AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Impeaching and Censuring the President

**Trial Memorandum of House of Representatives in the Impeachment of President Trump** (2020)[[1]](#footnote-1)

*On July 25, 2019, the day after special counsel Robert Mueller testified before the House Judiciary Committee on Russian interference with the 2016 presidential elections, President Donald Trump had a phone call with the new Ukrainian president Volodymyr Zelensky. In February 2014, the Russian-backed regime in the Ukraine collapsed, and within weeks Russia annexed Crimea, a region of the Ukraine on the border with Russia. The United States provided assistance to Ukraine in its continued military stand-off with Russia over Crimea. In his July 25th phone call, Trump reaffirmed American support for the Ukrainian government but urged Zelensky to speak with his informal advisor, Rudy Giuliani, about corruption investigations in the Ukraine. On September 9th, the inspector general for the foreign intelligence agencies informed the House intelligence committee that he had received a credible whistleblower report alleging that the president had solicited foreign interference in the 2020 election during his July 25th phone call with the Ukrainian president. Several House committees immediately launch investigations of the allegations and of Giuliani’s activities in the Ukraine. On September 24, Democratic House Speaker Nancy Pelosi held a press conference in which she announced that the House was pursuing an impeachment inquiry against the president.*

*On October 31, 2019, the House of Representatives voted to authorize several committees to investigate “whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach.” On December 18, 2019, the House voted to impeach President Donald Trump on two articles of impeachment. The first article charged the president with abuse of power for pressuring Ukrainian president Volodymyr Zelensky to announce a criminal investigation of Hunter Biden, the son of Democratic presidential frontrunner Joe Biden. The second article charged the president with obstruction of Congress for defying House committee subpoenas. No Republican member of the House voted to impeach the president, and only two Democratic members voted against both articles of impeachment.*

*On January 15, 2020, the House presented the articles of impeachment to the Senate, and the following day the Chief Justice John Roberts was sworn in as the presiding officer of the presidential impeachment trial in the Senate. After an extended presentation of arguments derived from the House impeachment inquiry, the Senate in a 51-49 vote declined to issue subpoenas to compel witnesses and evidence for the trial itself, and the Senate instead moved to closing arguments based on the record assembled in the House. On February 5, the Senate voted separately on each of the two articles of impeachment. Neither received the two-thirds vote necessary to convict the president and remove him from office. Only Senator Mitt Romney broke ranks with the Republicans and voted to convict on the first article of impeachment. He was the first senator to ever vote to convict a president of his own party in an impeachment trial. No Democratic senator voted to acquit.*

*On January 18, managers submitted its trial memorandum. This lengthy document summarized the House’s case against the president and the rationale for his conviction and removal from office. For the Senate impeachment trial of a federal officer, the House of Representatives designates a number of its members to serve as managers who prosecute the case before the Senate. The House selected seven Democratic members to serve as managers in the impeachment trial of President Trump, led by House Intelligence Committee chair Adam Schiff. The trial memorandum outlined both the factual and legal elements of the House’s case for conviction, and synthesized information contained in the much longer report on the House Judiciary Committee recommending the president’s impeachment and a staff report of the House Judiciary Committee setting out the constitutional grounds for impeachment.*

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The Constitution entrusts Congress with the solemn task of impeaching and removing from office a President who engages in “Treason, Bribery, or other high Crimes and Misdemeanors.” The impeachment power is an essential check on the authority of the President, and Congress must exercise this power when the President places his personal and political interests above those of the Nation. President Trump has done exactly that. His misconduct challenges the fundamental principle that Americans should decide American elections, and that a divided system of government, in which no single branch operates without the check and balance of the others, preserves the liberty we all hold dear.

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The President takes an oath to “faithfully execute the Office of the President of the United States.” Impeachment imposes a check on a President who violates that oath by using the powers of the office to advance his own interests at the expense of the national interest. Fresh from their experience under British rule by a king, the Framers were concerned that corruption posed a grave threat to their new republic. As George Mason warned the other delegates to the Constitutional Convention, “if we do not provide against corruption, our government will soon be at an end.” The Framers stressed that a President who “act[s] from some corrupt motive or other” or “willfully abus[es] his trust” must be impeached, because the President “will have great opportunitys of abusing his power.”

The Framers recognized that a President who abuses his power to manipulate the democratic process cannot properly be held accountable by means of the very elections that he has rigged to his advantage. The Framers specifically feared a President who abused his office by sparing “no efforts or means whatever to get himself re-elected.” Mason asked: “Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?”

