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## Impeachment in a System of Checks and Balances

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# Impeachment in a System of Checks and Balances

Keith E. Whittington\*

## ABSTRACT

*Measured by any yardstick, it is hard to think that the first impeachment of President Donald Trump was particularly successful. But there are important broader questions raised particularly by the first Trump impeachment that have significance for how we think about the impeachment power moving forward. If future impeachment efforts are to be more successful, or even useful, Congress will have to understand the nature of the constitutional task that it is undertaking.*

*As the House contemplates making use of the impeachment power and the Senate contemplates whether to convict an officer in an impeachment trial, there are some basic questions that must be asked in any impeachment episode. What is an impeachable offense? Is this kind of behavior impeachable? Does this instance of misconduct justify impeachment? It should not have been hard for the House to answer the first two questions in regard to the first Trump impeachment. The third question was the more challenging to answer, and the House struggled to answer it.*

*This Article argues that abusing the powers of the presidency for the sake of purely personal interests is well within the traditional scope of the impeachment power. In order to assess whether an officer has abused power in that way, members of Congress must take care to deliberate across the political aisle so as to identify and resolve possible good-faith explanations for an officer's behavior. A House that does not bother to curb its own partisan instincts risks abusing its own constitutional authority by rushing headlong into an impeachment that does not meet the constitutional standard of high crimes and misdemeanors. Even after the House and the Senate have come to an understanding of the scope of impeachable offenses and each has satisfied itself that an officer has committed deeds that fall within that scope, they must still decide whether an impeachment and a conviction and removal is warranted. Those decisions are necessarily political judgments about what risks the country faces and how they are best navigated. If Congress is to contemplate pursuing an impeachment, it should have a clear view of what it is trying to accomplish and why impeachment is the best path to getting there.*

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## I. INTRODUCTION

Few principles were so central to the founding era thinking about constitutional design as that power ought to be made to check power.<sup>1</sup> The records of the Philadelphia Convention are replete with discussions of how adequate checks on power are to be established. Edmund Randolph thought the Confederation period had demonstrated the “turbulence and follies of democracy” and “that some check therefore was to be sought for against this tendency of our Governments,” and hoped the Senate would do the trick.<sup>2</sup> Elbridge Gerry thought the judiciary ought to “have a sufficient check against encroachments on their own department,” and thought its authority of deciding on the constitutionality of the laws would provide it.<sup>3</sup> Benjamin Franklin worried that an absolute presidential veto over laws would be “a mischievous sort of check,”<sup>4</sup> but James Wilson worried that if the legislative could override a presidential veto too easily, the “Executive check” might prove inadequate, in “tempestuous moments,” to allow the executive “to defend itself.”<sup>5</sup> Hugh Williamson thought a legislature divided into two chambers could “serve as a mutual check,”<sup>6</sup> and James Madison hoped to provide Congress with a “check”

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<sup>1</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 547–53 (1969).

<sup>2</sup> JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION* 42 (Koch ed. 1987). Edmund Randolph was the senior-most constitutional delegate from Virginia, a former governor and attorney general of Virginia, and the introducer of the Virginia Plan to the convention. See Kevin R.C. Gutzman, *Edmund Randolph and Virginia Constitutionalism*, 66(3) *REVIEW OF POLITICS* 469 (2004).

<sup>3</sup> MADISON, *supra* note 2, at 61. Elbridge Gerry was a Massachusetts merchant, a critical player in keeping American forces supplied during the Revolution, and an active participant in the convention debates though he refused to sign the final document. Nicholas Mosvick, *Forgotten Founders: Elbridge Gerry, The “Brusque Maverick”*, NAT’L CONSTITUTION CNTR (Aug. 3, 2020), <https://constitutioncenter.org/blog/forgotten-founders-elbridge-gerry-the-brusque-maverick> [<https://perma.cc/F4D7-5NUM>].

<sup>4</sup> MADISON, *supra* note 2, at 62. Benjamin Franklin was the senior statesman of the convention, a drafter of the Declaration of Independence, a longtime American diplomat to England and France, and president of Pennsylvania at the time of the convention. See Mary Bellis, *Biography of Benjamin Franklin, Printer, Inventor, Statesman*, THOUGHT CO. (Aug. 28, 2019), <https://www.thoughtco.com/story-of-benjamin-franklin-1989852> [<https://perma.cc/6L8X-JRPR>].

<sup>5</sup> MADISON, *supra* note 2, at 63. James Wilson was a prominent Philadelphia lawyer, leading Federalist in Pennsylvania, and future justice of the U.S. Supreme Court. See William Ewald, *James Wilson and the Drafting of the Constitution*, 10(5) *J. CONSTITUTIONAL L.* 901 (2008).

<sup>6</sup> MADISON, *supra* note 2, at 82. Hugh Williamson was a leader of the North Carolinian delegation at the convention. See Louis W. Potts, *Hugh Williamson: The Poor Man’s Franklin and the National Domain*, 64(4) *N.C. HISTORICAL REV.* 371 (1987).

against the “mischiefs” of the states.<sup>7</sup> Checks had to be put in place everywhere so that no actor or interest could become too powerful or abusive.

The ultimate and most powerful of these checks, the impeachment power, was entrusted to the Congress. With this power, the legislative branch was vested with the sole authority to remove, when necessary, members of the other branches of the federal government. Members of the legislature could themselves only be removed by the chamber as a whole – through expulsion – or by their constituents as regular intervals—through election. The other branches of government were designed to be powerful and independent, but the legislature held the trump card. Though Madison was among those who worried about “a powerful tendency in the Legislature to absorb all power into its vortex,” there was no other body that could be entrusted to exercise a power to impeach and remove misbehaving members of the judicial and executive branches.<sup>8</sup>

The impeachment power might be a powerful congressional weapon, but it seemed more like a paper tiger during the presidency of Donald Trump. In late 2019, President Trump became only the third president in American history to be formally impeached.<sup>9</sup> Remarkably, in a single term of office he was impeached not once, but twice. Trump’s impeachment troubles will surely be the leading topic when recording his presidential legacy.

It is hard, however, to consider either Trump impeachment particularly successful. If the goal was to remove Trump from the White House, then impeachment never truly stood a chance, as the President never faced any serious risk of losing the Senate vote and being convicted. If the goal was to chasten the President and induce him to change his behavior while he occupied the Oval Office, the first impeachment seemed to do the opposite. Republican Senator Susan Collins famously explained her own vote for acquittal by saying, “I believe that the president has learned from his case. The president has been impeached. That’s a pretty

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<sup>7</sup> MADISON, *supra* note 2, at 88. James Madison was a central force at the convention, a principal author of the Constitution and later the Bill of Rights, and a key strategist for constitutional ratification. Michael Gerhardt & Jeffrey Rosen, *Introduction: A Madisonian Constitution for All*, NAT’L CONSTITUTION CNTR (2020), <https://constitutioncenter.org/debate/special-projects/a-madisonian-constitution-for-all/essay-series/introduction-to-a-madisonian-constitution-for-all> [https://perma.cc/F4XM-GP5Y].

<sup>8</sup> MADISON, *supra* note 2, at 338.

