapse.

I never understood this timorous attitude toward a legitimate constitutional failsafe mechanism, put there for the public’s protection. The historical record, while sparse, seemed pretty clear. Presidential impeachment had never done us any real harm. Though partisans of particular presidents insist impeachment “threatens democracy” and liken the process to a “coup,” it’s a strange coup that replaces one elected official with his hand-picked and also duly elected running mate.

Nor, for better or worse, does impeachment paralyze government.<sup>14</sup> During the alleged Watergate “nightmare,” Congress found time to

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independent-counsel-statute-and-problem-impeachment-anxiety-syndrome  
[<https://perma.cc/U5QG-DRNZ>].

<sup>10</sup> Katherine Connor Martin, “‘I’ Is for ... Impeachment: The I-Word.” OXFORD ENGLISH DICTIONARIES BLOG (May 24, 2017), <https://web.archive.org/web/20170606004057/https://blog.oxforddictionaries.com/2017/05/i-is-for-impeachment-the-i-word/> [<https://perma.cc/KXY2-8FSU>].

<sup>11</sup> *Id.*

<sup>12</sup> “Truly the political equivalent of capital punishment,” Harvard’s Laurence Tribe declaimed in 1998: allowing Congress “to decapitate the executive branch in a single stroke.” Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 723 (1999).

<sup>13</sup> Ronald Dworkin, *A Kind of Coup*, THE N.Y. REV. (January 14, 1999) (“the power to impeach a president is a *constitutional nuclear weapon*”) (emphasis added).

<sup>14</sup> Gene Healy, *It’s Not True That Impeachment Paralyzes Government (Unfortunately)*, CATO INSTITUTE (Dec. 18, 2019, 5:30 PM), <https://www.cato.org/blog/its-not-true-impeachment-paralyzes-government-unfortunately> [<https://perma.cc/5BVB-R2J3>].

pass landmark legislation like the Endangered Species Act, the War Powers Resolution, and the Impoundment Control Act.<sup>15</sup>

And whatever disruption impeachment causes, it's clearly not the kind that spooks investors. The Clinton impeachment, for instance coincided with one of the biggest bull markets in history.<sup>16</sup> Still less does impeachment threaten civic peace. As the constitutional scholar Sanford Levinson has noted, Nixon's resignation even led to "a brief 'Era of Good Feelings,' at least until Gerald Ford pardoned" him.<sup>17</sup>

Moreover, on at least one occasion, a presidential impeachment drive did the country a lot of good. In the Nixon case, the threat of impeachment drove a corrupt, lawless, and abusive president from office—and ushered in a wave of salutary reforms aimed at de-imperializing the presidency.<sup>18</sup> True, the process was awkward and cumbersome, Lord Bryce's "hundred-ton gun," requiring complex machinery to wheel it into position.<sup>19</sup> But it worked, after a fashion.

Even when it failed to remove a sitting president, the mere fact of impeachment by the House worked as a highly effective form of constitutional censure.<sup>20</sup> Presidents Johnson and Clinton survived their Senate trials, but impeachment left a black mark on their legacies. It stood to reason that the threat of that black mark could restrain bad behavior by future presidents.

### III. BAD PRECEDENTS

Given that perspective, you can imagine my disappointment when, more than two years into the Trump presidency, we hadn't yet had a serious impeachment effort. In late March 2019, just days after the long-

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<sup>15</sup> See list "Major Legislation" at 93<sup>rd</sup> *United States Congress*, WIKIPEDIA, [https://en.wikipedia.org/wiki/93rd\\_United\\_States\\_Congress#Major\\_legislation](https://en.wikipedia.org/wiki/93rd_United_States_Congress#Major_legislation) [<https://perma.cc/C7XU-8M8C>].

<sup>16</sup> Dan Burrows, *How the Stock Market Performed During the Clinton Impeachment*, KIPLINGER (Jan. 17, 2020), <https://www.kiplinger.com/article/investing/t038-c008-s001-how-stock-market-performed-clinton-impeachment.html> [<https://perma.cc/GL8T-NVM4>].

<sup>17</sup> Sanford Levinson, *Impeachment is Not Enough*, CATO UNBOUND (Mar. 11, 2019), <https://www.cato-unbound.org/2019/03/11/sanford-levinson/impeachment-not-enough/> [<https://perma.cc/9AVU-F6UE>].

