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 President Donald J. 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 20, the president’s legal team submitted its trial memorandum. This lengthy document summarized the president’s case against impeachment. The president’s defense team included White House Counsel Pat Cipollone and outside attorney Jay Sekulow, though notable attorneys Alan Dershowitz and Ken Starr, who presented oral arguments to the Senate, were not listed as authors of the trial memorandum. Although the memorandum contended that the evidence assembled by the House did not prove their charges, the bulk of the document argued that the House’s impeachment inquiry was procedurally flawed and that the articles of impeachment, even if true, did not meet the constitutional standard of high crimes and misdemeanors that would warrant conviction and removal.*

The Articles of Impeachment now before the Senate are an affront to the Constitution and to our democratic institutions. The Articles themselves—and the rigged process that brought them here—are a brazenly political act by House Democrats that must be rejected. They debase the grave power of impeachment and disdain the solemn responsibility that power entails. Anyone having the most basic respect for the sovereign will of the American people would shudder at the enormity of casting a vote to impeach a duly elected President. By contrast, upon tallying their votes, House Democrats jeered until they were scolded into silence by the Speaker. The process that brought the articles here violated every precedent and every principle of fairness followed in impeachment inquiries for more than 150 years. Even so, all that House Democrats have succeeded in proving is that the President did absolutely nothing wrong.

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The extraordinary process invoked by House Democrats under Article II, Section 4 of the Constitution is not the constitutionally preferred means to determine who should lead our country. It is a mechanism of last resort, reserved for exceptional circumstances—not present here—in which a President has engaged in unlawful conduct that strikes at the core of our constitutional system of government.

The Constitution makes clear that an impeachment by the House of Representatives is nothing more than an accusation. The Articles of Impeachment approved by the House come to the Senate with no presumption of regularity in their favor. On each of the two prior occasions that the House adopted articles of impeachment against a President, the Senate refused to convict on them. Indeed, the Framers wisely forewarned that the House could impeach for the wrong reasons. That is why the Constitution entrusts the Senate with the “sole Power to try all Impeachments.”. . .

The President of the United States occupies a unique position in the structure of our government. He is chosen directly by the People through a national election to be the head of an entire branch of government and Commander-in-Chief of the armed forces and is entrusted with enormous responsibilities for setting policies for the Nation. Whether Congress should supplant the will expressed by tens of millions of voters by removing the President from office is a question of breathtaking gravity. Approaching that question requires a clear understanding of the limits the Constitution places on what counts—and what does not count—as an impeachable offense.

Fearful that the power of impeachment might be abused, and recognizing that constitutional protections were required for the Executive, the Framers crafted a *limited*power of impeachment. The Constitution restricts impeachment to enumerated offenses: “Treason, Bribery, or other high Crimes and Misdemeanors.” Treason and bribery are well defined offenses and are not at issue in this case. The operative text here is the more general phrase “other high Crimes and Misdemeanors.” The structure and language of the clause—the use of the adjective “other” to describe “high Crimes and Misdemeanors” in a list immediately following the specific offenses “Treason” and “Bribery”—calls for applying the *ejusdem generis* canon of interpretation. This canon instructs that “‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” Under that principle, “other high Crimes and Misdemeanors” must be understood to have the same qualities—in terms of seriousness and their effect on the functioning of government—as the crimes of “Treason” and “Bribery.”

. . . . The text of the Constitution thus indicates that the “other” crimes and misdemeanors that qualify as impeachable offenses must be sufficiently egregious that, like treason and bribery, they involve a fundamental betrayal that threatens to subvert the constitutional order of government.

Treason and bribery are also, of course, offenses defined by law. Each of the seven other references in the Constitution to impeachment also supports the conclusion that impeachments must be evaluated in terms of offenses against settled law: The Constitution refers to “Conviction” for impeachable offenses twice and “*Judgment*in Cases of Impeachment.” It directs the Senate to “*try*all Impeachments” and requires the Chief Justice’s participation when the President is “tried.” And it implies impeachable offenses are “Crimes” and “Offenses” in the Jury Trial Clause and the Pardon Clause, respectively. These are all words that indicate violations of established law.

