

Written Statement

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*“The Impeachment Inquiry Into President Donald J. Trump:
The Constitutional Basis For Presidential Impeachment”*

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I. INTRODUCTION

Chairman Nadler, ranking member Collins, members of the Judiciary Committee, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.¹ It is an honor to appear before you today to discuss one of the most solemn and important constitutional functions bestowed on this House by the Framers of our Constitution: the impeachment of the President of the United States.

Twenty-one years ago, I sat here before you, Chairman Nadler, and other members of the Judiciary Committee to testify on the history and meaning of the constitutional impeachment standard as part of the impeachment of President William Jefferson Clinton. I never thought that I would have to appear a second time to address the same question with regard to another sitting president. Yet, here we are. Some elements are strikingly similar. The intense rancor and rage of the public debate is the same. It was an atmosphere that the Framers anticipated. Alexander Hamilton warned that charges of impeachable conduct “will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused.”² As with the Clinton impeachment, the Trump impeachment has again proven Hamilton’s words to be prophetic. The stifling intolerance for opposing views is the same. As was the case two decades ago, it is a perilous environment for a legal scholar who wants to

¹ I appear today in my academic capacity to present views founded in prior academic work on impeachment and the separation of powers. My testimony does not reflect the views or approval of CBS News, the BBC, or the newspapers for which I write as a columnist. My testimony was written exclusively by myself with editing assistance from Nicholas Contarino, Andrew Hile, Thomas Huff, and Seth Tate.

² ALEXANDER HAMILTON, FEDERALIST NO. 65 (1788), *reprinted in* THE FEDERALIST PAPERS 396, 396-97 (Clinton Rossiter ed., 1961).

explore the technical and arcane issues normally involved in an academic examination of a legal standard ratified 234 years ago. In truth, the Clinton impeachment hearing proved to be an exception to the tenor of the overall public debate. The testimony from witnesses, ranging from Arthur Schlesinger Jr. to Laurence Tribe to Cass Sunstein, contained divergent views and disciplines. Yet the hearing remained respectful and substantive as we all grappled with this difficult matter. I appear today in the hope that we can achieve that same objective of civil and meaningful discourse despite our good-faith differences on the impeachment standard and its application to the conduct of President Donald J. Trump.

I have spent decades writing about impeachment³ and presidential powers⁴ as an academic and as a legal commentator. My academic work reflects the bias of a Madisonian scholar. I tend to favor Congress in disputes with the Executive Branch and I have been critical of the sweeping claims of presidential power and privileges made by modern Administrations. My prior testimony mirrors my criticism of the expansion of executive powers and privileges.⁵ In truth, I have not held much fondness for any

³ See, e.g., Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Symposium, Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); Symposium, Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999).

⁴ See, e.g., Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Function Follows Form in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records*, 88 CORNELL L. REV. 651 (2003); Jonathan Turley, *The Military Pocket Republic*, 97 NW. L. REV. 1 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002).

⁵ See United States House of Representatives, Committee on the Judiciary, "Executive Privilege and Congressional Oversight," May 15, 2019 (testimony of Professor Jonathan Turley); United States House of Representatives, House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *The National Emergencies Act of 1976*, Feb. 28, 2019 (testimony of Professor Jonathan Turley); United States Senate, Committee on the Judiciary, *The Confirmation of William Pelham Barr As Attorney General of the United States Supreme Court*, Jan. 16, 2019 (testimony of Professor Jonathan Turley); United States Senate, Committee on Homeland Security and Governmental Affairs Committee, Subcommittee on Federal Spending Oversight and Emergency Management, *War Powers and the Effects of Unauthorized Military*

president in my lifetime. Indeed, the last president whose executive philosophy I consistently admired was James Madison.

In addition to my academic work, I am a practicing criminal defense lawyer. Among my past cases, I represented the United States House of Representatives as lead counsel challenging payments made under the Affordable Care Act without congressional authorization. I also served as the last lead defense counsel in an impeachment trial in the Senate. With my co-lead counsel Daniel Schwartz, I argued the case on behalf of federal judge Thomas Porteous. (My opposing lead counsel for the House managers was Adam Schiff). In addition to my testimony with other constitutional scholars at the Clinton impeachment hearings, I also represented former Attorneys General during the Clinton impeachment litigation over privilege disputes triggered by the investigation of Independent Counsel Ken Starr. I also served as lead counsel in a bill of attainder case, the sister of impeachment that will be discussed below.⁶

Engagements on Federal Spending”, June 6, 2018 (testimony of Professor Jonathan Turley); United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, Mar. 21, 2017 (testimony of Professor Jonathan Turley); United States House of Representatives, House Committee on Science, Space, and Technology, “*Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*,” Sept. 14, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016 (testimony and prepared statement of Jonathan Turley); United States Senate, Committee on Homeland Security and Governmental Affairs, “*The Administrative State: An Examination of Federal Rulemaking*,” Apr. 20, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*,” Mar. 15, 2016 (testimony and prepared statement of Jonathan Turley); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law); *Enforcing The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President’s Unprecedented “Recess” Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley). Parts of my testimony today is taken from this prior work.

⁶ *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003).

I would like to start, perhaps incongruously, with a statement of three irrelevant facts. First, I am not a supporter of President Trump. I voted against him in 2016 and I have previously voted for Presidents Clinton and Obama. Second, I have been highly critical of President Trump, his policies, and his rhetoric, in dozens of columns. Third, I have repeatedly criticized his raising of the investigation of the Hunter Biden matter with the Ukrainian president. These points are not meant to curry favor or approval. Rather they are meant to drive home a simple point: one can oppose President Trump's policies or actions but still conclude that the current legal case for impeachment is not just woefully inadequate, but in some respects, dangerous, as the basis for the impeachment of an American president. To put it simply, I hold no brief for President Trump. My personal and political views of President Trump, however, are irrelevant to my impeachment testimony, as they should be to your impeachment vote. Today, my only concern is the integrity and coherence of the constitutional standard and process of impeachment. President Trump will not be our last president and what we leave in the wake of this scandal will shape our democracy for generations to come. I am concerned about lowering impeachment standards to fit a paucity of evidence and an abundance of anger. If the House proceeds solely on the Ukrainian allegations, this impeachment would stand out among modern impeachments as the shortest proceeding, with the thinnest evidentiary record, and the narrowest grounds ever used to impeach a president.⁷ That does not bode well for future presidents who are working in a country often sharply and, at times, bitterly divided.

Although I am citing a wide body of my relevant academic work on these questions, I will not repeat that work in this testimony. Instead, I will focus on the history and cases that bear most directly on the questions facing this Committee. My testimony will first address relevant elements of the history and meaning of the impeachment standard. Second, I will discuss the past presidential impeachments and inquiries in the context of this controversy. Finally, I will address some of the specific alleged impeachable offenses raised in this process. In the end, I believe that this process has raised serious and legitimate issues for investigation. Indeed, I have previously stated that a quid pro quo to force the investigation of a political rival in exchange for military aid can be impeachable, if proven. Yet moving forward primarily or exclusively with the Ukraine controversy on this record would be as precarious as it would premature. It comes down to a type of constitutional architecture. Such a slender foundation is a red flag for architects who operate on the accepted 1:10 ratio between the width and height of

⁷ The only non-modern presidential impeachment is an outlier in this sense. As I discussed below, the impeachment of Andrew Johnson was the shortest period from the underlying act (the firing of the Secretary of War) to the adoption of the articles of impeachment. However, the House had been preparing for such an impeachment before the firing and had started investigations of matters referenced in the articles. This was actually the fourth impeachment, with the prior three attempts extending over a year with similar complaints and inquiries. Thus, the actual period of the impeachment of Johnson and the operative record is debatable. I have previously discussed the striking similarities between the Johnson and Trump inquiries in terms of the brevity of the investigation and narrowest of the alleged impeachable offenses.

a structure. The physics are simple. The higher the building, the wider the foundation. There is no higher constitutional structure than the impeachment of a sitting president and, for that reason, an impeachment must have a wide foundation in order to be successful. The Ukraine controversy has not offered such a foundation and would easily collapse in a Senate trial.

Before I address these questions, I would like to make one last cautionary observation regarding the current political atmosphere. In his poem “The Happy Warrior,” William Wordsworth paid homage to Lord Horatio Nelson, a famous admiral and hero of the Napoleonic Wars. Wordsworth began by asking “Who is the happy Warrior? Who is he what every man in arms should wish to be?” The poem captured the deep public sentiment felt by Nelson’s passing and one reader sent Wordsworth a gushing letter proclaiming his love for the poem. Surprisingly, Wordsworth sent back an admonishing response. He told the reader “you are mistaken; your judgment is affected by your moral approval of the lines.”⁸ Wordsworth’s point was that it was not his poem that the reader loved, but its subject. My point is only this: it is easy to fall in love with lines that appeal to one’s moral approval. In impeachments, one’s feeling about the subject can distort one’s judgment on the true meaning or quality of an argument. We have too many happy warriors in this impeachment on both sides. What we need are more objective noncombatants, members willing to set aside political passion in favor of constitutional circumspection. Despite our differences of opinion, I believe that this esteemed panel can offer a foundation for such reasoned and civil discourse. If we are to impeach a president for only the third time in our history, we will need to rise above this age of rage and genuinely engage in a civil and substantive discussion. It is to that end that my testimony is offered today.

II. A BRIEF OVERVIEW OF THE HISTORY AND MEANING OF THE IMPEACHMENT STANDARD

Divining the intent of the Framers often borders on necromancy, with about the same level of reliability. Fortunately, there are some questions that were answered directly by the Framers during the Constitutional and Ratification Conventions. Any proper constitutional interpretation begins with the text of the Constitution. Indeed, such interpretations ideally end with the text when there is clarity as to a constitutional standard or procedure. Five provisions are material to impeachment cases, and therefore structure our analysis:

Article I, Section 2: The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. U.S. Const. art. I, cl. 8.

Article I, Section 3: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or

⁸ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 2* (Yale, 1962).

Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. U.S. Const. art. I, 3, cl. 6.

Article I, Section 3: Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to the Law. U.S. Const. art. I, 3, cl. 7.

Article II, Section 2: [The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. U.S. Const., art. II, 2, cl. 1.

Article II, Section 4: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. U.S. Const. art. II, 4.

For the purposes of this hearing, it is Article II, Section 4 that is the focus of our attention and, specifically, the meaning of “Treason, Bribery, or other high Crimes and Misdemeanors.” It is telling that the actual constitutional standard is contained in Article II (defining executive powers and obligations) rather than Article I (defining legislative powers and obligations). The location of that standard in Article II serves as a critical check on service as a president, qualifying the considerable powers bestowed upon the Chief Executive with the express limitations of that office. It is in this sense an executive, not legislative, standard set by the Framers. For presidents, it is essential that this condition be clear and consistent so that they are not subject to the whim of shifting majorities in Congress. That was a stated concern of the Framers and led to the adoption of the current standard and, equally probative, the express rejection of other standards.

A. Hastings and the English Model of Impeachments

It can be fairly stated that American impeachments stand on English feet.⁹ However, while the language of our standard can be directly traced to English precedent, the Framers rejected the scope and procedures of English impeachments. English impeachments are actually instructive as a model rejected by the Framers due to its history of abuse. Impeachments in England were originally quite broad in terms of the basis for impeachment as well as those subject to impeachments. Any citizen could be

⁹ Much of this history is taken from earlier work, including Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999).

impeached, including legislators. Thus, in 1604, John Thornborough, Bishop of Bristol, was impeached for writing a book on the controversial union with Scotland.¹⁰

Thornborough was a member of the House of Lords, and his impeachment proved one of the many divisive issues between the two houses that ended in a draw. The Lords would ultimately rebuke the Bishop, but the House of Commons failed to secure a conviction. Impeachments could be tried by the Crown, and the convicted subjected to incarceration and even execution. The early standard was breathtakingly broad, including “treasons, felonies, and mischiefs done to our Lord, The King” and “divers deceits.” Not surprisingly, critics and political opponents of the Crown often found themselves the subject of such impeachments. Around 1400, procedures formed for impeachment but trials continued to serve as an extension of politics, including expressions of opposition to Crown governance by Parliament. Thus, Michael de la Pole, Earl of Suffolk, was impeached in 1386 for such offenses as appointing incompetent officers and “advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws.” Others were impeached for “giving pernicious advice to the Crown” and “malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad.”¹¹

English impeachments were hardly a model system. Indeed, they were often not tried to verdict or were subject to a refusal to hold a trial by the House of Lords. Nevertheless, there was one impeachment in particular that would become part of the constitutional debates: the trial of Governor General Warren Hastings of the East India Company.¹² The trial would captivate colonial figures as a challenge to Crown authority while highlighting all of the flaws of English impeachments. Indeed, it is a case that bears some striking similarities to the allegations swirling around the Ukrainian controversy.

Hastings was first appointed as the Governor of Bengal and eventually the Governor-General in India. It was a country like Ukraine, rife with open corruption and bribery. The East India Company held quasi-governing authority and was accused of perpetuating such corruption. Burisma could not hold a candle to the East India Company. Hastings imposed British control over taxation and the courts. He intervened in military conflicts to secure concessions. His bitter feuds with prominent figures even led to a duel with British councilor Philip Francis, who Hastings shot and wounded. The record was heralded by some and vilified by others. Among the chief antagonists was Edmund Burke, one of the intellectual giants of his generation. Burke despised Hastings, who he described as the “captain-general of iniquity” and a “spider of Hell.” Indeed, even with the over-heated rhetoric of the current hearings, few comments have reached the level of Burke’s denouncement of Hastings as a “ravenous vulture devouring the

¹⁰ See COLIN G.C. TITE, *IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND* 57 (1974).

¹¹ 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 798, at 268-69 (rev. ed. 1991).

¹² See Turley, *Senate Trials*, *supra* note 3. See also Jonathan Turley, *Adam Schiff’s Capacious Definition Of Bribery Was Tried In 1787*, WALL ST. J., Nov. 28, 2019.

carcasses of the dead.” Burke led the impeachment for bribery and other forms of abuse of power – proceedings that would take seven years. Burke made an observation that is also strikingly familiar in the current controversy. He insisted in a letter to Francis that the case came down to intent and Hastings’ defenders would not except any evidence as incriminating:

“Most of the facts, upon which we proceed, are confessed; some of them are boasted of. The labour will be on the criminality of the facts, where proof, as I apprehend, will not be contested. Guilt resides in the intention. But as we are before a tribunal, which having conceived a favourable opinion of Hastings (or what is of more moment, very favourable wishes for him) they will not judge of his intentions by the acts, but they will qualify his Acts by his presumed intentions. It is on this preposterous mode of judging that he had built all the Apologies for his conduct, which I have seen. Excuses, which in any criminal court would be considered with pity as the Straws, at which poor wretches drowning will catch, and which are such as no prosecutor thinks is worth his while to reply to, will be admitted in such a House of Commons as ours as a solid defence ... We know that we bring before a bribed tribunal a prejudged cause. In that situation all that we have to do is make a case strong in proof and in importance, and to draw inferences from it justifiable in logick, policy and criminal justice. As to all the rest, it is vain and idle.”¹³

That is an all-too-familiar refrain for the current controversy. Impeachment cases often come down to a question of intent, as does the current controversy. It also depends greatly on the willingness of the tribunal to consider the facts in a detached and neutral manner. Burke doubted the ability of the “bribed tribunal” to guarantee a fair trial—a complaint heard today on both sides of the controversy. Yet, ultimately for Burke, the judgment of history has not been good. While many of us think Burke truly believed the allegations against Hastings, Hastings was eventually acquitted and Burke ended up being censured after the impeachment.