<sup>9</sup> Richard Nixon having likely escaped that fate by resigning ahead of a House impeachment vote. Valerie Strauss, *History lesson: Richard Nixon was not impeached*, WASH. POST (May 29, 2017, 11:55 a.m. EST), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/29/richard-nixon-was-not-impeached-despite-what-hillary-clinton-and-others-say/> [https://perma.cc/PKC4-4HJD].

big lesson.”<sup>10</sup> Instead, Trump seems to have learned a different lesson than Collins would have hoped. He learned that he could count on his co-partisans to stick by his side and defeat any effort to remove him from office. Rather than adopting an apologetic attitude after his first impeachment ordeal, he was defiant, with the White House declaring the result to be a “full vindication and exoneration.”<sup>11</sup> As Republicans rallied around their embattled President, Democratic leadership made that easier by leaning into the partisanship. Rather than trying to build a broad coalition that might have emphasized that the concerns about the President were not merely the sour grapes of the opposition party, the Democrats chose to sideline the many conservative critics of Trump in preparing and moving forward with their impeachment effort.<sup>12</sup> Rather than authorizing a single committee to open a formal impeachment inquiry and construct a coherent public narrative to justify impeaching a sitting president, the House stumbled through an ad hoc process with no clear direction and unnecessarily opaque authority.<sup>13</sup>

There are important broader questions raised particularly by the first Trump impeachment that have significance for how we think about the impeachment power moving forward. The first Trump impeachment generated significant debate over how to think about the scope of impeachable offenses and the responsibilities of Congress when confronted by the kind of presidential behavior displayed by Donald Trump.

As the House contemplates making use of the impeachment power and the Senate contemplates whether to convict an officer in an impeachment trial, there are some basic questions that must be asked in any impeachment episode. What is an impeachable offense? Is this kind of behavior impeachable? Does this instance of misconduct justify impeachment? In this Article, I examine each question. The goal is not to relitigate the first Trump impeachment but to clarify how future

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<sup>10</sup> John Bowden, *Collins: Trump Has Learned ‘A Pretty Big Lesson’ From Impeachment*, THE HILL (Feb. 4, 2020, 5:35 p.m. EST), <https://thehill.com/homenews/senate/481486-collins-trump-has-learned-a-pretty-big-lesson-from-impeachment/> [<https://perma.cc/QYD3-73UP>].

<sup>11</sup> *Statement from the White House Press Secretary*, THE WHITE HOUSE (Feb. 5, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-109/> [<https://perma.cc/9N2K-9Z85>].

<sup>12</sup> See Keith E. Whittington, *The House Impeachment: A Postmortem*, LAWFARE (Feb. 6, 2020), <https://www.lawfareblog.com/house-impeachment-postmortem> [<https://perma.cc/4DQ7-FT7Z>] (“An impeachment is not a failure just because it ends in an acquittal, but an impeachment process that heightens political divisions without reinforcing the proper limits on the conduct of government officials is not much of a success.”).

<sup>13</sup> *Id.*

members of Congress should think about these questions when the impeachment issue is once again raised.

## II. WHAT IS AN IMPEACHABLE OFFENSE?

If the House wants to determine whether it should use the impeachment power, it first must know when the impeachment power *can* be used. Setting aside the jurisdictional question of who can be subjected to a House impeachment and Senate trial,<sup>14</sup> the Constitution lays down a substantive standard for what constitutes an impeachable offense. Article II specifies that officers can be impeached and removed for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>15</sup> The offenses of treason and bribery are relatively straightforward to define but have been of limited significance for how the impeachment power has actually been used over time. In practice, the most important set of impeachable offenses has also been the least clear—those that fall within the scope of “high Crimes and Misdemeanors.” The history and purpose of the impeachment power demonstrate that the scope of impeachable offenses is broad and flexible in allowing Congress to reach the unpredictable but potentially serious threats to the constitutional order that can arise from the misbehavior of federal officers.

The impeachment clause contained in the U.S. Constitution creates a broad standard rather than a precise rule. As a consequence, there has been persistent disagreement about what exactly the scope of the impeachment power might be. Particularly, the constitutional specification that officers can be impeached and removed for high crimes and misdemeanors has encouraged ongoing debate about what falls within the range of impeachable offenses.<sup>16</sup> Despite the existence of that debate, the

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<sup>14</sup> U.S. CONST. art. II, § 4 (“The President, Vice President, and all civil Officers of the United States, shall be removed from Office . . .”). Of course, the second Trump impeachment raised particularly interesting questions of whether a former president can be tried on impeachment charges in the Senate. I have argued that he can. See Keith E. Whittington, *Can a Former President Be Impeached and Convicted?*, LAWFARE (Jan. 15, 2021), <https://www.lawfareblog.com/can-former-president-be-impeached-and-convicted> [https://perma.cc/6RKV-ZSZE]; Keith E. Whittington, *Can the House Impeach a Former President?*, REASON (Dec. 5, 2019), <https://reason.com/volokh/2019/12/05/can-the-house-impeach-a-former-president> [https://perma.cc/3MT7-AVCV]; see also Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13 (2001).

<sup>15</sup> U.S. CONST. art. II, § 4.

<sup>16</sup> The practice of federal impeachments has mostly operated within the “construction zone” of constitutional indeterminacy. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999) (examination of historical impeachments as constitutional constructions); Lawrence B. Solum, *Interpretation/Construction*

mainstream political and scholarly view has been that the impeachment power is broad and that impeachable offenses include abuses of power.<sup>17</sup>

Given the nature of the charges against President Trump, it is not surprising that his defenders tried to narrow the scope of impeachable offenses to exclude political misdeeds and include only ordinary criminal offenses. The first step of setting up a defense to an impeachment is to question whether the acts being charged are even impeachable offenses within the scope of the House's impeachment power. Given the language of the constitutional provision, reducing "high Crimes" to the most familiar kind of "crime" – ordinary indictable criminal offenses – is a natural move to make. It is a move that the House should, and traditionally has, rejected.<sup>18</sup>

It is tempting, especially for those charged with an impeachable offense, to attempt to analogize high crimes to ordinary crimes. The Constitution lists two familiar sorts of criminal acts as impeachable,<sup>19</sup> and the language of crimes, misdemeanors, trials, and convictions that permeates the impeachment process is resonant of the ordinary criminal justice system. Ordinary criminal offenses have the advantage of being well known, and thus provide both clear notice to officers that they should avoid committing such offenses and reduce the need for legislators to have to grapple with a broader but less conventional category of impeachable offenses. Legislators who prefer to outsource impeachment investigations to special counsels benefit from a list of impeachable offenses that is coterminous with the criminal code.

Even well before the House voted on articles of impeachment, Trump's defenders had been actively arguing that he could not be impeached for anything other than the commission of ordinary criminal offenses. Alan Dershowitz has been the most prominent advocate of this view of late, though it is not completely without precedent.<sup>20</sup> As impeachment threats swirled around the Trump presidency, Dershowitz argued that Congress should understand the impeachment power as limited to statutory crimes comparable to the named offenses of treason

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*Distinction in Constitutional Law*, 27 CONST. CMT. 108 (2010) (defining construction zone as a "zone of underdeterminacy" in constitutional meaning).

<sup>17</sup> See, e.g., Keith E. Whittington, "High Crimes" After Clinton: Deciding What's Impeachable, 99 Pol'y. Rev. 27 (2000); MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 59–65 (2018); FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS 244–52 (2019).

<sup>18</sup> See Keith E. Whittington, *A Formidable Weapon of Faction? The Law and Politics of Impeachment*, 55 WAKE FOREST L. REV. 381, 403–04 (2020).

