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The Constitutional (and Political) Safeguards Against Impeachment

Victoria Nourse

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The Constitutional (and Political) Safeguards Against Impeachment

*Victoria Nourse**

TABLE OF CONTENTS

TABLE OF CONTENTS	819
I. INTRODUCTION	820
II. THE CONSTITUTIVE CONSTITUTION	821
III. STRUCTURAL CONSTRAINTS AGAINST IMPEACHMENT	825
<i>A. Collective Action</i>	825
<i>B. Contrary Vertical Electoral Incentives</i>	827
<i>C. Weak Parties in a Big Country: The Problem of Saliency and the Need for Ouster</i>	829
IV. THE FUTURE OF IMPEACHMENT	830
V. CONCLUSION	833

*Ralph Whitworth Professor of Law, Georgetown Law Center. I thank Professor Frank Bowman for his invitation to this wonderful symposium, and my co-panelists, Professors Philip Bobbitt and Brian Kalt for an intellectually stimulating exchange with experts in the field. Thanks as well to the excellent work of the law review editors at the *Missouri Law Review*. All errors are my own.

I. INTRODUCTION

Will the Trump impeachments inspire a flurry of future presidential impeachments? Will the second Trump impeachment, which occurred after the President left office, spur impeachments of lesser, former government officials? These and other questions emerged during the 2022 *Missouri Law Review* Symposium and on the Senate floor during the Trump impeachment trials. I have argued that we can make an educated prognosis about these possibilities based on constitutional structure. I called this argument the “political safeguards” of impeachment in my recent book, *The Impeachments of Donald Trump: An Introduction to Constitutional Argument*.¹ What I called *political* safeguards, invoking the great legal scholar Professor Herbert Wechsler,² are easily described as *constitutional* safeguards. They are political in the sense that they are part of our democracy, and not political in the sense that they are lawless or partisan. In this short Article, I expand on this claim, arguing that these “political” safeguards emerge from what Professor Charles Black called basic constitutional structures and relationships.³

This claim may sound oxymoronic for many readers. How can politics be a safeguard? Politics is the problem, not the solution.⁴ Won’t the President’s political opponents have an incentive to impeach, particularly in a highly polarized age? Won’t all those chants of “lock her up” lead to impeachments of unpopular political figures like former Secretary of State Hillary Clinton, long after she has left office? These claims assume a much too simple model of American politics, and an incomplete view of our Constitution. Congress’s constitutional structure operates as a disincentive to party unity.⁵ Absent egregious enough action

¹ VICTORIA NOURSE, *THE IMPEACHMENTS OF DONALD TRUMP: AN INTRODUCTION TO CONSTITUTIONAL ARGUMENT* (2021) [hereinafter *TRUMP IMPEACHMENTS*].

² Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

³ See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Admittedly, the electoral relationships to which I look are different in some respects from those to which Professor Black looked.

⁴ As I argue, *TRUMP IMPEACHMENTS*, *supra* note 1, at 17–19, it is very important to distinguish between various meanings of the word “political.” Some use the term to mean naked partisanship, others to mean particular policy preferences, and still others the demands of electoral office. It is always wise to remember that our Constitution creates a political order we call “democracy” which would not exist without political relationships known as representation.

⁵ Some contend that the separation of powers is a separation of parties not branches. I believe that view is incomplete for the reasons expressed by myself and others. See JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS*, 28–35 (2019); see also Matthew Stephenson & Jide

to unite a disunited country, I do not believe we will see a spiral of impeachments. Why? The costs of impeachment for Congress, both as an institution and for individual members, are high. To be sure, in a deeply divided nation, worries abound. Unforeseen cataclysms may defeat the most solid of predictions. But there are reasons that, in a post-pandemic era, impeachment fury may wither, even if politics at large remains viciously partisan. My point: those reasons lie in the Constitution's structure.

