The First Impeachment: from a Comparative Study of its British Historical Roots to a Contextual Analysis

by Justin O. Frosini & Alexis Keys

Abstract: Il primo impeachment: da uno studio comparativo delle sue radici storiche britanniche ad un'analisi contestuale – Combining the areas of expertise of the two authors the paper starts by providing the contemporary context to the first Trump impeachment then it goes on to compare today's legal instrument with the British historical roots of impeachment by making reference to the Framers' records from the late 18th century during the Constitutional Convention in 1787 and subsequent debates for ratification. The third section of the paper then addresses the actual case that brought about the approval of articles of impeachment against President Trump and offers a critique of the Senate Trial. At this point, the paper turns to the past so as to make a comparison between all previous cases of impeachment with the first Trump impeachment and then, having in mind public trust, the paper offers some predictions for the future combined with an intricate use of counterfactuals. The paper ends by encouraging concerned parties to look beyond political polarization because the current dynamics at work in shaping American political parties and partisan moods are also shaping electoral oversight, constitutional interpretation by the legislature, and the scope of executive authority. In the final analysis, the paper underlines the fact that one should never forget that impeachment exists to uphold democratic constitutionalism.

Keywords: Impeachment; Trump; United States; Constitution; Comparative Law.

1. Contemporary Context of the Trump Impeachment

Impeachment is the United States' constitutional alternative to the guillotine. In its 14th century British incarnation, impeachment by the House of Commons and trial by the House of Lords did not preclude as a final sentence beheading officers of the King's court.[1] The King himself remained

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"sacred and inviolable".[2] When designing the impeachment power in the United States, the Framers of the Constitution sought to provide a political remedy of last resort for political problems of the highest order. At the Constitutional Convention of 1787, the Framers "republicanized" the British tool of impeachment,[3] adopting from it phrases such as "high crimes and misdemeanors" due to the political gravity it carried at the time, but limiting its use from any private citizen to "[t]he President, Vice President and all civil Officers of the United States".[4] After having just fought and won a bloody war for independence from Kings and tyrants, they sought to avoid formulating an executive whose power could not be curtailed "without involving the crisis of a national revolution".[5] Neither the guillotine nor violent insurrection would be utilized to solve issues of governance in the new American republic.

Alas, the Framers designed impeachment as to answer definitively Convention delegate George Mason's famous question "Shall any man be above justice?"[6] The most obvious interpretation of the question is that not even the nation's most powerful leaders should be allowed to escape equitable accountability under the law. Another interpretation is that this question poses a challenge directly to Congress and the Supreme Court—co-equal in their constitutional authority to check and balance the Executive—in times of presidential abuse of power. Public officials are not just subject to the rule of law but are additionally responsible for maintaining the rule of law.[7] "Shall any man be above justice?" should serve as a lightning rod, inspiring those at the helm of America's political institutions to not only follow, but to safeguard the principles that govern these institutions.[8]

Two articles of impeachment against President Trump passed in a vote by the House of Representatives on the 18 of December 2019 passed

impeachment procedure. The assault on Capitol Hill and the second impeachment are addressed herein by Giovanni Poggeschi, *The assault on Capitol Hill of January 6, 2021: freedom of expression or rather freedom to impeach and to acquit?*.

[1] The literature on the Constitutional Convention, the British origins of impeachment, and debates on adapting the impeachment power for a republican government is vast. *See*, respectfully, M. Farrand, (Ed.), 'July 20,' in *The Records of the Federal Convention of 1787*, New Haven, Vol. 2, 1987, P.C. Hoffer & N.E.H Hull, *Impeachment in America, 1635-1805*, New Haven, 1980, pp. 96-106, 264-70., M.J. Klarman, *The Framers' Coup: The Making of the United States Constitution*, Oxford, 2016.

[2] A. Hamilton, *Federalist no. 69*, in L. Goldman (Ed.), *Alexander Hamilton, James Madison, and John Jay: The Federalist Papers*, Oxford, 2008, 338., (hereinafter referenced by essay author and no., *e.g.*, Hamilton, *Federalist no.* 65).

[3] Hoffer & Hull, pp. 96-106, 264-70.

[4] *U.S. Const.*, Art. II, s. 4.

[5] Ibid.

