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## IMPEACHMENT, DONALD TRUMP AND THE ATTEMPTED EXTORTION OF UKRAINE

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# IMPEACHMENT, DONALD TRUMP AND THE ATTEMPTED EXTORTION OF UKRAINE

Lawrence J. Trautman<sup>1</sup>

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### Abstract

*For only the third time in the nation's history, the decade of the 2020s begins with impeachment of a U.S. president. The first three years of the Trump presidency is characterized by: incitement of rampant political and racial polarization; multiple lies to the public on a daily basis from the president and administration; unprecedented cabinet and high level administrative personnel turnover; multiple convictions and sentencing of high level election campaign and administrative officials for crimes sounding in bribery and corruption; an investigation by Robert Mueller into Russian involvement in the 2016 U.S. elections; continuous violations of the Constitutional emoluments clause . . . and the list continues.*

*Donald Trump's presidency proves so divisive that talk about his impeachment begins immediately as the Democratic Party reclaims control of the House of representatives following the 2018 mid-term elections. Just a day after the conclusion of*

*the Mueller investigation into Russia's 2016 election interference, President Trump calls the president of Ukraine and requests an investigation into his political rival Joseph Biden in exchange for release of nearly \$400 million of congressional mandated military aid. As yet another Constitutional crisis during the Trump Presidency has come and gone, now is a good time to examine the history and role of impeachment, how it works, the Trump saga, and implications for the future.*

*Keywords: bribery, Bill Clinton, constitutional law, equal protection, emoluments, extortion, high crimes and misdemeanors, Andrew Johnson, Mueller investigation, Richard Nixon, obstruction of justice, pardon power, presidential impeachment, removal, treason, Donald Trump, Ukraine.*

*JEL Classifications: K10, K39, K40, K41, K42, K49.*

## I. INTRODUCTION

This Article proceeds in seven parts. First is an examination of the Constitutional provision for impeachment. Second is a look at the historical experience of U.S. presidential impeachment: a discussion about the impeachment proceedings of Presidents Andrew Johnson, Richard Nixon, and Bill Clinton. Third is a brief discussion of the first three years of Donald Trump's presidency. Fourth, I present the facts now known about events surrounding Donald Trump's July 25, 2019, phone call to the Ukraine president. Fifth is a look at the 2020 articles of impeachment. Sixth, the mechanics and political dynamics of impeachment are addressed. And last, I conclude. This Article comes at an important crossroads for the American democracy. The issues addressed here are timely and of profound importance to the United States, global community, and to the future of civilization. Seldom can these claims be made of a law review article. I have written previously on this topic. During mid-2019, before the release of The Mueller Report, I completed my manuscript for *Presidential Impeachment: A Contemporary Analysis*, published just months later in the *University of Dayton Law Review*.<sup>2</sup> Much of my language appearing here as Chapters I, II, and III *infra* rely heavily on this prior publication.

<sup>2</sup> See Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529 (2019).

## II. THE CONSTITUTIONAL PROVISION FOR IMPEACHMENT

*Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confident enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers?*

*William H. Rehnquist  
Chief Justice  
U.S. Supreme Court*<sup>3</sup>

Why impeachment? Chief Justice William H. Rehnquist explains how the Framers of the U.S. Constitution decided to deal with each of the three distinct branches of government—“legislative, executive, and judicial . . . in a separate article. Article I grants legislative power to congress, Article II grants the executive power to the president, and Article III rests the judicial power in the federal courts.”<sup>4</sup> Chief Justice Rehnquist writes, “[b]ut those who wrote the Constitution realized there could also be malfeasance by high officials of the government, and so they borrowed from England the concept of impeachment and removal of such officials.”<sup>5</sup>

In Article II Section IV, the U.S. Constitution provides for presidential impeachment as follows: “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>6</sup> It is the sole authority of the U.S. House of Representatives to initiate impeachment proceedings,<sup>7</sup> with trial conducted by the Senate.<sup>8</sup> Any such trial in the Senate will be presided over by

<sup>3</sup> WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORICAL IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 277 (1992).

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CONST. art. II, § 4.

<sup>7</sup> *Id.* art. I, § 2, cl. 5.

<sup>8</sup> *Id.* art. I, § 3, cl. 6.

the Chief Justice of the Supreme Court and requires the concurrence of two-thirds of the senators present.<sup>9</sup> As a threshold matter, we will first look at the meaning of the terms “Treason, Bribery, and other high Crimes and Misdemeanors.”

### A. Treason

The term “treason” is defined briefly and succinctly in Article III of the Constitution: “Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”<sup>10</sup> Yale Law school Professor Charles L. Black writes, “There is, in short, no reason to think the word means anything other than this in the impeachment passage. This makes irrelevant a great deal of learning . . . about treasons under English law. . .”<sup>11</sup>

### B. Bribery

Professor Black observes that, “bribery may mean the taking as well as the giving of a bribe. At the Constitutional Convention, Gouverneur Morris gave the instance of Charles II, who ‘was bribed by Louis XIV.’”<sup>12</sup> Professor Michael J. Gerhardt has written an excellent discussion of matters surrounding removing impeachable officials, including the Bribery Act of 1790, which provides additional color about the concern at the time regarding matters surrounding the bribery of federal judges and executive officers.<sup>13</sup>

### C. Other High Crimes and Misdemeanors

And now for the broadest aspect of impeachable offenses that has proven a most difficult term for interpretation due to its vagueness, the phrase “other high Crimes and Misdemeanors.”<sup>14</sup> Professor Black writes, “The phrase ‘high

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

<sup>10</sup> *Id.* art. III, §3, cl. 1.

<sup>11</sup> CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 25 (1974).

<sup>12</sup> *Id.* at 26.

<sup>13</sup> See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 82 (2d ed. 2000).

<sup>14</sup> BLACK, *supra* note 11, at 27.

Crimes and Misdemeanors' comes to us out of English law and practice, starting (as far as we know) in 1386. It frequently figured in impeachment of officers. The English . . . saw it as including serious misconduct in office, whether or not punishable as crime in the ordinary courts."<sup>15</sup> Professor Black writes that during the very brief discussion at the Constitutional Convention, "Mason's ready substitution of 'high Crimes and Misdemeanors' indicates that he thought (and no voice was raised in doubt) that this new phrase would satisfactorily cover 'many great and dangerous offenses' not reached by the words 'treason' and 'bribery'; its coverage was understood to be broad."<sup>16</sup>

#### D. Impeachment Is An Emergency Measure

Constitutional scholars Laurence Tribe and Joshua Matz write, "[i]mpeachment is not just another form of political combat; it's an emergency measure meant to save the democratic foundation on which all other politics unfold."<sup>17</sup> Because there have been relatively few impeachment proceedings:

[i]t's easy to forget that the United States has never actually impeached and removed a president. Although that was the likely outcome had Richard Nixon remained in office, he resigned before the House of representatives formally approved articles of impeachment against him. On the two occasions that the House did impeach a president—Andrew Johnson and Bill Clinton—the Senate ultimately acquitted, albeit in Johnson's case by only a single vote. We therefore have no historical experience with the full consequences . . . . Instead, we've generally relied on presidential term limits, the forces of civil society, federalism, and checks and balances to

<sup>15</sup> *Id.* at 49.

<sup>16</sup> *Id.* at 29; see also Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 CONN. L. REV. 1 (2019).

<sup>17</sup> LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* xii (2018).

mitigate the damage inflicted by terrible leaders.<sup>18</sup>

We are indebted to professors Tribe and Matz for providing an analytical framework that enables us to look at the prudence of any decision to impeach:

Accordingly, in responsible discussions about ending a presidency, there are three vital questions to ask. First, has the president engaged in conduct that authorizes his removal under the standard set forth in the Constitution? Second, as a matter of political reality, is the effort to remove the president likely to succeed in the House and then in the Senate? And third, is it genuinely necessary to resort to the impeachment power, recognizing that the collateral damage will likely be significant? Put differently: (1) Is removal permissible, (2) Is removal likely to succeed, and (3) Is removal worth the price the nation will pay?<sup>19</sup>

Recent American history has provided no shortage of scandals and scoundrels in the White House. A trip to any large library will disclose that stacks of books have been written about many presidents who have found themselves subject to or believed by someone to deserve impeachment: Richard Nixon;<sup>20</sup>

<sup>18</sup> *Id.* at xiii.

<sup>19</sup> *Id.* at xiv.

<sup>20</sup> See generally ELIZABETH DREW, WASHINGTON JOURNAL: REPORTING WATERGATE AND RICHARD NIXON'S DOWNFALL (2014); FRANK MANKIEWICZ, U.S. V. RICHARD NIXON: THE FINAL CRISIS (1975); WILLIAM H. MERRILL, WATERGATE PROSECUTOR (2008); GEOFFREY CARROLL SHEPARD, THE REAL WATERGATE SCANDAL: COLLUSION, CONSPIRACY, AND THE PLOT THAT BROUGHT NIXON DOWN (2015); THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON (1975); BOB WOODWARD, THE FINAL DAYS (1976).



Bill Clinton;<sup>21</sup> George W. Bush;<sup>22</sup> Barack Obama;<sup>23</sup> and Donald Trump.<sup>24</sup> I will not attempt here to restate the lengthy coverage given elsewhere for any of these significant American chief executive officers. Rather, a brief history to provide perspective and context to our contemporaneous situation is offered.

### III. HISTORY OF U.S. PRESIDENTIAL IMPEACHMENT PROCEEDINGS

*“Impeachment shouldn’t be understood as merely a cleaner and more orderly form of political assassination. Rather, it’s a democratic process by which the American people, speaking through Congress, decide that for the constitutional system to live, a presidency must die. This is a great power, and a terrible one. But it’s a power that befits any nation in which the people are truly sovereign. And it’s a power that might someday save us all.”*

*Professor Laurence Tribe and*

<sup>21</sup> See generally NATHAN AASENG, THE IMPEACHMENT OF BILL CLINTON (2000); PETER BAKER, THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON (2000); KEN GORMLEY, THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR (2010); RICH LOWRY, LEGACY: PAYING THE PRICE FOR THE CLINTON YEARS (2003); RUSSELL L. RILEY, INSIDE THE CLINTON WHITE HOUSE: AN ORAL HISTORY (2016); DAVID SCHIPPERS, SELLOUT: THE INSIDE STORY OF PRESIDENT CLINTON’S IMPEACHMENT (2000); JEFFREY TOOBIN, A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT (1999). Your author finds Baker’s detailed and valuable account of the personal struggle of so many legislators over this matter particularly impressive.

<sup>22</sup> See generally ELIZABETH HOLTZMAN, CHEATING JUSTICE: HOW BUSH AND CHENEY ATTACKED THE RULE OF LAW AND PLOTTED TO AVOID PROSECUTION – AND WHAT WE CAN DO ABOUT IT (2012); ELIZABETH HOLTZMAN, THE IMPEACHMENT OF GEORGE W. BUSH: A HANDBOOK FOR CONCERNED CITIZENS (2006); PAUL J. LANDIS, STOP BUSH NOW: A GUIDE AND RESOURCE (2004); DAVE LINDORFF & BARBARA OLSHANSKY, THE CASE FOR IMPEACHMENT: THE LEGAL ARGUMENT FOR REMOVING PRESIDENT GEORGE W. BUSH FROM OFFICE (2006).

<sup>23</sup> See generally AARON KLEIN, IMPEACHABLE OFFENSES: THE CASE FOR REMOVING BARACK OBAMA FROM OFFICE (2013); ANDREW C. MCCARTHY, FAITHLESS EXECUTION: BUILDING THE POLITICAL CASE FOR OBAMA’S IMPEACHMENT (2014).

<sup>24</sup> See Gregory Scott Crespi, *Developing A Law School Course on Presidential Impeachment*, 72 SMU L. REV. F. 41 (2019) (describing contemporary issues and resources); see also *infra* Sections III, IV, and V.

Joshua Matz<sup>25</sup>

The history of presidential impeachment proceedings in the United States focuses on the following historical events: the 1868 case against President Andrew Johnson and the more recent proceedings against President Bill Clinton. Although not resulting in impeachment, Richard Nixon's presidency included: the resignation of Vice President Spiro Agnew and the break-in of the Democratic National Headquarters, known as the Watergate burglary. These modern events have influenced the meaning in contemporary impeachment jurisprudence and what constitutes "high crimes and misdemeanors." Modernly, Professors Tribe and Matz write, "[u]nder George W. Bush, Barack Obama, and Trump, impeachment talk has become a far more significant aspect of U.S. political discourse and strategy."<sup>26</sup>

#### A. President Andrew Johnson

When Abraham Lincoln's successor Andrew Johnson removed Secretary of War Edwin M. Stanton from office in 1868, impeachment proceedings resulted.<sup>27</sup> The U.S. House of Representatives promptly impeached Andrew Johnson because of a continued dispute about how the country would reunite following the conclusion of the Civil War.<sup>28</sup> Justice Rehnquist provides an excellent discussion about the two-and-a-half-century history "of the American attitude toward Negro slavery," which is necessary to understand the complex residue of animosities still lingering after conclusion of the Civil War (voting by former slaves, etc.) resulting in the impeachment of Andrew Johnson.<sup>29</sup> I will not attempt to duplicate Justice Rehnquist's work here.

<sup>25</sup> TRIBE & MATZ, *supra* note 17, at 24.

<sup>26</sup> *Id.* at xviii.

<sup>27</sup> See REHNQUIST, *supra* note 3, at 145; see also GENE SMITH, HIGH CRIMES AND MISDEMEANORS: THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 212 (1977); Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347 (2010).

<sup>28</sup> See REHNQUIST, *supra* note 3, at 150.

<sup>29</sup> *Id.*

President Andrew Johnson was subjected to more than one attempt at impeachment and removal. President Andrew Johnson notified Secretary of War Edwin Stanton on August 13, 1867, that effective immediately he was suspended from the office of Secretary of War and that he should convey all “records, books, papers, and other public property now in [his] custody and charge” to his replacement General Ulysses S. Grant.<sup>30</sup> In addition to the complaint that President Johnson had violated the Tenure of Office Act by removing Stanton, other miscellaneous charges against President Andrew Johnson included “misuse of patronage, wrongful use of the pardon power by the president with respect to deserters in West Virginia, and even the possible complicity of Johnson in the assassination of Lincoln.”<sup>31</sup> In December 1867, after two days of House debate, the motion to impeach was unsuccessful by a vote of 108 to 57 and Stanton remained in office.<sup>32</sup> Then, when President Andrew Johnson decided to replace Stanton with General Lorenzo B. Thomas, yet more impeachment activity was triggered in the House of Representatives.<sup>33</sup> This new set of facts resulted in a vote of 126 to 47 in favor of impeachment on February 24, 1868.<sup>34</sup> Ten Articles of Impeachment were reported out on February 29, 1868.<sup>35</sup> Chief Justice William Rehnquist describes the trial by the Senate beginning on March 30, 1868, and final charges against President Andrew Johnson as follows:

<sup>30</sup> *Id.* at 213.

<sup>31</sup> *Id.* at 214.

<sup>32</sup> *Id.* at 215.

<sup>33</sup> *Id.* at 215.

<sup>34</sup> REHNQUIST, *supra* note 3, at 217.

<sup>35</sup> *Id.* at 218.

The central charge made against Andrew Johnson was that he had unlawfully removed Stanton in February 1868. Articles I, IV, V, VI, VII, and VIII accused him of violating the Tenure of Office Act by the removal. Articles II and III accused him of acting contrary to law when he designated Lorenzo Thomas an interim secretary of war in place of Stanton. Article IX accused him of having attempted to induce General William Emory to disobey the Act of Congress requiring Senate approval for the removal of the General of the Army. Article X was based on the disparaging public statements made by Johnson about members of Congress and Congress as a body in various speeches. Article XI, drafted by Thaddeus Stevens, was a potpourri which attempted to cast a broader net by lumping together several of the charges contained in the earlier separate articles.<sup>36</sup>

By an initial vote on the eleventh article only of 35 to convict, 19 to acquit, the Chief Justice proclaimed, “[t]wo-thirds not having pronounced guilty, the President is, therefore, acquitted upon this article.’ The motion to adjourn for ten days before considering other articles then passed the Senate by a vote of 32 to 21.”<sup>37</sup> After the ten-day recess, a vote was taken as to Articles II and III, again resulting in acquittal, “and the effort to convict Andrew Johnson ended without a formal vote ever having been taken upon eight of the articles presented.”<sup>38</sup>

#### B. Richard Nixon

The 1972 case of Richard Nixon, still in the collective memories of many baby boomers and members of Congress, becomes the next serious attempt to impeach a president.<sup>39</sup> Having enjoyed a landslide victory over Democratic challenger

<sup>36</sup> *Id.* at 226-27.

<sup>37</sup> *Id.* at 234.

<sup>38</sup> *Id.* at 235.

<sup>39</sup> *Id.* at 271.

George McGovern in both the electoral college and popular vote, Richard Nixon is elected President, with the Democratic party retaining control of both houses of Congress.<sup>40</sup> Historian Allan Lichtman writes, “Richard Nixon brilliantly orchestrated his reelection campaign, but he still feared that leaks of such illegal acts as a covert bombing war in Cambodia and the wiretapping of reporters and administration officials could sink his reelection and even lead to his impeachment.”<sup>41</sup> Professor Lichtman writes:

In 1971 [Nixon] established in the White House a covert unit known as the Plumbers to plug leaks. Members of the unit doubled as dirty tricks specialists who would conduct the Watergate break-in and the burglary of the office of the psychiatrist of Daniel Ellsberg, the man who had leaked the Defense Department’s secret history of the Vietnam War known as the “Pentagon Papers.”<sup>42</sup>

Comprehensive accounts and commentary about the Watergate burglary abound. For example, Chief Justice William H. Rehnquist describes the purpose of the June 1972 break-in of the Democratic National Committee headquarters as “apparently to bug—to place listening devices in—the [DNC] committee office.”<sup>43</sup> As efforts were made by a special prosecutor to uncover the truth and congressional hearings were conducted, “during the next two years, it gradually became evident that those involved in the burglary had ties to the Republican party, and that efforts to frustrate the investigation of the burglary had been made by persons on the White House staff.”<sup>44</sup> Chief Justice William H. Rehnquist states:

<sup>40</sup> REHNQUIST, *supra* note 3, at 271.