Ultimately, the United States would incorporate the language of “high crimes and misdemeanors” from English impeachments, but fashion a very different standard and process for such cases.

B. The American Model of Impeachment

Colonial impeachments did occur with the same dubious standards and procedures that marked the English impeachments. Indeed, impeachments were used in the absence of direct political power. Much like parliamentary impeachments, the colonial impeachments became a way of contesting Crown governance. Thus, the first colonial impeachment in 1635 targeted Governor John Harvey of Virginia for

¹³ Letter from Edmund Burke to Philip Frances, *in* 5 THE CORRESPONDENCE OF EDMUND BURKE 241 (Holden Furber ed., 1965).

misfeasance in office, including tyrannical conduct in office. Likewise, the 1706 impeachment of James Logan, Pennsylvania provincial agent and secretary of the Pennsylvania council, was based largely on political grievances including “a wicked intent to create Divisions and Misunderstandings between him and the people.” These colonial impeachments often contained broad or ill-defined grounds for impeachment for such things as “loss of public trust.” Some impeachments involved Framers, from John Adams to Benjamin Franklin, and most were certainly known to the Framers as a whole.

Given this history, when the Framers met in Philadelphia to craft the Constitution, impeachment was understandably raised, including the Hastings impeachment, which had yet to go to trial in England. However, there was a contingent of Framers that viewed any impeachment of a president as unnecessary and even dangerous. Charles Pinckney of South Carolina, Gouverneur Morris of Pennsylvania, and Rufus King of Massachusetts opposed such a provision.¹⁴ That opposition may have been due to the history of the use of impeachment for political purposes in both England and the colonies that I just discussed. However, they were ultimately overruled by the majority who wanted this option included into the Constitution. As declared by William Davie of North Carolina, impeachment was viewed as the “essential security for the good behaviour of the Executive.”

Unlike the English impeachments, the American model would be limited to judicial and executive officials. The standard itself however led to an important exchange between George Mason and James Madison:

“Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offense. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined - As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.

He movd. to add after “bribery” “or maladministration.”

Mr. Gerry seconded him -

Mr. Madison[.] So vague a term will be equivalent to a tenure during pleasure of the Senate.

Mr. Govr Morris[.] It will not be put in force & can do no harm - An election of every four years will prevent maladministration.

Col. Mason withdrew “maladministration” & substitutes “other high crimes & misdemeanors” (“agst. the State”).

¹⁴ Turley, *Senate Trials*, *supra* note 3, at 34.

On the question thus altered [Ayes - 8; Noes - 3]¹⁵

In the end, the Framers would reject various prior standards including “corruption,” “obtaining office by improper means”, betraying his trust to a foreign power, “negligence,” “perfidy,” “peculation,” and “oppression.” Perfidy (or lying) and peculation (self-dealing) are particularly interesting in the current controversy given similar accusations against President Trump in his Ukrainian comments and conduct.

It is worth noting that, while Madison objected to the inclusion of maladministration in the standard in favor of the English standard of “high crimes and misdemeanors,” he would later reference maladministration as something that could be part of an impeachment and declared that impeachment could address “the incapacity, negligence or perfidy of the chief Magistrate.”¹⁶ Likewise, Alexander Hamilton referred to impeachable offenses as “those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”¹⁷ These seemingly conflicting statements can be reconciled if one accepts that some cases involving high crimes and misdemeanors can include such broader claims. Indeed, past impeachments have alleged criminal acts while citing examples of lying and violations of public trust. Many violations of federal law by presidents occur in the context of such perfidy and peculation – aspects that help show the necessity for the extreme measure of removal. Indeed, such factors can weigh more heavily in the United States Senate where the question is not simply whether impeachable offenses have occurred but whether such offenses, if proven, warrant the removal of a sitting president. However, the Framers clearly stated they adopted the current standard to avoid a vague and fluid definition of a core impeachable offense. The structure of the critical line cannot be ignored. The Framers cited two criminal offenses—treason and bribery—followed by a reference to “other high crimes and misdemeanors.” This is in contrast to when the Framers included “Treason, Felony, or other Crime” rather than “high crime” in the Extradition Clause of Article IV, Section 2. The word “other” reflects an obvious intent to convey that the

¹⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 550 (Max Farrand ed., 1937).

¹⁶ Madison noted that there are times when the public should not have to wait for the termination of a term to remove a person unfit for the office. Madison explained:

“[It is] indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression... In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.”

See 2 RECORDS, *supra* note 15, at 65-66. Capacity issues however have never been the subject of presidential impeachments. That danger was later address in the Twenty-Fifth Amendment.

¹⁷ THE FEDERALIST NO. 65, *supra* note 2, at 396.

impeachable acts other than bribery and treason were meant to reach a similar level of gravity and seriousness (even if they are not technically criminal acts). This was clearly a departure from the English model, which was abused because of the dangerous fluidity of the standard used to accuse officials. Thus, the core of American impeachments was intended to remain more defined and limited.

It is a discussion that should weigh heavily on the decision facing members of this House.

III. PRIOR PRESIDENTIAL IMPEACHMENTS AND THEIR RELEVANCE TO THE CURRENT INQUIRY

As I have stressed, it is possible to establish a case for impeachment based on a non-criminal allegation of abuse of power. However, although criminality is not required in such a case, clarity is necessary. That comes from a complete and comprehensive record that eliminates exculpatory motivations or explanations. The problem is that this is an exceptionally narrow impeachment resting on the thinnest possible evidentiary record. During the House Intelligence Committee proceedings, Democratic leaders indicated that they wanted to proceed exclusively or primarily on the Ukrainian allegations and wanted a vote by the end of December. I previously wrote that the current incomplete record is insufficient to sustain an impeachment case, a view recently voiced by the New York Times and other sources.¹⁸

Even under the most flexible English impeachment model, there remained an expectation that impeachments could not be based on presumption or speculation on key elements. If the underlying allegation could be non-criminal, the early English impeachments followed a format similar to a criminal trial, including the calling of witnesses. However, impeachments were often rejected by the House of Lords as facially inadequate, politically motivated, or lacking sufficient proof. Between 1626 and 1715, the House of Lords only held trials to verdict in five of the fifty-seven impeachment cases brought. For all its failings, The House of Lords still required evidence of real offenses supported by an evidentiary record for impeachment. Indeed, impeachments were viewed as more demanding than bills of attainder.

A bill of attainder¹⁹ involves a legislative form of punishment. While a person could be executed under a bill of attainder, it was still more difficult to sustain an

¹⁸ Editorial, *Sondland Has Implicated the President and His Top Men*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/opinion/sondland-impeachment-hearings.html> (“It is essential for the House to conduct a thorough inquiry, including hearing testimony from critical players who have yet to appear. Right now, the House Intelligence Committee has not scheduled testimony from any witnesses after Thursday. That is a mistake. No matter is more urgent, but it should not be rushed — for the protection of the nation’s security, and for the integrity of the presidency, and for the future of the Republic.”).

¹⁹ I also litigated this question as counsel in the successful challenge to the Elizabeth Morgan Act, which was struck down as a bill of attainder. *See Foretich v. United States.*, 351 F.3d 1198 (D.C. Cir. 2003).

impeachment action. That difficulty is clearly shown by the impeachment of Thomas Wentworth, Earl of Strafford. Strafford was a key advisor to King Charles I, and was impeached in 1640 for the subversion of “the Fundamental Laws and Government of the Realms” and endeavoring “to introduce Arbitrary and Tyrannical Government against Law.” Strafford contested both the underlying charges and the record. The House of Commons responded by dropping the impeachment and adopting a bill of attainder. In doing so, the House of Commons avoided the need to establish a complete evidentiary record and Stafford was subject to the bill of attainder and executed. Fortunately, the Framers had the foresight to prohibit bills of attainder. However, the different treatment between the two actions reflects the (perhaps counterintuitive) difference in the expectations of proof. Impeachments were viewed as requiring a full record subjected to adversarial elements of a trial.

In the current case, the record is facially insufficient. The problem is not simply that the record does not contain direct evidence of the President stating a quid pro quo, as Chairman Schiff has suggested. The problem is that the House has not bothered to subpoena the key witnesses who would have such direct knowledge. This alone sets a dangerous precedent. A House in the future could avoid countervailing evidence by simply relying on tailored records with testimony from people who offer damning presumptions or speculation. It is not enough to simply shrug and say this is “close enough for jazz” in an impeachment. The expectation, as shown by dozens of failed English impeachments, was that the lower house must offer a complete and compelling record. That is not to say that the final record must have a confession or incriminating statement from the accused. Rather, it was meant to be a complete record of the key witnesses that establishes the full range of material evidence. Only then could the body reach a conclusion on the true weight of the evidence—a conclusion that carries sufficient legitimacy with the public to justify the remedy of removal.

The history of American presidential impeachment shows the same restraint even when there were substantive complaints against the conduct of presidents. Indeed, some of our greatest presidents could have been impeached for acts in direct violation of their constitutional oaths of office. Abraham Lincoln, for example, suspended habeas corpus during the Civil War despite the fact that Article 1, Section 9, of the Constitution leaves such a suspension to Congress “in Cases of Rebellion or Invasion the public Safety may require it.” The unconstitutional suspension of the “Great Writ” would normally be viewed as a violation of the greatest constitutional order. Other presidents faced impeachment inquiries that were not allowed to proceed, including John Tyler, Grover Cleveland, Herbert Hoover, Harry Truman, Richard Nixon, Ronald Reagan, and George Bush. President Tyler faced some allegations that had some common elements to our current controversy. Among the nine allegations raised by Rep. John Botts of Virginia, Tyler was accused of initiating an illegal investigation of the custom house in New York, withholding information from government agents, withholding actions necessary to “the just operation of government” and “shameless duplicity, equivocation, and falsehood, with his late cabinet and Congress.” Likewise, Cleveland was accused of high crimes and misdemeanors that included the use of the appointment power for political purposes (including influencing legislation) against the nation’s interest and “corrupt[ing] politics through the interference of Federal officeholders.” Truman faced an impeachment call over a variety of claims, including “attempting to disgrace the Congress of the United

States”; “repeatedly withholding information from Congress”; and “making reckless and inaccurate public statements, which jeopardized the good name, peace, and security of the United States.”

These efforts reflect the long history of impeachment being used as a way to amplify political differences and grievances. Such legislative throat clearing has been stopped by the House by more circumspect members before articles were drafted or passed. This misuse of impeachment has been plain during the Trump Administration. Members have called for removal based on a myriad of objections against this President. Rep. Al Green (D-Texas) filed a resolution in the House of Representatives for impeachment after Trump called for players kneeling during the national anthem to be fired.²⁰ Others called for impeachment over President Trump’s controversial statement on the Charlottesville protests.²¹ Rep. Steve Cohen’s (D-Tenn.) explained that “If the president can’t recognize the difference between these domestic terrorists and the people who oppose their anti-American attitudes, then he cannot defend us.”²² These calls have been joined by an array of legal experts who have insisted that clear criminal conduct by Trump, including treason, have been shown in the Russian investigation. Professor Lawrence Tribe argued that Trump’s pardoning of former Arizona sheriff Joe Arpaio is clearly impeachable and could even be overturned by the courts.²³ Richard Painter, chief White House ethics lawyer for George W. Bush and a professor at the University of Minnesota Law School, declared that President Trump’s participation in fundraisers for Senators, a common practice of all presidents in election years, is impeachable. Painter insists that any such fundraising can constitute “felony bribery” since these senators will likely sit in judgment in any impeachment trial. Painter declared “This is a bribe. Any other American who offered cash to the jury before a trial would go to prison for felony

²⁰ Nicole Cobler, *Texas lawmaker calls for impeachment vote over Trump’s NFL Remarks*, DALLAS MORNING NEWS (Sept. 26, 2017, 12:08 PM), <https://www.dallasnews.com/news/politics/2017/09/26/texas-lawmaker-calls-for-impeachment-vote-over-trump-s-nfl-remarks/>.

²¹ Jessica Estepa, *Democratic lawmaker to file articles of impeachment over Trump’s Charlottesville response*, USA TODAY (Aug. 17, 2017, 11:58 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/08/17/democratic-lawmaker-to-file-articles-of-impeachment-over-trump-charlottesville-response/575892001/>.

²² Michael Collins & Daniel Connolly, *Rep. Cohen to file articles of impeachments against Trump*, THE TENNESSEAN (Aug. 17, 2017, 9:21 AM), <https://www.tennessean.com/story/news/2017/08/17/steve-cohen-impeach-president-trump-charlottesville/575764001/>.

²³ Laurence H. Tribe & Ron Fein, *‘Sheriff Joe’ is back in court. The impeachment inquiry should pay attention*, BOS. GLOBE (Oct. 23, 2019, 3:30 PM), <https://www.bostonglobe.com/opinion/2019/10/22/sheriff-joe-back-court-the-impeachment-inquiry-should-pay-attention/1Yv9YZmzwL93wP9gYIFj7J/story.html>.

bribery. But he can get away with it?”²⁴ CNN Legal Analyst Jeff Toobin declared, on the air, that Trump could be impeached solely on the basis of a tweet in which Trump criticized then Attorney General Jeff Sessions for federal charges brought against two Republican congressman shortly before the mid-term elections.²⁵ CNN Legal Analyst and former White House ethics attorney Norm Eisen claimed before the release of the Mueller report (which ultimately rejected any knowing collusion or conspiracy by Trump officials with Russian operatives) that the criminal case for collusion was “devastating” and that Trump is “colluding in plain sight.”²⁶ I have known many of these members and commentators for years on a professional or personal basis. I do not question their sincere beliefs on the grounds for such impeachments, but we have fundamental differences in the meaning and proper use of this rarely used constitutional device.

As I have previously written,²⁷ such misuses of impeachment would convert our process into a type of no-confidence vote of Parliament. Impeachment has become an impulse buy item in our raging political environment. Slate has even featured a running “Impeach-O-Meter.” Despite my disagreement with many of President Trump’s policies and statements, impeachment was never intended to be used as a mid-term corrective option for a divisive or unpopular leader. To its credit, the House has, in all but one case, arrested such impulsive moves before the transmittal of actual articles of impeachment to the Senate. Indeed, only two cases have warranted submission to the Senate and one was a demonstrative failure on the part of the House in adhering to the impeachment standard. Those two impeachments—and the third near-impeachment of Richard Nixon—warrant closer examination and comparison in the current environment.

A. The Johnson Impeachment

The closest of the three impeachments to the current (Ukrainian-based) impeachment would be the 1868 impeachment of Andrew Johnson. The most obvious point of comparison is the poisonous political environment and the controversial style of

²⁴ Jason Lemon, *Trump Is Committing ‘Felony Bribery’ By Giving Cash To GOP Senators Ahead Of Impeachment Trial: Ex-Bush Ethics Lawyer*, NEWSWEEK (Oct. 31, 2019, 10:28 AM), <https://www.newsweek.com/trump-committing-felony-bribery-giving-fundraising-cash-gop-senators-ahead-impeachment-trial-1468946>.

²⁵ Veronica Stracqualursi, *Toobin: ‘Trump’s attack against Sessions ‘an ‘impeachable offense’*, CNN (Sept. 4, 2018, 11:09 AM), <https://www.cnn.com/2018/09/04/politics/jeffrey-toobin-trump-sessions-tweet-cnntv/index.html>.