Thus, the Framers resolved to hold the President “impeachable whilst in office” as “an essential security for the good behaviour of the Executive.” By empowering Congress to immediately remove a President when his misconduct warrants it, the Framers established the people’s elected representatives as the ultimate check on a President whose corruption threatened our democracy and the Nation’s core interests.

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In drafting the Impeachment Clause, the Framers adopted a standard flexible enough to reach the full range of potential Presidential misconduct: “Treason, Bribery, or other high Crimes and Misdemeanors.” The decision to denote “Treason” and “Bribery” as impeachable conduct reflects the Founding-era concerns over foreign influence and corruption. But the Framers also recognized that “many great and dangerous offenses” could warrant impeachment and immediate removal of a President from office. These “other high Crimes and Misdemeanors” provided for by the Constitution need not be indictable criminal offenses. Rather, as Hamilton explained, impeachable offenses involve an “abuse or violation of some public trust” and are of “a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself.” The Framers thus understood that “high crimes and misdemeanors” would encompass acts committed by public officials that inflict severe harm on the constitutional order.

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President Trump abused the power of the Presidency by pressuring a foreign government to interfere in an American election on his behalf. He solicited this foreign interference to advance his reelection prospects at the expense of America’s national security and the security of Ukraine, a vulnerable American ally at war with Russia, an American adversary. His effort to gain a personal political benefit by encouraging a foreign government to undermine America’s democratic process strikes at the core of misconduct that the Framers designed impeachment to protect against. President Trump’s abuse of power requires his conviction and removal from office.

An officer abuses his power if he exercises his official power to obtain an improper personal benefit while ignoring or undermining the national interest. An abuse that involves an effort to solicit foreign interference in an American election is uniquely dangerous. President Trump’s misconduct is an impeachable abuse of power.

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President Trump’s pursuit of the sham investigations marked a dramatic deviation from longstanding bipartisan American foreign policy goals in Ukraine. Legitimate investigations could have been recognized as an anti-corruption foreign policy goal, but there was no factual basis for an investigation into the Bidens or into supposed Ukrainian interference in the 2016 election. To the contrary, the requested investigations were precisely the type of political investigations that American foreign policy dissuades other countries from undertaking. That explains why the scheme to obtain the announcements was pursued through the President’s chosen political appointees and his personal attorney; why Trump Administration officials attempted to keep the scheme from becoming public due to its “sensitive nature”; why no credible explanation for the hold on security assistance was provided even within the U.S. government; why, over Defense Department objections, President Trump and his allies violated the law by withholding the aid; and why, after the scheme was uncovered, President Trump falsely claimed that his pursuit of the investigations did not involve a quid pro quo.

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The Senate should convict President Trump of Obstruction of Congress as charged in the Second Article of Impeachment. President Trump unilaterally declared the House’s investigation “illegitimate.” President Trump’s White House Counsel notified the House that “President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.” President Trump then directed his Administration categorically to withhold documents and testimony from the House.

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Refusing to comply with a Congressional impeachment investigation is not a constitutionally valid decision for a President to make. President Trump’s unprecedented “complete defiance of an impeachment inquiry . . . served to cover up the President’s own repeated misconduct and to seize and control the power of impeachment.” President Trump’s directive rejects one of the key features distinguishing our Republic from a monarchy: that “[t]he President of the United States [is] liable to be impeached, tried, and, upon conviction . . . removed.” Allowing President Trump to avoid conviction on the Second Article would set a dangerous precedent for future Presidents to hide their misconduct from Congressional scrutiny during an impeachment inquiry without fear of accountability.

Notwithstanding President Trump’s obstruction, the House obtained compelling evidence that he abused his power. The failure of President Trump’s obstruction and attempted cover-up, however, does not excuse his misconduct. There can be no doubt that the withheld documents and testimony would provide Congress with highly pertinent information about the President’s corrupt scheme. . . .

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When the Framers entrusted the House with the sole power of impeachment, they obviously meant to equip the House with the necessary tools to discover abuses of power by the President. Without that authority, the Impeachment Clause would fail as an effective safeguard against tyranny. A system in which the President cannot be charged with a crime, as the Department of Justice believes, and in which he can nullify the impeachment power through blanket obstruction, as President Trump has done here, is a system in which the President is above the law. The Senate should convict President Trump for his categorical obstruction of the House’s impeachment inquiry and ensure that this President, and any future President, cannot commit impeachable offenses and then avoid accountability by covering them up.

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President Trump has betrayed the American people and the ideals on which the Nation was founded. Unless he is removed from office, he will continue to endanger our national security, jeopardize the integrity of our elections, and undermine our core constitutional principles.

1. Excerpt taken from Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump (January 18, 2020). [↑](#footnote-ref-1)