[6] M. Farrand, (Ed.), 'July 20,' in *The Records of the Federal Convention of 1787*, New Haven, Vol. 2, 1987, 65.

[7] Ibid.

[8] J.A. Engel, J. Meacham, T. Naftali, P. Baker, *Impeachment: An American History*, New York, 2018, 210.

largely along party lines. These articles were the result of sustained effort by Democrats in Congress to rectify an unconstitutional pattern of behavior by Trump observable from the time of the 2016 presidential campaign and documented in the Mueller Report.[9] Presidents Andrew Johnson in 1868 and Richard Nixon in 1974 were both accused, but not convicted, of a course of conduct demonstrating abuse of powers granted by the Constitution.[10] Bill Clinton was impeached in 1999 for obstructing justice, carrying forth the precedent set in 1974 of using the impeachment power to protect and affirm the separation of powers.[11] The first article against Trump passed the House of Representatives by a margin of 230 to 197 and charged that President Trump "used the powers of his office to solicit and pressure a foreign government, Ukraine, to investigate his domestic political rival and interfere in the upcoming United States Presidential elections".[12] The second article impeached President Trump for obstruction of Congress, that he "directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment'."[13] The President plunged the United States electoral system into a crisis when he engaged in a "scheme" to solicit foreign interference in the 2020 election by discrediting Joe Biden the then-candidate for the Democratic presidential nomination.[14] The president then illegally authorized, and requested the White House Counsel to provide legal cover for, a stone wall around all executive office officials, political appointees, documents and evidence to obstruct lawful investigation by the House into his course of conduct.[15] In doing so, he steered our governmental system into a quintessential constitutional crisis, one that pressed sharply into new and old weaknesses in the separation of powers doctrine underlying the American governmental system. The final resolution impeaching Trump warned that this scheming would continue if left unchecked, and for these reasons recommended that the Senate impeach, remove and disqualify President Trump from holding office.[16]

The Supreme Court is recognized as an "ultimate interpreter" of the Constitution on judicial matters,[17] but much scholarly debate has challenged judicial supremacy in favor of alternate modes of interpretation. After much

[9] House of Representatives Resolution 755, 'Articles of Impeachment Against Donald Trump', 18 December 2019 (hereinafter H.Res. 755); D. Ramirez & G. Clem, *Fortifying the Rule of Law: Filling the Gaps Revealed by the Mueller Report and Impeachment Proceedings*, Ne. U. L. Rev., Vol 13, Iss. 1.
[10] *See* J. Meacham, T. Naftali & P. Baker, *Impeachment: An American History*, New York, 2018.
[11] Id., pp. 157, 172, 181-184.
[12] H.Res. 755, 1.
[13] Id., 2.
[14] Id., 1-3.
[15] Id.
[16] Id., 3.
[17] Senate Congressional Record, 'Impeachment', Vol. 166, No. 22, 3 February 2020, S801.

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debate in the Constitutional Convention art. I, sec. 3 relegates the Court to a minimal, almost symbolic role in the case of presidential impeachments, stating, "When the President of the United States is tried, the Chief Justice shall preside".[18] Legislators in the House of Representatives are given the "sole Power of Impeachment".[19] The Senate is granted "the sole Power to try all Impeachments".[20] Even more consequential, perhaps, than the parameters they selected to warrant impeachment, and the punishments that follow, were the bodies they entrusted with interpreting the Constitution to define what is and is not an impeachable offense, and to apply the appropriate political remedy.

In *Federalist no. 65* Alexander Hamilton asserted the Framers' vision of the Senate as the only body "sufficiently independent" from the Executive branch so as to fulfill its oath to do impartial justice in adjudicating the House of Representatives' impeachment case against a sitting president.[21] This oath is one of few impeachment procedures laid out explicitly in the Constitution and is taken above and beyond the general Senate oath. The same clause giving the Senate its quasi-judicial role in impeachments requires that "[w]hen sitting for that Purpose, they shall be on Oath or Affirmation".[22] Senators pledge specifically to "do impartial justice according to the Constitution and laws", [23] the same text used the first ever impeachment in 1798 of Senator Blount and codified in 1868 in the 26 Senate rules adopted for the first ever presidential impeachment, the post-Civil War case against Andrew Johnson.