<sup>18</sup> See, e.g., Sam Berger & Alex Tausanovitch, *Lessons from Watergate: Preparing for Post-Trump Reforms*, CTR. FOR AM. PROGRESS (July 30, 2018), <https://www.americanprogress.org/article/lessons-from-watergate/> [<https://perma.cc/VKK9-TT7H>].

<sup>19</sup> JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 208–09 (1st ed. 1888).

<sup>20</sup> Indeed, it's the only form of censure likely to work. The few successful censure resolutions against sitting presidents have mostly faded into obscurity, having all the force of declaring it "National Nurses' Week." See STEPHEN W. STATHIS & DAVID C. HUCKABEE, *supra* note 5.

awaited Mueller Report landed with an underwhelming splat, I discussed the likelihood of impeachment with Professor Bowman, over lunch at the Dubliner on Capitol Hill.<sup>21</sup> At the time, it looked like impeachment just wasn't in the cards. And imagine *Professor Bowman's* disappointment—as a patriot, a constitutional scholar, and an *author* of a just-completed magisterial history of impeachment for the age of Trump.<sup>22</sup>

As we commiserated over burgers and beer, at one point, I voiced a desperate prayer to anyone up there who might be listening: “Can't we please get *at least one impeachment* out of this [EXPLETIVE DELETED] presidency?”

And I can't help thinking that at that precise moment, somewhere, a finger on the Monkey's Paw uncurled.<sup>23</sup>

Here we are, some three years and two presidential impeachments later; what have we learned? The new data resulting from President Trump's land-speed record in impeachment hasn't caused me to revise my views completely. For one thing, once again, the usual scare stories about impeachment turned out to be overblown.<sup>24</sup>

But, as in the Monkey's Paw story, subsequent developments have an aspect of “be careful what you wish for” about them.

I now find myself somewhat less exuberant about the potential *good* impeachment can do in conditions of intense polarization and mass partisanship. Trump's two acquittals dramatically weakened the precedent set in the Nixon case. Congress wheeled that 100-ton gun into position twice in the space of two years, and both times, when it lit the fuse, out popped a little cartoon flag reading “bang.” Can impeachment really be the “indispensable remedy” if conditions of mass partisanship have rendered it all but wholly ineffectual?

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<sup>21</sup> Mark Mazzetti & Katie Benner, *Mueller Finds no Trump-Russia Conspiracy, but Stops Short of Exonerating President on Obstruction*, N.Y. TIMES (March 24, 2019), <https://www.nytimes.com/2019/03/24/us/politics/mueller-report-summary.html> [<https://perma.cc/9CN6-4EBM>].

<sup>22</sup> See FRANK O. BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (Cambridge Univ. Press 2019).

<sup>23</sup> In the classic horror story, a mummified monkey's paw grants three wishes, but in a fashion that punishes the owner mercilessly for having tempted fate. W.W. Jacobs, *The Monkey's Paw*, HARPER'S MAG. at 634 (Sept. 1902).

<sup>24</sup> Gene Healy, *What 'National Nightmare'? We got Through Impeachment Just Fine, Thank You*, NY DAILY NEWS (Feb. 12, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-what-national-nightmare-20200212-n7w2peejr5gkjin2u3bylryggg4-story.html> [<https://perma.cc/6RNU-SAJ4>].

### A. *Trump Round One*

The term “precedent” probably deserves air-quotes in this context.<sup>25</sup> Impeachment is a mixed operation of law and politics and, even in the best of times, the politics tend to swallow the law. Unlike Supreme Court opinions, Senate verdicts do not come with a holding and a majority opinion. Instead, you’re left figuring out the takeaway from how dozens of individual Senators publicly explain their votes. Moreover, the key precedent here, the Nixon case, wasn’t even a proper impeachment—Nixon having quit before the hammer could drop.

Even so, going into Trump’s first impeachment, one would have said that abusing the powers of the office for political gain was the quintessential high crime or misdemeanor. After all, abuse of power had been the thrust of the second article of impeachment against Nixon passed by the House Judiciary Committee in July 1974.<sup>26</sup> The first item that article listed was Nixon’s attempt to turn the IRS against his political rivals by ordering investigations and audits of supporters of Senator George McGovern, Nixon’s leading rival for the presidency.<sup>27</sup>

What Nixon had done, in the words of John Dean’s infamous “Enemies List” memo,<sup>28</sup> was to “use the available federal machinery to screw [his] political enemies.”<sup>29</sup> You can’t do that. That was the popular understanding and the black-letter law of impeachment, if you can have such a thing.