In Part II, I explain the "constitutive Constitution." Lawyers tend not to understand the Constitution as creating a government as opposed to limiting it. Focused firmly on courts, they mistake a part of the Constitution for its whole: most of the Constitution is political in the sense that it creates representative institutions. The prime reason for the 1787 Convention was not the creation of courts (otherwise the country would have perished long ago). It was the creation of a popularly-elected government, divided principally in two departments⁶: the legislature and the executive. In Part III, I explain why the constitutive Constitution makes it difficult to impeach. I focus on institutional reasons that make impeachment costly. These reasons can all be traced to the constitutional text, just not the text that most consider constitutional "law." In Part IV, I apply these lessons to argue that the second Trump impeachment trial (which occurred after the President left office) will *not lead* to the impeachment of *former* officials such as former Secretary of State Hillary Clinton or former Attorney General William Barr. I conclude that this is unlikely to happen because of Congress's more pressing electoral incentives, which are built into the Constitution's structural preference for local geography.

II. THE CONSTITUTIVE CONSTITUTION

When the Framers sat down to write a document creating a new government, they focused on creating a government that would work. In 1787, the existing government was in shambles, leaving the nation in danger. "The founders had just broken free from one empire, and the idea that some other empire was going to swallow them up was a constant

Nzelibe, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 517 (2010) (arguing that we have a separation of voters as much as a separation of parties).

⁶ I use the term "department" as the Framers did because we have three departments. One of those departments, the Congress, is divided into two "branches." *Two Bodies, One Branch*, U.S. CAPITOL VISITOR CTR. (last visited May 28, 2022), https://www.visitthecapitol.gov/about-congress/two-bodies-one-branch_ [<https://perma.cc/VKH4-BKK7>].

source of fear for them,” explains historian Mary Sarah Bilder.⁷ The Articles of Confederation had failed to unite the country or pay its debts. The Framers needed a new a government. Courts were the least of the Founders’ worries. That explains why Article I creates a Congress and Article II a Presidency.⁸ A working democracy requires rule by the people. Voters are the essence of democracy and that is why the Framers spent an inordinate amount of time in the summer of 1787 on who would vote for whom to create the Congress and the Presidency.⁹

The reason that I call these provisions the “constitutive Constitution” is because this is what the Framers were doing: they were *constituting* a government. We call the Constitution a “Constitution” rather than a “contract” or a “debt” or a “prayer” for a reason: it calls into existence something that did not exist before. Although the Framers were sent to “revise” the Articles of Confederation,¹⁰ they quickly found themselves proposing grander plans to address the nation’s urgent needs. A new constitutional structure dominated the convention. For example, constituting Congress was a major question: was there to be one chamber or two? Often, the Framers looked to the failures of the state constitutions

⁷ *The Founding Fathers Feared Foreign Influence — And Devised Protections Against It*, HISTORY (last visited May 28, 2022), <https://www.history.com/news/foreign-influence-constitution-founding-fathers> [<https://perma.cc/6HTD-KJVT>]. Professor Bilder is author of *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (Harvard 2017).

⁸ U.S. CONST. art. I, § 2. (“The House of Representatives shall be composed of members chosen every second year by the people of the several states. . . .”); *id.* at art. I, § 3 (“The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.”); *id.* at art. II, § 1.

⁹ To give just two examples, consider the following. The Virginia Plan, which in amended form became our Constitution, originally provided that the Senate was to be elected by the House: “members of the second branch of the National Legislature ought to be elected by those of the first...” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., rev. ed. 1966) (recording the May 29, 1787, resolutions proposed by Edmund Randolph of Virginia). The New Jersey Plan, a competing proposal, provided that the executive be appointed by the Congress. *See id.* at 20 (“Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of years”). For a more complete account, see Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996) [hereinafter “*Due Foundation*”]; Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) [hereinafter “*Vertical Separation*”].

¹⁰ Richard R. Beeman, *The Constitutional Convention of 1787: A Revolution in Government*, NAT’L CONST. CTR. (last visited April 26, 2022), <https://constitutioncenter.org/interactive-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government> [<https://perma.cc/MC28-TXU4>].

to decide.¹¹ And they ultimately decided on a bicameral approach with two different kinds of constituencies: states (then, the state legislature) would elect the Senate and smaller geographic and population units that we now call districts would elect the House. These were the kind of structural questions preoccupying the Framers in drafting Article I, although one might not know that from constitutional law classes which tend to focus on limits on Congress's powers (i.e., Section 8's limits),¹² not how Congress is elected.