On 13 December 2019 the House Judiciary Committee voted (23-17) to recommend two articles of impeachment against Donald J. Trump for a full vote on the House floor. The very same day Senate Majority Leader Mitch McConnell (R-KY) shocked even members of his own party when he announced clearly his plans to hijack the Senate trial process and shape it into something else entirely. "Everything I do during this, I'm coordinating with the White House counsel," McConnell told Fox News, adding that there would be "no difference between the president's position and our [Senate Republicans'] position".[24] This was problematic, to say the least. At worst, this was a pledge to sabotage the trial.

The President's position McConnell aligned himself and the Republican-led Senate with was a "*categorical* and *indiscriminate*" defiance of

[18] Art. I, s. 3, §6.
[19] Art. I, s. 2, §5.
[20] Art. I, s. 3, §6.
[21] Hamilton, *Federalist no.* 65, 322.
[22] U.S. Const., Article I, s. 3, §6.
[23] *See* S. Doc. No. 93-33, *Procedure and Guidelines for Impeachment Trials in the Senate (Revised Edition), Prepared Pursuant to Senate Resolution 439*, 99th Cong., 2d Sess., 1986, 61.
[24] S. G. Stolberg, 'McConnell, Coordinating with White House, Lays Plans for Impeachment Trial', *New York Times*, 13 Dec 2019.

the House's investigative power granted by Article 1 of the Constitution.[25] White House Counsel Pat A. Cipollone, issued a letter to House Democratic leaders on 8 October, weeks into the formal impeachment investigation launched 24 September, stating that "President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances".[26] Two days later, the President confirmed the Cipollone letter. The natural and foreseeable consequence of this instruction was that the White House to defied all subpoenas to produce information or records, the Departments of State, Energy, Defense and the Office of Management and Budget (OMB) to refused to produce "a single record to Investigative Committees", and nine administration officials, four at the senior level, were forbidden from abiding by lawful subpoenas to testify.[27] To align the Senate trial procedure with White House policy of obstructing the House impeachment inquiry was an unprecedented assist from Senate in the most absolute, sweeping presidential abuse of power ever executed in response to an impeachment inquiry.[28] Following McConnell's statement, House Impeachment Manager Rep. Val Demings (D-FL) called on McConnell to recuse himself. "No court in the country would allow a member of the jury to also serve as the accused's defense attorney", she argued, and added as a matter of fact "[t]he moment Senator McConnell takes the oath of impartiality required by the Constitution, he will be in violation of that oath."[29]

In the short term, a trial without witnesses and without new evidence was a creative solution by the Senate majority to the investigation of its party leader, President Trump. In the longer term, the 2020 Senate impeachment trial represented the latest turn for Americans towards a factionalism that undermines directly the constitutional rule of law at the highest levels of the legislative and executive branches. At least, it was the latest turn towards a factional attack on the electoral system and the rule of law until the fraud allegations promoted by Trump and the GOP after the 2020 presidential election.[30] President Trump lost, 232 electoral votes to 306 earned by Joe Biden. Biden flipped five states.[31] A joint statement from

[25] House Committee on the Judiciary, *Impeachment of Donald J. Trump President of the United States: Report of the Committee on the Judiciary, Together with Dissenting Views to accompany H.Res. 755*, Report 116–346, 116th Cong., 1st Sess., 15 December 2019, 149 (hereinafter *Trump Impeachment Report*).
[26] Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker of the House, Adam B. Schiff, Chairman, H. Perm. Select Comm. on Intelligence, Eliot L. Engel, Chairman, H. Comm. on Foreign Affairs, and Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform, 8 October 2019, (hereinafter *8 October Cipollone Letter*), pp. 1, 4.
[27] Id.
[28] Id.
[29] Statement from Congresswoman Val Demings, 13 December 2019.
[30] N. Corasaniti & J. Rutenberg, *Electoral College Vote Officially Affirms Biden's Victory*, *New York Times*, 14 December 2020.
[31] Id.