²⁶ Ronn Blitzer, *Former Obama Ethics Lawyer Says Trump is Now ‘Colluding In Plain Sight’*, LAW & CRIME (Feb. 27, 2018, 9:40 AM), <https://lawandcrime.com/high-profile/fmr-obama-ethics-lawyer-says-trump-is-now-colluding-in-plain-sight/>.

²⁷ Jonathan Turley, *What’s worse than leaving Trump in office? Impeaching him*, WASH. POST (Aug. 24, 2017, 11:05 AM), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/24/whats-worse-than-leaving-trump-in-office-impeaching-him/>.

the president. As a Southerner who ascended to the presidency as a result of the Lincoln assassination, Johnson faced an immediate challenge even before his acerbic and abrasive personality started to take its toll. Adding to this intense opposition to Johnson was his hostility to black suffrage, racist comments, and occupation of Southern states. He was widely ridiculed as the “accidental President” and specifically described by Representative John Farnsworth of Illinois, as an “ungrateful, despicable, besotted, traitorous man.” Woodrow Wilson described that Johnson “stopped neither to understand nor to persuade other men, but struck forward with crude, uncompromising force for his object, attempting mastery without wisdom or moderation.”²⁸ Johnson is widely regarded as one of the worst presidents in history—a view that started to form significantly while he was still in office.

The Radical Republicans in particular opposed Johnson, who was seen as opposing retributive measures against Southern states and full citizenship rights for freed African Americans. Johnson suggested hanging his political opponents and was widely accused of lowering the dignity of his office. At one point, he even reportedly compared himself to Jesus Christ. Like Trump, Johnson’s inflammatory language was blamed for racial violence against both blacks and immigrants. He was also blamed for reckless economic policies. He constantly obstructed the enforcement of federal laws and espoused racist views that even we find shocking for that time. Johnson also engaged in widespread firings that were criticized as undermining the functioning of government—objections not unlike those directed at the current Administration.

While Johnson’s refusal to follow federal law and his efforts to disenfranchise African Americans would have been viewed as impeachable (Johnson could not have worked harder to counterpunch his way into an impeachment), the actual impeachment proved relatively narrow. Radical Republicans and other members viewed Secretary of War Edwin M. Stanton as an ally and a critical counterbalance to Johnson. Johnson held the same view and was seen as planning to sack Stanton. To counter such a move (or lay a trap for impeachment), the Radical Republicans passed the Tenure of Office Act to prohibit a President from removing a cabinet officer without the appointment of a successor by the Senate. To facilitate an impeachment, the drafters included a provision stating that any violation of the Act would constitute a “high misdemeanor.” Violations were criminal and punishable “upon trial and conviction . . . by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both.”²⁹ The act was repealed in 1887 and the Supreme Court later declared that its provisions were presumptively constitutionally invalid.

Despite the facially invalid provisions, Johnson was impeached on eleven articles of impeachment narrowly crafted around the Tenure in Office Act. Other articles added intemperate language to unconstitutional limitations, impeaching Johnson for such grievances as trying to bring Congress “into disgrace, ridicule, hatred, contempt, and reproach” and making “with a loud voice certain intemperate, inflammatory, and scandalous harangues” Again, the comparison to the current impeachment inquiry is

²⁸ WOODROW WILSON, *A HISTORY OF THE AMERICAN PEOPLE*, vol. 5 (New York: Harper and Bros., 1903).

²⁹ Tenure in Office Act, ch. 154, 14 Stat. 430, 431 (1867).

obvious. After two years of members and commentators declaring a host of criminal and impeachable acts, the House is moving on the narrow grounds of an alleged quid pro quo while emphasizing the intemperate and inflammatory statements of the president. The rhetoric of the Johnson impeachment quickly outstripped its legal basis. In his presentation to the Senate, House manager John Logan expressed the view of President Johnson held by the Radical Republicans:

Almost from the time when the blood of Lincoln was warm on the floor of Ford's Theatre, Andrew Johnson was contemplating treason to all the fresh fruits of the overthrown and crushed rebellion, and an affiliation with and a practical official and hearty sympathy for those who had cost hecatombs of slain citizens, billions of treasure, and an almost ruined country. His great aim and purpose has been to subvert law, usurp authority, insult and outrage Congress, reconstruct the rebel States in the interests of treason... and deliver all snatched from wreck and ruin into the hands of unrepentant, but by him pardoned, traitors.

The Senate trial notably included key pre-trial votes on the evidentiary and procedural rules. The senators unanimously agreed that the trial should be judicial, not political, in character, but Johnson's opponents set about stacking the rules to guarantee easy conviction. On these votes, eleven Republicans broke from their ranks to insist on fairness for the accused. They were unsuccessful. Most Republican members turned a blind eye to the dubious basis for the impeachment. Their voters hated Johnson and cared little about the basis for his removal. However, Chief Justice Chase and other senators saw the flaws in the impeachment and opposed conviction. This included seven Republican senators—William Pitt Fessenden, James Grimes, Edmund Ross, Peter Van Winkle, John B. Henderson, Joseph Fowler, and Lyman Trumbull—who risked their careers to do the right thing, even for a president they despised. They became known as the “Republican Recusants.” Those seven dissenting Republicans represented a not-insignificant block of the forty-two Republican members voting in an intensely factional environment. Taking up the eleventh article as the threshold vote on May 16, 1868, 35 senators voted to convict while 19 voted to acquit—short of the two-thirds majority needed. Even after a ten-day delay with intense pressure on the defecting Republican members, two additional articles failed by the same vote and the proceedings were ended. The system prevailed despite the failure of a majority in the House and a majority of the Senate.

The comparison of the Johnson and Trump impeachment inquiries is striking given the similar political environments and the controversial qualities of the two presidents. Additionally, there was another shared element: speed. This impeachment would rival the Johnson impeachment as the shortest in history, depending on how one counts the relevant days. In the Johnson impeachment, Secretary of War Edwin Stanton was dismissed on February 21, 1868, and a resolution of impeachment was introduced that very day. On February 24, 1868, the resolution passed and articles of impeachment prepared. On March 2-3, 1868, eleven articles were adopted. The members considered the issue to be obvious in the Johnson case since the President had openly violated a statute that expressly defined violations as “high misdemeanors.” Of course, the scrutiny

of the underlying claims had been ongoing before the firing and this was the third attempted impeachment. Indeed, Congress passed legislation on March 2, 1867—one year before the first nine articles were adopted. Moreover, Johnson actually relieved Stanton of his duties in August 1867, and the House worked on the expected impeachment during this period. In December 1867, the House failed to adopt an impeachment resolution based on many of the same grievances because members did not feel that an actual crime had been committed. There were three prior impeachments with similar elements. When Stanton was actually fired, Johnson’s leading opponent Rep. Thaddeus Stevens of Pennsylvania (who had been pushing for impeachment for over a year) confronted the House members and demanded “What good did your moderation do you? If you don’t kill the beast, it will kill you.” With the former termination and the continued lobbying of Stevens, the House again moved to impeach and secured the votes. Thus, the actual resolution and adoption dates are a bit misleading. Yet, Johnson may technically remain the shortest investigation in history. However, whichever impeachment deserves the dubious distinction, history has shown that short impeachments are generally not strong impeachments.

While generally viewed as an abusive use of impeachment by most legal and historical scholars, the Johnson impeachment has curiously been cited as a basis for the current impeachment. Some believe that it is precedent that presidents can be impeached over purely “political disagreements.”³⁰ It is a chilling argument. Impeachment is not the remedy for political disagreement. The Johnson impeachment shows that the system can work to prevent an abusive impeachment even when the country and the Congress despise a president. The lasting lesson is that in every time and in every Congress, there remain leaders who can transcend their own insular political interests and defy the demands of some voters to fulfill their oaths to uphold the Constitution. Of course, the Constitution cannot take credit for such profiles of courage. Such courage rests within each member but the Constitution demands that each member summon that courage when the roll is called as it was on May 16, 1868.

B. The Nixon Inquiry

The Nixon “impeachment” is often referenced as the “gold standard” for impeachments even though it was not an actual impeachment. President Richard Nixon resigned before the House voted on the final articles of impeachment. Nevertheless, the Nixon inquiry was everything that the Johnson impeachment was not. It was based on an array of clearly defined criminal acts with a broad evidentiary foundation. That record was supported by a number of key judicial decisions on executive privilege claims. It is a worthy model for any presidential impeachment. However, the claim by Chairman Schiff that the Ukrainian controversy is “beyond anything Nixon did” is wildly at odds with the

³⁰ See generally Jonathan Turley, *What’s worse than leaving Trump in office? Impeaching him*, WASH. POST (Aug. 24, 2017, 11:05 AM), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/24/whats-worse-than-leaving-trump-in-office-impeaching-him/>.

historical record.³¹ The allegations in Nixon began with a felony crime of burglary and swept to encompass an array of other crimes involving political slush funds, payments of hush money, maintenance of an enemies list, directing tax audits of critics, witness intimidation, multiple instances of perjury, and even an alleged kidnapping. Ultimately, there were nearly 70 officials charged and four dozen of them found guilty. Nixon was also named as an unindicted conspirator by a grand jury. The convicted officials include former Attorney General John N. Mitchell (perjury); former Attorney General Richard Kleindienst (contempt of court); former Deputy Director of the Committee to Re-elect The President Jeb Stuart Magruder (conspiracy to the burglary); former Chief of Staff H.R. Haldeman (conspiracy to the burglary, obstruction of justice, and perjury); former counsel and Assistant to the President for Domestic Affairs to Nixon John Ehrlichman (conspiracy to the burglary, obstruction of justice, and perjury); former White House Counsel John W. Dean II (obstruction of justice); and former special counsel to the President Charles Colson (obstruction of justice). Many of the Watergate defendants went to jail, with some of the defendants sentenced to as long as 35 years. The claim that the Ukrainian controversy eclipses Watergate is unhinged from history.

While the Ukrainian controversy could still establish impeachable conduct, it undermines that effort to distort the historical record to elevate the current record. Indeed, the comparison to the Nixon inquiry only highlights the glaring differences in the underlying investigations, scope of impeachable conduct, and evidentiary records with the current inquiry. It is a difference between the comprehensive and the cursory; the proven and the presumed. In other words, it is not a comparison the House should invite if it is serious about moving forward in a few weeks on an impeachment based primarily on the Ukrainian controversy. The Nixon inquiry was based on the broadest and most developed evidentiary in any impeachment. There were roughly 14 months of hearings – not 10 weeks. There were scandalous tape recordings of Nixon and a host of criminal pleas and prosecutions. That record included investigations in both the House and the Senate as well as investigations by two special prosecutors, Archibald Cox and Leon Jaworski, including grand jury material. While the inquiry proceeded along sharply partisan lines, the vote on the proposed articles of impeachment ultimately included the support of some Republican members who, again, showed that principle could transcend politics in such historic moments.

Three articles were approved in the Nixon inquiry alleging obstruction of justice, abuse of power, and defiance of committee subpoenas. Two articles of impeachment based on usurping Congress, lying about the bombing of Cambodia, and tax fraud, were rejected on a bipartisan basis. While the Nixon impeachment had the most developed record and comprehensive investigation, I am not a fan of the structure used for the articles. The Committee evaded the need for specificity in alleging crimes like obstruction of justice while listing a variety of specific felonies after a catchall line declaring that “the means used to implement this course of conduct or plan included one

³¹ See Jonathan Turley, *Watergate line speaks volumes about weak impeachment case*, THE HILL (Nov. 30, 2019, 10:00 AM), <https://thehill.com/opinion/judiciary/472461-watergate-line-speaks-volumes-about-weak-impeachment-case>.

or more of the following.” Given its gravity, impeachment should offer concrete and specific allegations in the actual articles. This is the case in most judicial impeachments.

The impeachment began with a felony when “agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence.” The first article of impeachment reflected the depth of the record and scope of the alleged crimes in citing Nixon’s personal involvement in the obstruction of federal and congressional investigations. The article included a host of specific criminal acts including lying to federal investigators, suborning perjury, and witness tampering. The second article of impeachment also alleged an array of criminal acts that were placed under the auspices of abuse of power. The article addressed Nixon’s rampant misuse of the IRS, CIA, and FBI to carry out his effort to conceal the evidence and crimes following the break-in. They included Nixon’s use of federal agencies to carry out “covert and unlawful activities” and how he used his office to block the investigation of federal agencies. The third article concerned defiance of Congress stemming from his refusal to turn over material to Congress.

These articles were never subjected to a vote of the full House. In my view, they were flawed in their language and structure. As noted earlier, there was a lack of specificity on the alleged acts due to the use of catch-all lists of alleged offenses. However, my greatest concern rests with Article 3. That article stated:

“In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.”

This Article has been cited as precedent for impeaching a president whenever witnesses or documents are refused in an impeachment investigation, even under claims of executive immunities or privileges. The position of Chairman Peter Rodino was that Congress had the sole authority to decide what material had to be produced in such an investigation. That position would seem to do precisely what the article accused Nixon of doing: “assuming to [itself] functions and judgments” necessary for the Executive Branch. There is a third branch that is designated to resolve conflicts between the two political branches. In recognition of this responsibility, the Judiciary ruled on the Nixon disputes. In so doing, the Supreme Court found executive privilege claims are legitimate grounds to raise in disputes with Congress but ruled such claims can be set aside in the balancing of interests with Congress. What a president cannot do is ignore a final judicial order on such witnesses or evidence.

Putting aside my qualms with the drafting of the articles, the Nixon impeachment remains well-supported and well-based. He would have been likely impeached and removed, though I am not confident all of the articles would have been approved. I have particular reservations over the third article and its implications for presidents seeking judicial review. However, the Nixon inquiry had a foundation that included an array of criminal acts and a record that ultimately reached hundreds of thousands of pages. In the

end, Nixon was clearly guilty of directing a comprehensive conspiracy that involved slush funds, enemy lists, witness intimidation, obstruction of justice, and a host of other crimes. The breathtaking scope of the underlying criminality still shocks the conscience. The current controversy does not, as claimed, exceed the misconduct of Nixon, but that is not the test. Hopefully, we will not face another president responsible for this range of illegal conduct. Yet, that does not mean that other presidents are not guilty of impeachable conduct even if it does not rise to a Nixonian level. In other words, there is no need to out-Nixon Nixon. Impeachable will do. The question is whether the current allegation qualifies as impeachable, not uber-impeachable.

C. The Clinton Impeachment.

The third and final impeachment is of course the Clinton impeachment. That hearing involved 19 academics and, despite the rancor of the times, a remarkably substantive and civil intellectual exchange on the underlying issues. These are issues upon which reasonable people can disagree and the hearing remains a widely cited source on the historical and legal foundations for the impeachment standard. Like Johnson's impeachment, the Clinton impeachment rested on a narrow alleged crime: perjury. The underlying question for that hearing is well suited for today's analysis. We focused on whether a president could be impeached for lying under oath in a federal investigation run by an independent counsel. There was not a debate over whether Clinton lied under oath. Indeed, a federal court later confirmed that Clinton had committed perjury even though he was never charged. Rather, the issue was whether some felonies do not "rise to the level of impeachment" and, in that case, the alleged perjury and lying to federal investigators concerning an affair with White House intern, Monica Lewinsky.

