

# CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT

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REPORT BY THE MAJORITY STAFF OF THE  
HOUSE COMMITTEE ON THE JUDICIARY

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## **Foreword by Mr. Nadler**

I am pleased to make available a report prepared by the majority staff addressing constitutional grounds for presidential impeachment. The staff of the Committee on the Judiciary first produced a report addressing this topic in 1974, during the impeachment inquiry into President Richard M. Nixon, and that report was updated by the majority and minority staff in 1998, during the impeachment inquiry into President William Jefferson Clinton. Over the past several decades, however, legal scholars and historians have undertaken a substantial study of the subject. The earlier reports remain useful points of reference, but no longer reflect the best available learning on questions relating to presidential impeachment. Further, they do not address several issues of constitutional law with particular relevance to the ongoing impeachment inquiry respecting President Donald J. Trump. For that reason, the majority staff of the Committee have prepared this report for the use of the Committee on the Judiciary.

The views and conclusions contained in the report are staff views and do not necessarily reflect those of the Committee on the Judiciary or any of its members.

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# Constitutional Grounds for Presidential Impeachment

## Report by the Staff of the Committee on the Judiciary

### I. Introduction

Our President holds the ultimate public trust. He is vested with powers so great that they frightened the Framers of our Constitution; in exchange, he swears an oath to faithfully execute the laws that hold those powers in check. This oath is no formality. The Framers foresaw that a faithless President could destroy their experiment in democracy. As George Mason warned at the Constitutional Convention, held in Philadelphia in 1787, “if we do not provide against corruption, our government will soon be at an end.”<sup>1</sup> Mason evoked a well-known historical truth: when corrupt motives take root, they drive an endless thirst for power and contempt for checks and balances. It is then only the smallest of steps toward acts of oppression and assaults on free and fair elections. A President faithful only to himself—who will sell out democracy and national security for his own personal advantage—is a danger to every American. Indeed, he threatens America itself.

Impeachment is the Constitution’s final answer to a President who mistakes himself for a monarch. Aware that power corrupts, our Framers built other guardrails against that error. The Constitution thus separates governmental powers, imposes an oath of faithful execution, prohibits profiting from office, and guarantees accountability through regular elections. But the Framers were not naïve. They knew, and feared, that someday a corrupt executive might claim he could do anything he wanted as President. Determined to protect our democracy, the Framers built a safety valve into the Constitution: A President can be removed from office if the House of Representatives approves articles of impeachment charging him with “Treason, Bribery, or other high Crimes and Misdemeanors,” and if two-thirds of the Senate votes to find the President guilty of such misconduct after a trial.<sup>2</sup>

As Justice Joseph Story recognized, “the power of impeachment is not one expected in any government to be in constant or frequent exercise.”<sup>3</sup> When faced with credible evidence of extraordinary wrongdoing, however, it is incumbent on the House to investigate and determine whether impeachment is warranted. On October 31, 2019, the House approved H. Res. 660, which, among other things, confirmed the preexisting inquiry “into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America.”<sup>4</sup>

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<sup>1</sup> 1 Max Farrand, ed., *The Records of the Federal Convention of 1787*, 392 (1911) (hereinafter, “Records of the Federal Convention”).

<sup>2</sup> U.S. CONST. Art. II, § 4; *id.* Art. I, § 5, cl. 5; *id.* Art. I, § 3, cl. 6.

<sup>3</sup> 2 Joseph Story, *Commentaries on the Constitution of the United States*, 221 (1833).

<sup>4</sup> H.Res. 660, 116<sup>th</sup> Cong. (2019).

The Judiciary Committee now faces questions of extraordinary importance. In prior impeachment inquiries addressing allegations of Presidential misconduct, the staff of the Judiciary Committee has prepared reports addressing relevant principles of constitutional law.<sup>5</sup> Consistent with that practice, and to assist the Committee and the House in working toward a resolution of the questions before them, this staff report explores the meaning of the words in the Constitution’s Impeachment Clause: “Treason, Bribery, or other high Crimes and Misdemeanors.” It also describes the impeachment process and addresses several mistaken claims about impeachment that have recently drawn public notice.

## II. Summary of Principal Conclusions

Our principal conclusions are as follows.

The purpose of impeachment. As the Framers deliberated in Philadelphia, Mason posed a profound question: “Shall any man be above justice?”<sup>6</sup> By authorizing Congress to remove Presidents for egregious misconduct, the Framers offered a resounding answer. As Mason elaborated, “some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen.”<sup>7</sup> Unlike Britain’s monarch, the President would answer personally—to Congress and thus to the Nation—if he engaged in serious wrongdoing. Alexander Hamilton explained that the President would have no more resemblance to the British king than to “the Grand Seignior, to the khan of Tartary, [or] to the Man of the Seven Mountains.”<sup>8</sup> Whereas “the person of the king of Great Britain is sacred and inviolable,” the President of the United States could be “impeached, tried, and upon conviction . . . removed from office.”<sup>9</sup> Critically, though, impeachment goes no further. It results only in loss of political power. This speaks to the nature of impeachment: it exists not to inflict punishment for past wrongdoing, but rather to save the Nation from misconduct that endangers democracy and the rule of law. Thus, the ultimate question in an impeachment is whether leaving the President in our highest office imperils the Constitution.<sup>10</sup>

Impeachable offenses. The Framers were careful students of history and knew that threats to democracy can take many forms. They feared would-be monarchs, but also warned against fake populists, charismatic demagogues, and corrupt kleptocrats. The Framers thus intended impeachment to reach the full spectrum of Presidential misconduct

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<sup>5</sup> STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4 (Comm. Print 1974) (hereinafter “Constitutional Grounds for Presidential Impeachment (1974)"); STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS (Comm. Print 1998) (hereinafter “Constitutional Grounds for Presidential Impeachment: Modern Precedents (1998)”).

<sup>6</sup> 2 Farrand, *Records of the Federal Convention*, at 65.

<sup>7</sup> 1 Farrand, *Records of the Federal Convention*, at 86.

<sup>8</sup> Alexander Hamilton, *Federalist No. 69*, 444 (Benjamin Fletcher Wright ed., 2004).

<sup>9</sup> *Id.*

<sup>10</sup> See Laurence H. Tribe, *American Constitutional Law* 155 (3d ed. 2000).

that menaced the Constitution. Because they could not anticipate and prohibit every threat a President might someday pose, the Framers adopted a standard sufficiently general and flexible to meet unknown future circumstances: “Treason, Bribery, or other high Crimes and Misdemeanors.” This standard was proposed by Mason and was meant, in his words, to capture all manner of “great and dangerous offenses” against the Constitution.<sup>11</sup>

*Treason and bribery.* Applying traditional tools of interpretation puts a sharper point on this definition of “high Crimes and Misdemeanors.” For starters, it is useful to consider the two impeachable offenses that the Framers identified for us. “Treason” is an unforgiveable betrayal of the Nation and its security. A President who levies war against the government, or lends aid and comfort to our enemies, cannot persist in office; a President who betrays the Nation once will most certainly do so again. “Bribery,” in turn, sounds in abuse of power. Impeachable bribery occurs when the President offers, solicits, or accepts something of personal value to influence his own official actions. By rendering such bribery impeachable, the Framers sought to ensure that the Nation could expel a leader who would sell out the interests of “We the People” for his own personal gain.

In identifying “other high Crimes and Misdemeanors,” we are guided by the text and structure of the Constitution, the records of the Constitutional Convention and state ratifying debates, and the history of impeachment practice. These sources demonstrate that the Framers principally intended impeachment for three overlapping forms of Presidential wrongdoing: (1) abuse of power, (2) betrayal of the nation through foreign entanglements, and (3) corruption of office and elections. Any one of these violations of the public trust justifies impeachment; when combined in a single course of conduct, they state the strongest possible case for impeachment and removal from office.

*Abuse of power.* There are at least as many ways to abuse power as there are powers vested in the President. It would thus be an exercise in futility to attempt a list of every abuse of power constituting “high Crimes and Misdemeanors.” That said, impeachable abuse of power can be roughly divided into two categories: engaging in official acts forbidden by law and engaging in official action with motives forbidden by law. As James Iredell explained, “the president would be liable to impeachments [if] he had … acted from some corrupt motive or other.”<sup>12</sup> This warning echoed Edmund Randolph’s teaching that impeachment must be allowed because “the Executive will have great opportunitys of abusing his power.”<sup>13</sup> President Richard Nixon’s conduct has come to exemplify impeachable abuse of power: he acted with corrupt motives in obstructing justice and using official power to target his political opponents, and his decision to unlawfully defy subpoenas issued by the House impeachment inquiry was unconstitutional on its face.

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<sup>11</sup> 2 Farrand, *Records of the Federal Convention*, at 550.

<sup>12</sup> Quoted in *Background and History of Impeachment: Hearing before the Subcomm. On the Constitution of the H. Comm on the Judiciary*, 105<sup>th</sup> Cong. 49 (1999) (hereinafter “1998 Background and History of Impeachment Hearing”).

<sup>13</sup> 2 Farrand, *Records of the Federal Convention* at 67.

*Betrayal involving foreign powers.* As much as the Framers feared abuse, they feared betrayal still more. That anxiety is shot through their discussion of impeachment—and explains why “Treason” heads the Constitution’s list of impeachable offenses. James Madison put it simply: the President “might betray his trust to foreign powers.”<sup>14</sup> Although the Framers did not intend impeachment for good faith disagreements on matters of diplomacy, they were explicit that betrayal of the Nation through schemes with foreign powers justified that remedy. Indeed, foreign interference in the American political system was among the gravest dangers feared by the Founders of our Nation and the Framers of our Constitution. In his farewell address, George Washington thus warned Americans “to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.”<sup>15</sup> And in a letter to Thomas Jefferson, John Adams wrote: “You are apprehensive of foreign Interference, Intrigue, Influence. So am I.—But, as often as Elections happen, the danger of foreign Influence recurs.”<sup>16</sup>

*Corruption.* Lurking beneath the Framers’ discussion of impeachment was the most ancient and implacable foe of democracy: corruption. The Framers saw no shortage of threats to the Republic, and sought to guard against them, “but the big fear underlying all the small fears was whether they’d be able to control corruption.”<sup>17</sup> As Madison put it, corruption “might be fatal to the Republic.”<sup>18</sup> This was not just a matter of thwarting bribes; it was a far more expansive challenge. The Framers celebrated civic virtue and love of country; they wrote rules to ensure officials would not use public power for private gain.

Impeachment was seen as especially necessary for Presidential conduct corrupting our system of political self-government. That concern arose in multiple contexts as the Framers debated the Constitution. The most important was the risk that Presidents would place their personal interest in re-election above our bedrock national commitment to democracy. The Framers knew that corrupt leaders concentrate power by manipulating elections and undercutting adversaries. They despised King George III, who “resorted to influencing the electoral process and the representatives in Parliament in order to gain [his] treacherous ends.”<sup>19</sup> That is why the Framers deemed electoral treachery a central ground for impeachment. The very premise of the Constitution is that the American people govern themselves, and choose their leaders, through free and fair elections. When the President concludes that elections might threaten his grasp on power and abuses his office to sabotage opponents or invite inference, he rejects democracy itself and must be removed.

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<sup>14</sup> *Id.*, at 65-66.

<sup>15</sup> George Washington Farewell Address (1796), *George Washington Papers, Series 2, Letterbooks 1754-1799: Letterbook 24, April 3, 1793 - March 3, 1797*, Library of Congress.

<sup>16</sup> *To Thomas Jefferson from John Adams, 6 December 1787*, National Archives, Founders Online.

<sup>17</sup> Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* 57 (2014).

<sup>18</sup> 2 Farrand, *Records of the Federal Convention*, at 66.

<sup>19</sup> Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 33 (1998).

*Conclusions regarding the nature of impeachable offenses.* In sum, history teaches that “high Crimes and Misdemeanors” referred mainly to acts committed by public officials, using their power or privileges, that inflicted grave harm on our political order. Such great and dangerous offenses included treason, bribery, serious abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. They were unified by a clear theme: officials who abused, abandoned, or sought personal benefit from their public trust—and who threatened the rule of law if left in power—faced impeachment. Each of these acts, moreover, should be plainly wrong to reasonable officials and persons of honor. When a political official uses political power in ways that substantially harm our political system, Congress can strip them of that power.

Within these parameters, and guided by fidelity to the Constitution, the House must judge whether the President’s misconduct is grave enough to require impeachment. That step must never be taken lightly. It is a momentous act, justified only when the President’s full course of conduct, assessed without favor or prejudice, is “seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.”<sup>20</sup> But when that high standard is met, the Constitution calls the House to action—and the House, in turn, must rise to the occasion. In such cases, a decision *not* to impeach can harm democracy and set an ominous precedent.

The criminality issue. It is occasionally suggested that Presidents can be impeached only if they have committed crimes. That position was rejected in President Nixon’s case, and then rejected again in President Clinton’s, and should be rejected once more. Offenses against the Constitution are different than offenses against the criminal code. Some crimes, like jaywalking, are not impeachable. And some forms of misconduct may offend both the Constitution and the criminal law. Impeachment and criminality must therefore be assessed separately—even though the President’s commission of indictable crimes may further support a case for impeachment and removal. Ultimately, the House must judge whether a President’s conduct offends and endangers the Constitution itself.

Fallacies about impeachment. In the final section of this Report, we briefly address six falsehoods about impeachment that have recently drawn public notice.

*First*, contrary to mistaken claims otherwise, we demonstrate that the current impeachment inquiry has complied in every respect with the Constitution, the Rules of the House, and historic practice and precedent of the House.

*Second*, we address several evidentiary matters. The House impeachment inquiry has compiled substantial direct and circumstantial evidence bearing on the issues at hand. Nonetheless, President Trump has objected that some of the evidence gathered by the House comes from witnesses lacking first-hand knowledge of his conduct. But in the same breath, he has unlawfully ordered many witnesses with first-hand knowledge to defy House

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<sup>20</sup> REPORT OF THE COMMITTEE ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305 8 (1974) (hereinafter “Committee Report on Nixon Articles of Impeachment (1974)”).

subpoenas. As we show, President Trump’s assertions regarding the evidence before the House are misplaced as a matter of constitutional law and common sense.

*Third*, we consider President Trump’s claim that his actions are protected because of his right under Article II of the Constitution “to do whatever I want as president.”<sup>21</sup> This claim is wrong, and profoundly so, because our Constitution rejects pretensions to monarchy and binds Presidents with law. That is true even of powers vested exclusively in the chief executive. If those powers are invoked for corrupt reasons, or wielded in an abusive manner harming the constitutional system, the President is subject to impeachment for “high Crimes and Misdemeanors.” This is a core premise of the impeachment power.

*Fourth*, we address whether the House must accept at face value President Trump’s claim that his motives were not corrupt. In short, no. When the House probes a President’s state of mind, its mandate is to find the facts. That means evaluating the President’s account of his motives to see if it rings true. The question is not whether the President’s conduct *could have* resulted from permissible motives. It is whether the President’s *real reasons*, the ones in his mind at the time, were legitimate. Where the House discovers persuasive evidence of corrupt wrongdoing, it is entitled to rely upon that evidence to impeach.

*Fifth*, we explain that attempted Presidential wrongdoing is impeachable. Mason himself said so at the Constitutional Convention, where he described “*attempts* to subvert the Constitution” as a core example of “great and dangerous offenses.”<sup>22</sup> Moreover, the Judiciary Committee reached the same conclusion in President Nixon’s case. Historical precedent thus confirms that ineptitude and insubordination do not afford the President a defense to impeachment. A President cannot escape impeachment just because his scheme to abuse power, betray the nation, or corrupt elections was discovered and abandoned.

*Finally*, we consider whether impeachment “nullifies” the last election or denies voters their voice in the next one. The Framers themselves weighed this question. They considered relying solely on elections—rather than impeachment—to remove wayward Presidents. That position was firmly rejected. No President is entitled to persist in office after committing “high Crimes and Misdemeanors,” and no one who voted for him in the last election is entitled to expect he will do so. Where the President’s misconduct is aimed at corrupting elections, relying on elections to solve the problem is no safeguard at all.

### **III. The Purpose of Impeachment**

Freedom must not be taken for granted. It demands constant protection from leaders whose taste of power sparks a voracious need for more. Time and again, republics have fallen to officials who care little for the law and use the public trust for private gain.

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<sup>21</sup> *Remarks by President Trump at Turning Point USA’s Teen Student Action Summit 2019*, July 23, 2019, THE WHITE HOUSE.

<sup>22</sup> Cass R. Sunstein, *Impeachment: A Citizen’s Guide* 47 (2017).

The Framers of the Constitution knew this well. They saw corruption erode the British constitution from within. They heard kings boast of their own excellence while conspiring with foreign powers and consorting with shady figures. As talk of revolution spread, they objected as King George III used favors and party politics to control Parliament, aided by men who sold their souls and welcomed oppression.

The Framers risked their freedom, and their lives, to escape that monarchy. So did their families and many of their friends. Together, they resolved to build a nation committed to democracy and the rule of law—a beacon to the world in an age of aristocracy. In the United States of America, “We the People” would be sovereign. We would choose our own leaders and hold them accountable for how they exercised power.

As they designed our government at the Constitutional Convention, however, the Framers faced a dilemma. On the one hand, many of them embraced the need for a powerful chief executive. This had been cast into stark relief by the failure of the Nation’s very first constitution, the Articles of Confederation, which put Congress in charge at the federal level. The ensuing discord led James Madison to warn, “it is not possible that a government can last long under these circumstances.”<sup>23</sup> The Framers therefore created the Presidency. A single official could lead the Nation with integrity, energy, and dispatch—and would be held personally responsible for honoring that immense public trust.

