
YOU'RE FIRED: THE ORIGINAL MEANING OF PRESIDENTIAL IMPEACHMENT

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With just the third and fourth impeachments of the President in the nation's history, questions about the Constitution's original meaning of impeaching the President are again salient. Unlike other constitutional provisions, because the Supreme Court has deemed impeachment the ultimate political question, neither much historical practice nor case law informs our understanding of the Impeachment Clause. Thus, the original meaning takes on great weight. Further, previous scholarship has only either incidentally or in piecemeal fashion looked at the originalist evidence, and thus been akin to the tale of the blind men each feeling a different part of an elephant and consequently coming to wildly differing views as to what was before them.

This Article systematically examines that original meaning in light of the Philadelphia Convention debates, the Federalist Papers (and Anti-Federalist responses), and the state ratifying conventions. What is more, this Article becomes the first in American legal scholarship to both provide a corpus linguistic analysis of the term "high Crimes and Misdemeanors" and to publish findings from the Corpus of Early Modern English (COEME).

In short, this Article finds that the original meaning of presidential impeachment was both narrower and broader than the criminal law in that not every crime was an impeachable offense, but not every impeachable offense was a crime. Further, the corpus analysis shows that the term the

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Founders adopted was not by accident but was an established term of art in Britain. This Article then applies these findings to the first impeachment of President Trump, providing an in-depth analysis of the proceeding in light of the Constitution’s original meaning, critiquing arguments made on both sides.

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INTRODUCTION

In 2020, for just the third time in its history, the Senate conducted an impeachment trial of the President. While the 2020 case of President Donald Trump presented different facts than those of President Andrew Johnson in 1868 or President Bill Clinton in 1998, the Senate rendered the same verdict of acquittal. Initial investigations had probed whether President Trump or his campaign had coordinated with Russia to influence the 2016 elections, and then pursued the possibility of obstruction of the investigations themselves. But when the Justice Department decided that it could not indict a sitting President, Congress focused its inquiry on whether President Trump had withheld foreign aid from Ukraine until its leaders launched an investigation into his opponent in the 2020 election, then-former Vice President and current President Joseph Biden.

Whether Congress could constitutionally remove President Trump through impeachment raises questions as old as the Republic and facts as new as social media. The Constitution uses language to define the grounds for impeachment, such as “high Crimes and Misdemeanors,” that remains a mystery today. Does impeachment require a federal crime, or can it include

abuses of power and obstruction of Congress? How would Congress define these “high Crimes and Misdemeanors” in a neutral way that would not deter future Presidents from invoking their legitimate authority or unduly place the executive under legislative control? Can Congress remove the President because of a good-faith disagreement over the scope of executive power or the meaning of the Constitution itself? Even if impeachment included noncriminal acts, does the Constitution require that the offenses rise to a level of seriousness that justify removal? President Trump’s case raised the further question whether Congress could remove the President for actions that had a plausible public interest, or whether the legislature need only find that the President had pursued personal interests as well. The 2020 trial finally asked whether impeachment provides the only remedy for presidential misconduct, or whether the Constitution provides other remedies.

This Article seeks to answer these questions by examining the original understanding of presidential impeachment. We undertake this analysis both because the Framers’ work formed the central basis for both the prosecution and defense cases during the President Trump’s first impeachment and because other guides to constitutional meaning are lacking. As the Supreme Court has decided that impeachment qualifies as a “political question” outside Article III’s case or controversy requirement,¹ these questions have no legal answers from traditional sources, such as judicial opinions. Practice also provides little help. The House of Representatives has impeached only two other Presidents in American history. In the wake of President Abraham Lincoln’s assassination, Republicans in Congress found their plans for a radical reconstruction of the South frustrated by the new President Andrew Johnson, a Southern Democrat who favored a more lenient peace.² In 1868, the House impeached President Andrew Johnson for conducting himself in office in a disgraceful, yet not illegal, manner. President Johnson broke prevalent norms by speaking directly to the people to lobby for legislation and attacking Congress as “traitors.” Congress responded by including an article of impeachment for his unacceptable rhetoric.³ To strengthen their case, congressional Republicans made it a crime for the President to fire his cabinet officers without their consent—a law that the Supreme Court would later find an unconstitutional infringement of the President’s removal power.⁴

1. *Nixon v. United States*, 506 U.S. 224, 253 (1993).

2. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 87 (1973).

3. Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, in *THE CONSTITUTIONAL PRESIDENCY* 229, 232 (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009).

4. *Myers v. United States*, 272 U.S. 52, 176 (1926).

Exactly 130 years later, the House flexed its impeachment powers for only the second time in its history, but over the sordid and banal rather than the high and mighty. Rather than the reconstruction of the nation after a terrible Civil War, the impeachment of President Bill Clinton asked whether the President had committed perjury about his affair with a White House intern, Monica Lewinsky. The President had committed a crime, but the independent counsel, Kenneth Starr, concluded that the Justice Department could not indict a sitting President, much as it would almost two decades later. Instead, Starr referred the case to Congress to decide whether to take action. While the House impeached along a party-line vote, the Senate refused to convict, also on a close party-line vote. It seemed that President Clinton's argument that he had only lied about sex and had not committed any harm to the nation on a par with treason or bribery, seemed to carry the day. But the partisan nature of the vote also suggested that impeachment and removal would become a test of party discipline, in that Presidents would likely survive so long as they could maintain the support of thirty-four Senators of their party.

A third President, Richard Nixon, likely would have faced impeachment and removal had he not resigned on August 9, 1974. Both a special counsel and the House had launched probes into a burglary of Democratic Party offices at the Watergate Hotel during the President's reelection campaign. After the Supreme Court ordered President Nixon to obey a subpoena for White House tapes of meetings where the President had allegedly ordered the cover-up of the break-ins, the Judiciary Committee reported three articles of impeachment to the full House. President Nixon resigned before the House could vote but only after he had met with delegations of Republican congressmen who told him that he would likely lose the votes in Congress. While the committee had considered a wide variety of charges, such as bombing Cambodia without congressional authorization and tax cheating, in the end it recommended impeachment only for obstruction of the special counsel investigation, impeding the House's probe, and for violating the individual rights of his political enemies through misuse of the CIA, FBI, and IRS. Unlike the Johnson and Clinton examples, however, President Nixon's case never came to a vote in the House, not to mention a full trial in the Senate. It is difficult to conclude, therefore, that President Nixon's resignation creates some kind of precedent in the way that the 1868 and 1998 examples might.

It is not even clear that the Nixon case or even the Johnson and Clinton impeachments should create any precedent, in a judicial sense, for Congress. In both the Johnson and Clinton cases, the Senate refused to convict. It could have found that the House had not "proved" its facts, though in both cases

the facts seemed fairly clear. President Johnson had indeed fired his Secretary of War without the consent of Congress; President Clinton had lied to prosecutors in a deposition recorded on video. If the facts were proven, then the Senate must have acquitted because they did not amount to high crimes and misdemeanors as defined by the Constitution. But the Senate leaves behind no written opinion to explain its decision because it acts much as a jury in a criminal trial to solely determine conviction. Therefore, we can draw no firm legal precedents from these earlier impeachments.

A previous Senate, moreover, could not bind a future Senate to its interpretation of the constitutional standards on impeachment. One Congress generally cannot bind a future Congress; as with all three branches of government, Congress can simply undo any action by a past Congress by passing a repealing law or rule. The Senate that tried President Andrew Johnson may well have concluded that it should not remove a President for exercising the executive power to fire cabinet officers. It could have believed that the exercise of constitutional power could not qualify as a high crime or misdemeanor, or it could have thought the President had to actually violate federal criminal law. But the Reconstruction Senate never took a vote, issued an opinion, or enacted an internal rule that interpreted the standard for impeachment. Even if it had, a contemporary Senate could change any rule or opinion by majority vote, just as the Senate changed the filibuster rule to exclude judicial and cabinet appointments. Senators who wanted to follow the Johnson or Clinton impeachments as some sort of precedent would have to appeal to tradition, rather than any legal rule, to govern a Trump impeachment.

Without any legal precedents, or even any system of binding practice, the original understanding of the Constitution becomes magnified in importance. The Constitution does not provide for the trial or punishment of a sitting President by prosecutors or a regular court. Instead, the Impeachment Clause creates a means to remove “the President, Vice President, and all civil Officers of the United States.”⁵ It vests the power to impeach in the House and specifies no vote requirement, so we have always assumed it occurs by majority vote. Impeachment amounts to an indictment in a criminal case, in which prosecutors decide they have enough evidence to bring a prosecution before a jury. Vesting the power in the House, rather than prosecutors or judges, could suggest that impeachment will not fall solely within the preserve of law, but will involve politics as well. Without any reading of the Impeachment Clauses based on legal authorities, Congress might allow politics to overwhelm law in its indictment and trial of

5. U.S. CONST. art. II, § 4.

Presidents. Then-House Minority Leader Gerald Ford, for example, defended the impeachment of Justice Douglas because “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”⁶

Our analysis reveals new sources of materials that make the first Trump impeachment more complex than presented in the trial, debates, and media commentary. Contrary to the claims of President Trump’s defense, we find that the Framers understood “high Crimes and Misdemeanors” to include conduct that went beyond the violation of federal criminal law. Such offenses could include abuse of power; but we also conclude that these acts had to inflict serious harm upon the nation. A President could commit a crime, but it would not impose sufficient injury upon the public to justify removal (as with the Clinton example). A President could also commit no crime, but his misconduct or negligence could so harm the nation as to justify removal from office. We also find that the Framers were so worried that Congress would turn impeachment toward partisan political purposes that they erected the two-thirds requirement for conviction to preserve executive independence. Instead of impeachment, the Framers expected that elections would provide the primary check on presidential misconduct.

This Article proceeds in three parts. Part I reviews the investigations into President Trump, his first impeachment and trial, and his acquittal. Part II uses both new and old techniques to recover the history of the drafting and ratification of the Constitution. We use computerized textual analysis—corpus linguistics—of British materials pre-dating the Constitution’s framing to analyze what those of the founding generation would have believed the phrase “high Crimes and Misdemeanors” meant. We then examine the drafting and ratification of the Constitution to understand how the Founders expected the Impeachment Clauses to work. Part III draws forth lessons from this history and applies them to the issues raised by the Trump impeachment.

I. THE TRUMP INVESTIGATIONS

A. THE MUELLER REPORT

For progressives, a heady brew of criminal investigation and impeachment had inflated their hopes of overturning the results of the 2016 elections. They hoped that Mueller’s probe into the Trump campaign’s

6. Kenneth C. Davis, *The History of American Impeachment*, SMITHSONIAN MAG. (June 12, 2017), <https://www.smithsonianmag.com/history/what-you-need-know-about-impeachment-180963645> [<https://perma.cc/56EW-YKLU>].

contacts with Russian intelligence would yield indictments not just of high-ranking officials—and it did—but also somehow produce the prosecution of the President himself.

In his public release of the Mueller report, Attorney General William Barr only underscored this lesson by refusing to indict President Trump for obstruction of justice. But this is no perverse reading of criminal law. For all of the complaints about the Mueller probe, first from Republicans that it relied too heavily on partisans, then from Democrats that it contained no indictment of the President, the Mueller investigation's constitutional defects doomed it from the start. The Constitution itself establishes impeachment, not prosecution, as the answer to a corrupt or abusive President.

President Trump's critics, however, displayed a Janus-like face to the public on impeachment. Within a month of Mueller's July 2019 public testimony, about half of the Democrats (112 out of 235) in the House of Representatives had gone on record to demand impeachment.⁷ House Judiciary Chairman Jerrold Nadler (D-N.Y.), whose committee would launch any impeachment proceedings, said after the Mueller hearings that President Trump "richly deserves impeachment" and "has done many impeachable offenses, he's violated the law six ways from Sunday."⁸ While agreeing that the President had committed crimes, Speaker Nancy Pelosi resisted pleas from her party to begin impeachment. "We will proceed when we have what we need to proceed, not one day sooner," she told reporters shortly after the hearings.⁹ Pelosi dismissed accusations that she was trying to "run out the clock" with her reluctance to start impeachment proceedings.¹⁰ But she has also made no secret of her belief that impeachment would only spark a partisan fight with no hope of prevailing in the Senate, which could well turn the electorate toward President Trump's favor.

Democrat reluctance to strike off into impeachment reflects not just political calculation, but also the deeper constitutional challenges in removing a President. Democrats would have a hard time explaining whether

7. JM Rieger & Kevin Schaul, *Which House Members Voted to Impeach Trump*, WASH. POST (Dec. 11, 2019), https://www.washingtonpost.com/graphics/2019/politics/impeachment-support-house-democrats/?utm_term=.5d34102f11e6 [https://perma.cc/3Q3V-R8BQ].

8. Karoun Demirjian, *Top Democrat on House Judiciary Committee Says Trump 'Richly Deserves Impeachment'*, WASH. POST (July 28, 2019, 1:32 PM), https://www.washingtonpost.com/national-security/top-democrat-on-judiciary-committee-says-trump-richly-deserves-impeachment/2019/07/28/a1e07990-b13b-11e9-951e-de024209545d_story.html [https://perma.cc/996A-XX5D].

9. Nancy Pelosi, *House Speaker Weekly Briefing*, C-SPAN, at 9:15 (July 26, 2019), <https://www.c-span.org/video/?463037-1/speaker-pelosi-shes-not-run-clock-impeachment> [https://perma.cc/VH7V-Y3TF].

10. *Id.* at 9:00.

President Trump's conduct would qualify as "Treason, Bribery, or other high Crimes and Misdemeanors" as required by Article II, Section 4 of the Constitution. Democrats might argue that conspiring to hack into Hillary Clinton's or the Democratic National Committee's computers constituted a crime, much like the Watergate burglary of 1972, or that spreading the information amounted to a breach of federal classification laws. But they would have to justify impeachment after Mueller had found insufficient evidence of "collusion." In the Mueller hearings in July 2019, Democrats focused mostly on the second volume of the Mueller report, which probed whether President Trump had committed obstruction of justice.¹¹ Again, Democrats would have to explain why they could use impeachment after Attorney General William Barr found insufficient evidence to prosecute.

Some Democrats demanded President Trump's removal not for violating any law at all, but for his conduct in office. Representative Al Green (D-Tex.),¹² for example, introduced articles of impeachment because of President Trump's racist rhetoric, especially his July 2019 tweets that the "squad" of ultra-liberal, first-term Representatives Ilhan Omar of Minnesota, Alexandria Ocasio-Cortez of New York, Rashida Tlaib of Michigan, and Ayanna Pressley of Massachusetts should "go back and help fix the totally broken and crime infested places from which they came."¹³ While racist in nature and, at the very least, a breach of the norms of modern presidential speech, the tweet and others like them do not violate any federal laws. Democrats would have to explain why conduct that breaks no law can still qualify as a high crime and misdemeanor, when Republicans in the 1990s impeached President Bill Clinton for perjury before Whitewater investigators, not his affair with intern Monica Lewinsky. Other Democrats have launched investigations into President Trump's tax returns, his alleged hush payments to women, and shady real estate and business deals. But Democrats would have to argue that the Constitution allows them to impeach a President not for conduct in office, but his activities before he took office.

Some Democrats, of course, have demanded impeachment from day one. Elizabeth Holtzman, a young Member of the House at the time of

11. See generally *Robert Mueller Testifies Before Two House Committees*, C-SPAN (July 24, 2019), <https://www.c-span.org/video/?462628-1/robert-mueller-congressional-testimony> [<https://perma.cc/T4QL-SL2F>].

12. This was not Representative Green's first attempt at jumpstarting impeachment of President Trump. See Brian Naylor, *Impeachment Timeline: From Early Calls to a Full House Vote*, NPR (Dec. 17, 2019, 5:00 AM), <https://www.npr.org/2019/12/17/788397365/impeachment-timeline-from-early-calls-to-a-full-house-vote> [<https://perma.cc/M98R-92G8>]. He and Representative Brad Sherman (D-CA) "filed an article charging Trump obstructed justice, two months after the president fired then-FBI director James Comey." *Id.* And they reintroduced their article after Democrats won the House. *Id.*

13. @realDonaldTrump, TWITTER (July 14, 2019, 6:42 A.M.), <https://twitter.com/realdonaldtrump/status/1150381395078000643> [<https://perma.cc/4UT2-KV27>].

Watergate, set out *The Case for Impeaching Trump* in 2018. Calling for the impeachment of Republicans has become a full-time job for Holtzman, who also wrote several books demanding George W. Bush's impeachment, too. Nevertheless, what were President Trump's misdeeds after just less than two years in office? "He has refused to protect our system of free elections from foreign interference; he has relentlessly attacked the administration of justice[;] . . . he has failed to separate his personal business from the country's," she writes, "[A]nd to cover up these misdeeds, he has systematically lied and assailed the press."¹⁴ Professor Allan J. Lichtman reports that he was predicting impeachment even before President Trump had won the November 2016 election.¹⁵ What were his offenses after less than a year and a half in office? A "penchant for lying, disregard for the law, and conflicts of interest," which Lichtman said were "lifelong habits," and "a history of mistreating women and covering up his misdeeds."¹⁶ President Trump had "dubious connections to Russia [that] could open him to a charge of treason" and "disdain for constitutional restraints."¹⁷ Further, President Trump "could commit his crime against humanity, not directly through war, but indirectly by reversing the battle against catastrophic climate change, upon which humanity's well-being will likely depend."¹⁸

As the end of President Trump's term in office neared, even House Democrats had discarded the idea that failing to fight climate change amounted to an impeachable offense. Instead, critics focused on Mueller's decision not to prosecute President Trump for obstruction of justice. But the President's opponents should welcome Mueller's declination (as the choice not to prosecute is known). Declining to prosecute returns the duty to curb presidential abuses of power to its constitutional seat: Congress. Mueller makes clear that he "conducted a thorough factual investigation in order to preserve the evidence when memories were fresh and documentary materials were available" even though he could not prosecute a sitting President.¹⁹ Why? Mueller argues that DOJ does not prosecute sitting Presidents so as not to "potentially preempt constitutional processes for addressing

14. ELIZABETH HOLTZMAN, *THE CASE FOR IMPEACHING TRUMP* 1 (2018). *See generally* JOHN C. CONYERS, JR. & ELIZABETH HOLTZMAN, *THE CONSTITUTION IN CRISIS: THE HIGH CRIMES OF THE BUSH ADMINISTRATION AND A BLUEPRINT FOR IMPEACHMENT* (2007); ELIZABETH HOLTZMAN & CYNTHIA L. COOPER, *THE IMPEACHMENT OF GEORGE W. BUSH: A PRACTICAL GUIDE FOR CONCERNED CITIZENS* (2006).

15. *See generally* ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* (2017).

16. *Id.* at xiii.

17. *Id.*

18. *Id.*

19. 2 ROBERT S. MUELLER, III, *REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION* 2 (2019), <https://www.justice.gov/archives/sco/file/1373816/download> [<https://perma.cc/CTV6-XGJT>].

presidential misconduct.”²⁰ The only mechanism that the Framers established to remedy presidential abuse of power remains impeachment.

While Congress wanted to transfer the fraught decision on whether to remove President Trump on to the special counsel, Mueller properly refused to accept this effort to fundamentally alter the separation of powers. Congress can conclude that the same conduct raised in the Mueller report justifies removal from office even if it is not criminal, but that will require Congress to take the political and constitutional accountability for undoing the results of a presidential election. President Trump, on the other hand, could defeat impeachment by retaining the support of at least thirty-four of the fifty-three Republican Senators in any trial. To do this, he would need more than just political cunning. He would have to argue that the major obstruction charges unconstitutionally infringe on his constitutional authority to manage the executive branch and that Mueller’s other evidence does not prove an impeachable offense. House Democrats had no stomach for that fight; they never initiated impeachment proceedings over the Russian conspiracy or obstruction of justice claims.

After an expensive and damaging two-year probe, Robert Mueller unintentionally did President Trump a great favor. The special counsel’s report definitively cleared President Trump, his campaign, and his administration of conspiring with Russia to break federal law. Mueller’s investigation found significant Russian efforts to influence the elections and to harm Hillary Clinton’s candidacy. The special counsel, for example, indicted multiple Russian hackers and concluded that the “Russian government interfered in the 2016 presidential election in sweeping and systematic fashion.”²¹ But it found no cooperation by the obvious beneficiaries, the Trump campaign. Regarding “collusion,” however, the report stated that “the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.”²² At the cost of a year and a half, platoons of investigators, and millions of dollars, Mueller’s investigation should have put to rest the claim that President Trump had conspired with Russian agents to sabotage the Clinton campaign.

But the Mueller report opened a door and refused to reach the same conclusion on the issue of presidential obstruction of justice. The special counsel identified ten separate incidents where, the report suggested,

20. *Id.* at 1.

21. *Id.*

22. 1 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2 (2019), <https://www.justice.gov/archives/sco/file/1373816/download> [<https://perma.cc/TV3F-5VGE>].

President Trump may have tried to interfere with the probe itself. Some of the incidents included the picayune, such as candidate Trump denying any contacts with Russia yet declaring publicly: “Russia, if you’re listening, I hope you’re able to find the 30,000 [Clinton] emails that are missing.”²³ But some of the incidents had a more serious cast, such as President Trump’s decision to fire FBI Director Comey, which, as the President told NBC anchor Lester Holt, he thought “when I decided to just do it, I said to myself—I said, you know, this Russia thing with Trump and Russia is a made-up story.”²⁴ President Trump also considered separately firing Mueller and Attorney General Jeff Sessions because of the special counsel investigation, but White House staff did not follow up and the President ultimately dropped the idea.²⁵

Mueller’s theory of obstruction did not take traditional form. President Trump did not destroy evidence or threaten witnesses. Instead, it identified more subtle means that could have interfered with the probe, but also could have represented the President’s good-faith exercise of his constitutional authority over law enforcement. Nor could Mueller nail down the critical element of obstruction: whether President Trump had the “corrupt” mental state to impede the special counsel probe during these ten episodes. Here, the probe made a critical turn. Rather than seek a live interview with the President, the special counsel allowed President Trump to submit written answers that placed off-limits any questions about obstruction. Without any testimony subject to follow up cross-examination, Mueller could not have reached any definitive conclusions about whether President Trump committed obstruction or not.

Despite a second volume of 182 pages devoted to potential obstruction of justice, Mueller decided “not to make a traditional prosecutorial judgment” and reach “ultimate conclusions about the President’s conduct.”²⁶ Mueller explicitly declared that his report did not exonerate the President either. In the opening minutes of the July 2019 House Judiciary Committee hearing, for example, Chairman Nadler asked about President Trump’s multiple claims of vindication by the investigation. “And what about total exoneration? Did you actually totally exonerate the president?” Nadler asked. “No,” Mueller replied.²⁷

Both Mueller and Barr properly concluded that Justice Department

23. *Id.* at 49.

24. MUELLER, III, *supra* note 19, at 173.

25. *See id.* at 77–98.

26. *Id.* at 1, 8.