And what Trump had been charged with was on all fours with Nixon Article 2: a naked shakedown attempt on Ukraine’s president, threatening to withhold military aid unless and until he opened an investigation into Trump’s leading rival for the presidency in 2020, Joe Biden.<sup>30</sup>

It wasn’t the mere fact of acquittal that undermined the Nixon precedent. In theory, at least, it would have been possible to spare Trump

<sup>25</sup> See GENE HEALY, *INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION’S IMPEACHMENT POWER* 17–18 (2018); see also HEALY, *INDISPENSABLE REMEDY*, *supra* note 2, at 17–18.

<sup>26</sup> *Articles of Impeachment Adopted by the House of Representatives Committee on the Judiciary*, THE AM. PRESIDENCY PROJECT (July 27, 1974), <https://www.presidency.ucsb.edu/documents/articles-impeachment-adopted-the-house-representatives-committee-the-judiciary> [<https://perma.cc/3EFY-75BP>].

<sup>27</sup> *Id.*

<sup>28</sup> Nixon’s “Enemies List”, REAL CLEAR POL. (May 15, 2013, 9:11 AM), [https://www.realclearpolitics.com/lists/irs-scandal/nixon\\_enemies\\_list.html](https://www.realclearpolitics.com/lists/irs-scandal/nixon_enemies_list.html) [<https://perma.cc/P95Z-MUZM>].

<sup>29</sup> Michael E. Miller, *Nixon had an Enemies list. Now so does Trump*, THE WASH. POST (Aug. 19, 2018, 3:55 PM), <https://www.washingtonpost.com/news/retropolis/wp/2018/08/17/nixon-had-an-enemies-list-now-so-does-trump/> [<https://perma.cc/55LG-SDXU>].

<sup>30</sup> H.R. REP. NO. 116–346 (2019).



removal without whitewashing the behavior at issue or calling into question whether it could ever constitute a firing offense. For example, when Bill Clinton was acquitted by the Senate in his impeachment trial in 1999, nobody came away from that episode thinking that the message was: “Go ahead, have a fling with an intern and lie about it in court – you’re home free!” That’s because virtually every Democratic senator who voted to acquit made a point of condemning Clinton’s behavior in the harshest terms: “deplorable,” “reprehensible,” “indefensible”—and worse.<sup>31</sup>

That’s not what happened in Trump’s first impeachment. Rather, a plurality of GOP senators echoed Trump’s self-congratulatory assessment that his conversation with Ukrainian President Volodymyr Zelensky was “a perfect call.”<sup>32</sup> The president was just trying to “root out corruption in the Ukraine,” explained Sen. David Perdue (R-Ga.).<sup>33</sup> So it happened to be Trump’s major opponent for the presidency—was he supposed to just look the other way?

Worse still, several senators actually embraced the Trump defense team’s ludicrous theory that abuse of power is not impeachable. Senator Inhofe of Oklahoma, for example, said flat out “abuse of power is not . . . impeachable conduct.”<sup>34</sup> If only Dick Nixon had known!

### *B. Trump Round Two*

And then, less than a year later, the second finger of the Monkey’s Paw uncurled.

Recall Trump’s famous boast that he could shoot someone in the middle of Fifth Avenue and not lose votes.<sup>35</sup> The conduct at issue in his second impeachment trial was as close as one could get to testing that proposition in the impeachment context. The President had deliberately spun up a violent mob, hoping to intimidate Congress and his own Vice President into overturning an election he’d lost.<sup>36</sup> On January 13, 2021, a

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<sup>31</sup> Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 385–86 (1999).

<sup>32</sup> *The Morning Dispatch: Breaking Down Senate Republicans’ Impeachment Votes*, THE DISPATCH (Feb. 6, 2020), <https://morning.thedispatch.com/p/the-morning-dispatch-breaking-down?s=r> [<https://perma.cc/7K5J-3THP>].

<sup>33</sup> *David Perdue (R-Georgia) Excuses President Trump’s Ukraine Actions* (C-SPAN broadcast Feb. 6, 2020).

<sup>34</sup> 116 Cong. Rec. 790, 799 (daily ed. Feb. 3, 2020) (statement of Sen. Jim Inhofe).