Power, though, is a double-edged sword. “The power to do good meant also the power to do harm, the power to serve the republic also meant the power to demean and defile it.”<sup>24</sup> The President would be vested with breathtaking authority. If corrupt motives took root in his mind, displacing civic virtue and love of country, he could sabotage the Constitution. That was clear to the Framers, who saw corruption as “the great force that had undermined republics throughout history.”<sup>25</sup> Obsessed with the fall of Rome, they knew that corruption marked a leader’s path to abuse and betrayal. Mason thus emphasized, “if we do not provide against corruption, our government will soon be at an end.” This warning against corruption—echoed no fewer than 54 times by 15 delegates at the Convention—extended far beyond bribes and presents. To the Framers, corruption was fundamentally about the misuse of a position of public trust for any improper private benefit. It thus went to the heart of their conception of public service. As a leading historian recounts, “a corrupt political actor would either purposely ignore or forget the public good as he used the reins of power.”<sup>26</sup> Because men and women are not angels, corruption could not be fully eradicated, even in virtuous officials, but “its power can be subdued with the right combination of culture and political rules.”<sup>27</sup>

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<sup>23</sup> Quoted in *id.*, at 27.

<sup>24</sup> Arthur M. Schlesinger, Jr., *The Imperial Presidency* 415 (1973).

<sup>25</sup> Elizabeth B. Wydra & Brianne J. Gorod, *The First Magistrate in Foreign Pay*, THE NEW REPUBLIC, Nov. 11 2019.

<sup>26</sup> Teachout, *Corruption in America*, at 48.

<sup>27</sup> *Id.*, at 47.

The Framers therefore erected safeguards against Presidential abuse. Most famously, they divided power among three branches of government that had the means and motive to balance each other. “Ambition,” Madison reasoned, “must be made to counteract ambition.”<sup>28</sup> In addition, the Framers subjected the President to election every four years and established the Electoral College (which, they hoped, would select virtuous, capable leaders and refuse to re-elect corrupt or unpopular ones). Finally, the Framers imposed on the President a duty to faithfully execute the laws—and required him to accept that duty in a solemn oath.<sup>29</sup> To the Framers, the concept of faithful execution was profoundly important. It prohibited the President from taking official acts in bad faith or with corrupt intent, as well as acts beyond what the law authorized.<sup>30</sup>

A few Framers would have stopped there. This minority feared vesting any branch of government with the power to end a Presidency; as they saw it, even extreme Presidential wrongdoing could be managed in the normal course (mainly by periodic elections).

That view was decisively rejected. As Professor Raoul Berger writes, “the Framers were steeped in English history; the shades of despotic kings and conniving ministers marched before them.”<sup>31</sup> Haunted by those lessons, and convening in the shadow of revolution, the Framers would not deny the Nation an escape from Presidents who deemed themselves above the law. So they turned to a mighty constitutional power, one that offered a peaceful and politically accountable method for ending an oppressive Presidency.

This was impeachment, a legal relic from the British past that over the preceding century had found a new lease on life in the North American colonies. First deployed in 1376—and wielded in fits and starts over the following 400 years—impeachment allowed Parliament to charge royal ministers with abuse, remove them from office, and imprison them. Over time, impeachment helped Parliament shift power away from royal absolutism and encouraged more politically accountable administration. In 1679, it was thus proclaimed in the House of Commons that impeachment was “the chief institution for the preservation of government.”<sup>32</sup> That sentiment was echoed in the New World. Even as Parliamentary impeachment fell into disuse by the early 1700s, colonists in Maryland, Pennsylvania, and Massachusetts laid claim to this prerogative as part of their English birthright. During the revolution, ten states ratified constitutions allowing the impeachment of executive officials—and put that power to use in cases of corruption and abuse of

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<sup>28</sup> James Madison, *Federalist No. 51*, at 356.

<sup>29</sup> U.S. CONST. Art. II, § 1, cl. 8.

<sup>30</sup> See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111- 2121 (2019).

<sup>31</sup> Raoul Berger, *Impeachment: The Constitutional Problems* 4 (1974).

<sup>32</sup> *Id.*, at 1 n.2.

power.<sup>33</sup> Unlike in Britain, though, American impeachment did not result in fines or jailtime. It simply removed officials from political power when their conduct required it.

Familiar with the use of impeachment to address lawless officials, the Framers offered a clear answer to Mason’s question at the Constitutional Convention, “Shall any man be above justice”?<sup>34</sup> As Mason himself explained, “some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen.”<sup>35</sup> Future Vice President Elbridge Gerry agreed, adding that impeachment repudiates the fallacy that our “chief magistrate could do no wrong.”<sup>36</sup> Benjamin Franklin, in turn, made the case that impeachment is “the best way” to assess claims of serious wrongdoing by a President; without it, those accusations would fester unresolved and invite enduring conflict over Presidential malfeasance.<sup>37</sup>

Unlike in Britain, the President would answer personally—to Congress and thus to the Nation—for any serious wrongdoing. For that reason, as Hamilton later explained, the President would have no more resemblance to the British king than to “the Grand Seignior, to the khan of Tartary, [or] to the Man of the Seven Mountains.”<sup>38</sup> Whereas “the person of the king of Great Britain is sacred and inviolable,” the President could be “impeached, tried, and upon conviction … removed from office.”<sup>39</sup>

Of course, the decision to subject the President to impeachment was not the end of the story. The Framers also had to specify how this would work in practice. After long and searching debate they made three crucial decisions, each of which sheds light on their understanding of impeachment’s proper role in our constitutional system.

First, they limited the consequences of impeachment to “removal from Office” and “disqualification” from future officeholding.<sup>40</sup> To the extent the President’s wrongful conduct also breaks the law, the Constitution expressly reserves criminal punishment for the ordinary processes of criminal law. In that respect, “the consequences of impeachment and conviction go just far enough, and no further than, to remove the threat posed to the Republic by an unfit official.”<sup>41</sup> This speaks to the very nature of impeachment: it exists

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<sup>33</sup> Frank O. Bowman, III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* 72 (2019).

<sup>34</sup> 2 Farrand, *Records of the Federal Convention*, at 65-67.

<sup>35</sup> 1 Farrand, *Records of the Federal Convention*, at 66.

<sup>36</sup> 2 Farrand, *Records of the Federal Convention*, at 66.

<sup>37</sup> James Madison, *Notes on Debates in the Federal Convention of 1787* 332 (1987).

<sup>38</sup> Alexander Hamilton, *Federalist No. 69*, at 444.

<sup>39</sup> *Id.*

<sup>40</sup> U.S. CONST. Art. I, § 43, cl. 7.

<sup>41</sup> John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 650 (1999).

not to inflict personal punishment for past wrongdoing, but rather to protect against future Presidential misconduct that would endanger democracy and the rule of law.<sup>42</sup>

Second, the Framers vested the House with “the sole Power of Impeachment.”<sup>43</sup> The House thus serves in a role analogous to a grand jury and prosecutor: it investigates the President’s misconduct and decides whether to formally accuse him of impeachable acts. As James Iredell explained during debates over whether to ratify the Constitution, “this power is lodged in those who represent the great body of the people, because the occasion for its exercise will arise from acts of great injury to the community.”<sup>44</sup> The Senate, in turn, holds “the sole Power to try all Impeachments.”<sup>45</sup> When the Senate sits as a court of impeachment for the President, each Senator must swear a special oath, the Chief Justice of the United States presides, and conviction requires “the concurrence of two thirds of the Members present.”<sup>46</sup> By designating Congress to accuse the President and conduct his trial, the Framers confirmed—in Hamilton’s words—that impeachment concerns an “abuse or violation of some public trust” with “injuries done immediately to the society itself.”<sup>47</sup> Impeachment is reserved for offenses against our political system. It is therefore prosecuted and judged by Congress, speaking for the Nation.

Last, but not least, the Framers imposed a rule of wrongdoing. The President cannot be removed based on poor management, general incompetence, or unpopular policies. Instead, the question in any impeachment inquiry is whether the President has engaged in misconduct justifying an early end to his term in office: “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>48</sup> This phrase had a particular legal meaning to the Framers. It is to that understanding, and to its application in prior Presidential impeachments, that we now turn.

#### IV. Impeachable Offenses

As careful students of history, the Framers knew that threats to democracy can take many forms. They feared would-be monarchs, but also warned against fake populists, charismatic demagogues, and corrupt kleptocrats. In describing the kind of leader who might menace the Nation, Hamilton offered an especially striking portrait:

When a man unprincipled in private life[,] desperate in his fortune, bold in his temper . . . known to have scoffed in private at the principles of liberty

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<sup>42</sup> See Tribe, *American Constitutional Law*, at 155.

<sup>43</sup> U.S. CONST. Art. I, § 2, cl. 5.

<sup>44</sup> 4 Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 113 (1861) (hereinafter “Debates in the Several State Conventions”).

<sup>45</sup> U.S. CONST. Art. I, § 3, cl. 6.

<sup>46</sup> *Id.*

<sup>47</sup> Alexander Hamilton, *Federalist No. 65*, at 426.

<sup>48</sup> U.S. CONST. Art. II, § 4.

— when such a man is seen to mount the hobby horse of popularity — to join in the cry of danger to liberty — to take every opportunity of embarrassing the General Government & bringing it under suspicion — to flatter and fall in with all the non sense [sic] of the zealots of the day — It may justly be suspected that his object is to throw things into confusion that he may ride the storm and direct the whirlwind.<sup>49</sup>

This prophesy echoed Hamilton's warning, in *Federalist No. 1*, that “of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”<sup>50</sup>

The Framers thus intended impeachment to reach the full spectrum of Presidential misconduct that threatened the Constitution. They also intended our Constitution to endure for the ages. Because they could not anticipate and specifically prohibit every threat a President might someday pose, the Framers adopted a standard sufficiently general and flexible to meet unknown future circumstances. This standard was meant—as Mason put it—to capture all manner of “great and dangerous offenses” incompatible with the Constitution. When the President uses the powers of his high office to benefit himself, while injuring or ignoring the American people he is oath-bound to serve, he has committed an impeachable offense.

Applying the tools of legal interpretation, as we do below, puts a sharper point on this definition of “high Crimes and Misdemeanors.” It also confirms that the Framers principally aimed the impeachment power at a few core evils, each grounded in a unifying fear that a President might abandon his duty to faithfully execute the laws. Where the President engages in serious abuse of power, betrays the national interest through foreign entanglements, or corrupts his office or elections, he has undoubtedly committed “high Crimes and Misdemeanors” as understood by the Framers. Any one of these violations of the public trust is impeachable. When combined in a scheme to advance the President’s personal interests while ignoring or injuring the Constitution, they state the strongest possible case for impeachment and removal from office.

### A. Lessons from British and Early American History

As Hamilton recounted, Britain afforded “[t]he model from which the idea of [impeachment] has been borrowed.”<sup>51</sup> That was manifestly true of the phrase “high Crimes and Misdemeanors.” The Framers could have authorized impeachment for “crimes” or “serious crimes.” Or they could have followed the practice of many American state

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<sup>49</sup> Alexander Hamilton, “*Objections and Answers respecting the Administration of the Government*,” Founders Online, National Archives.

<sup>50</sup> Alexander Hamilton, *Federalist No. 1*, at 91.

<sup>51</sup> Alexander Hamilton, *Federalist No. 65*, at 427.

constitutions and permitted impeachment for “maladministration” or “malpractice.”<sup>52</sup> But they instead selected a “unique phrase used for centuries in English parliamentary impeachments.”<sup>53</sup> To understand their choice requires a quick tour through history.

That tour offers two lessons. The first is that the phrase “high Crimes and Misdemeanors” was used *only* for parliamentary impeachments; it was never used in the ordinary criminal law.<sup>54</sup> Moreover, in the 400-year history of British impeachments, the House of Commons impeached many officials on grounds that did not involve any discernibly criminal conduct. Indeed, the House of Commons did so yet again just as the Framers gathered in Philadelphia. That same month, Edmund Burke—the celebrated champion of American liberty—brought twenty-two articles of impeachment against Warren Hastings, the Governor General of India. Burke charged Hastings with offenses including abuse of power, corruption, disregarding treaty obligations, and misconduct of local wars. Historians have confirmed that “none of the charges could fairly be classed as criminal conduct in any technical sense.”<sup>55</sup> Aware of that fact, Burke accused Hastings of “[c]rimes, not against forms, but against those eternal laws of justice, which are our rule and our birthright: his offenses are not in formal, technical language, but in reality, in substance and effect, High Crimes and High Misdemeanors.”<sup>56</sup>

Burke’s denunciation of Hastings points to the second lesson from British history: “high Crimes and Misdemeanors” were understood as offenses against the constitutional system itself. This is confirmed by use of the word “high,” as well as Parliamentary practice. From 1376 to 1787, the House of Commons impeached officials on seven general grounds: (1) abuse of power; (2) betrayal of the nation’s security and foreign policy; (3) corruption; (4) armed rebellion [a.k.a. treason]; (5) bribery; (6) neglect of duty; and (7) violating Parliament’s constitutional prerogatives.<sup>57</sup> To the Framers and their contemporaries learned in the law, the phrase “high Crimes and Misdemeanors” would have called to mind these offenses against the body politic.

The same understanding prevailed on this side of the Atlantic. In the colonial period and under newly-ratified state constitutions, most impeachments targeted abuse of power, betrayal of the revolutionary cause, corruption, treason, and bribery.<sup>58</sup> Many Framers at the Constitutional Convention had participated in drafting their state constitutions, or in colonial and state removal proceedings, and were steeped in this outlook on impeachment. Further, the Framers knew well the Declaration of Independence, “whose bill of particulars

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<sup>52</sup> Bowman, *High Crimes and Misdemeanors*, at 65-72.

<sup>53</sup> Constitutional Grounds for Presidential Impeachment (1974), at 4.

<sup>54</sup> *See id.*

<sup>55</sup> Bowman, *High Crimes and Misdemeanors*, at 41.

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

<sup>57</sup> *Id.*, at 46; Berger, *Impeachment*, at 70.

<sup>58</sup> *See* Peter Charles Hoffer & N. E. H. Hull, *Impeachment in America, 1635-1805* 1-106 (1984).

against King George III modeled what [we would] now view as articles of impeachment.”<sup>59</sup> That bill of particulars did not dwell on technicalities of criminal law, but rather charged the king with a “long train of abuses and usurpations,” including misuse of power, efforts to obstruct and undermine elections, and violating individual rights.<sup>60</sup>

History thus teaches that “high Crimes and Misdemeanors” referred mainly to acts committed by public officials, using their power or privileges, that inflicted grave harm on society itself. Such great and dangerous offenses included treason, bribery, abuse of power, betrayal of the nation, and corruption of office. They were unified by a clear theme: officials who abused, abandoned, or sought personal benefit from their public trust—and who threatened the rule of law if left in power—faced impeachment and removal.

## B. Treason and Bribery

For the briefest of moments at the Constitutional Convention, it appeared as though Presidential impeachment might be restricted to “treason, or bribery.”<sup>61</sup> But when this suggestion reached the floor, Mason revolted. With undisguised alarm, he warned that such limited grounds for impeachment would miss “attempts to subvert the Constitution,” as well as “many great and dangerous offenses.”<sup>62</sup> Here he invoked the charges pending in Parliament against Hastings as a case warranting impeachment for reasons other than treason. To “extend the power of impeachments,” Mason initially suggested adding “or maladministration” after “treason, or bribery.”<sup>63</sup> Madison, however, objected that “so vague a term will be equivalent to a tenure during the pleasure of the Senate.”<sup>64</sup> In response, Mason substituted “other high Crimes and Misdemeanors.”<sup>65</sup> Apparently pleased with Mason’s compromise, the Convention accepted his proposal and moved on.

This discussion confirms that Presidential impeachment is warranted for all manner of great and dangerous offenses that subvert the Constitution. It also sheds helpful light on the nature of impeachable offenses: in identifying “other high Crimes and Misdemeanors,” we can start with two that the Framers identified for us, “Treason” and “Bribery.”

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<sup>59</sup> Laurence H. Tribe & Joshua Matz, *To End a Presidency: The Power of Impeachment* 7 (2018).

<sup>60</sup> The Declaration of Independence, *Thomas Jefferson, et al, July 4, 1776, Copy of Declaration of Independence*, Library of Congress.

<sup>61</sup> 2 Farrand, *Records of the Federal Convention*, at 550.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

## 1. Impeachable Treason

Under Article III of 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.”<sup>66</sup> In other words, a person commits treason if he uses armed force in an attempt to overthrow the government, or if he knowingly gives aid and comfort to nations (or organizations) with which the United States is in a state of declared or open war. At the very heart of “Treason” is deliberate betrayal of the nation and its security. Such betrayal would not only be unforgivable, but would also confirm that the President remains a threat if allowed to remain in office. A President who has knowingly betrayed national security is a President who will do so again. He endangers our lives and those of our allies.

## 2. Impeachable Bribery

The essence of impeachable bribery is a government official’s exploitation of his or her public duties for personal gain. To the Framers, it was received wisdom that nothing can be “a greater Temptation to Officers [than] to abuse their Power by Bribery and Extortion.”<sup>67</sup> To guard against that risk, the Framers authorized the impeachment of a President who offers, solicits, or accepts something of personal value to influence his own official actions. By rendering such “Bribery” impeachable, the Framers sought to ensure that the Nation could expel a leader who would sell out the interests of “We the People” to achieve his own personal gain.