<sup>19</sup> U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

<sup>20</sup> See generally, Niko Bowie, *High Crimes Without Law*, 132 HARV. L. REV. F. 39 (2018); WHITTINGTON, *supra* note 16, at 28–30, 145–48.



and bribery.<sup>21</sup> As the House impeachment inquiry advanced, Dershowitz dismissed the House's efforts: "You can't just make it up. To have a crime, you have to find something in the statute book that existed before the actions took place, and that was clear and unequivocal. It's just not there."<sup>22</sup> Similarly, Trump's former attorney general Matthew Whitaker took to the airwaves to ask, "What evidence of a crime do you have? . . . Abuse of power is not a crime."<sup>23</sup> Former Independent Counsel Kenneth Starr explained in interviews, "That is not a crime. It is poor judgment by the president."<sup>24</sup> These arguments made their way into the President's formal response to the articles of impeachment. This response was particularly impassioned, contending that "the Articles of Impeachment are constitutionally invalid on their face. They fail to allege any crime or violation of law whatsoever, let alone 'high Crimes and Misdemeanors,' as required by the Constitution."<sup>25</sup> The President's trial memorandum was only slightly more staid, arguing that the

House Democrats' novel theory of 'abuse of power' improperly supplants the standard of 'high Crimes and Misdemeanors' with a made-up theory. . . . By limiting impeachment to cases of 'Treason, Bribery, or other high Crimes and Misdemeanors,' the Framers restricted impeachment to specific offenses against 'already known and established law.'<sup>26</sup>

Anything else, Trump's defenders argued, would open the door to politicized impeachments and threaten to make government officers more dependent on the good will of Congress in order to retain their offices.<sup>27</sup> It might follow that one way to maintain the independence of the executive

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<sup>21</sup> ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* (2018).

<sup>22</sup> *Alan Dershowitz: It's "Unconstitutional" to Impeach Trump*, *Media Matters*, MEDIA MATTERS (Nov. 11, 2019), <https://www.mediamatters.org/trump-impeachment-inquiry/alan-dershowitz-its-unconstitutional-impeach-trump> [<https://perma.cc/8QG6-5DQX>].

<sup>23</sup> Jonathan Chait, "Abuse of Power is Not a Crime": *Trump's Former Attorney General Defines His Credo*, *THE INTELLIGENCER* (Oct. 23, 2019), <https://nymag.com/intelligencer/2019/10/abuse-of-power-is-not-a-crime-matthew-whitaker-trump-impeachment.html> [<https://perma.cc/7X36-DUW5>].

<sup>24</sup> Mike Brest, *Ken Starr Says Trump Showed "Poor Judgment" But "That's Not a Crime"*, *WASHINGTON EXAMINER* (Sep. 29, 2019), <https://www.washingtonexaminer.com/tag/donald-trump?source=%2Fnews%2Fken-starr-predicts-trump-impeachment-inquiry-is-doomed-to-fail> [<https://perma.cc/FV4P-VYQ7>].

<sup>25</sup> JAY ALAN SEKULOW & PAT A. CIPOLLONE, *ANSWER OF PRESIDENT DONALD J. TRUMP 1* (2020).

<sup>26</sup> JAY ALAN SEKULOW & PAT A. CIPOLLONE, *TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP 24* (2020).

<sup>27</sup> *See, e.g., id.*

and judicial branches from the legislative is to sharply limit the circumstances in which Congress could legitimately attempt to remove individuals holding office in the other two branches of government. This narrow understanding of impeachable offenses is at odds with most scholarship on the meaning of this constitutional provision and with the historical practice making use of the impeachment provision, but it buttresses the fortifications of the other two branches against an ambitious Congress.<sup>28</sup>

Examining the relevant history, however, makes clear that this understanding of impeachment is unnecessarily constrained. The constitutional framers were familiar with the impeachment device from English history, and after independence, it was quickly incorporated into American state constitutions. In English parliamentary practice, impeachment was a tool for checking the king and his ministers, and the term “high Crimes and Misdemeanors” developed within that practice to refer to misconduct by public officers. William Blackstone noted that “oppression and tyrannical partiality . . . in the administration and under the colour of their office” could often escape ordinary justice and was therefore accountable “by impeachment in parliament.”<sup>29</sup> Famously, more than a century before the American Revolution, the House of Commons had impeached the Earl of Strafford for attempting “to subvert the Fundamental Laws and Government of the Realms . . . and instead thereof, to introduce Arbitrary and Tyrannical Government.”<sup>30</sup> The British imperial officer Warren Hastings was embroiled in an impeachment scandal at the time of the Philadelphia Convention, and the House of Commons eventually charged him with “arbitrary, illegal, unjust, and tyrannical Acts” that rendered him “guilty of High Crimes and Misdemeanors.”<sup>31</sup>

The early state constitutions included their own impeachment provisions based on the English practice. For example, the Delaware constitution of 1776 empowered the assembly to impeach those “offending against the State, either by maladministration, corruption, or other means, by which the safety of the Commonwealth may be endangered.”<sup>32</sup> The New York constitution vested in the “representatives of the people in assembly” the “power of impeaching all officers of the

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<sup>28</sup> See Whittington, *supra* note 18, at 404.

<sup>29</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 140–41 (1776).

<sup>30</sup> *The Trial of the Earl of Strafford, on an Impeachment of High Treason*, 1 STATE TRIALS 100 (Samuel March Phillips ed. 1826).

<sup>31</sup> 1 MINUTES OF THE EVIDENCE TAKEN AT THE TRIAL OF WARREN HASTINGS ESQUIRE 7 (1788).

<sup>32</sup> DE. CONST. of 1776, art. XXIII.

State, for mal and corrupt conduct in their respective offices.”<sup>33</sup> The Massachusetts constitution of 1780 established an impeachment process for officers charged with “misconduct and maladministration in their offices.”<sup>34</sup> Likewise, the officers of Virginia were impeachable for “offending against the State, either by maladministration, corruption, or other means, by which the safety of the State may be endangered.”<sup>35</sup>

As the framers in Philadelphia contemplated creating a powerful and independent chief executive subject only to quadrennial elections, they agreed overwhelmingly that some ability to truncate the term of office of a misbehaving president would be necessary. James Madison thought it was “indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate.”<sup>36</sup> In the months after his inauguration, the president might “lose his capacity,” or “pervert his administration into a scheme of speculation or oppression,” or “betray his trust to foreign powers.”<sup>37</sup> Madison and others were also concerned that the president not become as subservient to the legislature as the early state governors often were. Making impeachment and removal too easy might subvert the independence of the executive that the Federalists also wanted to establish. The Convention thus rejected George Mason’s suggestion of using the common state language of “maladministration,” and instead favored the language of “high crimes and misdemeanors.”<sup>38</sup> “High crimes” seemed to capture the range of potential dangers that concerned Madison and others, without leaving the president vulnerable to impeachment over routine political and policy disagreements.

Subsequent commentators understood what the constitutional framers had done, and why they had done it. In *Federalist No. 65*, Alexander Hamilton noted that even an elected government would need an impeachment power to address “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”<sup>39</sup> They were political offenses, which “relate chiefly to injuries done immediately to society itself.”<sup>40</sup> Charles Pinckney argued in the South Carolina ratification convention that “abuse of power was more effectually checked” under the proposed Constitution than under the Articles of Confederation, and the primary evidence he offered was the existence of an impeachment power by which “those who behave amiss,

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<sup>33</sup> N.Y. CONST. of 1777, art. XXXIII.

<sup>34</sup> MASS. CONST. ch. I, § 2, art. VIII.

<sup>35</sup> VA. CONST. of 1776.

<sup>36</sup> MADISON, *supra* note 2, at 332.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 605.

<sup>39</sup> THE FEDERALIST NO. 65 (Alexander Hamilton).