My position in the Clinton impeachment hearing was simple and remains unchanged. Perjury is an impeachable offense. Period. It does not matter what the subject happened to be. The President heads the Executive Branch and is duty bound to enforce federal law including the perjury laws. Thousands of citizens have been sentenced to jail for the same act committed by President Clinton. He could refuse to answer the question and face the consequences, or he could tell the truth. What he could not do is lie and assume he had license to commit a crime that his own Administration was prosecuting others for. Emerging from that hearing was an "executive function" theory limiting "high crimes and misdemeanors" to misconduct related to the office of the President or misuse of official power.³² While supporters of the executive function theory recognized that this theory was not absolute and that some private conduct can be impeachable, it was argued that Clinton's conduct was personal and outside the realm of "other high crimes and misdemeanors."³³ This theory has been criticized in other articles. This threshold

³² Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999).

³³ Floor Debate, Clinton Impeachments, December 18, 1998 ("Perjury on a private matter, perjury regarding sex, is not a great and dangerous offense against the nation. It is not an abuse of uniquely presidential power. It does not threaten our form of government. It is not an impeachable offense.") (statement Rep. Jerrold Nadler, D., N.Y.).

argument, however, would appear again in the Senate trial. Notably, the defenders of the President argued that the standard of “high crimes and misdemeanors” should be treated differently for judicial, as opposed to presidential, officers. This argument was compelled by the fact that the Senate had previously removed Judge Claiborne for perjury before a grand jury and removed Judge Hastings, who had actually been acquitted on perjury charges by a court. I have previously written against this executive function theory of impeachable offenses.³⁴

The House Judiciary Committee delivered four articles of impeachment on a straight partisan vote. Article One alleged perjury before the federal grand jury. Article Two alleged perjury in a sexual harassment case. Article Three alleged obstruction of justice through witness tampering. Article Four alleged perjury in the President's answers to Congress. On December 19, 1998, the House approved two of the four articles of impeachment: perjury before the grand jury and obstruction of justice. In both votes, although Republicans and Democrats crossed party lines, the final vote remained largely partisan. The impeachment was technically initiated on October 8, 1998 and the articles approved on December 19, 1998.

The Senate trial of President Clinton began on January 7, 1999, with Chief Justice William H. Rehnquist taking the oath. The rule adopted by the Senate created immediate problems for the House managers. The rules specifically required the House managers to prove their case for witnesses and imposed a witness-by-witness Senate vote on the House managers. Because the Independent Counsel had supplied an extensive record with testimony from key witnesses, the need to call witnesses like the Nixon hearings was greatly reduced. For that reason, the House moved quickly to the submission of articles of impeachment after the hearing of experts. However, the Senate only approved three witnesses, described by House manager and Judiciary Committee Chairman Henry Hyde as “a pitiful three.” It proved fateful. One of the witnesses not called was Lewinsky herself. Years later, Lewinsky revealed (as she might have if called as a witness) that she was told to lie about the relationship by close associates of President Clinton. In 2018, Lewinsky stated Clinton encouraged her to lie to the independent counsel, an allegation raising the possibility of a variety of crimes as well as supporting the articles of impeachment.³⁵ The disclosure many years after the trial is a cautionary tale for future impeachments, as the denial of key witnesses from the Senate trial can prove decisive.

³⁴ Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999).

³⁵ Jonathan Turley, *Lewinsky interview renews questions of Clinton crimes*, THE HILL (Nov. 26, 2018, 12:00 PM), <https://thehill.com/opinion/white-house/418237-lewinsky-interview-renews-questions-of-clinton-crimes>. Lewinsky said on the A&E documentary series "The Clinton Affair" that Clinton phoned her at 2:30 a.m. one morning in late 1997 to tell her she was on witness list for Jones' civil suit against him. She said she was “petrified” and that “Bill helped me lock myself back from that and he said I could probably sign an affidavit to get out of it.” While he did not directly tell her to lie, she noted he did not tell her to tell the truth and that the conversation was about signing an affidavit “to get out of it.” Lewinsky went into details on how Clinton arranged for Lewinsky to meet with his close adviser and attorney Vernon Jordan. Jordan then

The Clinton impeachment was narrow but based on underlying criminal conduct largely investigated by an Independent Counsel. The allegation of perjury of a sitting president was supported by a long investigation and extensive record. Indeed, the perjury by Clinton was clear and acknowledged even by some of his supporters. The flaws in the Clinton impeachment emerged from the highly restrictive and outcome determinative rules imposed by the Senate. In comparison, the Trump impeachment inquiry has raised a number of criminal acts but each of those alleged crimes are undermined by legal and evidentiary deficiencies. As discussed below, the strongest claim is for a non-criminal abuse of power if a quid pro quo can be established on the record. That deficiency should be addressed before any articles are reported to the floor of the House.

D. Summary

A comparison of the current impeachment inquiry with the three prior presidential inquiries puts a few facts into sharp relief. First, this is a case without a clear criminal act and would be the first such case in history if the House proceeds without further evidence. In all three impeachment inquiries, the commission of criminal acts by Johnson, Nixon, and Clinton were clear and established. With Johnson, the House effectively created a trapdoor crime and Johnson knowingly jumped through it. The problem was that the law—the Tenure in Office Act—was presumptively unconstitutional and the impeachment was narrowly built around that dubious criminal act. With Nixon, there were a host of alleged criminal acts and dozens of officials who would be convicted of felonies. With Clinton, there was an act of perjury that even his supporters acknowledged was a felony, leaving them to argue that some felonies “do not rise to the level” of an impeachment. Despite clear and established allegations of criminal acts committed by the president, narrow impeachments like Johnson and Clinton have fared badly. As will be discussed further below, the recently suggested criminal acts related to the Ukrainian controversy are worse off, being highly questionable from a legal standpoint and far from established from an evidentiary standpoint.

Second, the abbreviated period of investigation into this controversy is both problematic and puzzling. Although the Johnson impeachment progressed quickly after the firing of the Secretary of War, that controversy had been building for over a year and was actually the fourth attempted impeachment. Moreover, Johnson fell into the trap laid a year before in the Tenure of Office Act. The formal termination was the event that triggered the statutory language of the act and thus there was no dispute as to the critical facts. We have never seen a controversy arise for the first time and move to an

arranged for Lewinsky to be represented by Frank Carter, who drafted a false affidavit denying any affair. Lewinsky, who had virtually no work history or relevant background, was offered a job with Revlon, where Jordan was a powerful member of the board of directors. Lewinsky said, “Frank Carter explained to me that if I signed an affidavit denying having had an intimate relationship with the president it might mean I would not have to be deposed in the Paula Jones case.” Those details – including Clinton’s encouragement for her to sign the affidavit and contracts after she became a witness – were never shared at the Senate trial.

impeachment in such a short period. Nixon and Clinton developed over many months of investigation and a wide array of witness testimony and grand jury proceedings. In the current matter, much remains unknown in terms of key witnesses and underlying documents. There is no explanation why the matter must be completed by December. After two years of endless talk of impeachable and criminal acts, little movement occurred toward an impeachment. Suddenly the House appears adamant that this impeachment must be completed by the end of December. To be blunt, if the schedule is being accelerated by the approach of the Iowa caucuses, it would be both an artificial and inimical element to introduce into the process. This is not the first impeachment occurring during a political season. In the Johnson impeachment, the vote on the articles was interrupted by the need for some Senators to go to the Republican National Convention. The bifurcated vote occurred in May 1868 and the election was held just six months later.

Finally, the difference in the record is striking. Again, Johnson's impeachment must be set aside as an outlier since it was based on a manufactured trap-door crime. Yet, even with Johnson, there was over a year of investigations and proceedings related to his alleged usurpation and defiance of the federal law. The Ukrainian matter is largely built around a handful of witnesses and a schedule that reportedly set the matter for a vote within weeks of the underlying presidential act. Such a wafer-thin record only magnifies the problems already present in a narrowly constructed impeachment. The question for the House remains whether it is seeking simply to secure an impeachment or actually trying to build a case for removal. If it is the latter, this is not the schedule or the process needed to build a viable case. The House should not assume that the Republican control of the Senate makes any serious effort at impeachment impractical or naïve. All four impeachment inquiries have occurred during rabid political periods. However, politicians can on occasion rise to the moment and chose principle over politics. Indeed, in the Johnson trial, senators knowingly sacrificed their careers to fulfill their constitutional oaths. If the House wants to make a serious effort at impeachment, it should focus on building the record to raise these allegations to the level of impeachable offenses and leave to the Senate the question of whether members will themselves rise to the moment that follows.

IV. THE CURRENT THEORIES OF IMPEACHABLE CONDUCT AGAINST PRESIDENT DONALD J. TRUMP

While all three acts in the impeachment standard refer to criminal acts in modern parlance, it is clear that “high crimes and misdemeanors” can encompass non-criminal conduct. It is also true that Congress has always looked to the criminal code in the fashioning of articles of impeachment. The reason is obvious. Criminal allegations not only represent the most serious forms of conduct under our laws, but they also offer an objective source for measuring and proving such conduct. We have never had a presidential impeachment proceed solely or primarily on an abuse of power allegation, though such allegations have been raised in the context of violations of federal or criminal law. Perhaps for that reason, there has been a recent shift away from a pure abuse of power allegation toward direct allegations of criminal conduct. That shift,

however, has taken the impeachment process far outside of the relevant definitions and case law on these crimes. It is to those allegations that I would now like to turn.

At the outset, however, two threshold issues are worth noting. First, this hearing is being held before any specific articles have been proposed. During the Clinton impeachment hearing, we were given a clear idea of the expected articles of impeachment and far greater time to prepare analysis of those allegations. The House leadership has repeatedly indicated that they are proceeding on the Ukrainian controversy and not the various alleged violations or crimes alleged during the Russian investigation. Recently, however, Chairman Schiff indicated that there might be additional allegations raised while continuing to reference the end of December as the working date for an impeachment vote. Thus, we are being asked to offer a sincere analysis on the grounds for impeachment while being left in the dark. My testimony is based on the public statements regarding the Ukrainian matter, which contain references to four alleged crimes and, most recently, a possible compromise proposal for censure.

Second, the crimes discussed below were recently raised as part of the House Intelligence Committee hearings as alternatives to the initial framework as an abuse of power. There may be a desire to refashion these facts into crimes with higher resonance with voters, such as bribery. In any case, Chairman Schiff and committee members began to specifically ask witnesses about elements that were pulled from criminal cases. When some of us noted that courts have rejected these broader interpretations or that there are missing elements for these crimes, advocates immediately shifted to a position that it really does not matter because “this is an impeachment.” This allows members to claim criminal acts while dismissing the need to actually support such allegations. If that were the case, members could simply claim any crime from treason to genocide. While impeachment does encompass non-crimes, including abuse of power, past impeachments have largely been structured around criminal definitions. The reason is simple and obvious. The impeachment standard was designed to be a high bar and felonies often were treated as inherently grave and serious. Legal definitions and case law also offer an objective and reliable point of reference for judging the conduct of judicial and executive officers. It is unfair to claim there is a clear case of a crime like bribery and simultaneously dismiss any need to substantiate such a claim under the controlling definitions and meaning of that crime. After all, the common mantra that “no one is above the law” is a reference to the law applied to all citizens, even presidents. If the House does not have the evidence to support a claim of a criminal act, it should either develop such evidence or abandon the claim. As noted below, abandoning such claims would still leave abuse of power as a viable ground for impeachment. It just must be proven.

A. Bribery

While the House Intelligence Committee hearings began with references to “abuse of power” in the imposition of a quid pro quo with Ukraine, it ended with repeated references to the elements of bribery. After hearing only two witnesses, House Speaker Nancy Pelosi declared witnesses offered “devastating” evidence that “corroborated” bribery. This view was developed further by House Intelligence Committee Chairman Adam Schiff who repeatedly returned to the definition of bribery

while adding the caveat that, even if this did not meet the legal definition of bribery, it might meet a prior definition under an uncharacteristically originalist view: “As the founders understood bribery, it was not as we understand it in law today. It was much broader. It connoted the breach of the public trust in a way where you’re offering official acts for some personal or political reason, not in the nation’s interest.”

The premise of the bribery allegations is that President Trump was soliciting a bribe from Ukraine when he withheld either a visit at the White House or military aid in order to secure investigations into the 2016 election meddling and the Hunter Biden contract by Ukraine. On its face, the bribery theory is undermined by the fact that Trump released the aid without the alleged pre-conditions. However, the legal flaws in this theory are more significant than such factual conflicts. As I have previously written,³⁶ this record does not support a bribery charge in either century. Before we address this bribery theory, it is important to note that any criminal allegation in an impeachment must be sufficiently clear and recognized to serve two purposes. First, it must put presidents on notice of where a line exists in the range of permissible comments or conduct in office. Second, it must be sufficiently clear to assure the public that an impeachment is not simply an exercise of partisan creativity in rationalizing a removal of a president. Neither of these purposes was satisfied in the Johnson impeachment where the crime was manufactured by Congress. This is why past impeachments focused on establishing criminal acts with reference to the criminal code and controlling case law. Moreover, when alleging bribery, it is the modern definition that is the most critical since presidents (and voters) expect clarity in the standards applied to presidential conduct. Rather than founding these allegations on clear and recognized definitions, the House has advanced a capacious and novel view of bribery to fit the limited facts. If impeachment is reduced to a test of creative redefinitions of crimes, no president will be confident in their ability to operate without the threat of removal. Finally, as noted earlier, dismissing the need to establish criminal conduct by arguing an act is “close enough for impeachment,” is a transparent and opportunistic spin. This is not improvisational jazz. “Close enough” is not nearly enough for a credible case of impeachment.

1. The Eighteenth-Century Case For Bribery

The position of Chairman Schiff is that the House can rely on a broader originalist understanding of bribery that “connoted the breach of the public trust in a way where you’re offering official acts for some personal or political reason, not in the nation’s interest.” The statement reflects a misunderstanding of early sources. Indeed, this interpretation reverses the import of early references to “violations of public trust.” Bribery was cited as an example of a violation of public trust. It was not defined as any violation of public trust. It is akin to defining murder as any violence offense because it is listed among violent offenses. Colonial laws often drew from English sources which barred the “taking of Bribes, Gifts, or any unlawful Fee or Reward, by Judges, Justices of

³⁶ Jonathan Turley, *Adam Schiff’s Capacious Definition of Bribery Was Tried in 1787*, WALL ST. J. (Nov. 28, 2019, 1:49 PM), <https://www.wsj.com/articles/adam-schiffs-capacious-definition-of-bribery-was-tried-in-1787-11574966979>.

the Peace, or any other Officers either magisterial or ministerial.”³⁷ Not surprisingly, these early laws categorized bribery as one of the crimes that constituted a violation of public trust. The categorization was important because such crimes could bar an official from holding public office. Thus, South Carolina's colonial law listed bribery as examples of acts barring service “[f]or the avoiding of corruption which may hereafter happen to be in the officers and ministers of those courts, places, or rooms wherein there is requisite to be had the true administration of justice or services of trust”³⁸

The expansion of bribery in earlier American law did not stem from the changing of the definition as much as it did the scope of the crime. Bribery laws were originally directed at judicial, not executive officers, and the receiving as opposed to the giving of bribes. These common law definitions barred judges from receiving “any undue reward to influence his behavior in office.”³⁹ The scope of such early laws was not broad but quite narrow.⁴⁰ Indeed, the narrow definition of bribery was cited as a reason for the English adoption of “high crimes and misdemeanors” which would allow for a broad base for impeachments. Story noted:

“In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office; but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power.”⁴¹

Thus, faced with the narrow meaning of bribery, the English augmented the impeachment standard with a separate broader offense.⁴²

³⁷ ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY, ch. XLI 23 (Samuel Allinson ed., Burlington, Isaac Collins 1776).

³⁸ THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA FROM ITS ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE 14648 (John F. Grimke ed., Philadelphia, R. Aitken 1790).