Unlike “Treason,” which is defined in Article III, “Bribery” is not given an express definition in the Constitution. But as Justice Joseph Story explained, a “proper exposition of the nature and limits of this offense” can be found in the Anglo-American common law tradition known well to our Framers.<sup>68</sup> That understanding, in turn, can be refined by reference to the Constitution’s text and the records of the Constitutional Convention.<sup>69</sup>

To start with common law: At the time of the Constitutional Convention, bribery was well understood in Anglo-American law to encompass *offering*, *soliciting*, or *accepting* bribes. In 1716, for example, William Hawkins defined bribery in an influential treatise as “the receiving or offering of any undue reward, by or to any person whatsoever ... in order to incline him to do a thing against the known rules of honesty and integrity.”<sup>70</sup>

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<sup>66</sup> U.S. CONST. Art. III, § 3, cl. 1.

<sup>67</sup> William Hawkins, *A Treatise of Pleas to the Crown*, ch. 67, § 3 (1716).

<sup>68</sup> 2 Story, *Commentaries*, at 263; *see also* H.R. REP. NO. 946, at 19 (1912).

<sup>69</sup> For example, while the English common law tradition principally addressed itself to *judicial* bribery, the Framers repeatedly made clear at the Constitutional Convention that they intended to subject the President to impeachment for bribery. They confirmed this intention in the Impeachment Clause, which authorizes the impeachment of “[t]he President, Vice President and all civil Officers of the United States” for “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST., Art. 2, § 4. It is therefore proper to draw upon common law principles and to apply them to the office of the Presidency.

<sup>70</sup> Hawkins, *A Treatise of Pleas to the Crown*, ch. 67, § 2 (1716).

This description of the offense was echoed many times over the following decades. In a renowned bribery case involving the alleged solicitation of bribes, Lord Mansfield agreed that “[w]herever it is a crime to take, it is a crime to give: they are reciprocal.”<sup>71</sup> Two years later, William Blackstone confirmed that “taking bribes is punished,” just as bribery is punishable for “those who offer a bribe, though not taken.”<sup>72</sup> Soliciting a bribe—even if it is not accepted—thus qualified as bribery at common law. Indeed, it was clear under the common law that “the *attempt* is a crime; it is complete on *his* side who *offers* it.”<sup>73</sup>

The Framers adopted that principle into the Constitution. As Judge John Noonan explains, the drafting history of the Impeachment Clause demonstrates that “‘Bribery’ was read both actively and passively, including the chief magistrate bribing someone and being bribed.”<sup>74</sup> Many scholars of Presidential impeachment have reached the same conclusion.<sup>75</sup> Impeachable “Bribery” thus covers—*inter alia*—the *offer*, *solicitation*, or *acceptance* of something of personal value by the President to influence his own official actions.

This conclusion draws still more support from a closely related part of the common law. In the late-17<sup>th</sup> century, “bribery” was a relatively new offense, and was understood as overlapping with the more ancient common law crime of “extortion.”<sup>76</sup> “Extortion,” in turn, was defined as the “abuse of public justice, which consists in any officer’s unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.”<sup>77</sup> Under this definition, both bribery *and*

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<sup>71</sup> *Rex v. Vaughan*, 98 Eng. Rep. 308, 311 (K.B. 1769).

<sup>72</sup> William Blackstone, *Commentaries on the Laws of England*, Vol. 2, Book 4, Ch. 10, § 17 (1771).

<sup>73</sup> *Rex v. Vaughan*, 98 Eng. Rep. 308, 311 (K.B. 1769). American courts have subsequently repeated this precise formulation. *See, e.g.*, *State v. Ellis*, 33 N.J.L. 102, 104 (N.J. Sup. Ct. 1868) (“The offence is complete when an offer or reward is made to influence the vote or action of the official.”); *see also* William O. Russell, *A Treatise on Crimes and Misdemeanors* 239-240 (1st American Ed) (1824) (“The law abhors the least tendency to corruption; and up on the principle which has been already mentioned, of an attempt to commit even a misdemeanor, being itself a misdemeanor, (f) attempts to bribe, though unsuccessful, have in several cases been held to be criminal.”).

<sup>74</sup> John T. Noonan, Jr., *Bribes: The Intellectual History of a Moral Idea*, 430 (1984).

<sup>75</sup> As Professor Bowman writes, bribery was “a common law crime that developed from a narrow beginning” to reach “giving, and offering to give, [any] improper rewards.” Bowman, *High Crimes & Misdemeanors*, at 243; *see also, e.g.*, Tribe & Matz, *To End A Presidency*, at 33 (“The corrupt exercise of power in exchange for a personal benefit defines impeachable bribery. That’s self-evidently true whenever the president receives bribes to act a certain way. But it’s also true when the president offers bribes to other officials—for example, to a federal judge, a legislator, or a member of the Electoral College ... In either case, the president is fully complicit in a grave degradation of power, and he can never again be trusted to act as a faithful public servant.”).

<sup>76</sup> *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 839 (1988).

<sup>77</sup> Blackstone, *Commentaries*, Vol. 2, Book 4, Ch. 10, § 22 (1771) (citing 1 Hawk. P. C. 170); *accord* Giles Jacob, *A New Law-Dictionary* 102 (1782) (defining “Extortion” as “an unlawful taking by an officer, &c. by colour of his office, of any money, or valuable thing, from a person where none at all is due, or not so much is due, or before it is due”).

extortion occurred when an official used his public position to obtain private benefits to which he was not entitled. Conduct which qualified as bribery was therefore “routinely punished as common law extortion.”<sup>78</sup> To the Framers, who would have seen bribery and extortion as virtually coextensive, when a President acted in his official capacity to offer, solicit, or accept an improper personal benefit, he committed “Bribery.”<sup>79</sup>

Turning to the nature of the improper personal benefit: because officials can be corrupted in many ways, the benefit at issue in a bribe can be anything of subjective personal value to the President. This is not limited to money. Indeed, given their purposes, it would have made no sense for the Framers to confine “Bribery” to the offer, solicitation, or acceptance of money, and they expressed no desire to impose that restriction. To the contrary, in guarding against foreign efforts to subvert American officials, they confirmed their broad view of benefits that might cause corruption: a person who holds “any Office of Profit or Trust,” such as the President, is forbidden from accepting “any present, Office or Title, of any kind whatever, from … a foreign State.”<sup>80</sup> An equally pragmatic (and capacious) view applies to the impeachable offense of “Bribery.” This view is further anchored in the very same 17<sup>th</sup> and 18<sup>th</sup> century common law treatises that were well known to the Framers. Those authorities used broad language in defining what qualifies as a “thing of value” in the context of bribery: “any undue reward” or any “valuable consideration.”<sup>81</sup>

To summarize, impeachable “Bribery” occurs when a President offers, solicits, or accepts something of personal value to influence his own official actions. Bribery is thus an especially egregious and specific example of a President abusing his power for private gain. As Blackstone explained, bribery is “the genius of despotic countries where the true principles of government are never understood”—and where “it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed.”<sup>82</sup> In our democracy, the Framers understood that there is no place for Presidents who would abuse their power and betray the public trust through bribery.

Like “Treason,” the offense of “Bribery” is thus aimed at a President who is a continuing threat to the Constitution. Someone who would willingly assist our enemies, or trade public power for personal favors, is the kind of person likely to break the rules again if they remain in office. But there is more: both “Treason” and “Bribery” are serious offenses with the capacity to corrupt constitutional governance and harm the Nation itself; both involve wrongdoing that reveals the President as a continuing threat if left in power; and both offenses are “plainly wrong in themselves to a person of honor, or to a good

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<sup>78</sup> Lindgren, *The Elusive Distinction*, 35 UCLA L. REV. at 839.

<sup>79</sup> For all the reasons given below in our discussion of the criminality issue, impeachable “Bribery” does not refer to the meaning of bribery under modern federal criminal statutes. *See also* Bowman, *High Crimes & Misdemeanors*, at 243-44; Tribe & Matz, *To End A Presidency*, at 31-33.

<sup>80</sup> U.S. CONST, art. I, § 9, cl.8.

<sup>81</sup> Hawkins, *A Treatise of Pleas to the Crown*, ch. 67, § 2 (1716).

<sup>82</sup> Blackstone, *Commentaries on the Laws of England*, Book 4, Ch. 10 “Of Offenses Against Public Justice” (1765-1770).

citizen, regardless of words on the statute books.”<sup>83</sup> Looking to the Constitution’s text and history—including the British, colonial, and early American traditions discussed earlier—these characteristics also define “other high Crimes and Misdemeanors.”

### C. Abuse, Betrayal & Corruption

With that understanding in place, the records of the Constitutional Convention offer even greater clarity. They demonstrate that the Framers principally intended impeachment for three forms of Presidential wrongdoing: serious abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. When the President engages in such misconduct, and does so in ways that are recognizably wrong and injurious to our political system, impeachment is warranted. That is proven not only by debates surrounding adoption of the Constitution, but also by the historical practice of the House in exercising the impeachment power.

#### 1. Abuse of Power

As Justice Robert Jackson wisely observed, “the purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”<sup>84</sup> Nowhere is that truer than in the Presidency. As the Framers created a formidable chief executive, they made clear that impeachment is justified for serious abuse of power. Edmund Randolph was explicit on this point. In explaining why the Constitution must authorize Presidential impeachment, he warned that “the Executive will have great opportunitys of abusing his power.”<sup>85</sup> Madison, too, stated that impeachment is necessary because the President “might pervert his administration into a scheme of … oppression.”<sup>86</sup> This theme echoed through the state ratifying conventions. Advocating that New York ratify the Constitution, Hamilton set the standard for impeachment at an “abuse or violation of some public trust.”<sup>87</sup> In South Carolina, Charles Pinckney agreed that Presidents must be removed who “behave amiss or betray their public trust.”<sup>88</sup> In Massachusetts, Reverend Samuel Stillman asked, “With such a prospect [of impeachment], who will dare to abuse the powers vested in him by the people.”<sup>89</sup> Time and again, Americans who wrote and ratified the Constitution confirmed that Presidents may be impeached for abusing the power entrusted to them.

There are at least as many ways to abuse power as there are powers vested in the President. It would thus be an exercise in futility to attempt a list of every conceivable

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<sup>83</sup> Charles L. Black Jr. & Philip Bobbitt, *Impeachment: A Handbook*, New Edition 34 (2018).

<sup>84</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (Jackson, J., concurring).

<sup>85</sup> 2 Farrand, *Records of the Federal Convention*, at 67.

<sup>86</sup> *Id.*, at 65-66.

<sup>87</sup> Alexander Hamilton, *Federalist No. 65*, at 426.

<sup>88</sup> Berger, *Impeachment*, at 94.

<sup>89</sup> 2 Elliot, *Debates in the Several State Conventions*, at 169.

abuse constituting “high Crimes and Misdemeanors.” That said, abuse of power was no vague notion to the Framers and their contemporaries. It had a very particular meaning to them. Impeachable abuse of power can take two basic forms: (1) the exercise of official power in a way that, on its very face, grossly exceeds the President’s constitutional authority or violates legal limits on that authority; and (2) the exercise of official power to obtain an improper personal benefit, while ignoring or injuring the national interest. In other words, the President may commit an impeachable abuse of power in two different ways: by engaging in forbidden acts, or by engaging in potentially permissible acts but for forbidden reasons (e.g., with the corrupt motive of obtaining a personal political benefit).

The first category involves conduct that is inherently and sharply inconsistent with the law—and that amounts to claims of monarchical prerogative. The generation that rebelled against King George III knew what absolute power looked like. The Framers had other ideas when they organized our government, and so they placed the chief executive within the bounds of law. That means the President may exercise only the powers expressly or impliedly vested in him by the Constitution, and he must also respect legal limits on the exercise of those powers (including the rights of Americans citizens). A President who refuses to abide these restrictions, thereby causing injury to society itself and engaging in recognizably wrongful conduct, may be subjected to impeachment for abuse of power.

That principle also covers conduct grossly inconsistent with and subversive of the separation of powers. The Framers knew that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.”<sup>90</sup> To protect liberty, they wrote a Constitution that creates a system of checks and balances within the federal government. Some of those rules are expressly enumerated in our founding charter; others are implied from its structure or from the history of inter-branch relations.<sup>91</sup> When a President wields executive power in ways that usurp and destroy the prerogatives of Congress or the Judiciary, he exceeds the scope of his constitutional authority and violates limits on permissible conduct. Such abuses of power are therefore impeachable. That conclusion is further supported by the British origins of the phrase “high Crimes and Misdemeanors”: Parliament repeatedly impeached ministers for “subvert[ing] its conception of proper constitutional order in favor of the ‘arbitrary and tyrannical’ government of ambitious monarchs and their grasping minions.”<sup>92</sup>

The Supreme Court advanced similar logic in *Ex Parte Grossman*, which held the President can pardon officials who defy judicial orders and are held in criminal contempt of court.<sup>93</sup> This holding raised an obvious concern: what if the President used “successive pardons” to “deprive a court of power to enforce its orders”?<sup>94</sup> That could fatally weaken

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<sup>90</sup> James Madison, *Federalist No. 47*, at 336.

<sup>91</sup> See generally *National Labor Relations Board v. Noel Canning, et al.*, 573 U.S. 513 (2014).

<sup>92</sup> Bowman, *High Crimes and Misdemeanors*, at 109.

<sup>93</sup> *Ex Parte Grossman*, 267 U.S. 87 (1925).

<sup>94</sup> *Id.*, at 121.

the Judiciary's role under Article III of the Constitution. On behalf of a unanimous Court, Chief Justice William Howard Taft—who had previously served as President—explained that “exceptional cases like this … would suggest a resort to impeachment.”<sup>95</sup>

Two impeachment inquiries have involved claims that a President grossly violated the Constitution's separation of powers. The first was in 1868, when the House impeached President Andrew Johnson, who had succeeded President Abraham Lincoln following his assassination at Ford's Theatre. There, the articles approved by the House charged President Johnson with conduct forbidden by law: in firing the Secretary of War, he had allegedly violated the Tenure of Office Act, which restricted the President's power to remove cabinet members during the term of the President who had appointed them.<sup>96</sup> President Johnson was thus accused of a facial abuse of power. In the Senate, though, he was acquitted by a single vote—largely because the Tenure of Office Act was viewed by many Senators as likely unconstitutional (a conclusion later adopted by the Supreme Court in an opinion by Chief Justice Taft, who described the Act as “invalid”<sup>97</sup>).

Just over 100 years later, this Committee accused a second chief executive of abusing his power. In a departure from prior Presidential practice—and in contravention of Article I of the Constitution—President Nixon had invoked specious claims of executive privilege to defy Congressional subpoenas served as part of an impeachment inquiry. His obstruction centered on tape recordings, papers, and memoranda relating to the Watergate break-in and its aftermath. As the House Judiciary Committee found, he had interposed “the powers of the presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to exercise the sole power of impeachment vested by the Constitution in the House of Representatives.”<sup>98</sup> Put simply, President Nixon purported to control the exercise of powers that belonged solely to the House and not to him—including the power of inquiry that is vital to any Congressional judgments about impeachment. In so doing, President Nixon injured the constitutional plan: “Unless the defiance of the Committee's subpoenas under these circumstances is considered grounds for impeachment, it is difficult to conceive of any President acknowledging that he obligated to supply the relevant evidence necessary for Congress to exercise its constitutional responsibility in an impeachment proceeding.”<sup>99</sup> The House Judiciary Committee therefore approved an article of impeachment against President Nixon for abuse of power in obstructing the House impeachment inquiry.

But that was only part of President Nixon's impeachable wrongdoing. The House Judiciary Committee also approved two additional articles of impeachment against him for

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<sup>95</sup> *Id.*

<sup>96</sup> *Articles of Impeachment Exhibited By The House Of Representatives Against Andrew Johnson, President of the United States*, 40<sup>th</sup> Cong. (1868).

<sup>97</sup> *Myers v. United States*, 272 U.S. 52, 108 (1926).

<sup>98</sup> *Committee Report on Nixon Articles of Impeachment* (1974), at 188.

<sup>99</sup> *Id.*, at 213.

abuse of power, one for obstruction of justice and the other for using Presidential power to target, harass, and surveil his political opponents. These articles demonstrate the second way in which a President can abuse power: by acting with improper motives.

This understanding of impeachable abuse of power is rooted in the Constitution's text, which commands the President to "faithfully execute" the law. At minimum, that duty requires Presidents "to exercise their power only when it is motivated in the public interest rather than in their private self-interest."<sup>100</sup> A President can thus be removed for exercising power with a corrupt purpose, even if his action would otherwise be permissible. As Iredell explained at the North Carolina ratifying convention, "the president would be liable to impeachments [if] he had ... acted from some corrupt motive or other," or if he was "willfully abusing his trust."<sup>101</sup> Madison made a similar point at Virginia's ratifying convention. There, he observed that the President could be impeached for abuse of the pardon power if there are "grounds to believe" he has used it to "shelter" persons with whom he is connected "in any suspicious manner."<sup>102</sup> Such a pardon would technically be within the President's authority under Article II of the Constitution, but it would rank as an impeachable abuse of power because it arose from the forbidden purpose of obstructing justice. To the Framers, it was dangerous for officials to exceed their constitutional power, or to transgress legal limits, but it was equally dangerous (perhaps more so) for officials to conceal corrupt or illegitimate objectives behind superficially valid acts.