<sup>40</sup> *Id.*

or betray their public trust” could be called to account by elected representatives of the people.<sup>41</sup>

In response to anti-Federalists worried that the Constitution invested too much power in federal officials, Federalists like South Carolina’s Edward Rutledge responded that the “very idea of power included the possibility of doing harm” and to “argue against the use of a thing from the abuse of it, had long since been exploded by all sensible people.”<sup>42</sup> Federalists argued that it was better to adequately empower federal officers to do good and then take care that if they “abused their trust, they were liable to impeachment and punishment.”<sup>43</sup> In North Carolina, Archibald Maclaine pointed out that it was “certainly necessary” that some “mode of punishment” be established so that federal officers “should be kept within proper bounds.”<sup>44</sup> Future Supreme Court Justice James Iredell observed that the impeachment power was “calculated to bring [“great offenders”] to punishment for crime which it is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against the government.”<sup>45</sup> When there is a “great injury to the community,” the elected representatives of the people are the ones best positioned to assess its nature and cause and take action against the offender, even when the offenses are of such a nature that they “cannot be easily reached by an ordinary tribunal” or cannot “be punishable” by ordinary law.<sup>46</sup>

The anti-Federalist Patrick Henry was less impressed by the security offered by the impeachment power. Though critics of the Constitution were assured that an officer who did “any thing derogatory to the honor or interest of their country” could be impeached and removed, Henry pointed out that those holding federal power would “try themselves” under the impeachment clause.<sup>47</sup> He thought there could be no “security where offenders mutually try one another.”<sup>48</sup> George Nicholas, by contrast, expected the impeachment power, held in the hands of representatives who were accountable “to the people at large,” to be an effective deterrent to “mal-administration” or abuse of the pardoning power by the president.<sup>49</sup> Edmund Randolph even suggested that the president could be impeached

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<sup>41</sup> JONATHAN ELLIOT, 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION* 281 (1836).

<sup>42</sup> *Id.* at 276.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 34.

<sup>45</sup> *Id.* at 113.

<sup>46</sup> *Id.* at 113–14.

<sup>47</sup> ELLIOT, *supra* note 41.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 17.

if he were “dishonest” in abusing the power to adjourn the two houses of Congress or for accepting an emolument from a foreign power.<sup>50</sup>

Early commentators on the Constitution continued to emphasize this broad scope of the federal impeachment power. The framers had indeed drafted a limited power of impeachment, but that limitation did not narrow the scope of impeachable offenses to ordinary crimes. Justice James Wilson pointed out in his law lectures that the impeachment power in America was “confined to political characters, to political crimes and misdemeanors, and to political punishments,” unlike the practice in England in which Parliament sometimes judged accusations of ordinary crimes committed by “offenders who were thought to be out of the reach of the ordinary power of the law.”<sup>51</sup> St. George Tucker simply noted that “all officers of the government, including the president, are impeachable for misconduct in office.”<sup>52</sup> In his overview of the Constitution, Justice Joseph Story concluded that “crimes of a strictly legal character” did fall within the impeachment power but that it would be “ordinarily applied” as a remedy to offenses “of a political character” that grew out of “personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office.”<sup>53</sup> William Rawle concluded that the impeachment power was carried over into the United States because, though “the firmness and integrity of the ordinary tribunals” would be adequate to hold to account any American – no matter how exalted – only a court of impeachment could remove a current officeholder and thereby prevent the “injury sustained by the nation” from being “renewed or increased, if the executive authority were perverse, tyrannical, or corrupt.”<sup>54</sup> The “offenses which may be committed equally by a private person as a public officer” were not generally the proper subject of an impeachment but could instead be “left to the ordinary course of judicial proceeding.”<sup>55</sup> The impeachment power was needed to check “men whose treachery to their country might be productive of the most serious disasters.”<sup>56</sup> With a century’s worth of perspective, the great constitutional commentator of the late nineteenth century Thomas Cooley concluded,

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<sup>50</sup> *Id.* at 368, 486.

<sup>51</sup> JAMES WILSON, 2 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 166 (1804).

<sup>52</sup> ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES 178 (1803).

<sup>53</sup> JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 532 (2d ed. 1851).

<sup>54</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 207 (1825).

<sup>55</sup> *Id.* at 204.

<sup>56</sup> *Id.* at 208.

It is often found that offences of a very serious nature by high officers are not offences against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty, which are dangerous and criminal because of the immense interests involved and the greatness of the trust which has not been kept. Such cases must be left to be dealt with on their own facts, and judged according to their apparent deserts.<sup>57</sup>

Across its history, the U.S. House of Representatives has approved only a small number of impeachments, and yet it has not confined itself to cases involving violations of the criminal code. The House's own practice manual concludes from the precedents that impeachable offenses consist of "misconduct incompatible with the official position of the office holder."<sup>58</sup> Its assessment of presidential impeachments concludes that they have generally involved charges of "abusing or exceeding the law powers of the office."<sup>59</sup> Many other impeachments involved non-felonious behavior that was nonetheless judged to be "grossly incompatible with the office," ranging from officers "appearing on the bench during the trial in a state of intoxication" or "permitting his partisan views to influence his conduct in certain trials" to committing "sexual misconduct with court employees" or preventing, obstructing or impeding the administration of justice.<sup>60</sup> "Less than one-third of all the articles the House has adopted have explicitly charged the violation of a criminal statute or used the word 'criminal' or 'crime' to describe the conduct alleged."<sup>61</sup>

The constitutional standard is not whether an officer has committed an ordinary criminal offense. To support an impeachment, there does not need to be a crime, only a high crime and misdemeanor. A president who egregiously misuses the powers of his office or engages in conduct grossly incompatible with the dignity of his office has forfeited the right to continue to occupy his office and is subject to the constitutional judgment of the Senate acting as a court of impeachment. The House and the Senate might conclude that accusations of misconduct are ungrounded or that remedy of removal is unwarranted, but the misconduct that they might assess need not involve violations of the criminal law.

At the start of 2020, the Senate was asked to convict President Trump on two articles of impeachment, neither of which charged him with having committed ordinary indictable crimes. He was charged with abusing the

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<sup>57</sup> THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 159 (1880).

<sup>58</sup> CHARLES W. JOHNSON, JOHN V. SULLIVAN, AND THOMAS J. WICKHAM, JR., *HOUSE PRACTICE* 592 (2017).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 593.

<sup>61</sup> *Id.* at 596.

powers of the presidency for the sake of his purely personal interests. A senator might reasonably think that such acts did not really constitute abuses of office, or that if they were abuses, they were not grave enough to merit the immediate removal of a sitting president in an election year. Senators might even conclude that President Trump had learned his lesson and could be counted on to conduct himself in a more presidential manner for the remainder of his tenure. Such judgments would be compatible with acquitting President Trump, but they would also have preserved traditional understandings of the scope of the impeachment power.

### III. IS THIS KIND OF BEHAVIOR IMPEACHABLE?

Knowing that the standard of impeachable offenses is not limited to ordinary crimes is only the first step, of course. The House must still determine whether the particular acts that an officer has committed are properly within the scope of that standard. While the constitutional guidance is limited, this section provides more robust guidance. Members of Congress should be self-conscious about their own limitations and the temptation to assume the worst about political opponents. The impeachment process encourages legislators to check their own judgments by deliberating across the political aisle to try to get a broader perspective on what might motivate an officer's actions and how it might be perceived. The corrupt motives and purposes of the President's actions and the threats he posed to the proper functioning of the democratic constitutional order helped justify a congressional conclusion that his particular behavior fell within the scope of the impeachment power.