<sup>41</sup> ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* 23 (2017).

<sup>42</sup> *Id.* at 24.

<sup>43</sup> REHNQUIST, *supra* note 3, at 272.

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

The impetus for Nixon's impeachment, of course, came from his alleged conduct in obstructing the investigation of the Watergate burglary. But here, too, the draft articles used that conduct as the basis of one count, and proceeded to add others. The Second article charged that Nixon had abused the power of the presidency by, for example, ordering the Internal Revenue Service to audit the tax returns of his political enemies. Article III was based on the president's refusal to honor the subpoenas issued to him by the Judiciary Committee. Article IV charged that Nixon had made false statements to Congress about the bombing of Cambodia during the Vietnam war. The final charge was that Nixon had wrongly used public money to improve his home at San Clemente, and had also taken deductions on his income-tax returns to which he was not entitled. Just as with Chase and Johnson, what started out as a simple, focused charge would become a potpourri if approved by the Judiciary Committee.<sup>45</sup>

Professor Lichtman describes another action taken by President Nixon that will add to the perception of high Crimes and Misdemeanors, when:

On Saturday evening October 20, 1973, in what would go down in history as the 'Saturday Night Massacre,' President Nixon ordered Attorney General Elliot Richardson to fire [special prosecutor] Archibald Cox; Richardson refused to obey what he believed to be an illegal order and resigned. Deputy Attorney General William D. Ruckelshaus also refused to carry out an illegal order and he resigned. Solicitor General Robert H.

<sup>45</sup> *Id.* at 273.

Bork then complied with the president's order and became the acting attorney general.<sup>46</sup>

Events rapidly unfolded during the summer of 1974 that rendered moot any further action by the House Judiciary Committee. The case of *United States v. Nixon*<sup>47</sup> was decided by the Supreme Court during late July, holding that the Nixon tapes of oval office conversations were to be turned over to the special prosecutor, "and one in particular proved incriminating as to the charges of obstructing justice in connection with the FBI investigation of the Watergate burglary."<sup>48</sup> Former counsel to President Nixon, John W. Dean, writes many decades later, "These surreptitious recordings eventually revealed that [Nixon's] public Watergate defenses were colossal deceptions, patent lies that eventually forced his resignation. Nixon's secret recordings provided much of the overwhelming evidence that sent his former top advisors to prison, not to mention forced his own early retirement."<sup>49</sup> "This tape was made public on August 5, 1974, and President Nixon resigned on August 9."<sup>50</sup> Your author provides a list of Articles of Impeachment against Richard M. Nixon elsewhere.<sup>51</sup>

### C. William Jefferson Clinton

Within the collective memories of many now serving in Congress, for only the second time in American history that a sitting U.S. President is impeached, the case against President William Jefferson Clinton, takes place on December 19, 1998. Based upon charges of perjury, proceedings were brought before a grand jury and for "other crimes of obstruction of justice . . . in an effort to conceal a sexual affair with a young White House

<sup>46</sup> LICHTMAN, *supra* note 41, at 29.

<sup>47</sup> 418 U.S. 683 (1974).

<sup>48</sup> REHNQUIST, *supra* note 3, at 273.

<sup>49</sup> Lawrence J. Trautman, *Grab 'Em By the Emoluments: The Crumbling Ethical Foundation of Donald Trump's Presidency*, 17 CONN. PUB. INT. L.J. 169 (2018) (citing JOHN W. DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* xvii (2014)); *see also* DOUGLAS BRINKLEY & LUKE A. NICTER, *THE NIXON TAPES: 1973* (2015) (providing transcriptions of actual 1973 conversations held in the Oval Office).

<sup>50</sup> REHNQUIST, *supra* note 3, at 273.

<sup>51</sup> *See* Trautman, *supra* note 2, at 587.

worker named Monica Lewinsky.”<sup>52</sup> Professor Cass Sunstein writes, “[d]ecades after it happened, the impeachment of Bill Clinton is almost incomprehensible, at least if it is explored in light of the debates in the late eighteenth century. You would have to work really hard to make a minimally plausible argument that Clinton committed an impeachable offense.”<sup>53</sup>

The Senate trial of President Clinton began on January 7, 1999 and ended with an acquittal on February 12, 1999.<sup>54</sup> Many legal scholars have commented to the effect that the impeachment and near removal of President Bill Clinton because of lying under oath about sexual infidelity has established a very low standard for constitutional impeachment proceedings.

Sexual indiscretions appear to be widespread, particularly among many politicians worldwide. Many American citizens then, as now, don’t believe that the underlying offense in the Clinton matter, lying under oath about consensual sex with a

<sup>52</sup> See RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON* 1 (1999) (primarily witness tampering and subornation of perjury). See generally DAVID P. SCHIPPERS & ALAN P. HENRY, *SELL OUT: THE INSIDE STORY OF PRESIDENT CLINTON’S IMPEACHMENT* (2000); Susan Low Bloch, *Assessing the Impeachment of President Bill Clinton from a Post 9/11 Perspective*, in *THE CLINTON PRESIDENCY AND THE CONSTITUTIONAL SYSTEM* 190 (Rosanna Perotti ed., 2012); Daniel H. Erskine, *The Trial of Queen Caroline and the Impeachment of President Clinton: Law as a Weapon for Political Reform*, 7 WASH. U. GLOBAL STUD. L. REV. 1 (2008); Neal K. Katyal, *Impeachment As Congressional Constitutional Interpretation*, 63 LAW AND CONTEMP. PROBS. 169 (2000); Karen A. Popp, *The Impeachment Of President Clinton: An Ugly Mix Of Three Powerful Forces*, 63 LAW & CONTEMP. PROBS. 223 (2000); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 CORNELL J.L. & PUB. POLY 503 (2003); Aviam Soifer, *The Gold Standard and Guilt-Edged Insecurities: The Impeachment Crucible as Tragic Farce*, in *AFTERMATH: THE CLINTON SCANDAL AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* (Len Kaplan & Beverly Moran eds., 2001); Charles Tiefer, *The Controversial Transition Process from Investigating the President to Impeaching Him*, 14 ST. JOHN’S J. LEGAL COMMENT. 111 (1999); Charles Tiefer, *The Senate Impeachment Trial for President Clinton*, 28 HOFSTRA L. REV. 407 (1999); Peter M. Tiersma, *Did Clinton Lie?: Defining “Sexual Relations,”* 79 CHI.-KENT L. REV. 927 (2004); Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422 (2000).

<sup>53</sup> CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 99 (2017).

<sup>54</sup> See POSNER, *supra* note 52, at 1; see also BAKER, *supra* note 21 (commenting that many books have been written about the Clinton impeachment).



22-year-old rises to the level of “high crimes and misdemeanors,” as envisioned by the Founders. Consensual sex, by itself is usually not a high crime; however, would lying under oath be considered a high crime by the Founders? Professor David E. Kyvig describes the Clinton impeachment process as, “the pouncing on a tawdry personal misstep after fruitless years of looking for malfeasance in governance and, finally, the inexorable pursuit of impeachment even after the electorate had registered disapproval of the effort.”<sup>55</sup> For example, Professor Susan Estrich, formerly campaign manager for Michael Dukakis is credited with writing, “[t]he President [Clinton] had shown ‘bad judgment’ in engaging in sex with an intern, his conduct was ‘deeply troubling’; but a consensual relationship does not constitute sexual harassment, much less is it criminal, much less does it rise to the level of an impeachable offense.”<sup>56</sup>

Professor Susan Low Bloch recommends that Congress is well served to revisit many of the important questions left unanswered: “including questions of attorney-client privilege, executive privilege, protective function privilege, and temporary immunity for a sitting president. These questions will recur, whether or not there is another impeachment . . . . Congress should examine them in a non-partisan, dispassionate fashion.”<sup>57</sup> Professor Michael J. Gerhardt concludes the following about the Clinton impeachment proceedings:

First, it is practically impossible to remove a president from office without bipartisan support. A successful presidential impeachment requires making charges of sufficient gravity to draw bipartisan support in Congress. If past is prologue, such charges should show (1) serious injury to the republic and (2) a connection between

<sup>55</sup> DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960*, at 311 (2008).

<sup>56</sup> Trautman, *supra* note 2 at 78 (citing Elizabeth Rapaport, *Sex and Politics at the Close of the Twentieth Century: A Feminist Looks Back at the Clinton Impeachment and the Thomas Confirmation Hearings*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 23 (Leonard V. Kaplan & Beverly I. Moran eds., 2001)).

<sup>57</sup> Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 *LAW & CONTEMP. PROBS.* 143, 167 (2000), <https://scholarship.law.georgetown.edu/facpub/41/>.

an official's misconduct and duties—or, in the absence of the latter, misconduct so outrageous or so thoroughly incompatible with an official's duties that Congress has no choice but to impeach and remove the official.<sup>58</sup>

Shortly after President Clinton's acquittal, Judge Richard A. Posner observed that it is not possible to "write about the Clinton impeachment and related matters without touching on politically sensitive issues, and in particular without criticizing President Clinton's conduct and that of members of Congress."<sup>59</sup> In addition:

<sup>58</sup> GERHARDT, *supra* note 13, at 192.

<sup>59</sup> POSNER, *supra* note 52, at 3.

Apart from its sheer narrative intricacy, Clinton's ordeal presents a number of distinct but interrelated issues that have to be sorted out and related to facts that are contested and incompletely known, and so in need of being weighed and sifted. There are issues of law, including criminal and constitutional law, the law of evidence, and the substantive and procedural principles that should guide impeachment and impeachment trials. There are issues of jurisprudence, concerning the appropriate roles of historical scholarship and pragmatic reasoning in answering questions of law and policy, the difference between popular and legal justice, and (a related point) the meaning and appropriateness of characterizing impeachment proceedings as 'legal.' There are issues of morality, both private and public, and of political theory, political history, political science, and the specialized branch of history and political science known as Presidential studies. There are issues that evoke the theory of conflict, or strategy, and numerous perplexing issues of political and cultural sociology, including the peculiar sociology of the 'moralistic Right' and of the 'academic Left.' (These are crude, even offensive, categorizations, but I shall defend them).<sup>60</sup>

Professor Elizabeth Rapaport writes, "[a] constant feature of the scandal was the mildness of public reaction; although the public was having fun, it couldn't be persuaded that the scandal was the stuff of national political crisis."<sup>61</sup>

As so eloquently put by professor Craig Lerner, "[A]n impeachment trial that sets off an avalanche of law review articles, but garners fewer than ten million television viewers, is not a constitutional crisis."<sup>62</sup> Professor David Kyvig writes:

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

<sup>61</sup> Rapaport, *supra* note 56.

<sup>62</sup> Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional*

Bill Clinton's impeachment attracted far more scrutiny than any threatened or actual impeachment since the case of Richard Nixon. Not only did it go further than any formal congressional action against a president in over a century, but it also did so in a manner and with a result that challenged prevailing perceptions of the validity and integrity of the constitutional removal process. For the first time since the era of Andrew Johnson, foes of a president actively engaged in constructing an arguably impeachable offense rather than merely reacting to discovered misconduct of major consequence.<sup>63</sup>

Your author has provided a list of Articles of Impeachment against William Jefferson Clinton elsewhere.<sup>64</sup>

#### IV. DONALD TRUMP'S FIRST THREE YEARS AS PRESIDENT

*"Impeachment is not a punishment for a terrible deed . . . . Impeachment is meant as a defense of the constitutional order, a defense of democracy against a president who would abuse his power to threaten the constitutional order to aggrandize power."*

*Jerrold Nadler  
Chairman  
U.S. House Judiciary Committee<sup>65</sup>*

Appearing in the Washington Post on May 13, 2017, Harvard Professor Laurence H. Tribe wrote an op-ed titled, Trump Must Be Impeached. Here's Why.<sup>66</sup> Professor Tribe writes, "[t]he time has come for Congress to launch an

*Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2059 (2002).

<sup>63</sup> KYVIG, *supra* note 55, at 310.

<sup>64</sup> See Trautman, *supra* note 2, at 592.

<sup>65</sup> Nicholas Fandos, *New Judiciary Chairman Warns Against 'Premature' Rush to Impeach*, N.Y. TIMES, Dec. 1, 2018, at A20.

<sup>66</sup> See TRIBE & MATZ, *supra* note 17.

impeachment investigation of President Trump for obstruction of justice.”<sup>67</sup> Observing that, “[t]he remedy of impeachment was designed to create a last-resort mechanism for preserving our constitutional system. It operates by removing executive-branch officials who have so abused power through what the framers called ‘high crimes and misdemeanors’ that they cannot be trusted to continue in office,” Professor Tribe describes the situation at that time as unique.<sup>68</sup> Former Republican U.S. Senator Jeff Flake observed while still in office:

In the tweeting life of our president, strategy is difficult to detect. Influencing the news cycles seems to be the principal goal; achieving short-term tactical advantage, you bet. But ultimately, it’s all noise and no signal. And in the absence of preparation and a well-considered strategy—especially when one is moving global chess pieces—volatile unpredictability is not a virtue. We have quite enough volatile actors to deal with internationally as it is without becoming one of them.<sup>69</sup>

During early July 2017, California Representative Brad Sherman introduced articles of impeachment against President Trump, HR 438. According to The Los Angeles Times, “the measure accuses Trump of obstruction of justice and seeking to ‘use his authority to hinder and cause the termination’ of an investigation into former national security advisor Michael Flynn, including ‘through threatening, and then terminating, James Comey.’”<sup>70</sup> At that time, Texas Rep. Al Green was the only co-sponsor of the measure; technically a movement toward impeachment. With Republicans in control of the House of

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> JEFF FLAKE, CONSCIENCE OF A CONSERVATIVE: A REJECTION OF DESTRUCTIVE POLITICS AND A RETURN TO PRINCIPLE 5 (2017).

<sup>70</sup> Christine Mai-Duc, *Rep. Brad Sherman Introduces Articles of Impeachment Against Trump*, L.A. TIMES (July 12, 2017 3:36 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-rep-brad-sherman-just-introduced-1499883664-htmlstory.html>.

Representatives, there was no reason to believe that the bill would get anywhere in committee.

#### A. Fitness for Office and Incapacity

While not in the category of impeachment, the Constitution does provide for instances of presidential incapacity.<sup>71</sup> While a more substantive discussion is presented elsewhere,<sup>72</sup> the topic deserves brief mention here. It is the Twenty-Fifth Amendment to the U.S. Constitution which provides for removal of an incapacitated president who is “unable to discharge the powers and duties of his office,” and states in Section 4:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President . . . .<sup>73</sup>

As discussed more fully elsewhere, a number of prominent leaders of the President’s own political party expressed concern about President Trump’s fitness to serve:

By late September 2018, reports of President Trump’s mental instability had become legion. Bob Woodward mentions a senior White House official describing of President Trump’s behavior, “It seems clear that many of the president’s senior advisors, especially those in the national security realm, are extremely concerned with his erratic

<sup>71</sup> See generally Lawrence J. Trautman, *The Twenty-Fifth Amendment: Incapacity and Ability to Discharge the Powers and Duties of Office?*, 67 CLEVE. ST. L. REV. 373 (2019).

<sup>72</sup> *Id.*

<sup>73</sup> U.S. CONST. amend. XXV, § 4.

nature, his relative ignorance, his inability to learn, as well as what they consider his dangerous views.”<sup>74</sup> Woodward has also reported that “Politico had run a long piece on Trump’s anger issues, calling Trump ‘driven by his temper’ and saying ‘anger serves as a way to manage staff, express his displeasure or simply as an outlet that soothes him . . .”

As early as August 2017, Republican U.S. Senator Bob Corker, addressing a Rotary Club meeting in Chattanooga, Tennessee[,] stated, “The president has not yet been able to demonstrate the stability, nor some of the competence, that he needs to demonstrate in order for him to be successful—and our nation and our world needs for him to be successful, whether you are Republican or Democrat.”<sup>75</sup>

Given that nuclear destruction of our civilization may be just minutes away, “[a] large and growing body of literature from many psychiatrists and other highly regarded mental health experts warn of a clear and present concern about the mental fitness of our current president, Donald Trump.”<sup>76</sup> Bandy X.

<sup>74</sup> Trautman, *supra* note 71, at 416 (quoting BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE 226 (2018)).

<sup>75</sup> Trautman, *supra* note 71, at 416 (quoting BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE 226 (2018)); see Michael Collins, *Republican Sen. Bob Corker: Trump Has Not Shown ‘Competence’ Needed to Lead*, TENNESSEAN (Aug. 17, 2017, 4:15 PM), <https://www.tennessean.com/story/news/politics/2017/08/17/republican-sen-bob-corker-donald-trump-has-not-shown-competence-needed-lead/577240001/>.