Again, President Nixon's case is instructive. After individuals associated with his campaign committee committed crimes to promote his reelection, he used the full powers of his office as part of a scheme to obstruct justice. Among many other wrongful acts, President Nixon dangled pardons to influence key witnesses, told a senior aide to have the CIA stop an FBI investigation into Watergate, meddled with Justice Department immunity decisions, and conveyed secret law enforcement information to suspects. Even if some of this conduct was formally within the scope of President Nixon's authority as head of the Executive Branch, it was undertaken with illegitimate motives. The House Judiciary Committee therefore included it within an article of impeachment charging him with obstruction of justice. Indeed, following President Nixon's resignation and the discovery of additional evidence concerning obstruction, all eleven members of the Committee who had originally voted against that article joined a statement affirming that "we were prepared to vote for his impeachment on proposed Article I had he not resigned his office."<sup>103</sup> Of course, several decades later, obstruction of justice was also the basis for an article of impeachment against President Clinton, though his conduct did not involve official acts.<sup>104</sup>

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<sup>100</sup> Kent et al., *Faithful Execution*, at 2120, 2179.

<sup>101</sup> 1998 Background and History of Impeachment Hearing, at 49.

<sup>102</sup> 3 Elliott, *Debates in the Several State Conventions*, at 497-98.

<sup>103</sup> Committee Report on Nixon Articles of Impeachment (1974), at 361.

<sup>104</sup> In President Clinton's case, the House approved the article of impeachment for obstruction of justice. There was virtually no disagreement in those proceedings over whether obstructing justice can be impeachable; scholars, lawyers, and legislators on all sides of the dispute recognized that it can be. *See* Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV 1277, 1305-1307 (2018).

Yet obstruction of justice did not exhaust President Nixon's corrupt abuse of power. He was also accused of manipulating federal agencies to injure his opponents, aid his friends, gain personal political benefits, and violate the constitutional rights of American citizens. For instance, President Nixon improperly attempted to cause income tax audits of his perceived political adversaries; directed the FBI and Secret Service to engage in targeted (and unlawful) surveillance; and formed a secret investigative unit within the White House—financed with campaign contributions—that utilized CIA resources in its illegal covert activities. In explaining this additional article of impeachment, the House Judiciary Committee stated that President Nixon's conduct was “undertaken for his personal political advantage and not in furtherance of any valid national policy objective.”<sup>105</sup> His abuses of executive power were thus “seriously incompatible with our system of constitutional government” and warranted removal from office.<sup>106</sup>

With the benefit of hindsight, the House's decision to impeach President Johnson is best understood in a similar frame. Scholars now largely agree that President Johnson's impeachment was motivated not by violations of the Tenure of Office Act, but on his illegitimate use of power to undermine Reconstruction and subordinate African-Americans following the Civil War.<sup>107</sup> In that period, fundamental questions about the nature and future of the Union stood unanswered. Congress therefore passed a series of laws to “reconstruct the former Confederate states into political entities in which black Americans enjoyed constitutional protections.”<sup>108</sup> This program, however, faced an unyielding enemy in President Johnson, who declared that “white men alone must manage the south.”<sup>109</sup> Convinced that political control by African-Americans would cause a “relapse into barbarism,” President Johnson vetoed civil rights laws; when Congress overrode him, he refused to enforce those laws.<sup>110</sup> The results were disastrous. As Annette Gordon-Reed writes, “it would be impossible to exaggerate how devastating it was to have a man who affirmatively hated black people in charge of the program that was designed to settle the terms of their existence in post-Civil War America.”<sup>111</sup> Congress tried to compromise with

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Publicly available evidence does not suggest that the Senate's acquittal of President Clinton was based on the view that obstruction of justice is not impeachable. Rather, Senators who voted for acquittal appear to have concluded that some of the factual charges were not supported and that, even if Presidential perjury and obstruction of justice might in some cases justify removal, the nature and circumstances of the conduct at issue (including its predominantly private character) rendered it insufficiently grave to warrant that remedy.

<sup>105</sup> Committee Report on Nixon Articles of Impeachment (1974), at 139.

<sup>106</sup> *Id.*

<sup>107</sup> See generally Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (1999).

<sup>108</sup> Jeffrey A. Engel, Jon Meacham, Timothy Naftali, & Peter Baker, *Impeachment: An American History* 48 (2018).

<sup>109</sup> *Id.* at 49.

<sup>110</sup> *Id.*

<sup>111</sup> See Annette Gordon-Reed, *Andrew Johnson: The American Presidents Series: the 17<sup>th</sup> President, 1865-1869* 12 (2011).

the President, but to no avail. A majority of the House finally determined that President Johnson posed a clear and present danger to the Nation if allowed to remain in office.

Rather than directly target President Johnson's faithless execution of the laws, and his illegitimate motives in wielding power, the House resorted to charges based on the Tenure of Office Act. But in reality, "the shaky claims prosecuted by [the House] obscured a far more compelling basis for removal: that Johnson's virulent use of executive power to sabotage Reconstruction posed a mortal threat to the nation—and to civil and political rights—as reconstituted after the Civil War ... [T]he country was in the throes of a second founding. Yet Johnson abused the powers of his office and violated the Constitution to preserve institutions and practices that had nearly killed the Union. He could not be allowed to salt the earth as the Republic made itself anew."<sup>112</sup> Viewed from that perspective, the case for impeaching President Johnson rested on his use of power with illegitimate motives.

Pulling this all together, the Framers repeatedly confirmed that Presidents can be impeached for grave abuse of power. Where the President engages in acts forbidden by law, or acts with an improper motive, he has committed an abuse of power under the Constitution. Where those abuses inflict substantial harm on our political system and are recognizably wrong, they warrant his impeachment and removal.<sup>113</sup>

## **2. Betrayal of the National Interest Through Foreign Entanglements**

It is not a coincidence that the Framers started with "Treason" in defining impeachable offenses. Betrayal was no abstraction to them. They had recently waged a war for independence in which some of their fellow citizens remained loyal to the enemy. The infamous traitor, Benedict Arnold, had defected to Britain less than a decade earlier. As they looked outward, the Framers saw kings scheming for power, promising fabulous wealth to spies and deserters. The United States could be enmeshed in such conspiracies: "Foreign powers," warned Elbridge Gerry, "will intermeddle in our affairs, and spare no expense to influence them."<sup>114</sup> The young Republic might not survive a President who schemed with other nations, entangling himself in secret deals that harmed our democracy.

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<sup>112</sup> Tribe & Matz, *To End a Presidency*, at 55.

<sup>113</sup> In President Clinton's case, it was debated whether Presidents can be impeached for acts that do not involve their official powers. See *Constitutional Grounds for Presidential Impeachment: Modern Precedents* (1998), at 6-7; MINORITY STAFF OF H. COMM. ON THE JUDICIARY, 105<sup>TH</sup> CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS MINORITY VIEWS 3-4, 8-9, 13-16 (Comm. Print 1998). Many scholars have taken the view that such private conduct may be impeachable in extraordinary circumstances, such as where it renders the President unviable as the leader of a democratic nation committed to the rule of law. See, e.g., Tribe & Matz, *To End A Presidency*, at 10, 51; Black & Bobbitt, *Impeachment*, at 35. It also bears mention that some authority supports the view that Presidents might be subject to impeachment not for *abusing* their official powers, but by *failing* to use them and thus engaging in gross dereliction of official duty. See, e.g., Tribe & Matz, *To End A Presidency*, at 50; Akhil Reed Amar, *America's Constitution: A Biography* 200 (2006); Black & Bobbitt, *Impeachment*, at 34.

<sup>114</sup> Wydra & Gorod, *The First Magistrate in Foreign Pay*.

That reality loomed over the impeachment debate in Philadelphia. Explaining why the Constitution required an impeachment option, Madison argued that a President “might betray his trust to foreign powers.”<sup>115</sup> Gouverneur Morris, who had initially opposed allowing impeachment, was convinced: “no 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.”<sup>116</sup> In the same vein, Franklin noted “the case of the Prince of Orange during the late war,” in which a Dutch prince reneged on a military treaty with France.<sup>117</sup> Because there was no impeachment power or other method of inquiry, the prince’s motives were secret and uncontested, drastically destabilizing Dutch politics and giving “birth to the most violent animosities and contentions.”<sup>118</sup>

Impeachment for betrayal of the Nation’s interest—and especially for betrayal of national security and foreign policy—was hardly exotic to the Framers. “The history of impeachment over the centuries shows an abiding awareness of how vulnerable the practice of foreign policy is to the misconduct of its makers.”<sup>119</sup> Indeed, “impeachments on this ground were a constant of parliamentary practice,” and “a string of British ministers and royal advisors were impeached for using their official powers contrary to the country’s vital foreign interests.”<sup>120</sup> Although the Framers did not intend impeachment for genuine, good faith disagreements between the President and Congress over matters of diplomacy, they were explicit that betrayal of the Nation through plots with foreign powers justified removal.

In particular, foreign interference in the American political system was among the gravest dangers feared by the Founders of our Nation and the Framers of our Constitution. For example, in a letter to Thomas Jefferson, John Adams wrote: “You are apprehensive of foreign Interference, Intrigue, Influence. So am I.—But, as often as Elections happen, the danger of foreign Influence recurs.”<sup>121</sup> And in *Federalist No. 68*, Hamilton cautioned that the “most deadly adversaries of republican government” may come “chiefly from the desire in foreign powers to gain an improper ascendant in our councils.”<sup>122</sup>

The President’s important role in foreign affairs does not disable the House from evaluating whether he committed impeachable offenses in that field. This conclusion follows from the Impeachment Clause itself but is also supported by the Constitution’s

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<sup>115</sup> 2 Farrand, *Records of the Federal Convention*, at 65.

<sup>116</sup> *Id.*, at 68.

<sup>117</sup> *Id.*, at 67-68.

<sup>118</sup> *Id.*

<sup>119</sup> Frank O. Bowman, III, *Foreign Policy Has Always Been at the Heart of Impeachment*, FOREIGN AFFAIRS (Nov 2019).

<sup>120</sup> Bowman, *High Crimes & Misdemeanors*, at 48, 106.

<sup>121</sup> *To Thomas Jefferson from John Adams, 6 December 1787*, National Archives, Founders Online.

<sup>122</sup> Alexander Hamilton, *Federalist No. 68*, at 441.

many grants of power to Congress addressing foreign affairs. Congress is empowered to “declare War,” “regulate Commerce with foreign Nations,” “establish an uniform Rule of Naturalization,” “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” “grant Letters of Marque and Reprisal,” and “make Rules for the Government and Regulation of the land and naval Forces.”<sup>123</sup> Congress also has the power to set policy, define law, undertake oversight and investigations, create executive departments, and authorize government funding for a slew of national security matters.<sup>124</sup> In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate.<sup>125</sup> In those respects and many others, constitutional authority over the “conduct of the foreign relations of our Government” is shared between “the Executive and Legislative [branches].”<sup>126</sup> Stated simply, “the Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”<sup>127</sup> In these realms, as in many others, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>128</sup>

Accordingly, where the President uses his foreign affairs power in ways that betray the national interest for his own benefit, or harm national security for equally corrupt reasons, he is subject to impeachment by the House. Any claims to the contrary would horrify the Framers. A President who perverts his role as chief diplomat to serve private rather than public ends has unquestionably engaged in “high Crimes and Misdemeanors”—especially if he invited, rather than opposed, foreign interference in our politics.

### **3. Corruption of Office or Elections**

As should now be clear, the Framers feared corruption most of all, in its many and shifting manifestations. It was corruption that led to abuse of power and betrayal of the Nation. It was corruption that ruined empires, debased Britain, and menaced American freedom. The Framers saw no shortage of threats to the Republic, and fought valiantly to guard against them, “but the big fear underlying all the small fears was whether they’d be able to control corruption.”<sup>129</sup> This was not just a matter of thwarting bribes and extortion; it was a far greater challenge. The Framers aimed to build a country in which officials would not use public power for personal benefits, disregarding the public good in pursuit of their own advancement. This virtuous principle applied with special force to the

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<sup>123</sup> U.S. CONST., Art. I, § 8.

<sup>124</sup> See Lawrence Friedman & Victor Hansen, *There Is No Constitutional Impediment to an Impeachment Inquiry that Concerns National Security*, JUST SECURITY, Oct. 1, 2019.

<sup>125</sup> U.S. CONST., Art. II, §2, cl. 2.

<sup>126</sup> *Medellin v. Texas*, 552 U.S. 491, 511 (2008).

<sup>127</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

<sup>128</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>129</sup> Teachout, *Corruption in America*, at 57.

Presidency. As Madison emphasized, because the Presidency “was to be administered by a single man,” his corruption “might be fatal to the Republic.”<sup>130</sup>

The Framers therefore sought to ensure that “corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed.”<sup>131</sup> Impeachment was central to that plan. At one point the Convention even provisionally adopted “treason, bribery, or corruption” as the standard for impeaching a President. And no fewer than four delegates—Morris, Madison, Mason, and Randolph—listed corruption as a reason why Presidents must be subject to removal. That understanding followed from history: “One invariable theme in [centuries] of Anglo-American impeachment practice has been corruption.”<sup>132</sup> Treason posed a threat of swift national extinction, but the steady rot of corruption could destroy us from within. Presidents who succumbed to that instinct, serving themselves at the Nation’s expense, forfeited the public trust.

Impeachment was seen as especially necessary for Presidential conduct corrupting our system of political self-government. That concern arose in two contexts: the risk that Presidents would be swayed to prioritize foreign over domestic interests, and the risk that they would place their personal interest in re-election above our abiding commitment to democracy. The need for impeachment peaks where both threats converge at once.

First was the risk that foreign royals would use wealth, power, and titles to seduce American officials. This was not a hypothetical problem. Just a few years earlier, and consistent with European custom, King Louis XVI of France had bestowed on Benjamin Franklin (in his capacity as American emissary) a snuff box decorated with 408 diamonds “of a beautiful water.”<sup>133</sup> Magnificent gifts like this one could unconsciously shape how American officials carried out their duties. To guard against that peril, the Framers adopted the Foreign Emoluments Clause, which prohibits Presidents—among other federal officials—from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State” unless Congress affirmatively consents.<sup>134</sup>

The theory of the Foreign Emoluments Clause, based in history and the Framers’ lived experience, “is that a federal officeholder who receives something of value from a foreign power can be imperceptibly induced to compromise what the Constitution insists be his exclusive loyalty: the best interest of the United States of America.”<sup>135</sup> Rather than

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<sup>130</sup> Jonathan Elliot ed., *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia, in 1787* 341 (1861) (hereinafter “Debates on the Adoption of the Federal Constitution”).

<sup>131</sup> 4 Elliot, *Debates in the Several State Conventions*, at 302.

<sup>132</sup> Bowman, *High Crimes & Misdemeanors*, at 277.

<sup>133</sup> Teachout, *Corruption in America*, at 1.

<sup>134</sup> U.S. CONST., Art. I, § 9, cl. 8.

<sup>135</sup> Norman L. Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, And Application To Donald J. Trump*, BROOKINGS, Dec. 16, 2016.

scrutinize every exchange for potential bribery, the Framers simply banned officials from receiving anything of value from foreign powers. Although this rule sweeps broadly, the Framers deemed it central to American self-governance. Speaking in Philadelphia, Charles Pinckney “urged the necessity of preserving foreign ministers, and other officers of the United States, independent of external influence.”<sup>136</sup> At Virginia’s convention, Randolph elaborated that “[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any *emoluments* from foreign states.”<sup>137</sup> Randolph added that if the President violated the Clause, “he may be impeached.”<sup>138</sup>

The Framers also anticipated impeachment if a President placed his own interest in retaining power above the national interest in free and fair elections. Several delegates were explicit on this point when the topic arose at the Constitutional Convention. By then, the Framers had created the Electoral College. They were “satisfied with it as a tool for picking presidents but feared that individual electors might be intimidated or corrupted.”<sup>139</sup> Impeachment was their answer. William Davie led off the discussion, warning that a President who abused his office might seek to escape accountability by interfering with elections, sparing “no efforts or means whatever to get himself re-elected.”<sup>140</sup> Rendering the President “impeachable whilst in office” was thus “an essential security for the good behaviour of the Executive.”<sup>141</sup> The Constitution thereby ensured that corrupt Presidents could not avoid justice by subverting elections and remaining in office.

George Mason built on Davie’s position, directing attention to the Electoral College: “One objection agst. Electors was the danger of their being corrupted by the Candidates; & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?”<sup>142</sup> Mason’s concern was straightforward. He feared that Presidents would win election by improperly influencing members of the Electoral College (*e.g.*, by offering them bribes). If evidence of such wrongdoing came to light, it would be unthinkable to leave the President in office—especially given that he might seek to avoid punishment by corrupting the next election. In that circumstance, Mason concluded, the President should face impeachment and removal under the Constitution. Notably, Mason was not alone in this view. Speaking just a short while later, Gouverneur Morris emphatically agreed that “the Executive ought therefore to

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<sup>136</sup> Elliot, *Debates on the Adoption of the Federal Constitution* at 467.

<sup>137</sup> 3 Elliot, *Debates in the Several State Conventions*, at 465.

<sup>138</sup> *Id.*, at 201.

<sup>139</sup> Tribe & Matz, *To End A Presidency*, at 4.