For much of the Constitutional Convention, how to elect the President was unresolved. Some favored a multiple chief executive, whereas some favored a single President with a council. But the most important decision about the Presidency was not about whether there would be a single or multiple executive. The most important decision – one not decided until nearly the end of the convention – was to give the President a national constituency, mediated by an electoral college. For much of the Constitutional Convention, Congress was to elect the President. That would have created, in essence, a parliamentary government. In the parliamentary system, such as the one in Britain, members of the Parliament form a “government,” meaning that members of the legislature sit in the executive branch.¹³ Today, that would mean the current Speaker of the House, Nancy Pelosi, would serve simultaneously in the Executive. In a parliamentary form of government, the “party” elected is the driving force uniting members of the legislature and the executive (for example, in Britain, the “Labor Party” or the “Conservative Party” rules). The Framers did not like the idea of parties or “factions” as they called them. Had they adopted a system in which the President was elected by Congress, it would have bound the two institutions together as they are bound in parliamentary systems. The President would have looked to Congress, and to curry favor with its members, if he sought re-election.

When the Framers, at the Convention, finally rejected congressional election of the President, they made the President independent from Congress. That, in turn, created *the separation of powers*.¹⁴ Had the

¹¹ See, e.g., THE FEDERALIST No. 47 (James Madison) (discussing the failures of state constitutions to guarantee the separation of powers even when they had express provisions requiring separate powers).

¹² U.S. CONST. art. 1, § 8 (providing that Congress has certain “powers” such as the power to regulate commerce).

¹³ See TRUMP IMPEACHMENTS, *supra* note 1, at 68–69 (discussing the difference between parliamentary systems and our separation of powers).

¹⁴ See, e.g., The Federalist No. 47 (James Madison). Note that Madison writes that the Virginia Governor and council legislature, which were elected by the legislature exemplified the failure of the separation of powers in the states. *Id.* at 37 (“the chief magistrate, with his executive council, are appointable by the legislature; . . . two members of the latter are triennially displaced at the pleasure of

President been elected by the House and the Senate, the President would have had an incentive to cultivate House and Senate members. In effect, those who elected the House and Senate members would elect the President. The Founders created a different system: the President was to have an independent, national constituency. As Gouverneur Morris expressed it, had the President been elected by the House and the Senate, the President would have spent all his time in Washington seeking favor from members of Congress.¹⁵ A national constituency encouraged the President to represent those outside of Washington.¹⁶ Indeed, since electoral college votes determined the outcome, the President would have an incentive to cultivate those states with the most Senators and Representatives—the most populous states.

It is possible to see any Constitution as purely constitutive, meaning only constituting the political departments. Other countries' traditions have done so.¹⁷ In such a world, the Constitution is not enforced by courts as law, but is a guide for the legislature and the executive. But, in the United States, from the earliest days, courts asserted the notion that a “written” constitution required legal enforcement.¹⁸ Notice, however, that it does not follow that a Constitution enforced as law (the “juridical” Constitution) is one that does not create a government (what I am calling the “constitutive” Constitution). Although this goes without saying, a Constitution that only had courts would have no voters. If that were our Constitution, the Chief Justice would serve as a legal autocrat. Today, we have *both* a *constitutive* Constitution and a *legal/juridical* Constitution, operating simultaneously.

If this is correct, then we must recognize that the Constitution creates institutions and it creates political relationships between voters and institutions essential to constitutional structure. The Congress is a multi-member body; each member represents a different group of citizens in particular geographic areas. Those who care about the Constitution's text should not fear this is political theory divorced from text, since the text itself creates this arrangement. These provisions are generally forgotten

the legislature; and . . . all the principal offices, both executive and judiciary, are filled by the same department.”).

¹⁵ 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 500 (Sept. 2, 1787) (statement of Gouverneur Morris).

¹⁶ One might argue that under a system in which Senators were elected by state legislatures (prior to the 17th Amendment), the President would look to the state legislatures for his authority. At the time, given the difficulty of travel, however, the state legislatures' influences would be funneled through Senators in Washington.