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the Cybersecurity and Infrastructure Security Agency (CISA), the National Association of Secretaries of State (NASS) and others election administration agencies declared 3 November 2020 "the most secure in American history".[32]

There is a wealth of scholarship covering basic principles that follow the political realities of divided versus unified government.[33] There are important and divergent implications for legislative output and constitutional oversight inherent in times of divided and unified government. In a divided government, both parties' support is required to advance any significant legislation, whereas in a unified government, the ruling party can advance its policy agenda more easily. This is a useful simplification for a more complex reality. It has been observed that legislative oversight of the presidency is reasonably more intense during times of divided government.[34] The party composition and ideological cohesiveness of the legislature can determine how legislators interpret their powers of oversight. Recent Washington history demonstrates that "one can understand how the US government actually operates...by seeing it as a government fundamentally structured around the existence of two nationally organized political parties".[35] Political parties and the now extraordinary partisan competition that has come to define the United States operating under what Mark Tushnet calls the "efficient constitution".[36]

"Popular constitutionalism" is one method of constitutional interpretation outside of the courts that has given the legislative branch the power to set standards of constitutionality, or precedent, that is reflected in the efficient constitution, whether or not these standards are affirmed by judgments from the Supreme Court and incorporated into the written Constitution as amendments, or other common law jurisprudence and become judicial precedents.[37] These legislative norms shape American society under the political, legal, and executive regime of that era. A simple but consequential method of setting precedents in impeachments that through legislative—or popular—constitutional interpretation that go on to become standards of constitutionality is quite banal: the process of setting rules for proceedings. Tushnet argues that the most significant constitutional provision dealing with the Congress's operations is perhaps the provision giving each house the power to determine the Rules of its

[32] *Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees*, Cybersecurity and Infrastructure Security Agency (CISA), 12 November 2020.
[33] *See* M. Tushnet, *The Constitution of the United States of America: A Contextual Analysis*, Oxford, 2015, 5; Divided government, specifically in the context of the separation of parties; "exists when one or both of the branches of the national legislature are under effective control of one political party and the presidency is controlled by the other".
[34] Id., pp. 5, 35-36, 224-225.
[35] Id., 5.
[36] Tushnet, 1.
[37] Id., 5-7, 271.

Proceedings."[38] This case of impeachment has revealed that the increasing polarization in the two-party system has normalized giving bold political agents among the GOP power to decline to hold the Republican party leader accountable for a straightforward and elaborate case of high crimes and misdemeanors.

This is a stark illustration of today's political reality, one the Framers imagined but despised–a "separation of parties, not powers".[39] This work makes use of the healthy dose of political realism offered in this theory from constitutional law Professors Levinson and Pildes, that constitutional questions are determined more along party lines, and "[f]ew aspects of the founding generations' political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers".[40] This is particularly relevant in today's context of hyper-partisan, ideologically unified parties that emerged in the States after the Republican Revolution of 1978 ushered in a confrontational, anti-establishment style of politics to undermine the institutions of Congress, win the media and win disaffected voters.[41] A central argument in the present article is that the American political system has long since departed from the ideals of democratic and constitutional balance envisioned by the Framers and arrived at a balance resting on partisan competition. The case of the forgotten impeachment of Donald Trump demonstrates how articles of impeachment from the House can be rendered impotent, ineffective, and inconsequential as a check on a rogue Executive if the Senate fails to function as an impartial jury. Ultimately, we argue that this sets an anti-democratic precedent, one that seeks to define for future generations the constitutionality of one branch holding another accountable not based on one's adherence to constitutional principles, the rule of law or the spirit of impeachment. The White House counsel's argument demonstrates exactly Hamilton's idea of "the greatest danger" in an impeachment—"that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt".[42]

The House of Representatives' move to impeach the President may have further divided the nation, but an honest assessment of this and previous presidential impeachments would reveal that impeachment is more probable at more divided moments in American society. The framework put forth by Mettler and Lieberman posits that 'four threats' resurface throughout the nation's history, and have given rise to major crises that have

[38] Tushnet, 69.
[39] D.J. Levinson & R.H Pildes, *Separation of Parties, Not Powers*, *Harv. L. Rev.*, Vol. 119, No. 8, 2006, 2313.
[40] Levinson & Pildes, 2313.
[41] *See, e.g.*, F.E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*, Chicago, 2009; G. Kabaservice, *Rule and Ruin: The Downfall of Moderation and the Destruction of the Republican Party, From Eisenhower to the Tea Party*, Oxford, 2012.
[42] Hamilton, *Federalist no. 65*, 321.