<sup>76</sup> Trautman, *supra* note 71, at 418 (citing Leonard Cruz & Steven Buser, *Introduction to Narcissistic Personality Disorder*, in A CLEAR AND PRESENT DANGER: NARCISSISM IN THE ERA OF PRESIDENT TRUMP ix (Leonard Cruz & Steven Buser eds., 2017 [hereinafter NARCISSISM])). See generally Jean Shinoda Bolen, *The Wounded Healer: Transformation Through Compassion*, in NARCISSISM, *supra*, at 203; Steven Buser, *Post Trump-matic Stress Disorder & Other Psychological Aftermath from President Trump’s Victory*, in NARCISSISM, *supra*, at 3; Leonard Cruz, *Commentary on Post Trump-matic Stress Disorder*, in NARCISSISM, *supra*, at 11; Leonard Cruz, *Trumplethinskin: Narcissism & the Will to Power*, in NARCISSISM, *supra*, at 69; Leonard Cruz & Steven Buser, *The Goldwater Rule: Crossing the Border of Assessing Public Figures*, in NARCISSISM, *supra*, at xiii; Lance Dodes, *Sociopathy*, in THE DANGEROUS CASE OF DONALD TRUMP: 27 PSYCHIATRISTS AND MENTAL HEALTH EXPERTS ASSESS A

Lee, M.D., M. Div., is an Assistant Clinical Professor in Law and Psychology at Yale School of Medicine. She also teaches at Yale Law School, co-founded Yale's Violence and Health Study Group, author of more than one hundred peer-reviewed articles, and author or editor of numerous academic books.<sup>77</sup> Professor Lee warns:

It doesn't take a psychiatrist to notice that our president is mentally compromised. Members of the press have come up with their own diagnostic nomenclature, calling the president a 'mad king' (Dowd 2017), a 'nut job' (Collins 2017), and 'emotionally unhinged' (Rubin 2017). Conservative columnist George Will (2017) writes that the president has a 'disorderly mind.' By speaking out as mental health professionals, we lend support and dignity to our fellow citizens who are justifiably alarmed by the president's furious tirades, conspiracy fantasies, aversion to facts, and attraction to violence. . . . When he lies, does he know he is lying, or does he believe his own lies? When he makes wild accusations, is he truly paranoid, or is he consciously and cunningly

PRESIDENT 83 (Bandy X. Lee ed., 2017) [hereinafter DANGEROUS CASE]; Henry J. Friedman, *On Seeing What You See and Saying What You Know: A Psychiatrist's Responsibility*, in DANGEROUS CASE, *supra*, at 160; Nanette Gartrell & Dee Mosbacher, *He's Got the World in His Hands and His Finger on the Trigger: The Twenty-Fifth Amendment Solution*, in DANGEROUS CASE, *supra*, at 343; James Gilligan, *The Issue Is Dangerousness, Not Mental Illness*, in DANGEROUS CASE, *supra*, at 170; Leonard L. Glass, *Should Psychiatrists Refrain from Commenting on Trump's Psychology?*, in DANGEROUS CASE, *supra*, at 151; Judith Lewis Herman & Bandy X. Lee, *Prologue*, in DANGEROUS CASE, *supra*, at 1; Luba Kessler, *Birtherism and the Deployment of the Trumpian Mind-Set*, in DANGEROUS CASE, *supra*, at 261; Bandy X. Lee, *Our Duty to Warn*, in DANGEROUS CASE, *supra*, at 11; Robert Jay Lifton, *Our Witness to Malignant Normality*, in DANGEROUS CASE, *supra*, at xv; Kathryn Madden, *The Hall of Mirrors: Narcissism and Celebrity in the World of Twitter and Reality TV*, in NARCISSISM, *supra*, at 145; David M. Reiss, *Cognitive Impairment, Dementia, and POTUS*, in DANGEROUS CASE, *supra*, at 126; Tom Singer, *President Trump and the American Selfie: Archetypal Defenses of the Group Spirit*, in NARCISSISM, *supra*, at 17; Steve Wruble, *Trump's Daddy Issues: A Toxic Mix for America*, in DANGEROUS CASE, *supra*, at 268.

<sup>77</sup> Bandy X. Lee, M. Div., *Psychiatry*, YALE SCH. MED., [https://medicine.yale.edu/psychiatry/people/bandy\\_lee.profile](https://medicine.yale.edu/psychiatry/people/bandy_lee.profile) (last visited May 1, 2020).



trying to deflect attention from his misdeeds? . . . . A man can be both evil and mentally compromised—which is a more frightening proposition. Power not only corrupts but also magnifies existing psychopathologies, even as it creates new ones. Fostered by the flattery of underlings and the chants of crowds, a political leader's grandiosity may morph into grotesque delusions of grandeur. Sociopathic traits may be amplified as the leader discovers that he can violate the norms of civil society and even commit crimes with impunity. And the leader who rules through fear, lies, and betrayal may become increasingly isolated and paranoid, as the loyalty of even his closest confidants must forever be suspect.<sup>78</sup>

#### B. Early Movement to Impeach Donald Trump

Professor Philip Bobbitt writes, “[w]as the hacking of the Democratic campaign chairman’s emails in 2016 like the burglary of the Democratic campaign chairman’s correspondence at the Watergate complex in 1972? Was the Republican campaign’s contacts with Russian diplomats in 2016 like the Nixon campaign’s contacts with South Vietnamese diplomats in 1968?”<sup>79</sup> Other threshold questions include, “[d]o the House Judiciary Committee’s charges against Nixon set a precedent defining an ‘impeachable offence’ arising from improper use of the Justice Department, even though the President resigned before the House could vote on this charge?”<sup>80</sup>

Just days after the 2018 midterm elections, Representative Jerold Nadler who then becomes responsible for any potential impeachment hearings by virtue of his status as chair of the House Judiciary Committee, states on the popular television broadcast *This Week with George Stephanopoulos*:

<sup>78</sup> Herman & Lee, *supra* note 76, at 3.

<sup>79</sup> See Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J. F. 515, 515 (2018), <https://www.yalelawjournal.org/forum/impeachment-a-handbook>.

<sup>80</sup> *Id.* at 516.

I think it's too early to—to make [a] determination [about impeachment]. You have to be very reluctant to do an impeachment. . .

We will have to see from the Mueller investigation, from whatever we find, because Congress should be active in our own investigations and our own upholding of our duty to hold the administration accountable and to provide a check and a balance.

We have to look into all kinds of questions. We'll have to find out . . . [whether] the president has or has not committed apparently impeachable offenses and whether those impeachable offenses rise to the gravity which would necessitate putting together—putting the country through the trauma of an impeachment process . . . .

Right now our top priority is to protect the Mueller investigation, to protect the integrity of that investigation from the White House attempt to stifle it and to—to interfere with it.<sup>81</sup>

Constitutional law Professor Catherine J. Ross observes, “[e]very member of Congress swore an oath of office committing to ‘support and defend the Constitution.’ We the people, who formed the Republic, should hold our representatives to that oath.”<sup>82</sup> Consider:

The fact that a judicial remedy may be available to halt or undo specific presidential violations does not diminish the need for Congress to act without further delay in order to prevent continuing harm to the rule of law.

Any impeachment inquiry, and any vote to impeach, as well as the requisite trial that would

<sup>81</sup> *This Week* Transcript 11-11-18: Rep. Elijah Cummings, Rep. Jerrold Nadler and Kellyanne Conway, ABC NEWS, (Nov. 11, 2018 9:32 AM), <https://abcnews.go.com/Politics/week-transcript-11-11-18-rep-elijah-cummings/story?id=59109619>.

<sup>82</sup> Catherine J. Ross, Professor at George Washington Univ. Sch. of Law, Remarks at National Press Club in Washington, D.C. (Dec. 6, 2017) (transcript on file with author).

follow in the Senate, would be a deliberate and deliberative process. By definition, criminal investigation, indictment and trial would take much longer to play out. Impeachment was intended as a safety valve for reining in violations of the public trust. Indeed it is the failsafe at the heart of the constitutional structure to be used when the president threatens constitutional norms, the institutions on which democracy rests, and the rule of law.

The stakes are high, the dangers to our constitutional system are great. Delay in beginning this process is dangerous and irresponsible.<sup>83</sup>

### C. Tom Steyer Impeachment Efforts

From almost the moment of Donald Trump's 2016 election, Tom Steyer has been leading an effort to impeach and recall President Donald Trump. Steyer, who according to Forbes had a net worth of \$1.6 billion as of November 11, 2018, spent \$65 million backing environmental causes and Democratic candidates during the 2016 election cycle. Steyer and his wife, Kat Taylor, have reportedly donated tens of millions of dollars for "advanced energy" research to their alma maters Yale and Stanford.<sup>84</sup> Mr. Steyer's Op-Ed appearing in the New York Times is titled *Democrats Must Impeach Trump*, and reads in relevant part:

Democrats' inability to run the table on a Republican Party that depended on lying, race-baiting and suppressing the vote is a sign that the American people do not know what the Democratic Party stands for. We Democrats can begin to answer that question by acting to guarantee equal justice under the law.

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

<sup>84</sup> *Thomas Steyer*, FORBES, <https://www.forbes.com/profile/thomas-steyer/#ece9eb973f5b> (last visited May 1, 2020).

As President Trump continues to accelerate his lawlessness, the new Democratic House majority must initiate impeachment proceedings against him as soon as it takes office in January.

For nearly two years, Mr. Trump has publicly flouted his oath of office. He has turned the presidency into a moneymaking enterprise for a family business he refuses to divest from, in direct violation of any plain reading of the Constitution. He is an all but unindicted co-conspirator in two federal felony cases. He has created an atmosphere of criminality through his hateful, violent rhetoric against political opponents, journalists and private citizens alike.

Most egregiously, he has a longstanding pattern of obstructing justice. On Wednesday, he continued this by firing Attorney General Jeff Sessions and installing Matthew Whitaker—who has publicly called for curtailing the special counsel’s investigation—as acting attorney general, spurring a constitutional crisis that threatens the rule of law itself.

As the list of Mr. Trump’s impeachable offenses—at least nine and counting—has grown, more than 6.2 million people across the country have signed a petition, created by my organization Need to Impeach, demanding that their representatives confront his lawlessness. For months, public support for impeaching the president has been roughly equal to what it was before Richard Nixon resigned.

Yet the current Democratic leadership has insisted that no one so much as mention the word ‘impeachment.’ Instead, they have suggested using Mr. Trump’s abuses of power as bargaining chips in future negotiations.

For too long, Democratic leaders have convinced their fellow elected officials that bland, nonconfrontational and incremental centrism is the way to win elections and make progress. In

truth, it's just the easiest way to protect the balance of power in Washington. But by trying to meet a corrupt Republic Party halfway, instead of taking clear stands for what's right, they have failed to define the party and failed to protect their constituents.

We see the same approach on impeachment: As a way to delay making a decision, Democratic leaders have insisted on waiting for the special counsel, Robert Mueller, to deliver his report. But now the investigation is at risk, because Mr. Whitaker could prevent the special counsel's team from reaching a just conclusion or even releasing its findings to the public . . . .

We cannot allow this to be an argument about what Republicans will permit—it's about demanding the truth and protecting the foundations of our free society. Anything less would mean abandoning the Constitution.<sup>85</sup>

#### D. Impeachable Offenses

As of November 11, 2018, Tom Steyer's Need to Impeach movement listed the following nine impeachable offenses:<sup>86</sup>

##### 1. Obstructing Justice;<sup>87</sup>

<sup>85</sup> Tom Steyer, Opinion, *Democrats Must Impeach Trump*, N.Y. TIMES, Nov. 10, 2018, at A25.

<sup>86</sup> Donald Trump's 10 Impeachable Offenses, NEED TO IMPEACH, <https://www.needtoimpeach.com/impeachable-offenses/> (last visited May 1, 2020).

<sup>87</sup> See Devlin Barrett, John Wagner & Seung Min Kim, *Trump and Sessions Feud Over the Direction of the Justice Department*, WASH. POST (Aug. 23, 2018 6:16 PM), [https://www.washingtonpost.com/politics/trump-says-sessions-was-given-attorney-general-job-only-because-of-his-loyalty-during-campaign/2018/08/23/47d7c20c-a6c7-11e8-8fac-12e98c13528d\\_story.html](https://www.washingtonpost.com/politics/trump-says-sessions-was-given-attorney-general-job-only-because-of-his-loyalty-during-campaign/2018/08/23/47d7c20c-a6c7-11e8-8fac-12e98c13528d_story.html); see also Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. VA. L. REV. 100 (2018); Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>; Jon Swaine, *Jeff Sessions Firing: Top Republicans Warn Trump that Mueller Inquiry Must Continue*, GUARDIAN (Nov. 7, 2018 7:21 PM), <https://www.theguardian.com/us-news/2018/nov/07/jeff-sessions-fired->

2. Violating the Emoluments Clause of the U.S. Constitution;<sup>88</sup>

3. Conspiring with Others to Commit Crimes Against the United States, and Attempting to Conceal Those Violations;<sup>89</sup>

4. Advocating Violence and Undermining Equal Protection Under the Law;<sup>90</sup>

5. Abusing the Pardon Power;<sup>91</sup>

6. Engaging in Conduct that Grossly Endangers the Peace and Security of the United States;<sup>92</sup>

7. Directing Law Enforcement to Investigate and Prosecute Political Adversaries for Improper and Unjustifiable Purposes;<sup>93</sup>

8. Undermining the Freedom of the Press;<sup>94</sup> and

us-attorney-general.

<sup>88</sup> U.S. CONST. art. I, § 9, cl. 8.; see Don Mayer & Adam Sulkowski, *The U.S. Constitution's Emoluments Clauses: How History, Behavioral Psychology, and the Framers' Understanding of Corruption All Require an End to President Trump's Conflicts of Interest*, 7 BR. J. AM. LEG. STUDS. 257 (2018); Trautman, *supra* note 48.

<sup>89</sup> See Glenn Kessler, *Trump's Claim that 'I Have Nothing to do With Russia,'* WASH. POST (July 27, 2016 4:11 PM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/07/27/trumps-claim-that-i-have-nothing-to-do-with-russia/>; Sharon LaFraniere, Benjamin Weiser & Maggie Haberman, *Prosecutors Say Trump Organized Illegal Payments*, N.Y. TIMES, Dec. 8, 2018, at A1.

<sup>90</sup> See U.S. CONST. amend. XIV, § 1.

<sup>91</sup> See Peter Baker, *Trump, Amid New Revelations on Russia, Asserts 'Complete Power to Pardon,'* N.Y. TIMES, July 23, 2017, at A21; Sadie Gurman & Byron Tau, *U.S. Charges Russian In Election Meddling*, WALL ST. J., Oct. 20, 2018, at A1.

<sup>92</sup> See generally MICHAEL V. HAYDEN, *THE ASSAULT ON INTELLIGENCE: AMERICAN NATIONAL SECURITY IN AN AGE OF LIES* (2018); see also Matthew Rosenberg & Maggie Haberman, *Spies Are Listening, but Trump Stays on iPhone*, N.Y. TIMES, Oct. 25, 2018, at A1; Matthew Rosenberg & Maggie Haberman, *Trump Dismisses Report of Spies Listening to His Calls as 'Soooo Wrong,'* N.Y. TIMES, Oct. 26, 2018, at A7.

<sup>93</sup> See John Nichols, *Donald Trump Just Committed a Fully Impeachable Offense*, NATION (Sept. 5, 2018), <https://www.thenation.com/article/donald-trump-just-committed-a-fully-impeachable-offense/>; Michael S. Schmidt & Maggie Haberman, *Trump Sought To Have Foes Face Charges*, N.Y. TIMES, Nov. 21, 2018 at A1.

<sup>94</sup> See Joe Flint, *CNN Sues the White House, Seeks Return of Press Pass*, WALL ST. J., Nov. 14, 2018, at A3; Jim Rutenberg, *Chipping Away at the 'Enemy': The President's Almost Daily BroadSides Against Journalists Seems*

### 9. Cruelly and Unconstitutionally Imprisoning Children and their Families.<sup>95</sup>

Elsewhere, I have provided a discussion of the logic behind each of these potential impeachable offenses, any one of which may be found to constitute high crimes and misdemeanors.<sup>96</sup>

#### E. Mueller Report and Concern of Former U.S. Senators

Our Constitution, observes Professor Dershowitz, “is fragile and imperfect, as is democracy itself.”<sup>97</sup> On December 10, 2018, forty-four former U.S. senators write in an open letter published by The Washington Post:

*to be Delivering the Desired Effect*, N.Y. TIMES, Oct. 29, 2018, at B1; Sonja West, *Presidential Attacks on the Press*, 80 MO. L. REV. 915, 916 (2018) (citing Margaret Sullivan, *Trump’s Vicious Attack on the Media Shows one Thing Clearly: He’s Running Scared*, WASH. POST (Aug. 23, 2017), [https://www.washingtonpost.com/lifestyle/style/trumps-viciousattack-on-the-press-shows-one-thing-clearly-hes-running-scared/2017/08/23/4fc1a6a2-8802-11e7-a50fe0d4e6ec070a\\_story.html](https://www.washingtonpost.com/lifestyle/style/trumps-viciousattack-on-the-press-shows-one-thing-clearly-hes-running-scared/2017/08/23/4fc1a6a2-8802-11e7-a50fe0d4e6ec070a_story.html) (calling Trump’s campaign against the press “the most sustained attack any president has ever made on the news media”)); see also Roy Shapira, *Law As Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. & POL’Y REV. (2018), <https://pdfs.semanticscholar.org/7850/e36500f6e63ff2c265ca90ee69e0a488ca33.pdf>.

<sup>95</sup> See Caitlin Dickerson, *The Price Tag of Immigrant Family Separations: \$80 Million and Rising*, N.Y. TIMES, Nov. 21, 2018, at A11; Barbara Stark, *Introduction: The Trump Administration and Children’s Human Rights*, 56 FAM. CT. REV. 283 (2018) (providing other symposium observations about this topic); Jeremy Raff, *The Separation Was So Long. My Son Has Changed So Much*, ATLANTIC (Sept. 7, 2018), <https://www.theatlantic.com/politics/archive/2018/09/trump-family-separation-children-border/569584/>; Alexander Burns & Astead W. Herndon, *Trump Escalates Use of Migrants As Election Ploy*, N.Y. TIMES, Oct. 23, 2018, at A1; Alicia A. Caldwell, *Surge in Some Migrants Confounds Officials*, WALL ST. J., Oct. 15, 2018, at A3; Ryan Dube & Robbie Whelan, *More Migrants at Border Are Coming as Families*, WALL ST. J., Nov. 17, 2018, at A1; Astead W. Herndon & Sydney Ember, *Trump’s Theme Is Outshining Election Gold: Focus on Immigration Eclipses Job News*, N.Y. TIMES, Nov. 3, 2018; Elisabeth Malkin, *Migrant Caravan Reaches U.S. Border, and Waits*, N.Y. TIMES, Nov. 19, 2018, at A4; Kirk Semple & Elisabeth Malkin, *First Wave of Migrants in Caravan Reaches U.S. Border*, N.Y. TIMES, Nov. 15, 2018, at A6; Kirk Semple, *Blistered Feet and Sleepless Nights: A Fraying Exodus Presses On*, N.Y. TIMES, Oct. 26, 2018, at A7.