¹⁷ See Giorgio Pino, *Forms and Methods of Constitutional Interpretation – Italian Style*, 1 ROMA TRE LAW REV. 187 (2020) (last visited April 11, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4008240 [<https://perma.cc/FNW7-7EKL>].

¹⁸ See, e.g., *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803).

by lawyers because lawyers are taught that the Constitution is a province of courts. No first year constitutional law student is unaware of Chief Justice John Marshall's statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁹ Lawyers read that to mean that the core function of the judiciary is to interpret the law, even if the truth is that both the President and the Congress "interpret" the laws that they make, and do so on a daily basis. The important point to see is that *Marbury's* statement reflects and reinforces a juridical view of the Constitution. It leads to a vision of the Constitution as a set of *restraints on Congress and the Presidency* rather than *constitutive of, or creating, the Congress and the Presidency*.

III. STRUCTURAL CONSTRAINTS AGAINST IMPEACHMENT

Armed with this understanding of the "constitutive Constitution," we can begin to see "institutional" and "political" constraints on impeachment. In this Part, I explain three features of the structural Constitution that make impeachment hard, and why it would be hard whatever the precise legal standard of impeachment—whether it would be "high Crimes and Misdemeanors" or something like "maladministration."²⁰ These features are: (1) collective action by a majority of the House of Representatives to vote for Articles of Impeachment; (2) contrary electoral incentives produced by the electoral relationship between individual House members and their small and local constituencies;²¹ and (3) weak parties in a large country.

A. Collective Action

Our Constitution makes it extremely difficult to pass legislation. Structurally, the Constitution tilts libertarian by requiring bicameral legislation (agreement of the House and Senate) and Presidential approval. As we know from the literature on collective action,²² getting lots of

¹⁹ *Id.* at 177.

²⁰ For the best scholarly treatment of this question, see FRANK BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (2019).

²¹ All judgments about constituency relationships offered in this Article are comparative judgments about likely incentives. I make no claim that any of these relationships "work" in some abstract sense; some members in "safe" seats may entirely ignore their constituencies. As a relative matter, however, one can say that the House member's electoral relationships are more local than those of the President who speaks to the nation. The member from the 5th of Texas speaks for the 5th of Texas, not the entire country. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 69 (1991).

²² RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

people to act (535 in Congress) imposes serious transaction costs. An easy experiment proves this: ask a class of one hundred students, or a faculty meeting of one hundred professors, when to hold a make-up class, and there will be lots and lots of answers. Coordinated action takes time and work and makes action less likely. Now consider that the action is far more important than legislation – it is the unseating of an elected President – and one begins to see that the passage of Articles of Impeachment is not a particularly easy thing to do. Over two hundred people, representing wildly different geographic districts, must agree that impeachment is appropriate. This helps to explain the one bare fact that we know about impeachment of Presidents: it has happened very, very rarely.

One might think that because the Speaker largely controls the contemporary House,²³ that collective action problems would be overcome by strong party leadership. But that assumes that there is no intra-party dissent within the Speaker's party about the wisdom of impeachment. Unseating a President is a major constitutional and political action. Intra-party disagreements on an issue of such magnitude are predictable. Will the member from Anchorage or Baton Rouge really care? We saw this in the Trump impeachments. For example, Speaker Nancy Pelosi resisted the first Articles of Impeachment for a very long time, in part because her more “moderate” members resisted, questioning whether the action was worth the trouble: whether voters cared more about their taxes and roads than about a “divisive” impeachment.²⁴ Of course, recent events – and Russia's invasion of Ukraine – now tell us that Trump's call to Ukrainian President Zelensky to halt aid to Ukraine was one step on the road to war. But, at the time, when the House was trying to decide whether to impeach based on Trump's failure to heed Congress's instructions on Ukrainian aid, no one foresaw such events.

²³ SEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS* 160 (6th ed. 2009) (“The reinforcement of the Speaker's powers, beginning in the early 1970s, represents an important development in the distribution of power in the House.”).