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challenged and weakened the American system of democracy.[43] These four threats are "political polarization, conflict over who belongs in the political community, high and growing economic inequality, and excessive executive power", and they continue to pose the most formidable challenges to the U.S. system of government throughout its history by creating the most desperate, divided moments in American society.[44] When one or more of these challenges are present "democracy is prone to decay".[45] They argue that Americans today find themselves evaluating the Trump impeachment in a truly exceptional circumstance wherein the U.S. is facing all the above four threats at once, creating the conditions for a fragile and deteriorating republic.[46]

In the same way the four threats are familiar, recognizable foes of American democracy, unpresidential, illegal and unconstitutional actions undertaken by Donald Trump call to mind some of the worst of the impeachable offenses committed by each of the three other presidents to have faced this sanction. Like Andrew Johnson, he is endorsed or supported openly by anti-Black organizations claiming a false sense of racial superiority, and often refuses to or avoids denouncing them.[47] Akin to Richard Nixon, Donald Trump was caught in the act of abusing his authority as president to derail the presidential campaign of his political rival. Whereas Nixon enlisted the help of domestic agencies such as the IRS and the CIA, Donald Trump was observed on at least three occasions soliciting a foreign government to take detrimental action against his rival in a presidential race.[48] Not dissimilar from Bill Clinton, Donald Trump was accused by multiple women of sexual assault, harassment, and even rape. Whereas Clinton abused his power as President by encouraging the forging of affidavits to cover up his sordid sexual affairs, Trump's lawyer Michael Cohen served prison time for arranging hush payments to a now-famous adult entertainer on behalf of the President.[49] Comprehensive evaluation of the other episodes of presidential impeachment is beyond the scope of this article, however, understanding social context, recurring presidential abuses of power, and certainly precedents in impeachment allow a critical assessment of President Trump, his unpresidential behavior, and the peculiarities in the deregulated institutional environment of weak

[43] S. Mettler & R.C. Lieberman, *Four Threats: The Recurring Crises of American Democracy*, New York, 2020.
[44] Id., 16.
[45] Id., 14.
[46] Id., 16.
[47] M. Quinn, *Stand Back and Stand By*: Trump Declines to Condemn White Supremacists at Debate, CBS News. September 30, 2020.
[48] R.S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Office of Special Counsel, U.S. Dept. of Justice, Vol. I, March 2019, 49.
[49] K. Breuninger & D. Mangan, *Feds End Probe of Hush Money That Trump Lawyer Michael Cohen Directed to Stormy Daniels, Karen McDougal*, CNBC. July 17, 2019.

interbranch accountability the Republican Senate majority in the 116th Congress has created around him.

Considering altogether the constitutional, political, partisan, social and presidential challenges summarized above, and with an interdisciplinary lens, this article argues that now is an appropriate moment to propose that the United States is in a critical juncture. From the perspective of social movement theory we can understand critical junctures as windows of expanded opportunity brought about by crises, changes in leadership, failures crises, changes in leadership, failures, natural disasters, or conflicts[50] The months-long conflict between protesters and police during the nation-wide Black Lives Matter uprising blossomed into global solidarity protests in major cities around the globe. Viral video of excessively forceful responses from law enforcement, especially towards credentialed journalists, has aided in making some of the protesters' points of contention to life better than slogans ever could. During critical junctures gatekeepers and the public alike become more aware of the shortcomings of the status quo and start considering changes they may not have considered before. For example, the 2020 iteration of the Black Lives Matter movement has brought discussions of defunding the police and other demands for economic redistribution into mainstream public discourse, bringing major cities including New York, Los Angeles, Minnesota and Philadelphia to revise downwards their police budgets.[51]

If the global coronavirus pandemic is classified as a natural disaster, it can be argued that the United States is facing each category of critical juncture at once. As of December, COVID-19 has now become the leading cause of death in the United States.[52] The Trump administration's handling of the nation's public health response is a grave failure of leadership. The New England Journal of Medicine reported in October, that Americans are "dying in a leadership vacuum" that has "taken a crisis and turned it into a tragedy".[53] Additionally, the U.S. is experiencing an anomalous crisis as a result of a change in leadership. 126 Republican members of Congress, over half of the Republican members of the House, signed onto a December 2020 lawsuit filed by the State of Texas with the Supreme Court requesting to invalidate the results of the 2020 presidential election in four other states based on baseless claims by the President and the GOP of widespread election fraud.[54] In signing onto this lawsuit, 17 of the signatories "directly