<sup>96</sup> See Trautman, *supra* note 2, at 550-79.

<sup>97</sup> ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* (2018).

Dear Senate colleagues,

As former members of the U.S. Senate, Democrats and Republicans, it is our shared view that we are entering a dangerous period, and we feel an obligation to speak up about serious challenges to the rule of law, the Constitution, our governing institutions and our national security.

We are on the eve of the conclusion of special counsel Robert S. Mueller III's investigation and the House's commencement of investigations of the president and his administration. The likely convergence of these two events will occur at a time when simmering regional conflicts and global power confrontations continue to threaten our security, economy and geopolitical stability.

It is a time, like other critical junctures in our history, when our nation must engage at every level with strategic precision and the hand of both the president and the Senate.

We are at an inflection point in which the foundational principles of our democracy and our national security interests are at stake, and the rule of law and the ability of our institutions to function freely and independently must be upheld.

During our service in the Senate, at times we were allies and at other times opponents, but never enemies. We all took an oath swearing allegiance to the Constitution. Whatever united or divided us, we did not veer from our unwavering and shared commitment to placing our country, democracy and national interest above all else.

At other critical moments in our history, when constitutional crises have threatened our foundations, it has been the Senate that has stood in defense of our democracy. Today is once again such a time.

Regardless of party affiliation, ideological leanings or geography, as former members of this



great body, we urge current and future senators to be steadfast and zealous guardians of our democracy by ensuring that partisanship or self-interest not replace national interest.

[signed by 44 Former U.S. senators]<sup>98</sup>

Given law review space limitations, the events surrounding the decision to use critically needed 2019 Ukraine funding as leverage to insist on investigations into political rivals of the U.S. president, and subsequent cover-up, is the remaining focus of this Article.

## V. UKRAINE

### A. The Trump-Zelensky July 25, 2019 Phone Call

Just one day after testimony before Congress by Robert Mueller “about how the Russians had tried to help elect Mr. Trump by organizing the theft and release of emails damaging to his opponent. . . . Now the president and his minions were the aggressors, seeking help with the 2020 re-election effort.”<sup>99</sup> President Trump on Thursday, July 25, 2019, at 9:03 a.m., “was connected [by White House phone] to Volodymyr Zelensky, [and asked] the newly elected president of Ukraine . . . a leader in dire need of American military aid . . . to ‘do us a favor’ by investigating one of [Trump’s] political rivals and an unfounded

<sup>98</sup> Max Baucus, Evan Bayh, Jeff Bingaman, Bill Bradley, Richard Bryan, Ben Nighthorse Campbell, Max Cleland, William Cohen, Kent Conrad, Al D’Amato, John C. Danforth, Tom Daschle, Dennis DeConcini, Chris Dodd, Byron Dorgan, David Durenberger, Russ Feingold, Wyche Fowler, Bob Graham, Chuck Hagel, Tom Harkin, Gary Hart, Bennett Johnston, Bob Kerrey, John Kerry, Paul Kirk, Mary Landrieu, Joe Lieberman, Blanche Lincoln, Richard Lugar, Barbara Mikulski, Ben Nelson, Sam Nunn, Larry Pressler, David Pryor, Don Riegle, Chuck Robb, Jay Rockefeller, Jim Sasser, Alan Simpson, Mark Udall, John W. Warner, Lowell Weicker & Tim Wirth, Letter to the Editor, *We are Former Senators. The Senate Has Long Stood in Defense of Democracy—and Must Again.*, WASH. POST (Dec. 10, 2018 8:30 PM), [https://www.washingtonpost.com/opinions/we-are-former-senators-the-senate-has-long-stood-in-defense-of-democracy—and-must-again/2018/12/10/3adfbdea-fca1-11e8-ad40-cdfd0e0dd65a\\_story.html](https://www.washingtonpost.com/opinions/we-are-former-senators-the-senate-has-long-stood-in-defense-of-democracy—and-must-again/2018/12/10/3adfbdea-fca1-11e8-ad40-cdfd0e0dd65a_story.html).

<sup>99</sup> Sharon LaFraniere, Andrew E. Kramer & Danny Hakim, *Trump, Ukraine and Impeachment: The Inside Story of How We Got Here*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/us/ukraine-trump.html>.

conspiracy theory about the 2016 election.”<sup>100</sup> Journalist Nicholas Fandos writes, “[a] White House official who listened to President Trump’s July phone call with Ukraine’s leader described it as ‘crazy,’ ‘frightening’ and ‘completely lacking in substance related to national security,’ according to a memo written by the whistle-blower at the center of the Ukraine scandal.”<sup>101</sup>

The New York Times reports this “30-minute conversation has now emerged as a mortal threat to Mr. Trump’s presidency. . . . More than a half dozen Trump administration officials have called the phone conversation and the events surrounding it insidious and shocking. Five officials who dealt with Ukraine have resigned since September.”<sup>102</sup> Journalist David E. Sanger writes, “in the haunting words attributed to Gordon D. Sondland, who parlayed political donations into the ambassadorship to the European Union . . . ‘President Trump cares more about the investigation of Biden’ than about Ukraine’s confrontation with Mr. Putin’s forces.”<sup>103</sup> Sanger adds, “It was perhaps the most telling, and to some the most damning, line of the torrent of revelations in the past two months—the distillation of an internal argument inside the Trump administration that the president’s closest aides have endeavored to keep hidden.”<sup>104</sup>

During the months to follow, in a well-worn public relations strategy that has become predictable to observers of Mr. Trump’s career—the president has characterized well-established facts as “fake news”; his own behavior as “perfect”; and maligned each of his accusers.<sup>105</sup> Journalist Maggie Haberman writes:

Over four decades in public life, President Trump has sought to bend business, real-estate

<sup>100</sup> *Id.*

<sup>101</sup> See Nicholas Fandos, *Vowing Defiance, White House Says Inquiry Is Invalid: ‘Crazy’ Ukraine Call Shook Trump Aide, Document Says*, N.Y. TIMES, Oct. 9, 2019, at A1.

<sup>102</sup> See LaFraniere, et al., *supra* note 90.

<sup>103</sup> David E. Sanger, *For President, Case of Policy Vs. Obsession*, N.Y. TIMES, Nov. 15, 2019, at A1.

<sup>104</sup> *Id.*

<sup>105</sup> See Maggie Haberman, *Trump’s Defense: Malign Accusers and Attack Facts*, N.Y. TIMES, Nov. 23, 2019, at A1.

and political rivals to his will. Facts that cut against his position have been declared false. Witnesses who have questioned his motives have been declared dishonest. Critics of his behavior are part of a corrupt, shadowy effort aiming to damage him.

And, as he likes to put it, his own actions are always, to one degree or another, ‘perfect.’ . . . The White House and congressional Republicans allied with Mr. Trump are preparing for a Senate trial in which they will not only say that Mr. Trump did nothing wrong, but present a version of events that portray him as the victim of a broad plot to undermine his presidency even before it began.

That narrative will include claims that Ukrainians meddled in the 2016 election instead of the Russians—an unfounded allegation refuted by the administration’s own intelligence agencies . . . .”<sup>106</sup>

#### B. Two Years Earlier

When Mr. Trump was elected president, Ukraine’s president until May 2019, Petro O. Poroshenko, began “an elaborate campaign to win over Mr. Trump . . . includ[ing] trade deals that were politically expedient for Mr. Trump, meetings with Rudolph W. Giuliani, the freezing of potentially damaging criminal cases and attempts to use the former Trump campaign chairman Paul J. Manafort as a back channel.”<sup>107</sup> Consider the New York Times’ observation:

An examination of the first year of Mr. Trump’s dealings with Ukraine shows how the White House also saw the relationship as a transactional one that could help Mr. Trump politically.

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

<sup>107</sup> Mark Mazzetti, Eric Lipton & Andrew E. Kramer, *From the Start, Ukraine Tried to Woo Trump*, N.Y. TIMES, Nov. 4, 2019, at A1.

....

Mr. Poroshenko's strategy yielded results. The Trump administration reversed an Obama-era moratorium on sales of lethal weapons that Ukraine sought for its fight against the separatists in the country's east.

Near the end of 2017, just as the government in Kiev was trying to get final approval from the Trump administration on the sale of the Javelin anti-tank weapons, Mr. Poroshenko's prosecutor general, Yuriy Lutsenko, had begun freezing cases in Ukraine relevant to the Mueller investigation, including an inquiry tracing millions of dollars that Ukrainian political figures paid to Mr. Manafort.

....

Advisers [to Mr. Poroshenko] came up with an idea that they were certain would appeal to Mr. Trump's base: a plan to buy tens of millions of dollars' worth of American-mined coal to help supply Ukrainian power plants... the chief foreign policy adviser to Mr. Poroshenko, saw the plan to buy coal from American mines as a perfect move. 'It was a deal that pleased Trump,'... "He had promised work for Pennsylvania coal miners. It was a win-win situation."

Ukraine sent executives from its state-owned electric utility Centrenergo to Pittsburgh to meet with potential coal suppliers, with the help of the United States Commerce Department. Mr. Poroshenko met with Mr. Trump and separately with Energy Secretary Rick Perry and Commerce Secretary Wilbur L. Ross Jr. both of whom helped secure the deal. Within weeks—unusually fast for an international deal—a Latrobe, Pa.-based supplier, Xcoal Energy & Resources, signed a contract to deliver 700,000 tons of coal to Ukraine.

The economic impact of the deal was relatively small for the United States—just 70 American jobs, according to the Commerce Department estimate. But it was the first of three

similar deals intended to warm relations between the United States and Ukraine.

The Ukrainian government signed a separate \$1 billion deal in early 2018 with GE Transportation to build 30 new train locomotives in Erie, Pa., and to retrofit other aging Ukrainian train systems. And Pennsylvania-based Westinghouse Electric Company also signed its own deal to supply more fuel for Ukraine's nuclear power plants. The contract gave Westinghouse a greater share of the business of supplying nuclear fuel to Ukraine, which Russia used to dominate.<sup>108</sup>

### C. Whistleblower Complaint

The July 25, 2019, "Do us a favor and investigate Democrats" Trump-Zelensky phone call was apparently so disturbing to some of those having awareness that, "[t]he alarm among officials who heard the exchange led to an extraordinary effort to keep many more people from learning about it."<sup>109</sup> Peter Baker of the New York Times writes:

In the days to come, according to a whistleblower complaint . . . White House officials embarked on a campaign to 'lock down' the record of the call, removing it from the usual electronic file and hiding it away in a separate system normally used for classified information. But word began to spread anyway, kicking off a succession of events that would eventually reveal the call to the public and has now put Mr. Trump at risk of being impeached . . . for abusing his power and betraying his office. The story . . . is one of a White House scrambling to keep secrets to protect a president willing to cross lines others

<sup>108</sup> *Id.*

<sup>109</sup> Peter Baker, *Complaint Asserts A White House Cover-Up*, N.Y. TIMES, Sept. 27, 2019, at A1.

would not, only to find that the very government he disparages would expose him.

“The White House officials who told me this information were deeply disturbed by what had transpired in the phone call,” the whistle-blower, a C.I.A. official who once worked at the White House, wrote in his complaint, which was declassified and made public by the House Intelligence Committee.<sup>110</sup>

The New York Times reports, “[t]he story of how Mr. Trump and Mr. Giuliani operated in Ukraine has emerged gradually in recent months. It was laid out in further detail . . . in a reconstructed transcript of Mr. Trump’s phone call this summer with a new Ukrainian president and in a complaint filed by a whistleblower . . . .”<sup>111</sup> Based on documents and interviews the front-page story states, “the latest revelations show that Mr. Trump and Mr. Giuliani ran what amounted to a shadow foreign policy in Ukraine that unfolded against the backdrop of three elections—this year’s vote in Ukraine, and the 2016 and 2020 presidential races in the United States.”<sup>112</sup>

In response to the whistle-blower revelations, President Trump “repeatedly referred to the whistle-blower and condemned the news media as ‘crooked’ for reporting [it]. . . . ‘I want to know who’s the person who gave the whistle-blower the information because that’s close to a spy,’ Mr. Trump said.”<sup>113</sup> By mid-November, reports surface that, “President Trump had discussed dismissing the intelligence community’s inspector general, Michael Atkinson, because Mr. Atkinson reported a whistleblower’s complaint about Mr. Trump’s interactions with Ukraine to Congress after concluding it was credible, according to four people familiar with the discussions.”<sup>114</sup> Soon, “[a]t least one additional whistleblower with firsthand knowledge of the

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

<sup>111</sup> Kenneth P. Vogel, Andrew E. Kramer & David E. Sanger, *A Shadow Foreign Policy Backfires on the President*, N.Y. TIMES, Sept. 29, 2019, at A1.

<sup>112</sup> *Id.*

<sup>113</sup> Maggie Haberman & Katie Rogers, *President Likens Inside Sources to ‘Spies,’* N.Y. TIMES, Sept. 27, 2019, at A1.

<sup>114</sup> Maggie Haberman & Michael S. Schmidt, *Trump Mulled Firing Official for Reporting Ukraine Call*, N.Y. TIMES, Nov. 13, 2019, at A15.

circumstances around President Trump's July call with his Ukrainian counterpart has come forward, according to lawyers representing both the individual and the CIA officer whose initial complaint helped spark an impeachment inquiry."<sup>115</sup> President Trump tweets, "[w]here is the Whistleblower, and why did he or she write such a fictitious and incorrect account of my phone call with the Ukrainian President[?]"<sup>116</sup> In response, The New York Times writes, "virtually every piece of information that the public first learned from the whistle-blower's complaint has been corroborated by the White House's reconstructed transcript of your [Trump's] July 25 call with President Zelensky of Ukraine or by the congressional testimony and documents provided by current and former administration officials."<sup>117</sup> Consider the New York Times' summary of what is now known:

1.The President [Trump] did solicit interference.

....

2.Giuliani and Barr were involved.

....

3.There was reason for alarm.

....

4.Yes, that's what he said [sought to pressure the Ukrainian leader].

....

5.White House officials knew the call was problematic.

....

6.This is not proved [identity of State Department official said to listen in on the call].

....

7.A transcript was put in a highly classified computer system.

....

<sup>115</sup> Dustin Volz, *Second Official Comes Forward On Trump*, WALL ST. J., Oct. 7, 2019, at A1; see also Annie Karni & Nicholas Fandos, *Legal Team Says It Represents a Second Whistle-Blower Over Trump and Ukraine*, N.Y. TIMES, Oct. 7, 2019, at A1.

<sup>116</sup> Editorial Bd., Opinion, *Thanks, Whistle-Blower, Your Work is Done*, N.Y. TIMES, Oct. 27, 2019, at SR8.

<sup>117</sup> *Id.*

8.They [Volker & Sondland] coordinated closely with the Ukrainians.

....

9.Giuliani told Ukrainians what needed to be done.

....

10.Giuliani reached out to senior Ukrainian officials.

....

11.Ukrainian officials did travel to Washington.

....

12.Ambassador Marie Yovanovitch was summarily recalled.

....

13.Yuriy Lutsenko, a Ukrainian prosecutor, undercut the ambassador.

....

14.Trump officials worried about Giuliani's behavior.

....

15.A White House meeting depended on Ukrainian [announcement of investigations against Trump's domestic political rivals].

....

16.The administration turns colder toward Ukraine.

....

17.More about the highly classified server.

....

18.Ukraine aid is frozen.

....

19.The aid freeze was ordered by the President . . . .<sup>118</sup>

#### D. In Search of the Facts

As 2020 begins, the Trump administration continues to prohibit testimony before Congress by administration officials as

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



to the relevant events—and few documents have been produced that provide a factual recounting of events. Accordingly, what follows are excerpts from Congressional testimony and other sources that are revealed over the course of several months—thus building a clear picture of political extortion of a foreign power by withholding Congressionally-approved, desperately needed, funds, for Trump’s personal gain. On October 5, 2019, the Wall Street Journal runs a front page story disclosing that, “[t]wo weeks after national elections in April [2019] vaulted him from the role of television comic to Ukrainian president, Volodymyr Zelensky got the word that President Trump’s personal lawyer wanted to come to Kyiv to talk.”<sup>119</sup> Consider:

In an April 7[, 2019,] appearance on Fox News, the former New York City mayor [Giuliani] had made it clear he wanted information about his client’s political rival, Joe Biden, and his family. Mr. Zelensky, fearful of getting sucked into a foreign drama when he had plenty at home, declined to take the meeting. He got sucked in anyway. Over the next several months, Mr. Zelensky’s administration tried to sort through conflicting signals from Washington that have now become central to an impeachment inquiry into Mr. Trump. A summit dangled by the U.S. leader kept receding. At the last minute, it was announced that Energy secretary Rick Perry would be attending his inauguration instead of Vice President Mike Pence. Most worrying, for a country that depends on its strategic alliance with the U.S. to help fend off Russian aggression, the Ukrainians learned long after the fact that Washington had decided to withhold nearly \$400 million in approved military assistance.<sup>120</sup>

An October 5, 2019, story by New York Times journalist Peter Baker notes, “President Trump denied again on Friday

<sup>119</sup> Alan Cullison, Georgi Kantchev, Thomas Grove & James Marson, *Ukraine Sweated as U.S. Pressed for Probe*, WALL ST. J., Oct. 5, 2019, at A1.