It is widely accepted that the scope of impeachable offenses should be construed so broadly as to encompass ordinary political and policy disagreements. The constitutional drafters' rejection of "maladministration" in favor of "high crimes and misdemeanors" marked an effort to tighten the standard for impeachable offenses from one that was common in some of the early state constitutions and to ensure that the president was more independent of the Congress than the governors frequently were of the state legislatures.<sup>62</sup> Maladministration could imply errors in judgment. High crimes and misdemeanors implied misconduct. Congress was not to remove a president simply because it disagreed with his policies and how he administered the executive branch. Ordinary political disagreements were to be resolved through more ordinary political means. The heavy constitutional weaponry of the impeachment power was to be reserved for more extraordinary occasions. Around the time of the impeachment of President Andrew Johnson, John Norton Pomeroy argued that "very many breaches of public duty" were within the

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<sup>62</sup> See, e.g., MARC KRUMAN, BETWEEN AUTHORITY AND LIBERTY 123–30 (1997) (on the weakness of early state governors).

scope of the impeachment power, but not “a mere mistake in the exercise of [an officer’s] discretion.”<sup>63</sup> As John Randolph Tucker observed at the end of the nineteenth century, the “obvious purpose of the Constitution” was to empower Congress “to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it.”<sup>64</sup> Failures of duty that were “due to mistake, inadvertence or misjudgment” were to be addressed by other means, but “a purposed defiance of official duty” or “flagrant misbehavior” were within the purpose of this constitutional tool to deal with the dangers of a “wicked executive.”<sup>65</sup>

It is a challenge for the House to distinguish between the “flagrant misbehavior” of a “wicked executive” and an instance of a mere “mistake, inadvertence or misjudgment.”<sup>66</sup> Federal officers will not always make it easy to know on which side of that line they are operating, and in a polarized political environment, it is only natural to jump to conclusions. One check on that tendency is to incorporate the target of the impeachment inquiry into the process at an early stage so as to give the officer an opportunity to craft a defense of his actions or explicitly forego the opportunity to do so. If a president can provide an appropriate rationale for his conduct and dispel the suspicion that he is simply a “wicked executive,” then he may peel away votes in the House during the impeachment inquiry and at least create reasonable doubt in the public and in the legislature as to whether his actions merit immediately truncating his term of office.

Advocates for impeachment can further substantiate their own instincts by self-consciously reaching across the political aisle. The supermajority requirement in the Senate provides an effective restraint on what Thomas Jefferson worried would become “the most formidable weapon for the purposes of a dominant faction that ever was contrived.”<sup>67</sup> It has turned out to be very rare that a single party controls enough seats in the Senate to be able to convict and remove officers on a pure party-line vote. A partisan House majority might be able to impeach an officer, but if it wants to remove an officer it will need to win over some votes from the other party. That process of stress-testing the case of impeachment should begin early. If impeachment advocates are only appealing to their partisan base, they will not only fail to mount a credible prosecution that

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<sup>63</sup> JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 484 (3d ed. 1875).

<sup>64</sup> JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES* 419 (1899).

<sup>65</sup> *Id.* at 419–20.

<sup>66</sup> *Id.*

<sup>67</sup> THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 202 (Paul Leicester Ford ed., 1895).



has a chance of reaching the two-thirds threshold in the Senate, but they will also too easily delude themselves into believing that ordinary policy disagreements are something more nefarious. A House that does not bother to curb its own partisan instincts risks abusing its own constitutional authority by rushing headlong into an impeachment that does not meet the constitutional standard of high crimes and misdemeanors.

A classic basis for distinguishing “maladministration” from “misconduct” is to focus on the motives of the officer. Early state constitutions frequently listed “corruption” as an instance of an impeachable offense.<sup>68</sup> The federal Constitution did not repeat that language, but the discussions surrounding the adoption of the Constitution made it plain that such considerations were still part of the founding-era thinking about the purpose of the impeachment power. Subsequent usage has frequently targeted corrupt behavior by federal officers, clarifying through the course of legislative precedent that corrupt acts are within the scope of the impeachment power. Determining whether any particular action of an officer is properly, or best, attributed to corrupt motives may require difficult judgments, but an important line of inquiry in attempting to ascertain whether an action is best characterized as misconduct is exploring the explanations for the action and evaluating the credibility of the proffered justifications for it.

The first article of impeachment in the first impeachment of President Trump rested on just such a claim. The first article focused on President Trump’s phone call with Ukrainian president Volodymyr Zelensky on July 25, 2019, and the surrounding administration interaction with the Ukrainians.<sup>69</sup> The United States was providing military aid to Ukraine in support of its ongoing conflict with a Russian incursion on its eastern border. The Trump administration was holding up the delivery of some of that aid. Hunter Biden, the son of Democratic presidential aspirant Joe Biden, also had a history of financial interests in Ukraine, and the Trump White House was particularly concerned with demonstrating, or at least suggesting, that the Bidens had themselves behaved in a corrupt fashion in dealing with Ukraine. These two separate issues were tied together by President Trump in his phone call with Zelensky. Trump responded to Zelensky’s expression of interest in acquiring Javelin anti-tank missiles

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<sup>68</sup> See, e.g., VA. CONST. of 1776 (“The Governor, when he is out of office, and others, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates”); N.Y. Const. of 1777 (“That the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people in assembly”); N.C. CONST. of 1776 (“the Governor, and other officers, offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly”).

<sup>69</sup> S. Doc. No. 116–12, at 2 (2020).

from the United States with the non-sequitur, “I would like you to do us a favor though,” and transitioned to encouraging the Ukrainian government to investigate the Bidens.<sup>70</sup> Meanwhile, Trump’s private emissaries were making it clear to Ukrainian officials that they would at least need to “issue a public statement” that Trump’s domestic political rivals were under criminal investigation if they expected the White House to release American military aid to them and provide public support for the Zelensky government.<sup>71</sup>

The possibility that the president was withholding American arms from a foreign ally with no clear “policy rational” but with an evident interest in advancing his own personal political interests would certainly fit the bill of corruption.<sup>72</sup> Accordingly, the first article of impeachment characterized the president’s action as a “course of conduct for corrupt purposes in pursuit of personal political benefit.”<sup>73</sup> It is of less significance for constitutional purposes whether such actions amounted to bribery or extortion under criminal statutes than whether they represented corruption of the office for the personal benefit of the officeholder.

The second article of impeachment, which too often seemed like an afterthought for the House during the impeachment inquiry and Senate trial, focused on a very different issue. It charged the President with obstruction of Congress as a result of the White House’s refusal to cooperate with congressional inquiries.<sup>74</sup> It was, at heart, an effort to defend Congress’s own institutional prerogatives as a coordinate branch of government.

The U.S. Constitution does not vest an explicit power of oversight or investigation in Congress. The grant to the House of Representatives of the sole power to impeach and to the Senate the sole power to try all impeachments is the one place where the Constitution would seem to put Congress in that role. The Constitution vests “all legislative Powers herein granted” to Congress, but investigative powers are not clearly legislative in nature.<sup>75</sup> Nonetheless, judges and politicians have long understood

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<sup>70</sup> Zachary B. Wolf & Curt Merrill, *Trump’s Ukraine Phone Call, Annotated*, CNN (Sep. 25, 2019), <https://www.cnn.com/interactive/2019/09/politics/trump-ukraine-transcript-annotated/> [<https://perma.cc/RW9U-7EAJ>].

<sup>71</sup> Viola Gienger and Ryan Goodman, *Timeline: Trump, Giuliani, Biden, and Ukrainegate*, JUST SEC. (Jan. 31, 2020), <https://www.justsecurity.org/66271/timeline-trump-giuliani-bidens-and-ukrainegate/> [<https://perma.cc/HTL7-6D9L>].

<sup>72</sup> *Document: Read the Whistle-Blower Complaint*, N. Y. TIMES (Sep. 26, 2019), <https://www.nytimes.com/interactive/2019/09/26/us/politics/whistle-blower-complaint.html> [<https://perma.cc/W49G-X6SN>].