<sup>140</sup> 2 Farrand, *Records of the Federal Convention*, at 64.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*, at 65.

be impeachable for ... Corrupting his electors.”<sup>143</sup> Although not articulated expressly, it is reasonable to infer that the concerns raised by Davie, Mason, and Morris were especially salient because the Constitution—until ratification of the Twenty-Second Amendment in 1951—did not limit the number of terms a President could serve in office.<sup>144</sup> A President who twisted or sabotaged the electoral process could rule for life, much like a king.

This commitment to impeaching Presidents who corruptly interfered with elections was anchored in lessons from British rule. As historian Gordon Wood writes, “[t]hroughout the eighteenth century the Crown had slyly avoided the blunt and clumsy instrument of prerogative, and instead had resorted to influencing the electoral process and the representatives in Parliament in order to gain its treacherous ends.”<sup>145</sup> In his influential *Second Treatise on Civil Government*, John Locke blasted such manipulation, warning that it serves to “cut up the government by the roots, and poison the very fountain of public security.”<sup>146</sup> Channeling Locke, American revolutionaries vehemently objected to King George III’s electoral shenanigans; ultimately, they listed several election-related charges in the Declaration of Independence. Those who wrote our Constitution knew, and feared, that the chief executive could threaten their plan of government by corrupting elections.

The true nature of this threat is its rejection of government by “We the People,” who would “ordain and establish” the Constitution.<sup>147</sup> The beating heart of the Framers’ project was a commitment to popular sovereignty. At a time when “democratic self-government existed almost nowhere on earth,”<sup>148</sup> the Framers imagined a society “where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people.”<sup>149</sup> That would be possible only if “those entrusted with [power] should be kept in dependence on the people.”<sup>150</sup> This is why the President, and Members of Congress, must stand before the public for re-election on fixed terms. It is through free and fair elections that the American people protect their right to self-government, a right unforgivably denied to many as the Constitution was ratified in 1788 but now extended to all American citizens over the age of 18. When the President concludes that elections threaten his continued grasp on power, and therefore seeks to corrupt or interfere with them, he denies the very premise of our constitutional system. The American people choose their leaders; a President who wields power to destroy opponents or manipulate elections is a President who rejects democracy itself.

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<sup>143</sup> *Id.*, at 69.

<sup>144</sup> U.S. CONST. Amend. XXII.

<sup>145</sup> Wood, *The Creation of the American Republic*, at 33.

<sup>146</sup> John Locke, *Second Treatise of Government* 112 (C.B. Macpherson ed. 1980).

<sup>147</sup> U.S. CONST. Pmbl.

<sup>148</sup> Amar, *America’s Constitution*, at 8.

<sup>149</sup> 4 Elliot, *Debates in the Several State Conventions*, at 331; see also James Madison, *Federalist No. 14*.

<sup>150</sup> James Madison, *Federalist No. 37*, at 268.

In sum, the Framers discussed the risk that Presidents would improperly conspire with foreign nations; they also discussed the risk that Presidents would place their interest in retaining power above the integrity of our elections. Both offenses, in their view, called for impeachment. That is doubly true where a President conspires with a foreign power to manipulate elections to his benefit—conduct that betrays American self-governance and joins the Framers’ worst nightmares into a single impeachable offense.<sup>151</sup>

#### D. Conclusion

Writing in 1833, Justice Joseph Story remarked that impeachable offenses “are of so various and complex a character” that it would be “almost absurd” to attempt a comprehensive list.<sup>152</sup> Consistent with Justice Story’s wisdom, “the House has never, in any impeachment inquiry or proceeding, adopted either a comprehensive definition of ‘high Crimes and Misdemeanors’ or a catalog of offenses that are impeachable.”<sup>153</sup> Rather than engage in abstract, advisory or hypothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers, the House has awaited a “full development of the facts.”<sup>154</sup> Only then has it weighed articles of impeachment.

In making such judgments, however, each Member of the House has sworn an oath to follow the Constitution, which sets forth a legal standard governing when Presidential conduct warrants impeachment. That standard has three main parts.

First, as Mason explained just before proposing “high Crimes and Misdemeanors” as the basis for impeachment, the President’s conduct must constitute a “great and dangerous offense” against the Nation. The Constitution itself offers us two examples: “Treason” and “Bribery.” In identifying “other” offenses of the same kind, we are guided by Parliamentary and early American practice, records from the Constitutional Convention and state ratifying conventions, and insights from the Constitution’s text and structure. These sources prove that “high Crimes and Misdemeanors” involve misconduct that subverts and injures constitutional governance. Core instances of such misconduct by the President are serious abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. The Framers included an

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<sup>151</sup> In fact, the Framers were so concerned about improper foreign influence in the Presidency that they restricted that position to natural born citizens. U.S. CONST. Art. II, § 1. As one commentator observed, “Considering the greatness of the trust, and that this department is the ultimately efficient power in government, these restrictions will not appear altogether useless or unimportant. As the President is required to be a native citizen of the United States, ambitious foreigners cannot intrigue for the office, and the qualification of birth cuts off all those inducements from abroad to corruption, negotiation, and war, which have frequently and fatally harassed the elective monarchies of Germany and Poland, as well as the pontificate at Rome.” 1 James Kent, *Commentaries on American Law* 255 (1826).

<sup>152</sup> 2 Story, *Commentaries*, at 264.

<sup>153</sup> 1998 Background and History of Impeachment Hearing, at 2.

<sup>154</sup> Constitutional Grounds for Presidential Impeachment (1974), at 2.

impeachment power in the Constitution specifically to protect the Nation against these forms of wrongdoing.

Past practice of the House further illuminates the idea of a “great and dangerous offense.” President Nixon’s case is most helpful. There, as explained above, the House Judiciary Committee approved articles of impeachment on three grounds: (1) obstruction of an ongoing law enforcement investigation into unlawful acts by his presidential re-election campaign; (2) abuse of power in targeting his perceived political opponents; and (3) improper obstruction of a Congressional impeachment inquiry into his obstruction of justice and abuse of power. These articles of impeachment, moreover, were not confined to discrete acts. Each of them accused President Nixon of undertaking a course of conduct or scheme, and each of them supported that accusation with a list of discrete acts alleged to comprise and demonstrate the overarching impeachable offense.<sup>155</sup> Thus, where a President engages in a course of conduct involving serious abuse of power, betrayal of the national interest through foreign entanglements, or corruption of office and elections, impeachment is justified.

Second, impeachable offenses involve wrongdoing that reveal the President as a continuing threat to the constitutional system if he is allowed to remain in a position of political power. As Iredell remarked, impeachment does not exist for a “mistake.”<sup>156</sup> That is why the Framers rejected “maladministration” as a basis for impeachment, and it is why “high Crimes and Misdemeanors” are not simply unwise, unpopular, or unconsidered acts. Like “Treason” and “Bribery,” they reflect decisions by the President to embark on a course of conduct—or to act with motives—inconsistent with our plan of government. Where the President makes such a decision, Congress may remove him to protect the Constitution, especially if there is reason to think that he will commit additional offenses if left in office (e.g., statements by the President that he did nothing wrong and would do it all again). This forward-looking perspective follows from the limited consequences of impeachment. The question is not whether to punish the President; that decision is left to the criminal justice system. Instead, the ultimate question is whether to bring an early end to his four-year electoral term. In his analysis of the Constitution, Alexis de Tocqueville thus saw impeachment as “a preventive measure” which exists “to deprive the ill-disposed citizen of an authority which he has used amiss, and to prevent him from ever acquiring it again.”<sup>157</sup> That is particularly true when the President injures the Nation’s interests as part of a scheme to obtain personal benefits; someone so corrupt will again act corruptly.

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<sup>155</sup> Consistent with that understanding, one scholar remarks that it is the “repetition, pattern, [and] coherence” of official misconduct that “tend to establish the requisite degree of seriousness warranting the removal of a president from office.” John Labovitz, *Presidential Impeachment* 129-130 (1978); *see also, e.g.*, McGinnis, *Impeachment*, at 659 (“[I]t has been well understood that the official’s course of conduct as a whole should be the subject of judgment.”); *Debate On Articles Of Impeachment: Hearing before the H. Comm. On the Judiciary*, 93rd Cong. (1974) (hereinafter “Debate on Nixon Articles of Impeachment (1974)”) (addressing the issue repeatedly from July 24, 1974 to July 30, 1974).

<sup>156</sup> Sunstein, *Impeachment*, at 59.

<sup>157</sup> Alexis de Tocqueville, *Democracy in America and Two Essays on America* 124-30 (Gerald E. Bevan, tr., 2003).

Finally, “high Crimes and Misdemeanors” involve conduct that is recognizably wrong to a reasonable person. This principle resolves a potential tension in the Constitution. On the one hand, the Framers adopted a standard for impeachment that could stand the test of time. On the other hand, the structure of the Constitution—including its prohibition on bills of attainder and the *Ex Post Facto* Clause—implies that impeachable offenses should not come as a surprise.<sup>158</sup> Impeachment is aimed at Presidents who believe they are above the law, and who believe their own interests transcend those of the country and Constitution. Of course, as President Nixon proved, Presidents who have committed impeachable offenses may seek to confuse the public through manufactured ambiguity and crafty pretexts. That does not shield their misconduct from impeachment. The principle of a plainly wrong act is not about academic technicalities; it simply focuses impeachment on conduct that any person of honor would recognize as wrong under the Constitution.

To summarize: Like “Treason” and “Bribery,” and consistent with the offenses historically considered by Parliament to warrant impeachment, “high Crimes and Misdemeanors” are great and dangerous offenses that injure the constitutional system. Such offenses are defined mainly by abuse of power, betrayal of the national interest through foreign entanglements, and corruption of office and elections. In addition, impeachable offenses arise from wrongdoing that reveals the President as a continuing threat to the constitutional system if allowed to remain in a position of power. Finally, they involve conduct that reasonable officials would consider to be wrong in our democracy.

Within these parameters, and guided by fidelity to the Constitution, the House must judge whether the President’s misconduct is grave enough to require impeachment. That step must never be taken lightly. It is a momentous act, justified only when the President’s full course of conduct, assessed without favor or prejudice, is “seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.”<sup>159</sup> When that standard is met, however, the Constitution calls the House to action. In such cases, a decision *not* to impeach has grave consequences and sets an ominous precedent. As Representative William Cohen remarked in President Nixon’s case, “It also has been said to me that even if Mr. Nixon did commit these offenses, every other President … has engaged in some of the same conduct, at least to some degree, but the answer I think is that democracy, that solid rock of our system, may be eroded away by degree and its survival will be determined by the degree to which we will tolerate those silent and subtle subversions that absorb it slowly into the rule of a few.”<sup>160</sup>

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<sup>158</sup> See Black & Bobbitt, *Impeachment*, at 29-30.

<sup>159</sup> Constitutional Grounds for Presidential Impeachment (1974), at 27.

<sup>160</sup> Debate on Nixon Articles of Impeachment (1974), at 79.

## V. The Criminality Issue

It is occasionally suggested that Presidents can be impeached only if they have committed crimes. That position was rejected in President Nixon's case, and then rejected again in President Clinton's, and should be rejected once more.<sup>161</sup>

Offenses against the Constitution are different in kind than offenses against the criminal code. Some crimes, like jaywalking, are not impeachable. Some impeachable offenses, like abuse of power, are not crimes. Some misconduct may offend both the Constitution and the criminal law. Impeachment and criminality must therefore be assessed separately—even though the commission of crimes may strengthen a case for removal.

A “great preponderance of authority” confirms that impeachable offenses are “not confined to criminal conduct.”<sup>162</sup> This authority includes nearly every legal scholar to have studied the issue, as well as multiple Supreme Court justices who addressed it in public remarks.<sup>163</sup> More important, the House itself has long treated “high Crimes and Misdemeanors” as distinct from crimes subject to indictment. That understanding follows from the Constitution’s history, text, and structure, and reflects the absurdities and practical difficulties that would result were the impeachment power confined to indictable crimes.

### A. History

“If there is one point established by … Anglo-American impeachment practice, it is that the phrase ‘high Crimes and Misdemeanors’ is not limited to indictable crimes.”<sup>164</sup> As recounted above, impeachment was conceived in Parliament as a method for controlling abusive royal ministers. Consistent with that purpose, it was not confined to accusations of criminal wrongdoing. Instead, it was applied to “many offenses, not easily definable by law,” such as abuse of power, betrayal of national security, corruption, neglect of duty, and

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<sup>161</sup> REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, TOGETHER WITH ADDITIONAL, MINORITY, AND DISSENTING VIEWS TO ACCOMPANY H. RES. 611, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 105-830 (1998) (hereinafter “Committee Report on Clinton Articles of Impeachment (1998)”), at 64 (“Although, the actions of President Clinton do not have to rise to the level of violating the federal statute regarding obstruction of justice in order to justify impeachment.”). Constitutional Grounds for Presidential Impeachment (1974), at 22-26.

<sup>162</sup> Berger, *Impeachment*, at 58.

<sup>163</sup> See, e.g., Black & Bobbitt, *Impeachment*, at 33-37, 559-565; Bowman, *High Crimes and Misdemeanors*, at 244-252; Tribe & Matz, *To End A Presidency*, at 43-53; Sunstein, *Impeachment*, at 117-134; Amar, *America’s Constitution*, at 200-20; Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J. L. & PUB. POL’Y 619, 620 (1998-1999); Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 105-113 (3rd ed. 2019); Berger, *Impeachment*, at 58 (collecting sources); Merrill Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 KAN. CITY. L. REV. 3, 22 (1938) (quoting Chief Justice Taft); Charles E. Hughes, *The Supreme Court of the United States* 19 (1928) (Chief Justice Hughes); 2 Henry Adams, *History of the United States of America* 223 (1962).

<sup>164</sup> Bowman, *High Crimes and Misdemeanors*, at 44.

violating Parliament's constitutional prerogatives.<sup>165</sup> Many officials were impeached for non-criminal wrongs against the British system of government; notable examples include the Duke of Buckingham (1626), the Earl of Strafford (1640), the Lord Mayor of London (1642), the Earl of Orford and others (1701), and Governor General Warren Hastings (1787).<sup>166</sup> Across centuries of use, the phrase "high Crimes and Misdemeanors" thus assumed a "special historical meaning different from the ordinary meaning of the terms 'crimes' and 'misdemeanors.'"<sup>167</sup> It became a term of art confined to impeachments, without "relation to whether an indictment would lie in the particular circumstances."<sup>168</sup>

That understanding extended to North America. Here, the impeachment process was used to address diverse misconduct by public officials, ranging from abuse of power and corruption to bribery and betrayal of the revolutionary cause.<sup>169</sup> As one scholar reports, "American colonists before the Revolution, and American states after the Revolution but before 1787, all impeached officials for non-criminal conduct."<sup>170</sup>

At the Constitutional Convention itself, no delegate linked impeachment to the technicalities of criminal law. On the contrary, the Framers invoked an array of broad, adaptable terms as grounds for removal—and when the standard was temporarily narrowed to "treason, or bribery," Mason objected that it must reach "great and dangerous" offenses against the Constitution. Here he cited Burke's call to impeach Hastings, whose acts were not crimes, but instead violated "those eternal laws of justice, which are our rule and our birthright."<sup>171</sup> To the Framers, impeachment was about abuse of power, betrayal of nation, and corruption of office and elections. It was meant to guard against these threats in every manifestation—known and unknown—that might someday afflict the Republic.

That view appeared repeatedly in the state ratifying debates. Delegates opined that the President could be impeached if he "deviates from his duty" or "dare[s] to abuse the power vested in him by the people."<sup>172</sup> In North Carolina, Iredell noted that "the person convicted [in an impeachment proceeding] is further liable to a trial at common law, and may receive such common-law punishment ... *if it be punishable by that law*" (emphasis added).<sup>173</sup> Similarly, in Virginia, George Nicholas declared that the President "will be absolutely disqualified [by impeachment] to hold any place of profit, honor, or trust, and liable to further punishment *if he has committed such high crimes as are punishable at*

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<sup>165</sup> 2 Story, *Commentaries*, at 268.

<sup>166</sup> See Bowman, *High Crimes and Misdemeanors*, at 44-47.

<sup>167</sup> Constitutional Grounds for Presidential Impeachment (1974), at 22.

<sup>168</sup> Berger, *Impeachment*, at 62.

<sup>169</sup> Hoffer & Hull, *Impeachment in America*, at 1-95.

<sup>170</sup> Bowman, *High Crimes and Misdemeanors*, at 244.

<sup>171</sup> Edmund Burke, *Reflections on the Revolution in France and Other Writings* 409 (2015).

<sup>172</sup> Quoted in Michael J. Gerhardt, *Impeachment: What Everyone Needs to Know* 60 (2018).

<sup>173</sup> Constitutional Grounds for Presidential Impeachment (1974), at 23.

*common law*” (emphasis added).<sup>174</sup> The premise underlying this statement—and Iredell’s—is that some Presidential “high Crimes and Misdemeanors” were *not* punishable by common law.