<sup>120</sup> *Id.*

that there was any quid pro quo attached to his pressure on Ukraine to investigate his political enemies, but text messages and testimony collected by congressional investigators indicated that his own representatives saw it differently.”<sup>121</sup> Of particular importance:

Among other things, the messages demonstrated that the president’s team made clear to Volodymyr Zelensky, Ukraine’s president, even before the now famous July 25 call with Mr. Trump, that he would have to agree to the investigations to confirm a visit to the White House that had been promised and then held up for two months.<sup>122</sup>

The Wall Street Journal reports, “[a] Pentagon official told House impeachment investigators that a White House budget aide said at a July 26[, 2019,] meeting that nearly \$400 million in aid to Ukraine was on hold because of President Trump’s concerns about corruption in the country.”<sup>123</sup> In addition, “Ms. [Laura] Cooper’s was one of three testimonies for which House committees released transcripts . . . . Transcripts of testimony by two State Department Ukraine experts, Catherine Croft and Christopher Anderson, revealed longstanding concerns in the Trump administration about the White House’s handling of foreign policy toward Ukraine.”<sup>124</sup> As the chronology of the Ukraine-Trump matter continues to be revealed, the New York Times reports, “President Trump had already been briefed on a whistle-blower’s complaint about his dealings with Ukraine when he unfroze military aid for the country in September, according to two people familiar with the matter.”<sup>125</sup>

<sup>121</sup> Peter Baker, *President Denies Quid Pro Quo for Kiev, but Envoys Saw Signs*, N.Y. TIMES, Oct. 5, 2019, at A1.

<sup>122</sup> *Id.*

<sup>123</sup> Andrew Duehren, *Official Testified on Ukraine Aid Concerns*, WALL ST. J., Nov. 12, 2019, at A6.

<sup>124</sup> *Id.*

<sup>125</sup> Michael S. Schmidt, Julian E. Barnes & Maggie Haberman, *Trump Had Been Told About Whistle-Blower Before Releasing Aid*, N.Y. TIMES, Nov. 27, 2019, at A16.

### E. Congressional Testimony

Attempts by the House of Representatives to discover relevant facts were repeatedly hampered by the lack of White House cooperation in producing requested documents and the failure of many knowledgeable witnesses to appear, including Rudolph W. Giuliani, Vice President Mike Pence, Mike Pompeo, Mick Mulvaney, John R. Bolton, former White House counsel Donald F. McGahn II, and Energy Secretary Rick Perry.<sup>126</sup> During late September and continuing throughout November 2019, hearings held before the House Permanent Select Committee on Intelligence paint an image of what actually happened between President Trump and the Ukrainian president.<sup>127</sup> Highlights of these revelations follow.

#### 1. Ambassador Marie Yovanovitch

Enjoying a distinguished State Department career which included service to six U.S. presidents, longtime diplomat Marie L. Yovanovitch is asked, “[w]ould she extend her term as ambassador to Ukraine, scheduled to end in August [2019], into 2020? Less than two months later came another departmental communiqué: Get ‘on the next plane’ to Washington. Her ambassadorship was over . . . even though [per her boss] she had ‘done nothing wrong.’”<sup>128</sup> The New York Times reports that Ambassador Yovanovitch’s account:

began with a business proposition being pursued in Ukraine by two Americans who, according to an indictment against them unsealed on Thursday, wanted her gone, and who would

<sup>126</sup> See Peter Baker, *Gaps in Witness List Leave Loose Ends*, N.Y. TIMES, Nov. 22, 2019, at A1 (noting John Bolton’s announcement via Twitter on Jan. 6, 2020, regarding his conditional willingness to testify before the Senate if subpoenaed).

<sup>127</sup> See generally Hearing Calendar, U.S. HOUSE REPRESENTATIVES PERMANENT SELECT COMM. ON INTELLIGENCE, <https://intelligence.house.gov/calendar/?EventTypeID=215&CategoryID=0> (last visited May 1, 2020).

<sup>128</sup> Sharon LaFraniere, Nicholas Fandos & Andrew E. Kramer, *Ex-Envoy to Ukraine Testifies ‘False Claims’ Propelled Ouster*, N.Y. TIMES, Oct. 12, 2019, at A1.

later become partners with Rudolph W. Giuliani, Mr. Trump's personal lawyer, in digging up political dirt in Ukraine for Mr. Trump.

From there it became part of the effort by Mr. Giuliani to undercut the special counsel's investigation into Russian interference in the 2016 election and push for damaging information about former Vice President Joseph R. Biden Jr., a possible Democratic challenger to Mr. Trump in 2020.

In her prepared testimony to House investigators, Ms. Yovanovitch [says]

... Americans abroad in search of personal gain or private influence—especially in a country like Ukraine with a long history of corruption and people eager to exploit them—threatened to undermine the work of loyal diplomats and the foreign policy goals of the United States.<sup>129</sup>

During closed-door testimony the New York Times reports that Ambassador Yovanovitch, the State Department's highest-ranked female ambassador, encountered, "[t]he president, by way of his personal lawyer, Rudolph W. Giuliani, target[ing] Ms. Yovanovitch as an impediment to the investigations they were trying to advance in Ukraine at the expense of former Vice President Joseph R. Biden Jr. and his son Hunter—the events leading Mr. Trump to the brink of impeachment."<sup>130</sup> Reports soon surface of criticism within the State Department over Secretary of State Mike Pompeo's failure to support Ms. Yovanovitch and other "U.S. Foreign Service officers caught in the impeachment inquiry."<sup>131</sup>

<sup>129</sup> *Id.* See also Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis*, 20 Pitt. J. Tech. L. & Pol'y 41 (2020).

<sup>130</sup> Mark Leibovich, *Diplomat Is Plunged into the War Zone of U.S. Politics*, N.Y. TIMES, Nov. 16, 2019, at A1.

<sup>131</sup> Jessica Donati, *Pompeo Faces Department Outcry*, WALL ST. J., Nov. 12, 2019, at A6.

## 2. Career Diplomat George Kent

During October 2019, career State Department diplomat George Kent testified and characterized Mr. Giuliani's efforts as "full of lies and incorrect information' to undercut the then-ambassador to Ukraine . . . culminating in her removal from the post by President Trump . . . [and] testified that he grew alarmed at efforts by Mr. Giuliani . . . to set up a channel to engage with Ukraine that existed outside of normal diplomatic protocol."<sup>132</sup> On Twitter, House Intelligence Committee Chairman Adam Schiff says, "Here's why George Kent matters: He and his colleagues recognized the impropriety of Trump's Ukraine pressure campaign to undertake politically-motivated investigations . . . . He corroborates testimony from numerous other officials, and he documented it'. . . President Trump has denied wrongdoing and called the impeachment inquiry a hoax."<sup>133</sup> Mr. Kent concludes, "I do not believe the U.S. should ask other countries to engage in politically associated investigations and prosecutions. [Such behavior] goes against everything that we are trying to promote in post-Soviet states for the past 28 years, which is the promotion of the rule of law."<sup>134</sup>

## 3. William Taylor

On November 7, 2019, the New York Times features a front-page story reporting, "[t]he top American diplomat in Ukraine identified Rudolph W. Giuliani, President Trump's personal lawyer, as the instigator behind the drive to get Ukraine's president to announce investigations into Mr. Trump's political rivals, telling impeachment investigators last month that Mr. Giuliani was acting on behalf of the president."<sup>135</sup> Then, "In a nationally televised hearing from a stately committee room across from the Capitol, William B. Taylor Jr., the top American diplomat in Ukraine, brought to life Democrats' allegations that

<sup>132</sup> Dustin Volz, *Diplomat Testifies Giuliani Spread 'Lies,'* WALL ST. J., Nov. 7, 2019, at A4; *see also* discussion *infra* on Ambassador Yovanovitch.

<sup>133</sup> Volz, *supra* note 132, at A4.

<sup>134</sup> *Id.*

<sup>135</sup> Nicholas Fandos, *Giuliani Led Push to Sway Ukraine, Top Witness Said*, N.Y. TIMES, Nov. 7, 2019, at A1.

Mr. Trump had abused his office by trying to enlist a foreign power to help him in an election.”<sup>136</sup> The New York Times reports:

Mr. Taylor testified to the House Intelligence Committee that he learned only recently of a July telephone call overheard by one of his aides in which the president was preoccupied with Ukraine’s willingness to say it would look into Mr. Biden and work by his son Hunter Biden for a Ukrainian energy firm. Immediately afterward, Mr. Taylor said, the aide had been informed that Mr. Trump cared more about ‘investigations of Biden’ than he did about Ukraine . . . .

“Security was so important for Ukraine, as well as our own national interests,” Mr. Taylor testified, describing his growing sense of alarm at learning that \$391 million in vital military aid for the former Soviet republic had been held up. “To withhold that assistance for no good reason other than help with a political campaign made no sense. It was counterproductive to all of what we had been trying to do. It was illogical. It could not be explained. It was crazy.”<sup>137</sup>

#### 4. Hearings Continue

Impeachment inquiry hearings continued on November 19, 2019, with “[t]hree current and former national-security officials testify[ing] that they were immediately concerned by a July 25 call in which President Trump urged his Ukrainian counterpart to undertake investigations that could benefit him politically, in the third day of public impeachment hearings.”<sup>138</sup> Witnesses for this day of hearings had all been on the July 25 phone call and include: Army Lt. Col. Alexander Vindman, a National Security

<sup>136</sup> Nicholas Fandos & Michael D. Shear, *Envoys Reveal Scope of Trump Ukraine Push: Witnesses Cite a ‘Highly Irregular’ Political Effort*, N.Y. TIMES, Nov. 14, 2019, at A1.

<sup>137</sup> *Id.*

<sup>138</sup> Rebecca Ballhaus & Dustin Volz, *Officials Describe Concern over July Call*, WALL ST. J., Nov. 20, 2019, at A4.

Council (NSC) Ukraine expert; former envoy Kurt Volker, appearing for the Republican committee minority; former NSC official Timothy Morrison; and Jennifer Williams, a national security advisor to Vice President Mike Pence.<sup>139</sup> The Wall Street Journal concludes, “[t]aken together, the marathon day of hearings portrayed a White House in which officials were grappling in real time with the significance and potential political fallout of Mr. Trump’s July phone call.”<sup>140</sup>

## 5. Gordon Sondland

A significant development surfaces on November 6, 2019, with the New York Times reporting that, “[a] crucial witness in the impeachment inquiry reversed himself this week and acknowledged to investigators that he had told a top Ukrainian official that the country would most likely have to give President Trump what he wanted—a public pledge for investigations . . . to unlock military aid.”<sup>141</sup> Gordon D. Sondland in a four-page sworn statement directly contradicting testimony given to investigators just a month earlier, contending “he ‘never’ thought there was any precondition on the aid,” did a total reversal and “confirmed his role in laying out a quid pro quo to Ukraine that conditioned the release of [U.S.] security assistance . . . [upon] the country’s willingness to say it was investigating former Vice President Joseph R. Biden Jr.”<sup>142</sup>

It is the Congressional testimony of November 20, 2019, by Gordon D. Sondland, Trump donor and ambassador to the European Union, that likely changes the dynamic of this Congressional inquiry. The New York Times reports that ambassador Sondland testified, “that he reluctantly followed Mr. Trump’s directive . . . the president instructed him to work with Rudolph W. Giuliani . . . as he pressured Ukraine to publicly commit to investigating former Vice President Joseph

<sup>139</sup> *Id.*; see Rebecca Ballhaus & Vivian Salama, *Pence Aide Surprised by Call’s Political Tone*, WALL ST. J., Nov. 8, 2019, at A4 (discussing comments by Jennifer Williams, former special advisor to Vice President Pence for Russia and Europe, on President Trump’s impeachment).

<sup>140</sup> Ballhaus & Volz, *supra* note 138.

<sup>141</sup> Michael S. Schmidt, *Envoy Now Tells of Pressing Kiev In A Quid Pro Quo*, N.Y. TIMES, Nov. 6, 2019, at A1.

<sup>142</sup> *Id.*

R. Biden Jr. and an unsubstantiated theory that Democrats conspired with Kyiv to interfere in the 2016 election.”<sup>143</sup> Observing that ‘we followed the president’s orders,’ Ambassador Sondland’s testimony “amounted to an act of defiance by an official who has been described by other witnesses as a point man in the push to extract the investigations.”<sup>144</sup> In his testimony, “[Ambassador] Sondland linked the most senior members of the administration to the effort—including the vice president, the secretary of state, the acting chief of staff and others.”<sup>145</sup> Reported elsewhere, “Mr. Sondland made a point of stressing that he was no rogue operator, but in fact at key moments had kept everyone ‘in the loop.’”<sup>146</sup> The New York Times characterizes the testimony, “[e]veryone was in the Loop. It was no secret,” as “the damning words of President Trump’s handpicked ambassador to the European Union . . . who . . . directly implicated not only Mr. Trump, but also several top members of his administration, in the Ukraine shakedown scheme at the heart of the House of Representatives’ impeachment inquiry.”<sup>147</sup>

## 6. Fiona Hill

Fiona Hill served as senior director for European and Russian Affairs on the National Security Council until summer 2019 and, in testimony before the House impeachment inquiry on November 21, 2019, “focused her opening statement on challenging the unsubstantiated theory that Ukraine interfered in the 2016 election, which Republicans have repeatedly brought up during the hearings.”<sup>148</sup> Ms. Hill warns:

<sup>143</sup> Nicholas Fandos & Michael S. Schmidt, *Sondland Names Top Officials in Ukraine Push*, N.Y. TIMES, Nov. 21, 2019, at A1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Peter Baker, ‘We Followed the President’s Orders’: Democrats Detect Watergate Echo, N.Y. TIMES, Nov. 21, 2019, at A1; see Rebecca Ballhaus & Dustin Volz, *Envoy Says Trump Directed Effort*, WALL ST. J., Nov. 21, 2019, at A1.

<sup>147</sup> Editorial Bd., Opinion, *Implicating the President and His Men*, N.Y. TIMES, Nov. 21, 2019, at A22.

<sup>148</sup> Vivian Salama, *Ex-Official Calls Ukraine Theory False*, WALL ST. J., Nov. 22, 2019, at A4.



Some of you on this committee appear to believe that Russia and its security services did not conduct a campaign against our country—and . . . somehow, for some reason, Ukraine did. . . . This is a fictional narrative that has been perpetrated and propagated by the Russian security services themselves.<sup>149</sup>

#### F. Year-End 2019 Disclosures

By late December 2019, Senator Chuck Schumer announces that “newly released emails showing that military aid to Ukraine was suspended 90 minutes after president Trump demanded ‘a favor’ from Ukraine’s president were ‘explosive.’ They strengthened . . . Democratic demands for far more internal administration documents ahead of Mr. Trump’s impeachment trial.”<sup>150</sup> The New York Times reports that, “[t]he emails . . . included one from a White House budget office aid, Michael Duffey, telling Pentagon officials to keep quiet ‘given the sensitive nature of the request.’”<sup>151</sup> And, “the timing of the email—just an hour and a half after Mr. Trump raised investigations of his Democratic rivals with President Volodymyr Zelensky of Ukraine—added an element to Democrats’ contentions that they say become clearer with every new release of evidence: Mr. Trump abused the power of his office to solicit Ukraine to help him win reelection in 2020.”<sup>152</sup> In another instance:

[b]eginning in July [2019], Elaine McCusker, the acting Pentagon comptroller, sent officials at the White House Office of Management and Budget emails in which she raised concerns about the legality of the hold on nearly \$400 million in aid. Though Pentagon officials’ frustrations were previously known, the emails, earlier versions of

<sup>149</sup> *Id.*

<sup>150</sup> Sheryl Gay Stolberg & Catie Edmondson, *Schumer Cites Emails in Bid for Evidence*, N.Y. TIMES, Dec. 24, 2019, at A1.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

which had been redacted by the Justice Department, offer a new level of detail about Ms. McCusker's concerns.<sup>153</sup>

On December 30, 2019, the New York Times, based on “[i]nterviews with dozens of current and former administration officials, congressional aides and others, previously undisclosed emails and documents, and a close reading of thousands of pages of impeachment testimony,” runs a front-page story that may “provide the most complete account yet of the 84 days from when Mr. Trump first inquired about the money to his decision in September to relent.”<sup>154</sup> Accordingly:

It was June 27[, 2019], more than a week after Mr. Trump had first asked about putting a hold on security aid to Ukraine, an embattled American ally; and Mr. Mulvaney needed an answer.

The aide, Robert B. Blair, replied that it would be possible, but not pretty. “Expect Congress to become unhinged” if the White House tried to countermand spending passed by the House and Senate, he wrote in a previously undisclosed email. And, he wrote, it might further fuel the narrative that Mr. Trump was pro-Russia.

Mr. Blair was right, even if his prediction of a messy outcome was wildly understated, Mr. Trump's order to hold \$391 million worth of sniper rifles, rocket-propelled grenades, night vision goggles, medical aid and other equipment the Ukrainian military needed to fight a grinding war against Russian-backed separatists would help pave a path to the president's impeachment.<sup>155</sup>

<sup>153</sup> Andrew Restuccia, *Emails Show Clashes Over Ukraine Aid*, WALL ST. J., Jan. 3, 2020, at A4.

<sup>154</sup> Eric Lipton, Maggie Haberman & Mark Mazzetti, *Inside Ukraine Aid freeze: An 84-Day Clash of Wills*, N.Y. TIMES, Dec. 30, 2019, at A1.