³⁹ IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND: IN FOUR BOOKS 129 (1765-69).

⁴⁰ CONG. RESEARCH SERV., IMPEACHMENT AND THE CONSTITUTION, 43 (2019).

⁴¹ II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 798 (1833).

⁴² Indeed, Chairman Schiff may be confusing the broader treatment given extortion in early laws, not bribery. *See generally* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 875 (1988) (“Since bribery law remained undeveloped for so long, another crime was needed to fill the gap-especially against corruption by nonjudicial officers.”).

This view of bribery was also born out in the Constitutional Convention. As noted earlier, the Framers were familiar with the impeachment of Warren Hastings which was pending trial at the time of the drafting of the Constitution. The Hastings case reflected the broad impeachment standard and fluid interpretations applied in English cases. George Mason wanted to see this broader approach taken in the United States. Mason specifically objected to the use solely of “treason” and “bribery” because those terms were too narrow—the very opposite of the premise of Chairman Schiff’s remarks. Mason ultimately failed in his effort to adopt a tertiary standard with broader meaning to encompass acts deemed as “subvert[ing] the Constitution.” However, both Mason and Madison were in agreement on the implied meaning of bribery as a narrow, not broad crime. Likewise, Gouverneur Morris agreed, raising bribery as a central threat that might be deterred through the threat of impeachment:

“Our Executive was not like a Magistrate having a life interest, much less like one having a hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and 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 agst it by displacing him. One would think the King of England well secured agst bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.”⁴³

Bribery, as used here, did not indicate some broad definition of, but a classic payment of money. Louis XIV bribed Charles II to sign the secret Treaty of Dover of 1670 with the payment of a massive pension and other benefits kept secret from the English people. In return, Charles II not only agreed to convert to Catholicism, but to join France in a wartime alliance against the Dutch.⁴⁴

Under the common law definition, bribery remains relatively narrow and consistently defined among the states. “The core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised.”⁴⁵ The definition does not lend itself to the current controversy. President Trump can argue military and other aid is often used to influence other countries in taking domestic or international actions. It might be a vote in the United Nations or an anti-corruption investigation within a nation. Aid is not assumed to be “gratuitously exercised” but rather it is used as part of foreign policy discussions and international relations. Moreover, discussing visits to the White House is hardly the stuff of bribery under any of these common law sources. Ambassador Sondland testified that the President expressly denied there was a quid pro quo and that he was never told of such preconditions. However, he also testified that he came to believe there was a quid pro quo, not for military aid, but rather for the visit to the White House: “Was there a ‘quid pro quo? With regard to the requested White House call and White House meeting,

⁴³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 68-69 (Max Farrand ed., 1937).

⁴⁴ GEORGE CLARK, THE LATER STUARTS (1660-1714) 86-87, 130 (2d ed. 1956).

⁴⁵ J. NOONAN, BRIBES xi (1984).

the answer is yes.” Such visits are routinely used as bargaining chips and not “gratuitously exercised.” As for the military aid, the withholding of the aid is difficult to fit into any common law definition of a bribe, particularly when it was ultimately provided without the satisfaction of the alleged pre-conditions. Early bribery laws did not even apply to executive officials and actual gifts were regularly given. Indeed, the Framers moved to stop such gifts separately through provisions like the Emoluments Clause. They also applied bribery to executive officials. Once again Morris’ example is illustrative. The payment was a direct payment to Charles II of personal wealth and even a young French mistress.

The narrow discussion of bribery by the Framers stands in stark contrast to an allegedly originalist interpretation that would change the meaning of bribery to include broader notions of acts against the public trust. This is why bribery allegations in past impeachments, particularly judicial impeachments, focused on contemporary understandings of that crime. To that question, I would like to now turn.

2. The Twenty-First Century Case For Bribery

Early American bribery followed elements of the British and common law approach to bribery. In 1789, Congress passed the first federal criminal statute prohibiting bribing a customs official⁴⁶ and one year later Congress passed "An Act for the Punishment of Certain Crimes against the United States" prohibiting the bribery of a federal judge.⁴⁷ Various public corruption and bribery provisions are currently on the books, but the standard provision is found in 18 U.S.C. § 201 which allows for prosecution when “[a] public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.” While seemingly sweeping in its scope, the definition contains narrowing elements on the definition of what constitutes “a thing of value,” an “official act,” and “corrupt intent.”

The Supreme Court has repeatedly narrowed the scope of the statutory definition of bribery, including distinctions with direct relevance to the current controversy. In *McDonnell v. United States*,⁴⁸ the Court overturned the conviction of former Virginia governor Robert McDonnell. McDonnell and his wife were prosecuted for bribery under the Hobbs Act, applying the same elements as found in Section 201(a)(3). They were accused of accepting an array of loans, gifts, and other benefits from a businessman in return for McDonnell facilitating key meetings, hosting events, and contacting government officials on behalf of the businessman who ran a company called Star Scientific. The benefits exceeded \$175,000 and the alleged official acts were completed. Nevertheless, the Supreme Court unanimously overturned the conviction. As explained by Chief Justice Roberts:

⁴⁶ Act of July 31, 1789, ch. 5, 34-35, 1 Stat. 29.

⁴⁷ Act of April 30, 1790. ch. 9, 1, 1 Stat. 112.

⁴⁸ *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

“[O]ur concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute. A more limited interpretation of the term ‘official act’ leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.”⁴⁹

The opinion is rife with references that have a direct bearing on the current controversy. This includes the dismissal of meetings as insufficient acts. It also included the allegations that “recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs.” While the meeting and contacts discussed by Ambassador Sondland as a quid pro quo are not entirely the same, the Court refused to recognize that “nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.”⁵⁰ The Court also explained why such “boundless interpretations” are inimical to constitutional rights because they deny citizens the notice of what acts are presumptively criminal: “[U]nder the Government's interpretation, the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement.’”⁵¹ That is precisely the danger raised earlier in using novel or creative interpretations of crimes like bribery to impeach a president. Such improvisational impeachment grounds deny presidents notice and deny the system predictability in the relations between the branches.

The limited statements from the House on the bribery theory for impeachment track an honest services fraud narrative. These have tended to be some of the most controversial fraud and bribery cases when brought against public officials. These cases are especially difficult when the alleged act was never taken by the public official. *McDonnell* resulted in the reversal of a number of convictions or dismissal of criminal counts against former public officials. One such case was *United States v. Silver* involving the prosecution of the former Speaker of the New York Assembly. Silver was accused of an array of bribes and kickbacks in the form of referral fees from law firms. He was convicted on all seven counts and sentenced to twelve years of imprisonment. It was overturned because of the same vagueness that undermined the conviction in *McDonnell*. The Second Circuit ruled the “overbroad” theory of prosecution “encompassed any action taken or to be taken under color of official authority.”⁵² Likewise, the Third Circuit reversed conviction on a variety of corruption

⁴⁹ *Id.* at 2375.

⁵⁰ *Id.* at 2372.

⁵¹ *Id.* at 2373.

⁵² *United States v. Silver*, 864 F.3d 102, 113 (2d Cir. 2017).

counts in *Fattah v. United States*.⁵³ Former Rep. Chaka Fattah (D-Penn.) was convicted on all twenty-two counts of corruption based on an honest services prosecution. The case also involved a variety of alleged “official acts” including the arranging of meetings with the U.S. Trade Representative. The Third Circuit ruled out the use of acts as an “official act.” As for the remanded remainder, the court noted it might be possible to use other acts, such as lobbying for an appointment of an ambassador, to make out the charge but stated that “[d]etermining, for example, just how forceful a strongly worded letter of recommendation must be before it becomes impermissible ‘pressure or advice’ is a fact-intensive inquiry that falls within the domain of a properly instructed jury.”⁵⁴ Faced with the post-*McDonnell* reversal and restrictive remand instructions, the Justice Department elected not to retry Fattah.⁵⁵ Such a fact-intensive inquiry would be far more problematic in the context of a conversation between two heads of state where policy and political issues are often intermixed.⁵⁶

The same result occurred in the post-*McDonnell* appeal by former Rep. William Jefferson. Jefferson was convicted of soliciting and receiving payments from various sources in return for his assistance. This included shares in a telecommunications company and the case became a classic corruption scandal when \$90,000 in cash was found in Jefferson’s freezer. The money was allegedly meant as a bribe for the Nigerian Vice President to secure assistance in his business endeavors. Jefferson was convicted on eleven counts and the conviction was upheld on ten of eleven of those counts. *McDonnell* was then handed down. The federal court agreed that the case imposed more limited definitions and instructions for bribery.⁵⁷ The instruction defining the element of “official acts” is notable given recent statements in the House hearings: “An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.” The court agreed that such definitions are, as noted in *McDonnell*, unbounded. The court added:

⁵³ *United States v. Fattah*, 902 F.3d 197, 240 (3d Cir. 2018) (“in accordance with *McDonnell*, that Fattah's arranging a meeting between Vederman and the U.S. Trade Representative was not itself an official act. Because the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt.”).

⁵⁴ *Id.* at 241.

⁵⁵ Griffin Connolly, *DOJ Won't Re-Try Ex-Rep Fatah*, ROLL CALL (May 2, 2019), <https://www.rollcall.com/news/congress/doj-wont-retry-ex-rep-fattah-overturned-convictions-wont-reduce-prison-time>. Rep. Fatah’s sentencing on other counts however left a ten-year sentence in place.

⁵⁶ The convictions of former New York Majority Leader Dean Skelos and his son for bribery or corruption were also vacated by Second Circuit over the definition of “official act.” *United States v. Skelos*, 707 Fed. Appx. 733, 733-36 (2d Cir. 2017). They were later retried and convicted.

⁵⁷ *United States v. Jefferson*, 289 F. Supp. 3d. 717, 721 (E.D. Va. 2017).

“the jury instructions in Jefferson's case did not explain that to qualify as an official act ‘the public official must make a decision or take an action on that question, matter, cause, suit, proceeding or controversy, or agree to do so.’ The jury charge in Jefferson's case did not require the jury to consider whether Jefferson could actually make a decision on a pending matter, nor did the instructions clarify that Jefferson's actions could include “using [an] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official.” Without these instructions, the jury could have believed that any action Jefferson took to assist iGate or other businesses was an official act, even if those acts included the innocent conduct of attending a meeting, calling an official, or expressing support for a project.”⁵⁸

Accordingly, the court dismissed seven of ten of the counts, and Jefferson was released from prison.⁵⁹

McDonnell also shaped the corruption case against Sen. Robert Menendez (D-N.J.) who was charged with receiving a variety of gifts and benefits in exchange for his intervention on behalf of a wealthy businessman donor. Both Sen. Menendez and Dr. Salomon Melgen were charged in an eighteen-count indictment for bribery and honest services fraud in 2015.⁶⁰ The jury was given the more restrictive post-*McDonnell* definition and proceeded to deadlock on the charges, leading to a mistrial. As in the other cases, the Justice Department opted to dismiss the case—a decision attributed by experts to the view that *McDonnell* “significantly raised the bar for prosecutors who try to pursue corruption cases against elected officials.”⁶¹

Applying *McDonnell* and other cases to the current controversy undermines the bribery claims being raised. The Court noted that an “official act”

“is a decision or action on a ‘question, matter, cause, suit, proceeding or controversy.’ The ‘question, matter, cause, suit, proceeding or controversy’ must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something

⁵⁸ *Id.* at 735 (internal citations omitted).

⁵⁹ Rachel Weiner, *Judge lets former Louisiana congressman William Jefferson out of prison*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d_story.html.

⁶⁰ *United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015).

⁶¹ Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html>.

specific and focused that is ‘pending’ or ‘may by law be brought’ before a public official.”

The discussion of a visit to the White House is facially inadequate for this task, as it is not a formal exercise of governmental power. However, withholding of military aid certainly does smack of a “determination before an agency.” Yet, that “quo” breaks down on closer scrutiny, even before getting to the question of a “corrupt intent.” Consider the specific act in this case. As the Ukrainians knew, Congress appropriated the \$391 million in military aid for Ukraine and the money was in the process of being apportioned. Witnesses before the House Intelligence Committee stated that it was not uncommon to have delays in such apportionment or for an Administration to hold back money for a period longer than the 55 days involved in these circumstances. Acting Chief of Staff Mike Mulvaney stated that the White House understood it was required to release the money by a date certain absent a lawful reason barring apportionment. That day was the end of September for the White House. Under the 1974 Impoundment Control Act (ICA), reserving the funds requires notice to Congress. This process has always been marked by administrative and diplomatic delays. As the witnesses indicated, it is not always clear why aid is delayed. Arguably, by the middle of October, the apportionment of the aid was effectively guaranteed. It is not contested that the Administration could delay the apportionment to resolve concerns over how the funds would be effectively used or apportioned. The White House had until the end of the fiscal year on September 30 to obligate the funds. On September 11, the funds were released. By September 30, all but \$35 million in the funds were obligated. However, on September 27, President Trump signed a spending bill that averted a government shutdown and extended current funding, specifically providing another year to send funds to Ukraine.⁶²

It is certainly fair to question the non-budgetary reasons for the delay in the release of the funds. Yet, the White House was largely locked into the statutory and regulatory process for obligating the funds by the end of September. Even if the President sought to mislead the Ukrainians on his ability to deny the funding, there is no evidence of such a direct statement in the record. Indeed, Ambassador Taylor testified that he believed the Ukrainians first raised their concerns over a pre-condition on August 31 with the publication of the Politico article on the withholding of the funds. The aid was released roughly ten days later, and no conditions were actually met. The question remains what the “official act” was for this theory given the deadline for aid release. Indeed, had a challenge been filed over the delay before the end of September, it would have most certainly been dismissed by a federal court as premature, if not frivolous.

Even if the “official act” were clear, any bribery case would collapse on the current lack of evidence of a corrupt intent. In the transcript of the call, President Trump

⁶² Caitlin Emma, *Trump signs stopgap spending bill to avoid a shutdown*, POLITICO (Sept. 27, 2019, 6:26 PM), <https://www.politico.com/news/2019/09/27/trump-signs-spending-bill-007275>; Joe Gould, *Senate passes Ukraine aid extension, averts government shutdown for now*, DEFENSENEWS (Sept. 26, 2019), <https://www.defensenews.com/congress/2019/09/26/senate-passes-ukraine-aid-extension-stopgap-spending-bill/>.

pushes President Zelensky for two investigations. First, he raises his ongoing concerns over Ukrainian involvement in the 2016 election:

“I would like you to do us a favor though because our country has been through a lot and Ukraine knows a lot about it. I would like you to find out what happened with this whole situation with Ukraine, they say CrowdStrike ... I guess you have one of your wealthy people ... The server, they say Ukraine has it. There are a lot of things that went on, the whole situation ... I think you’re surrounding yourself with some of the same people. I would like to have the Attorney General call you or your people and I would like you to get to the bottom of it. As you saw yesterday, that whole nonsense. It ended with a very poor performance by a man named Robert Mueller, an incompetent performance, but they say a lot of it started with Ukraine. Whatever you can do, it’s very important that you do it if that’s possible.”⁶³

Many have legitimately criticized the President for his fixation on CrowdStrike and his flawed understanding of that company’s role and Ukrainian ties. However, asking for an investigation into election interference in 2016 does not show a corrupt intent. U.S. Attorney John Durham is reportedly looking into the origins of the FBI investigation under the Obama Administration. That investigation necessarily includes the use of information from Ukrainian figures in the Steele dossier. Witnesses like Nellie Ohr referenced Ukrainian sources in the investigation paid for by the Democratic National Committee and the campaign of Hillary Clinton. While one can reasonably question the significance of such involvement (and it is certainly not on the scale of the Russian intervention into the election), it is part of an official investigation by the Justice Department. Trump may indeed be wildly off base in his concerns about Ukrainian efforts to influence the election. However, even if these views are clueless, they are not corrupt. The request does not ask for a particular finding but cooperation with the Justice Department and an investigation into Ukrainian conduct. Even if the findings were to support Trump’s view (and there is no guarantee that would be case), there is no reason to expect such findings within the remaining time before the election. Likewise, the release of unspecified findings from an official investigation at some unspecified date are not a “thing of value” under any reasonable definition of the statute.