Leading minds echoed that position through the Nation’s early years. In *Federalist No. 65*, Hamilton argued that impeachable offenses are defined by “the abuse or violation of some public trust.”<sup>175</sup> In that sense, he reasoned, “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.”<sup>176</sup> A few years later, Constitutional Convention delegate James Wilson reiterated Hamilton’s point: “Impeachments, and offences and offenders impeachable, come not ... within the sphere of ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different objects.”<sup>177</sup> Writing in 1829, William Rawle described impeachment as reserved for “men whose treachery to their country might be productive of the most serious disasters.”<sup>178</sup> Four years later, Justice Story emphasized that impeachable offenses ordinarily “must be examined upon very broad and comprehensive principles of public policy and duty.”<sup>179</sup>

The American experience with impeachment confirms that lesson. A strong majority of the impeachments voted by the House since 1789 have included “one or more allegations that did not charge a violation of criminal law.”<sup>180</sup> Several officials, moreover, have subsequently been convicted on non-criminal articles of impeachment. For example, Judge Robert Archbald was removed in 1912 for non-criminal speculation in coal properties, and Judge Halsted Ritter was removed in 1936 for the non-criminal offense of bringing his court “into scandal and disrepute.”<sup>181</sup> As House Judiciary Committee Chairman Hatton Sumners stated explicitly during Judge Ritter’s case, “We do not assume the responsibility ... of proving that the respondent is guilty of a crime as that term is known to criminal jurisprudence.”<sup>182</sup> The House has also applied that principle in Presidential impeachments. Although President Nixon resigned before the House could consider the articles of impeachment against him, the Judiciary Committee’s allegations encompassed many non-criminal acts.<sup>183</sup> And in President Clinton’s case, the Judiciary Committee report accompanying articles of impeachment to the House floor stated that

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<sup>174</sup> *Id.*

<sup>175</sup> Alexander Hamilton, *Federalist No. 65*, at 426.

<sup>176</sup> *Id.*

<sup>177</sup> James Wilson, *Collected Works of James Wilson* 736 (Kermit L. Hall and Mark David Hall ed. 2007).

<sup>178</sup> William Rawle, *A View of the Constitution of the United States of America* 218 (1829).

<sup>179</sup> 2 Story, *Commentaries*, at 234.

<sup>180</sup> Constitutional Grounds for Presidential Impeachment (1974), at 24.

<sup>181</sup> REPORT OF THE COMMITTEE ON THE JUDICIARY, ROBERT W. ARCHBALD, JUDGE OF THE UNITED STATES COMMERCE COURT, H.R. REP. NO. 62-946 (1912); H. RES. 422, 74<sup>th</sup> Cong. (1936) (enacted).

<sup>182</sup> Berger, *Impeachment*, at 60.

<sup>183</sup> See generally Committee Report on Nixon Articles of Impeachment (1974).

“the actions of President Clinton do not have to rise to the level of violating the federal statute regarding obstruction of justice in order to justify impeachment.”<sup>184</sup>

History thus affords exceptionally clear and consistent evidence that impeachable “high Crimes and Misdemeanors” are not limited to violations of the criminal code.

## B. Constitutional Text and Structure

That historical conclusion is bolstered by the text and structure of the Constitution. Starting with the text, we must assign weight to use of the word “high.” That is true not only because “high Crimes and Misdemeanors” was a term of art with its own history, but also because “high” connotes an offense against the State itself. Thus, “high” treason in Britain was an offense against the Crown, whereas “petit” treason was the betrayal of a superior by a subordinate. The Framers were aware of this when they incorporated “high” as a limitation on impeachable offenses, signifying only constitutional wrongs.

That choice is particularly noteworthy because the Framers elsewhere referred to “crimes,” “offenses,” and “punishment” without using this modifier—and so we know “the Framers knew how to denote ordinary crimes when they wanted to do so.”<sup>185</sup> For example, the Fifth Amendment requires a grand jury indictment in cases of a “capital, or otherwise infamous crime.”<sup>186</sup> The Currency Clause, in turn, empowers Congress to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”<sup>187</sup> The Law of Nations Clause authorizes Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”<sup>188</sup> And the Interstate Extradition Clause provides that “[a] Person charged in any State with Treason, Felony, or other Crime” who flees from one state to another shall be returned upon request.<sup>189</sup> Only in the Impeachment Clause did the Framers refer to “high” crimes. By adding “high” in this one provision, while excluding it everywhere else, the Framers plainly sought to capture a distinct category of offenses against the state.<sup>190</sup>

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<sup>184</sup> Committee Report on Clinton Articles of Impeachment (1998), at 66.

<sup>185</sup> Tribe & Matz, *To End a Presidency*, at 40.

<sup>186</sup> U.S. CONST. Amend. V, § 1.

<sup>187</sup> U.S. CONST. Art. I, § 8, cl. 6.

<sup>188</sup> U.S. CONST. Art. I, § 8, cl. 10.

<sup>189</sup> U.S. CONST. Art. IV, § 2, cl. 2.

<sup>190</sup> One might object that since “Treason” and “Bribery” are indictable crimes, the same must be true of “other high Crimes and Misdemeanors.” But this argument would fail. Although it is true that “other high Crimes and Misdemeanors” share certain characteristics with “Treason” and “Bribery,” the key question is *which* characteristics unify them. And for all the reasons given here, it is wrong to conclude that criminality is the unifying principle of impeachable offenses. Moreover, if the Framers’ goal was to limit impeachment to violations of the criminal law, it is passing strange that the Impeachment Clause uses a term of art—“high Crimes and Misdemeanors”—that appears neither in the criminal law itself nor anywhere else in the Constitution (which *does* elsewhere refer both to “crimes” and “offenses”). It would have been easy to write a provision limiting the impeachment power to serious crimes, and yet the Framers pointedly did not do so.

That interpretation is also most consistent with the structure of the Constitution. This is true in three respects.

*First*, as explained above, the Impeachment Clause restricts the consequences of impeachment to removal from office and disqualification from future federal officeholding. That speaks to the fundamental character of impeachment. In Justice Story's words, it is "a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity."<sup>191</sup> Given that impeachment exists to address threats to the political system, applies only to political officials, and responds only by stripping political power, it makes sense to infer that "high Crimes and Misdemeanors" are offenses against the political system rather than indictable crimes.

*Second*, if impeachment were restricted to crimes, impeachment proceedings would be restricted to deciding whether the President had committed a specific crime. Such a view would create tension between the Impeachment Clause and other provisions of the Constitution. For example, the Double Jeopardy Clause protects against being tried twice for the same crime. Yet the Impeachment Clause contemplates that an official, once removed, can still face "Indictment, Trial, Judgment and Punishment, according to Law." It would be strange if the Framers forbade double jeopardy, yet allowed the President to be tried in court for crimes after Congress convicted him in a proceeding that necessarily (and exclusively) decided whether he was guilty of those very same crimes.<sup>192</sup> That oddity is avoided only if impeachment proceedings are seen "in noncriminal terms," which occurs if impeachable offenses are understood as distinct from indictable crimes.<sup>193</sup>

*Finally*, the Constitution was originally understood as limiting Congress's power to create a federal law of crimes. It would therefore be strange if the Framers restricted impeachment to criminal offenses, while denying Congress the ability to criminalize many forms of Presidential wrongdoing that they repeatedly described as requiring impeachment.

To set this point in context, the Constitution expressly authorizes Congress to criminalize only a handful of wrongful acts: "counterfeiting, piracy, 'offenses against the law of nations,' and crimes that occur within the military."<sup>194</sup> Early Congresses did not tread far beyond that core category of crimes, and the Supreme Court took a narrow view of federal power to pass criminal statutes. It was not until much later—in the twentieth century—that the Supreme Court came to recognize that Congress could enact a broader criminal code. As a result, early federal criminal statutes "covered relatively few categories

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<sup>191</sup> 2 Story, *Commentaries*, at 272.

<sup>192</sup> See Berger, *Impeachment*, at 80.

<sup>193</sup> *Id.*

<sup>194</sup> William J. Stuntz, *The Collapse of American Criminal Justice* 99 (2011).

of offenses.”<sup>195</sup> Many federal offenses were punishable only when committed “in special places, and within peculiar jurisdictions, as, for instance, on the high seas, or in forts, navy-yards, and arsenals ceded to the United States.”<sup>196</sup>

The Framers were not fools. They authorized impeachment for a reason, and that reason would have been gutted if impeachment were limited to crimes. It is possible, of course, that the Framers thought the common law, rather than federal statutes, would define criminal offenses. That is undeniably true of “Bribery”: the Framers saw this impeachable offense as defined by the common law of bribery as it was understood at the time. But it is hard to believe that the Framers saw common law as the sole measure of impeachment. For one thing, the common law did not address itself to many wrongs that could be committed uniquely by the President in our republican system. The common law would thus have been an extremely ineffective tool for achieving the Framers’ stated purposes in authorizing impeachment. Moreover, the Supreme Court held in 1812 that there is no federal common law of crimes.<sup>197</sup> If the Framers thought only crimes could be impeachable offenses, and hoped common law would describe the relevant crimes, then they made a tragic mistake—and the Supreme Court’s 1812 decision ruined their plans for the impeachment power.<sup>198</sup>

Rather than assume the Framers wrote a Constitution full of empty words and internal contradictions, it makes far more sense to agree with Hamilton that impeachment is not about crimes. The better view, which the House itself has long embraced, confirms that impeachment targets offenses against the Constitution that threaten democracy.<sup>199</sup>

### C. The Purpose of Impeachment

The distinction between impeachable offenses and crimes also follows from the fundamentally different purposes that impeachment and the criminal law serve. At bottom, the impeachment power is “the first step in a remedial process—removal from office and possible disqualification from holding future office.”<sup>200</sup> It exists “primarily to maintain constitutional government” and is addressed exclusively to abuses perpetrated by federal

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<sup>195</sup> Tribe & Matz, *To End a Presidency*, at 48.

<sup>196</sup> 2 Story, *Commentaries*, at 264.

<sup>197</sup> *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812).

<sup>198</sup> In the alternative, one might say that “high Crimes and Misdemeanors” occur when the president violates *state* criminal law. But that turns federalism upside down: invoking state criminal codes to supply the content of the federal Impeachment Clause would grant states a bizarre and incongruous primacy in the constitutional system. Especially given that impeachment is crucial to checks and balances *within* the federal government, it would be nonsensical for states to effectively control when this power may be wielded by Congress.

<sup>199</sup> Article III of the Constitution provides that “the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” Article III, §2. This provision recognizes that impeachable conduct *may* entail criminal conduct—and clarifies that in such cases, the trial of an impeachment still occurs in the Senate, not by jury.

<sup>200</sup> Constitutional Grounds for Presidential Impeachment (1974), at 24.

officeholders.<sup>201</sup> It is through impeachment proceedings that “a President is called to account for abusing powers that only a President possesses.”<sup>202</sup> The criminal law, in contrast, “sets a general standard of conduct that all must follow.”<sup>203</sup> It applies to all persons within its compass and ordinarily defines acts forbidden to everyone; in our legal tradition, the criminal code “does not address itself [expressly] to the abuses of presidential power.”<sup>204</sup>

Indeed, “the early Congresses—filled with Framers—didn’t even *try* to create a body of criminal law addressing many of the specific abuses that motivated adoption of the Impeachment Clause in the first place.”<sup>205</sup> This partly reflects “a tacit judgment that it [did] not deem such a code necessary.”<sup>206</sup> But that is not the only explanation. The Constitution vests “the sole Power of Impeachment” in the House; it is therefore doubtful that a statute enacted by one Congress (and signed by the President) could bind the House at a later date.<sup>207</sup> Moreover, any such effort to define and criminalize all impeachable offenses would quickly run aground. As Justice Story cautioned, impeachable offenses “are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.”<sup>208</sup>

There are also general characteristics of the criminal law that make criminality inappropriate as an essential element of impeachable conduct. For example, criminal law traditionally forbids acts, rather than failures to act, yet impeachable conduct “may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution.”<sup>209</sup> In addition, unlike a criminal case focused on very specific conduct and nothing else, a Congressional impeachment proceeding may properly consider a broader course of conduct or scheme that tends to subvert constitutional government.<sup>210</sup> Finally, the application of general criminal statutes to the President may raise constitutional issues that have no bearing on an impeachment proceeding, the whole point of which is to assess whether the President has abused power in ways requiring his removal from office.<sup>211</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

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

<sup>205</sup> Tribe & Matz, *To End a Presidency*, at 48-49.

<sup>206</sup> Berger, *Impeachment*, at 78.

<sup>207</sup> Committee Report on Nixon Articles of Impeachment (1974), at 25.

<sup>208</sup> 2 Story, *Commentaries*, at 264.

<sup>209</sup> Constitutional Grounds for Presidential Impeachment (1974), at 24

<sup>210</sup> *Id.*, at 24-25.

<sup>211</sup> Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Vol. II at 170-181 (March 2019).

For all these reasons, “[a] requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable.”<sup>212</sup>

#### **D. The Limited Relevance of Criminality**

As demonstrated, the President can commit “high Crimes and Misdemeanors” without violating federal criminal law. “To conclude otherwise would be to ignore the original meaning, purpose and history of the impeachment power; to subvert the constitutional design of a system of checks and balances; and to leave the nation unnecessarily vulnerable to abusive government officials.”<sup>213</sup> Yet the criminal law is not irrelevant. “Our criminal codes identify many terrible acts that would surely warrant removal if committed by the chief executive.”<sup>214</sup> Moreover, the President is sworn to uphold the law. If he violates it while grossly abusing power, betraying the national interest through foreign entanglements, or corrupting his office or elections, that weighs in favor of impeaching him.

### **VI. Addressing Fallacies About Impeachment**

Since the House began its impeachment inquiry, a number of inaccurate claims have circulated about how impeachment works under the Constitution. To assist the Committee in its deliberations, we address six issues of potential relevance: (1) the law that governs House procedures for impeachment; (2) the law that governs the evaluation of evidence, including where the President orders defiance of House subpoenas; (3) whether the President can be impeached for the abuse of his executive powers; (4) whether the President’s claims regarding his motives must be accepted at face value; (5) whether the President is immune from impeachment if he attempts an impeachable offense but is caught before he completes it; and (6) whether it is preferable to await the next election when a President has sought to corrupt that very same election.

#### **A. The Impeachment Process**

It has been argued that the House has not followed proper procedure in its ongoing impeachment inquiry. We have considered those arguments and find that they lack merit.

To start with first principles, the Constitution vests the House with the “sole Power of Impeachment.”<sup>215</sup> It also vests the House with the sole power to “determine the Rules

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<sup>212</sup> Constitutional Grounds for Presidential Impeachment (1974), at 25.

<sup>213</sup> Keith E. Whittington, *Must Impeachable Offenses Be Violations of the Criminal Code?*, LAWFARE, Nov. 19, 2019.

<sup>214</sup> Tribe & Matz, *To End a Presidency*, at 51.

<sup>215</sup> U.S. CONST. Art. I, § 2, cl. 5.

of its Proceedings.”<sup>216</sup> These provisions authorize the House to investigate potential “high Crimes and Misdemeanors,” to draft and debate articles of impeachment, and to establish whatever rules and procedures it deems proper for those proceedings.<sup>217</sup>

When the House wields its constitutional impeachment power, it functions like a grand jury or prosecutor: its job is to figure out what the President did and why he did it, and then to decide whether the President should be charged with impeachable offenses. If the House approves any articles of impeachment, the President is entitled to present a full defense at trial in the Senate. It is thus in the Senate, and *not* in the House, where the President might properly raise certain protections associated with trials.<sup>218</sup>

Starting in May 2019, the Judiciary Committee undertook an inquiry to determine whether to recommend articles of impeachment against President Trump. The Committee subsequently confirmed, many times, that it was engaged in an impeachment investigation. On June 11, 2019, the full House approved a resolution confirming that the Judiciary Committee possessed “any and all necessary authority under Article I of the Constitution” to continue its investigation; an accompanying Rules Committee Report emphasized that the “purposes” of the inquiry included “whether to approve ‘articles of impeachment with respect to the President.’”<sup>219</sup> As the Judiciary Committee continued with its investigation, evidence came to light that President Trump may have grossly abused the power of his office in dealings with Ukraine. At that point, the House Permanent Select Committee on Intelligence, and the House Oversight and Foreign Affairs Committees, began investigating potential offenses relating to Ukraine. On September 24, 2019, House Speaker Nancy Pelosi directed these committees, as well as the House Judiciary, Financial Services and Ways and Means Committees, to “proceed with their investigations under that umbrella of [an] impeachment inquiry.”<sup>220</sup> Finally, on October 31, 2019, the full House approved H. Res. 660, which directed the six committees “to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America.”<sup>221</sup>

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<sup>216</sup> U.S. CONST. Art. I, § 5, cl. 2.

<sup>217</sup> See David Pozen, *Risk-Risk Tradeoffs in Presidential Impeachment*, TAKE CARE, Jun. 6, 2018 (“Both chambers of Congress enjoy vast discretion in how they run impeachment proceedings.”).

<sup>218</sup> *Contra* Letter from Pat A. Cipollone, Counsel to the President, to Hon. Nancy Pelosi, Speaker of the House, Hon. Adam B. Schiff, Chairman, H. Perm. Select Comm. on Intelligence, Hon. Eliot L. Engel, Chairman, H. Foreign Affairs Comm., and Hon. Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform (Oct. 8, 2019); *Leader McCarthy Speech Against the Sham Impeachment Vote*, Kevin McCarthy, Republican Leader, Oct. 31, 2019.

<sup>219</sup> H. Res. 430, 116<sup>th</sup> Cong. (2019); AUTHORIZING THE COMMITTEE ON THE JUDICIARY TO INITIATE OR INTERVENE IN JUDICIAL PROCEEDINGS TO ENFORCE CERTAIN SUBPOENAS AND FOR OTHER PURPOSES TO ACCOMPANY H. RES. 430, H.R. REP. 116-108, at 21 (2019).

<sup>220</sup> *Pelosi Remarks Announcing Impeachment Inquiry*, Sep. 24 2019, NANCY PELOSI, SPEAKER OF THE HOUSE.