²⁴ See, e.g., Sarah Ferris, *Moderate Democrats Warn Pelosi of Impeachment Obsession*, POLITICO (Sept. 15, 2019 6:52 AM), <https://www.politico.com/story/2019/09/15/moderate-democrats-pelosi-impeachment-1495832> [<https://perma.cc/QTP4-6DJY>]; Mike Lillis, *Pelosi Says Leadership Won't Pressure Moderates to Back Impeachment*, THE HILL (Dec. 12, 2019, 11:33 AM ET), <https://thehill.com/homenews/house/474279-pelosi-says-leadership-wont-pressure-moderates-to-back-impeachment> [<https://perma.cc/JAK3-FZFC>] (“several moderate members are holding out ahead of the votes amid concerns that backing the effort might alienate voters in their battleground districts heading into the 2020 election.”).

B. Contrary Vertical Electoral Incentives

So, the first thing making it hard to impeach is that a majority of 435 members of the House must agree. That's a collective action problem. Given the importance of impeachment, members are likely to be divided. A skeptic might ask: Why would they be divided? Wouldn't party membership control? The answer is "no." Enter constitutional structure: as we will see, it fights against party allegiance. Members' "electoral connections" to particular geographic units, whether Detroit or Kansas City or San Francisco, are set by the Constitution's requirements.²⁵ These "electoral connections" easily operate as a disincentive to party unity in a large country: what Kansas City wants, Detroit or San Francisco may not. More importantly, those same geographical "electoral connections" operate as disincentives to impeach. Representatives are elected to lead and reflect their constituencies.²⁶ The voters are the member's "boss." And, as a general rule, the boss wants House members focused on them – the voters and their immediate needs (gas prices, infrastructure, jobs, health care) – as opposed to impeachment. Even if one believes that representatives simply manipulate ignorant voters, or seek to please party leaders, there are limits to such strategies: a member who works against voters' interests either to privilege party or money takes an electoral risk that her opponent will win by running on the fact that the member cares more for party or money than the voters.

To use a spatial analogy, members have a "vertical"²⁷ incentive: the voters. By contrast, impeachment, and oversight in general, is a "horizontal" effort: the Congress attempts to control its coequal branch—the President. Most members will care more about delivering to their constituents – or funders²⁸ – on issues of the day, from health care to tax

²⁵ This is a staple of basic political science literature. *See generally* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2004). As Douglas Arnold has argued, members are continually trying to anticipate what their constituencies want. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 67 (1990) (explaining that members anticipate and have little trouble "estimating" how "attentive" publics will react if the member votes against their policy preferences). Imagine an entirely different view: representatives could represent wealth, not geography, making the country an aristocracy.

²⁶ This is both a constitutionally created relationship, and a general baseline assumption of political scientists. *See* Arnold, *supra* note 25, at 60 (accepting the "assumption that the quest for reelection is legislators' dominant goal").

²⁷ Although I have used this term, *see Vertical Separation, supra* note 9, at 752, it can be found in caselaw. *See* Clinton v. New York, 524 U.S. 417, 452 (1998) (Kennedy, J. concurring) (noting that the "[s]eparation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised").

²⁸ Even if one were to take the posture, given our current campaign finance laws, that Congress represents monied interests as much as voters, the point would still hold:

relief, than they will care about impeaching a president for minor errors. House Members have very little time and are elected every two years, which means that they have to make hard decisions about what to focus on. Unless the impeachable conduct is grave, and known to offend their constituents, it is unlikely that a member's first priority will be impeachment if the member seeks reelection. To be sure, members have a duty to uphold the Constitution and should not forsake that duty for electoral expedience. Simply because members do not have much of an electoral incentive to encourage impeachment on weak grounds does not mean that they have no duty to impeach in cases where there are strong grounds. But it does suggest that many might find it convenient, or in their interest, to downplay the severity of ambiguous or insufficiently severe presidential missteps. Put in other words, doubts are likely to be called against the constitutional validity of an impeachment.

Those who fear that impeachments will flourish often point to congressional efforts to harass officials with multiple oversight hearings. One thinks of the eight House hearings on the handling of an attack on the United States embassy in Benghazi and the many hours of testimony by former Secretary of State Hillary Clinton.²⁹ But, again, this cuts *against* rather than *for* impeachment frenzy. Some members may stake their electoral fate on executive oversight. But that does not mean that it is in a majority of members' interests. In fact, it cannot be because a majority of members do not have the power to hold hearings in the House; one would have to be a chairman of a committee to hold such power. In fact, the availability of oversight "hearings" to expose "executive" misconduct provides a powerful *alternative* to impeachment.