The references to investigating possible 2016 election interference cannot be the basis for a credible claim of bribery or other crimes, at least on the current record. That, however, was not the only request. After President Zelensky raised the fact that his aides had spoken with Trump’s counsel, Rudy Giuliani, and stated his hope to speak with him directly, President Trump responded:

⁶³ *Telephone Conversation with President Zelenskyy of Ukraine on July 25, 2019* (Sept. 24, 2019) (available at <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf>).

“Good because I heard you had a prosecutor who was very good and he was shut down and that’s really unfair. A lot of people are talking about that, the way they shut your very good prosecutor down and you had some very bad people involved. Mr. Giuliani is a highly respected man. He was the mayor of New York City, a great mayor, and I would like him to call you. I will ask him to call you along with the Attorney General. Rudy very much knows what’s happening and he is a very capable guy. If you could speak to him that would be great. The former ambassador from the United States, the woman, was bad news and the people she was dealing with in the Ukraine were bad news so I just want to let you know that. The other thing, there’s a lot of talk about Biden’s son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it. It sounds horrible to me.”⁶⁴

This is clearly the most serious problem with the call. In my view, the references to Biden and his son were highly inappropriate and should not have been part of the call. That does not, however, make this a plausible case for bribery. Trump does not state a quid pro quo in the call. He is using his influence to prompt the Ukrainians to investigate both of these matters and to cooperate with the Justice Department. After President Zelensky voiced a criticism of the prior U.S. ambassador, President Trump responded:

“Well, she’s going to go through some things. I will have Mr. Giuliani give you a call and I am also going to have Attorney General Barr call and we will get to the bottom of it. I’m sure you will figure it out. I heard the prosecutor was treated very badly and he was a very fair prosecutor so good luck with everything. Your economy is going to get better and better I predict. You have a lot of assets. It’s a great country. I have many Ukrainian friends, they’re incredible people.”⁶⁵

Again, the issue is not whether these comments are correct, but whether they are corrupt. In my view, there is no case law that would support a claim of corrupt intent in such comments to support a bribery charge. There is no question that an investigation of the Bidens would help President Trump politically. However, if President Trump honestly believed that there was a corrupt arrangement with Hunter Biden that was not fully investigated by the Obama Administration, the request for an investigation is not corrupt, notwithstanding its inappropriateness. The Hunter Biden contract has been widely criticized as raw influence peddling. I have joined in that criticism. For many years, I have written about the common practice of companies and lobbyists attempting to curry favor with executive branch officials and members of Congress by giving windfall contracts or jobs to their children. This is a classic example of that corrupt practice. Indeed, the glaring appearance of a conflict was reportedly raised by George Kent, the

⁶⁴ *Id.* at 3-4.

⁶⁵ *Id.* at 4.

Deputy Assistant Secretary of State for European and Eurasian Affairs during the Obama Administration.

The reference to the Bidens also lacks the same element of a promised act on the part of President Trump. There is no satisfaction of a decision or action on the part of President Trump or an agreement to make such a decision or action. There is a presumption by critics that this exists, but the presumption is no substitute for proof. The current lack of proof is another reason why the abbreviated investigation into this matter is so damaging to the case for impeachment. In the prior bribery charges in *McDonnell* and later cases, benefits were actually exchanged but the courts still rejected the premise that the meetings and assistance were official acts committed with a corrupt intent.

Finally, the “boundless interpretations of the bribery statutes” rejected in *McDonnell* pale in comparison to the effort to twist these facts into the elements of that crime. I am not privy to conversations between heads of state, but I expect many prove to be fairly freewheeling and informal at points. I am confident that such leaders often discuss politics and the timing of actions in their respective countries. If this conversation is a case of bribery, we could have marched every living president off to the penitentiary. Presidents often use aid as leverage and seek to advance their administrations in the timing or content of actions. The media often discusses how foreign visits are used for political purposes, particularly as elections approach. The common reference to an “October surprise” reflects this suspicion that presidents often use their offices, and foreign policy, to improve their image. If these conversations are now going to be reviewed under sweeping definitions of bribery, the chilling effect on future presidents would be perfectly glacial.

The reference to the Hunter Biden deal with Burisma should never have occurred and is worthy of the criticism of President Trump that it has unleashed. However, it is not a case of bribery, whether you are adopting the view of an eighteenth century, or of a twenty-first century prosecutor. As a criminal defense attorney, I would view such an allegation from a prosecutor to be dubious to the point of being meritless.

B. Obstruction of Justice

Another crime that was sporadically mentioned during the House Intelligence hearings was obstruction of justice or obstruction of Congress.⁶⁶ Once again, with only a

⁶⁶ It is important to distinguish between claims of “obstruction of justice,” “obstruction of Congress,” and “contempt of Congress” – terms often just loosely in these controversies. Obstruction of Congress falls under the same provisions as obstruction of justice, specifically, 18 U.S.C. §1505 (prohibiting the “obstruction of proceedings before ... committees”). However, the Congress has also used its contempt powers to bring both civil and criminal actions. The provision on contempt states:

“Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, ... or any committee of either House of Congress, willfully makes default, or who, having

few days to prepare this testimony and with no public report on the specific allegations, my analysis remains mired in uncertainty as to any plan to bring such a claim to the foundational evidence for the charge. Most of the references to obstruction have been part of a Ukraine-based impeachment plan that does not include any past alleged crimes from the Russian investigation. I will therefore address the possibility of a Ukraine-related obstruction article of impeachment.⁶⁷ However, as I have previously written,⁶⁸ I believe an obstruction claim based on the Mueller Report would equally at odds with the record and the controlling case law.⁶⁹ The use of an obstruction theory from the Mueller Report

appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$ 100,000] nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.”

2 U.S.C. §§192, 194. Thus, when the Obama Administration refused to turn over critical information in the Fast and Furious investigation, the Congress brought a contempt not an impeachment action against Attorney General Eric Holder. In this case, the House would skip any contempt action as well as any securing any order to compel testimony or documents. Instead, it would go directly to impeachment for the failure to turn over material or make available witnesses – a conflict that has arisen in virtually every modern Administration.

⁶⁷ For the record, I previously testified on obstruction theories in January in the context of the Mueller investigation before the United States Senate Committee of the Judiciary as part of the Barr confirmation hearing. United States Senate, Committee on the Judiciary, *The Confirmation of William Pelham Barr As Attorney General of the United States Supreme Court* (Jan. 16, 2019) (testimony of Professor Jonathan Turley).

⁶⁸ See, e.g., Jonathan Turley, *Mueller’s end: A conclusion on collusion but confusion on Obstruction*, THE HILL (March 24, 2019, 8:30 PM), <https://thehill.com/opinion/white-house/435553-muellers-end-a-conclusion-on-collusion-but-confusion-on-obstruction>.

⁶⁹ I have previously criticized Special Counsel Mueller for his failure to reach a conclusion on obstruction as he did on the conspiracy allegation. See Jonathan Turley, *Why Mueller may be fighting a public hearing on Capitol Hill*, THE HILL (May 5, 2019, 10:00 AM), <https://thehill.com/opinion/judiciary/445534-why-mueller-may-be-fighting-a-public-hearing-on-capitol-hill>. However, the report clearly undermines any credible claim for obstruction. Mueller raises ten areas of concern over obstruction. The only substantive allegation concerns his alleged order to White House Counsel Don McGahn to fire Mueller. While the President has denied that order, the report itself destroys any real case for showing a corrupt intent as an element of this crime. Mueller finds that Trump had various non-criminal motivations for his comments regarding the investigation, including his belief that there is a deep-state conspiracy as well as an effort to belittle his 2016 election victory. Moreover, the Justice Department did what Mueller should have done: it reached a conclusion. Both Attorney General Bill Barr and Deputy Attorney General Rod Rosenstein reviewed the Mueller Report and concluded that no

would be unsupportable in the House and unsustainable in the Senate. Once again, the lack of information (just weeks before an expected impeachment vote) on the grounds for impeachment is both concerning and challenging. It is akin to being asked to diagnose a patient's survivability without knowing his specific illness.

Obstruction of justice is a more broadly defined crime than bribery and often overlaps with other crimes like witness tampering, subornation, or specific acts designed to obstruct a given proceeding. There are many federal provisions raising forms of obstruction that reference parallel crimes. Thus, influencing a witness is a standalone crime and also a form of obstruction under 18 U.S.C. 1504. In conventional criminal cases, prosecutions can be relatively straightforward, such as cases of witness intimidation under 18 U.S. 1503. Of course, this is no conventional case. The obstruction claims leveled against President Trump in the Ukrainian context have centered on two main allegations. First, there was considerable discussion of the moving of the transcript of the call with President Zelensky to a classified server as a possible premeditated effort to hide evidence. Second, there have been repeated references to the "obstruction" of President Trump by invoking executive privileges or immunities to withhold witnesses and documents from congressional committees. In my view, neither of these general allegations establishes a plausible case of criminal obstruction or a viable impeachable offense.

The various obstruction provisions generally share common elements. 18 U.S.C. § 1503, for example, broadly defines the crime of "corruptly" endeavoring "to influence, obstruct or impede the due administration of justice." This "omnibus" provision, however, is most properly used for judicial proceedings such as grand jury investigations, and the Supreme Court has narrowly construed its reach. There is also 18 U.S.C. § 1512(c), which contains a "residual clause" in subsection (c)(2), which reads:

(c) Whoever corruptly-- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added].

cognizable case was presented for an allegation of obstruction of justice. Many members of this Committee heralded the selection of Rosenstein as a consummate and apolitical professional who was responsible for the appointment of the Special Counsel. He reached this conclusion on the record sent by Mueller and, most importantly, the controlling case law. As with the campaign finance allegation discussed in this testimony, an article based on obstruction in the Russian investigation would seek the removal of a President on the basis of an act previously rejected as a crime by the Justice Department. Many of us have criticized the President for his many comments and tweets on the Russian investigation. However, this is a process that must focus on impeachable conduct, not imprudent or even obnoxious conduct.

This residual clause has long been the subject of spirited and good-faith debate, most recently including the confirmation of Attorney General Bill Barr. The controversy centers on how to read the sweeping language in subsection (c)(2) given the specific listing of acts in subsection (c)(1). It strains credulity to argue that, after limiting obstruction with the earlier language, Congress would then intentionally expand the provision beyond recognition with the use of the word “otherwise.” For that reason, it is often argued that the residual clause has a more limited meaning of other acts of a similar kind. As with the bribery cases, courts have sought to maintain clear and defined lines in such interpretations to give notice of citizens as to what is criminal conduct under federal law. The purpose is no less relevant in the context of impeachments.

The danger of ambiguity in criminal statutes is particularly great when they come into collision with constitutional functions or constitutional rights like free speech. Accordingly, federal courts have followed a doctrine of avoidance when ambiguous statutes collide with constitutional functions or powers. In *United States ex rel. Attorney General v. Delaware & Hudson Co.*,⁷⁰ the Court held that “Under that doctrine, when ‘a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.’”⁷¹ This doctrine of avoidance has been used in conflicts regarding proper the exercise of executive powers. Thus, when the Supreme Court considered the scope of the Federal Advisory Committee Act (“FACA”) it avoided a conflict with Article II powers through a narrower interpretation. In *Public Citizen v. U.S. Department of Justice*,⁷² the Court had a broad law governing procedures and disclosures committees, boards, and commissions. However, when applied to consultations with the American Bar Association regarding judicial nominations, the Administration objected to the conflict with executive privileges and powers. The Court adopted a narrow interpretation: “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”⁷³ These cases would weigh heavily in the context of executive privilege and the testimony of key White House figures on communications with the President.

⁷⁰ 213 U.S. 366 (1909).

⁷¹ *Id.* at 408; *see also* Op. Off. Legal Counsel 253, 278 (1996) (“It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it.”).

⁷² 491 U.S. 440 (1989).

⁷³ *Id.*; *see also* *Ass’n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (“Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes.”).

There is no evidence that President Trump acted with the corrupt intent required for obstruction of justice on the record created by the House Intelligence Committee. Let us start with the transfer of the file. The transfer of the transcript of the file was raised as a possible act of obstruction to hide evidence of a quid pro quo. However, the nefarious allegations behind the transfer were directly contradicted by Tim Morrison, the former Deputy Assistant to the President and Senior Director for Europe and Russia on the National Security Council. Morrison testified that he was the one who recommended that the transcript be restricted after questions were raised about President Trump's request for investigations. He said that he did so solely to protect against leaks and that he spoke to senior NSC lawyer John Eisenberg. When Morrison learned the transcript was transferred to a classified server, he asked Eisenberg about the move. He indicated that Eisenberg was surprised and told him it was a mistake. He described it as an "administrative error." Absent additional testimony or proof that Morrison has perjured himself, the allegation concerning the transfer of the transcript would seem entirely without factual support, let alone legal support, as a criminal obstructive act.

Most recently, the members have focused on an obstruction allegation centering on the instructions of the White House to current and former officials not to testify due to the expected assertions of executive privilege and immunity. Notably, the House has elected not to subpoena core witnesses with first-hand evidence on any quid pro quo in the Ukraine controversy. Democratic leaders have explained that they want a vote by the end of December, and they are not willing to wait for a decision from the court system as to the merits of these disputes. In my view, that position is entirely untenable and abusive in an impeachment. Essentially, these members are suggesting a president can be impeached for seeking a judicial review of a conflict over the testimony of high-ranking advisers to the President over direct communications with the President. The position is tragically ironic. The Democrats have at times legitimately criticized the President for treating Article II as a font of unilateral authority. Yet, they are now doing the very same thing in claiming Congress can demand any testimony or documents and then impeach any president who dares to go to the courts. Magnifying the flaws in this logic is the fact that the House has set out one of the shortest periods in history for this investigation—a virtual rocket docket for impeachment. House leaders are suggesting that they will move from notice of an alleged impeachable act at the beginning of September and adopt articles of impeachment based on controversy roughly 14 weeks later. On this logic, the House could give a president a week to produce his entire staff for testimony and then impeach him when he seeks review by a federal judge.