<sup>221</sup> H. Res. 660, 116<sup>th</sup> Cong. (2019).

This approach to investigating potential impeachable offenses adheres to the Constitution, the Rules of the House, and historical practice.<sup>222</sup> House Committees have frequently initiated and made substantial progress in impeachment inquiries before the full House considered a resolution formalizing their efforts. That is what happened in the cases of Presidents Johnson and Nixon, as well as in many judicial impeachments (which are subject to the same constitutional provisions).<sup>223</sup> Indeed, numerous judges have been impeached without any prior vote of the full House authorizing a formal inquiry.<sup>224</sup> It is both customary and sensible for committees—particularly the Judiciary Committee—to investigate evidence of serious wrongdoing before decisions are made by the full House.

In such investigations, the House's initial task is to gather evidence. As is true of virtually any competent investigation, whether governmental or private, the House has historically conducted substantial parts of the initial fact-finding process out of public view to ensure more accurate and complete testimony.<sup>225</sup> In President Nixon's case, for instance, only the Judiciary Committee Chairman, Ranking Member, and Committee staff had access to material gathered by the impeachment inquiry in its first several months.<sup>226</sup> There was no need for similar secrecy in President Clinton's case, but only because the House did not engage in a substantial investigation of its own; it largely adopted the facts set forth in a report by Independent Counsel Kenneth Starr, who had spent years investigating behind closed doors.<sup>227</sup>

When grand juries and prosecutors investigate wrongdoing by private citizens and public officials, the person under investigation has no right to participate in the examination of witnesses and evidence that precedes a decision on whether to file charges. That is black letter law under the Constitution, even in serious criminal cases that threaten loss of life or liberty. The same is true in impeachment proceedings, which threaten only loss of public office. Accordingly, even if the full panoply of rights held by criminal defendants hypothetically were to apply in the non-criminal setting of impeachment, the President has no "due process right" to interfere with, or inject himself into, the House's fact-finding efforts. If the House ultimately approves articles of impeachment, any rights that the President might hold are properly secured at trial in the Senate, where he may be afforded an opportunity to present an evidentiary defense and test the strength of the House's case.

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<sup>222</sup> See generally H.R. REP. NO. 116-108.

<sup>223</sup> See 3 Hinds Ch. 75 § 2400 (President Johnson); 3 Deschler Ch. 14, § 15 (President Nixon); H.R. REP. NO. 101-36, at 13–16 (1988) (Judge Walter Nixon); H. R. RES. 320, 100th Cong. (Judge Alcee Hastings); H.R. REP. NO. 99-688, at 3–7 (1986) (Judge Harry Claiborne); 3 Deschler Ch. 14 § 5 (Justice William O. Douglas).

<sup>224</sup> See H. RES. 87, 101st Cong. (1989) (impeaching Judge Nixon); H. RES. 499, 100th Cong. (1988) (impeaching Judge Hastings); H. RES. 461, 99th Cong. (1986) (impeaching Judge Claiborne).

<sup>225</sup> See Tribe & Matz, *To End A Presidency*, at 92 ("Historically, the House and Senate have investigated through their committees ... Critically, although they may involve occasional public hearings, most investigatory activities must be kept secret until they have nearly reached an end.").

<sup>226</sup> Debate on Nixon Articles of Impeachment (1974), at 86.

<sup>227</sup> Committee Report on Clinton Articles of Impeachment (1998), at 300.

Although under no constitutional or other legal obligation to do so, but consistent with historical practice, the full House approved a resolution—H. Res. 660—that ensures transparency, allows effective public hearings, and provides the President with opportunities to participate. The privileges afforded under H. Res. 660 are even greater than those provided to Presidents Nixon and Clinton. They allow the President or his counsel to participate in House Judiciary Committee proceedings by presenting their case, responding to evidence, submitting requests for additional evidence, attending hearings (including non-public hearings), objecting to testimony, and cross-examining witnesses. In addition, H. Res. 660 gave the minority the same rights to question witnesses that the majority has, as has been true at every step of this impeachment proceeding.

The impeachment inquiry concerning President Trump has thus complied in every respect with the Constitution, the Rules of the House, and historic practice of the House.

## **B. Evidentiary Considerations and Presidential Obstruction**

The House impeachment inquiry has compiled substantial direct and circumstantial evidence bearing on the question whether President Trump may have committed impeachable offenses. President Trump has objected that some of this evidence comes from witnesses lacking first-hand knowledge of his conduct. In the same breath, though, he has ordered witnesses with first-hand knowledge to defy House subpoenas for testimony and documents—and has done so in a categorical, unqualified manner. President Trump’s evidentiary challenges are misplaced as a matter of constitutional law and common sense.

The Constitution does not prescribe rules of evidence for impeachment proceedings in the House or Senate. Consistent with its sole powers to impeach and to determine the rules of its proceedings, the House is constitutionally authorized to consider any evidence that it believes may illuminate the issues before it. At this fact-finding stage, “no technical ‘rules of evidence’ apply,” and “[e]vidence may come from investigations by committee staff, from grand jury matter made available to the committee, or from any other source.”<sup>228</sup> The House may thus “subpoena documents, call witnesses, hold hearings, make legal determinations, and undertake any other activities necessary to fulfill [its] mandate.”<sup>229</sup> When deciding whether to bring charges against the President, the House is not restricted by the Constitution in deciding which evidence to consider or how much weight to afford it.

Indeed, were rules of evidence to apply anywhere, it would be in the Senate, where impeachments are tried. Yet the Senate does not treat the law of evidence as controlling at such trials.<sup>230</sup> As one scholar explains, “rules of evidence were elaborated primarily to hold

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<sup>228</sup> Black & Bobbitt, *Impeachment*, at 9.

<sup>229</sup> Tribe & Matz, *To End a Presidency*, at 129.

<sup>230</sup> Gerhardt, *The Federal Impeachment Process*, at 42 (“[E]ven if the Senate could agree on such rules for impeachment trials, they would not be enforceable against or binding on individual senators, each of whom traditionally has had the discretion in an impeachment trial to follow any evidentiary standards he or she sees fit.”).

*juries* within narrow limits. They have no place in the impeachment process. Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to ‘hearsay’ evidence; they cannot be sequestered and kept away from newspapers, like a jury.”<sup>231</sup>

Instead of adopting abstract or inflexible rules, the House and Senate have long relied on their common sense and good judgment to assess evidence in impeachments. When evidence is relevant but there is reason to question its reliability, those considerations affect how much weight the evidence is given, not whether it can be considered at all.

Here, the factual record is formidable and includes many forms of highly reliable evidence. It goes without saying, however, that the record might be more expansive if the House had full access to the documents and testimony it has lawfully subpoenaed from government officials. The reason the House lacks such access is an unprecedented decision by President Trump to order a total blockade of the House impeachment inquiry.

In contrast, the conduct of prior chief executives illustrates the lengths to which they complied with impeachment inquiries. As President James Polk conceded, the “power of the House” in cases of impeachment “would penetrate into the most secret recesses of the Executive Departments,” and “could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge.”<sup>232</sup> Decades later, when the House conducted an impeachment inquiry into President Johnson, it interviewed cabinet officials and Presidential aides, obtained extensive records, and heard testimony about conversations with Presidential advisors.<sup>233</sup> Presidents Grover Cleveland, Ulysses S. Grant, and Theodore Roosevelt each confirmed that Congress could obtain otherwise-shielded executive branch documents in an impeachment inquiry.<sup>234</sup> And in President Nixon’s case—where the President’s refusal to turn over tapes led to an article of impeachment—the House Judiciary Committee still heard testimony from his chief of staff (H.R. Haldeman), special counsel (Charles Colson), personal attorney (Herbert Kalmbach), and deputy assistant (Alexander Butterfield). Indeed, with respect to the Senate Watergate investigation, President Nixon stated: “All members of the White House Staff will appear voluntarily when requested by the committee. They will testify under oath, and they will

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<sup>231</sup> Black & Bobbitt, *Impeachment*, at 18. *see also* Gerhardt, *The Federal Impeachment Process*, at 117 (“Both state and federal courts require special rules of evidence to make trials more efficient and fair or to keep certain evidence away from a jury, whose members might not understand or appreciate its reliability, credibility, or potentially prejudicial effect.”).

<sup>232</sup> H.R. Jour., 29th Cong., 1st Sess., 693 (1846); 4 James D. Richardson ed., *Messages and Papers of Presidents* 434-35 (1896).

<sup>233</sup> *See generally* Reports of Committees, Impeachment Investigation, 40th Cong., 1st Sess. 183-578 (1867).

<sup>234</sup> *See* Jonathan David Shaub, *The Executive’s Privilege: Rethinking the President’s Power to Withhold Information*, LAWFARE (Oct. 31, 2019).

answer fully all proper questions.”<sup>235</sup> President Trump’s categorical blockade of the House impeachment inquiry has no analogue in the history of the Republic.<sup>236</sup>

As a matter of constitutional law, the House may properly conclude that a President’s obstruction of Congress is relevant to assessing the evidentiary record in an impeachment inquiry. For centuries, courts have recognized that “when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.”<sup>237</sup> Moreover, it is routine for courts to draw adverse inferences where a party acts in bad faith to conceal or destroy evidence or preclude witnesses from testifying.<sup>238</sup> Although those judicial rules do not control here, they are instructive in confirming that parties who interfere with fact-finding processes can suffer an evidentiary sanction. Consistent with that commonsense principle, the House has informed the administration that defiance of subpoenas at the direction or behest of the President or the White House could justify an adverse inference against the President. In light of President Trump’s unlawful and unqualified direction that governmental officials violate their legal responsibilities to Congress, as well as his pattern of witness intimidation, the House may reasonably infer that their testimony would be harmful to the President—or at least not exculpatory. If this evidence were helpful to the President, he would not break the law to keep it hidden, nor would he engage in public acts of harassment to scare other witnesses who might consider coming forward.<sup>239</sup>

One noteworthy result of President Trump’s obstruction is that the House has been improperly denied testimony by certain government officials who could have offered first-hand accounts of relevant events. That does not leave the House at sea: there is still robust evidence, both documentary and testimonial, bearing directly on his conduct and motives.

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<sup>235</sup> *The President’s Remarks Announcing Developments and Procedures to be Followed in Connection with the Investigation*, THE WHITE HOUSE Apr. 17, 1973. President Nixon initially stated that members of his “personal staff” would “decline a request for a formal appearance before a committee of the Congress,” but reversed course approximately one month later., *Statement by the President, Executive Privilege* THE WHITE HOUSE Mar. 12, 1973.

<sup>236</sup> See Tribe & Matz, *To End A Presidency*, at 129 (“Congress’s investigatory powers are at their zenith in the realm of impeachment. They should ordinarily overcome almost any claim of executive privilege asserted by the president.”).

<sup>237</sup> *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also Interstate Circuit v. United States*, 306 U.S. 208, 225–26 (1939); *Rossi v. United States*, 289 U.S. 89, 91–92 (1933); *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51–53 (1927); *Burdine v. Johnson*, 262 F.3d 336, 366 (5th Cir. 2001) (collecting cases); *United States v. Pitts*, 918 F.2d 197, 199 (D.C. Cir. 1990) (holding that, where a missing witness has “so much to offer that one would expect [him] to take the stand,” and where “one of the parties had some special ability to produce him,” the law allows an inference “that the missing witness would have given testimony damaging to that party”).

<sup>238</sup> See, e.g., *Bracey v. Grondin*, 712 F.3d 1012, 1018 (7th Cir. 2013); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217 (1st Cir. 1982); *see also 2 Jones on Evidence* § 13:12 & § 13:15 (7th ed. 2019 update).

<sup>239</sup> If the President could order all Executive Branch agencies and officials to defy House impeachment inquiries, and if the House were unable to draw any inferences from that order with respect to the President’s alleged misconduct, the impeachment power would be a nullity in many cases where it plainly should apply.

But especially given the President’s obstruction of Congress, the House is free under the Constitution to consider reliable testimony from officials who overheard—or later learned about—statements by the President to witnesses whose testimony he has blocked.<sup>240</sup>

To summarize: just like grand jurors and prosecutors, the House is not subject to rigid evidentiary rules in deciding whether to approve articles. Members of the House are trusted to fairly weigh evidence in an impeachment inquiry. Where the President illegally seeks to obstruct such an inquiry, the House is free to infer that evidence blocked from its view is harmful to the President’s position. It is also free to rely on other relevant, reliable evidence that illuminates the ultimate factual issues. The President has no right to defy an impeachment inquiry and then demand that the House turn back because it lacks the very evidence he unlawfully concealed. If anything, such conduct confirms that the President sees himself as above the law and may therefore bear on the question of impeachment.<sup>241</sup>

### C. Abuse of Presidential Power is Impeachable

The powers of the President are immense, but they are not absolute. That principle applies to the current President just as it applied to his predecessors. President Nixon erred in asserting that “when the President does it, that means it is not illegal.”<sup>242</sup> And President Trump was equally mistaken when he declared he had “the right to do whatever I want as president.”<sup>243</sup> The Constitution always matches power with constraint. That is true even of powers vested exclusively in the chief executive. If those powers are invoked for corrupt

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<sup>240</sup> Under the Federal Rules of Evidence—which, again, are not applicable in Congressional impeachment proceedings—judges sometimes limit witnesses from offering testimony about someone else’s out-of-court statements. They do so for reasons respecting reliability and with an eye to the unique risks presented by unsophisticated juries that may not properly evaluate evidence. But because hearsay evidence can in fact be highly reliable, and because it is “often relevant,” *Tome v. United States*, 513 U.S. 150, 163 (1995), there are many circumstances in which such testimony is admissible in federal judicial proceedings. Those circumstances include, but are by no means limited to, recorded recollections, records of regularly conducted activity, records of a public office, excited utterances, and statements against penal or other interest. Moreover, where hearsay evidence bears indicia of reliability, it is regularly used in many other profoundly important contexts, including federal sentencing and immigration proceedings. *See, e.g., Arrazabal v. Barr*, 929 F.3d 451, 462 (7th Cir. 2019); *United States v. Mitrovic*, 890 F.3d 1217, 1222 (11th Cir. 2018); *United States v. Woods*, 596 F.3d 445, 448 (8th Cir. 2010). Ironically, although some have complained that hearings related to the Ukraine affair initially occurred out of public sight, one reason for that measure was to ensure the integrity of witness testimony. Where multiple witnesses testified to the same point in separate, confidential hearings, that factual conclusion may be seen as corroborated and more highly reliable.

<sup>241</sup> The President has advanced numerous arguments to justify his across-the-board defiance of the House impeachment inquiry. These arguments lack merit. As this Committee recognized when it impeached President Nixon for obstruction of Congress, the impeachment power includes a corresponding power of inquiry that allows the House to investigate the Executive Branch and compel compliance with its subpoenas.

<sup>242</sup> *Document: Transcript of David Frost’s Interview with Richard Nixon, 1977*, TEACHING AMERICAN HISTORY.

<sup>243</sup> Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him ‘The Right To Do Whatever I Want’*, THE WASHINGTON POST, July 23, 2019.

reasons, or in an abusive manner that threatens harm to constitutional governance, the President is subject to impeachment for “high Crimes and Misdemeanors.”

This conclusion follows from the Constitution’s history and structure. As explained above, the Framers created a formidable Presidency, which they entrusted with “the executive Power” and a host of additional authorities. For example, the President alone can confer pardons, sign or veto legislation, recognize foreign nations, serve as Commander in Chief of the armed forces, and appoint or remove principal officers. The President also plays a significant (though not exclusive) role in conducting diplomacy, supervising law enforcement, and protecting national security. These are daunting powers for any one person to wield. If put to nefarious ends, they could wreak havoc on our democracy.

The Framers knew this. Fearful of tyranny in all its forms, they saw impeachment as a necessary guarantee that Presidents could be held accountable for how they exercised executive power. Many delegates at the Constitutional Convention and state ratifying conventions made this point, including Madison, Randolph, Pinckney, Stillman, and Iredell. Their view was widely shared. As James Wilson observed in Pennsylvania, “we have a responsibility in the person of our President”—who is “possessed of power”—since “far from being above the laws,” he is “amenable to them … by impeachment.”<sup>244</sup> Hamilton struck the same note. In *Federalist No. 70*, he remarked that the Constitution affords Americans the “greatest securities they can have for the faithful exercise of any delegated power,” including the power to discover “with facility and clearness” any misconduct requiring “removal from office.”<sup>245</sup> Impeachment and executive power were thus closely intertwined in the Framers’ constitutional plan: the President could be vested with awesome power, but only because he faced removal from office for grave abuses.

The architects of checks and balances meant no exceptions to this rule. There is no power in the Constitution that a President can exercise immune from legal consequence. The existence of any such unchecked and uncheckable authority in the federal government would offend the bedrock principle that nobody is above the law. It would also upend the reasons why our Framers wrote impeachment into the Constitution: the *exact* forms of Presidential wrongdoing that they discussed in Philadelphia could be committed through use of executive powers, and it is unthinkable that the Framers left the Nation defenseless in such cases. In fact, when questioned by Mason in Virginia, Madison expressly stated that the President could be impeached for abuse of his exclusive pardon power—a view that the Supreme Court later echoed in *Ex Parte Grossman*.<sup>246</sup> By the same token, a President could surely be impeached for treason if he fired the Attorney General to thwart

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<sup>244</sup> 2 Elliot, *Debates in the Several State Conventions*, at 480.