<sup>155</sup> *Id.*

### G. Energy Secretary Rick Perry

Soon after taking the job as energy Secretary in 2017, Rick Perry says, “he saw a continent uncomfortably reliant on Russian energy, with potential to be a U.S. customer instead. Ukraine . . . Mr. Perry thought, was key: Sell more U.S. natural gas there, as the U.S. itself was becoming an energy exporter.”<sup>156</sup> Next, “several visits with Ukrainian leaders followed, with Mr. Perry viewing himself as salesman-in-chief for the U.S. energy industry . . . his role expanded into being one of Mr. Trump’s primary foreign-policy intermediaries in Ukraine, involving him in administration activities that are now at the heart of the House impeachment inquiry.”<sup>157</sup> Consider:

Mr. Perry was subpoenaed last week by several House committees seeking any documents related to his interactions on the matter. At the Friday deadline, his department sent a letter to the House committees saying it wouldn’t comply with the request, calling the probe invalid and further citing executive privilege and a lack of time.

He also this past week announced his imminent resignation, though a person familiar with the matter said his departure is unrelated to the scrutiny of his actions in the impeachment inquiry.

....

Mr. Perry became one of three administration officials who oversaw U.S. policy toward the country, the others being Gordon Sondland, the ambassador to the European Union, and special envoy Kurt Volker. It was an arrangement that brought them, at the president’s direction, in contact with Mr. Giuliani, whose dealings in

<sup>156</sup> Timothy Puko & Georgi Kantchev, *Energy Push Linked Perry To Ukraine*, WALL ST. J., Oct. 19, 2019, at A6.

<sup>157</sup> *Id.*

Ukraine are also being investigated by federal prosecutors.<sup>158</sup>

#### H. Rudolph Giuliani and Ukraine

A common theme that emerges from the early congressional testimony regarding the Ukrainian episode involves the highly unusual back-channel role played by President Trump's personal lawyer Rudolph Giuliani. So now, a few words about what is known to date about Mr. Giuliani's involvement.

##### 1. Lev Parnas and Igor Fruman

A front-page story appearing in the October 11, 2019, edition of the New York Times states, "Federal prosecutors unsealed charges . . . against two men who have aided President Trump's efforts to gather damaging information in Ukraine about his political opponents, a criminal case that signaled growing legal exposure for the president's allies."<sup>159</sup> The Lev Parnas and Igor Fruman indictments, "sketched a complex scheme to violate campaign finance laws and . . . revealed new details about the push to pressure Ukraine: a campaign encouraged by Mr. Trump, led by his private lawyer Rudolph W. Giuliani and assisted by obscure figures like Mr. Parnas and Mr. Fruman."<sup>160</sup>

Mr. Parnas is described as:

a Ukrainian-American businessman with a trail of debts and lawsuits, had known Mr. Giuliani casually for years through Republican political circles. Last year their relationship deepened when a company [that Parnas co-founded] . . . paid Mr. Giuliani hundreds of

<sup>158</sup> *Id.*

<sup>159</sup> Mark Mazzetti, Eileen Sullivan, Adam Goldman & William K. Rashbaum, *2 Who Helped Giuliani Go after Trump Rivals Are Arrested by F.B.I: Case Reveals Legal Jeopardy Faced by President's Allies*, N.Y. TIMES, Oct. 11, 2019, at A1.

<sup>160</sup> *Id.*; see also Georgi Kantchev, Rebecca Davis O'Brien & Joe Palazzolo, *Giuliani Associate Tried Ukraine Comeback*, WALL ST. J., Nov. 22, 2019, at A5.

thousands of dollars for what Mr. Giuliani said . . . was business and legal advice.<sup>161</sup>

The New York Times reports:

Mr. Giuliani dispatched Mr. Parnas and an associate, Igor Fruman, a Belarusian-American businessman, to Kiev, the Ukrainian capital, where, despite fending off creditors at home, BuzzFeed reported, they ran up big charges at a strip club and the Hilton International hotel. Their mission was to find people and information that could be used to undermine the special counsel's investigation, and also to damage former Vice President Joseph R. Biden Jr., a prospective Democratic challenger to Mr. Trump.<sup>162</sup>

## 2. Dmitry Firtash and Ihor Kolomoisky

Rudolph Giuliani is also credited with a plan to target and recruit two legally vulnerable Ukrainians with problems in the United States into assisting with the Biden investigation strategy. As reported by the New York Times, one of these recruited oligarchs “had been indicted on federal bribery charges. The other was embroiled in a vast banking scandal and was reported to be under investigation by the F.B.I.”<sup>163</sup> The New York Times story reports that:

Interviews with the two Ukrainian oligarchs—Dmitry Firtash and Ihor Kolomoisky—as well as with several other people with knowledge of Mr. Giuliani's dealings, point to a new dimension in his exertions on behalf of his client, Mr. Trump. Taken together, they depict a strategy clearly aimed at leveraging information

<sup>161</sup> Kenneth P. Vogel, *A Ukraine Team on a Hunt for Influence, Dirt and Money*, N.Y. TIMES, Oct. 11, 2019, at A1.

<sup>162</sup> *Id.*

<sup>163</sup> Jo Becker, Walt Bogdanich, Maggie Haberman & Ben Protess, *Why Giuliani Eyed 2 Oligarchs to Dig Dirt*, N.Y. TIMES, Nov. 25, 2019, at A1.

from politically powerful but legally vulnerable foreign citizens.

In the case of Mr. Firtash, an energy tycoon with deep ties to the Kremlin who is facing extradition to the United States on bribery and racketeering charges, one of Mr. Giuliani's associates has described offering the oligarch help with his Justice Department problems—if Mr. Firtash hired two lawyers who were close to President Trump and were already working with Mr. Giuliani on his dirt-digging mission. Mr. Firtash said the offer was made in late June when he met with Lev Parnas and Igor Fruman, both Soviet-born businessmen involved in Mr. Giuliani's Ukraine pursuit.

Mr. Parnas's lawyer, Joseph A. Bondy, confirmed that account and added that his client had met with Mr. Firtash at Mr. Giuliani's direction and encouraged the oligarch to help in the hunt for compromising information "as part of any potential resolution to his extradition matter."

Mr. Firtash's relationship to the trump-allied lawyers . . . has led to intense speculation that he is, at least indirectly, helping to finance Mr. Giuliani's campaign. But until now he has stayed silent, and many of the details of how and why he came to hire the lawyers have remained murky.<sup>164</sup>

### 3. Giuliani Probe Broadens?

On November 26, 2019, the Wall Street Journal reports, "Subpoenas issued to people with ties to . . . Rudy Giuliani, indicate a broad federal investigation into possible money laundering, obstruction of justice and campaign-finance violations and show that prosecutors are probing Mr. Giuliani's consulting businesses and other sources of income, according to

<sup>164</sup> *Id.*

people familiar with the matter.”<sup>165</sup> Reporting by the Wall Street Journal states:

A concern of the investigation is whether Mr. Giuliani violated federal lobbying laws by serving as an unregistered agent of a foreign government or hid his work for foreign nationals, said one person familiar with the investigation. Mr. Giuliani has denied ever serving as a lobbyist or agent of a foreign government . . . .

Subpoenas described to The Wall Street Journal listed more than a half dozen potential charges under consideration: obstruction of justice, money laundering, conspiracy to defraud the United States, making false statements to the federal government, serving as an agent of a foreign government without registering with the Justice Department, donating funds from foreign nationals, making contributions in the name of another person or allowing someone else to use one’s name to make a contribution, along with mail fraud and wire fraud.<sup>166</sup>

In what may prove to be a related matter, a December 2, 2019, story by NBC News captioned Prosecutor Says New Charges ‘Likely’ in Case against Rudy Giuliani Associates reports that Joseph Bondy, lawyer for Mr. Parnas:

said Parnas was told that Rep. Devin Nunes, R-Calif., the chief defender of Trump as ranking member of the House Intelligence Committee, met with Ukraine’s former top prosecutor about investigating the activities of Biden and his son Hunter.

In an appearance on Fox News late last month, Nunes sidestepped a question about the allegation. “I really want to answer all of these

<sup>165</sup> Rebecca Davis O’Brien, Rebecca Ballhaus & Shelby Holliday, *Subpoenas Signal Broad Probe of Giuliani*, WALL ST. J., Nov. 26, 2019, at A5.

<sup>166</sup> *Id.*

questions, and I promise you I absolutely will come back on the show,” Nunes told host Maria Bartiromo.

Nunes added: “Everybody’s going to know all the facts, but I think you can understand that I can’t compete by trying to debate this out with the public media when 90 percent of the media are totally corrupt.”<sup>167</sup>

### I. John Bolton

In a statement published on his website on January 6, 2020, former White House national security advisor John R. Bolton states, “Since my testimony is once again at issue, I have had to resolve the serious competing [constitutional] issues as best I could, based on careful consideration and study. I have concluded that, if the Senate issues a subpoena for my testimony, I am prepared to testify.”<sup>168</sup> A diplomat and lawyer, Ambassador John R. Bolton served as U.S. Permanent Representative to the United Nations during 2005 and 2006. He served as Under Secretary of State for Arms Control and International Security from 2001 to 2005 and was an Assistant Attorney General during the Reagan Administration.<sup>169</sup>

The New York Times observes, “Mr. Bolton’s surprise declaration . . . was a dramatic turn that could alter the political dynamic of the impeachment process in the senate and raise the risks for Mr. Trump of Republican defections.”<sup>170</sup> Mr. Bolton’s testimony is important because he “is a potentially vital witness, with direct knowledge of presidential actions and conversations regarding Ukraine that could fill in the blanks in the narrative of the impeachment case.”<sup>171</sup> The Bolton decision “raised immediate questions for Senator Mitch McConnell, Republican

<sup>167</sup> Tom Winter and Rich Schapiro, *Prosecutor Says New Charges ‘Likely’ in Case against Rudy Giuliani Associates*, NBC NEWS (Dec. 2, 2019 5:06 PM), <https://www.nbcnews.com/politics/justice-department/prosecutor-says-new-charges-likely-case-against-rudy-giuliani-associates-n1094506>.

<sup>168</sup> *Statement of John R. Bolton*, BOLTON PAC (Jan. 6, 2020), <https://www.boltonpac.com/2020/01/statement-of-john-r-bolton>.

<sup>169</sup> BOLTON PAC, <https://www.boltonpac.com> (last visited May 1, 2020).

<sup>170</sup> Nicholas Fandos & Michael S. Schmidt, *Bolton, In Twist, Offers to Testify at Trump’s Trial*, N.Y. TIMES, Jan. 7, 2020, at A1.

<sup>171</sup> *Id.*



of Kentucky, around how to proceed with the trial. He has steadfastly refused to commit to calling witnesses, but as majority leader, he must also weigh the wishes of . . . moderate Republicans who may press to hear from them.”<sup>172</sup> Carl Hulse of the New York Times says of Republican party leadership:

[S]ome of their rank and file insist that fairness—and, equally important, public perception and credibility—depends on hearing the crucial firsthand account and allowing more investigation. But the end result is the same as initially anticipated: Bret M. Kavanaugh is confirmed as a Supreme Court justice despite the testimony of Christine Blasey Ford.

With the former national security adviser John R. Bolton now volunteering to testify in the Senate impeachment trial of President Trump, the circumstances of the toxic 2018 Kavanaugh showdown could provide a template for what to expect as senators extend their clash over the ground rules for opening the proceeding.

...

But a few Republican senators—notably Mitt Romney of Utah and Susan Collins of Maine—left the door open to subpoenaing witnesses later if they saw the need to do so after hearing arguments from House prosecutors and the president’s defenders. They say they are simply applying bipartisan precedents established in the 1999 Clinton trial

...

Even if Mr. Bolton testified, it was unclear whether it could change the course of the trial. As the Kavanaugh example showed, new testimony—however explosive it may seem to some—does not necessarily change enough minds in the Senate to change an outcome.<sup>173</sup>

<sup>172</sup> *Id.*

<sup>173</sup> Carl Hulse, *Echoes of Kavanaugh in Bolton’s Offer to Testify*, N.Y. TIMES, Jan. 8, 2020, at A17.

Harold Hongju Koh, professor of international law and former dean at Yale Law School, asks the following, “John Bolton has let it be known that he will testify before the Senate, if he is subpoenaed. But what gives him the right to dictate terms?”<sup>174</sup> Professor Koh writes, “Like jury duty or paying taxes, testifying under oath about facts we know is not optional: it is a fundamental obligation of citizenship. As a government official, Mr. Bolton took an oath to ‘support and defend the Constitution.’ Testifying at a Senate impeachment trial fulfills that constitutional oath.”<sup>175</sup>

J. Targeted Killing of Iranian Maj. Gen. Qassem Soleimani

During the first ten days of 2020, before articles of impeachment are transmitted from the House of Representatives to the Senate, “President Trump’s abrupt decision to kill Iran’s top security commander has reshuffled the already fraught political dynamic around impeachment and thrust matters of war and peace into the middle of an election-year debate over whether to remove Mr. Trump from office.”<sup>176</sup> As Congress returns to Washington following the end-of-year holiday break, “the specter of escalating hostilities with Iran and a searing debate over the justification behind Mr. Trump’s action will take center stage on Capitol Hill. The unexpected turn of events has added a volatile new element to the pitched fight over Mr. Trump’s impeachment trial in the Senate.”<sup>177</sup>

<sup>174</sup> Harold Hongju Koh, Opinion, *The Arrogance of Trump’s Enablers*, N.Y. TIMES, Jan. 8, 2020, at A23.

<sup>175</sup> *Id.*

<sup>176</sup> Julian E. Barnes, Catie Edmondson & Rukmini Callimachi, *Democrats Press for Details on Threats Cited by Trump*, N.Y. TIMES, Jan. 8, 2020, at A1; Nicholas Fandos & Catie Edmondson, *Iran Fears Join Impeachment on the Docket*, N.Y. TIMES, Jan. 6, 2020, at A1; *see also* Gordon Lubold, Nancy A. Youssef & Isabel Coles, *Iran Retaliates With Missile Attack*, WALL ST. J., Jan. 8, 2020, at A1; Isabel Coles, *Mideast Tensions Rise After Strike*, WALL ST. J., Jan. 4, 2020, at A1; David D. Kirkpatrick & Ronen Bergman, *Its Barrage Left Little Damage, But Iran Has Deadlier Weapons*, N.Y. TIMES, Jan. 9, 2020, at A1.

<sup>177</sup> Fandos & Edmondson, *supra* note 176.

Concerns that President Trump grossly endangers the peace and security of the United States are not new. Michael V. Hayden, retired United States Air Force four-star general and former director of the National Security Agency and Central Intelligence Agency reports common complaints that President Trump, “has shown no interest in educating himself. He continues to display an alarming ignorance of basic facts of contemporary international politics. Despite his lack of knowledge, Mr. Trump claims that he understands foreign affairs and ‘knows more about ISIS than the generals do.’”<sup>178</sup> General Hayden warns:

He seemed purely instinctive, spontaneous, even impulsive, and although he had little background on the substance or processes of international affairs, he also had little patience with written or even verbal presentations. He seemed to have an eerie confidence in his own a priori narrative of how the world worked.

He also seemed disinclined to learn more, even at first pushing back on the very concept of a daily intelligence briefing, saying that he was a very smart person and did not need to be told the same things over and over again every day, itself a hideous mischaracterization of the PDB [president’s daily briefing].<sup>179</sup>

It is clear by now that America is the victim of ongoing cyber warfare conducted by nation states and transnational criminal organizations, including Iran.<sup>180</sup> General Michael Hayden

<sup>178</sup> HAYDEN, *supra* note 92, at 67.

<sup>179</sup> *Id.* at 79.

<sup>180</sup> See Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who’s Who & How It Works*, 5 J.L. & CYBER WARFARE 138 (2016); Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 U. ILL. J.L. TECH. & POL’Y 341 (2015); Lawrence J. Trautman & Peter C. Ormerod, *Corporate Directors’ and Officers’ Cybersecurity Standard of Care: The Yahoo Data Breach*, 66 AM. U. L. REV. 1231 (2017); Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-commerce, Political and Regulatory Compliance Risks*, 10 WM. & MARY BUS. L. REV. 1 (2018); Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things*, 72 U. MIAMI L. REV. 761 (2018); Lawrence

describes Russian strategy explained by Russian General Valery Garasimov who wrote during 2013:

A perfectly thriving state can, in a matter of months or even days, be transformed into an arena of fierce armed conflict . . . and sink into a web of chaos.

....

The role of nonmilitary means of achieving political and strategic goals has grown [and the trend now was] the broad use of political, economic, informational, humanitarian, and other nonmilitary measures – applied in coordination with the protest potential of the population.

....

[Seeing large clashes of men and metal as a “thing of the past,” Garasimov called for] “long-distance, contactless actions against the enemy” and included in his arsenal “information actions, devices, and means.” He concluded, “The information space opens wide asymmetrical possibilities for reducing the fighting potential of the enemy,” and so new “models of operations and military conduct” were needed.<sup>181</sup>

J. Trautman, *Is Cyberattack the Next Pearl Harbor?*, 18 N.C. J.L. & TECH. 233 (2016); Lawrence J. Trautman, *Managing Cyberthreat*, 33 SANTA CLARA HIGH TECH. L.J. 230 (2016); Lawrence J. Trautman, *The Board’s Responsibility for Crisis Governance*, 13 HASTINGS BUS. L.J. 275 (2017); Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503 (2019); Lawrence J. Trautman, Mohammed T. Hussein, Louis Ngamassi & Mason J. Molesky, *Governance of the Internet of Things (IoT)*, 60 JURIMETRICS (2020); David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18 COLO. TECH. L.J. 49 (2019); Lawrence J. Trautman, Mohammed T. Hussein, Emmanuel U. Opara & Shahedur Rahman, *Posted: No Phishing*, <http://ssrn.com/abstract=3549992>; Lawrence J. Trautman & Mason Molesky, *A Primer for Blockchain*, 88 UMKC L. REV. (2019); Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041 (2017); Lawrence J. Trautman, *Virtual Currencies: Bitcoin & What Now After Liberty reserve, Silk Road, and Mt. Gox?*, 20 RICH. J.L. & TECH. 13 (2014).