27. *Robert Mueller Testifies Before Two House Committees*, *supra* note 11, at 22:30.

legal opinions prohibited them from charging a sitting President with a federal crime. As the Clinton Office of Legal Counsel ruled in 2000, “the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions.”²⁸

But if both Mueller and Barr believed the constitutional bar on prosecuting a President settled the matter, they should never have allowed Volume II’s obstruction probe. Instead, Barr reviewed the report and reached a decision, as the nation’s top federal prosecutor, that “the evidence developed by the Special Counsel is not sufficient to establish that the President committed an obstruction-of-justice offense.”²⁹ In his April 2019 press conference summarizing the Mueller report’s findings, Barr argued that he worked within Mueller’s “legal framework,” despite his disagreements with it, and simply found that the evidence did not clear the bar for a case.³⁰

But the Mueller report and Barr’s declination to prosecute do not end the matter. While his reasoning to decline to prosecute was vague, it depended on impeachment as the proper constitutional method to remove Presidents who abuse their powers. Mueller made clear in his report that he “conducted a thorough factual investigation in order to preserve the evidence when memories were fresh and documentary materials were available” even though he could not prosecute a sitting president.³¹ Preserving evidence and memories makes no sense if Mueller had already decided he could not bring a case against a sitting President. The Justice Department does not play the role of national historian. Instead, Mueller explained that the DOJ does not prosecute sitting Presidents so as not to “potentially preempt constitutional processes for addressing presidential misconduct.” The Constitution lists only two “processes” for addressing “presidential misconduct.”³² One is elections—the American people can punish an abusive President by voting the President out of office at the next ballot. The second is impeachment. There are no others.

28. A Sitting President’s Amenability to Indictment & Crim. Prosecution, 24 Op. O.L.C. 222, 222 (2000).

29. William P. Barr, Attorney General, U.S. Dep’t of Just., Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election (Apr. 18, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-in-vestigation-russian> [<https://perma.cc/BF3B-2CNL>].

30. *Id.*

31. MUELLER, III, *supra* note 19, at 2.

32. *Id.* at 1.

B. THE UKRAINE MESS

But even as the Mueller probe ended, House Democrats seized on a second controversy to launch a real impeachment proceeding. Just days after the Mueller report came to a finish, President Trump made a phone call to Ukraine President Volodymyr Zelensky on July 25, 2019. The call set off impeachment hearings within a month of the first news reports of the whistleblower complaint. The House Intelligence Committee completed its investigation in about two months, the Judiciary Committee voted out articles of impeachment in two weeks, and the House impeached in one week. Even though the House's procedures for the probe would not meet courtroom standards of fairness, the Constitution does not require that impeachment follow due process. But the speed with which the House conducted its proceedings and its truncated nature—the investigators never interviewed top White House and cabinet heads, such as John Bolton, Mick Mulvaney, or Mike Pompeo—suggests that Democrats decided not to pursue a serious inquiry. The Senate could have based its February 2020 decision to acquit solely on the ground that the House had failed to conduct a fair, thorough investigation before exercising its most awesome constitutional power.

In late September 2019, the House Intelligence Committee began its investigation into President Trump's dealings with Ukraine. Democrats claimed that beginning with the July 25 phone call, President Trump sought a quid pro quo from Ukraine. President Trump allegedly would release almost \$400 million in U.S. foreign and military aid already earmarked by Congress for Ukraine or grant a White House visit. In exchange, Kyiv would investigate Hunter Biden's lucrative board seat with Burisma, a Ukrainian natural gas company, and Joe Biden's role in pressuring a previous Ukrainian administration to fire a prosecutor who wished to investigate that relationship. Democrats further argued that President Trump created an off-the-books foreign policy run by his personal lawyer, Rudy Giuliani, and two political appointees, ambassadors Volker and Sondland, that excluded career State Department and NSC officials.

No American President has ever been removed from office by Congress. And that is still the case after conclusion of both impeachment proceedings against President Trump. President Richard Nixon would likely have been removed in the Watergate scandal if the House had impeached and the Senate held a trial, but he resigned in 1974. The House had impeached only two Presidents, President Andrew Johnson in 1868 and President Bill Clinton in 1998, but the Senate acquitted them both. Trump's impeachment in 2019 and his trial in 2020 followed the same pattern. By fighting his impeachment, however, President Trump stood for more than

President Johnson and President Clinton. President Johnson sought to frustrate Congress's post-Civil War plans by ending Reconstruction early. Even though he beat impeachment, President Johnson failed to alter the course of Reconstruction—much to the nation's benefit. President Clinton sought to conceal a sordid affair with a young White House intern, among other scandals. He remained in office, with little effect on the nation's system of governance. President Trump's struggle with House Democrats sought to protect the President's constitutional right to conduct foreign policy and to manage the executive branch. His acquittal will help make sure that future Presidents can take advantage of those powers as their predecessors have.

Before turning to the substance, the Ukraine impeachment first raised the question of procedure. Even as they rushed headlong into their unavoidable constitutional crash, President Donald Trump and Speaker Nancy Pelosi might have agreed on the procedures for the impeachment inquiry. Contrary to the President's claims, the Constitution does not require the House to be "fair" in its probe. But House leaders should still have furnished the President with due process because otherwise the impeachment proceedings could not persuade the Senate or the American people of the case against Trump. That is ultimately what happened.

Both sides staked out extreme constitutional positions from the start. In a letter dated October 8, 2019, White House counsel Pat Cipollone declared that the President would refuse to cooperate with the inquiry or even recognize its legality.³³ Cipollone accused the House of acting "contrary to the Constitution of the United States and all past bipartisan precedent" and of designing an inquiry that "violates fundamental fairness and constitutionally mandated due process."³⁴ Claiming that any allegations against President Trump were "baseless," Cipollone informed Pelosi that neither the President nor his administration would "participate in your partisan and unconstitutional inquiry."³⁵ President Trump's private counsel, Rudy Giuliani, was equally critical of the House. "You look at all the irregularities, you can come to the conclusion that this is an illicit hearing," Rudolph W. Giuliani, the President's personal lawyer, said the next day.³⁶ "This is the first time that a president hasn't had the ability to have his party

33. See generally Letter from Pat A. Cipollone, White House Couns., to Nancy Pelosi, Speaker, House of Representatives, Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel., Eliot L. Engel, Chairman, House Foreign Affs. Comm. & Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform (Oct. 8, 2019).

34. *Id.* at 1.

35. *Id.* at 2.

36. Peter Baker, *Trump's Sweeping Case Against Impeachment Is a Political Strategy*, N.Y. TIMES (Oct. 9, 2019) (quoting Giuliani), <https://www.nytimes.com/2019/10/09/us/politics/trump-case-against-impeachment.html> [<https://perma.cc/QDH9-FJ7B>].

to call witnesses in the preliminary phase. It sounds like they're singling him out for unfair treatment."³⁷

Even while adopting an absolutist constitutional position, President Trump still signaled an openness to compromise. Even though he has attacked the House for running a "kangaroo court," the President said a week later that he might cooperate if the House voted to approve the impeachment inquiry and provided some procedures.³⁸ "Yeah, that sounds O.K.," he told reporters.³⁹ "We would if they give us our rights. It depends."⁴⁰

President Trump and Cipollone had half a point. The House acted at odds with the precedents set by Presidents Richard Nixon and Bill Clinton's investigations. Rather than hold a House vote to launch impeachment, Speaker Pelosi simply gave her public blessing to ongoing committee probes into President Trump's Ukraine machinations. She did not cure this defect until a month after the impeachment inquiry began.⁴¹ Unlike Watergate, the Democratic House committee chairs did not create a bipartisan staff, nor did they grant the President (or the Republican minority) the right to have counsel present, cross-examine witnesses, call their own witnesses, subpoena evidence, or present competing arguments and facts.⁴² Democrats threatened to ignore any executive privilege raised by administration witnesses.⁴³ "Any failure to appear," one committee chair informed a career State Department official, "shall constitute evidence of obstruction."⁴⁴

Despite these hardball tactics, Speaker Pelosi had the Constitution on her side. Article I gives the House "the sole Power of Impeachment" and the right to "determine the Rules of its Proceedings."⁴⁵ It does not place any limits on the power. Because of this sparse text, the House may run its impeachment inquiry in whatever manner it wishes. In 1868, the House voted to impeach President Andrew Johnson only three days after he fired

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Nicholas Fandos & Sheryl Gay Stolberg, *A Divided House Endorses Impeachment Inquiry into Trump*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/10/31/us/politics/house-impeachment-vote.html> [<https://perma.cc/LD6C-RHMM>].

42. Gene Healy, *Trump's 'Due Process' Dodge on Impeachment*, CATO INST. (Oct. 25, 2019), <https://www.cato.org/commentary/trumps-due-process-dodge-impeachment> [<https://perma.cc/E7V5-ALW8>].

43. Curt Anderson, *Experts: White House Has Dubious Reasons to Ignore Subpoenas*, AP NEWS (Nov. 4, 2019), <https://apnews.com/article/48c57b063e3a4da699cd9a8ee8dbfe91> [<https://perma.cc/EZW2-UWZ9>].

44. Articles of Impeachment Against Pres. Donald J. Trump Vol. 1: Hearing on H. Res. 755 Before the H. Comm. on the Judiciary, 116 Cong. 370 (Dec. 11–13, 2019) (quoting Chairman Schiff).

45. U.S. CONST. art. I, §§ 2, 5.

the Secretary of War without congressional consent (violating a law that was surely unconstitutional). If the Watergate or Whitewater hearings provided Presidents with any rights, they came as a matter of legislative grace, not constitutional rights.

Supreme Court precedent affirms the House's broad discretion. In *Nixon v. United States*, the Justices considered parallel constitutional language that gives the Senate "the sole Power to try all Impeachments."⁴⁶ A federal judge argued that his removal violated the Constitution because he had not received a real trial with due process rights. Writing for a 9-0 Court, Chief Justice Rehnquist held that the word "sole" ousted the judiciary any review of the trial.⁴⁷ The Senate was to operate "independently and without assistance or interference."⁴⁸ If we understand (as we should) the same constitutional words to bear the same meaning, the House's "sole" power to impeach similarly excludes review not just of the trial, but the impeachment, too.

Cipollone, however, had institutional politics on his side. If the House had sought seriously to remove the President, it should have granted President Trump more rights. Holding a vote of the House to authorize the investigation held only symbolic value. The real benefits would have come in the day-to-day conduct of the probe. Democrats should have invited the White House and the Republican minority to witness interviews and to review all documentary evidence. They should have provided all witnesses with the right to counsel. They should have recognized all valid privileges rooted in the Constitution or the federal rules of evidence. They should have bent over backwards to give President Trump and House Republicans the opportunity to be heard. A defendant's right to confront his or her accusers traces to the very beginnings of Western civilization. In a 1988 case, Justice Scalia quoted Saint Paul in *Acts 25:16*: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."⁴⁹

Pelosi could argue that President Trump's demands go beyond anything required by Article II's Impeachment Clause. The House plays the role of a prosecutor, who does not bring defendants along to meet witnesses and see evidence. That comparison does not fit, however, because prosecutors also do not hold hearings to air their evidence in public, nor do they engage in majority and minority questioning of witnesses. The division of authority

46. *Nixon v. United States*, 506 U.S. 224, 229–33 (1993).

47. *Id.* at 252–53. See generally BENEDICT, *supra* note 2.

48. *Nixon*, 506 U.S. at 231.

49. *Coy v. Iowa*, 487 U.S. 1012, 1015–16 (1988).

between the House and Senate creates an even weightier responsibility. Under the existing rules, the Senate holds only a pale imitation of a trial. Individual senators cannot speak, question witnesses, or test evidence. They never debate the meaning of “high Crimes and Misdemeanors.” House managers present their case in speeches, the President’s lawyers make closing statements, and the senators vote. Treating senators as silent jurors, a Senate trial creates no forum for the testing of the witnesses or the evidence.

Because of the Senate’s obsolete rules, the House impeachment process provided the only opportunity for the American people to weigh the factual evidence and the legal arguments against President Trump. That magnified the importance of providing President Trump with due process rights, not because the Constitution required it, but because it would have given the public greater faith in a decision to impeach. Involving the White House and the Republican opposition would have created greater confidence that impeachment had survived the same trial-by-fire demanded for any criminal conviction. Even if the Senate acquitted, the House’s bulletproofed judgment that President Trump committed a “high Crime or Misdemeanor” would surely affect his reelection, where the Framers expected the ultimate decision to remove a President to be made.

President Trump’s first impeachment also gave the Senate the opportunity to reform its antiquated rules for the trial. Under existing Senate procedures, the trial produced the worst of both worlds. When the House has a flimsy case, the Senate must still put the country through the wrenching, divisive political spectacle of an impeachment trial without any opportunity to immediately dismiss the case. When the House has a strong case, Senators must sit silently without any chance to participate directly in the trial. Allowing a real trial would have improved the decision-making over whether to “fire” President Trump and would have made Congress more responsive and accountable to the American people.

With House Democrats swiftly marching to impeachment in the course of just three months, Senators could have attended to the defects revealed by the President Bill Clinton’s 1998 trial. Those rules give Senators a passive role: they cannot reject the House’s decision to send an impeachment over, they must sit and listen to House prosecutors and White House defense lawyers without making a peep, they never directly see or examine witnesses or documents, and they never make arguments over the facts or the law of conviction, particularly the meaning of “high Crimes and Misdemeanors.”⁵⁰

50. *See generally* RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, S. DOC. NO. 113-1, at 223 (1986).

As early as October 2019, Senate majority leader Mitch McConnell properly recognized that existing Senate rules automatically required a trial if the House impeached. Some conservative commentators argued that Senate Republicans should slow-walk the process. They may have hoped for a repeat of their success in holding open the seat of Supreme Court Justice Antonin Scalia by refusing to schedule a vote for Obama's nominee, Merrick Garland. If Republicans could have delayed a trial indefinitely, or at least until after the 2020 elections, President Trump would never have faced removal from office at all.

All parties assumed that the Constitution required the Senate to hold a trial, even if—as we saw in the 1998 Clinton impeachment—it essentially consumed all of the nation's political attention to the detriment of other pressing national problems. This ignored the Constitution's assignment of roles to the House and Senate. The House starts the process by “impeaching” the President on a charge of treason, bribery, or some other “high Crime” or “Misdemeanor.” The Senate has “the sole power to try” the case. The constitutional text underscores that the Senate plays a judicial role by including the word “try,” requiring the Chief Justice to preside at the President's trial, and referring to “the Party convicted” if the Senate decides to remove the President from office.

Nothing in the constitutional text required the Senate to consider a House impeachment promptly, or even at all. The Senate could have postponed consideration of a House impeachment indefinitely—say, until after the 2020 presidential election. Just as a court need not schedule a trial upon a prosecutor's wishes, so the Senate could suit its own convenience, not just that of the House. The Senate has delayed consideration of actions by other branches of the government for years, such as refusing to consider treaties submitted by the President for advice and consent. Or the Senate could simply have voted to reject the case, much as a court can find that a plaintiff cannot win its case, even if all the facts are accepted as true, because it has no legal claim. An employer might have fired an employee because the former did not like the employee's schooling, for example, but federal law provides no right to sue for discrimination on that ground. Similarly, the House may have proven that President Trump had indeed asked Ukraine for a favor that would have benefitted him personally, but that the facts did not rise to the level of treason, bribery, or other high crimes and misdemeanors.

But under its own rules, the Senate chose to give up its constitutional flexibility. Upon receiving the House's articles of impeachment, the Senate must “proceed to the consideration” of the articles.⁵¹ It must remain in

51. *Id.*

session every day “until final judgment shall be rendered.”⁵² These rules senselessly require the Senate to move immediately to a trial no matter how meritless or partisan the House’s case for impeachment. Suppose the House impeached President Trump for a difference over foreign policy where the President had done nothing wrong, as the White House argued throughout the impeachment. Even then, the Senate would have to go to a trial that consumed all of the air in our nation’s political system.

Senators forgot that they remained masters of their own procedures. Because each house of Congress enjoys unilateral control over its own procedures, the Senate can structure its trial role as it sees fit. In the 1993 *Nixon* case, the Supreme Court also made clear that federal courts will not review Senate impeachment procedures.⁵³ When sitting as a court trying an impeachment, the Senate is the supreme court.

Because a simple majority can change its rules at any time, Republicans could have established a new rule to require a vote to begin an impeachment trial, rather than allowing one to begin automatically. Republicans recently have used their power to change Senate rules, such as ending the filibuster for Supreme Court nominations. The same goes for Democrats, who earlier ended the filibuster for lower court nominees.

Those who believed the House produced strong grounds to impeach the President should also have supported a reform. Under the existing rules, individual Senators could not speak at any length. They never questioned witnesses, never tested documentary evidence, and never interpreted the law. They never meaningfully debate the meaning of “high Crimes and Misdemeanors.” While silence called upon Senators to play the role of impartial jurors, it also curbed debate and diminished political accountability. A real trial would have allowed the American people—through the lens of the Senate—not just to see but to judge the facts and the law of President Trump’s impeachment. Under current Senate rules, the trial only became a trailer of the main show: House impeachment hearings.

President Trump’s impeachment, of course, did not turn on process. The Senate acquitted because it concluded that the facts claimed by the House did not justify removal. Because President Trump’s impeachment ended without removal by the Senate—following the pattern of Presidents Johnson and Clinton—Democrats were blamed for dragging the nation through a futile ordeal to remove President Trump and lost seats in the 2020 elections.

Overall, the hearings were relatively monotonous and made little

52. *Id.*

53. *Nixon*, 506 U.S. at 235–38.

progress on substance. Few people will have changed their minds after watching all two weeks of testimony. In the televised hearings in the House Intelligence Committee, we saw distinguished U.S. diplomats—such as acting Ambassador to Ukraine William Taylor and Deputy Assistant Secretary of State George Kent—carefully and unemotionally describe what they witnessed. We saw fighting between Intelligence Committee Chairman Adam Schiff (D-Calif.), and Republican committee members who questioned his exclusion of their witnesses and lines of questioning.

But the facts remained the same. On July 25, President Trump made a phone call to Ukrainian President Volodymyr Zelensky. In the course of the conversation, President Trump asked for “a favor,” according to a rough transcript released by the White House. The favor? That Zelensky investigate why Ukrainian prosecutors had not investigated the appointment of the unqualified Hunter Biden (son of then-Vice President Joe Biden) to a cushy spot on the board of the Burisma natural gas firm—reportedly at a salary of about \$50,000 per month. The White House temporarily delayed nearly \$400 million in U.S. foreign and military aid to Ukraine until the public announcement of the investigations. But the Ukrainians never announced or conducted such investigations, and the White House eventually released the funds. As a result, President Trump provided far more effective assistance for Ukraine’s struggle against Russian aggression than the administration of President Obama ever did.

Most of this story was already widely known, thanks to Democratic legislative malpractice. House Democrats had conducted depositions of Kent, Taylor, Vindman, Sondland, Hill, and others behind closed doors, with little participation by the minority Republicans. But Democrats then released the witnesses’ written testimony, after earlier leaking the high points of the questioning. With no new testimony, and civil servants doing their best to be bland and nonpartisan (which, after all, is their job), the hearings only repeated what the news media had already broadcast weeks before. The televised hearings also provided few critical facts because of the White House’s decision weeks before to release the rough transcript of the July 25 Trump-Zelensky call. The White House’s move reduced much of the public testimony to providing color and context to facts already known.

Take, for example, the “news” that Taylor had learned from staff of an overheard, July 26 phone call between President Trump and America’s ambassador to the European Union, Gordon Sondland. President Trump allegedly asked Sondland about the “investigations,” and Sondland

reportedly replied that the Ukrainians were “ready to move forward.”⁵⁴ When the aide asked Sondland what President Trump thought of Ukraine, the ambassador reportedly replied that President Trump cares “more about the investigations of Biden, which Giuliani was pressing for,” referring to President Trump’s lawyer Rudy Giuliani.⁵⁵ But this should come as no surprise. The July 25 transcript already made clear that President Trump cared enough about the investigations to raise the issue directly with the President Zelensky. And the already unreliable Sondland, who has had to correct his testimony and may be in the habit of exaggerating his role, added another level of hearsay to the tale.⁵⁶ This made front-page headlines but was soon forgotten.

In fact, the speed of the House impeachment proceedings precluded the thorough investigation demanded by a decision of this constitutional magnitude. Democrats had difficulty showing that President Trump had demanded a true quid pro quo. The July 25 transcript showed that President Trump had asked Ukraine for the “favor” of looking into whether a Ukrainian-linked cybersecurity company had anything to do with interference in the 2016 elections. While we may agree with Fiona Hill that this conspiracy theory of Ukrainian meddling makes no sense and does not square with the facts, a request for further investigation seems within the national interest, rather than just to President Trump’s personal benefit.⁵⁷ If President Trump had asked Ukraine to help with the U.S. investigation into Russian meddling in the 2016 election, it seems beyond doubt that such a favor would have equally fallen within the scope of U.S. national interests. Just because information might benefit President Trump does not mean that it does not benefit the nation as well.

But Democrats encountered even more difficult challenges in showing an exchange of a benefit for the second favor: looking into the Bidens. Initially, it is not even clear what President Trump asked for in the July 25 transcript. “There’s a lot of talk about Biden’s son, that Biden stopped the

54. Rebecca Ballhaus, *Sondland Kept Trump Administration Officials Apprised of Ukraine Push*, WALL ST. J. (Nov. 17, 2019, 6:11 PM), <https://www.wsj.com/articles/lawmakers-dispute-impact-of-first-week-of-public-impeachment-hearings-11574007673> [<https://perma.cc/J7UN-338B>].

55. Morgan Chalfant, *Taylor Testifies Trump Cared More about ‘Investigations’ than Ukraine*, HILL (Nov. 13, 2019, 11:16 AM), <https://thehill.com/homenews/administration/470248-taylor-sondland-said-trump-cared-more-about-investigations-than> [<https://perma.cc/92S6-AJYL>].

56. *See id.*

57. Vivian Salama, *Fiona Hill Calls Theories About Election Interference by Ukraine False*, WALL ST. J. (Nov. 21, 2019, 10:05 PM), <https://www.wsj.com/articles/fiona-hill-david-holmes-expected-to-testify-on-ukraine-pressure-campaign-11574332203> [<https://perma.cc/N3BA-ZGYF>].

prosecution,” President Trump said.⁵⁸ “[A] lot of people want to find out about that so whatever you can do with the Attorney General would be great.”⁵⁹ He finished by telling Zelensky that “Biden went around bragging that he stopped the prosecution so if you can look into it It sounds horrible to me.”⁶⁰ Viewed in a fair light, President Trump seems to be rambling here, and it is unclear what President Trump wants Zelensky to do—whatever it is, it does not seem to take the form of a demand. But more importantly, President Trump never mentions in the phone call that he has ordered a hold on foreign and military aid for Ukraine, and it appears that Ukraine did not even learn about the delay until more than a month later.⁶¹ Even when Ukraine did, they did not appear to feel any coercion had occurred, as they never publicly announced an investigation into the Bidens and Burisma. It is hard to pull off a quid pro quo if the holder of the quo does not know about the quid.

This is not to say that we know for sure whether President Trump was pursuing corruption, on behalf of the national interest, or Biden, for his own personal political advantage. This is where the House Democrats failed in their constitutional duty. They limited their investigation to the questioning of career Foreign Service and NSC staff, plus a few mid-level political appointees and ambassadors. None of them apparently had ever discussed Ukraine with President Trump or had direct evidence of a corrupt quid pro quo. A thorough investigation would have sought the testimony of those who would have directly spoken with the President about Ukraine. The list of indispensable witnesses includes Chief of Staff Mick Mulvaney, National Security Advisor John Bolton, and Secretary of State Mike Pompeo. While these officials initially claimed executive privilege, Congress has many tools at its disposal to overcome such obstacles or to persuade Presidents to waive their right to secrecy. In fact, past impeachment inquiries, not to mention regular oversight hearings, had managed to convince Presidents to allow their subordinates to cooperate with Congress. The Watergate Tapes case is but one example of a White House having to give up executive privilege in the face of possible impeachment.

House Democrats unfortunately could not wait for the courts or for political negotiations. Instead, they seemed determined to drive the process quickly so that impeachment could conclude by Christmas and a trial could

58. Memorandum of Telephone Conversation with President Zelensky of Ukraine (July 25, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf> [https://perma.cc/WMV9-ABEH].