<sup>245</sup> Alexander Hamilton, *Federalist No. 70*, at 456.

<sup>246</sup> 3 Elliot, *Debates in the Several State Conventions*, 497-98; *Ex Parte Grossman*, 267 U.S. at 121. Madison adhered to this understanding after the Constitution was ratified. In 1789, he explained to his colleagues in the House that the President would be subject to impeachment for abuse of the removal power—which is held by the President alone—“if he suffers [his appointees] to perpetrate with impunity High crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.” 1 *Annals of Congress* 387 (1789).

the unmasking of an enemy spy in wartime; he could be impeached for bribery if he offered to divulge state secrets to a foreign nation, conditioned on regulatory exemptions for his family business.<sup>247</sup> Simply put, “the fact that a power is exclusive to the executive—that is, the president alone may exercise it—does not mean the power cannot be exercised in clear bad faith, and that Congress cannot look into or act upon knowledge of that abuse.”<sup>248</sup>

The rule that abuse of power can lead to removal encompasses all three branches. The Impeachment Clause applies to “The President, Vice President and all civil Officers of the United States,” including Article III judges.<sup>249</sup> There is no exception to impeachment for misconduct by federal judges involving the exercise of their official powers. In fact, the opposite is true: “If in the exercise of the powers with which they are clothed as ministers of justice, [judges] act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment.”<sup>250</sup> Similarly, if Members of Congress exercise legislative power abusively or with corrupt purposes, they may be removed pursuant to the Expulsion Clause, which permits each house of Congress to expel a member “with the Concurrence of two thirds.”<sup>251</sup> *Nobody* is entitled to wield power under the Constitution if they ignore or betray the Nation’s interests to advance their own.

This is confirmed by past practice of the House. President Nixon’s case directly illustrates the point. As head of the Executive Branch, he had the power to appoint and remove law enforcement officials, to issue pardons, and to oversee the White House, IRS, CIA, and FBI. But he did not have any warrant to exercise these Presidential powers abusively or corruptly. When he did so, the House Judiciary Committee properly approved multiple articles of impeachment against him. Several decades later, the House impeached President Clinton. There, the House witnessed substantial disagreement over whether the President could be impeached for obstruction of justice that did *not* involve using the powers of his office. But it was universally presumed—and never seriously questioned—that the President could be impeached for obstruction of justice that *did* involve abuse of those powers.<sup>252</sup> That view rested firmly on a correct understanding of the Constitution.

Our Constitution rejects pretensions to monarchy and binds Presidents with law. A President who sees no limit on his power manifestly threatens the Republic.

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<sup>247</sup> Scholars have offered many examples and hypotheticals that they see as illustrative of this point. See Bowman, *High Crimes and Misdemeanors*, at 258; Black & Bobbitt, *Impeachment*, 115; Hemel & Posner, *Presidential Obstruction of Justice*, at 1297; Tribe & Matz, *To End a Presidency*, at 61.

<sup>248</sup> Jane Chong, *Impeachment-Proof? The President’s Unconstitutional Abuse of His Constitutional Powers*, LAWFARE, Jan. 2 2018.

<sup>249</sup> U.S. CONST. Art. II, § 4.

<sup>250</sup> *Bradley v. Fisher* 80 U.S. 335, 350 (1871).

<sup>251</sup> U.S. CONST. Art. I, § 5, cl. 2.

<sup>252</sup> See generally 1998 Background and History of Impeachment Hearing.

#### D. Presidential Pretexts Need Not Be Accepted at Face Value

Impeachable offenses are often defined by corrupt intent. To repeat Iredell, “the president would be liable to impeachments [if] he had … acted from some corrupt motive or other,” or if he was “willfully abusing his trust.”<sup>253</sup> Consistent with that teaching, both “Treason” and “Bribery” require proof that the President acted with an improper state of mind, as would many other offenses described as impeachable at the Constitutional Convention. Contrary to occasional suggestions that the House may not examine the President’s intent, an impeachment inquiry may therefore require the House to determine *why* the President acted the way he did. Understanding the President’s motives may clarify whether he used power in forbidden ways, whether he was faithless in executing the laws, and whether he poses a continuing danger to the Nation if allowed to remain in office.

When the House probes a President’s state of mind, its mandate is to find the facts. There is no room for legal fictions or lawyerly tricks that distort a clear assessment of the President’s thinking. That means evaluating the President’s explanations to see if they ring true. The question is not whether the President’s conduct *could have* resulted from innocent motives. It is whether the President’s *real reasons*—the ones actually in his mind as he exercised power—were legitimate. The Framers designed impeachment to root out abuse and corruption, even when a President masks improper intent with cover stories.

Accordingly, where the President’s explanation of his motives defies common sense, or is otherwise unbelievable, the House is free to reject the pretextual explanation and to conclude that the President’s false account of his thinking is itself evidence that he acted with corrupt motives. The President’s honesty in an impeachment inquiry, or his lack thereof, can thus shed light on the underlying issue.<sup>254</sup>

President Nixon’s case highlights the point. In its discussion of an article of impeachment for abuse of power, the House Judiciary Committee concluded that he had “falsely used a national security pretext” to direct executive agencies to engage in unlawful electronic surveillance investigations, thus violating “the constitutional rights of citizens.”<sup>255</sup> In its discussion of the same article, the Committee also found that President Nixon had interfered with the Justice Department by ordering it to cease investigating a crime “on the pretext that it involved national security.”<sup>256</sup> President Nixon’s repeated claim that he had acted to protect national security could not be squared with the facts, and so the Committee rejected it in approving articles of impeachment against him for targeting political opponents.

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<sup>253</sup> *Id.*, at 49.

<sup>254</sup> See Tribe & Matz, *To End A Presidency*, at 92 (“Does the president admit error, apologize, and clean house? Does he prove his innocence, or at least his reasonable good faith? Or does he lie and obstruct until the bitter end? Maybe he fires investigators and stonewalls prosecutors? … These data points are invaluable when Congress asks whether leaving the president in office would pose a continuing threat to the nation.”).

<sup>255</sup> Committee Report on Nixon Articles of Impeachment (1974), at 146.

<sup>256</sup> *Id.*, at 179.

Testing whether someone has falsely characterized their motives requires careful attention to the facts. In rare cases, “some implausible, fantastic, and silly explanations could be found to be pretextual without any further evidence.”<sup>257</sup> Sifting truth from fiction, though, usually demands a thorough review of the record—and a healthy dose of common sense. The question is whether “the evidence tells a story that does not match the explanation.”<sup>258</sup>

Because courts assess motive all the time, they have identified warning signs that an explanation may be untrustworthy. Those red flags include the following:

First, *lack of fit between conduct and explanation*. This exists when someone claims they were trying to achieve a specific goal but then engaged in conduct poorly tailored to achieving it.<sup>259</sup> For instance, imagine the President claims that he wants to solve a particular problem—but then he ignores many clear examples of that problem, weakens rules meant to stop it from occurring, acts in ways unlikely to address it, and seeks to punish only two alleged violators (both of whom happen to be his competitors). The lack of fit between his punitive conduct and his explanation for it strongly suggests that the explanation is false, and that he invented it as a pretext for corruptly targeting his competitors.

Second, *arbitrary discrimination*. When someone claims they were acting for a particular reason, look to see if they treated similarly-situated individuals the same.<sup>260</sup> For example, if a President says that people doing business abroad should not engage in specific practices, does he punish everyone who breaks that rule, or does he pick and choose? If he picks and chooses, is there a good reason why he targets some people and not others, or does he appear to be targeting people for reasons unrelated to his stated motive? Where similarly-situated people are treated differently, the President should be able to explain why; if no such explanation exists, it follows that hidden motives are in play.

Third, *shifting explanations*. When someone repeatedly changes their story, it makes sense to infer that they began with a lie and may still be lying.<sup>261</sup> That is true in daily life and it is true in impeachments. The House may therefore doubt the President’s account of his motives when he first denies that something occurred; then admits that it occurred but denies key facts; then admits those facts and tries to explain them away; and then

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<sup>257</sup> *Purkett v. Elem*, 514 U.S. 765, 776–77 (1995) (Stevens, J., dissenting).

<sup>258</sup> *Dep’t of Commerce v. N.Y.*, No. 18-966, at 27 (U.S. Jun. 27, 2019).

<sup>259</sup> See *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Miller-El v. Dretke*, 545 U.S. 231, 260 (2005).

<sup>260</sup> *Flowers v. Mississippi*, 139 S. Ct. 2228, 2249 (2019); *Miller-El v. Cockrell*, 537 U.S. 322, 345 (2003).

<sup>261</sup> See *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016); *Evans v. Sebelius*, 716 F.3d 617, 620–21 (D.C. Cir. 2013); *Geleta v. Gray*, 645 F.3d 408, 413–14 (D.C. Cir. 2011); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001); *Domínguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996).

changes his explanation as more evidence comes to light. Simply stated, the House is “not required to exhibit a naiveté from which ordinary citizens are free.”<sup>262</sup>

Fourth, *irregular decisionmaking*. When someone breaks from the normal method of making decisions, and instead acts covertly or strangely, there is cause for suspicion. As the Supreme Court has reasoned, “[t]he specific sequence of events leading up the challenged decision” may “shed some light on the decisionmaker’s purposes”—and “[d]epartures from the normal procedural sequence” might “afford evidence that improper purposes are playing a role.”<sup>263</sup> There are many personnel and procedures in place to ensure sound decisionmaking in the Executive Branch. When they are ignored, or replaced by secretive irregular channels, the House must closely scrutinize Presidential conduct.

Finally, *explanations based on falsehoods*. Where someone explains why they acted a certain way, but the explanation depends on demonstrably false facts, then their explanation is suspect.<sup>264</sup> For example, if a President publicly states that he withheld funds from a foreign nation due to its failure to meet certain conditions, but the federal agencies responsible for monitoring those conditions certify that they were satisfied, the House may conclude that the President’s explanation is only a distraction from the truth.

When one or more of these red flags is present, there is reason to doubt that the President’s account of his motives is accurate. When they are all present simultaneously, that conclusion is virtually unavoidable. Thus, in examining the President’s motives as part of an impeachment inquiry, the House must test his story against the evidence to see if it holds water. If it does not, the House may find that he acted with corrupt motives—and that he has made false statements as part of an effort to stymie the impeachment inquiry.

#### **E. Attempted Presidential Misconduct Is Impeachable**

As a matter of settled constitutional law, and contrary to recent suggestions otherwise, attempted Presidential wrongdoing can be impeachable. This is clear from the records of the Constitutional Convention. In the momentous exchange that led to adoption of the “high Crimes and Misdemeanors” standard, Mason championed impeaching Presidents for any “great and dangerous offenses.” It was therefore necessary, he argued, to avoid a narrow standard that would prevent impeachment for “*attempts* to subvert the Constitution” (emphasis added). Then, only minutes later, it was Mason himself who suggested “high Crimes and Misdemeanors” as the test for Presidential impeachment. The very author of the relevant constitutional text thus made clear it must cover “attempts.”

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<sup>262</sup> *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.) (making a similar point about federal judges).

<sup>263</sup> See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

<sup>264</sup> See, e.g., *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 147 (2000); *Geleta v. Gray*, 645 F.3d 408, 414 (D.C. Cir. 2011); *Czekalski v. Peters*, 475 F.3d 360, 366 (D.C. Cir. 2007); *Murray v. Gilmore*, 406 F.3d 708, 716 (D.C. Cir. 2005); *Salazar v. Wash. Metro. Transit Auth.*, 401 F.3d 504, 511–12 (D.C. Cir. 2005); *Anderson v. Zubieta*, 180 F.3d 329, 348 (D.C. Cir. 1999).

The House Judiciary Committee reached this conclusion in President Nixon's case. Its analysis is compelling and consistent with Mason's reasoning:

In some of the instances in which Richard M. Nixon abused the powers of his office, his unlawful or improper objective was not achieved. But this does not make the abuse of power any less serious, nor diminish the applicability of the impeachment remedy. The principle was stated by Supreme Court Justice William Johnson in 1808: "If an officer attempt[s] an act inconsistent with the duties of his station, it is presumed that the failure of the attempt would not exempt him from liability to impeachment. Should a President head a conspiracy for the usurpation of absolute power, it is hoped that no one will contend that defeating his machinations would restore him to innocence." *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 365 (No. 5, 420) (C.C.D.S.C. 1808).

Adhering to this legal analysis, the Committee approved articles of impeachment against President Nixon that encompassed acts of attempted wrongdoing that went nowhere or were thwarted. That includes President Nixon's attempt to block an investigation by the Patman Committee into the Watergate break-ins,<sup>265</sup> his attempt to block testimony by former aides,<sup>266</sup> his attempt to "narrow and divert" the Senate Select Committee's investigation,<sup>267</sup> and his attempt to have the IRS open tax audits of 575 members of George McGovern's staff and contributors to his campaign, at a time when McGovern was President Nixon's political opponent in the upcoming 1972 presidential election.<sup>268</sup> Moreover, the article of impeachment against President Nixon for abuse of power charged that he "attempted to prejudice the constitutional right of an accused to a fair trial."<sup>269</sup>

History thus confirms that defiance by his own aides do not afford the President a defense to impeachment. The Nation is not required to cross its fingers and hope White House staff will persist in ignoring or sidelining a President who orders them to execute "high Crimes and Misdemeanors." Nor can a President escape impeachment just because his corrupt plan to abuse power or manipulate elections was discovered and abandoned. It is inconceivable that our Framers authorized the removal of Presidents who engage in treason or bribery, but disallowed the removal of Presidents who attempt such offenses and are caught before they succeed. Moreover, a President who takes concrete steps toward engaging in impeachable conduct is not entitled to any benefit of the doubt. As one scholar remarks in the context of attempts to manipulate elections, "when a substantial attempt is made by a candidate to procure the presidency by corrupt means, we may presume that he

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<sup>265</sup> Committee Report on Nixon Articles of Impeachment (1974), at 64.

<sup>266</sup> *Id.*, at 120.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*, at 143.

<sup>269</sup> *Id.*, at 3.

at least thought this would make a difference in the outcome, and thus we should resolve any doubts as to the effects of his efforts against him.”<sup>270</sup>

Common sense confirms what the law provides: a President may be impeached where he attempts a grave abuse of power, is caught along the way, abandons his plan, and subsequently seeks to conceal his wrongdoing. A President who attempts impeachable offenses will surely attempt them again. The impeachment power exists so that the Nation can remove such Presidents from power before their attempts finally succeed.

#### **F. Impeachment is Part of Democratic Governance**

As House Judiciary Committee Chairman Peter Rodino emphasized in 1974, “it is under our Constitution, the supreme law of our land, that we proceed through the sole power of impeachment.”<sup>271</sup> Impeachment is part of democratic constitutional governance, not an exception to it. It results in the President’s removal from office only when a majority of the House, and then a super-majority of the Senate, conclude that he has engaged in sufficiently grave misconduct that his term in office must be brought to an early end. This process does not “nullify” the last election. No President is entitled to persist in office after committing “high Crimes and Misdemeanors,” and no voter is entitled to expect that their preferred candidate will do so. Under the Constitution, when a President engages in great and dangerous offenses against the Nation—thus betraying their Oath of Office—impeachment and removal by Congress may be necessary to protect our democracy.

The Framers considered relying solely on elections, rather than impeachment, to remove wayward Presidents. But they overwhelmingly rejected that position. As Madison warned, waiting so long “might be fatal to the Republic.”<sup>272</sup> Particularly where the President’s misconduct is aimed at corrupting our democracy, relying on elections to solve the problem is insufficient: it makes no sense to wait for the ballot box when a President stands accused of interfering with elections and is poised to do so again. Numerous Framers spoke directly to this point at the Constitutional Convention. Impeachment is the remedy for a President who will do anything, legal or not, to remain in office. Allowing the President a free pass is thus the wrong move when he is caught trying to corrupt elections in the final year of his first four-year term—just as he prepares to face the voters.

Holding the President accountable for “high Crimes and Misdemeanors” not only upholds democracy, but also vindicates the separation of powers. Representative Robert Kastenmeier explained this well in 1974: “The power of impeachment is not intended to obstruct or weaken the office of the Presidency. It is intended as a final remedy against executive excess … [a]nd it is the obligation of the Congress to defend a democratic society

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<sup>270</sup> Black & Bobbitt, *Impeachment*, at 93.

<sup>271</sup> Debate on Nixon Articles of Impeachment (1974), at 2.

<sup>272</sup> Elliot, *Debates on the Adoption of the Federal Constitution*, at 341.

against a Chief Executive who might be corrupt.”<sup>273</sup> The impeachment power thus restores balance and order when Presidential misconduct threatens constitutional governance.

## **VII. Conclusion**

As Madison recognized, “In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it control itself.”<sup>274</sup> Impeachment is the House’s last and most extraordinary resort when faced with a President who threatens our constitutional system. It is a terrible power, but only “because it was forged to counter a terrible power: the despot who deems himself to be above the law.”<sup>275</sup> The consideration of articles of impeachment is always a sad and solemn undertaking. In the end, it is the House—speaking for the Nation as a whole—that must decide whether the President’s conduct rises to the level of “high Crimes and Misdemeanors” warranting impeachment.

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<sup>273</sup> Debate on Nixon Articles of Impeachment (1974), at 16.

<sup>274</sup> James Madison, *Federalist No. 51*, at 356.

<sup>275</sup> Jill Lepore, *The Invention - And Reinvention – Of Impeachment*, THE NEW YORKER, Oct. 21 2019.