Powerful members, like committee chairpersons, who are concerned about serious and impeachable executive misbehavior have an easier way to move forward: they may simply hold a hearing on the latest malfeasance. Consider, for example, the joint Senate-House hearings held about President Ronald Reagan's Iran-Contra policies in the 1990s. He might have been impeached (some of his aides were criminally prosecuted for theft and basic corruption among other things), but no impeachment resolution passed. Nevertheless, the highly publicized joint House and Senate hearings stand as an object lesson for those who would conduct a secret foreign policy inside the White House against Congress's expressed

members would be focused on those interests if they wanted to be reelected. There is no guarantee those interests will support impeachment; as a general matter, corporate America tends to contribute to both parties and resist government actions that are divisive or unpredictable as these will upset the markets.

²⁹ *Hillary Clinton's Benghazi Testimony By the Numbers*, ABC NEWS (Oct. 22, 2015, 9:16 PM), <https://abcnews.go.com/Politics/hillary-clintons-benghazi-testimony-numbers/story?id=34667634> [<https://perma.cc/66QB-RYW9>] (Stating that there had been eight congressional investigations into the attack and that then Secretary of State Clinton had spent eight hours, in one day, testifying).

wishes.³⁰ More recently (and after I first submitted this Article), the January 6th Committee to Investigate the Insurrection has reached millions of people and raised serious questions about the former President's conduct. To create such a committee, the Speaker of the House did not need to convince more than 200 members to impeach.

C. Weak Parties in a Big Country: The Problem of Saliency and the Need for Ouster

All of this might be different if the country were smaller, or if the country's parties were stronger. Let us imagine that the President tasks the military with moving the Capitol of the State of California from Sacramento to Los Angeles. Other states might fear similar aggressions, but some might not care. In Detroit or Kansas City, the voters might be oblivious: "that's a California fight," they might say. Political scientists have known for decades about "low-information" voters who generally do not vote on issues because they simply take general "cues" from parties or other affiliations.³¹ Americans do not like politics and if something does not affect them at the proverbial "kitchen table," they may look the other way. In short, a big country tends to reduce the saliency, or importance, of Presidential actions that might be impeachable. For the Congress to act on impeachment, the President has to do something wrong, that action has to be widely salient across a large nation, and voters have to agree that it is *so wrong the President should go*.³² As long as California, in our case above, has some other remedy that might be effective – a lawsuit, for example, or legislation to stop the President from such an action – members and voters are unlikely to *see the need for impeachment*.

The Clinton impeachment precisely conveyed these lessons. There were a majority of members at the time who saw Clinton's conduct – an affair with White House intern, Monica Lewinsky – as a gross deviation from the proper behavior of a President. There was a fair amount of bipartisan sentiment that the President was deeply wrong to lie about the affair in a public proceeding under oath. Because it was rather salacious, the news was widely spread. Congress passed Impeachment articles. But even if voters knew and disapproved the misconduct, they were divided

³⁰ On the Iran-Contra affair and impeachment, see CHARLES L. BLACK & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* 70–75 (2018).

³¹ See, e.g., ARNOLD, *supra* note 25, 57–58 (discussing how "inattentive citizens" aggregate information from generalized sources even if they "do not follow congressional elections very closely.").

³² This is not to say that there are no constitutional constraints on the House and Senate conduct of impeachment: there are. Even if everyone in America thought Bill Clinton should have been ousted from office, there were serious issues about whether he had committed a "high crime" comparable to the issues raised in prior impeachments.

on whether the conduct was sufficiently severe to merit presidential ouster. *Was the country really in danger?* That is the question that members and voters must answer. Ultimately, and predictably given the high 2/3 vote requirement for conviction, the Senate refused to oust Clinton from office. Perhaps more importantly for future impeachments, impeaching party members were punished at the polls for wasting voters' time. The generally accepted wisdom of the Clinton impeachment was that Republicans should have spent less time on impeachment and more time tending to their local constituencies.³³

IV. THE FUTURE OF IMPEACHMENT

Now that we've had an impeachment of a President no longer in office, some have worried that the House might vote to impeach former officials other than the President, such as President Obama's Secretary of State Hillary Clinton or President Trump's Attorney General William Barr. The first question this raises is whether such action follows from the second Trump impeachment. The second question is whether such impeachments are likely.