<sup>35</sup> Jeremy Diamond, *Trump: “I could shoot somebody and I wouldn’t lose voters”* CNN POLITICS (January 24, 2016, 12:03 PM), <https://www.cnn.com/2016/01/23/politics/donald-trump-shoot-somebody-support/index.html> [<https://perma.cc/59TK-ZUEQ>].

<sup>36</sup> H.R. REP. NO. 116–346 (2019).

week after the January 6 incursion at the Capitol, the House passed a single article of impeachment, charging “incitement of insurrection,” by a vote of 237–197.<sup>37</sup> A month later, after a four-day trial, fifty-seven senators voted to convict, the final tally falling ten votes short of the constitutionally-required two-thirds.<sup>38</sup>

According to a tally by law professor Brian Kalt, of the forty-three GOP senators who voted to acquit, only thirteen bothered to criticize Trump *at all* in their post-vote statements.<sup>39</sup> But because ten House Republicans and seven GOP senators crossed the aisle to vote against their party’s president, the *New York Times*,<sup>40</sup> the *Washington Post*,<sup>41</sup> and others hailed the vote as “the most bipartisan majority in favor of conviction in history.”<sup>42</sup> If Trump’s second impeachment won that prize, however, it was only on a technicality, and hardly cause for celebration.

The “technicality” here was the lack of a full-House vote in the paradigmatic Nixon case. Still, back then, seven of the seventeen GOP members of the House Judiciary Committee voted to impeach,<sup>43</sup> and when Nixon finally relinquished the smoking gun tape, the remaining ten announced they planned to switch to “yes” when the articles went to the

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<sup>37</sup> Brian Naylor, *Article of Impeachment Cites Trump’s ‘Incitement’ Of Capitol Insurrection*, NPR (Feb. 9, 2021, 12:30 PM), <https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/11/955631105/impeachment-resolution-cites-trumps-incitement-of-capitol-insurrection> [https://perma.cc/B7NP-SCTX].

<sup>38</sup> Nicholas Fandos, *Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority votes ‘Guilty’*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/trump-impeachment.html> [https://perma.cc/LW5S-RQZZ].

<sup>39</sup> @ProfBrianKalt, TWITTER (Feb. 14, 2021, 8:56 AM), <https://twitter.com/ProfBrianKalt/status/1360966052801314819?s=20> [https://perma.cc/D6MY-UJ4T].

<sup>40</sup> *Impeachment Trial: Trump is Acquitted by the Senate*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/live/2021/02/13/us/impeachment-trial#7-senate-republicans-vote-guilty-the-most-bipartisan-margin-in-favor-of-conviction-in-history> [https://perma.cc/EZ6W-JWLG].

<sup>41</sup> Aaron Blake, *Trump’s Second Impeachment is the Most Bipartisan one in History*, THE WASH. POST (Jan. 13, 2021, 6:04 PM), <https://www.washingtonpost.com/politics/2021/01/13/trumps-second-impeachment-is-most-bipartisan-one-history/> [https://perma.cc/E483-MREQ].

<sup>42</sup> *7 Senate Republicans Vote ‘Guilty,’ the most Bipartisan Margin in Favor of Conviction in History*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/live/2021/02/13/us/impeachment-trial#7-senate-republicans-vote-guilty-the-most-bipartisan-margin-in-favor-of-conviction-in-history> [https://perma.cc/8UUZ-GDRB]; Blake, *supra* note 41.

<sup>43</sup> James M. Naughton, *New Accusation*, N.Y. TIMES (July 30, 1974), <https://www.nytimes.com/1974/07/30/archives/new-accusation-nixon-is-charged-with-failure-to-uphold-nations-laws.html> [https://perma.cc/5KX2-2STG].

House floor.<sup>44</sup> And it was the Republican congressional leadership – Sen. Barry Goldwater (R-AZ), Senate minority leader Hugh Scott (R-PA) and House minority leader John Rhodes (R-AZ) – who gave their president a final push out the door with a visit to the White House on August 7, 1974, the day before Nixon announced his resignation.<sup>45</sup> Watergate-era Republicans’ sense of betrayal now seems almost quaint: why, the president had *lied* to them!<sup>46</sup> Apparently, they had limits.

This is not your father’s GOP. Recall Richard Nixon’s infamous quote from the David Frost interview: “[W]hen the president does it, that means it is not illegal.”<sup>47</sup> In 2021, congressional Republicans offered a modern variation on that theme: “When *our* president does it, that means it is *not* impeachable.”