As extreme as that hypothetical may seem, it is precisely the position of some of those advancing this claim. In a recent exchange on National Public Radio with former Rep. Liz Holtzman, I raised the utter lack of due process and fairness in such a position.⁷⁴ Holtzman, one of the House Judiciary Committee members during the Nixon impeachment, insisted that a president has no right to seek judicial review and that he must turn over everything and anything demanded by Congress. Holtzman insisted that

⁷⁴ Public Impeachment Hearing Analysis From Nixon, Clinton Figures, WBUR (Nov. 14, 2019), <https://www.wbur.org/onpoint/2019/11/14/first-impeachment-hearing-congress-trump-taylor-kent>.

the position of her Chairman, Peter Rodino, was that the House alone dictates what must be produced. That is a position this Committee should not replicate. This returns us to the third article of impeachment against Nixon discussed earlier. That article stated:

“In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives... [i]n all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.”⁷⁵

Once again, I have always been critical of this article. Nixon certainly did obstruct the process in a myriad of ways, from witness tampering to other criminal acts. However, on the critical material sought by Congress, Nixon went to Court and ultimately lost in his effort to withhold the evidence. He had every right to do so. On July 25, 1974, the Court ruled in *United States v. Nixon*⁷⁶ that the President had to turn over the evidence. On August 8, 1974, Nixon announced his intention to resign. Notably, in that decision, the Court recognized the existence of executive privilege—a protection that requires a balancing of the interests of the legislative and executive branches by the judicial branch. The Court ruled that “[n]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”⁷⁷ Yet, the position stated in the current controversy is perfectly Nixonian. It is asserting the same “absolute, unqualified” authority of Congress to demand evidence while insisting that a president has no authority to refuse it. The answer is obvious. A President cannot “substitute[] his judgment” for Congress on what they are entitled to see and likewise Congress cannot substitute its judgment as to what a President can withhold. The balance of those interests is performed by the third branch that is constitutionally invested with the authority to review and resolve such disputes.

The recent decision by a federal court holding that former White House Counsel Don McGahn must appear before a House committee is an example of why such review is so important and proper.⁷⁸ I criticized the White House for telling McGahn and others not to appear before Congress under a claim of immunity. Indeed, when I last appeared before this Committee as a witness, I encouraged that litigation and said I believed the

⁷⁵ WATERGATE.INFO, <https://watergate.info/impeachment/articles-of-impeachment>.

⁷⁶ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

⁷⁷ *Id.*

⁷⁸ *Committee on the Judiciary v. McGahn*, Civ. No. 19-cv-2379 (KBJ), 2019 U.S. Dist. LEXIS 203983 (D.D.C. 2019).

Committee would prevail.⁷⁹ Notably, the opinion in *Committee on the Judiciary v. McGahn* rejected the immunity claims of the White House but also reaffirmed “the Judiciary’s duty under the Constitution to interpret the law and to declare government overreaches unlawful.”⁸⁰ The Court stressed that

“the Framers made clear that the proper functioning of a federal government that is consistent with the preservation of constitutional rights hinges just as much on the intersectionality of the branches as it does on their separation, and it is the assigned role of the Judiciary to exercise the adjudicatory power prescribed to them under the Constitution’s framework to address the disputed legal issues that are spawned from the resulting friction.”⁸¹

The position of this Committee was made stronger by allowing the judiciary to rule on the question. Indeed, that ruling now lays the foundation for a valid case of obstruction. If President Trump defies a final order without a stay from a higher court, it would constitute real obstruction. Just yesterday, in *Trump v. Deutsche Bank*, the United States for the Second Circuit became the latest in a series of courts to reject the claims made by the President’s counsel to withhold financial or tax records from Congress.⁸² The Court reaffirmed that such access to evidence is “an important issue concerning the investigative authority.”⁸³ With such review, the courts stand with Congress on the issue of disclosure and ultimately obstruction in congressional investigations. Moreover, such cases can be expedited in the courts. In the Nixon litigation, courts moved those cases quickly to the Supreme Court. In contrast, the House leaderships have allowed two months to slip away without using its subpoena authority to secure the testimony of critical witnesses. The decision to adopt an abbreviated schedule for the investigation and not to seek to compel such testimony is a strategic choice of the House leadership. It is not the grounds for an impeachment.

If the House moves forward with this impeachment basis, it would be repeating the very same abusive tactics used against President Andrew Johnson. As discussed earlier, the House literally manufactured a crime upon which to impeach Johnson in the Tenure in Office Act. This was a clearly unconstitutional act with a trap-door criminal provision (transparently referenced as a “high misdemeanor”) if Johnson were to fire the Secretary of War. Congress created a crime it knew Johnson would commit by using his recognized authority as president to pick his own cabinet. In this matter, Congress set a

⁷⁹ See United States House of Representatives, Committee on the Judiciary, “Executive Privilege and Congressional Oversight” (May 15, 2019) (testimony of Professor Jonathan Turley).

⁸⁰ *McGahn*, 2019 U.S. Dist. LEXIS 203983, at *11.

⁸¹ *Id.* at 98.

⁸² *Trump v. Deutsche Bank*, No. 19-1540-cv (2d Cir. Dec. 3, 2019) (available at <https://www.documentcloud.org/documents/6565847-Deutsche-Bank-20191203.html>).

⁸³ *Id.*

short period for investigation and then announced Trump would be impeached for seeking, as other presidents have done, judicial review over the demand for testimony and documents.

The obstruction allegation is also undermined by the fact that many officials opted to testify, despite the orders from the President that they should decline. These include core witnesses in the impeachment hearings, like National Security Council Director of European Affairs Alexander Vindman, Ambassador William Taylor, Ambassador Gordon Sondland, Deputy Assistant Secretary of State George Kent, Acting Assistant Secretary of State Philip Reeker, Under Secretary of State David Hale, Deputy Associate Director of the Office of Management and Budget Mark Sandy, and Foreign Service Officer David Holmes. All remain in federal service in good standing. Thus, the President has sought judicial review without taking disciplinary actions against those who defied his instruction not to testify.

If this Committee elects to seek impeachment on the failure to yield to congressional demands in an oversight or impeachment investigation, it will have to distinguish a long line of cases where prior presidents sought the very same review while withholding witnesses and documents. Take the Obama administration position, for instance, on the investigation of “Fast and Furious,” which was a moronic gunwalking operation in which the government arranged for the illegal sale of powerful weapons to drug cartels in order to track their movement. One such weapon was used to murder Border Patrol Agent Brian Terry, and Congress, justifiably so, began an oversight investigation. Some members called for impeachment proceedings. But President Obama invoked executive privilege and barred essential testimony and documents. The Obama Administration then ran out the clock in the judiciary, despite a legal rejection of its untenable and extreme claim by a federal court. During its litigation, the Obama Administration argued the courts had no authority over its denial of such witnesses and evidence to Congress. In *Committee on Oversight & Government Reform v. Holder*,⁸⁴ Judge Amy Berman Jackson, ruled that “endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers.” The position of the Obama Administration was extreme and absurd. It was also widely viewed as an effort to run out the clock on the investigation. Nevertheless, President Obama had every right to seek judicial review in the matter and many members of this very Committee supported his position.

Basing impeachment on this obstruction theory would itself be an abuse of power . . . by Congress. It would be an extremely dangerous precedent to set for future presidents and Congresses in making an appeal to the Judiciary into “high crime and misdemeanor.”

⁸⁴ 979 F. Supp. 2d 1, 3-4 (D.D.C. 2013).

C. Extortion.

As noted earlier, extortion and bribery cases share a common law lineage. Under laws like the Hobbs Act, prosecutors can allege different forms of extortion. The classic form of extortion is coercive extortion to secure property “by violence, force, or fear.”⁸⁵ Even if one were to claim the loss of military aid could instill fear in a country, that is obviously not a case of coercive extortion as that crime has previously been defined. Instead, it would presumably be alleged as extortion “under color of official right.”⁸⁶ Clearly, both forms of extortion have a coercive element, but the suggestion is that Trump was “trying to extort” the Ukrainians by withholding aid until they agreed to open investigations. The problem is that this allegation is no closer to the actual crime of extortion than it is to its close cousin bribery. The Hobbs Act defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right.”⁸⁷

As shown in cases like *United States v. Silver*,⁸⁸ extortion is subject to the same limiting definition as bribery and resulted in a similar overturning of convictions. Another obvious threshold problem is defining an investigation into alleged corruption as “property.” Blackstone described a broad definition of extortion in early English law as “an abuse of public, justice which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due him, or more than is due, or before it is due.”⁸⁹ The use of anything “of value” today would be instantly rejected. Extortion cases involve tangible property, not possible political advantage.⁹⁰ In this case, Trump asked for cooperation with the Justice Department in its investigation into the origins of the FBI investigation on the 2016 election. As noted before, that would make a poor basis for any criminal or impeachment theory. The Biden investigation may have tangible political benefits, but it is not a form of property. Indeed, Trump did not know when such an investigation would be completed or what it might find. Thus, the request was for an investigation that might not even benefit Trump.

The theory advanced for impeachment bears a close similarity to one of the extortion theories in *United States v. Blagojevich* where the Seventh Circuit overturned an extortion conviction based on the Governor of Illinois, Rod Blagojevich, pressuring then Sen. Barack Obama to make him a cabinet member or help arrange for a high-paying job in exchange for Blagojevich appointing a friend of Obama's to a vacant Senate seat. The prosecutors argued such a favor was property for the purposes of extortion. The court dismissed the notion, stating “The President-elect did not have a

⁸⁵ 18 U.S.C. §§ 1951 (2018).

⁸⁶ *Id.*

⁸⁷ 18 U.S.C. § 1951(b)(2).

⁸⁸ 864 F.3d 102 (2d Cir. 2017).

⁸⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES 141 (1769).

⁹⁰ *See Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 404 (2003) (citing *United States v. Enmons*, 410 U.S. 396, 400 (1973)).

property interest in any Cabinet job, so an attempt to get him to appoint a particular person to the Cabinet is not an attempt to secure ‘property’ from the President (or the citizenry at large).”⁹¹ In the recent hearings, witnesses spoke of the desire for “deliverables” sought with the aid. Whatever those “deliverables” may have been, they were not property as defined for the purposes of extortion any more than the “logrolling” rejected in *Blagojevich*.

There is one other aspect of the *Blagojevich* opinion worth noting. As I discussed earlier, the fact that the military aid was required to be obligated by the end of September weakens the allegation of bribery. Witnesses called before the House Intelligence Committee testified that delays were common, but that aid had to be released by September 30th. It was released on September 11th. The ability to deny the aid, or to even withhold it past September 30th is questionable and could have been challenged in court. The status of the funds also undermines the expansive claims on what constitutes an “official right” or “property”:

“The indictment charged Blagojevich with the ‘color of official right’ version of extortion, but none of the evidence suggests that Blagojevich claimed to have an ‘official right’ to a job in the Cabinet. He did have an ‘official right’ to appoint a new Senator, but unless a position in the Cabinet is ‘property’ from the President’s perspective, then seeking it does not amount to extortion. Yet a political office belongs to the people, not to the incumbent (or to someone hankering after the position). *Cleveland v. United States*, 531 U.S. 12 (2000), holds that state and municipal licenses, and similar documents, are not ‘property’ in the hands of a public agency. That’s equally true of public positions. The President-elect did not have a property interest in any Cabinet job, so an attempt to get him to appoint a particular person to the Cabinet is not an attempt to secure ‘property’ from the President (or the citizenry at large).”⁹²

A request for an investigation in another country or the release of money already authorized for Ukraine are even more far afield from the property concepts addressed by the Seventh Circuit.

The obvious flaws in the extortion theory were also made plain by the Supreme Court in *Sekhar v. United States*,⁹³ where the defendant sent emails threatening to reveal embarrassing personal information to the New York State Comptroller’s general counsel in order to secure the investment of pension funds with the defendant. In an argument analogous to the current claims, the prosecutors suggested political or administrative support was a form of intangible property. As in *McDonnell*, the Court was unanimous in rejecting the “absurd” definition of property. The Court was highly dismissive of such convenient linguistic arguments and noted that “shifting and imprecise characterization of

⁹¹ *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015).

⁹² *Id.*

⁹³ 570 U.S. 729 (2013).

the alleged property at issue betrays the weakness of its case.”⁹⁴ It concluded that “[a]dopting the Government’s theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress’s choice to penalize one but not the other. That we cannot do.”⁹⁵ Nor should Congress. Much like such expansive interpretations would be “absurd” for citizens in criminal cases, it would be equally absurd in impeachment cases.

To define a request of this kind as extortion would again convert much of politics into a criminal enterprise. Indeed, much of politics is the leveraging of aid or subsidies or grants for votes and support. In *Blagojevich*, the court dismissed such “logrolling” as the basis for extortion since it is “a common exercise.”⁹⁶ If anything of political value is now the subject of the Hobbs Act, the challenge in Washington would not be defining what extortion is, but what it is not.

D. Campaign Finance Violation

Some individuals have claimed that the request for investigations also constitutes a felony violation of the election finance laws. Given the clear language of that law and the controlling case law, there are no good-faith grounds for such an argument. To put it simply, this dog won’t hunt as either a criminal or impeachment matter. U.S.C. section 30121 of Title 52 states: “It shall be unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election.”

On first blush, federal election laws would seem to offer more flexibility to the House since the Federal Election Commission has adopted a broad interpretation of what can constitute a “thing of value” as a contribution. The Commission states “‘Anything of value’ includes all ‘in-kind contributions,’ defined as ‘the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.’”⁹⁷ However, the Justice Department already reviewed the call and correctly concluded it was not a federal election violation. This determination was made by the prosecutors who make the decisions on whether to bring such cases. The Justice Department concluded that the call did not involve a request for a “thing of value” under the federal law. Congress would be alleging a crime that has been declared not to be a crime by career prosecutors. Such a decision would highlight the danger of claiming criminal acts, while insisting that impeachment does not require actual crimes. The “close enough for impeachment” argument will only undermine the legitimacy of the

⁹⁴ *Id.* at 737.

⁹⁵ *Id.*

⁹⁶ *Blagojevich*, 794 F.3d at 735.

⁹⁷ FEDERAL ELECTION COMMISSION, THE LAW OF A ‘THING OF VALUE’ (Oct. 2019), <https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf>.

impeachment process, particularly if dependent on an election fraud allegation that itself is based on a demonstrably slipshod theory.

The effort to pound these facts into an election law violation would require some arbitrary and unsupported findings. First, to establish a felony violation, the thing of value must be worth \$25,000 or more. As previously mentioned, we do not know if the Ukrainians would conclude an investigation in the year before an election. We also do not know whether an investigation would offer a favorable or unfavorable conclusion. It could prove costly or worthless. In order for the investigation to have value, you would have to assume one of two acts were valuable. First, there may be value in the announcement of an investigation, but an announcement is not a finding of fact against the Bidens. It is pure speculation what value such an announcement might have had or whether it would have occurred at a time or in a way to have such value. Second, you could assume that the Bidens would be found to have engaged in a corrupt practice and that the investigation would make those findings within the year. There is no cognizable basis to place a value on such unknown information that might be produced at some time in the future. Additionally, this theory would make any encouragement (or discouragement) of an investigation into another country a possible campaign violation if it could prove beneficial to a president. As discussed below, diplomatic cables suggest that the Obama Administration pressured other countries to drop criminal investigations into the U.S. torture program. Such charges would have proven damaging to President Obama who was criticized for shifting his position on the campaign in favor of investigations.⁹⁸ Would an agreement to scuttle investigations be viewed as a “thing of value” for a president like Obama? The question is the lack of a limiting principle in this expansive view of campaign contributions.

There is also the towering problem of using federal campaign laws to regulate communications between the heads of state. Any conversation between heads of state are inherently political. Every American president facing reelection schedules foreign trips and actions to advance their political standing. Indeed, such trips and signing ceremonies are often discussed as transparently political decisions by incumbents. Under the logic of this theory, any request that could benefit a president is suddenly an unlawful campaign finance violation valued arbitrarily at \$25,000 or more. Such a charge would have no chance of surviving a threshold of motion to dismiss.