<sup>73</sup> S. Doc. No. 116–12, at 1 (2020).

<sup>74</sup> *Id.* at 4.

<sup>75</sup> John M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159–60 (1926).

legislatures to have the authority to do some investigative work even outside the impeachment context.<sup>76</sup>

In the middle of the nineteenth century, the English philosopher and liberal reformer John Stuart Mill had come to doubt how well an elected legislature could actually make informed policy decisions and govern, casting doubt on the legislature's most traditional role within the political system. Even so, he thought the oversight function of the modern legislature was its most essential function.

The proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors. This is surely ample power, and security enough for the liberty of the nation.<sup>77</sup>

Congress must also be able to engage in investigations to perform particular non-legislative tasks that the Constitution has entrusted to it. When the Senate is called upon to ratify a treaty or confirm a nominee for an office, it must gather information to help it determine whether it should accede to the president's wishes.<sup>78</sup> When Congress considers whether it should authorize the use of military force against another nation, it must take steps to determine whether such military action is warranted or advisable.<sup>79</sup> When the House contemplates whether it should exercise its sole power of impeachment, it must inquire into the conduct of government officers to determine whether anything is amiss, and whether impeachment and removal are the proper remedy.<sup>80</sup>

Presidential administrations are often the targets of such investigations, and presidents are not always eager to cooperate with them. Claims of executive privilege have been a common basis on which presidents have asserted that limits exist as to how far they should cooperate with congressional investigations. Like congressional oversight, executive privilege is not mentioned in the Constitution, but has

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<sup>76</sup> *Kilbourne v. Thompson*, 103 U.S. 168, 194 (1880); *McGrain v. Daugherty*, 273 U.S. 135, 179–80 (1927). See, Landis, *supra* note 75; William P. Marshall, *The Limits of Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 785 (2004).

<sup>77</sup> JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 104 (1861).

<sup>78</sup> U.S. CONST. art. II, § 2.

<sup>79</sup> U.S. CONST. art. I, § 8.

<sup>80</sup> U.S. CONST. art. I, § 2.

instead been inferred from it as a necessary implication of the president's constitutional responsibilities and the effective functioning of the separate branches of government.

When the House of Representatives balked at passing a statute needed to help implement the controversial Jay Treaty of 1795, it asked the President to supply all the communications relating to the negotiation of the treaty to inform its deliberations about whether to adopt the legislation the President wanted.<sup>81</sup> George Washington responded that it was his "constant endeavor to harmonize with the other branches" of the government, but that some of the requested documents were sensitive.<sup>82</sup> The House had no proper right to such documents, and the president had no duty to provide them. James Madison, then serving in the House, responded to Washington's message by insisting that the President could only appropriately assess the executive branch's own interest in those papers, but he "ought not to refuse them as irrelative to the objects of the House," which was something that the House alone could properly judge.<sup>83</sup> Washington admitted that the House had the constitutional authority to inspect the executive's papers if it were part of an impeachment investigation, but such a purpose had not been "expressed."<sup>84</sup> Madison countered that the House had no obligation to state that it wanted access to documents for purposes of an impeachment inquiry, and in many cases it might even be "evidently improper to state that to be the object of information."<sup>85</sup> In the end, they compromised, and the House passed the desired bill.

The first president and the Fourth Congress were grappling with some basic constitutional and political problems that continue to bedevil the 45th president and the 116th Congress. Washington was confronting the emergence of the first divided government, in which the House majority was in organized opposition to his own administration, a situation that Washington came to regard as threatening to the very foundations of the republic. An opposing party is particularly motivated to make unpleasant demands on the presidential administration and to scrutinize its every action with great skepticism, and presidents are often inclined to think that an opposing party is behaving unscrupulously and unfairly. At the same time, presidents can often rely on their partisan friends to go easy on them and not be too aggressive in exposing the administration's problems.<sup>86</sup>

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<sup>81</sup> 5 ANNALS OF CONG. 759 (1796).

<sup>82</sup> *Id.* at 760.

<sup>83</sup> *Id.* at 773.

<sup>84</sup> *Id.* at 760.

<sup>85</sup> *Id.* at 774.

<sup>86</sup> Keith E. Whittington, *Trump's Defiance Is Destroying Congress's Power*, THE ATLANTIC (Oct. 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/trumps-defiance-destroying-congress/599923/> [https://perma.cc/J6HK-ND3F] (the

Washington and Madison were also confronting a fundamental question in the American constitutional system about who should be able to judge the constitutional rights and responsibilities of the various branches of the government and what tools Congress had available to compel a reluctant executive to cooperate with its inquiries. They left those questions unresolved, and they remain unresolved. Both the House and the President insisted on their own authority to judge their own constitutional responsibilities, but both denied the authority of others to judge those responsibilities.<sup>87</sup> The President could reasonably assert executive privilege, but he could not reasonably tell the House what information it did or did not need to perform its own duties. The President had control over the information that the House wanted to examine, but the President needed the House's cooperation to advance the policies he desired. And as Washington seemed to recognize, the House had the ultimate power to impeach the president and could demand whatever information it might deem relevant to that inquiry or let the president face the consequences if he refused to satisfy their concerns.

The system has worked through give and take. Both branches of government have recognized that they should not push things too far and that there are deals to be made to overcome impasses. Madison in the House understood that some information did in fact need to be kept confidential if the president were to be able to perform his constitutional functions on behalf of the nation. Washington in the White House understood that interbranch cooperation and concessions would be necessary to keep the government functioning, and that as a practical matter there were things he needed from the House, thus requiring him to find ways to satisfy its members.

White House Counsel Pat Cipollone's letter to the House regarding the House impeachment inquiry could not have been more distant from Washington's letter to the House in tone, substance, or attitude.<sup>88</sup> Trump's White House Counsel responded to the House's "numerous, legally unsupported decisions made as part of what you have labeled – contrary to the Constitution of the United States and all past bipartisan precedent – as an 'impeachment inquiry.'"<sup>89</sup> In the eyes of the White House, the inquiry "violate[d] fundamental fairness and constitutionally mandated due process."<sup>90</sup> The House was simply seeking "to overturn the results of

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article continues, "In this case, Washington benefited from a Federalist Senate that was willing to ratify the Jay Treaty despite the objections of the Jeffersonian opposition, which held more seats in the House.").

<sup>87</sup> 5 ANNALS OF CONG. 760, 773.

<sup>88</sup> Quinta Jerecic, *White House Letter to Congress on Impeachment Inquiry*, LAWFARE (Oct. 8, 2019, 5:23 PM), <https://www.lawfareblog.com/white-house-letter-congress-impeachment-inquiry> [<https://perma.cc/U46Y-MH4P>].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

the 2016 election and deprive the American people of the President they have freely chosen.”<sup>91</sup> The “baseless, unconstitutional effort to overturn the democratic process” had “left the President with no choice” but to refuse to “participate in your partisan and unconstitutional inquiry.”<sup>92</sup> President Trump “cannot allow your constitutionally illegitimate proceedings to distract him and those in the Executive Branch from their work on behalf of the American people.”<sup>93</sup> The President “has a country to lead” and the executive branch would simply ignore the so-called “impeachment inquiry” in the House.<sup>94</sup>

Cipollone’s letter reflects the intense partisan divide in contemporary politics and the distrust that had grown between the Democrats in Congress and the Trump White House. It also reflects a sense that the House and the administration had reached the endgame. James Madison’s House had some leverage over the Washington administration because it had something that the administration wanted, and there was some realistic possibility of reaching an accommodation that could satisfy both sides. Nancy Pelosi’s House seemed to have lost much of its leverage over the Trump administration. The President seemed to assume that he would inevitably be impeached and that there was no legislative policy agenda to be advanced, and so he had nothing more to lose by refusing to cooperate further with the House. He was positioning himself for the Senate trial and the 2020 electoral campaign.