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Significantly, the records of the Constitutional Convention also make clear that, in important respects, the Framers intended the scope of impeachable offenses under the Constitution to be much *narrower*than under English practice. When the draft Constitution had limited the grounds for impeachment to “Treason, or bribery,” George Mason argued that the provision was too narrow because “[a]ttempts to subvert the Constitution may not be Treason” and that the clause “will not reach many great and dangerous offenses.” He proposed the addition of “maladministration,” which had been a ground for impeachment in English practice. Madison opposed that change on the ground that “[s]o vague a term” would make the President subject to “a tenure during [the] pleasure of the Senate,” and the Convention agreed on adding “other high crimes & misdemeanors” instead.

By rejecting “maladministration,” the Framers significantly narrowed impeachment under the Constitution and made clear that mere differences of opinion, unpopular policy decisions, or perceived misjudgments cannot constitutionally be used as the basis for impeachment. Indeed, at various earlier points during the Convention, drafts of the Constitution had included as grounds for impeachment “malpractice or neglect of duty” and “neglect of duty [and] malversation,” but the Framers rejected all of these formulations. The ratification debates confirmed the point that differences of opinion or differences over policy could not justify impeachment. James Iredell warned delegates to North Carolina’s ratifying convention that “[a] mere difference of opinion might be interpreted, by the malignity of party, into a deliberate, wicked action,” and thus should not provide the basis for impeachment. And Edmund Randolph pointed out in the Virginia ratifying convention that “[n]o man ever thought of impeaching a man for an opinion.”

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[C]onviction of a President raises particularly profound issues under our constitutional structure because it means overturning the democratically expressed will of the people in the only national election in which all eligible citizens participate. The impeachment power permits the possibility that “the legislative branch [will] essentially cancel[] the results of the most solemn collective act of which we as a constitutional democracy are capable: the national election of a President.”

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[B]ecause the President himself is vested with the authority of an entire branch of the federal government, his removal would cause extraordinary disruption to the Nation. Article II, Section 1 declares in no uncertain terms that “[t]he executive Power shall be vested in a President of the United States of America.” . . . As a result, “the application of the Impeachment Clause to the President of the United States involves the uniquely solemn act of having one branch essentially overthrow another.” It also carries the risk of profound disruption for the operation of the federal government.

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Given the profound implications of removing a duly elected president from office, an exceptionally demanding standard of proof must apply in a presidential impeachment trial. Senators should convict on articles of impeachment against a President only if they find that the House Managers have carried their burden of proving that the President committed an impeachable offense beyond a reasonable doubt.

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House Democrats’ novel conception of “abuse of power” as a supposedly impeachable offense is constitutionally defective. It supplants the Framers’ standard of “high Crimes and Misdemeanors” with a made-up theory that the President can be impeached and removed from office under an amorphous and undefined standard of “abuse of power.” The Framers adopted a standard that requires a violation of established law to state an impeachable offense. By contrast, in their Articles of Impeachment, House Democrats have not even attempted to identify any law that was violated. Moreover, House Democrats’ theory in this case rests on the radical assertion that the President could be impeached and removed from office entirely for his *subjective**motives*—that is, for undertaking permissible actions for supposedly “forbidden reasons.” That unprecedented test is so flexible it would vastly expand the impeachment power beyond constitutional limits and would permanently weaken the Presidency by effectively permitting impeachments based on policy disagreements.

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Under the Constitution, impeachable offenses must be defined under established law. And they must be based on objective wrongdoing, not supposed subjective motives dreamt up by a hostile faction in the House and superimposed onto a President’s entirely lawful conduct.

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House Democrats’ conception of “abuse of power” is especially dangerous because it rests on the even more radical claim that a President can be impeached and removed from office solely for doing something he is allowed to do, if he did it for the “wrong” *subjective*reasons. Under this view, impeachment can turn entirely on “whether the President’s *real reasons*, the ones actually in his mind at the time, were legitimate.” That standard is so malleable that it would permit a partisan House—like this one—to attack virtually any presidential decision by questioning a President’s motives. By eliminating any requirement for wrongful conduct, House Democrats have tried to make thinking the wrong thoughts an impeachable offense.

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1. Excerpt taken from Trial Memorandum of President Donald J. Trump (January 20, 2020). [↑](#footnote-ref-1)