<sup>181</sup> HAYDEN, *supra* note 92, at 193.

### K. Professor Koh's Proposal

Yale law professor Harold Koh recalls that, “in *United States v. Nixon*, the landmark White House tape recording case, the Supreme Court unanimously rejected the claim of a president under an impeachment inquiry to an ‘absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.’”<sup>182</sup> The failure of many of President Trump’s closest aides and advisors (namely, Robert Blair, Michael Duffy, Rudolph Giuliani, Don McGahn, Mick Mulvaney, and Mike Pompeo) to testify about the Ukraine matter constitutes a new constitutional crisis.<sup>183</sup> Professor Koh writes, “[u]nlike Nixon, Mr. Trump has now actually been impeached, for abuse of power and obstructing congressional investigation. If official witnesses don’t testify about these acts, the very subordinates who may have helped Mr. Trump commit them can aid and abet his continuing obstruction.”<sup>184</sup> Given these developments, “on what conceivable basis can such officials as Mr. Pompeo and Mr. Mulvaney continue to hold high office under an oath to support and defend the Constitution?”<sup>185</sup> Because these witnesses continue to withhold testimony “in contempt of Congress and the law,” Professor Koh proposes that congressional response should consist of the following four steps:

First, no law empowers an impeachment witness to dictate that he or she will testify under subpoena before the Senate, but not the House. To supplement its impeachment report, the House should immediately vote to subpoena Mr. Bolton. Mitch McConnell, the Senate majority leader, said Tuesday he has the votes to proceed to trial without committing to call witnesses. But the house speaker, Nancy Pelosi, should not transmit the articles of impeachment to the Senate until Mr. McConnell agrees to the calling of critical witnesses, as occurred during the Clinton trial.

<sup>182</sup> Koh, *supra* note 174; *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>183</sup> See Koh, *supra* note 174.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

Second, the Constitution authorizes Congress to exercise its inherent contempt power to jail an individual who defies an order to testify. The House should pass a resolution to hold individuals who resist testifying in contempt of Congress, and to detain them until they agree to give that testimony. As part of the rules it must pass to govern its impeachment trial, the Senate should adopt a resolution, authorized by a 1978 law, demanding these witnesses' testimony and seeking a declaratory judgment from the District of Columbia federal court requiring these witnesses to testify promptly.

Third, some of these witnesses have shown contempt not just for Congress, but also the courts. The house legal counsel should petition those courts where subpoenas against these witnesses are pending to jail them on the ground that their continued refusal to testify constitutes both a criminal violation and civil contempt of court.

Finally, if all else fails, once House managers are appointed, they should seek an order from the presiding judge, Chief Justice John Roberts, directing these witnesses to testify. If they defy his order, he is entitled to rule that their defiance at Mr. Trump's direction constitutes evidence that the testimony they are withholding would have supported the impeachment charges.<sup>186</sup>

Professor Koh warns, “[w]hen a presidency, the Constitution and our national security are all at stake, witnesses who flout their duty to testify must bear the consequences of their contempt.”<sup>187</sup> All Americans should consider that “[t]he impeachment voted by the House is the first in history for national security misconduct. The unfolding crisis in Iran only increases the urgency of learning from direct witnesses whether

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

President Trump has responsibly exercised his constitutional responsibilities in foreign affairs.”<sup>188</sup>

## VI. THE 2020 ARTICLES OF IMPEACHMENT

On Tuesday, December 10, 2019, “House Democrats moved to charge President Trump with at least two articles of impeachment—abuse of power and obstruction of Congress . . . The nine-page impeachment document asserts that Trump ‘ignored and injured the interests of the nation.’”<sup>189</sup> In impeaching Donald J. Trump for “high crimes and misdemeanors,” the first “Abuse of Power” article, alleges that by acting both directly and through agents and by:

[u]sing the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election. He did so through a scheme or course of conduct that included soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection, harm the election prospects of a political opponent, and influence the 2020 United States Presidential election to his advantage. President Trump also sought to pressure the Government of Ukraine to take these steps by conditioning official United States Government acts of significant value to Ukraine on its public announcement of the investigations. President Trump engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit. In so doing, President Trump used the powers of the Presidency in a manner that compromised the national security of the United States and undermined the integrity of

<sup>188</sup> *Id.*

<sup>189</sup> Sarah D. Wire, *Democrats’ Impeachment Articles Aim to Balance Demands of Moderates and Progressives*, L.A. TIMES (Dec. 10, 2019, 2:46 PM) <https://www.latimes.com/politics/story/2019-12-10/house-trump-impeachment-articles>.

the United States democratic process. He thus ignored and injured the interests of the nation.<sup>190</sup>

A popular Republican defense to refute this allegation of Trump's illegal and corrupt solicitation is that because the monies were ultimately released (after Trump's request became public knowledge), there was "no quid pro quo" exchange. Harvard Law Professor Noah Feldman states, "[o]n its own, the request that Trump made to Ukrainian president Volodymyr Zelensky in his July 25, 2019, phone call qualifies as solicitation under the terms of the article of impeachment. Trump abused his office merely by requesting the 'favor' he mentioned in the call."<sup>191</sup>

The second "obstruction of Congress" article charges that "Donald. J. Trump has directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment.'"<sup>192</sup> In brief, the Trump obstruction abuse of power takes place by:

- (1) Directing the White House to defy a lawful subpoena by withholding the production of documents sought therein by the Committees;
- (2) Directing other Executive Branch agencies and offices to defy lawful subpoenas and withhold the production of documents and records from the Committees. . .
- (3) Directing current and former Executive Branch officials not to cooperate with the Committees . . . .<sup>193</sup>

Professor Feldman writes, "[a] president who cannot be criminally investigated and also cannot be investigated by Congress would be effectively above the law. . . . [It is therefore]

<sup>190</sup> H.R. Res. 755, 116th Cong. (2019) (enacted).

<sup>191</sup> Noah Feldman, *Is Trump Above the Law?*, N.Y. REV. BOOKS, Jan. 16, 2020, at 12.

<sup>192</sup> H.R. Res. 755.

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



so constitutionally evident that obstruction of Congress must be a high crime and misdemeanor. Denying Congress's power to conduct an impeachment inquiry subverts the foundation of democratic government.”<sup>194</sup> The language of the House resolution is reproduced in full here:

Shown Here:

Reported in House (12/15/2019)

House Calendar No. 61

116th  
CONGRESS  
1st Session

H. RES. 755  
[Report No. 116–346]

Impeaching Donald John Trump, President  
of the United States, for high crimes and  
misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

December 10, 2019

Mr. Nadler submitted the following  
resolution; which was referred to the Committee  
on the Judiciary

December 15, 2019

Reported with an amendment, referred to  
the House Calendar and ordered to be printed  
[Strike out all after the resolving clause and  
insert the part printed in *italic*]  
[For text of introduced resolution, see copy of  
resolution as introduced on December 10, 2019]

RESOLUTION

Impeaching Donald John Trump, President of  
the United States, for high crimes and  
misdemeanors.

Resolved, That Donald John Trump,  
President of the United States, is impeached for  
high crimes and misdemeanors and that the

<sup>194</sup> Feldman, *supra* note 191, at 14.

following articles of impeachment be exhibited to the United States Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and of the people of the United States of America, against Donald John Trump, President of the United States of America, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

#### ARTICLE I: ABUSE OF POWER

The Constitution provides that the House of Representatives “shall have the sole Power of Impeachment” and that the President “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”. In his conduct of the office of President of the United States—and in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed—Donald J. Trump has abused the powers of the Presidency, in that:

Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election. He did so through a scheme or course of conduct that included soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection, harm the election prospects of a political opponent, and influence the 2020 United States Presidential election to his advantage. President Trump also sought to pressure the Government of Ukraine to take these steps by conditioning official United States Government acts of significant value to Ukraine on its public announcement of the investigations. President

Trump engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit. In so doing, President Trump used the powers of the Presidency in a manner that compromised the national security of the United States and undermined the integrity of the United States democratic process. He thus ignored and injured the interests of the Nation.

President Trump engaged in this scheme or course of conduct through the following means:

(1) President Trump—acting both directly and through his agents within and outside the United States Government—corruptly solicited the Government of Ukraine to publicly announce investigations into—

(A) a political opponent, former Vice President Joseph R. Biden, Jr.; and

(B) a discredited theory promoted by Russia alleging that Ukraine—rather than Russia—interfered in the 2016 United States Presidential election.

(2) With the same corrupt motives, President Trump—acting both directly and through his agents within and outside the United States Government—conditioned two official acts on the public announcements that he had requested—

(A) the release of \$391 million of United States taxpayer funds that Congress had appropriated on a bipartisan basis for the purpose of providing vital military and security assistance to Ukraine to oppose Russian aggression and which President Trump had ordered suspended; and

(B) a head of state meeting at the White House, which the President of Ukraine sought to demonstrate continued United States support for the Government of Ukraine in the face of Russian aggression.

(3) Faced with the public revelation of his actions, President Trump ultimately released the military and security assistance to the

Government of Ukraine, but has persisted in openly and corruptly urging and soliciting Ukraine to undertake investigations for his personal political benefit.

These actions were consistent with President Trump's previous invitations of foreign interference in United States elections.

In all of this, President Trump abused the powers of the Presidency by ignoring and injuring national security and other vital national interests to obtain an improper personal political benefit. He has also betrayed the Nation by abusing his high office to enlist a foreign power in corrupting democratic elections.

Wherefore President Trump, by such conduct, has demonstrated that he will remain a threat to national security and the Constitution if allowed to remain in office, and has acted in a manner grossly incompatible with self-governance and the rule of law. President Trump thus warrants impeachment and trial, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

#### ARTICLE II: OBSTRUCTION OF CONGRESS

The Constitution provides that the House of Representatives "shall have the sole Power of Impeachment" and that the President "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors". In his conduct of the office of President of the United States—and in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed—Donald J. Trump has directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives

pursuant to its “sole Power of Impeachment”. President Trump has abused the powers of the Presidency in a manner offensive to, and subversive of, the Constitution, in that:

The House of Representatives has engaged in an impeachment inquiry focused on President Trump’s corrupt solicitation of the Government of Ukraine to interfere in the 2020 United States Presidential election. As part of this impeachment inquiry, the Committees undertaking the investigation served subpoenas seeking documents and testimony deemed vital to the inquiry from various Executive Branch agencies and offices, and current and former officials.

In response, without lawful cause or excuse, President Trump directed Executive Branch agencies, offices, and officials not to comply with those subpoenas. President Trump thus interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, and assumed to himself functions and judgments necessary to the exercise of the “sole Power of Impeachment” vested by the Constitution in the House of Representatives.

President Trump abused the powers of his high office through the following means:

(1) Directing the White House to defy a lawful subpoena by withholding the production of documents sought therein by the Committees.

(2) Directing other Executive Branch agencies and offices to defy lawful subpoenas and withhold the production of documents and records from the Committees—in response to which the Department of State, Office of Management and Budget, Department of Energy, and Department of Defense refused to produce a single document or record.

(3) Directing current and former Executive Branch officials not to cooperate with the Committees—in response to which nine Administration officials defied subpoenas for

testimony, namely John Michael “Mick” Mulvaney, Robert B. Blair, John A. Eisenberg, Michael Ellis, Preston Wells Griffith, Russell T. Vought, Michael Duffey, Brian McCormack, and T. Ulrich Brechbuhl.

These actions were consistent with President Trump’s previous efforts to undermine United States Government investigations into foreign interference in United States elections.

Through these actions, President Trump sought to arrogate to himself the right to determine the propriety, scope, and nature of an impeachment inquiry into his own conduct, as well as the unilateral prerogative to deny any and all information to the House of Representatives in the exercise of its “sole Power of Impeachment”. In the history of the Republic, no President has ever ordered the complete defiance of an impeachment inquiry or sought to obstruct and impede so comprehensively the ability of the House of Representatives to investigate “high Crimes and Misdemeanors”. This abuse of office served to cover up the President’s own repeated misconduct and to seize and control the power of impeachment—and thus to nullify a vital constitutional safeguard vested solely in the House of Representatives.

In all of this, President Trump 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.

Wherefore, President Trump, by such conduct, has demonstrated that he will remain a threat to the Constitution if allowed to remain in office, and has acted in a manner grossly incompatible with self-governance and the rule of law. President Trump thus warrants impeachment and trial, removal from office, and

disqualification to hold and enjoy any office of honor, trust, or profit under the United States.<sup>195</sup>

## VII. FAILURE TO ACT IN THE SENATE

*“The grave question the Constitution tasks senators to answer is whether the president committed an act so extreme and egregious that it rises to a level of a high crime and misdemeanor. Yes, he did.”*

*U.S. Senator Mitt Romney  
Republican of Utah  
February 5, 2020<sup>196</sup>*

On February 6, 2020, *The New York Times* states, “After five months of hearings, investigations and revelations about President Trump’s dealings with Ukraine, a divided United States Senate acquitted him on Wednesday of charges that he abused his power and obstructed Congress to aid his own re-election, bringing an acrimonious impeachment trial to its expected end.”<sup>197</sup> In summary, the senators “disagreed over Mr. Trump’s conduct and his fitness for office, even as some members of his own party conceded the basic allegations that undergirded the charges, that he sought to smear his political rivals.”<sup>198</sup> *The Wall Street Journal* observed, “while Mr. Trump had hoped for a forceful display of unity from Republicans in defense of his actions, he got something less: GOP senators strongly supported his acquittal, but several said the Democrats had proved that he acted improperly—though not in a manner deserving of impeachment.”<sup>199</sup> A discussion about the failure of the United States Senate to reasonably search for and

<sup>195</sup> H.R. Res. 755.

<sup>196</sup> See remarks by U.S. Senator Mitt Romney (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/mitt-romney-impeachment-speech-transcript.html>.

<sup>197</sup> Nicholas Fandos, *Split senate Clears Trump On All Counts In Finale Of A Bitter Impeachment Battle* at A1, N.Y. TIMES (Feb. 6, 2020).

<sup>198</sup> *Id.*

<sup>199</sup> Rebecca Ballhaus & Natalie Andrews, *Trump Acquitted* at A1, WALL ST. J., (Feb. 6, 2020).

document the truth of issues germane to this impeachment proceeding now follows.

#### A. Republican Rapid Acquittal Strategy

On Monday January 20, 2020, senate majority leader Mitch McConnell released the procedural ground rules “for President Trump’s impeachment trial that would attempt to speed the proceeding along and refuse to admit the evidence against the president unearthed by the House without a separate vote.”<sup>200</sup> In addition:

Mr. Trump’s legal team called on the Senate to ‘swiftly reject’ the impeachment charges and acquit him, arguing that Democrats would ‘permanently weaken the presidency’ if they succeeded in removing him from office over what the team characterized as policy and political differences...

Mr. Trump’s lawyers dismissed the validity of both articles of impeachment lodged against him—abuse of power and obstruction of Congress—because they do not state any specific violation of the law, advancing a constrained and widely rejected interpretation of the power to impeach a president. While the lawyers did not contest the basic facts of the case, they maintained that Democrats’ accusations in effect seek to punish Mr. Trump for foreign policy decisions and efforts to preserve executive prerogatives...

Mr. McConnell’s trial rules, which limited each side’s arguments to 24 hours over two days, gave the White House a helping hand at the onset and drew swift anger from Democrats. The rules left open the possibility that the Senate could not only decline to hear new evidence not uncovered in the House impeachment inquiry...

<sup>200</sup> Peter Baker, Maggie Haberman & Nicholas Fandos, *McConnell Plans for Senate Trial On A Tight Pace* at A1, N.Y. TIMES (Jan. 21, 2020).



The legal brief filed by Mr. Trump's lawyers did not deny that the president asked Ukraine to announce the investigations into Democrats, including former Vice President Joseph R. Biden Jr., nor that he withheld military aid that Congress had approved for Kyiv.<sup>201</sup>

#### B. Testimony from John Bolton?

On January 27, 2020 after the House had impeached President Trump, but before the Senate had started trial proceedings, *The New York Times* reports that, "The White House and Senate Republican leaders struggled on Monday to salvage their plans to push toward a quick acquittal of President Trump this week in his impeachment trial, after a new account by his former national security advisor corroborated a central piece of the case against him."<sup>202</sup> The front-page story continues to warn, "The newly disclosed revelations by John R. Bolton, whose forthcoming book details how Mr. Trump conditioned military aid for Ukraine on the country's willingness to furnish information on his political rivals, angered key Republicans and reinvigorated a bid to call witnesses... and pose new dangers for the president."<sup>203</sup> Peter Baker reports:

At first glance, John R. Bolton's account of President Trump's private remarks sounded like an echo of the so-called smoking gun tape that proved President Richard M. Nixon really had orchestrated the Watergate cover-up and ultimately forced him from office. By the end of Monday, the revelation appeared to make it more likely that the Senate would agree to hear witnesses at the trial...

But this is Trump's era and Mr. Trump's Washington, and the old rules don't always apply anymore. The reality show star who was elected

<sup>201</sup> *Id.* at A12.

<sup>202</sup> Michael D. Shear & Nicholas Fandos, *Hopes Dim for Quick Resolution to Trial* at A1, N.Y. TIMES (Jan. 28, 2020).

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

president even after he was captured on an ‘Access Hollywood’ tape boasting about sexual assault has gone on to survive one politically charged furor after another during his three years in the White House, proving more durable than any other national politician in modern American history.<sup>204</sup>

On February 1, 2020 *The New York Times* reports, “More than two months before he asked Ukraine’s president to investigate his political opponents, President Trump directed John R. Bolton, then his national security advisor, to help with his pressure campaign to extract damaging information on Democrats from Ukrainian officials, according to an unpublished manuscript by Mr. Bolton.”<sup>205</sup> According to Mr. Bolton’s manuscript, this instruction from the President was given, “during an Oval Office conversation in early May [2019] that included the acting White House chief of staff, Mick Mulvaney, the president’s personal lawyer Rudolph W. Giuliani and the White House counsel, Pat A. Cipollone, who is now leading the president’s impeachment defense.”<sup>206</sup> Of importance, “The previously undisclosed directive that Mr. Bolton describes would be the earliest known instance of Mr. Trump seeking to harness the power of the United States government to advance his pressure campaign against Ukraine...”<sup>207</sup> However, the majority Republican Senate did not appear interested in having any additional testimony or disclosures about the events surrounding extortion of Ukraine.