More than once after the Democrats captured the House of Representatives in the midterm elections of 2018, President Donald Trump had taken to Twitter to express his irritation at “presidential harassment!”<sup>95</sup> Undoubtedly, he was not the first occupant of the Oval Office to feel that way, but his response had been different. The Trump administration had tended to adopt a posture of maximal presidential obstruction of congressional investigations into the conduct of the executive branch and the individuals surrounding it. That defiance culminated in Cipollone’s letter to Speaker of the House Nancy Pelosi declaring that the administration would not cooperate in any way with an impeachment inquiry that it regarded as “illegitimate” and “constitutionally invalid.”<sup>96</sup>

Cipollone, on behalf of the President, had thrown down the gauntlet. The White House refused to offer documents or testimony to the House—

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Deanna Paul, *Trump Keeps Complaining about “Presidential Harassment” – Which is Actually Just “Oversight”*, WASH. POST (Feb. 7, 2019, 1:35 PM EST), <https://www.washingtonpost.com/politics/2019/02/07/trump-keeps-complaining-about-presidential-harassment-which-is-actually-just-oversight/> [<https://perma.cc/6DES-45TK>].

<sup>96</sup> Jerecic, *supra* note 88.

even those that might have put the President's or the administration's conduct in a better light. The House could either choose to impeach the President based on what it already knew or could discover without the president's cooperation, or it could move on and drop the impeachment effort. The President had dared the House to impeach him, and he had then chosen to mount his defense against possible removal in the Senate and in the court of public opinion. Members of Congress of both parties should understand the institutional stakes of such a challenge. If President Trump could simply issue a blanket refusal to cooperate with any congressional oversight of executive branch activities and still not be impeached, then Congress should expect that future presidents will try to build on that example.

Congress has some capacity to pressure an administration to comply with its subpoenas by turning to the courts or even using its inherent contempt power to detain an uncooperative witness, but its more substantial weapons have always been political.<sup>97</sup> Congress can refuse to adopt policies that an administration wants. The Senate can refuse to confirm nominees that the president wants to see seated. Congress can refuse to provide funding for White House priorities. At the extreme, the House can vote to impeach, and the Senate can vote to remove officers who stonewall congressional investigations.

Congress is often reluctant to use those constitutional weapons, in part because there will be collateral damage. Congress also wants laws passed, the government funded, and vacant offices filled. The stakes of a particular dispute between the branches are not always high enough to make those costs worth bearing. The Trump administration could credibly threaten complete noncooperation with the House because it did not think there was much to be gained by cooperation, and in those circumstances, Congress will have lost an important part of its leverage over the White House. The challenge for the House is in demonstrating to a presidential administration that there are still things to lose, and perhaps still things to be won. And ultimately, as Madison himself noted, if certain issues cannot “be adjusted by the departments themselves,” then “there is no resource left but the will of the community.”<sup>98</sup> The two sides can plead their case to the electorate and pray the voters can resolve the disagreement.

#### IV. DOES THIS INSTANCE OF MISCONDUCT JUSTIFY IMPEACHMENT?

Even after the House has come to an understanding of the scope of impeachable offenses and satisfied itself that an officer has committed

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<sup>97</sup> Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 735–36 (2012).

<sup>98</sup> JAMES MADISON, 5 THE WRITINGS OF JAMES MADISON 404 (Gaillard Hunt ed. 1904).

deeds that fall within that scope, it must still decide whether an impeachment is warranted. Ultimately, the Senate too must decide not only whether the House has demonstrated that an officer has committed impeachable offenses but also whether the offenses rise to the level that would justify conviction and removal of the officer. Those decisions to impeach and to convict are necessarily political judgments about what risks the country faces and how they are best navigated. They require an understanding of what the impeachment power is for.

To appreciate the importance of this question, we must appreciate that impeachments are matters of constitutional politics, not legalities. The impeachment power is entrusted to Congress as a potential remedy to a severe political problem, but the impeachment power is the heaviest artillery in the congressional arsenal and should not be used if other, less dramatic remedies are available and can get the job done. Moreover, the audience for these arguments is ultimately political. The president and his defenders must persuade the members of the House and Senate, and beyond them the American people, that no unforgivable sins have been committed. That is not primarily a lawyerly task but a political one. If the president loses the battle for public opinion, then the legislative conclusion that the offenses are in fact impeachable will likely follow.

The language of the Constitution is discretionary, not mandatory. The House “shall have the sole Power of Impeachment.”<sup>99</sup> The language is framed this way for a reason. The House is empowered to impeach an officer of the government, including the president, if it discovers high crimes and misdemeanors, but it might choose to react differently. The point is not that the House should feel free to ignore abuses of office but simply that impeachment is not the only way to address them.

The House’s own guidebook on rules and precedents emphasizes that the impeachment power is designed to be “a constitutional remedy to address serious offenses against the system of government.”<sup>100</sup> One important question then, is whether the country suffers grave ills.<sup>101</sup> If those are identified, that leaves the issue of whether impeachment is a useful remedy. The House might conclude that a president has committed impeachable offenses, but it may not believe that impeachment and removal are in the nation’s best interest. An impeachment inquiry will help reveal what, if any, misconduct has occurred and how serious that might be, but it will require further political judgment to decide how to

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<sup>99</sup> U.S. CONST. art. I, § 2.

<sup>100</sup> JOHNSON, SULLIVAN, & WICKHAM, *supra* note 58, at 591.

<sup>101</sup> In the last presidential impeachment, of Bill Clinton, many critics doubted that the Republican House majority satisfactorily answered that question. *See*, Keith E. Whittington, *Bill Clinton was no Andrew Johnson: Comparing Two Impeachments*, 22 U. PENN. J. CONST. L. 422, 422–23 (2000).



respond. Through his own actions, Trump had strengthened the case for impeachment as both justified and in the nation's best interest.

Most obviously, it was not clear at the time that the House was engaging in its investigation that Trump would be convicted in the Senate. Impeachment requires only a simple majority in the House, so the decision to impeach is a conversation the Democrats could have among themselves. Conviction on articles of impeachment and removal from office require the support of two-thirds of the Senate, which meant persuading a significant number of Republicans. If removing the president from office is the best remedy to the country's perceived troubles, then the House might be obliged to press forward—if there is a realistic chance of conviction. But if Republican voters remained firmly in Trump's corner and Republican senators remained unwilling to buck their constituents, then rushing ahead with an impeachment could be counterproductive. The House has no duty to impeach just for the sake of making hopeless, symbolic gestures.

If the point of impeachment is removal, no shortcut can avoid the necessity of chipping away at the president's public and political support until the prospect of a Senate conviction is something more than a Hail Mary pass. When the Ukraine revelations first came to light, there were some indications that the scandal could shake some Republicans loose from Trump.<sup>102</sup> So the House's real constitutional duty in such circumstances was to try to widen that political opening. That meant not only proceeding with the investigation in a way that might move public opinion and pressure Republican politicians, but also confining any eventual articles of impeachment to charges that stood a chance of winning conviction. Larding on additional charges that might satisfy the Democratic base but repel wavering Republicans would have been a mistake if the point was to win a conviction. In that sense the impeachment process is not so different than the legislative process; getting things done requires compromise and satisfying the pivotal players who are needed to get over the majoritarian or super-majoritarian hurdles of the process.<sup>103</sup>

In the case of a president, an alternative remedy to presidential misbehavior is always an electoral one. If the president poses an imminent threat to the country because of his ongoing abuse of power, then waiting for the election cycle to play out would be reckless. If, however, the president's apparent misconduct is in the past, containable or of lesser

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<sup>102</sup> Shannon Pettypiece, *Trump Vents over Pelosi Impeachment Push over Ukraine Call*, NBC NEWS (Sep. 24, 2019, 9:34 AM CST), <https://www.nbcnews.com/politics/white-house/trump-accuses-democrats-another-witch-hunt-talk-impeachment-grows-n1058086> [<https://perma.cc/7649-ZMFQ>].