59. *Id.*

60. *Id.*

61. *See id.*

begin in the new year. Some clearly feared that President Trump would be reelected if they did not remove him swiftly. Representative Al Green, D-Texas, admitted, "I'm concerned that if we don't impeach this president, he will get reelected."⁶² Others likely made the calculation that drawing impeachment out into 2020 could help President Trump by preventing Democrats from shifting attention to their legislative achievements or the virtues of their own presidential candidates. House Democrats could offer no good, nonpolitical reason to halt the impeachment investigation before Congress had a chance to hear from the most important, relevant witnesses. Putting political calculation before investigatory thoroughness betrayed the Constitution's purposes for impeachment. The Framers understood that impeachment would cause political disruption. Impeachment "will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly, or inimical, to the accused," Hamilton predicted in *Federalist 65*.⁶³

In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.⁶⁴

The Senate could have well chosen to acquit based on the facts and the law, rather than the process. It can remove a President for "Treason, Bribery, or other high Crimes and Misdemeanors." House Democrats believed that conduct that would violate the federal bribery statute would simultaneously meet the "Bribery" requirement in the Impeachment Clause. This was mistaken, for it would allow Congress to change the meaning of the Impeachment Clause by statute. A President's abuse of his or her foreign affairs power, however, for purely personal or even partisan gain, rather than to advance the national interest, could fall within the Framers' understanding of "high Crimes and Misdemeanors." Nevertheless, the facts as found by the House did not present clear and convincing evidence that the President sought to advance only his personal interest when he asked Ukraine to investigate Hunter Biden.

The Senate may also have agreed with the Founders that impeachment should only come as a last resort. "At the end of four years, [the President] may be turned out of his office," Governor Edmund Randolph said during

62. Madlin Mekelburg, *Putting Al Green's Comments on Impeachment in Context*, POLITIFACT (Oct. 25, 2019), <https://www.politifact.com/texas/article/2019/oct/25/putting-al-greens-comments-impeachment-context/> [<https://perma.cc/GFQ5-4KT2>].

63. THE FEDERALIST NO. 65, at 338 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

64. *Id.*

the 1788 Virginia ratifying convention to Anti-Federalists worried about executive power.⁶⁵ “If he misbehaves he may be impeached, and in this case he will never be reelected.”⁶⁶ Otherwise, Federalists worried, the President would become too dependent on a Congress all too eager to use impeachment to get its way.⁶⁷ As the nation entered a presidential election year, Democratic candidates freely called for impeachment.⁶⁸ But the Senators realized that these candidates—and not the Constitution’s elaborate procedures for impeachment—played the Framers’ primary role in checking presidential abuses of power. The Constitution trusts the American people, acting through the ballot box, to make a judgment on whether President Trump really sought a quid pro quo with Ukraine. Senators remained confident, where House Democrats did not, in the Framers’ judgment.

II. IMPEACHMENT: THE ORIGINAL UNDERSTANDING

While recognizing that both law and politics would infuse impeachment, the Constitution also tries to prevent the people’s representatives from abusing their power to remove the President for purely political ends. The Constitution divides impeachment, which amounts to indicting or choosing to go to prosecution, from the trial itself. Article I gives the duty of conducting the trial to the Senate, rather than allowing the House to be prosecutor and jury. Unlike the decision to impeach, the Constitution also requires a two-thirds vote for conviction. If the one-third of smallest states banded together, roughly nine percent of the nation could prevent the other ninety-one percent from removing a President. It creates such a high requirement to convict—the same vote necessary for Congress to send a constitutional amendment to the States or to override a presidential veto—that it demands that presidential removal represent a broad consensus across the nation’s geography, population, and social classes. As Akhil Amar has observed, this structure reinforces the principle that regular criminal prosecutors cannot bring charges against the President because a local district attorney, or even U.S. Attorney, could not represent the broad

65. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 138 (1827), https://o11-resources.s3.us-east-2.amazonaws.com/o113/store/titles/1907/Elliot_1314-03_EBK_v6.0.pdf [<https://perma.cc/S3P6-5FPG>].

66. *Id.*

67. *See generally* THE FEDERALIST NO. 65, *supra* note 63.

68. Alan Smith, Ben Kamisar, Melissa Holzberg & Jonathan Allen, *2020 Democratic Candidates’ Trump Impeachment Push Grows*, NBC NEWS (Sept. 24, 2019, 3:21 PM), <https://www.nbcnews.com/politics/2020-election/2020-democratic-candidates-stand-pat-impeachment-positions-n1058236> [<https://perma.cc/G8BU-VB72>].

consensus required by the impeachment clause.⁶⁹

Yet another provision declares that the punishment “shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”⁷⁰ This provision effectively limits impeachment to the same punishment as that possible at the next quadrennial election: being voted out of office. Or, put another way, the Constitution allows for the removal of a President who commits high crimes and misdemeanors through impeachment immediately, or through the regular electoral process over a longer period of time. It also makes clear that after conviction, the removed officer “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”⁷¹ Thus, the Constitution makes clear that the impeachment power addresses only removal from office, and that prosecution for violating federal law has to wait until after conviction. The Constitution specifies no right to appeal the judgment of the Senate, and the Supreme Court made clear in 1993 that it considers impeachment to pose a “political question” outside of judicial review.⁷² The Constitution prevents a President from enjoying complete immunity from lawbreaking, but simply modifies the timing of accountability until after the President leaves office.

Only two constitutional provisions address the standard for impeachment. Article II states that “The 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.”⁷³ A different provision addresses the impeachment of judicial officers. Article III states that “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.”⁷⁴ Thus, these two provisions read together suggest that “Treason, Bribery, or other high Crimes and Misdemeanors” includes a different set of offenses than a violation of “good Behavior.” A textual approach would also suggest that “high Crimes and Misdemeanors” would have a similar nature to “Treason” and “Bribery” since they are included in the same list and are connected by the key word “other.” If the clause had read “Treason, Bribery, and high Crimes and

69. AKHIL R. AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 202 (2006). The constitutional text also displays a sensitivity to the conflicts of interest created by the awesome step of reversing the outcome of a national election. For all impeachment trials, for example, the Vice President sits as the trial judge as the presiding officer of the Senate. But when the President is impeached, the Chief Justice sits as the presiding judge because the Vice President would benefit if the Senate were to convict.

70. U.S. CONST. art. I, § 3, cl. 7.

71. *Id.*; *cf. id.* art. I, § 2, cl. 5 (House Impeachment).

72. *Nixon v. United States*, 506 U.S. 224, 252–53 (1993).

73. U.S. CONST. art. II, § 4.

74. *Id.* art. III, § 1.

Misdemeanors” instead, without the “other,” impeachment might have a much broader scope. Other parts of the Constitution reinforce the idea that “high Crimes and Misdemeanors” limits impeachment to serious offenses. Article I immunizes members of Congress from arrest when attending a session except for “Treason, Felony, and Breach of the Peace.”⁷⁵ It seems that felonies or breaches of the peace do not amount to “high” crimes. Article IV requires states to extradite fugitives charged with “Treason, Felony, or other Crime.” This approach does not answer the question as to what treason, bribery, and other high crimes and misdemeanors should have in common—only that we should read the catch-all as including only offenses of a similar gravity.

A. PREVIOUS SCHOLARSHIP & VIEWS

Politicians and scholars have fought over the scope of impeachment for as long as the Republic has existed. The debate naturally focuses on the grounds for impeachment and removal of a sitting President. Some, such as President Trump’s defense team, argue that the Chief Executive must commit an actual crime in order to meet the standard of “high Crimes and Misdemeanors.” Harvard Law Professor Alan Dershowitz most prominently argued during the 2020 impeachment trial and his earlier writing that Congress could not remove a President in the exercise of his or her constitutional powers, but instead only if the President committed a crime such as bribery.⁷⁶ On the other end of the spectrum, then-Minority Leader Gerald Ford took the position in 1970, in proposing the removal of Supreme Court Justice William O. Douglas, that “[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”⁷⁷ Others, such as Yale Law Professor Charles Black and Columbia Law Professor Philip Bobbitt, have sought to identify a line somewhere between a crime and anything, such as offenses “which so seriously threaten the order of political society as to make pestilent and dangerous the [President’s] continuance in power.”⁷⁸

Imposing a criminal requirement would place the clearest lines around the impeachment power. It would give the clearest definition of the conduct at issue by incorporating federal criminal statutes and the case law interpreting them. Drawing on Justice Benjamin Curtis’s arguments as

75. *Id.* art. I, § 6, cl. 1.

76. ALAN DERSHOWITZ, *THE CASE AGAINST THE DEMOCRATIC HOUSE IMPEACHING TRUMP* 24–25 (2019).

77. Davis, *supra* note 6.

78. CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK*, NEW EDITION 36 (2018).

President Johnson's impeachment defense counsel, Nikolas Bowie argues that "the principle of no crime without law remains an important safeguard for all potential criminal defendants," including those in an impeachment trial.⁷⁹ "There is no reason why when Congress acts as a prosecutor it should be permitted to ignore the Constitution's basic protections of due process and criminal procedure," Bowie concludes.⁸⁰ Otherwise, Congress would enjoy "as much unlimited discretion as Parliament once had to accuse and convict a political opponent of a crime."⁸¹ In his testimony before the House, Jonathan Turley similarly warned that the Trump impeachment "is a case without a clear criminal act and would be the first such case in history if the House proceeds without further evidence." He further urged the House not to approve the articles because "[i]n all three impeachment inquiries, the commission of criminal acts by [Presidents] Johnson, Nixon, and Clinton were clear and established."⁸²

During his impeachment trial, President Trump added two further requirements in addition to criminality: the conduct at hand also must "inflict[] sufficiently egregious harm on the government" and that the harm "threatens to subvert the Constitution."⁸³ His counsel drew these three requirements out of the constitutional text. By using the terms treason, bribery, and "other high Crimes and Misdemeanors," the White House argued, the Framers limited impeachment only to criminal acts. "Other high Crimes and Misdemeanors" must have the same character as treason and bribery, which are crimes as well.

While the President rested his defense on this textual argument, he made historical and structural arguments as well. President Trump claimed as support Blackstone's observation that an impeachment is a "prosecution of the already known and established law."⁸⁴ He also pointed to the decision at the Constitutional Convention to replace the original standard for impeachment—mal-administration—with "high Crimes and Misdemeanors" as evidence that the Framers intended to limit Congress's power to remove the President to criminal acts. His defense further claimed

79. Nikolas Bowie, *High Crimes Without Law*, 132 HARV. L. REV. F. 59, 76 (2018) (responding to LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY* (2018)).

80. *Id.*

81. *Id.*

82. *The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment: Hearing on H.R. 660 Before the H. Comm. on the Judiciary*, 116th Cong. 74 (2019) (statement of Jonathan Turley, Professor, Washington University Law School).

83. TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP IN PROCEEDINGS BEFORE THE UNITED STATES SENATE 13 (Jan. 20, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/01/ukraine-clearinghouse-Trial-Memorandum-of-President-Donald-J.-Trump-january-20-2020.pdf> [https://perma.cc/84XT-9KM8] [hereinafter TRUMP TRIAL MEMORANDUM].

84. 4 WILLIAM BLACKSTONE, COMMENTARIES *256.

that the crime-only reading had survived the test of practice, as Congress had charged both President Andrew Johnson and President William J. Clinton with crimes.

These historical claims, however, do not persuade. While it is true that Blackstone did observe that Parliament had considered impeachments that had violated established law, Blackstone more importantly treated crimes and impeachments separately in his *Commentaries*. Blackstone did not consider impeachment limited to only crimes. In fact, he defined “high misdemeanors” subject to impeachment in Parliament as “the mal-administration of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment.”⁸⁵ While the Constitutional Convention did replace “mal-administration” as a ground of impeachment, President Trump could not identify any important supporter of the Constitution, at the time of ratification, who argued that Congress could remove a President only for criminal conduct. In fact, such an argument would have made little sense during ratification, when the Federalists sought to defend the Presidency against Anti-Federalists who charged that the Executive was already too powerful.

President Trump’s summoning of historical practice to his defense seems similarly flawed. President Johnson, for example, violated the Tenure in Office Act. But Congress enacted the Tenure in Office Act itself to violate the President’s constitutional authority to remove subordinate executive branch officials. It was as if Congress had passed a law prohibiting the President from appointing or firing a White House advisor. Congress sought to remove President Johnson not because he had violated the law, but because he sought to frustrate its Reconstruction policies. President Bill Clinton’s impeachment comes closer to the mark, as he allegedly committed perjury by lying about his affair with Monica Lewinsky. The Senate, however, as in the Johnson case, refused to convict, which weakens the value of the Clinton case as precedent.

Advocates of crime-only impeachment cannot claim support from the original understanding of the Constitution’s drafting and ratification. Instead, they must argue that their approach would advance important structural goals. President Trump, for example, argued that an impeachable offense requires “a violation of established law” because removal raises two profound issues.⁸⁶ First, the White House argues, conviction “means overturning the democratically expressed will of the people in the only

85. *Id.* at *121.

86. TRUMP TRIAL MEMORANDUM, *supra* note 83, at 16.

national election in which all eligible citizens participate.”⁸⁷ This argument mirrors the one made by the President’s political supporters at the time that impeachment amounted to an undoing of the results of the 2016 election. Second, President Trump argues, “because the President himself is vested with the authority of an entire branch of the federal government, his removal would cause extraordinary disruption to the Nation.”⁸⁸ In particular, conviction would throw into doubt the federal government’s ability to perform the unique Article-II functions of law enforcement, command of the military, and foreign policy.

These structural arguments miss the more important constitutional principle at stake. Impeachment does not quite match overturning the 2016 elections, because if the Senate had removed President Trump, the Constitution would have mandated that his partisan running mate, Vice President Mike Pence, would have ascended to the Presidency. Overturning the 2016 election would have called for making Hillary Clinton President. Nor does frustrating the will of the 2016 electorate raise constitutional issues. Impeachment by the House gave voice to the results of the 2018 election, in which the Democratic Party went from a 194–241 minority to a 235–199 majority, a swing of 41 seats. Many Democrats ran squarely against the President and his fitness for office; bringing impeachment proceedings may have represented the most recent expression of popular will. Oddly, the President did not invoke the most important structural reason provided by the Framers for impeachment’s difficulty. As we explain *infra*, the Federalists sought to place a check on potential abuse of office, but at the same time they did not want the legislature to use its removal power to control the President. In their mind, this would undo the very reform—an independent, unified executive branch—that they sought to import into the Constitution.

Leading scholars, however, reject the idea that Congress can only impeach a President for a crime. At the other end of the spectrum from the crime-only reading, some argue that the Constitution makes impeachment a political offense, and so its definition is simply up to politics. The dean of impeachment scholars, Michael Gerhardt, concludes that “the framers and ratifiers seemed to have shared a common understanding of impeachment as a political proceeding and impeachable offenses as political crimes.”⁸⁹ Gerhardt suggests that impeachable offenses could extend not just to serious violations of federal law, but also deliberately leaving the nation defenseless.

87. *Id.* at 17.

88. *Id.* at 18.

89. MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 104 (2d ed. 2000).

The constitutional text, however, “defies specification because it rests on the circumstances under which the offenses have occurred,” he writes, “and on the collective *political* judgment of Congress.”⁹⁰ Frank Bowman agrees that politics will determine whether conduct amounts to an impeachable offense. He argues that “the judgment about whether a particular president should be impeached will, at the moment of crisis, turn primarily on whether Congress thinks it is good or bad for the country that he or she should be permitted to remain as chief executive.”⁹¹ Impeachment is a political, rather than legal process. “[I]mpeachment was designed not as a legal process for punishing individual wrongdoing,” Bowman writes, “but as a means of protecting the republic from the faults, frailties, or skullduggery of high government officers.”⁹² Bowman, upon whom the House Judiciary Committee relied heavily in its impeachment report, comes perilously close to Gerald Ford’s definition. Originalist Michael Paulsen agrees: “Impeachment is a political process designed to impose political punishments for misconduct that includes offenses fairly characterized as political.”⁹³

Other scholars have sought to find a limiting principle for the idea that impeachment encompasses noncriminal conduct. In the midst of the Nixon proceedings, legal historian Raoul Berger published a detailed study, *Impeachment: The Constitutional Problems*, that surveyed the British and colonial antecedents. He observed that Americans adopted a practice that Parliament had used in the seventeenth century and before to render Crown ministers accountable to the legislature. He argued that “high Crimes and Misdemeanors” did not refer to crimes, but constituted “words of art confined to impeachments without roots in the ordinary criminal law.”⁹⁴ In addition to bribery and treason, Berger argued, British history showed that impeachment extended to misuse of funds, abuse of power, neglect of duty, contempt of Parliamentary power, and corruption.⁹⁵ While arguing that the Framers rejected much of British impeachment practice, Akhil Amar reads “high Crimes and Misdemeanors” to permit removal of the President for “high behavior or high misconduct, whether or not strictly criminal.”⁹⁶ As examples, Amar suggests “a president who [runs] off on a frolic in the middle of a national crisis” or other misconduct that approximated bribery or treason

90. *Id.* at 106.

91. FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 21 (2019).

92. *Id.* at 20.

93. Michael S. Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 718 (2018) (book review).

94. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 66 (1973).

95. *Id.* at 76.

96. AMAR, *supra* note 69, at 200.

“in moral gravity or dangerousness to the republic.”⁹⁷ Unlike Berger, however, Amar does not draw these rules from history, which he says went much further in imposing criminal punishments on public officials. Instead, he relies upon structural concerns that impeachment does not serve political purposes akin to a legislative vote of no-confidence. Though he believes impeachment to be primarily political, Paulsen agrees with Amar. He would not allow partisan politics to intrude, but instead believes impeachment involves high politics, such as a President’s action that seriously harms the national interest or an inaction that fails to carry out a constitutional duty.⁹⁸

It is difficult for these scholars to identify when presidential activity crosses the line into “serious” or “high” misconduct serious enough for removal from office. Others attempt to address this problem by adopting something close to a totality-of-the-circumstances approach. Charles Black, author of one the most influential works on impeachment, which Philip Bobbitt recently updated to address the possibility of impeaching President Trump, concluded that high crimes and misdemeanors “ought to be held to be those offenses which are obviously wrong, whether or not ‘criminal.’”⁹⁹ But that alone is not enough. The offense must “so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator.”¹⁰⁰ Black also argued that the impeachable conduct had to result from an act or series of acts, rather than “[g]eneral lowness and shabbiness.”¹⁰¹ We learn more from Black’s application of his test to the Nixon investigations, which he generally finds to have met the constitutional standards, and hypotheticals, than the standard itself. He finds, for example, that using the IRS to harass and punish political opponents, misuse of the FBI against campaign opponents, and obstruction of justice to be impeachable offenses, while refusing to spend appropriated funds and conducting undeclared wars to be less likely cases.

Another prominent scholar, Laurence Tribe, joined with a co-author, Joshua Matz, also took the occasion of the Trump presidency to flesh out a totality-of-the-circumstances approach. Unlike most scholars, Tribe and Matz refuse to rely on the original understanding. “Now and always, the Constitution belongs to the living,” they declare; even if history were relevant, they argue, here the evidence is unclear and disputed.¹⁰² Ironically, like the Trump defense, they seek to draw meaning squarely from the text.

97. *Id.* at 200–01.

98. *See* Paulsen, *supra* note 93.

99. BLACK & BOBBITT, *supra* note 78, at 36.

100. *Id.*

101. *Id.*

102. LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 16 (2018).

They believe that “other high Crimes and Misdemeanors” should take the same character as the preceding terms, treason and bribery. Therefore, impeachable offenses should include serious conduct such as “corruption, betrayal, or an abuse of power that subverts core tenets of the U.S. governmental system.”¹⁰³ They add a mens rea requirement—impeachable offenses require “proof of intentional, evil deeds that risk grave injury to the nation.” And they add a sort of malum in se requirement—impeachable offenses “are so plainly wrong by current standards that no reasonable official could honestly profess surprise at being impeached.”¹⁰⁴ And then they add a political constraint—that the conduct be “so terrible that it makes the president unviable as a national leader.”¹⁰⁵ Tribe and Matz concede that they may have added so many factors to their test for impeachment as to render it incapable of clear definition or predictable application. “This may all sound a bit vague. Fair enough.”¹⁰⁶ In other words, they have invented a multi-factor test divorced from original understanding that reflects merely their own policy preferences and that does nothing to add to the stability of the law in this area.¹⁰⁷

In sum, originalist work in this area has suffered from comprehensiveness and systematic analysis of the most relevant evidence. In other words, it has been akin to the tale of the blind men each feeling a different part of an elephant, and thus each coming to wildly differing conclusions as to what it was they were feeling. We seek to rectify this shortcoming with the remainder of Part II.

B. BRITISH USAGE OF “HIGH CRIMES AND MISDEMEANORS”

There has been work by others on the history of British impeachment. We wanted to add a different angle: a more linguistic look at the terms the Constitution adopted in British parlance. After all, if the Founders incorporated, with some alterations, the British practice of impeachment, they may have also incorporated British terminology. And a study of those phrases may shed light on the Constitution’s meaning.

To undertake this, we examined the Corpus of Early Modern English (COEME).¹⁰⁸ COEME (pronounced koh-eem), is a database that includes

103. *Id.* at 42.

104. *Id.*

105. *Id.* at 23.

106. *Id.*

107. For an additional critique of Tribe and Matz, see generally Paulsen, *supra* note 93.

108. See generally *BYU-Corpus of Early Modern English (BYU_COEME)*, BYU L. & CORPUS LINGUISTICS, <https://lawcorpus.byu.edu/byucoeme/concordances> [https://perma.cc/7AY6-TDJP] [hereinafter *COEME*]. Text from COEME is quoted frequently throughout this Article. Due to the

over 40,000 (mostly British) English texts from 1475–1800, totaling over 1.1 billion words.¹⁰⁹ We focused primarily on the term “high Crimes and Misdemeanors” to see if we could get greater leverage on the historical scope of that term in England. A quick search of the term, in both the singular and plural form, found that it was rather common, appearing nearly one hundred sixty times.¹¹⁰ This is tentative evidence that the phrase may have become a term of art.

To test this, we engaged in what corpus linguists refer to as collocation analysis. Collocates are words that are “co-located” with other words. One can think of this phenomenon as “word neighbors.” These semantic patterns of word association can sometimes be intuitive: we expect *dark* to appear more often in the same semantic environment as *night* than with *perfume*. But sometimes the patterns are surprising. This linguistic phenomenon has long been implicitly recognized in the law in the canon of construction called *noscitur a sociis*: “it is known by its associates.”¹¹¹ Linguists just put it a slightly different way: “you shall know a word by the company it keeps.”¹¹²

By seeing which words are collocates of each other, we can sometimes get additional insight into how people understand those words. This can be done in a corpus by entering a search term, and then indicating how many words to the left or right (or both) of the search term one wants to examine. The results can be ranked by raw frequency or by statistical measures that indicate how likely it is that two words would be located near each other given how frequently they occur in the corpus. And we can also see how usage patterns change. For instance, one of us in an earlier paper noted that the top five collocates (in raw frequency) of the term *domestic violence* from

changes in English over time, many quotes may appear, from a contemporary perspective, to contain misspellings and grammatical errors. Because such “errors” are so pervasive throughout these quotes, the traditional “[sic],” used to indicate errors in text, has been omitted from these quotes.

109. *Law & Corpus Linguistics*, BYU L. & CORPUS LINGUISTICS, <https://lawcorpus.byu.edu> [<https://perma.cc/UPK6-JUXZ>].