On the first question, it is important to recognize that the second Trump impeachment was not a classic "late" impeachment.³⁴ Trump was impeached for conduct while in office (the insurrection occurred after the 2020 election and before the inauguration of President Biden).³⁵ The Senate refused to hold the trial while Trump was in office, however.³⁶ In short, in my view, the second Trump impeachment was not a late impeachment, it was a late *impeachment trial*. The House impeached President Trump for his role in the capitol insurrection while he was still in office.³⁷ That is a far cry from attempting to impeach those who have been out of office for years, on the theory that they committed wrongs in

³³ Russell Riley, *The Clinton Impeachment and Its Fallout*, THE MILLER CTR. AT THE UNIV. OF VA., <https://millercenter.org/the-presidency/impeachment/clinton-impeachment-and-its-fallout> [<https://perma.cc/J4GK-8ELY>] (last visited May 29, 2022) (stating that the Republican "party actually lost five seats in the House while gaining no Senate seats in the November 1998 elections conducted just prior to the impeachment vote. Traditionally, the opposition party registers significant gains in the off-year elections of a President's second term, and so the Republican loss was virtually unprecedented").

³⁴ For the most comprehensive and best treatment of so-called "late impeachments," see Brian C. Kalt, *The Constitutional Case for the Impeachment of Former Federal Officials: An Analysis of the Law, the History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13 (2001).

³⁵ Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [<https://perma.cc/27AL-CSPE>].

³⁶ *Id.*

³⁷ *Id.*

the past and should be barred from future office. Moreover, if Speaker Pelosi is right that the Senate intentionally delayed the proceedings,³⁸ then it is even less of a precedent than it might otherwise appear for impeaching former officials.

More importantly, however venomous the anger at particular officials, members of Congress are likely to believe that they have more important things to do if they want to be reelected. To be sure, individual members may file a resolution to impeach. But only collective action counts. There has to be a *majority of members* who see it in their electoral interest to take the time to impeach. A Judiciary committee of two dozen members might pass Articles, but over two hundred members – representing constituents from rural Kansas to urban Miami – would all have to think it worth their time to engage in such a political process when there are likely to be more important things requiring attention in rural Kansas and urban Miami from the voters' perspectives: for example, roads, schools, guns, housing, or COVID-19. If the Trump impeachments tell us anything, it is that when the conduct is not as serious as an armed insurrection (a literally unprecedented event in our history), at least some members will fear that they will risk punishment at the polls for engaging in divisive Washington-based politics. Certainly, that is what some members thought about the first Trump impeachment.³⁹

To be sure, the more divided the country, the more likely it is that parties will increase in strength and unity due, in large part, to partisan gerrymandering at the state level. A House of Representatives in which a bare majority of members aligned with Republicans would have the power to impeach President Biden and former government officials, but it is highly unlikely that they would find it in their electoral interest to spend precious time doing it. In any large group, there will be those who prefer to focus on other issues (i.e. fighting transgender bathrooms or child pornography), thinking those issues were more likely to gain them reelection than a time-intensive Beltway fight against officials long gone

³⁸ Speaker Pelosi (D-CA) publicly claimed that the Senate Leader, Mitch McConnell (R-KY) had purposefully delayed the trial while Trump was in office. Lisa Hagen, *McConnell Tears into Trump Over Riots, While Pelosi Blames GOP Leader for Delay of Trial*, U.S. NEWS (Feb. 13, 2021), <https://www.usnews.com/news/politics/articles/2021-02-13/mcconnell-tears-into-trump-over-riots-while-pelosi-blames-gop-leader-for-delay-of-trial> (“It is so pathetic that Sen. McConnell kept the Senate shut down so that the Senate could not receive the article of impeachment and has used that as his excuse for not voting to convict Donald Trump.”).