[50] D. Green, *How Change Happens*, Oxford, 2020, 11.
[51] J. Alemany, *Power Up: Protesters 'Defund the Police' Rallying Cry is Achieving Some Progress*, *The Washington Post*, 5 June 2020.
[52] 'COVID-19 Results Briefing: the United States of America, *Institute for Health Metrics and Evaluation*, 4 December 2020, 2.
[53] *Dying in a Leadership Vacuum*, *The New England Journal of Medicine*, Massachusetts Medical Society, Vol. 383, Iss. 15, 8 October 2020.
[54] New York Times Editorial Board, *Republicans Who Embraced Nihilism*, *New York Times*, 12 December 2020.

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challeng[ed] the legitimacy of their own victories and the integrity of their own states' elections".[55] This unstable state of play has led Trump's main rival, China, to prefer Joe Biden in the Oval Office, not only for a reprieve from his bully pulpit but due to a belief that Trump "has weakened American power and accelerated American decline".[56] These critical junctures are a clear window into the human consequences that abdicating congressional oversight can have for national security, electoral integrity and public health. The framework of historical institutionalism describes critical junctures as a time when institutions become fluid, and the range of possible decisions for key actors to open up "placing institutional arrangements on paths or trajectories".[57] Decisions by influential actors within existing institutions become more causally decisive. This work in part analyzes President Donald Trump, Senate Majority Leader Mitch McConnell, and other admittedly or demonstrably partial judges in Trump's impeachment trial as this type of political actors whose actions in a critical juncture will have heightened consequences for the development of the institutions of the Senate, the presidency, and the intergovernmental accountability intended to constrain them both.

Are there any clear remedies available in the American constitutional design to address these issues? Some scholars have argued that the House of Representatives can reinvigorate its power of impeachment in the future by bypassing the Senate and issuing instead its own verdict, as became necessary after Nixon resigned and brought about an abrupt end to the impeachment proceedings against him. Would the Supreme Court have been better suited for trying cases of impeachment, as was considered but decided against during the Constitutional Convention of 1787? The controversy to confirm a new justice to the Supreme Court, nominated by an impeached president and confirmed during the election he was impeached for undermining, may have proven that there is no perfect court for trying impeachment cases after all. Considering this along with creative solutions and counterfactuals, this work attempts to bring to bear just a few of the constitutional, political, and social challenges plaguing Trump's America by placing them in the context of the ultimate test of inter-branch accountability: presidential impeachment.

The Trump-Zelenskyy call so disturbed White House officials that the alarm among officials who heard the exchange led to an "extraordinary effort" to keep many more people from learning about it.[58] This effort included an attempt to bury the call record on a secure server reserved for

[55] Id.
[56] R. Doshi, *Beijing Believes Trump Is Accelerating American Decline*, *Foreign Affairs*, 12 October 2020.
[57] G. Capoccia, & R. Kelemen, T*he Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, *World Politics*, Vol. 59, Iss. 3, pp. 341-342.
[58] P. Baker, *Complaint Asserts a White House Cover-up*, *The New York Times*, 27 September 2019.

sensitive national security content.[59] It harkened back to then-candidate Trump's "Russia, if you're listening" invitation to hack his political opponent in 2016, which seemed like an outrageous faux pa, until the first traces of Russian email hacking were discovered just five hours later.[60] Entering this election year knowing Russia would launch a similar attack may have moved another Senate majority leader to protect and secure the American electoral system to the best of his ability. Neither proved to be a priority for McConnell.

The architects of the Constitution intended for checks and balances between the three branches of government that would sustain the American democratic machine. James Madison was credited as a champion of this tripartite division of the labor of maintaining democratic leadership, democratic governance and the rule of law. Pildes and Levinson re-envisioned the law and theory of separation of powers between branches of government by viewing it through the reality of competition between the political parties. This challenges the basic assumptions and more formalistic Madisonian ideal that members of the House would defend the distinct interests of the House, the Senate would do this for the Senate, and the President for the presidency, and that this would perpetuate a vigorous, self-sustaining political competition where ambition is constrained by ambition, strengthening evermore the system of checks and balances.