110. We recognize there is some duplication with COEME, which somewhat inflates these numbers as well as the results in the collocate and cluster analysis that follows. Given alternative spellings, typos in the corpus (s’s often look like f’s), commas or ampersands instead of *and*, the use of *or* instead of *and*, and sometimes a word inserted into the phrase, a search of the phrase itself misses some of the instances of the phrase. However, by doing a collocate search of *high crime* and *high crimes*, with the parameters set at six words to the right and left of the target phrase, one finds the following instances where some variation of *misdemeanor* collocates with *high crime(s)* with nearly every instance being some variation of the phrase: *misdemeanors* (55), *mifdemeanors* (48), *mifdemeanours* (34), *misdemeanours* (17), and *misdemeanor* (11). See COEME, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522high%2520crime%2522%2520%3B%2522high%2520crimes%2522;left=6;right=6;sort=collocationalFrequency%3Bcollocate;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore> [<https://perma.cc/QA5D-XLNW>].

111. *Noscitur A Sociis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

112. John Rupert Firth, *A Synopsis of Linguistic Theory, 1930–1955*, in *STUDIES IN LINGUISTIC ANALYSIS* 1, 11 (John Rupert Firth ed., 1957).

1760–1979 were (1) *against*, (2) *state(s)*, (3) *protect*, (4) *convened*, and (5) *invasion*.¹¹³ This reflects the sense as used in the Constitution of a rebellion or insurrection within a state. But the top five collocates of *domestic violence* from 1980–2009 showed a radical shift: (1) *women*, (2) *abuse(d)*, (3) *honor*, (4) *national*, and (5) *victims*.¹¹⁴ These collocates reflect the sense of violence against a member of one’s household, usually a wife or girlfriend.

In addition to collocation, corpus linguistic analysis also “looks at variation in somewhat fixed phrases, which are often referred to as lexical bundles.”¹¹⁵ Generally, lexical bundles are defined as a repeated series or grouping of three or more words.¹¹⁶ In other linguistic circles, these lexical bundles are referred to as N-grams or clusters.¹¹⁷ For example, “Do you want to” and “I don’t know what” are two of the most common clusters in conversational English.¹¹⁸ Clusters are “not complete phrases” and “are statistically defined (identified by their overwhelming co-occurrence).”¹¹⁹ In linguistics, these types of phrases or groupings of words are often referred to as binomials or multinomials. A binomial is “a coordinated pair of linguistic units of the same word class which show *some* semantic relation,” and are often, but not limited to, noun pairs.¹²⁰ An example of this from legal language would be *cease and desist* or *aid and abet*, which are sometimes called legal doublets.¹²¹ “Multinomials are similarly chained by semantic and syntactic links, but consist of longer sequences of related words.”¹²² Examples in common language include *hold, defend, and favour* or *lock, stock, and barrel*.¹²³ Binomials have been found to be characteristic of legal language and have been observed to be five times more frequent in modern legal writing than nonlegal writing, making binomial usage “clearly a style

113. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 298 tbl.1 (2019).

114. *Id.*

115. GENA R. BENNETT, *USING CORPORA IN THE LANGUAGE LEARNING CLASSROOM: CORPUS LINGUISTICS FOR TEACHERS* 9 (2010).

116. *Id.*; see also DOUGLAS BIBER, STIG JOHANSSON, GEOFFREY LEECH, SUSAN CONRAD & EDWARD FINEGAN, *LONGMAN GRAMMAR OF SPOKEN AND WRITTEN ENGLISH* 990 (1999).

117. See generally Yu-Hua Chen & Paul Baker, *Lexical Bundles in L1 and L2 Academic Writing*, 14 LANGUAGE LEARNING & TECH. 30, 30 (2010). For this Article, we will refer to these as “clusters” because that is what they are referred to in the corpus linguistics software used in this study.

118. BIBER ET AL., *supra* note 116, at 994.

119. BENNETT, *supra* note 115, at 9.

120. Joanna Kopaczyk & Hans Sauer, *Defining and Exploring Binomials*, in *BINOMIALS IN THE HISTORY OF ENGLISH: FIXED AND FLEXIBLE* 1, 3 (Joanna Kopaczyk & Hans Sauer eds., 2017).

121. See BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 248–49 (4th ed. 2018).

122. Anu Lehto, *Binomials and Multinomials in Early Modern English Parliamentary Acts*, in *BINOMIALS IN THE HISTORY OF ENGLISH: FIXED AND FLEXIBLE* 261, 263 (Joanna Kopaczyk & Hans Sauer eds., 2017).

123. Kopaczyk & Sauer, *supra* note 120, at 3.

marker in law language.”¹²⁴ Examples of multinomials in legal language include *give, devise and bequeath* or *right, title, and interest*. This frequent occurrence of binomials and multinomials in legal writing is due to their ability to “increase the precision and all-inclusiveness of the documents, although they are also used for stylistic reasons and belong among the key features of the genre.”¹²⁵

We first looked to see whether the term “high Crimes and Misdemeanors” was found in reverse: “Misdemeanors and high Crimes” or “high Misdemeanors and Crimes.” If the phrase’s constituent parts are found about equally in either location with the phrase, then the phrase may not have become some kind of term of art. However, we never found a single example of “Misdemeanors and high Crimes” or “high Misdemeanors and Crimes.”¹²⁶ This is further evidence the Constitution was adopting a British term of art that had perhaps taken on a single linguistic meaning.

Next, we looked to see what other nouns may follow “high Crime(s) and.” If “misdemeanors” was just one of numerous nouns that appeared at the end of this multinomial, then the Constitution’s specific wording may not have a specialized meaning. Our search revealed 220 instances of “high Crime(s) and” NOUN, after removing examples the corpus picked up that followed punctuation indicating a new sentence or clause.¹²⁷

124. Marita Gustafsson, *The Syntactic Features of Binomial Expressions in Legal English*, 4 TEXT & TALK: AN INTERDISC. J. OF LANGUAGE, DISCOURSE, & COMMUN STUD. 125 (1984).

125. Lehto, *supra* note 122, at 261. See generally VIJAY KUMAR BHATIA, *ANALYSING GENRE: LANGUAGE USE IN PROFESSIONAL SETTINGS* (1993) (implementing genre analysis as a means to analyze the unique aspects of legal writing).

126. We did find instances of the term “high misdemeanors,” but neither the words “crime(s)” nor “impeach/ed/ment” were collocates. *COEME*, *supra* note 114, <https://lawcorpus.byu.edu/byucoeme/concordances;q=high%2520crime%2520and;collocate=%252Fn;left=0;right=1/compare/byucoeme/concordances;q=high%2520crime%2520and;collocate=malefice%252Fn;left=0;right=1> [<https://perma.cc/PDL2-6Y93>].

127. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522high%2520crimes%2520and%2522%3B%2522high%2520crime%2520and%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource> [<https://perma.cc/SDN5-Z8VA>].

TABLE 1. Nouns Following the Phrase *High Crime(s) and*

Misdemeanor(s) ^a	184 (83.6%)
Offences	21 (9.5%)
Treasons ^b	11 (5.0%)
Provocation ^c	2 (0.9%)
Impeachments	1 (0.5%)
Malefice ^d	1 (0.5%)

Notes: ^a This was spelled numerous ways: misdemeanors, mifdemeanors, mifdemeanours, misdemeanours, mifdeameanours, mifdemeaners, and so forth. This also included instances where the word was accidentally split into two by the text reading software that generate the files, resulting in “mis” or the like. When you click on it, you see that it’s actually the word mis-demeanor.

^b This was spelled treafons or treasons.

^c This was not in the context of impeachment, but the context of religion: casting out priests and replacing them “is objected against Jeroboam by Abijah as a very high crime, and provocation against God.” See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522a%2520very%2520high%2520crime%252C%2520and%2520provocation%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.A91192;position=51214;matchTokenCount=7> [<https://perma.cc/WH66-BUGW>].

^d Appears to be in a religious context, or at least a religion-infused discussion. See *id.*

These findings added further weight to the conclusion that *high crime(s) and misdemeanor(s)* is a term of art, given that *misdemeanor(s)* is the predominant noun following *high crime(s) and*, doing so over eighty percent of the time.

Turning to collocate analysis, we looked at the twenty most common words within six words of the phrase *high crime(s) and*.¹²⁸

128. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522high%2520crimes%2520and%2522%3B%2522high%2520crime%2520and%2522;left=6;right=6;sort=collocationalFrequencyRight%253ADESC;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore> [<https://perma.cc/7CZE-WE28>].

TABLE 2. Top Collocates Within Six Words of *High Crime(s) and*

<i>Rank</i>	<i>Collocate</i>	<i>N</i>	<i>Rank</i>	<i>Collocate</i>	<i>N</i>
1.	Misdemeanor(s)	171	12.	Charge	19
2.	Treason(s)	80	13.	Conviction	18
3.	Other	65	14.	Divers	17
4.	Impeach(ed/ment)	50	...	Article(s)	17
5.	He/Him	42	16.	Parliament	16
6.	Against	41	17.	Mr.	12
7.	High	34	...	People	12
8.	His	30	...	Read	12
9.	Bribery	22	20.	England	11
10.	Offences	21	...	Guilty	11
11.	Commons	20	...	House	11

These collocates reflect an impeachment-heavy meaning associated with the phrase *high crime(s) and*. Words like *impeach*, *article(s)*, *against*, *charge*, *conviction* and *guilty* predominate, as well as words reflecting the body responsible for impeachment: *Commons*, *House*, and *Parliament*. In fact, there is not much evidence of any other meaning to the term.

Finally, as far as the collocate analysis goes, we sought to see what other “crimes” were listed in the same semantic environment (within six words to the left) of the phrase *other high crimes*. After all, *other high crimes* is a general catchall that should follow a specific list (even if just one) of high crimes. And this type of phrasing implicates a legal rule of construction—*ejusdem generis*, wherein “general words follow specific words in a [legal document’s] enumeration.”¹²⁹ In such a scenario, “the general words are construed to embrace only objects similar in nature to those objects

129. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (internal quotation marks omitted) (citations omitted).

enumerated by the preceding specific words.”¹³⁰ We found eight specific *high crimes*, though some were rather rare and actually come from American usage:

TABLE 3. Other Crimes Listed Within Six Words to the Left of *Other High Crime(s)*

<i>Crime</i>	<i>Number</i>
Treason	93
Bribery	24
Forgery	6
Felony	3
Perjury	3
Trespass	2
Contempt	2
Murder	1

The two crimes the Founders chose to list in the Constitution as specific instances of impeachable high crimes—treason and bribery—were the two crimes most associated with *other high crime(s)* in British English. Those two make up about eighty-seven percent of the times a specific crime was listed near *other high crime(s)*. We note that treason was sometimes called *high treason*, which is merely our current understanding of treason,¹³¹ but is contrasted with *petty* or *petit treason*: the “[m]urder of one’s employer or husband.”¹³² A similar pattern of *high* and *petty*¹³³ occurs in relation to crimes in British English. For instance, the collocates of *high crime(s)* differ significantly from the collocates of *petty crime(s)*, with the latter showing no indication of any linguistic connection to impeachment, as shown in Table 4.

130. *Id.*

131. See *Treason*, BLACK’S LAW DICTIONARY (11th ed. 2019) (noting that treason—“[t]he offense of attempting to overthrow the government of the state to which one owes allegiance, either by making war against the state or by materially supporting its enemies”—is “[a]lso termed *high treason*”).

132. See *Petty Treason*, BLACK’S LAW DICTIONARY (11th ed. 2019).

133. COEME records fifty-four instances of the term *petty crime(s)*. COEME, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522petty%2520crime%2522%3B%2522petty%2520crimes%2522;left=6;right=6;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource> [https://perma.cc/A4DB-JXT9].

TABLE 4. Top Fifteen Collocates in COEME of *High Crime(s)* Versus *Petty Crime(s)*

<i>High Crime(s) Collocates</i>	<i>N</i>	<i>Petty Crime(s) Collocates</i>	<i>N</i>
Misdemeanor(s)	165	Number	10
Treason(s)	141	Their	9
Other	109	Great	7
Against	81	Advantage	6
He/Him	78	Committed	6
High	62	His	6
Impeach(ed)/ment	51	Offspring	6
Charge	47	Poverty	6
His	42	We	6
They	32	Distress	6
Bribery	27	They	5
Offenses	27	Adultery	4
Guilty	25	Murder	4
England	23	Rout	3
Conviction	20	Tax	3

It would seem, then, that *high crimes* were to be distinguished from *petty crimes*, thus excising the latter from consideration for impeachment. What is more, one might think that *misdemeanor(s)* would be a more common collocate of *petty crime(s)* than with *high crime(s)*, but *misdemeanor(s)* never appears within six words of *petty crime(s)* in COEME out of over 200 possible collocates of that term.¹³⁴ This seems further evidence that *high crime(s)* and *misdemeanor(s)* is a term of arm rather than independently referring to *high crimes* and *misdemeanors*.

Additionally, the few rare specific crimes (other than treason and bribery) found to be collocates to the left of *other high crime(s)* are even rarer in British English than a first glance shows. For example, of the six instances of *forgery*, there was only one unique example of it in British

134. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522petty%2520crime%2522%3B%2522petty%2520crimes%2522;left=6;right=6;sort=collocationalFrequency%3Bcollocate;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore> [https://perma.cc/HC9N-UV57].

English (one was a duplicate and the other four were the same example from American English).¹³⁵ All three of the *perjury* examples were duplicates of one instance of American English (the same one as for *forgery*: a state constitution).¹³⁶ The two instances of *trespass* were just one unique example (the same example that produced the one British forgery example).¹³⁷ Likewise, the two instances of *contempt* were just one unique example (the same example that produced the one British *forgery* and *trespass* example).¹³⁸ Finally, the example with *murder*¹³⁹ is also the same one that has one of the three examples of *felony*, the other two examples coming from the previous example that included *forgery*, *trespass*, and *contempt*. Thus, we could only find two British examples in COEME that listed any other specific crime, outside of *treason* and *bribery*. This is telling, especially given that the British practice of impeachment was much broader than that enacted in our Constitution, as private citizens could be impeached for purely

135. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522other%2520high%2520crime%2522%3B%2522other%2520high%2520crimes%2522;left=6;right=6;sort=collocationalFrequency%3Bcollocate;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore/details;cq=forgery> [https://perma.cc/3NSQ-ZBTZ].

136. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522other%2520high%2520crime%2522%3B%2522other%2520high%2520crimes%2522;left=6;right=6;sort=collocationalFrequency%253ADESC;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore/details;cq=perjury> [https://perma.cc/XR7T-BVQE].

137. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522other%2520high%2520crime%2522%3B%2522other%2520high%2520crimes%2522;left=6;right=6;sort=collocate%253ADESC;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore/details;cq=tre%C5%BFpa%C5%BFs> [https://perma.cc/MHG4-YKS4]; *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522other%2520high%2520crime%2522%3B%2522other%2520high%2520crimes%2522;left=6;right=6;sort=collocate%253ADESC;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore/details;cq=trespass> [https://perma.cc/2NRH-HJJ7].

138. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522other%2520high%2520crime%2522%3B%2522other%2520high%2520crimes%2522;left=6;right=6;sort=collocate%253AASC;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore/details;cq=contempt> [https://perma.cc/2DE3-7FS3].

139. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/collocates;q=%2522other%2520high%2520crime%2522%3B%2522other%2520high%2520crimes%2522;left=6;right=6;sort=collocate%253ADESC;field=collocate%3BcollocationalFrequency%3BcollocationalFrequencyLeft%3BcollocationalFrequencyRight%3BdeltaP%3BzScore/details;cq=murder> [https://perma.cc/U693-BTSR].

criminal conduct before Parliament.¹⁴⁰ And executed.¹⁴¹ Very few crimes, then, appear to have been grounds for impeachment in the British tradition.

Besides this more quantitative collocate or cluster analysis, we also delved qualitatively into the results of several searches. We examined actual instances of the term *high crime(s) and misdemeanor(s)*. We found various slightly different formulations of the list of impeachable offenses, but none that indicated a difference in meaning:

“High Treason, and other high Crimes, Misdemeanors and Offences”¹⁴²

“high Crimes and Misdemeanors, contrary to the Kings Prerogative, the Fundamental Laws of the Land, the Rights of Parliament, the Property and Liberty of the Subject; and matters tending to sedition, and of dangerous consequence”¹⁴³

“Treason, and other high Crimes and Misdemeanors”¹⁴⁴

“High Treason, and diverse high Crimes and Misdemeanors”¹⁴⁵

140. For instance, one Dr. H. Sacheverel was impeached by the House of Commons for publishing two sermons that the House deemed “scandalous and seditious libels.” See 1 JOHN BROWN, A COMPENDIOUS HISTORY OF THE BRITISH CHURCHES IN ENGLAND, SCOTLAND, IRELAND, AND AMERICA 290 (Glasgow, John Bryce 1784); see also *COEME*, supra note 108, [https://perma.cc/8VGS-7UQ7](https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522scandalous%2520and%2520seditious%2520libels%2522%2520;left=6;right=6;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ecco.K124952.000;position=105771;matchTokenCount=4)].

141. See *COEME*, supra note 108, [https://perma.cc/PPC2-8SP2](https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522Duncan%2520earl%2520of%2520Lennox%2520was%2520arrested%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ecco.K113361.000;position=407688;matchTokenCount=6)] (“Some time after king James I. returned from England, Duncan earl of Lennox was arrested at the king’s instance, was incarcerated in the castle of Edinburgh, and from thence carried to the castle of Stirling, where he was accused, not of treason, but of high crimes and misdemeanors; of which, by the verdict of an assize, he was found guilty, and condemned to lose his head; which sentence was executed upon him at Stirling, Fordan, vol. II . p. 483 . in May 1425, when he was about eighty years old.”).

142. See *COEME*, supra note 108, [https://perma.cc/6PLE-ZCBL](https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522high%2520treason%252C%2520and%2520other%2520high%2520crimes%252C%2520misdemeanors%2520and%2520offences%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ebo.A47831;position=23374;matchTokenCount=10850)].

143. See *COEME*, supra note 108, [https://perma.cc/7PRJ-VETL](https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522misdemeanors%252C%2520contrary%2520to%2520the%2520kings%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ebo.A45227;position=38046;matchTokenCount=6)].

144. See *COEME*, supra note 108, [https://perma.cc/SR8Z-BAKZ](https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522treason%252C%2520and%2520other%2520high%2520crimes%2520and%2520misdemeanors%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource)].

145. See *COEME*, supra note 108, [https://perma.cc/AHX3-9J7Q](https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522high%2520treason%252C%2520and%2520diverse%2520high%2520crimes%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ebo.A47831;position=27323;matchTokenCount=7)].

“high treason, and other high crimes and misdemeanors”¹⁴⁶

“divers other high crimes and misdemeanors”¹⁴⁷

A look at the various types of behavior considered to constitute high crimes and misdemeanors further shows not only that this appears to be a term of art, but also that its meaning is, in somewhat circular fashion, whatever is deemed to be impeachable. As to the first point, additional evidence that “high crime(s) and misdemeanor(s)” is a term of art comes from its use outside of the impeachment or indictment setting. For instance, the term was used several times with a religious connotation: “the Apostle himselfe arraigns the Athenians of that high Crime, and misdemeanour of Idolatry upon the account of their sacrificing to an unknown God.”¹⁴⁸ It was also used in a work of fiction to describe the bad behavior of a quarreling lover.¹⁴⁹ And the term was invoked to describe a small child’s abominable conduct toward his nurse.¹⁵⁰ In other words, the term in ordinary parlance

146. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522high%2520treason%252C%2520and%2520other%2520high%2520crimes%2520and%2520misdemeanors%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ecco.K113610.002;position=42953;matchTokenCount=9> [<https://perma.cc/D7NY-3F88>].

147. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522divers%2520other%2520high%2520crimes%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.K023576.000;position=1872;matchTokenCount=4> [<https://perma.cc/2A7K-55SY>].

148. See *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522the%2520athenians%2520of%2520that%2520high%2520crime%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.A57064;position=50169;matchTokenCount=6> [<https://perma.cc/77WS-WDKN>]; see also *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522what%2520an%2520high%2520crime%252C%2520and%2520misdemeanor%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.N04735;position=69206;matchTokenCount=7> [<https://perma.cc/5BBJ-5XAW>] (“What an high Crime, and misdemeanour, must it then be, for any to make Light of [a divine commandment].”); *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522the%2520soul%2520is%2520saved%252C%2520when%2520its%2520high%2520crimes%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.N05135;position=11180;matchTokenCount=9> [<https://perma.cc/2UJ3-VXWF>] (“The Soul is saved, when its high Crimes, and Misdemeanors, are no longer imputed, or reckoned to it, but her Guilt is cancelled, and her Iniquity is taken away.”).

149. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522I%2520shall%2520not%2520write%2520to%2520you%2520again%2520till%2520I%2520can%2520inform%2520you%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ecco.K107078.002;position=25024;matchTokenCount=12> [<https://perma.cc/FSG7-K688>] (“I shall not write to you again till I can inform you how matters are accommodated between Charles and Eliza. I AM sure my dear Emily will be full of impatience to know how our lovers quarrel has ended; why, as all love quarrels do end; in an increased affection for each other. As I foretold, she signed an act of oblivion, as soon as he could assume resolution enough to ask it, which was not for two days, such a just sense had he of his high crimes and misdemeanors. I am provoked that she could think more lightly of them than he did . . .”).

150. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522I%2520defy%2520you%2520to%2520guess%2520in%2520a%2520twelve%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ecco.K101669.001;position=10972;matchTokenCount=8> [<https://perma.cc/3HB8-7BEB>] (“I defy you to guess in a twelve-month the high crime and misdemeanour by which the infant-culp[r]it had excited the anger of his nurse[.]”).

appears to be used as a synonym for doing something rather terrible but not necessarily criminal.

Turning to the context of Parliament, various behaviors were viewed as qualifying for the epithet of “high crimes and misdemeanors.” For example, the “commons” found there was “sufficient matter to impeach the Duke of Leeds of high crimes and misdemeanours” for bribery (five thousand pounds “were traced to . . . the Duke”).¹⁵¹ Several bishops were

impeached by the Knights, Citizens and Burgesses of the Commons House of Parliament, for several high Crimes and Misdemeanors, contrary to the Kings Prerogative, the Fundamental Laws of the Land, the Rights of Parliament, the Property and Liberty of the Subject; and matters tending to sedition, and of dangerous consequence.¹⁵²

Sir Edward Herbert, then Attorney General, was impeached for introducing articles of high treason against several members of Parliament, which was described as “intending & endeavouring thereby, falsely, unlawfully, and maliciously to deprive the said houses of their said severall Members, and to take away their lives, estates, and good names,” and thus was conduct

tending to sedition, and to the utter subversion of the fundamentall Rights and being of Parliament, the Liberty of Subjects, and to the great scandall and dishonour of his Majesty and his Government, and were and are contrarie to the oath of the said Attorney General, and to the great trust reposed in him by his Majesty: and contrary to the Lawes of this Realm, and a great derogation to his Majesties Royall Crown and Dignity.¹⁵³

The House of Commons “impeach[ed] the chancellor Thomas, earl of Macclesfield, at the bar of the house of lords, for high crimes and misdemeanors” because “many abuses had crept into the court of chancery, which either impeded justice, or rendered it venal,” and the Earl was convicted of “fraudulent practices.”¹⁵⁴ “Articles of Impeachment of High

151. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522sufficient%2520matter%2520to%2520impeach%2520the%2520duke%2520of%2520leeds%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=ecco.K056324.002;position=32428;matchTokenCount=8> [https://perma.cc/34KD-RBPD].

152. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522impeached%2520by%2520the%2520knights%2520and%2520burgesses%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.A45227;position=38026;matchTokenCount=8> [https://perma.cc/YX4S-UAXY].

153. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522tending%2520to%2520sedition%2520and%2520to%2520the%2520utter%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.A50287;position=1655;matchTokenCount=8> [https://perma.cc/8YLG-GQ92].

154. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522the%2520chancellor%2520thomas%2520earl%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.K124952.000;position=109675;matchTokenCount=5> [https://perma.cc/FWY3-5QGJ].

Treason, and other High Crimes, Misdemeanors, and Offences, against Thomas Earl of Danby, Lord High-Treasurer of England” were delivered for having “wasted the King’s Treasure, by issuing out of His Majesty’s Exchequer, and several Branches of his Revenue, divers great Sums of Money for unnecessary Pensions, and secret Services”; “removed two of His Majesty’s Commissioners of that part of the Revenue, for refusing to consent to such his unwarrantable Actings”; and “by indirect Means procur’d from His Majesty for himself divers Considerable Gifts and Grants of Inheritance of the Ancient Revenue of the Crown.”¹⁵⁵ In short, the aforementioned examples are actions that can be characterized, if they are not explicitly labeled, as bribery, treason, sedition, and corruption. Some, perhaps, are merely political in nature, such as the charges against Attorney General Herbert. Others may also violate criminal laws. But they are not minor charges of a broad swath of criminal conduct.¹⁵⁶

In conclusion, the analysis of COEME appears to show that “high Crimes and Misdemeanors” was a term of art in the context of British impeachment. It was associated only with bribery, treason, and similar conduct that harmed the state, and at times appeared to really just mean that conduct which is serious enough to be impeachable. By choosing to use these specific terms laden with a few centuries of meaning, the Founders would have been importing this understanding into the Constitution, barring any explicit alterations—such as limiting the type of punishment that could be imposed upon conviction after impeachment—they may have been making to British understanding and practice.

C. THE DRAFTING OF THE IMPEACHMENT CLAUSE

Next, to provide additional historical context to these words, we attempt to recreate the understanding that those who ratified the Constitution would have held about impeachment. At the time of the Philadelphia Convention, the delegates would have had experience with the British practice and the impeachment mechanisms of the state constitutions. As already noted, the Framers drew the concept and language of impeachment directly from Great Britain, where it had existed for several centuries, but modified it to suit America’s unique constitutional setting. Impeachment held importance at the time of the framing because Great Britain was still evolving from the Crown-

155. *COEME*, *supra* note 108, <https://lawcorpus.byu.edu/byucoeme/concordances;q=%2522by%2520indirect%2520means%2520procur'd%2522;field=concordance%3BtextId%3Byear%3Bgenre%3Bsource/details;textId=eebo.A37160;position=83997;matchTokenCount=5> [https://perma.cc/FF6P-ZMN8].

156. The British also appeared to use the term “high crimes and misdemeanors” in the context of indicting citizens for crimes, but that was not the impeachment context. *See* 1 BROWN, *supra* note 140, at 199, 290.

dominated system of past centuries into the parliamentary supremacy of today. The monarch, rather than the leader of the majority party, appointed the ministers who executed national policy. But British law had no formal means to hold an unfit king or queen accountable. Instead, Parliament could oppose Crown policies by impeaching and removing the monarch's ministers, without whom governing would prove difficult or impossible. Parliament could impeach for offenses that did not strictly violate the criminal law but could amount to what the Framers would later describe as political offenses against the people or nation or even "mal-administration."¹⁵⁷ Unlike the American system, however, British impeachment had become a criminal process. Parliament held a criminal trial and could impose a criminal punishment, including imprisonment and ultimately death.¹⁵⁸

While the newly independent American states kept impeachment, they moderated its reach. Even though the states created constitutions that gave the legislature far greater powers, they did not do away completely with the separation between the executive and legislative branches. Because the executive did not simply represent the majority in the legislature, as in modern parliamentary systems, the assemblies wished to retain some way to remove executive officers. But the states generally limited impeachment to executive officers and only punished them with removal. Significantly, those constitutions did not limit impeachment to criminal acts while in office, as with the British practice.¹⁵⁹ At the same time, these states did not generally agree on a broader "other high Crimes and Misdemeanors." The leading models at the Philadelphia Convention, the constitutions of New York and Massachusetts, included policy as well as crime in the definition of impeachable conduct. In the former, the legislature could impeach for "mal and corrupt conduct" in office, while in the latter, the legislature could impeach "for misconduct and maladministration."¹⁶⁰

These precedents inspired the Constitutional Convention. While the first proposals for the Constitution, the Virginia and New Jersey Plans, differed on whether Congress should represent the population or the states, they both agreed that the judiciary would have held the power to impeach

157. See generally Cass R. Sunstein, *Impeachment: A Citizen's Guide* 16–33 (2017).

158. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *244.

159. See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805*, at 96 (1974).

160. *Constitutional Convention. Plan of Government*, [18 June 1787], NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-04-02-0099> [<https://perma.cc/BY6N-QJWW>]. See generally William Lawrence, *The Law of Impeachment*, 15 AM. L REG. 641 (1867).

federal officers.¹⁶¹ Interestingly, the New Jersey Plan created a special process for removal of the President by Congress upon the request of a majority of state governors.¹⁶² Neither plan, however, set out a standard for the offenses. Alexander Hamilton, whose own proposal for the Constitution merely provoked discussion, set out a definition: “The Governor, Senators, and all officers of the United States [were] to be liable to impeachment for mal[administration] and corrupt conduct”¹⁶³ The delegates started working on draft language that allowed the President “to be removable on impeachment and conviction [for] malpractice or neglect of duty.”¹⁶⁴

On July 20, 1787, the Convention specifically debated presidential impeachment. Some delegates opposed impeachment altogether because the President would already have the incentive to seek approval from the people by reelection. “If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected,” said William Davie of North Carolina.¹⁶⁵ “He considered this as an essential security for the good behavior of the Executive.”¹⁶⁶ Gouverneur Morris of New York argued further that reelection would allow the people to decide whether to remove the President: “In case he should be re-elected, that will be sufficient proof of his innocence.”¹⁶⁷ Rufus King of Massachusetts agreed that the President, like the members of Congress, would fall subject to trial by the electorate at every election: “Like them therefore, he ought to be subject to no intermediate trial, by impeachment.”¹⁶⁸

On the cost side of the ledger, delegates worried that impeachment would clip the wings of the new office of the Presidency that they were still designing. Morris warned that impeachment would undermine the independence of the new executive, whose vigor would give energy to the new government. If the Constitution vested the power to remove the President in another branch of government, it would “render the Executive dependent on those who are to impeach.”¹⁶⁹ Charles Pinckney of South

161. Notes of James Madison (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15, 21–22 (Max Farrand ed., 1911) (Virginia Plan); Notes of James Madison (June 15, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 242, 244 (New Jersey Plan).

162. Notes of James Madison (June 15, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 161, at 242, 244.

163. Notes of James Madison (June 18, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 161, at 282, 292.

164. Notes of James Madison (July 20, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 161, at 63, 64.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 67.

169. *Id.* at 65.

Carolina agreed that the legislature would hold impeachment “as a rod over the Executive” and “effectually destroy his independence.”¹⁷⁰ King worried that impeachment by Congress would “be destructive of his independence and of the principles of the Constitution.” King counted on “the vigor of the Executive as a great security for the public liberties.”¹⁷¹

A majority of the delegates, however, believed the Constitution should retain a mechanism to remove a President in midstream. George Mason responded to Morris: “When great crimes were committed he was for punishing the principal as well as the Coadjutors.” He rhetorically asked, “Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?”¹⁷² Mason raised the prospect of a President who used bribery to secure his election in the first place as a case for impeachment. Benjamin Franklin worried that without impeachment, opponents would resort to worse, such as assassination, to remove “obnoxious” executives. Impeachment would provide, he predicted, “for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.”¹⁷³

In advocating for impeachment, James Madison argued for grounds that went beyond criminal conduct. “[S]ome provision should be made for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate,” he declared.¹⁷⁴ He did not believe that coming up for election every four years would provide enough of a safeguard. “He might lose his capacity after his appointment,” Madison worried (seemingly foreshadowing the Constitution’s Twenty-Fifth amendment).¹⁷⁵ Or worse yet, “[h]e might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers.”¹⁷⁶ Edmund Randolph supported his fellow Virginian because “[t]he Executive will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands.”¹⁷⁷ Without impeachment, he predicted, the people would have to resort to “tumults [and] insurrections” to turn out such a President.¹⁷⁸

Madison’s and Randolph’s concerns about interference by a foreign power seemed to win the day. By the end of that day’s debate, Morris

170. *Id.* at 66.

171. *Id.* at 67.

172. *Id.* at 65.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 65–66.

177. *Id.* at 67.

178. *Id.*

switched sides and declared that he favored impeachment. Unlike a hereditary monarch, the President “may be bribed by a greater interest to betray his trust,” Morris observed. “[N]o one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard [against] it by displacing him.”¹⁷⁹ Even the British king had gone on the payroll of Louis XIV. “The Executive ought therefore to be impeachable for treachery,” Morris agreed.¹⁸⁰ “Corrupting his electors, and incapacity were other causes of impeachment.” After Morris spoke, the Convention approved impeachment of the President by eight states to two.¹⁸¹

As the Constitution moved through different drafts during the rest of the summer of 1787, the definition of impeachable offenses changed. On August 20, 1787, the Committee of Detail limited the grounds for impeachment to “neglect of duty, malversation, or corruption.”¹⁸² By September 4, a second committee proposed to limit the offenses even further to “treason or bribery.”¹⁸³ This provoked a reaction from Mason, who argued that “[t]reason as defined in the Constitution will not reach many great and dangerous offenses.”¹⁸⁴ He then moved to add “or maladministration” to treason and bribery, but Madison responded that “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate,” and Morris argued that “[a]n election of every four years will prevent maladministration.” Mason withdrew his amendment and proposed instead the now familiar “other high Crimes and Misdemeanors” in addition to treason and bribery, which passed by eight states to three.¹⁸⁵ Impeachment scholar Michael J. Gerhardt reads Mason as believing “other high Crimes and Misdemeanors” to merely amount to a restatement of “maladministration.”¹⁸⁶ But Yale Law Professor Charles L. Black, Jr. just as easily concludes that Mason responded to Madison and Morris by raising the standard for impeachment above “maladministration.”¹⁸⁷

One other important debate occurred on impeachment at this time. By

179. *Id.* at 68.

180. *Id.* at 69.

181. *Id.*

182. Journal (August 20, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 334, 337 (Max Farrand ed., 1911).

183. Journal (September 4, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 182, at 493, 495.

184. Notes of James Madison (September 8, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 182, at 547, 550.

185. *Id.*

186. MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 9 (3d ed. 2019).

187. BLACK & BOBBITT, *supra* note 78, at 27–28.

the end of the first debates, it appeared that the Convention had not come to a final view on where to locate the trial of impeachment: the Senate or the Supreme Court. When earlier drafts of the Constitution had given the House or Senate the right to select the President, delegates worried about giving Congress the power to both appoint and remove the President. By the September 4 debate, the creation of an Electoral College to choose a President made it easier to vest the trial role in the Senate. Nevertheless, Madison proposed shifting the trial to the Supreme Court because Congress would use the lower standard of impeachment to control the President. He “objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor.”¹⁸⁸ Madison complained that “the President under these circumstances was made improperly dependent.”¹⁸⁹ Pinckney agreed. “If he opposes a favorite law,” he argued, “the two Houses will combine against him, and under the influence of heat and action throw him out of office.”¹⁹⁰ A majority of delegates, however, thought it better to remove the Supreme Court from the process, which could become “warped or corrupted” by the political pressures. While “[h]e was [against] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger,” Morris argued that the Senate was too numerous to corrupt, would live up to their oaths to say whether “the President was guilty of crimes or facts,” and that a guilty President “can be turned out” every four years by election.¹⁹¹ The Convention voted down Madison’s proposal by nine states to two, and then it approved the Impeachment Clauses we have today by ten states to one.¹⁹²

D. THE FEDERALIST

While the Convention transformed the British concept of impeachment into an American mechanism, it did not have the authority to adopt the Constitution on behalf of the United States. It could only propose a new governing document, and even that on tenuous grounds, as the Congress had only given it the job of developing amendments to the Articles of Confederation. The critical act of adopting the Constitution fell to the state ratifying conventions. The premier source for recovering the understanding held during ratification comes from *The Federalist*, which set forth the most articulate arguments in favor of ratification and served as the basic talking

188. Notes of James Madison (September 8, 1787), *supra* note 184, at 551.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 551–52.

points used by supporters of the Constitution throughout the states.¹⁹³ *The Federalist* holds more importance for recapturing the original understanding than the record of the Philadelphia debates. While the *Records* remained secret until James Madison's death in 1836,¹⁹⁴ and hence could not have influenced the ratification process, *The Federalist* took the form of individual pamphlets that explained the Constitution's terms to the delegates of the key state conventions.

In *Federalist No. 65*, Alexander Hamilton explained the need for impeachment and the choice of the Senate as the court. In passing, he addressed the meaning of "high Crimes and Misdemeanors." Impeachment exists for "offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust," Hamilton explained. "They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."¹⁹⁵ To Hamilton, impeachable offenses went far beyond merely violating federal law itself but had to rise to the level of a harm to the nation. Rather than trying crimes, impeachment functioned "as a bridle in the hands of the legislative body upon the executive servants of the government."¹⁹⁶

Impeachment, Hamilton warned, was inherently political. Such cases "will seldom fail to agitate the passions of the whole community" and enlist factions and "all their animosities, partialities, influence, and influence" on both sides. While there was no perfect place to locate such a politically fraught role, Hamilton argued that the Senate would have large enough numbers to reduce the influence of politics. "The awful discretion which a court of impeachments must necessarily have, to doom to honour or to infamy the most confidential and the most distinguished characters of the community," Hamilton wrote, "forbids the commitment of the trust to a small number of persons."¹⁹⁷ The Constitution wisely chose not the vest the trial in the courts, Hamilton further explained, because judges could well see a disgraced President in their courts after his removal, and they might also engage in self-dealing if they too came up for impeachment.

In addition to the standard for presidential removal, Hamilton addressed two further issues that bear directly on the Trump controversies. The Mueller

193. See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 828 (2007).

194. SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776–2014*, at 12 (2015).

195. THE FEDERALIST NO. 65, *supra* note 63, at 338.

196. *Id.* at 339.

197. *Id.*

investigation turned on whether the Justice Department could prosecute a sitting President, or whether it had to defer to the impeachment process. As already suggested in *Federalist 65*, Hamilton explained that judges should not sit on impeachment trials because they would also sit on any subsequent criminal case. “After having been sentenced to a perpetual ostracism from the esteem and confidence, and honours and emoluments of his country, [the President] will still be liable to prosecution and punishment in the ordinary course of law,” Hamilton wrote. “Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen, in one trial, should, in another trial, for the same offence, be also the disposers of his life and his fortune?”¹⁹⁸ Judges would find a strong incentive to uphold the earlier impeachment verdict and so would effectively undermine the Constitution’s limit on impeachment only to removal from office. “The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present, and disqualification for a future office,” Hamilton observed.¹⁹⁹ In comparing the British king with the American executive in *Federalist No. 69*, Hamilton again made clear that criminal prosecution could only follow an impeachment: “The president of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.”²⁰⁰ While they did not explain why, the Federalists could not have made themselves clearer that impeachment would come first, and criminal proceedings would only come second.

A second issue is the criticism that impeachment provides no practical recourse to President Trump because of its political nature. House Democratic leaders, for example, argued that impeaching President Trump would prove futile because of the Republican majority in the Senate, which could have effectively blocked any conviction.²⁰¹ Representative Steny Hoyer told CNN that pursuing impeachment of President Trump following the release of the Mueller report was not “worthwhile at this point.”²⁰² Anti-

198. *Id.* at 340.

199. *Id.*

200. THE FEDERALIST NO. 69, at 356 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

201. Felicia Sonmez, *House Democratic Leaders Face Pressure to Impeach Trump Post-Mueller Hearings*, WASH. POST (July 31, 2019, 6:34 PM), https://www.washingtonpost.com/politics/house-democratic-leaders-face-pressure-to-impeach-trump-post-mueller-hearings/2019/07/30/97d531da-b2e8-11e9-8f6c-7828e68cb15f_story.html [<https://perma.cc/N2XY-V3D7>].

202. Dana Bash & Clare Foran, *No. 2 House Democrat: Impeachment ‘Not Worthwhile at this Point,’* CNN (Apr. 18, 2019, 7:48 PM), <https://www.cnn.com/2019/04/18/politics/impeachment-democrats-mueller-report-trump/index.html> [<https://perma.cc/865V-WL9D>].

Federalists made a somewhat similar attack on the impeachment mechanism for excessively increasing the power of Congress generally, and that of the Senate in particular. Vesting impeachment in a political body, rather than a court, could allow the legislature to abuse its power to control the executive. In a somewhat contradictory argument, other Anti-Federalists argued that the Senate could use its power to shield the officials that it had confirmed or to protect Presidents with whom it had conspired. Answering the first critique, Hamilton argued that the division of the power of removal between the House and Senate would make it difficult for Congress to exploit its impeachment power for political gain. “[A]ssigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches,” Hamilton explained in *Federalist No. 66*.²⁰³ In other words, the political nature of the House and Senate would prevent impeachment abuse, rather than allow Presidents to escape scot-free.

Responding to the second critique, Hamilton argued that the Senate could well protect an administration with which it agreed, but he found it unlikely. He believed that the Senate would only approve the choices of the President for cabinet officers and treaties—and, Hamilton might have added, would not even consent to the decision of the people of the President—and so would not have any political investment in protecting him. The record of human experience, Hamilton observed,

must destroy the supposition, that the senate, who will merely sanction the choice of the executive, should feel a bias, towards the objects of that choice, strong enough to blind them to the evidences of guilt so extraordinary, as to have induced the representatives of the nation to become its accusers.²⁰⁴

Hamilton believed that the Senate would have little incentive to ignore the facts that would justify the impeachment of a cabinet officer or even a President. He pressed the point even further in taking up the possibility that the Senate would never impeach a President for betraying the nation in a treaty to which it would have given its approval earlier. While the two-thirds requirement for treaties made such a prospect difficult to imagine, Hamilton conceded that the same issue would arise if the House cooperated with the President to “sacrific[e] the interests of the society by an unjust and tyrannical act of legislation.”²⁰⁵ Again, Hamilton claimed that Americans

203. THE FEDERALIST NO. 66, at 343 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

204. *Id.* at 348.

205. *Id.* at 346.

could count on the Senators, and “upon their pride, if not upon their virtue,” in order “to punish the abuse of their confidence, or to vindicate their own authority” in response to an abuse of executive power. At the very least, he predicted, Senators would “divert the public resentment from themselves, by a ready sacrifice of the authors of their mismanagement and disgrace.”²⁰⁶ Hamilton believed that the political nature of impeachment might just as easily lead Senators to punish a President to protect their own institutional prerogatives or even personal careers, as well as to shield him.

E. IMPEACHMENT AND THE RATIFICATION DEBATES

Hamilton’s *Federalist* papers justly receive most of the attention because the state ratification debates otherwise devoted little time to the question of presidential removal. Only two state conventions appear to have discussed the question at any length: Virginia and North Carolina. Virginia’s convention might be said to be the most important, as Virginia was perhaps the critical state, along with Massachusetts and New York, which made the Revolution a success. It provided both the philosophical inspiration for the Revolution in Thomas Jefferson’s Declaration of Independence and its realization on the battlefield in the generalship of George Washington. It brought together leading critics of the Constitution who had been prominent figures in the Revolution, such as Patrick Henry and George Mason, and the younger generation of nationalists who would play important roles under the new Constitution, such as James Madison and John Marshall. The Constitution passed by only eighty-nine to seventy-nine in the Virginia convention, which means that *The Federalist* provided crucial representations about the Constitution’s meaning that allowed for ratification by the narrowest of margins. As a result, Virginia provided the ultimate forum for the contest over the Constitution, and its debates over the document’s meaning should take second place only to *The Federalist* itself.²⁰⁷

Supporters of the Constitution promised the Virginia convention that impeachment would encompass more than just crimes. In opening the debates on June 4, 1788, Federalist George Nicholas responded to criticism of the aristocratic nature of the Constitution by arguing that Congress had ample powers to control the executive. The most important power was funding. A second “source of superiority is the power of impeachment.”²⁰⁸

206. *Id.* at 347.

207. Maggs, *supra* note 193, at 835.

208. Address of George Nicholas to the Virginia Ratifying Convention (June 4, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 7, 17 (Jonathan Elliot ed., 2d ed. 1836).

According to Nicholas, “[t]his power must have much greater force in America, where the President himself is personally amenable for his maladministration.”²⁰⁹ Edmund Randolph, Governor of Virginia and the future Attorney General and Secretary of State in the Washington administration, seemed to agree that impeachment covered more than crime. “At the end of four years, [the President] may be turned out of his office,” he said in response to Anti-Federalists who claimed the executive held too much power. “If he misbehaves he may be impeached, and in this case he will never be reelected.”²¹⁰ Later, Randolph observed that impeachment could control presidential behavior of a noncriminal nature: if the President “be honest, he will do what is right; if dishonest, the representatives of the people will have the power of impeaching him.”²¹¹

Anti-Federalists, however, foresaw that Presidents might conspire with senators to betray the public trust to foreign powers and thus escape impeachment. Patrick Henry, the Revolutionary War governor and leading Virginia political figure, suggested that countries might bribe the President and the Senate to give away valuable trading rights or territory by treaty. “Yes, you can impeach [the President] before the Senate,” Henry admitted. But “[a] majority of the Senate may be sharers in the bribe. Will they pronounce him guilty who is in the same predicament with themselves?”²¹² John Tyler, father of the future President, agreed that impeachment even made the Senate “too dangerous” when combined with the treaty power.²¹³ George Mason, a delegate to the Philadelphia Convention who refused to sign the Constitution, agreed that senators would be a serious problem because they would not try themselves for treaties that resulted from bribery or treason. “After a treaty manifestly repugnant to the interests of the country was made, [Mason] asked how they were to be punished.”²¹⁴ “The senators were to try themselves,” Mason stated. “If a majority of them were guilty of the crime, would they pronounced themselves guilty.”²¹⁵ He argued that the Constitution should create an executive council of ministers to prevent the Senate from playing this role, and then excusing itself from mistakes. Under the Constitution, he predicted, “The Senate and President will form a

209. *Id.*

210. Address of Edmund Randolph to the Virginia Ratifying Convention (June 10, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 194, 201.

211. Debates of the Virginia Ratifying Convention (June 14, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 365, 368.

212. Address of Patrick Henry to the Ratifying Convention (June 13, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 351, 355.

213. Debates of the Virginia Ratifying Convention, *supra* note 211, at 365–66.

214. Address of George Mason to the Virginia Ratifying Convention (June 14, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 402.