Would the outcome be much different if the political polarities were reversed, and Democrats confronted a president of their own party who had committed similar enormities? We’ve yet to run the experiment, but modern conditions of hyper-partisanship give us good reason to worry about the result. The past two decades mark “an acute era of polarization,” two Stanford political scientists report in a 2018 study.<sup>48</sup> During that period, “partisans’ mild dislike for their opponents has been transformed into a deeper form of animus.”<sup>49</sup> Sixty to seventy percent of Democrats and Republicans now view their political opponents as “a serious threat to the United States and its people.”<sup>50</sup> Forty-two percent go so far as to affirm

<sup>44</sup> Andrew Glass, *Watergate “Smoking Gun” Tape Released, Aug. 5, 1974*, POLITICO (August 5, 2018, 6:50 AM), <https://www.politico.com/story/2018/08/05/watergate-smoking-gun-tape-released-aug-5-1974-753086> [https://perma.cc/2CK4-L4WS].

<sup>45</sup> Dan Nowicki, *In 1974, Goldwater and Rhodes told Nixon he was Doomed*, AZCENTRAL (August 2, 2014, 9:27 PM), <https://www.azcentral.com/story/azdc/2014/08/03/goldwater-rhodes-nixon-resignation/13497493/> [https://perma.cc/KF6B-KJ74].

<sup>46</sup> “It was an enormous betrayal for some of Nixon’s allies when they realized that he had been lying the whole time,” says presidential historian Jeffrey Engel. Amelia Thomson-Deveaux, *It took a long time for Republicans to Abandon Nixon*, FIVETHIRTYEIGHT (October 9, 2019), <https://fivethirtyeight.com/features/it-took-a-long-time-for-republicans-to-abandon-nixon/> [https://perma.cc/6PDH-87SR].

<sup>47</sup> David Frost, “*I Have Impeached Myself*”: *Edited Transcript of David Frost’s Interview with Richard Nixon Broadcast in May 1977*, THE GUARDIAN (September 7, 2007, 5:18 PM), <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1> [https://perma.cc/P8AA-QWBU].

<sup>48</sup> Shanto Iyengar & Marsha Krupenkin, *The Strengthening of Partisan Affect*, POL. PSYCH. Feb. 13, 2018f.

<sup>49</sup> *Id.*

<sup>50</sup> Gene Healy, *Political Sectarianism and the Presidential Cult*, CATO INSTITUTE: POLICY REPORT (Sept./Oct. 2021), <https://www.cato.org/policy-report/september/october-2021/political-sectarianism-presidential-cult> [https://perma.cc/PB5E-BWFG].

that the other team is “not just worse for politics—they are downright evil.”<sup>51</sup>

Even in the best of times, Alexander Hamilton warned in the *Federalist* that impeachments “seldom fail to agitate the passions of the whole community, and to divide it into parties.”<sup>52</sup> The current environment of intense congressional partisanship and mass polarization threatens to render conviction by the Senate impossible, even for the worst abuses.<sup>53</sup> And if a president can be impeached twice and go on to win the nomination of his party, as Donald Trump may well do in 2024, even the censure function of impeachment by the House will have been catastrophically weakened, transfigured from a mark of shame into a sort of battle scar and badge of partisan pride.

#### IV. CONCLUSION

The Trump experience ought to help dispel the notion that impeachment is either a “national nightmare” or a cure-all for what ails the body politic. Still, I haven’t completely abandoned my earlier enthusiasm for presidential impeachments in general. It’s always good to remind presidents that they serve at our pleasure and – like most other Americans – can be fired when they misbehave. It would be even better to vastly reduce the powers of the office and lower the stakes, limiting the harm an unfit or malicious president can do.

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<sup>51</sup> *Id.*

<sup>52</sup> THE FEDERALIST NO. 65, at 338 (Alexander Hamilton) (The Gideon ed., 2001).

<sup>53</sup> Moreover, representatives who vote to hold a president of their own party accountable are hardly rewarded for that principled stand. As of this writing, it looks like as few as two of the ten House Republicans who voted to impeach President Trump in 2021, will go on to serve in the next Congress. Adam Wollner, *Where the ‘Impeachment 10’ stand heading into the final 2022 primaries*, CNN (Aug. 10, 2022), <https://www.cnn.com/2022/08/08/politics/impeachment-10-midterms/index.html> [<https://perma.cc/CV5U-MSG4>].