### C. Witnesses Blocked

By Senate vote, President Trump’s acquittal becomes virtually assured on Friday, January 31, 2020, “of charges that he abused his power and obstructed Congress, as Republicans voted to block consideration of new witnesses and documents in his impeachment trial and shut down a final push by Democrats to bolster their case

<sup>204</sup> Peter Baker, *Bolton’s Account Fuels Senate Push to Call Witnesses: Likely Turning Point, if Old Rules Held* at A1, N.Y. TIMES (Jan. 28, 2020).

<sup>205</sup> Maggie Haberman & Michael S. Schmidt, *Ukraine Push Began in May, Bolton Writes* at A1, N.Y. TIMES (Feb. 1, 2020).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

for the president's removal.”<sup>208</sup> *The Wall Street Journal* writes, “The 51-49 vote late Friday afternoon represented a major victory for Republican leadership, which has sought to complete the trial as quickly as possible and avoid testimony that could be politically damaging.”<sup>209</sup> Having successfully avoided additional damaging testimony and documents, the Senate successfully clears President Trump on all counts, with Republican Senator Mitt Romney casting the lone dissenting Republican vote.<sup>210</sup>

#### D. Republican Mitt Romney Votes to Convict

Senator Mitt Romney's lone Republican vote to convict President Trump “of abuse of power for his pressure campaign on Ukraine to investigate his political rivals... earned a new distinction... as the first senator in American history to vote to remove a president of his own party from office.”<sup>211</sup> Because of historical significance, Senator Romney's remarks given during floor debate are reproduced here:

The Constitution is at the foundation of our Republic's success, and we each strive not to lose sight of our promise to defend it. The Constitution established the vehicle of impeachment that has occupied both houses of our Congress these many days. We have labored to faithfully execute our responsibilities to it. We have arrived at different judgments, but I hope we respect each other's good faith.

The allegations made in the articles of impeachment are very serious. As a senator-juror, I swore an oath before God to exercise impartial justice. I am profoundly religious. My faith is at the

<sup>208</sup> Michael D. Shear & Nicholas Fandos, *Only 2 Side With Democrats—Vote on Trump is Wednesday* at A1, N.Y. TIMES (Feb. 1, 2020).

<sup>209</sup> Andrew Duehren, *Senate Rejects Witnesses in Trial* at A1, WALL ST. J. (Feb. 1-2, 2020).

<sup>210</sup> See Fandos, *supra* note 197.

<sup>211</sup> Mark Leibovich, *An Act of defiance by Romney Against a Party He'd Personified* at A1, N.Y. TIMES (Feb. 6, 2020).

heart of who I am. I take an oath before God as enormously consequential. I knew from the outset that being tasked with judging the president, the leader of my own party, would be the most difficult decision I have ever faced. I was not wrong.

The House managers presented evidence supporting their case, and the White House counsel disputed that case. In addition, the president's team presented three defenses, first that there could be no impeachment without a statutory crime, second that the Bidens' conduct justified the president's actions, and third, that the judgment of the president's actions should be left to the voters. Let me first address those three defenses.

The historic meaning of the words "high crimes and misdemeanors," the writings of the founders and my own reasoned judgment convince me that a president can indeed commit acts against the public trust that are so egregious that while they're not statutory crimes, they would demand removal from office. To maintain that the lack of a codified and comprehensive list of all the outrageous acts that a president might conceivably commit renders Congress powerless to remove such a president defies reason.

The president's counsel also notes that Vice President Biden appeared to have a conflict of interest when he undertook an effort to remove the Ukrainian prosecutor general. If he knew of the exorbitant compensation his son was receiving from a company actually under investigation, the vice president should have recused himself. While ignoring a conflict of interest is not a crime, it is surely very wrong. With regards to Hunter Biden, taking excessive advantage of his father's name is unsavory, but also not a crime. Given that in neither the case of the father nor the son was any evidence presented by the president's counsel that a crime had been committed, the president's insistence that they

be investigated by the Ukrainians is hard to explain other than as a political pursuit. There's no question in my mind that were their names not Biden, the president would never have done what he did.

The defense argues that the Senate should leave the impeachment decision to the voters. While that logic is appealing to our democratic instincts, it is inconsistent with the Constitution's requirement that the Senate, not the voters, try the president.

Hamilton explained that the founders' decision to invest senators with this obligation rather than leave it to the voters was intended to minimize, to the extent possible, the partisan sentiments of the public at large. So the verdict is ours to render under our Constitution. The people will judge us for how well and faithfully we fulfill our duty. The grave question the Constitution tasked senators to answer is whether the president committed an act so extreme and egregious that it rises to the level of a high crime and misdemeanor. Yes, he did.

The president asked a foreign government to investigate his political rival. The president withheld vital military funds from that government to press it to do so. The president delayed funds for an American ally at war with Russian invaders. The president's purpose was personal and political. Accordingly, the president is guilty of an appalling abuse of public trust.

What he did was not perfect. No, it was a flagrant assault on our electoral rights, our national security and our fundamental values. Corrupting an election to keep oneself in office is perhaps the most abusive and destructive violation of one's oath of office that I can imagine.

In the last several weeks, I've received numerous calls and texts. Many demanded, in their words, that I "stand with the team." I can assure you that that thought has been very much on my mind:

You see, I support a great deal of what the president has done. I voted with him 80 percent of the time.

But my promise before God to apply impartial justice required that I put my personal feelings and political biases aside. Were I to ignore the evidence that has been presented and disregard what I believe my oath and the Constitution demands of me for the sake of a partisan end, it would, I fear, expose my character to history's rebuke and the censure of my own conscience.

I'm aware that there are people in my party and in my state who will strenuously disapprove of my decision, and in some quarters I will be vehemently denounced. I'm sure to hear abuse from the president and his supporters. Does anyone seriously believe that I would consent to these consequences other than from an inescapable conviction that my oath before God demanded it of me?

I sought to hear testimony from John Bolton, not only because I believed he could add context to the charges, but also because I hoped that what he might say could raise reasonable doubt and thus remove from me the awful obligation to vote for impeachment.

Like each member of this deliberative body, I love our country. I believe that our Constitution was inspired by Providence. I'm convinced that freedom itself is dependent on the strength and vitality of our national character. As it is with each senator, my vote is an act of conviction. We've come to different conclusions fellow senators, but I trust we have all followed the dictates of our conscience.

I acknowledge that my verdict will not remove the president from office. The results of this Senate court will, in fact, be appealed to a higher court, the judgment of the American people. Voters will make the final decision, just as the president's lawyers have implored. My vote will likely be in the minority in the Senate, but irrespective of these things, with

my vote, I will tell my children and their children that I did my duty to the best of my ability believing that my country expected it of me.

I will only be one name among many, no more, no less, to future generations of Americans who look at the record of this trial. They will note merely that I was among the senators who determined that what the president did was wrong, grievously wrong. We are all footnotes at best in the annals of history, but in the most powerful nation on Earth, the nation conceived in liberty and justice, that distinction is enough for any citizen.

Thank you, Mr. President. I yield the floor.<sup>212</sup>

#### VIII. IMPEACHMENT AND TRUMP: WHAT NOW?

Now, as we attempt to place the topic of Impeachment into contemporary context, let's look again at the analytical framework provided by professors Tribe and Matz, and reduce our focus to three basic questions that enable us to look at the prudence of any decision to impeach: (1) Is removal permissible, (2) Is removal likely to succeed, and (3) Is removal worth the price the nation will pay?<sup>213</sup>

##### A. Is Removal Permissible?

Professor Alan Dershowitz writes, “[i]t would be dangerous to the stability of our system of government—and in direct defiance of the constitutional text and debates—if we could impeach a president based on mere policy disagreements. The founding fathers considered criteria of abuse of office and flatly rejected it.”<sup>214</sup> In addition:

[t]o be impeachable, the offenses or crimes must also constitute “the abuse or violation of some public trust.” It is such an abuse or

<sup>212</sup> See Romney, *supra* footnote 196.

<sup>213</sup> See TRIBE & MATZ, *supra* note 17, at xiv.

<sup>214</sup> DERSHOWITZ, *supra* note 97, at 8.

violation, in addition to the explicit criteria, that makes the removal process “political.” Put another way, conviction by the Senate of an enumerated crime is a necessary but not sufficient condition for removal. The added elements of violation of public trust and injury to society are required as well.<sup>215</sup>

As we have seen from: (1) the Mueller special investigation into Russian involvement in the 2016 U.S. elections; (2) the Ukraine incident; and (3) a long list of potentially impeachable offenses, perhaps constituting High Crimes and Misdemeanors have taken place during the first three years of the Trump presidency. However, impeachment requires Congress to separate those strongly held disagreements in policy matters that many believe rise to threaten the very safety and survival of American citizens and the world community—such as climate change—from matters that demand resolution before the next presidential election.<sup>216</sup> As of early January 2020, the question of whether the President’s family business activities may have included money laundering and or potential violations of the Foreign Corrupt Practices Act (FCPA) has not risen to the status of inclusion in the House’s articles vote.<sup>217</sup> Professor Philip Bobbitt writes:

Perhaps because bribery and treason are crimes, some have inferred that any crime could serve as the basis for impeachment of the president. This view is inconsistent, however, with the notion of a “high crime.” Bribing a maître

<sup>215</sup> *Id.* at 16.

<sup>216</sup> See Carol J. Miller & Bonnie Persons, *Offshore Oil Leasing: Trump Administration’s Environmentally Dangerous Energy Policy*, 43 WM. & MARY ENVTL. L. & POL’Y REV. 329 (2019).

<sup>217</sup> See generally Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act*, 30 FLA. J. INT’L L. (2018) (discussing the FCPA); Lawrence J. Trautman, *Following the Money: Lessons from the “Panama Papers,” Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017) (discussing money laundering involving real estate assets); Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns and Money – The Bribery Problem and U.K. Bribery Act*, 47 INT’L LAW. 481 (2013) (discussing the FCPA).



d' to get a good table at a restaurant might excite an overzealous prosecutor, but it could scarcely serve as a predicate for action by the House to remove a president. Like treason, the impeachable offense of bribery—like other impeachable offenses that are also common crimes—must be an act that actually threatens the constitutional stability and security of the State.<sup>218</sup>

As observed by Professors Tribe and Matz, “[p]residents who abuse their power, betray the nation, or corrupt their office must be confronted and constrained.”<sup>219</sup> Based upon what we now know, or upon evidence that becomes available, Congressional leaders may determine that “bribery, treason, or other High Crimes and Misdemeanors” have been committed and that removal of President Trump is both permissible and in the best interest of the American people. Professor Noah Feldman asks, “[i]f the Senate does not remove Trump, what will it mean for his presidency, and for impeachment itself?”<sup>220</sup> Professor Feldman observes, “An impeached president must face trial in the Senate. (And a Senate that refused to hold such a trial would be in violation of the Constitution.)”<sup>221</sup>

#### B. Is Removal Likely to Succeed?

As Professor Michael Klarman writes, “presidents will be removed from office either when the objectionable conduct meets a threshold standard and the impeaching party has a two-thirds majority in the Senate or when the conduct is sufficiently egregious that bipartisan support for impeachment exists.”<sup>222</sup> The Impeachment process is a political decision. With majority control of the House of Representatives returning to the Democratic Party by virtue of the November 2018 mid-term elections, President Trump is impeached by House vote during

<sup>218</sup> Bobbitt, *supra* note 79, at 562.

<sup>219</sup> TRIBE & MATZ, *supra* note 17, at 238.

<sup>220</sup> Feldman, *supra* note 191, at 14.

<sup>221</sup> *Id.*

<sup>222</sup> Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 658-59 (1999).

December 2019. However, with the U.S. Senate remaining under Republican control during 2020, the likelihood of a successful removal vote in the Senate appears remote. Constitutional scholars warn:

The option of expelling an alleged tyrant doesn't just appear out of nowhere. Ending a presidency requires months or years of concerted political and investigative activity. It also requires substantial public deliberation over the factual, legal, and political case against the chief executive. In other words, removing a tyrant requires impeachment talk – and lots of it. Forcefully advocating in favor of the president's ouster, and building the infrastructure to support that agenda, is imperative in the lead-up to a successful impeachment.<sup>223</sup>

It is possible that facts may require removal of President Trump from office. Then, and only then—if even the staunchest Republican Trump supporters in the Senate become too embarrassed in front of their grandchildren to continue support for President Trump, a two-thirds majority vote in the Senate may become possible. Professor Feldman warns that Trump and his defenders:

[c]an be expected to argue that a party-line vote in the House should vitiate the stigma of impeachment. Trump, who has shown himself impervious to much criticism that would have affected previous presidents, may find himself buoyed by non-removal. It is even possible that a Senate vote in his favor might help his reelection prospects. If that happens, and Trump is reelected after having been impeached, he may see himself as, genuinely above the law, a prospect that is concerning to say the least.<sup>224</sup>

<sup>223</sup> TRIBE & MATZ, *supra* note 17, at 238.

<sup>224</sup> Feldman, *supra* note 191, at 14.

### C. Is Removal Worth the Price the Nation Will Pay?

And now we ask the most difficult question, is removal worth the very high price to be paid? Americans find themselves polarized about support for this president. Professor Frank O. Bowman writes:

The most common verdict on Watergate and President Nixon's resignation was that "the constitution worked." The principle lesson that should be drawn from the Clinton impeachment is ill-advised changes to the constitutional structure combined with short-sighted decisions by constitutional officers very nearly prevented the constitution from working again. In my own view, farce though it ultimately proved to be, the Clinton affair came nearer in many ways to being a long-term catastrophe for the conduct of American politics and government than Watergate. If the Republican fire-breathers had prevailed, if the culture of criminalized attack politics had triumphed, American public life would have been crippled for a generation and more. It was a near run thing. If such close calls are to be averted in the future, judges, legislators, prosecutors, and presidents will need to think hard about the adult lessons to be learned from William Jefferson Clinton's juvenile affair. The preservation of the Madisonian structure of the American constitution, of the American idea of governance itself, depends on the presence in government of people who understand it, believe in it, and act in each generation to preserve it.<sup>225</sup>

A very careful and deliberate debate should be conducted in considering whether impeachment and removal is our best

<sup>225</sup> See generally Frank O. Bowman III, *Falling Out of Love with America: The Clinton Impeachment and the Madisonian Constitution*, 60 MD. L. REV. 25 (2001), <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1066&context=facpubs>.

remedy for this dangerous and threatening problem. And now for a particularly disturbing potential scenario. Professor Alan Dershowitz writes:

The decision to remove is not self-enforcing. The impeached and removed president would have to accept the legitimacy of such a decision and agree to leave office. What would happen if the president announced that he did not accept as final the unconstitutional decision of the Senate to remove him, because they had failed to charge and convict him of one of the crimes enumerated in the Constitution?

This would generate a constitutional crisis between the legislative and executive branches that would have to be resolved by the judicial branch. But what if Congress insisted that it, rather than the Supreme Court, was the final arbiter of impeachment and removal?<sup>226</sup>

Transmittal by the House of the Articles of Impeachment to the Senate for trial comes at an inconvenient time for Democratic Senators who may prefer to be campaigning in the democratic primary during spring of 2020.<sup>227</sup> During January 2020, the New York Times observes, “Mr. Trump’s acquittal appears all but certain in the Republican-led chamber. But the trial could plunge Congress, the Presidency and the 2020 presidential campaign into uncertainty for weeks.”<sup>228</sup> Professor Feldman warns:

The most dangerous outcome for constitutional governance would be if the public accepted the facts about Trump’s conduct but concluded that it was not impeachable because it was perfectly fine – business as usual. If the American people were to “get over it,” as Trump’s

<sup>226</sup> DERSHOWITZ, *supra* note 97, at 21.

<sup>227</sup> Nicholas Fandos, *Tense Wait Ends: Pelosi to Send Impeachment Articles to Senate*, N.Y. TIMES, Jan. 11, 2020, at A1.

<sup>228</sup> *Id.*

acting chief of staff Mick Mulvaney advised in a press conference, it would mean they had accepted the idea that a president may constitutionally abuse his office for personal political gain. . . . The passing of the political virtue necessary for constitutional democracy is terrible to contemplate. But it is not unprecedented in world history.<sup>229</sup>

Given the calendar and limited number of months before President Trump's first term expires, perhaps Congress will decide that the 2020 elections provide the best remedy for this president. As Laurence Tribe and Joshua Matz have counseled, "To be sure, there are times when impeachment is the last, best hope for democracy; faced with abuse and corruption of the highest order, our duty is to act."<sup>230</sup> However, "[b]ecause of its extraordinary danger, impeachment should be invoked only under dire circumstances. And even then, it must be handled with care. Every effort should be made to carry out the impeachment process in a manner that brings the country together rather than rending it apart."<sup>231</sup>

## IX. CONCLUSION

As a measure to guard against bribery, treason, or other high Crimes and Misdemeanors, the U.S. Constitution provides for a process of impeachment and removal. History has provided us with several examples of where the country has been faced with this Constitutional crisis. As yet another Constitutional crisis during the Trump presidency has come and gone, we are required to examine the history and role of impeachment and removal in our constitutional system, how it works, and likely implications for our future.

<sup>229</sup> Feldman, *supra* note 191, at 14.

<sup>230</sup> TRIBE & MATZ, *supra* note 17, at xx.

<sup>231</sup> *Id.*