215. *Id.*

combination that cannot be prevented by the representatives.” Impeachment only allows “the guilty [to] try themselves. The President is tried by his counsellors. He is not removed from office during his trial.”²¹⁶

While a concern that may seem remote today, abuse of the treaty power rose to become one of the most important issues in the Virginia struggle over ratification. A significant delegation from western Virginia, in what would become Kentucky in 1792, held the deciding votes for or against the Constitution. Farmers in this region relied upon the Mississippi River to make their agricultural products available to wider markets on the East Coast and in Europe at low cost. Americans in this region looked upon control of the Mississippi as critical for the expansion of the nation further westward. Anti-Federalists appealed to these delegates by raising the prospect of a treaty that gave up trading and navigation rights in New Orleans, the city that controlled access from the Mississippi to the Gulf of Mexico. In fact, the Continental Congress had almost approved an agreement known as the Jay-Gardoqui Treaty, which would have given up American rights to navigation of the Mississippi in exchange for generous trading privileges with the Spanish Empire that would have benefitted Boston, New York, and Philadelphia. Hence, Anti-Federalists attacked the new Constitution for allowing similar treaties against the national interest, because a willful or corrupt President would negotiate them, and a sectional or bribed Senate would consent to them, without any check by the more populous House of Representatives.²¹⁷

Federalists conceded that in Great Britain, bad treaties provided the most numerous grounds for impeachment. But they argued that Congress had to have more than just disagreement over policy to remove a President. “In England, those subjects which produce impeachments are not opinions,” Randolph said in response to Henry. “No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a wil[l]ful mistake of the heart, or an involuntary fault of the head.”²¹⁸ Madison, however, argued that a President who conspired with the smallest states to approve a treaty against the larger national interest could fall subject to impeachment. “Were the President to commit any[]thing

216. Address of George Mason to the Virginia Ratifying Convention (June 18, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 493–94.

217. For discussion of the importance of the treaty power in the Virginia debate, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 2061–68 (1999). See also Lance Banning, *Virginia: Sectionalism and the General Good*, in RATIFYING THE CONSTITUTION 261–69 (Michael A. Gillespie & Michael Lienesch eds., 1989); FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 259, 268, 366–67 (1958).

218. Address of Edmund Randolph to the Virginia Ratifying Convention (June 14, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 400–01.

so atrocious as to summon only a few states [to approve a treaty], he would be impeached and convicted,” Madison declared, “as a majority of the states would be affected by his misdemeanor.”²¹⁹ Nicholas added that the British Parliament could use impeachment “for the punishment of such ministers as, from criminal motives, advise or conclude any treaty which shall afterwards be judged to derogate from the honor and interest of the nation.”²²⁰

Randolph further argued that if a President received a bribe for a treaty, he would be “receiving emoluments from foreign powers. If discovered, he may be impeached. If he be not impeached, he may be displaced at the end of the four years.”²²¹ Madison added that impeachment could extend to abuse of the pardon power. “If the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty,” Madison declared in response to Mason.²²²

Henry remained unconvinced. He responded that the British system could guard against abuse of the treaty power because Parliament could impeach ministers, who did not necessarily sit in the legislature and instead represented the Crown. “But I beg gentlemen to consider the American impeachment,” Henry declared. “What is it? It is a mere sham—a mere farce.”²²³ It was a farce because the Senate held both the power to consent to a treaty and to conduct impeachment trials, which created an insuperable conflict of interest. “When they do anything derogatory to the honor or interest of their country, they are to try themselves,” Henry said of senators. “Can there be any security where offenders mutually try one another?”²²⁴ Arguing that Henry misunderstood impeachment, Madison claimed that the Constitution would impose a tighter limit on executive abuse of the treaty power in the United States than in England. “Let us compare the responsibility in this government to that of the British government,” Madison began, “[i]f there be an abuse of this royal prerogative, the minister who

219. Debates of the Virginia Ratifying Convention (June 18, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 488, 500.

220. Address of George Nicholas to the Virginia Ratifying Convention (June 18, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 208, at 505–06.

221. Address of Edmund Randolph to the Virginia Ratifying Convention (June 17, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 208, at 452, 486.

222. Address of James Madison to the Virginia Ratifying Convention (June 17, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 208, at 488, 498.

223. Address of Patrick Henry to the Virginia Ratifying Convention (June 18, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 208, at 505, 512.

224. *Id.*

advises him is liable to impeachment.”²²⁵ But not, Madison emphasized, the king himself, only his advisors. “Now, sir, is not the minister of the United States under restraint? Who is the minister? The President himself, who is liable to impeachment. He is responsible in person.”²²⁶ Madison further argued that the election of new senators every two years would render the executive even more vulnerable. The President “may be tried and convicted by the succeeding senators, and the upright senators who were in the Senate before” and were “innocent” of conspiracy with the executive.²²⁷ While Henry failed in his quest to defeat the Constitution, he succeeded in raising enough doubts that the Virginia convention recommended “[t]hat some tribunal other than the Senate be provided for trying impeachments of senators.”²²⁸ But the convention approved the Constitution without seeking any changes to the impeachment procedures for the President.

North Carolina, which ultimately did not ratify the Constitution, raised many of the same Federalist and Anti-Federalist arguments on impeachment. But in the course of the longest debate over impeachment during the ratification, North Carolina’s delegates extensively parsed the meaning of “high Crimes and Misdemeanors.” Anti-Federalists in the state waged war against the impeachment clauses with outlandish hypotheticals, such as the prospect of Congress using impeachment to punish state officials, minor employees, or even private citizens for crimes or even innocent conduct. Or they repeated the arguments of other Anti-Federalists that Senators would never remove a President with whom they conspired in the abuse of the treaty and appointments powers or over legislation. “What can the Senate try him for?” Anti-Federalist leader Samuel Spencer asked, “[f]or doing that which they have advised him to do, and which, without their advice, he would not have done.”²²⁹ He predicted that the Senate would never convict a President “with any effect, or to any purpose, for any misdemeanor in his office, unless it should extend to high treason,” or unless it wished to shift political blame to him.²³⁰

Samuel Johnston, then governor and future U.S. senator, responded by distinguishing between regular crimes and high crimes and misdemeanors.

225. Address of James Madison to the Virginia Ratifying Convention (June 18, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 208, at 505, 516.

226. *Id.*

227. *Id.*

228. Debates of the Virginia Ratifying Convention (June 27, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 208, at 657, 661.

229. Address of Samuel Spencer to the Virginia Ratifying Convention (July 21, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 117 (Jonathan Elliot ed., 2d ed. 1836).

230. *Id.* at 117–18.

“If an officer commits an offence against an individual, he is amenable to the courts of law,” Johnston said.²³¹ “If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial point out for great misdemeanors against the public.”²³² Richard Spaight, a signer of the Constitution and future governor of North Carolina, even suggested that misuse of the military could qualify. Congress “alone had the means of supporting armies, and . . . the President was impeachable if he in any manner abused his trust.”²³³ James Iredell, who would become one of the first Justices of the U.S. Supreme Court, emphasized that impeachment involved the violation of the public trust, rather than simple crime. “If the President does a single act by which the people are prejudiced, he is punishable himself,” Iredell observed in arguing against a British cabinet system.²³⁴ “If he commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit.”²³⁵ Iredell acknowledged that impeachment created a “punishment for crime which it is not easy to describe, but which everyone must be convinced is a high crime and misdemeanor against the government.”²³⁶ Nevertheless, the Constitution had to vest the power in Congress “because the occasion for its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal.”²³⁷ Crimes would not escape punishment; they would just have to wait until after impeachment. “The punishment annexed to this conviction on impeachment can only be removal from office,” Iredell observed. “But the person convicted is further liable to a trial at common law.”²³⁸

Federalists sought to make clear that impeachment went beyond mere mistakes in policy. As in Virginia, Anti-Federalists claimed that the Senate would not remove a President for a treaty to which it had given its advice

231. Address of Samuel Johnston to the Virginia Ratifying Convention (July 21, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 229, at 1, 48.

232. *Id.*

233. Address of Richard Spaight to the Virginia Ratifying Convention (July 21, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 229, at 1, 114.

234. Address of James Iredell to the Virginia Ratifying Convention (July 21, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 229, at 1, 108–09.

235. *Id.* at 109.

236. *Id.* at 113.

237. *Id.*

238. *Id.* at 114.

and consent. Spaight repeated the Federalist argument in Virginia that the Senate could remove a President for a poor treaty. “He may be impeached and punished for giving his consent to a treaty, whereby the interest of the community is manifestly sacrificed,” he told the delegates.²³⁹ Iredell, however, drew a finer line between policy errors and decisions driven by unworthy motives. “[W]hen any man is impeached, it must be for an error of the heart, and not of the head,” he told delegates.²⁴⁰ “God forbid that a man, in any country in the world, should be liable to be punished for want of judgment.”²⁴¹ With regard to treaties specifically, Iredell maintained that if a “treaty should be deemed unwise, or against the interests of the country, yet if nothing could be objected against it but the difference of opinion,” impeachment would not apply.²⁴² He worried that if impeachment reached differences over policy alone, the best leaders would refuse to serve in government and those that did would “act from a principle of fear.”²⁴³ Accordingly, impeachment should only apply to a President “where he had received a bribe, or had acted from some corrupt motive or other.” As an example, Iredell proposed a President “giving false information to the Senate” and with it “induced them to enter into measures injurious to their country,” which the Senate would “not have consented to had the true state of things been disclosed.”²⁴⁴

F. LESSONS FROM THE FOUNDING

While the House has impeached two Presidents, the Senate has not removed any. This practice leaves the Founders’ original design relatively unvarnished. The history of the drafting and ratification of the Constitution leaves some important markers for the current controversies about President Trump.

First, and most important, the Framers believed that the political process should impose the primary restraint on a President. A President intent on bribery, treason, or other high crimes and misdemeanors would need the cooperation of the House and Senate to succeed in his plans, either through funding, legislation, or the approval of treaties and appointees. In such cases, the Framers hoped, the separation of powers would make it difficult for the President to execute any nefarious designs. “[T]he great security against a gradual concentration of the several powers in the same

239. Address of Richard Spaight, *supra* note 233, at 1, 124.

240. Address of James Iredell, *supra* note 234, at 1, 125–26.

241. *Id.* at 126.

242. *Id.*

243. *Id.*

244. *Id.* at 126–27.

department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others,” James Madison wrote in *Federalist No. 51*.²⁴⁵ “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”²⁴⁶ By pursuing their own self-interest, the other branches of government should check any undue aggrandizement of power by the President.

In today’s language, the Framers would expect President Trump’s critics to put up or shut up. Congressional Democrats, of course, can accuse President Trump of violating the Constitution in presidential debates, cable television shows, or newspaper op-ed’s. But this is just cheap talk. A President’s opponents should deploy their own constitutional authority to stop abuses of power. Democrats in the House, for example, can hold oversight hearings and probes into executive misdeeds. They can bring to the public’s attention executive scandals, which voters can consider at the next congressional or presidential elections. Congressional Democrats can go even further and refuse to enact the administration’s legislative agenda. If the Trump administration wants tax cuts, a trade deal with Canada and Mexico, or tougher immigration laws, it must have the cooperation of the House. Speaker Nancy Pelosi can prevent any of these agenda items from becoming reality simply by refusing to schedule a vote on any Trump proposal. House Democrats could go even further. They enjoy the ultimate control over the government, the power of the purse. As Madison argued in *Federalist No. 58*, the “power over the purse, may in fact be regarded as the most compleat and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”²⁴⁷ If House Democrats truly believe that President Trump has violated the Constitution and has committed high crimes and misdemeanors, they can block administration spending priorities or simply refuse to fund the government at all. President Trump’s critics can wield the Constitution’s most effective check on executive power simply by doing nothing at all.

Second, the Founders expected that elections could constrain abusive chief executives.²⁴⁸ The Framers understood that a President still might

245. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

246. *Id.*

247. THE FEDERALIST NO. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961).

248. See JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 25 (1978) (“Whatever the rhetorical uses of the president’s accountability through impeachment, it was recognized practically from the outset that it would be neither an easy nor an expeditious method of removal. The consolation, if there was one, was that the electorate could remove the president at the next election and his misconduct would not have to be endured for any longer than four more years.”).

commit a corrupt act that could escape impeachment. Anti-Federalists made arguments remarkably similar to those made against Senator Majority Leader Mitch McConnell today, even though they did not anticipate that political parties would bind Presidents and senators together. Critics today claim that Senate Republicans will protect President Trump out of political survival, just as Senate Democrats uniformly voted against removing President Clinton two decades before. Alex Castellanos told the Washington Post that “[a]s long as impeachment is a Democratic priority driven by” Nancy Pelosi, “it will be difficult—if not impossible—or Senate Republicans to get on board.”²⁴⁹ But that is nothing new. Critics at the time of the Framing worried that senators might have a political incentive to block impeachment when they had blessed executive conduct, such as consenting to a damaging treaty or confirming a traitor to office. Federalists argued that House impeachment would impose enormous political pressures on senators to try a President in good faith. But even if the Senate failed in its duty, the people would still have their say. By rejecting a President’s campaign for reelection, the people would render their own verdict. While the constitutional amendment limiting Presidents to two terms may mute this judgment, it underscores the faith that the Founders put into the regular political process to constrain executive power.

The Framers’ electoral check reveals the hollowness of the ongoing impeachment investigation by House Democrats. It makes little sense to conduct an impeachment inquiry when the next Presidential election is just months away. House Democrats could claim that the Mueller report missed some vital fact or leaped to an incorrect legal conclusion. They could call all the same witnesses and demand all the same documents as Mueller. But they are unlikely to uncover facts missed by the Mueller team, which had millions of dollars and dozens of experienced prosecutors and investigators. The White House waived executive privilege, ordered administration officials to fully cooperate, and provided millions of pages of documents. President Trump will not extend the same courtesy to a hostile Democratic-led impeachment inquiry. Any serious investigation would only duplicate Mueller’s findings. Instead, House Democrats could say that they have reached a different legal conclusion about Russian collusion or obstruction on the basis of the Mueller report’s facts. But then such a truncated impeachment proceeding should take weeks and could have wrapped up easily in 2019. Conducting an impeachment investigation that stretches into

249. Robert Costa & Philip Rucker, ‘*Out on a Limb*’: Inside the Republican Reckoning over Trump’s Possible Impeachment, WASH. POST (Oct. 6, 2019, 1:55 PM), https://www.washingtonpost.com/politics/out-on-a-limb-inside-the-republican-reckoning-over-trumps-possible-impeachment/2019/10/05/8e2b73c0-e6ef-11e9-b403-f738899982d2_story.html [<https://perma.cc/X23K-WWHN>].

2020 not only creates a wasteful constitutional redundancy, but it seems obviously designed only to produce politically damaging stories about an incumbent President during an election year.

Third, the Framers provided for impeachment should the political process not provide a remedy. But they tried to strike a delicate balance while adapting this British constitutional device to American conditions. They did not want impeachment to become a tool for legislative control of the executive. As had happened in the revolutionary states, Congress could become too dominant due to its control over spending, taxes, and laws. “The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex,” Madison observed in *Federalist No. 48*.²⁵⁰ The Founders sought to give the President independence by providing for his election outside of the legislature, as in a parliamentary system. They deliberately divided the power between the House and Senate to prevent Congress from resorting to impeachment as a tool for political control of the executive. Impeachment would have to represent the views of two bodies elected at different times and representing different constituencies. Members of the House, who represented the immediate passions of the people because of their two-year terms, would have to persuade two-thirds of the Senate, who represented the states. A President need only keep one-third of the Senate, which even then could represent a small fraction of the people (in the 1790 census, the smallest one-third of the states represented a mere 11.7 percent of the population). A supermajority made it almost impossible for Congress to remove a President over mere differences over policy.

Fourth, the Founders remained acutely aware of the possibility of executive wrongdoing. But they created a two-track approach to safeguard against it. They understood that a President might commit a violation of the criminal law. But they believed that prosecutors would have to wait until after a President left office, either willingly or unwillingly, before they could bring their case. While Hamilton and other Federalists did not explain, it seems apparent that a President subject to the criminal law could be dragged from “pillar to post” by lawsuits, as Thomas Jefferson would say during the Burr conspiracy trial.²⁵¹ Expecting the criminal law to restrain a sitting President would prove futile anyway. Cases brought by state officials would run into Supremacy Clause difficulties; federal judges would likely suppress such lawsuits as state interference with federal officials. Cases brought by federal officials would run into the President’s ultimate constitutional control

250. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

251. Letter from Thomas Jefferson to George Hay (June 20, 1807), in THOMAS JEFFERSON, WRITINGS 404 (Merrill Peterson ed., 1984).

over all federal law enforcement. A President could simply order that any charges brought against him be dropped, and if any officials refused to carry out his orders, he could remove them. Impeaching a President for crimes, moreover, would represent something akin to double jeopardy, because it would essentially pre-determine the results of any criminal case against the President after he left office. If the Senate acquitted a President of a criminal case, a federal court would find it difficult to convict, and if the Senate convicted, a judge and jury would have to exercise great fortitude not to convict in a subsequent proceeding.

The second track, impeachment, did not strictly depend on criminal law. While, as Iredell observed, high crimes and misdemeanors might become vague on the margins, it did not simply incorporate all crimes. Impeachment would not cover conduct that amounted to minor crimes or did not involve the performance of executive duties. While such acts might be crimes and misdemeanors, they would not be “high.” This is not to say that impeachable offense could not be crimes themselves. Treason and bribery are both impeachable offenses and crimes. But if “other high crimes and misdemeanors” are to sit at the same level as treason and bribery, they must involve a similar level of corruption or harm to the public interest. When President Bill Clinton’s supporters claimed in his defense that he had only lied about sex, they might have unintentionally appealed to this principle. He may have lied, but it was not about any great matter of state, and so would not have met the standard for an impeachable offense. In such cases, the federal justice system would punish a President for such non-impeachable misdeeds after he left office.

This principle readily disposes of criminal and congressional investigations into President Trump for his alleged payments of “hush money” to cover up past affairs with models. In August 2018, the Trump Organization’s lawyer, Michael Cohen, pled guilty to eight counts of tax evasion, campaign finance violations, and making false financial statements.²⁵² Cohen confessed that he had arranged payments in 2016 of 150,000 dollars and 130,000 dollars to two women “for the principal purpose of influencing [the] election.”²⁵³ According to Cohen, these payments, which violated the federal limits on campaign contributions, came at the direction of then-candidate Trump, which would make him a coconspirator in the crime. As former Federal Elections Commission Chair Bradley Smith

252. Nicole Hong, Rebecca Ballhaus, Rebecca Davis O’Brien & Joe Palazzolo, *Michael Cohen Pleads Guilty, Says Trump Told Him to Pay Off Women*, WALL ST. J. (Aug. 21, 2018, 11:25 PM), <https://www.wsj.com/articles/michael-cohen-to-plead-guilty-to-criminal-charges-1534875978> [https://perma.cc/V5FQ-FAU7].

253. *Id.*

argued, however, the payments would not have violated campaign contributions limits if President Trump would have made the payments even if he had never run for office.²⁵⁴ A candidate's spending on clothes and daily expenses do not qualify as candidate expenditures, even though they might help him or her succeed in a campaign, because the candidate would have spent the money anyway. Given President Trump's known record of extramarital affairs, sadly the hush money payments probably amounted to a regular business expense!

But, more importantly, the payments do not rise to the same level of criminal conduct as treason or bribery. To compare, the 2008 Obama campaign did not disclose the identities of the donors of 2 million dollars and kept 1.3 million dollars in contributions above the legal limits. In 2013, the FEC fined the campaign 375,000 dollars, but the Justice Department did not bring anyone up on criminal charges.²⁵⁵ Even if Cohen and President Trump had conspired to make any illegal campaign expenditures, they should have to pay a fine—albeit a large one—and would suffer no criminal prosecution. Indeed, the Mueller special counsel investigation did not pursue Cohen's claims, which investigators likely believed fell outside its mandate to investigate Russian interference with the 2016 elections. Although the U.S. Attorney's Office for the Southern District of New York elicited the guilty plea from Cohen, it decided to decline any prosecution of President Trump. It goes almost without saying that these violations would not have come near the level of treason and bribery and, hence, would not justify an impeachment inquiry.

On the other hand, the Framers did not understand “other high Crimes and Misdemeanors” to be limited to just a subset of serious crimes. In this sense, impeachment was both narrower and broader than the criminal law. Of course, the impeachment clauses explicitly overlap with the criminal law in cases of treason and bribery. But impeachment punishes offenses against the people, rather than just federal crimes. The Constitutional Convention debates could have supported the opposite reading; when Mason replaced “mal-administration” with “high Crimes and Misdemeanors,” he could have thought that they carried the same meaning. Several leading scholars, such as Charles Black and Akhil Amar, however, believe that choosing “high

254. Bradley Smith, *Those Payments to Women Were Unseemly. That Doesn't Mean They Were Illegal*, WASH. POST (Aug. 22, 2018, 3:35 PM), https://www.washingtonpost.com/opinions/those-payments-to-mistresses-were-unseemly-that-doesnt-mean-they-were-illegal/2018/08/22/634acdf4-a63b-11e8-8fac-12e98c13528d_story.html [https://perma.cc/VSW3-ARLB].

255. T.W. Farnam, *Obama Campaign to Pay \$375,000 Fine for Omitting Some Donor's Names in 2008*, WASH. POST (Jan. 4, 2013), https://www.washingtonpost.com/politics/obama-campaign-to-pay-375000-fine-for-omitting-some-donors-names-in-2008/2013/01/04/78973402-56bb-11e2-8b9e-dd8773594efc_story.html [https://perma.cc/38R4-ECRA].

Crimes and Misdemeanors” amounted to a rejection of simply poor policies or administration.²⁵⁶ But more importantly, the Federalists clearly conceded during the state ratification debates that impeachment would not only punish criminal acts. Hamilton provided the talking points for Federalists throughout the nation when he declared that impeachment punished “offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust,” Hamilton explained.²⁵⁷ “They are of a nature which may with particular propriety be denominated POLITICAL.”²⁵⁸

Several examples will illustrate what the Constitution might include as a noncriminal, yet impeachable, offense. During the ratification debates, the Framers agreed that Congress could impeach a President who signed a treaty that sacrificed the national interest to advance a personal, partisan, or regional goal. In the Virginia convention, Federalists appeared to concede that a President might be impeachable for entering something like the Jay-Gardoqui Agreement, which Southerners believed sacrificed western expansion to the benefit of northeast cities dependent on trade with Great Britain. Similarly, a President who aligned U.S. foreign policy to curry favor with a foreign power for his or her personal or family benefit, rather than to advance the public interest, would be subject to impeachment. Both Federalists and Anti-Federalists referred to the example of Charles II, who had received financial support from Louis XIV in exchange for keeping troops out of the French wars on the Continent. Federalists also suggested that a President who misused his or her power as Commander-in-Chief might fall subject to impeachment, as had British ministers who had lost grievous wars or had coordinated policies with others against the public interest.²⁵⁹

We can probably agree on similar conduct that would qualify as an impeachable offense. Suppose a President were to react to a foreign invasion by refusing to order the military to fight the enemy. Perhaps the President even retreats to his or her family home under the belief foreign rule would improve the welfare of the American people. Surrender would not violate the criminal law, in that nothing was received in exchange (bribery), nor did the President directly “adhere[] to [the] enemy, giving them Aid and Comfort,” as Article III, Section 3 defines treason, because he or she rationally concluded that losing the war was in the best interest of the American

256. BLACK & BOBBITT, *supra* note 78, at 27–28; AMAR, *supra* note 69, at 218–20.

257. THE FEDERALIST NO. 65, *supra* note 63, at 338.

258. *Id.*

259. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 214 (1996).

people.²⁶⁰ During the Revolutionary War, for example, Thomas Jefferson hastily retreated before the British, narrowly missing capture himself, and generally waged an incompetent war as governor. But the remedy came when he chose not to run for reelection, and a legislative committee later investigated him for cowardice as governor.²⁶¹ Misuse of the Commander-in-Chief power might also include cases where the President led the United States into utterly disastrous wars, which advanced no plausible national interest, and for which he or she displayed lack of judgment or even serious interest. Attacking longtime allies, for example, might qualify, or invading lands in the face of stiff resistance for little discernable strategic gain. Instead of buying Greenland, for example, suppose President Trump ordered the military to invade it—but even then, Greenland would have great strategic importance in controlling the North Atlantic and the Arctic.