<sup>103</sup> This model of legislative politics is outlined most famously in KEITH KREHBIEL, *PIVOTAL POLITICS* (1998).

consequence, then exposing problems for voters to see and leaving the final judgment to the American people becomes a viable option, and in some circumstances the most responsible option.<sup>104</sup>

Depending on the nature of the presidential conduct, lesser political remedies might be available to curb presidential behavior and protect the public interest. Richard Nixon was eventually abandoned by his own party and pushed out of office with the credible threat of impeachment and removal, but lawmakers responded not just by pursuing an impeachment inquiry but also by addressing the underlying concerns about abuse of executive power. Congress adopted internal reforms so it could respond more effectively to a hostile president and reconsidered the statutory grants of authority that future presidents might misuse.<sup>105</sup> Presidential administrations can likewise take credible steps toward demonstrating that ills afflicting the body politic can be remedied without the necessity of removing the president from office.<sup>106</sup> If Senate Republicans had been willing to hold the threat of conviction over President Trump's head, they might have demanded, and received, a significant shake-up in White House staff and operating procedures. Senators could have demanded that there be "adults in the room" with Trump and people holding positions of responsibility willing to push back against presidential whims.<sup>107</sup> Whether such concessions should have been regarded as adequate given the well-known impulsiveness and stubbornness of President Trump is another question, but congressional Republicans seemed content to simply hope that the President might someday begin to act more presidential.

Even if conviction and removal are effectively off the table, there might still be reasons to impeach.<sup>108</sup> Impeachment can serve other

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<sup>104</sup> See also Keith E. Whittington, *Is Presidential Impeachment Like a Coup?*, 18 *GEO. J. L. & PUB. POL'Y.* 669, 692–93 (2020).

<sup>105</sup> See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999); JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* (1981).

<sup>106</sup> See Keith E. Whittington, *How to Get Out of Impeachment Territory*, *LAWFARE* (May 19, 2017, 3:48 PM) <https://www.lawfareblog.com/how-get-out-impeachment-territory> [<https://perma.cc/J7EM-4GFV>].

<sup>107</sup> The appeal to "adults in the room" was common in the Trump in the presidency, and the refrain seemed increasingly empty as senior advisors left the administration and the President demonstrated his reluctance to follow advice. See, e.g., James Mann, *The Adults in the Room*, N.Y. REVIEW OF BOOKS (Oct. 26, 2017), <https://www.nybooks.com/articles/2017/10/26/trump-adult-supervision/> [<https://perma.cc/7EVT-HFKZ>]; Quinta Jurecic, *Did the "Adults in the Room" Make Any Difference with Trump?*, N.Y. TIMES (Aug. 29, 2019), <https://www.nytimes.com/2019/08/29/opinion/james-mattis-trump.html> [<https://perma.cc/D54C-VHU3>].

<sup>108</sup> See Keith E. Whittington, *Should the House Impeach if the Senate Won't Convict*, *LAWFARE* (May 8, 2019), <https://www.lawfareblog.com/should-house-impeach-if-senate-wont-convict> [<https://perma.cc/9VPU-B5Z6>].

purposes.<sup>109</sup> It can serve as a tool for shoring up, or changing, the accepted norms of political behavior.<sup>110</sup> Impeachment can be a rebuke to the officeholder and a warning to his successors. If violating norms appears to be a path to political success, the theory goes, established norms will eventually crumble. Impeachment is a tool to impose political costs on norm violators and discourage others from emulating them. 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.

## V. CONCLUSION

The first Trump impeachment starkly exposed the difficulties that the modern Congress has in wielding the impeachment power as an effective check on the presidency. Presidents have significant advantages in impeachment battles in the current political environment. Deep partisan polarization makes it relatively easy for a president to retain the support of his co-partisans when he is under attack from members of the opposite party. The presidency comes with substantial resources to shape public opinion, influence potential allies, and rally political support. Political leaders have learned that if they are willing to weather a political scandal, they can often survive it. President Trump had additional unique advantages in that Congress had little leverage over him since he did not want much from it and did not expect much of it. Trump's legislative agenda was minimal and largely dead-on-arrival, and the President could reasonably make the calculation that Democrats were determined to do all they could to hamper his administration once they won control of the House in the midterms. Under the circumstances, retreating into the shell of the White House was a viable strategy. Future presidents might feel that there are more downsides than Trump did to having to battle through an impeachment process and as a consequence might be willing to do more to avoid going down that path. But a stubborn president can be difficult to dislodge.

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<sup>109</sup> See Quinta Jurecic, *The House is Right to Move Toward an Impeachment Inquiry*, LAWFARE (May 21, 2019, 4:55 PM), <https://www.lawfareblog.com/house-right-move-toward-impeachment-inquiry> [<https://perma.cc/YPQ3-J9P5>]; Greg Weiner, *Impeachment's Political Heart*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/opinion/impeachment-trump-constitution.html> [<https://perma.cc/ZHE9-J2CS>].

<sup>110</sup> See Keith E. Whittington, *What Is the Impeachment Power For?*, LAW & LIBERTY (May 22, 2017), <https://lawliberty.org/what-is-the-impeachment-power-for/> [<https://perma.cc/Y9RG-APVL>]; see generally Whittington, *supra* note 17, at 27; WHITTINGTON, *supra* note 16.

Congress encountered problems of its own making as well. A necessary, though hardly sufficient, condition for Congress to do better next time is to better understand its own impeachment process. That begins by understanding that impeachment is necessarily a political process. It requires political effort to build support for using the impeachment power, and it requires political judgment to determine whether the impeachment power should be used. To borrow a phrase, impeachment is a continuation of politics by other means, and the means can never be considered in isolation from their purpose. If Congress is to contemplate pursuing an impeachment, it should have a clear view of what it is trying to accomplish and why impeachment is the best path to getting there.

From a constitutional perspective, the first Trump impeachment raised familiar questions about how to understand the nature of the congressional power to impeach and remove a sitting president. Legislators who find themselves called upon to consider making use of the impeachment power have an obligation to think through some basic questions. What is an impeachable offense? Is this kind of behavior impeachable? Does this instance of misconduct justify impeachment? Legislators were not as clear as they could have been in asking and answering such questions during the Trump presidency, but the presidential actions that led to the first impeachment made the third question particularly salient. Despite the efforts of the President's defenders to narrow the scope of impeachable offenses, it seems clear that such efforts were contrary to the purpose and history of the impeachment power. Moreover, the behavior at issue in this case could be comfortably situated within that traditional understanding of the scope of the impeachment power. The hard question should have been the third, whether the President's particular actions justified his impeachment and removal in an election year and in such a highly polarized environment. The President's charges that the impeachment effort was illegitimate was bound to resonate with a sizable swatch of the country, and it soon became apparent that this scandal would not erode the President's core base of political support. Given that reality, conviction and removal was a longshot at best. Perhaps the impeachment process could nonetheless have been used to extract concessions from the White House or to shore up political norms about proper presidential behavior. It is not obvious that it achieved either, but that does not mean that future impeachments could not accomplish more.