The Framers would not have created this mightily powerful Executive without granting the country an escape hatch. However, the democratic balance in American politics has been skewed far beyond what the Framers had hoped for. This Ukrainian extortion campaign illustrates an extreme case of how expanding executive power and shrinking legislative-executive accountability during times of hyper-partisan unified or partially unified government can facilitate undermining the rule of law. The Trump case quickly disappeared from the news cycle under the weight of the COVID-19 pandemic, the election coverage, and of course, the Senate cover-up. At this state in the fragile American republic, we cannot afford to ignore that the highest-ranking member of the Senate Judiciary Committee, Chairman Senator Lindsay Graham (R-SC), admitted he was "not an impartial juror" in the Trump impeachment trial.[61] The historical import of Senate Majority Leader Mitch McConnell serving simultaneously as a sort of jury foreman and defense attorney in the President's impeachment trial will linger on in the public record. In the worst-case scenario, this corruption in Congress will endure in practice as a precedent weakening the tool of impeachment.

[59] Id.; *Unclassified Whistleblower Complaint, Letter to Chairman Burr of Senate Intelligence Committee and Chairman Schiff of H. Perm Select Committee of Intelligence*,12 August 2019.
[60] *Mueller Report*, Vol. I, 49.; M.S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, *The New York Times*, 13 July 2018.
[61] T. Barrett & A. Zaslav, *Mitch McConnell: 'I'm not an impartial juror' ahead of Senate impeachment trial*, *CNN*, 18 December 2019.

This is the immediate legacy of what took place on Capitol Hill after impeachment.

There is a body of evidence and pattern of behavior by the President and his supporters inside and outside the federal government that includes additional legal violations, further abuses of power, and reveals more fully the depth of foreign interference solicited by and coordinated throughout the Trump White House. This work analyzes the 'impeached' offenses along with other impeachable offenses we identify as a pattern of behavior that has come to characterize the Trump doctrine. A portion of this pattern was addressed by the House (only), resulting in the two articles of impeachment. A significant portion of this pattern went unaddressed in the obstructed House impeachment process and the corrupt Senate "trial". Ultimately, we argue that the separation of powers doctrine is no match for this ideologically unified, powerful faction currently in control of the Oval Office and the Senate. The new extreme in partisan politics resembles the factionalism feared by the Framers that led them to reject political parties as corrupt. This factionalism of today has allowed President Trump to follow a pattern of subverting elections, abusing power and obstructing investigations into his own misconduct that will likely be sustained by future Executives shielded by a corrupt partisan majority in the legislative branch.

2. The Constitutional Provision for Impeachment

Article 2, section 4 of the Constitution provides that "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".[62] Constitution does not belabor the process of impeachment by setting procedural recommendations in detail. The procedure that is followed for impeachment is actually the procedure that was followed in the United Kingdom against ministers of the king's government. Essentially, we know that the procedure for impeachment starts in the House of Representatives and then it is completed, if there is impeachment, in the Senate, which is presided over by the Chief Justice of the Supreme Court.

A look at the historical origins and the Framers' records from the late 18th century during the Constitutional Convention in 1787 and subsequent debates for ratification reveals that this practice of impeachment was taken from 14th century British legal system. The House of Commons would be the one that would be carrying out the enquiry and carrying out indictment of sorts, and it would be the House of Lords that would decide whether that given minister should be impeached or not. It is interesting to note that the United Kingdom no longer has a judicial committee of the House of Lords but has created a separate Supreme Court. So, this historical model of

[62] U.S. Const. Art. 2, s. 4.

impeachment lives on in the American Constitution, but no longer characterizes the uncodified Constitution of the United Kingdom.[63]