Consider another possible abuse of executive power that would not violate the criminal law. President Nixon had used the IRS and the FBI to investigate members of his “political enemies’ list.”²⁶² Even though it does not appear that President Nixon’s orders violated any criminal law at the time, they provided the grounds for his second article of impeachment. Suppose that the Obama administration had refused to grant tax-exempt status to conservative nonprofits (which it did) not because of the schemes of IRS official Lois Lerner, but because of White House orders. Using the power of the government to punish political or ideological opponents, as with the Watergate charges, could form the basis for impeachment. Like treason and bribery, such abuse of power aims for a personal or corrupt advantage rather than pursuit of the public interest.

Defining impeachment solves the problem posed by the controversy over whether the Mueller probe could bring charges against a sitting President. The evidence from the Founding supports the Justice Department’s brief legal opinion that it cannot prosecute the chief executive. Putting aside the point that the President could simply order any investigation stopped, criminal laws cannot bar a President’s exercise of constitutional power. Otherwise, Congress could effectively use the criminal law to deprive the executive branch of its independent authorities. Congress, for example, could make it criminal to fire a subordinate executive official even though all three branches have historically agreed that the President

260. U.S. CONST. art. III, § 3.

261. MICHAEL KRANISH, FLIGHT FROM MONTICELLO: THOMAS JEFFERSON AT WAR 214–15, 259–64 (2010).

262. Morris Kaplan, *2 Ex-Rivals Sue Rep. Rooney, on Their Defeats in Primaries*, N.Y. TIMES (Apr. 19, 1974), <https://timesmachine.nytimes.com/timesmachine/1974/04/19/80527637.html?pageNumber=4> 1 [<https://perma.cc/Z9V6-HWHL>].

enjoys a removal power. Congress did exactly this in the 1867 Tenure of Office Act in order to prevent President Andrew Johnson from firing members of his cabinet, most of whom were holdovers from the Lincoln administration, without congressional consent. When President Johnson fired Edward Stanton as Secretary of War, Congress used his violation of the law as the principal ground for impeachment. In the 1926 decision of *Myers v. United States*, the Supreme Court would make clear that the Act had violated the President's authority to remove his principal advisors.²⁶³

Broad powers would accrue to Congress if it could pass criminal laws that applied to executive conduct. It need not even seek to restrict the President by passing ham-handed laws such as the Tenure of Office Act. Instead, it could enact broad laws, such as obstruction of justice, which makes anyone who "corruptly" alters and destroys evidence for use in an official proceeding, or "otherwise obstructs, influences, or impedes any official proceeding" guilty of obstruction.²⁶⁴ Obstruction of justice formed the basis for President Nixon's first article of impeachment. Suppose a President impedes an investigation not by corruptly interfering with witnesses or destroying evidence, but by subtly using the powers of his office to encourage others to refuse to cooperate with an investigation. A President could suggest to witnesses to a conspiracy in which he or she has participated that he or she might pardon everyone involved. Or suppose a President simply fires the investigators pursuing the alleged conspiracy. All of these actions would meet the plain text of the obstruction statute.

But Congress cannot use a statute, even a criminal law, to alter the Constitution's allocation of powers between the President and Congress. As future Attorney General William Barr argued in a June 8, 2018, letter to the Justice Department, the broad terms of the obstruction statute could arguably constrict the President's ability to exercise prosecutorial discretion.²⁶⁵ A President could decide for any number of reasons to drop a case, most of all if it wastes time and resources better spent elsewhere. The President could even decide to drop a case because it could prove politically damaging to the government or the United States, even though prosecutors could prove their case in court. A presidential decision to drop a case on its face would normally take immediate effect without question; indeed, the courts long ago recognized that such decisions lie outside their review.²⁶⁶ But should FBI

263. See *Myers v. United States*, 272 U.S. 52, 176 (1926).

264. 18 U.S.C. § 1512(c)(1)–(2).

265. BILL BARR, MEMORANDUM ON MUELLER'S "OBSTRUCTION" THEORY 1–2 (June 8, 2018), <https://s3.documentcloud.org/documents/5638848/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.pdf> [<https://perma.cc/N65S-BMCP>].

266. See generally *United States v. Armstrong*, 517 U.S. 456 (1996).

agents or DOJ prosecutors disagree with the President, Justice Department officials or members of Congress could accuse him of corruptly obstructing, influencing, or impeding an official proceeding within the terms of the law. In order to prove such a claim, the judiciary would have to strike down decisions that on their face would meet legal standards, but for the state of mind of the President.

While in the context of immigration policy, the Supreme Court rejected the idea that courts should probe presidential state of mind in *Trump v. Hawaii*.²⁶⁷ If courts could consider the President's unstated motives for the exercise of prosecutorial discretion to discern a corrupt motive, they would have similar powers of review over every other executive decision, such as whether to appoint officers and judges, veto a bill, start a war, sign a treaty, or recognize a foreign government. Such a standard would also apply to a President's use of delegated authority from Congress, which would conceivably sweep in most of the operations of the administrative state. Under the opposite theory, that the criminal laws apply to the President, anyone could accuse the President of having a "corrupt" motive for most executive decisions, and hence stall policies as the DOJ and Congress launch investigations. This not only would present a heavy burden on the executive's ability to perform its constitutional functions, but it would also allow Congress to expand its control over the presidency, the very outcome that worried the Founders. To avoid this constitutional outcome, the federal courts interpret laws that do not specifically apply to the President to exclude him or her.²⁶⁸ Otherwise, many generally applicable laws, particularly criminal ones, would have the effect of limiting executive power.

Understanding the limits on the criminal laws allows us to discard the idea that the Mueller probe could have prosecuted the President for obstruction of justice. According to the Mueller report, President Trump separately ordered the stopping of the probe, the removal of the special counsel and the Attorney General, and publicly encouraged witnesses and targets not to cooperate with the investigation. But each of these acts would have involved President Trump's exercise of a core executive power. President Trump has the inherent executive power to fire subordinate executive branch officials, including both the Attorney General and the special counsel. Indeed, Congress has rejected proposals over the years to safeguard the Attorney General with for cause removal provisions, and it specifically chose not to renew an independent counsel law that would have given prosecutors in Mueller's position that same protection. President

267. See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

268. See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that the Administrative Procedure Act does not apply to the President).

Trump has the authority to order the beginning or end of any federal investigation in his position as the top constitutional law enforcement officer. And the President has the explicit power to issue pardons, subject to only the conditions that they not cover impeachment or state crimes. Reading the obstruction of justice statute to criminalize the use of these powers, even if under the suspicion of Oval Office self-dealing, would violate the Constitution's grant of these authorities to the President in the first place.

But finding that the criminal law has no place in correcting presidential behavior only points the way to the true remedy: impeachment. It turns out that President Trump had good reason in his attempts to terminate the Mueller probe. President Trump knew that his campaign had not conspired with the Russian government to influence the 2016 presidential race. While Mueller found that Russia had conducted serious cyber operations to attempt to affect the elections, he did not find that the Trump campaign had ever met with, not to mention reached an agreement with, Russian officials. Instead, Mueller's successful prosecutions amounted primarily to "process crimes," where figures such as former national security advisor Michael Flynn had lied to FBI agents, or efforts to avoid federal income and reporting requirements, as in the case of Paul Manafort. It is theoretically possible to commit obstruction of justice even when no substantive crime had occurred, just as one can lie to federal agents even when he or she is not covering up any underlying illegal activity. But the fact that the President sought to end an investigation for conduct that he knew did not happen makes it difficult to conclude that he held a "corrupt" motive within the meaning of the obstruction statute.

But suppose that President Trump had actually committed the elements of a crime. Rather than allowing Mueller to complete his investigation, suppose President Trump had halted the special counsel early in his probe to avoid the airing of his campaign secrets. Or imagine that President Trump had directed the acting Attorney General, Rod Rosenstein (the Attorney General, Jeff Sessions, had recused himself because he had served as an advisor to the Trump campaign) or Mueller himself to curtail the probe. Or that he had even fired Sessions, Rosenstein, and Mueller, as he had apparently considered (according to the testimony of former White House Counsel Donald McGahn and former Trump campaign chair Corey Lewandowski). Further, suppose that President Trump had contacted potential witnesses and other targets and had encouraged them not to cooperate with the special counsel. Perhaps he did more than just implicitly dangle the possibility of pardons, but, as some conservative commentators recommended, offered them to everyone subjected to the Mueller investigation. President Trump could have blocked White House officials

from interviewing with the special counsel and prevented anyone in the executive branch from providing documents.

Even so, Congress would need more to prove obstruction of justice sufficient to meet the standard for impeachment. These hypothetical actions fall within the executive power of the President and could have plausible, independent reasons behind them. President Trump might have fired Sessions because, after his recusal, he could no longer effectively lead the Justice Department. He could have lost confidence in Rosenstein's judgment after stories broke that the latter had considered wearing a wire in his meetings with the President. He could have removed Mueller or closed the special counsel investigation because he believed the probe wasted money, resources, and political effort. He could have prohibited cooperation with the special counsel because he wanted to preserve executive privilege, and he could have offered pardons because he believed juries had convicted Paul Manafort or George Papadopoulos unjustly.

For Congress to find these acts impeachable offenses, it would have to go beyond finding that they had factually occurred. It would have to reach a judgment about the President's state of mind behind the conduct. It would have to find that President Trump had used his constitutional powers for corrupt purposes on a par with those that characterize treason and bribery. Perhaps the Trump campaign had contacts with the Russians, encouraged them to break into Hillary Clinton's server, and helped spread the stolen emails that proved so damaging. As Columbia Law Professor Philip Bobbitt argues, the President's alleged involvement with the hack into the Clinton email systems would bear a resemblance to the Watergate burglary.²⁶⁹ At the time of President Nixon's resignation, the House was moving to impeach the President. As Bobbitt observes, President Trump's mere use of the negative information about Clinton spread by Wikileaks would not constitute, by itself, an impeachable offense. But if President Trump had gone farther and sought to impede the probe into the initial crime, his actions might be akin to President Nixon's effort to cover up the burglary of the Democratic National Committee headquarters. Recall that neither the special counsel nor the House Judiciary Committee charged President Nixon with actually authorizing the burglary itself.

The need for a showing of motive becomes even more critical if the House were to seek to impeach President Trump because of an alleged bias in favor of Putin and the Russians. Some of the most fevered commentators, including the Obama administration's director of national intelligence, James Clapper, have claimed that President Trump acts like a Russian

269. BLACK & BOBBITT, *supra* note 78, at 122–25.

intelligence “asset,” while others, such as former Obama CIA Director John Brennan, claimed that President Trump’s behavior toward Putin “rises to [and] exceeds the threshold of ‘high crimes [and] misdemeanors’ and “was nothing short of treasonous.”²⁷⁰ These former Obama intelligence chiefs believe that Trump had been indebted to Russian intelligence in some way for years, either because Moscow helped President Trump win, or Putin has blackmail on President Trump, or Russian interests bailed President Trump out of his several bankruptcies. But finding such a malign state of mind would prove near impossible. Putting aside the accusations by Obama-era intelligence officials, President Trump may well have set the United States in a more friendly posture toward Russia. But there may well be very good policy reasons to do so. If faced with the threat posed by a rising China, the White House could choose to build stronger ties with Moscow simply as a matter of the national interest—an inverse of the Nixon-Kissinger opening to China to balance the Soviet Union during the Cold War. President Trump and his advisors may conclude in good faith that reducing tensions in Eastern Europe and the Middle East requires a more accommodating policy toward Russia. Making such foreign policy choices lies within the executive branch’s constitutional authority to set foreign policy.

Or consider the overheated charges of treason. President Trump could have had several reasons to discourage any investigation that, while perhaps not the most wholesome in nature, would not meet the constitutional standard. Maybe President Trump benefitted from the Russians, such as the hacking into the Clinton email server and social media misinformation, or even received past favors while a private citizen, but without any overt agreement. Or perhaps President Trump knew that his campaign had no conspiracy with the Russian government, but he wanted to impede the Mueller investigation because he feared it might discover other dirty laundry, such as irregularities at the Trump organization, his hush money payoffs, or his personal finances. Recalling the way that the British government had used accusations of treason to suppress political opposition, the Framers made treason the only crime defined in the Constitution: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”²⁷¹ Further, the Constitution requires that conviction cannot stand “unless on the Testimony

270. Sonam Sheth, *Former Director of National Intelligence James Clapper: Putin Is Handling Trump Like a Russian ‘Asset,’* BUS. INSIDER (Dec. 19, 2017, 5:52 AM), <https://www.businessinsider.com/james-clapper-putin-trump-russia-asset-2017-12> [<https://perma.cc/64PJ-NNWJ>] (Clapper); Maegan Vazquez, *Former National Intel Chiefs Condemn Trump’s News Conference with Putin*, CNN (July 17, 2018, 9:10 AM), <https://www.cnn.com/2018/07/16/politics/john-brennan-donald-trump-treasonous-vladimir-putin/index.html> [<https://perma.cc/NG9E-7TB8>] (Brennan).

271. U.S. CONST. art. III, § 3.

of two Witnesses to the same overt Act, or on Confession in open Court.”²⁷² Whatever Putin’s involvement in meddling with the 2016 elections, the United States is not at war with Russia, and so it may not be possible to commit treason based on even the most fevered accusations against President Trump. If Congress could find evidence to support the existence of such corrupt or treasonous motives, it might have grounds to impeach President Trump. But without them, it could not remove him.

Focus on obstruction of justice obscures the broader uses of impeachment that could present themselves. Some distinguished observers have argued that tying “other high Crimes and Misdemeanors” to treason and bribery suggests that impeachment includes only conduct that implies a certain corruption or similar abuse of office. But the ratification debates make clear that the Framers believed impeachment would sweep more broadly. They appeared to reject the idea that “mal-administration” could constitute grounds for impeachment. Congress should not reverse the results of a national election because the President had made a simple mistake in execution or even error in policy. Nor did they believe that disagreements over policy and values should justify removal from office. The Constitution creates a system in which different parties, with conflicting ideological views, could control Congress and the presidency. The Framers did not want the executive to bend to an already-powerful legislature out of concern over his removal, which would have reduced our separation of powers to something more like a parliamentary system.

But the Founders also made clear that impeachment would not have the narrow sweep of the criminal law. They did not want Congress to hold the specter of removal over a President to win simple policy disputes or even to punish errors of judgment. Such control would make the executive dependent on the legislature, perhaps just as much as if Congress had chosen the President. But the Federalists also understood that the nation would face crises where an individual had failed in the duties and responsibilities of the presidency, even if they had committed no crime. Dereliction of duty must constitute grounds for impeachment. In several of the state ratification debates, the Federalists offered as hypothetical cases a President who entered the nation into a disastrous treaty. If Congress could impeach a President for a bad treaty, it should have the power to remove him or her for its opposite, a bad war. By the eighteenth century, the British Parliament had impeached ministers for poorly conducting wars. As some Federalists cautioned, however, Congress should not use its power to punish bad judgment alone, but something more serious, whether it be cowardice, indifference, or even

272. *Id.* cl. 1.

the elevation of family, social, economic, or regional interests over the public interest.

Thus, Democratic members of Congress who truly believe that President Trump has conducted foreign affairs to advance himself, rather than the United States, have an avenue open to them. If they conclude in good faith that President Trump moved the U.S. Embassy in Israel from Tel Aviv to Jerusalem for religious or ethnic reasons, they could impeach him. If congressional critics think that President Trump bombed targets in Syria or elsewhere to distract attention from his political troubles—as they once suggested of both Presidents Bill Clinton and George W. Bush—then they also could launch impeachment proceedings. If House Democrats find that President Trump eased U.S. sanctions toward Russia—quite the opposite of the record—because he feared blackmail or owed Moscow favors, it could remove him. If they believe that President Trump has sparked a disastrous trade war with China, or even imposed sanctions on European imports, to advance his personal finances, or even to gain reelection, they could start impeachment.

But even with foreign policy, as with obstruction, President Trump's state of mind is everything. For most every decision, President Trump has a plausible, if not compelling, reason that could explain his choices. Consider the move of the U.S. Embassy in Israel. Critics might argue that President Trump reached his decision because of his Jewish son-in-law, Jared Kushner, and daughter, Ivanka Trump, who converted to Judaism. But the President could argue instead that he believed, as did several U.S. Congresses that sought to recognize Jerusalem as the capital of Israel, that American foreign policy should support Israeli nationhood. President Trump would argue that he bombed Syria not to distract political attention away from his political controversies, but to punish the Assad regime for using chemical weapons on his own people—much as President Obama had. He can claim, as we have suggested already, that improving relations with Moscow lies in America's long-term strategic interests. He could maintain that in launching trade wars, he is only fulfilling his 2016 campaign promises and ending Chinese cheating on intellectual property and joint ventures. As the Supreme Court made clear in *Trump v. Hawaii*, the judiciary would not peer behind the facially legal orders of a President in a quest to discover an illegitimate motive.²⁷³

Similar problems beset impeachment for domestic dereliction of duty. If the Constitution should establish any noncriminal impeachable offenses, it should punish an intentional refusal to perform the duties and

273. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018).

responsibilities of the office of the presidency. A good example comes from President Obama's DACA and DAPA programs, which refused to remove broad classes of aliens who remained in the country in violation of the immigration laws. Article II of the Constitution imposes a duty on the President to "take care that the laws be faithfully executed."²⁷⁴ In adding that provision, as we have seen, the Framers sought to both make clear that the Executive, and not the other branches, held the sole responsibility to execute the law; but they also understood the clause to remove any executive power to suspend the laws. In only the most limited circumstance can a President refuse to enforce an act of Congress: when he or she in good faith believes the law to violate the higher law of the Constitution itself, just as the Supreme Court did in *Marbury v. Madison*. The Constitution also recognizes the prosecutorial discretion inherent in the executive power to make choices about which cases to enforce. Congress cannot fund and the Executive cannot manage a system where sufficient officers exist to prosecute every violation, no matter how small, of every federal law.

But a President cannot decline to enforce a law because he or she disagrees with its policies. President Obama did not promulgate his DACA and DAPA policies because he believed the immigration laws violated the Constitution—his administration never made such a claim. Nor could he claim that insufficient resources forced him to allow all of the aliens in the DACA and DAPA programs to remain free of the immigration laws. In fact, the Obama administration went further than simply refusal to bring removal actions; it also created a process to grant work permits to allow the employment of illegal aliens. President Obama created the programs because he, at a minimum, believed that the current immigration law unfairly required the removal of children who had entered the United States illegally through no fault of their own and had then grown up to contribute to society. While we might share that sense of unfairness, Congress refused to reform the immigration laws to allow the "Dreamers," and their parents, to remain. Allowing Presidents to refuse to enforce the laws would mark a seismic shift in the separation of powers. President Trump, for example, may want a lower top income tax rate, but has succeeded in persuading Congress to enact only a modest reduction. But following President Obama's example, the Trump administration could declare that it would only collect up to twenty percent of a taxpayer's income in any given year. It could then say the IRS would simply not spend the resources or time to try to collect anything above twenty percent. Such a policy would render Congress's taxing power a hollow one.

Proving that a President sought to suspend a law, however, rather than

274. U.S. CONST. art. II, § 3, cl. 5.

simply exercise prosecutorial discretion, might come down to intention as well as numbers. President Obama could claim that he continued to enforce the immigration laws overall. His administration used its discretion to concentrate ICE and DOJ resources on removing felons and others more dangerous to public safety than Dreamers. Suppose President Trump had tried something similar. Like Presidents Nixon, Ford, Carter, and Reagan before him, President Trump could have concluded that over-regulation was stifling the economy. Where those Presidents had responded by requiring that new major regulations survive a cost-benefit test, President Trump could have suspended enforcement of any existing regulations that failed the test, either as a whole, or case-by-case. Where President Obama could claim that he did not enforce parts of the immigration laws because he disagreed with the effects on aliens, President Trump could argue that he disagreed with inefficient and ineffective regulations that suppressed economic growth. To impeach, Congress would have to reject the prosecutorial discretion traditionally granted to the executive and conclude instead that the President had deliberately refused to enforce the laws.

These examples show the difficulty of impeaching President Trump for the conduct set out in the Mueller Report. First, the Framers expected the electoral process to provide the primary check on presidential abuses of power. As we approached an election year, members of Congress would have little incentive to trigger the impeachment machinery when the American people could simply remove President Trump at the ballot box. Second, the Framers intended impeachment to remove Presidents for serious abuses of power on a par with treason and bribery, rather than for policy disagreements or simple political opposition. They set the vote required to remove at two-thirds to block the use of impeachment as a partisan tool. With the Republican Party in control of fifty-three of the one hundred Senate seats, Congress would not remove President Trump unless the evidence was so overwhelming of a high crime or misdemeanor that forty percent of Republican Senators would vote against their party.

Third, the Framers sought to narrow the scope of impeachment so that its use would not inflict permanent harm on the Constitution's structures. Chief among those structures, and the Framers' most remarkable invention, was the executive branch. They did not want Congress to use impeachment to undermine the President's independence or to sap the executive power of its vigor. President Trump's removal of FBI Director Jim Comey and other high-ranking officials constituted a valid use of his executive power to fire subordinates. Without that power, Presidents could not ensure that the agencies follow their directives in carrying out federal law. Allowing Congress to punish President Trump's exercise of valid executive powers

would make future Presidents more subservient to the legislature, as a political if not constitutional matter. The Framers designed the executive to be independent of Congress, rather than an agent of the legislature as in a parliamentary system.

Fourth, the evidence to support removal should meet a high standard, again another requirement imposed by the two-thirds vote necessary to convict. This is not to say that the impeachment and trial must take the form of a courtroom proceeding. The Framers rejected the involvement of the federal judiciary in impeachment and clearly understood that they had given the power to political actors. But members of Congress and the President must still obey the Constitution in their political actions and should not convict unless they believe the House has provided proof that exceeds a simple more-likely-than-not standard. Impeaching President Trump is all the harder because his actions did not objectively amount to treason or bribery or other serious abuse of power. The case for President Trump's removal would depend on his state of mind when he fired Comey or considered firing Mueller. Impeaching based on such a delicate difference as the President's state of mind, whose true nature without President Trump's own confessing testimony would be unknowable, would run counter to the Constitution's creation of an independent executive. Indeed, President Trump would have had an obligation to fight any obstruction of justice charges as hard as possible, not just for his own political survival, but to ensure that future Presidents would not fall into a state of congressional dependency.

Because of impeachment's disruptive effect on the body politic, it should only occur when the Constitution truly calls for it. Carrying out a truncated impeachment investigation guaranteed that the Senate would acquit the President and that the nation's political time and energy would go to waste for no good reason. The Constitution creates impeachment for extraordinary circumstances, and it accordingly seems to call on the House and the Senate to conduct their roles with seriousness and diligence. The Framers would have seen the use of impeachment simply to satisfy a partisan interest or to engage in a symbolic protest as a misuse of the awesome power to investigate and remove a President elected by the whole nation. By not taking their time, calling all of the relevant witnesses, and undertaking a careful review of the facts and the law, House Democrats revealed their use of impeachment as a political weapon, rather than as the fulfillment of a constitutional duty.