³⁹ See *supra* note 24 (discussing moderate House Democrats' hostility to the first Trump impeachment); see also NORM EISEN, A CASE FOR THE AMERICAN PEOPLE: THE UNITED STATES V. DONALD J. TRUMP 171 (2020) (insider account stating that Speaker Pelosi was “highly influenced” by what Members called the “majority makers”—those Members seeking reelection from vulnerable purple or red districts).

from office. For example, President Trump's supporters would face questions at home about why they were not spending more time on pressing local issues, like critical infrastructure or lowering taxes. To be sure, impeachment fervor increases with increasing party divisions. Actual impeachments have increased over time, in my view, because there are increasingly few "purple" seats in the House, districts where the constituencies are reliably mixed among the parties. One lesson this teaches: If you want to prevent impeachment fury, you should push hard against partisan gerrymandering,⁴⁰ which has increasingly narrowed the band of House seats that are competitive between republicans and democrats.

The bottom line: the Constitution's institutional structure governs by geography, not party. At some point, party can overcome the pull of individual incentives. But, absent universally condemned conduct, geography (and personal electoral self-interest) provides an incentive to resist impeachment. Only under two conditions would this change: (1) a dramatic party split (say 60/40) supporting same-party domination in the House *and* Senate; *and* (2) a willingness by members to bet their political future on divisiveness. Now, some may say that could happen, given former President Trump's incendiary rhetoric and support for an insurrection; disruption may be the point of some members of the modern Republican party. But even in the highly implausible scenario of a large Trump super-majority in both the House and the Senate, there would still be counterincentives. Such a super-majority would have to balance the time it would spend on impeachment against the cost of time lost effecting radical legislative change (think abortion and immigration—top Trump party issues). Some members may prefer to spend their time on those issues rather than on a costly Washington fight.

Enter the final two pieces of the structural Constitution providing an incentive against impeachment. First, the Constitution's 2/3 conviction rule. Even if the House has a super-majority desiring impeachment, the likelihood of a Senate conviction remains low (the larger state geographies in the Senate make it much more likely that the members are not as wedded to party outliers). As long as at least 1/3 of the Senate members are from a non-Trump party, then impeachment will be a dead end. All those House members who wish to impeach will be asked, by reporters, their constituents, and their fellow members, why they are engaging in a process that will never convict. This occurred in the first Trump impeachment on the then-theory that the call to President Zelensky was simply too complex

⁴⁰ For a recent and general overview on this topic, see Eric McGhee, *Partisan Gerrymandering and Political Science*, 23 ANN. REV. POL. SCI. 171 (2020). On the negative downstream political effects on congressional voting, see Nicholas Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGAL STUD. Q. 609 (2020).

for the average American to understand. Second, there are constitutional rules limiting impeachment. Just because a super-majority of the House may wish for an impeachment trial does not mean that they have the proper legal grounds: precedent suggests that whatever a “high Crime” is, it needs to be something big enough to put the country at risk. And, here again, House partisans will face the kinds of questions faced by Republicans who impeached President Clinton and by Democrats in the first Trump impeachment⁴¹: was there really a high crime here, and if there was not, why not stick to doing business for the people?

V. CONCLUSION

No one can deny that we live in an age of impeachment not seen by the greatest generation who survived World War II. There have been three times as many impeachment trials – exactly three – in my lifetime than in my parents’ much longer lives. People fear that we will continue to see impeachments break out in increasing intensity. They should be worried, given the country’s deep partisan divisions, the increasing nationalization of local politics, and the capacity of the internet to spread hate at the speed of light. Earnest work should be done, on main street, in churches, and in law schools, to try to heal the wounds of a divided country, siloed by real disease (COVID-19), fake news, and gerrymandered districts. But there are reasons for hope that impeachment will remain rare. As I have tried to explain in this Article, our Constitution includes structures that resist impeachment—namely it enshrines local geography as a key reason for and against political action. In normal times, history tells us that this makes political action difficult, but it also works to resist the passions of party and faction.

⁴¹ In my own view, history has supported the importance of the first impeachment, particularly given Russia’s invasion of Ukraine. Nevertheless, those who oppose impeachment often do so on the ground that the conduct is not sufficiently severe or nation-threatening.