Even if such cases were to make it to a jury, few such cases have been brought and the theory has fared poorly. The best-known usage of the theory was during the prosecution of former Sen. John Edwards. Edwards was running for the Democratic nomination in 2008 when rumors surfaced that he not only had an affair with filmmaker Rielle Hunter but also sired a child with her. He denied the affair, as did Hunter. Later it

⁹⁸ Adam Serwer, *Obama's Legacy of Impunity For Torture*, THE ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/>; Kenneth Roth, *Barack Obama's Shaky Legacy on Human Rights*, FOREIGN POLICY (Jan. 4, 2017), <https://foreignpolicy.com/2017/01/04/barack-obamas-shaky-legacy-on-human-rights/>; *CIA Off The Hook For Past Waterboarding*, CBS NEWS (Apr. 16, 2009, 2:43 PM), <https://www.cbsnews.com/news/cia-off-the-hook-for-past-waterboarding/>.

was revealed that Fred Baron, the Edwards campaign finance chairman, gave money to Hunter, but he insisted it was his own money and that he was doing so without the knowledge of Edwards. Andrew Young, an Edwards campaign aide, also obtained funds from heiress Rachel Lambert Mellon to pay to Hunter. In the end, Mellon gave \$700,000 in order to provide for the child and mother in what prosecutors alleged as a campaign contribution in violation of federal campaign-finance law.⁹⁹ The jury acquitted Edwards and the Justice Department dropped all remaining counts.¹⁰⁰

Although the Edwards case involved large quantities of cash the jury failed to convict because they found the connection to the election too attenuated. The theory being advanced in the current proceedings views non-existent information that may never be produced as a contribution to an election that might occur before any report is issued. That is the basis upon which some would currently impeach a president, under a standard that the Framers wanted to be clear and exacting. Framers like Madison rejected “vague” standards that would “be equivalent to a tenure during pleasure of the Senate.” The campaign finance claim makes “maladministration” look like the model of clarity and precision in the comparison to a standard based on an assumption of future findings to be delivered at an unknown time.

E. Abuse of Power

The Ukraine controversy was originally characterized not as one of these forced criminal allegations, but as a simple abuse of power. As I stated from the outset of this controversy, a president can be impeached for abuses of power. In Federalist #65, Alexander Hamilton referred to impeachable offenses as “those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”¹⁰¹ Even though every presidential impeachment has been founded on criminal allegations, it is possible to impeach a president for non-criminal acts. Indeed, some of the allegations contained in the articles of impeachment against all three presidents were distinctly non-criminal in character. The problem is that we have never impeached a president solely or even largely on the basis of a non-criminal abuse of power allegation. There is good reason for that unbroken record. Abuses of power tend to be even less defined and more debatable as a basis for impeachment than some of the crimes already mentioned. Again, while a crime is not required to impeach, clarity is necessary. In this case, there needs to be clear and unequivocal proof of a quid pro quo. That is why I have been critical of how this impeachment has unfolded. I am particularly

⁹⁹ Manuel Roig-Franzia, *John Edwards trial: Jurors seek information on 'Bunny' Mellon's Role*, WASH. POST (May 23, 2012), https://www.washingtonpost.com/politics/john-edwards-trial-jurors-seek-information-on-bunny-mellons-role/2012/05/23/gJQAtiFzkU_story.html.

¹⁰⁰ Dave Levinthal, *Campaign cash laws tough to enforce*, POLITICO (June 1, 2012, 1:47 PM), <http://www.politico.com/news/stories/0612/76961.html>.

¹⁰¹ ALEXANDER HAMILTON, FEDERALIST NO. 65 (1788), *reprinted in* THE FEDERALIST PAPERS 396, 396 (Clinton Rossiter ed., 1961).

concerned about the abbreviated schedule and thin record that will be submitted to the full house.

Unlike the other dubious criminal allegations, the problem with the abuse of power allegation is its lack of foundation. As I have previously discussed, there remain core witnesses and documents that have not been sought through the courts. The failure to seek this foundation seems to stem from an arbitrary deadline at the end of December. Meeting that deadline appears more important than building a viable case for impeachment. Two months have been wasted that should have been put toward litigating access to this missing evidence. The choice remains with the House. It must decide if it wants a real or recreational impeachment. If it is the former, my earlier testimony and some of my previous writing show how a stronger impeachment can be developed.¹⁰²

The principle problem with proving an abuse of power theory is the lack of direct evidence due to the failure to compel key witnesses to testify or production of key documents. The current record does not establish a quid pro quo. What we know is that President Trump wanted two investigations. The first investigation into the 2016 election is not a viable basis for an abuse of power, as I have previously addressed. The second investigation into the Bidens would be sufficient, but there is no direct evidence President Trump intended to violate federal law in withholding the aid past the September 30th deadline or even wanted a quid pro quo maintained in discussions with the Ukrainians regarding the aid. If Trump encouraged an investigation into the Bidens alone, it would not be a viable impeachment claim. The request was inappropriate, but it was not an offer to trade public money for a foreign investigation. President Trump continued to push for these investigations but that does not mean that he was planning to violate federal law. Indeed, Ambassador Sondland testified that, when he concluded there was a quid pro quo, he understood it was a visit to the White House being withheld. White House visits are often used as leverage from everything from United Nations votes to domestic policy changes. Trump can maintain he was suspicious about the Ukrainians in supporting his 2016 rival and did not want to grant such a meeting without a demonstration of political neutrality. If he dangled a White House meeting in these communications, few would view that as unprecedented, let alone impeachable.

Presidents often put pressure on other countries which many of us view as inimical to our values or national security. Presidents George W. Bush and Barack Obama reportedly put pressure on other countries not to investigate the U.S. torture program or seek the arrest of those responsible.¹⁰³ President Obama and his staff also reportedly pressured the Justice Department not to initiate criminal prosecution stemming

¹⁰² Jonathan Turley, *How The Democrats can build a better case to impeach President Trump*, THE HILL (Nov. 25, 2019, 12:00 PM), <https://thehill.com/opinion/judiciary/471890-how-democrats-can-build-a-better-case-to-impeach-president-trump>.

¹⁰³ David Corn, *Obama and GOPers Worked Together to Kill Bush Torture Probe*, MOTHER JONES (Dec. 1, 2010), <https://www.motherjones.com/politics/2010/12/wikileaks-cable-obama-quashed-torture-investigation/> (discussing cables pressuring the Spanish government to shut down a judicial investigation into torture).

from the torture program.¹⁰⁴ Moreover, presidents often discuss political issues with their counterparts and make comments that are troubling or inappropriate. However, contemptible is not synonymous with impeachable. Impeachment is not a vehicle to monitor presidential communications for such transgressions. That is why making the case of a quid pro quo is so important – a case made on proof, not presumptions. While critics have insisted that there is no alternative explanation, it is willful blindness to ignore the obvious defense. Trump can argue that he believed the Obama Administration failed to investigate a corrupt contract between Burisma and Hunter Biden. He publicly called for the investigation into the Ukraine matters. Requesting an investigation is not illegal any more than a leader asking for actions from their counterparts during election years.

Trump will also be able to point to three direct conversations on the record. His call with President Zelensky does not state a quid pro quo. In his August conversation with Sen. Ron Johnson (R., WI.), President Trump reportedly denied any quid pro quo. In his September conversation with Ambassador Sondland, he also denied any quid pro quo. The House Intelligence Committee did an excellent job in undermining the strength of the final two calls by showing that President Trump was already aware of the whistleblower controversy emerging on Capitol Hill. However, that does not alter the fact that those direct accounts stand uncontradicted by countervailing statements from the President. In addition, President Zelensky himself has said that he did not discuss any quid pro quo with President Trump. Indeed, Ambassador Taylor testified that it was not until the publication of the *Politico* article on September 31st that the Ukrainians voiced concerns over possible preconditions. That was just ten days before the release of the aid. That means that the record lacks not only direct conversations with President Trump (other than the three previously mentioned) but even direct communications with the Ukrainians on a possible quid pro quo did not occur until shortly before the aid release. Yet, just yesterday, new reports filtered out on possible knowledge before that date—highlighting the premature move to drafting articles of impeachment without a full and complete record.¹⁰⁵

Voters should not be asked to assume that President Trump would have violated federal law and denied the aid without a guarantee on the investigations. The current narrative is that President Trump only did the right thing when “he was caught.” It is possible that he never intended to withhold the aid past the September 30th deadline while also continuing to push the Ukrainians on the corruption investigation. It is possible that Trump believed that the White House meeting was leverage, not the military aid, to push for investigations. It is certainly true that both criminal and impeachment cases can be

¹⁰⁴ Glenn Greenwald, *Obama’s justice department grants final immunity to Bush’s CIA torturers*, THE GUARDIAN (Aug. 31, 2012 12:00PM)
<https://www.theguardian.com/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer>.

¹⁰⁵ Andrew Kramer, *Ukraine Knew Of Aid Freeze in July, Says Ex-Top Official In Kyiv*, N.Y. TIMES (Dec. 3, 2019, 7:59 am),
<https://www.nytimes.com/2019/12/03/world/europe/ukraine-impeachment-military-aid.html>.

based on circumstantial evidence, but that is less common when direct evidence is available but unsecured in the investigation. Proceeding to a vote on this incomplete record is a dangerous precedent to set for this country. Removing a sitting President is not supposed to be easy or fast. It is meant to be thorough and complete. This is neither.

F. The Censure Option

Finally, there is one recurring option that was also raised during the Clinton impeachment: censure. I have been a long critic of censure as a part of impeachment inquiries and I will not attempt to hide my disdain for this option. It is not a creature of impeachment and indeed is often used by members as an impeachment-lite alternative for those who do not want the full constitutional caloric load of an actual impeachment. Censure has no constitutional foundation or significance. Noting the use of censure in a couple of prior cases does not make it precedent any more than Senator Arlen Specter's invocation of the Scottish "Not Proven" in the Clinton trial means that we now have a third option in Senate voting. If the question is whether Congress can pass a resolution with censure in its title, the answer is clearly yes. However, having half of Congress express their condemnation for this president with the other half opposing such a condemnation will hardly be news to most voters. I am agnostic about such extra-constitutional options except to caution that members should be honest and not call such resolutions part of the impeachment process.

V. CONCLUSION

Allow me to be candid in my closing remarks.

I get it. You are mad. The President is mad. My Democratic friends are mad. My Republican friends are mad. My wife is mad. My kids are mad. Even my dog is mad . . . and Luna is a golden doodle and they are never mad. We are all mad and where has it taken us? Will a slipshod impeachment make us less mad or will it only give an invitation for the madness to follow in every future administration?

That is why this is wrong. It is not wrong because President Trump is right. His call was anything but "perfect" and his reference to the Bidens was highly inappropriate. It is not wrong because the House has no legitimate reason to investigate the Ukrainian controversy. The use of military aid for a quid pro quo to investigate one's political opponent, if proven, can be an impeachable offense.

It is not wrong because we are in an election year. There is no good time for an impeachment, but this process concerns the constitutional right to hold office in this term, not the next.

No, it is wrong because this is not how an American president should be impeached. For two years, members of this Committee have declared that criminal and impeachable acts were established for everything from treason to conspiracy to obstruction. However, no action was taken to impeach. Suddenly, just a few weeks ago, the House announced it would begin an impeachment inquiry and push for a final vote in just a matter of weeks. To do so, the House Intelligence Committee declared that it would

not subpoena a host of witnesses who have direct knowledge of any quid pro quo. Instead, it will proceed on a record composed of a relatively small number of witnesses with largely second-hand knowledge of the position. The only three direct conversations with President Trump do not contain a statement of a quid pro quo and two expressly deny such a pre-condition. The House has offered compelling arguments why those two calls can be discounted by the fact that President Trump had knowledge of the underlying whistleblower complaint. However, this does not change the fact that it is moving forward based on conjecture, assuming what the evidence would show if there existed the time or inclination to establish it. The military aid was released after a delay that the witnesses described as “not uncommon” for this or prior Administrations. This is not a case of the unknowable. It is a case of the peripheral. The House testimony is replete with references to witnesses like John Bolton, Rudy Giuliani, and Mike Mulvaney who clearly hold material information. To impeach a president on such a record would be to expose every future president to the same type of inchoate impeachment.

Principle often takes us to a place where we would prefer not to be. That was the place the “Republican Recusants” found themselves in 1868 when sitting in judgment of a president they loathed and despised. However, they took an oath not to Andrew Johnson, but to the Constitution. One of the greatest among them, Lyman Trumbull (R-Ill.) explained his fateful decision to vote against Johnson’s impeachment charges even at the cost of his own career:

“Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes ... no future President will be safe who happens to differ with the majority of the House and two-thirds of the Senate ...

I tremble for the future of my country. I cannot be an instrument to produce such a result; and at the hazard of the ties even of friendship and affection, till calmer times shall do justice to my motives, no alternative is left me...”¹⁰⁶

Trumbull acted in the same type of age of rage that we have today. He knew that raising a question about the underlying crime or the supporting evidence would instantly be condemned as approving of the underlying conduct of a president. In an age of rage, there seems to be no room for nuance or reservation. Yet, that is what the Constitution expects of us. Expects of you.

For generations, the seven Republicans who defected to save President Johnson from removal have been heralded as profiles of courage. In recalling the moment he was called to vote, Senator Edmund Ross of Kansas said he “almost literally looked down into my open grave.” He jumped because the price was too great not to. Such moments are easy to celebrate from a distance of time and circumstance. However, that is precisely the moment in which you now find yourself. “When the excitement of the hour [has]

¹⁰⁶ WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 243-44 (1992).

subsided” and “calmer times” prevail, I do not believe that this impeachment will be viewed as bringing credit upon this body. It is possible that a case for impeachment could be made, but it cannot be made on this record. To return to Wordsworth, the Constitution is not a call to arms for the “Happy Warriors.” The Constitution calls for circumspection, not celebration, at the prospect of the removal of an American president. It is easy to allow one’s “judgment [to be] affected by your moral approval of the lines” in an impeachment narrative. But your oath demands more, even personal and political sacrifice, in deciding whether to impeach a president for only the third time in the history of this Republic.

In this age of rage, many are appealing for us to simply put the law aside and “just do it” like this is some impulse-buy Nike sneaker. You can certainly do that. You can declare the definitions of crimes alleged are immaterial and this is an exercise of politics, not law. However, the legal definitions and standards that I have addressed in my testimony are the very thing dividing rage from reason. Listening to these calls to dispense with such legal niceties, brings to mind a famous scene with Sir Thomas More in “A Man For All Seasons.” In a critical exchange, More is accused by his son-in-law William Roper of putting the law before morality and that More would “give the Devil the benefit of law!” When More asks if Roper would instead “cut a great road through the law to get after the Devil?,” Roper proudly declares “Yes, I’d cut down every law in England to do that!” More responds by saying “And when the last law was down, and the Devil turned ‘round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man’s laws, not God’s! And if you cut them down, and you’re just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake!”

Both sides in this controversy have demonized the other to justify any measure in defense much like Roper. Perhaps that is the saddest part of all of this. We have forgotten the common article of faith that binds each of us to each other in our Constitution. However, before we cut down the trees so carefully planted by the Framers, I hope you consider what you will do when the wind blows again . . . perhaps for a Democratic president. Where will you stand then “the laws all being flat?”¹⁰⁷

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.¹⁰⁸

¹⁰⁷ R. BOLT, *A MAN FOR ALL SEASONS* 37-38 (Vintage ed. 1962).

¹⁰⁸ As discussed above, I have been asked to include some of my relevant scholarship: Jonathan Turley, *A Fox In The Hedges: Vermeule’s Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of*

Presidential Privilege, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, "From Pillar to Post": *The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation*, 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 145 (1992).