Unfortunately, the public hearings and the news coverage ignored the central question whether the facts justified President Trump's impeachment and removal from office. By the end of the hearings, Democrats were accusing President Trump of committing bribery, rather than of seeking a

quid pro quo. This Article's review of the founding history, however, indicates that any exchange of benefits between President Trump and Zelensky would not have risen to the level of bribery contemplated by the Impeachment Clause. To be sure, it seems clear that the *type* of conduct at issue here involving President Trump and Ukraine could supply the grounds for impeachment. As we saw earlier, the Framers had in mind Louis XIV's payments to Charles II for neutrality in the European wars. The writers of the Constitution thought bribery occurred when a foreign nation paid off a U.S. President. It seems unlikely that they had in mind the opposite case where the United States bribed a foreign official in exchange for a benefit. After all, the CIA bribes foreign officials for information or cooperation all the time. Under the Articles of Confederation and the Washington and Adams administrations, the United States made payments to the Barbary States to allow U.S. shipping to ply the Mediterranean free from seizure.²⁷⁵ No one thought Presidents Washington or Adams had committed impeachable offenses.

The argument that President Trump's conduct violated the existing federal bribery statute was beside the point. House Democrats correctly pointed out that federal law makes it a crime if someone "corruptly gives, offers, or promises anything of value to any public official" to influence their decisions or defraud the United States.²⁷⁶ The law also makes it a crime when a public official "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value" in exchange for their decisions.²⁷⁷ But at the time of the Constitution's drafting and ratification, Congress had not enacted a bribery statute. Congress did not pass this law until 1962, and it did not enact the earliest law that could apply, the mail and wire fraud statute, until 1872. These detailed definitions of bribery are an invention of the twentieth century and could not have influenced how the Framers thought about bribery in the Impeachment Clause.

Furthermore, Congress could not alter the meaning of bribery in the Impeachment Clause even if it wanted to. In the foundational case of *Marbury v. Madison*, Chief Justice John Marshall made clear that Congress could not enact laws that sought to change the meaning of terms used in the Constitution.²⁷⁸ In that case, Congress had tried to expand the types of cases that the Supreme Court had to hear directly, rather than on appeal.²⁷⁹

275. See JOHN YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 111–15 (2010).

276. 18 U.S.C. § 201(b)(1).

277. *Id.* § 201(b)(2).

278. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

279. *Id.* at 175.

Marshall held that even if Congress believed it had enacted a law in accord with the Constitution, the Court still would give force to the Constitution above any conflicting statute. Similarly, here Congress could not expand the Constitution's definition of "bribery" for purposes of impeachment.²⁸⁰

Applying the lessons of history indicates that President Trump's conduct would not rise to the level of bribery as used in the Impeachment Clause. As we have seen from the discussion of impeachable offenses during the ratification, bribery should rise to a level of serious abuse of power similar to that of treason. Hamilton explained that treason, bribery, or other high crime and misdemeanor would amount to an offense against the whole body politic. Federalists illustrated their argument with the example of a foreign state bribing a U.S. President to go to war or not go to war. They would have had difficulty finding the Trump-Zelensky phone call to have risen to the same level as the annual payments from Louis XIV to Charles II.

Democrats would have had more constitutional success in arguing that President Trump's conduct, while not treason or bribery, qualified as a "high Crime or Misdemeanor." The Framers openly worried about a President who might use his or her foreign affairs powers for personal or political gain. As the Virginia ratifying convention showed, they believed that "high Crimes and Misdemeanors" included abuse of the executive's control over foreign policy. Recall that Federalists illustrated this standard with the example of a President who negotiated a treaty that sacrificed the national interest for personal, partisan, or regional advantage. They even thought that Congress could impeach a President who signed a treaty that concentrated its benefits for his state and its fellow allies, much as Southerners thought the failed Jay-Gardoqui Treaty threatened to do.

It is on this point where the House impeachment hearings proved so disappointing. House Democrats did not convincingly explain why a quid pro quo that never succeeded (assuming the facts in the worst light for the White House) and that involved a relatively small country at the periphery of American security interests should justify removal of a President. The White House clearly delayed the foreign and military assistance appropriated by Congress, but it released the 400 million dollars by September 2019. During the impeachment process, the President and his lawyers justified the delay on the government's right to withhold funds that would fall prey to foreign corruption. They argued that in referring to the Biden's, President

280. See Charlie Savage, *Did Trump Commit 'Bribery'? Pelosi's Impeachment Accusation, Explained*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/us/politics/bribery-impeachment-explained.html> [<https://perma.cc/5HXC-RYME>]; Josh Blackman & Seth Barrett Tillman, *Defining a Theory of 'Bribery' for Impeachment*, LAWFARE (Dec. 6, 2019, 12:43 PM), <https://www.lawfareblog.com/defining-theory-bribery-impeachment> [<https://perma.cc/ZV7P-V4TB>].

Trump had merely resorted to a confused, rambling shorthand in his own mind for Ukrainian government corruption. House Democrats had to show why their account that President Trump's true, corrupt motive was to seek dirt on his likely opponent in the 2020 presidential race, with evidence that at least was clear and convincing, if not beyond a reasonable doubt (the standard required in criminal jury trials). Impeachment depended on making fine inferences of the President's state of mind based on no direct testimony by the President or, indeed, by any witness that had directly and consistently discussed Ukraine with him. This very challenge of determining a President's unstated mental state had led the Supreme Court to refuse to overturn the travel ban and prevented the Mueller Report from definitely finding whether President Trump had committed obstruction of justice.

This is not to argue that President Trump was completely blameless in the Ukraine affair, or that he might have had ulterior political motives in mind. This Article instead only underscores that impeachment cannot serve as the catchall remedy for all executive misdeeds. Our nation's founders believed that impeachment should only come as a last resort. They expected that the American people would hold a President accountable for any abuses of power at the ballot box. Defenders of the Constitution designed impeachment to be a rare event, especially by making the requirement for removal a two-thirds vote of the Senate for treason, bribery, or other high crimes or misdemeanors, rather than "mal-administration," in their words. The Federalists worried that the President otherwise would become too dependent on a Congress eager to use impeachment to fight political and partisan disputes. President Trump's successful defeat of impeachment may well have preserved the independence of the presidency for his successors, even as it involved such political damage that it could have led to his loss on the November 2020 ballot.

III. THE SECOND TRUMP IMPEACHMENT

This Article has addressed the original understanding of the standard for impeachment. It does not answer the different question raised by the second impeachment of Donald Trump in 2021: whether Congress can try and punish an executive branch officer who is no longer in office. On January 6, 2021, the day that Congress began officially counting the electoral votes that would confirm Joe Biden's election as President, Trump gave an incendiary speech claiming widespread voter fraud to a large crowd: "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard," the President declared; "[i]f you don't fight like hell, you're not going to have a country

anymore.”²⁸¹ A mob descended on the Capitol and forced a suspension of the proceedings.²⁸² Members of Congress fled into hiding; rioters and Capitol police engaged in pitched battles throughout the House and Senate; at least five protesters and one officer died.²⁸³

In response, Congress impeached President Trump on January 13, 2021, on the single charge of “incitement of insurrection.” The Senate, however, did not begin its trial until February 9, 2021, after Trump had left office. It acquitted Trump on February 13, 2021, with fifty-seven voting to convict and forty-three to acquit, ten votes short of the necessary two-thirds.²⁸⁴ Trump’s defenders explained their vote for acquittal on the ground that the Constitution only provides for the impeachment of current officers of the United States. “There is no question that President Trump is practically and morally responsible for provoking the events of” January 6, Senate Minority Leader Mitch McConnell said after the vote. “But in this case, that question is moot. Because former President Trump is constitutionally not eligible for conviction.” After looking at the constitutional text, he concluded, “We have no power to convict and disqualify a former officeholder who is now a private citizen.”²⁸⁵

The question whether the Senate had jurisdiction to try a former President divides legal scholars into two opposing camps. The plain text of the Constitution does not appear to provide for the trial of a private citizen, even an ex-President accused of inciting an insurrection. Advocates of a Senate trial, however, rested not on text but on the claim that the Framers originally understood a broad impeachment power not fully established in the text alone.²⁸⁶ In our view the historical evidence provides, at best, weak

281. Brian Naylor, *Read Trump’s Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/UN93-JVHS>].

282. Lauren Leatherby, Arielle Ray, Anjali Singhvi, Christiaan Triebert, Derek Watkins & Haley Willis, *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> [<https://perma.cc/3RDL-6U34>].

283. *Id.*

284. Weiyi Cai, *A Step-by-Step Guide to the Second Impeachment of Donald J. Trump*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/08/us/politics/trump-second-impeachment-timeline.html> [<https://perma.cc/G7AM-57TJ>].

285. Carl Hulse & Nicholas Fandos, *McConnell, Denouncing Trump After Voting to Acquit, Says His Hands Were Tied*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/mcconnell-trump-impeachment-acquittal.html> [<https://perma.cc/YZG6-ECBK>].

286. *See generally* MAJORITY STAFF OF HOUSE COMM. ON THE JUDICIARY, 116TH CONG., REP. ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 1 (Comm. Print 2019) [hereinafter REP. ON PRESIDENTIAL IMPEACHMENT]; Chuck Cooper, *The Constitution Doesn’t Bar Trump’s Impeachment*

reasons to reject the constitutional text's plain meaning. Faced with such evidence, prudence might have counseled against the unprecedented step of trying an ex-President for impeachment because of the potential harm to the executive branch's independence and the separation of powers.²⁸⁷

Supporters of impeachment, however, including many leading conservatives and libertarians, argued that the Senate could try, convict, and sentence Trump to permanent disqualification from federal office, even though he had left the Presidency. Professor Steven Calabresi led a group of scholars and former officials who supported the trial and conviction of ex-Presidents. "We differ from one another in our politics, and we also differ from one another on issues of constitutional interpretation," wrote the signatories.²⁸⁸ "But despite our differences, our carefully considered views of the law lead all of us to agree that the Constitution permits the impeachment, conviction, and disqualification of former officers, including Presidents."²⁸⁹

These Trump critics generally argued that conservatives should defer to the original understanding of the Constitution to find that Congress can impeach an ex-President. As a few commentators, such as Harvard Law Professor Alan Dershowitz²⁹⁰ and former judge Michael Luttig argued,²⁹¹ the Constitution standing alone extends impeachment only to current federal officers. Article II of the Constitution declares that "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."²⁹² Impeaching a former official conflicts

Trial, WALL ST. J. (Feb. 7, 2021, 1:55 PM), <https://www.wsj.com/articles/the-constitution-doesnt-bar-trumps-impeachment-trial-11612724124> [<https://perma.cc/YV5Y-WW4F>]; Lawrence H. Tribe, *Opinion: The Senate Can Constitutionally Hold an Impeachment Trial After Trump Leaves Office*, WASH. POST (Jan. 13, 2021, 2:31 PM), <https://www.washingtonpost.com/opinions/2021/01/13/senate-impeachment-trial-constitutional-after-trump-leaves/> [<https://perma.cc/22S6-B76X>].

287. There appears to have been only one sustained scholarly examination of this question at the time of the trial, which concluded on balance that Congress could try and impeach former officials. See generally 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).

288. Letter from Steven Calabresi et al. to Congress, Constitutional Law Scholars on Impeaching Former Officers (Jan. 21, 2021), <https://www.politico.com/f/?id=00000177-2646-de27-a5f7-3fe714ac0000> [<https://perma.cc/QV2S-P5CT>].

289. *Id.*

290. Alan M. Dershowitz, *No, You Can't Try an Impeached Former President*, WALL ST. J. (Jan. 20, 2021, 1:25 PM), <https://www.wsj.com/articles/no-you-cant-try-an-impeached-former-president-11611167113> [<https://perma.cc/75XJ-7XG4>].

291. J. Michael Luttig, *Opinion: Once Trump Leaves Office, the Senate Can't Hold an Impeachment Trial*, WASH. POST (Jan. 12, 2021, 2:42 PM), <https://www.washingtonpost.com/opinions/2021/01/12/once-trump-leaves-office-senate-cant-hold-an-impeachment-trial/> [<https://perma.cc/M46L-DWBW>].

292. U.S. CONST. art. 2, § 4.

with this wording. After January 20, Trump no longer qualified as an “Officer of the United States,” and the sentence of removal cannot apply to someone who is no longer in office. If Trump was still the “President” after his term of office for purposes of the impeachment clauses, why is he not still the “President” under the Commander in Chief clause?

Other constitutional provisions do little to undermine this view. Most of the other clauses relating to impeachment describe its process, rather than its substance. Article I defines House impeachment, Senate trial, the two-thirds requirement for conviction, and the Chief Justice’s role as trial judge when the President is the defendant. Supporters of Trump’s impeachment had to make heavy inferences from these procedural clauses such as: “judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”²⁹³ Trump critics argue that by including future disqualification the Founders intended impeachment to extend to former officials.²⁹⁴ But it is not clear from this text whether disqualification must accompany removal (notice the “and” before “disqualification”), or whether it constitutes an independent and separate penalty.

In order to overcome the constitutional text, Trump’s critics must rely on a power of impeachment that the constitutional text does not define. They further argue that when Article II prescribes removal as punishment for “the President, Vice President, and all civil Officers of the United States,”²⁹⁵ it only describes the standard that applies, and the punishments available, to existing officers but not former ones. They point out that since Article III of the Constitution states that Congress can remove federal judges who violate the “good behavior” standard, a broad, nontextual impeachment power must exist because the text does not make clear elsewhere that impeachment even applies to federal judges.²⁹⁶

Any originalist should recognize the difficulties with this nontextual approach. It contains within itself no limiting principle as to time or targets or terms. If Article II only describes the punishments due to current officers, but does not define other targets of impeachment, then the Constitution allows the impeachment and disqualification of all former executive officers and judges. Congress could impeach Jimmy Carter for the failed Iran hostage

293. *Id.* art. 1, § 2, cl. 7.

294. *See* REP. ON PRESIDENTIAL IMPEACHMENT, *supra* note 286, at 34–36; Tribe, *supra* note 286.

295. U.S. CONST. art. 2, § 4.

296. *See* REP. ON PRESIDENTIAL IMPEACHMENT, *supra* note 286, at 46; Tribe, *supra* note 286.

rescue operation or Barack Obama for refusing to enforce the immigration laws. It could impeach any former cabinet officer too; it could charge Hillary Clinton for failure to safeguard classified information or James Comey for provoking the Russia special counsel investigation. If Article II applies only to existing officers but not former ones, then Congress theoretically could use something other than the high crimes and misdemeanors standard. Why not impeach former Presidents for “maladministration,” a standard rejected by the Founders in favor of “high crimes and misdemeanors,” which apparently only applies to existing officers.

Even more worrisome, this theory means that Congress need not limit its scope to federal officials, either present or past. Impeachment could target private citizens who had never held public office, as had occurred in Great Britain in the centuries before the Constitution, or state and local officials. If we adopted British practice before the ratification of the Constitution, Congress could even impose punishments beyond removal or disqualification too, so long as the defendants were not current office holders. In eighteenth-century British practice, for example, Parliament could impose any punishments allowed by law, including imprisonment or even death.²⁹⁷ Once impeachment exists outside Article II, the constitutional text does not limit Congress’s discretion on any of these issues.

Trump’s critics appeal to such historical practice to overcome the constitutional text. They argue that, in addressing impeachment in bits and pieces throughout the Constitution, the Founders consciously intended to adopt the whole of British constitutional practice. They correctly note that the Founders would have followed the case of Warren Hastings, whom Parliament impeached for his acts as governor-general of India, but after he had resigned and returned to England.²⁹⁸ But Hastings, whom the House of Lords eventually acquitted in 1785, would prove too much. Adopting the British practice would also imply that impeachment can also extend to private citizens, contain no statute of limitations, and include criminal punishments of fine and jail time. Indeed, the British model is a misleading guide here altogether. In the British model, only the king’s ministers could be impeached and removed by Parliament. By contrast, the President could be impeached and removed. The two models are fundamentally dissimilar.

297. *Punishment Sentences at the Old Bailey*, OLD BAILEY ONLINE, <https://www.oldbaileyonline.org/static/Punishment.jsp> [https://perma.cc/J6ND-CQ5S].

298. See REP. ON PRESIDENTIAL IMPEACHMENT, *supra* note 286, at 32; Neil Kinkopf, *The Senate Retains Authority to Try Donald Trump After He Leaves Office*, AM. CONST. SOC’Y: EXPERT F. (Jan. 15, 2021), <https://www.acslaw.org/expertforum/the-senate-retains-authority-to-try-donald-trump-after-he-leaves-office> [https://perma.cc/7GQM-CEGJ]; Tribe, *supra* note 286.

In fact, the most reliable originalist sources tend to support our view. Both sides must admit that the history of the drafting and adoption of the Constitution provides no compelling evidence to settle the question. Neither the debates of the 1787 Philadelphia Convention (which wrote and proposed the constitutional text but whose proceedings remained secret until after James Madison's death in 1836),²⁹⁹ nor the records of the 1787–1788 state ratifying conventions (which actually exercised the legal authority to adopt the Constitution),³⁰⁰ contain any direct discussion of whether impeachment could apply to ex-officers. An originalist should only adopt a nontextual reading of the impeachment power if we were to see extensive discussion at the time of the Constitution's adoption that clearly assumed such a power to exist.

In contrast, the most significant governing instruments of the day—the state constitutions—further support the idea that the Constitution extends impeachment only to officers of the present, not the past. It appears that the revolutionary Americans who wrote the first state constitutions intended impeachment to apply to former office holders. But when they wanted to adopt this British practice, they explicitly said so. Pennsylvania's 1776 Constitution, perhaps the most radical of the state constitutions, made clear that impeachment would apply to an executive officer “either when in office, or after his resignation, or removal.”³⁰¹ The Virginia Constitution of 1776 stated that the governor “when he is out of office,” could be impeached by the House of Delegates.³⁰² Delaware's 1776 constitution similarly made clear that the legislature could impeach the executive “when he is out of office, and within eighteen months after.”³⁰³ In 1777, Vermont's Constitution stated that the assembly could impeach executive officers “either when in office, or after his resignation, or removal.”³⁰⁴

When the states wanted to include former officers in impeachment, they clearly said so in their constitutional texts. Other state constitutions of the time, such as 1777 New York and 1780 Massachusetts did not follow these examples. Instead, these states explicitly applied impeachment only to

299. *See generally* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

300. *See generally* THE DEBATES IN THE SEVERAL STATE CONVENTIONS (J. Elliot ed., 1827–1830); DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 1976–2007); THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2001).

301. PA. CONST. of 1776, § 22.

302. VA. CONST. of 1776.

303. DEL. CONST. of 1776, art. 23.

304. VT. CONST. of 1777, ch. 2, § XX.

current officers.³⁰⁵ These later state constitutions, which provided models for the federal Constitution, sought more balance between their executive and legislative branches. Originalists would read such silence on including past officers in impeachment as a rejection of the earlier, radical state constitutions.

Finally, originalists should recognize the structural problems with relying upon a nontextual impeachment power. Impeachment made sense within the context of the British constitution—and even the British dropped impeachment by the early eighteenth century—because Britain had no true separation of powers. Parliament could impeach and convict for impeachment, but it could also try and convict any individual for regular crimes. Our Constitution, however, institutes a careful separation of powers that rejects the British idea that the legislature could both define and execute the law. Montesquieu's axiom that "there is no liberty if the power of judging be not separated from legislative power and the executive power" was probably one of the most quoted authorities during the Framing.³⁰⁶ A nontextual impeachment power that allowed Congress to convict and sentence even private citizens, without limit as to time or even punishment, would run counter to the Framers' invention of a separation of powers.

Furthermore, a nontextual impeachment power would undermine the Constitution's effort to make the President independent of Congress. As Brown historian Gordon Wood has shown, freeing the executive from the control of the legislative branch represented one of the important objectives of those who wrote and ratified our founding document. For example, the Framers rejected proposals for congressional selection of the President and instead decentralized the choice by giving it to the states through the Electoral College. They also understood that the power to fire the President would give Congress the power to control the executive. Hence, they made it difficult to remove the Chief Executive by creating a two-thirds requirement for conviction of impeachment.³⁰⁷

Imagine the incentives created if the Framers had allowed Congress to impeach not just the current President, who could at least muster supporters in the Senate, but also all ex-Presidents and, indeed, all ex-federal officers. Suppose Congress could not only impeach all former executive officers, but

305. N.Y. CONST. of 1777, § XXXII; MASS. CONST. of 1780, ch. 1, art. VIII.

306. See THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001); THE FEDERALIST NO. 78 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

307. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 150–61 (1967).

subject them to disqualification and even criminal punishment. Such humiliation and harassment would provide a powerful incentive to bend the knee to Congress while in office—the very outcome decried by the Founders when they created an independent executive branch.

Critics may ask: if the Senate lacks jurisdiction to try Trump, does that mean he would be legally unaccountable for the alleged crime of incitement? It does not. Trump might still be held liable by an ordinary court of law if, indeed, he has committed a federal crime. The absence of Senate jurisdiction does not imply that there is no other forum available to establish accountability (or, equally, to acquit Trump if the charge is unfounded).

Federal officials who have been impeached are subject to criminal prosecution for the same underlying actions. The Constitution's impeachment clauses in fact explicitly preclude the defense of double jeopardy.³⁰⁸ And the Constitution leaves the sequencing of a criminal prosecution and an impeachment proceeding open. A criminal proceeding against the official usually precedes the impeachment case because the criminal trial and conviction can lead to the discovery of evidence of misconduct meriting impeachment and removal. Several federal judges have been criminally prosecuted and convicted for conduct that has formed the basis for a later congressional impeachment.³⁰⁹

In Trump's case, even if the Senate had jurisdiction, the better course by far would be for the Department of Justice to investigate Trump's alleged criminal incitement and, if the charge has merit, to prosecute and try him. First, the public at large would likely put more trust in the integrity of Judge Garland and the career Justice Department prosecutors under him than it does in Senate politicians like Chuck Schumer and Mitch McConnell. Second, if the prosecution and trial of the former President led to a criminal conviction, the impeachment charge brought by the House would be shown to have had more substance than now appears. Conversely, were the Department of Justice to decide that no prosecution should be brought because Trump had not committed criminal incitement, or if Trump should be acquitted after trial on that charge, those conclusions, while not binding on the Senate, would certainly bear on the question whether Trump had committed a high crime or misdemeanor disqualifying him from holding future federal office.

308. U.S. CONST. art. 1, § 3, cls. 6–7; *id.* art. 2, § 4.

309. *Washington Watch: When Federal Judges Are Impeached*, FED. BAR ASS'N (Mar. 11, 2020), <https://www.fedbar.org/blog/washington-watch-when-federal-judges-are-impeached> [https://perma.cc/6UVN-HLSF].

CONCLUSION

Before we launched special counsels, criminal probes, and impeachment proceedings, we should have considered the long-lasting damage on the presidency. The Framers learned all too well the failures brought by a lack of independence and energy in the executive. In Article II of the Constitution, they sought to cure the disease by vesting “the executive power” in the President, which they understood to include the power over national security and foreign affairs as well as the execution of the laws. Both the Mueller probe and the Ukraine impeachment may have lowered President Trump in the minds of the public, but they could not lead to the President’s removal from office.

Critics might have felt satisfaction in the political symbolism of President Trump’s first impeachment, but it could come at the cost of the independence and vigorousness necessary for a successful President. Watergate may have properly forced Nixon’s resignation, but it also led to a period of congressional supremacy that contributed to the failed Ford and Carter presidencies. The nation would have to wait for President Ronald Reagan to use a rejuvenated executive branch to jump-start the economy and to restore America’s standing in the world. Here, President Trump’s critics risk the same harm to the presidency, but all for the prize of inflicting political harm on a President within a year of a presidential election. President Trump properly fought impeachment as hard as he did in order to prevent Congress from undermining presidential independence and sapping it of executive energy.