Now, with regard to the impeachable offenses. The Constitution talks about "Treason, Bribery and other high Crimes and Misdemeanors".[64] The definition that is given in the American Constitution is again, quite narrow. It mentions levying war against the United States, or in "adhering to their Enemies giving them Aid and Comfort".[65] So, this is a quite narrow definition of what we would consider to be treason. In fact, in more contemporary common usage it is often used to refer to actions that are fundamentally inconsistent with persons commitments to the United States. If we look at the Trump situation from this point of view, although we might think that he could be convicted of treason, and if we look at the speech that was given by Nancy Pelosi when she initiated the inquiry,[66] she used the word betrayal on various occasions. Bribery is generally understood to be a payment to the recipient given in exchange for the recipient's performance of an act benefiting the donor. With regard to the famous conversation between President Trump and President Zelensky of Ukraine, Trump was certainly not receiving any money in exchange for taking certain decisions. Other scholars have agreed that the characterization of the Zelenskyy phone call and months-long campaign undertaken in the shadows more resembles an attempt at extortion.[67]

The third expression, and one used as a catch-all for other offenses against the state, is "high Crimes and Misdemeanors". Unlike with treason and bribery, which were decided on relatively easily, there was quite a debate in the Convention when drafting the American Constitution on what should constitute "high crimes and misdemeanors". There were some that proposed as a possible definition 'maladministration'.[68] However, some members said that this was too vague a concept, and therefore once again there was an extrapolation from British law the expression "high crimes and other misdemeanors". The truth of the matter, however, is that even that expression is quite vague because there is no, then, further definition in ordinary statute law as to what we mean by high crimes and misdemeanors. To aid in explaining this technical distinction in this, the all-important concept of a high crime which sets the impeachment procedure apart from a criminal procedure, we point to this technical argument made by Professor

[63] *See generally* S.E. Coke, *Institutes of the Laws of England*, London, 1628-1645; H. Hallam, *Constitutional History of England. From the Accession of Henry VII to the Death of George II*1884; S.W. Holdsworth, *A History of English Law*, London, 1903-1938.
[64] U.S. Const. Art. II, s. 4.
[65] U.S. Const. Art. III, s. 3, § 1.
[66] Statement by House Speaker Nancy Pelosi announcing formal impeachment inquiry into President Donald Trump, 24 September 2019.
[67] M. Tushnet, *Impeaching a President: How It Works, and What to Expect from It*, *VerfBlog*, 2019.
[68] Farrand, 550.; *See also* generally M.J. Klarman.; R. Berger.; Tribe & Matz., Sunstein, C.R., *Impeachment: A Citizen's Guide*, London, 2017.

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of Law at Harvard Mark Tushnet, an imminent comparative constitutionalist:

> I would put it [high Crimes and Misdemeanors] as the following: in the neighborhood of criminal conduct even if actual criminality cannot be proved because of for example technical deficiencies with respect to the proof of one element or the invocation of technical defenses.[69]

This sounds like rather complicated legal jargon. Does this intend to say that the president could be accused of high crimes or other misdemeanors without actually, strictly speaking, violating the criminal code? Does this mean that betraying the public trust is a high crime although no crime has been committed according to ordinary criminal law? The House Committees investigating Trump referred to the 1974 impeachment of Nixon to determine that though "criminal law is not irrelevant",[70] "[a] requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government".[71] That is what renders this more complex than a criminal proceeding. There is a necessary level of interpretation and subjectivity required to navigate the boundary between prosecuting 'maladministration', which is a standard wholly subjective, and prosecuting a "high crime" against the public trust. Prosecuting these harms against society, then, was always bound to be mired in divisive political maneuvering. The nature of "high Crimes and Misdemeanors" renders the jurisdiction of what are to be considered impeachable offenses "of a nature which may with peculiar propriety be denominated POLITICAL", offenses "proceed[ing] from the misconduct of public men" or "from the abuse or violation of some public trust".[72] Prosecuting "high Crimes and Misdemeanors", then, is not solely to hold judges, presidents, and vice-presidents to the standard of criminal statutes. More importantly for the rule of law and the regulatory environment is the higher normative threshold for their behavior in order to preserve the public trust in government.

There were a number of considerations that went into assigning a split power of impeachment to the House and the Senate, discussed below in detail. The special jurisdiction and the unique jury selection for the purpose of impeachment should raise the level that is expected from the highest public officer in the American legal system. However, this means that there exist—one has to underline this—less guarantees in terms of the application of criminal law, because it would seem that we need to find less proof and less evidence in order to proceed with an impeachment. And the fact that the

[69] Tushnet, 2019; Farrand., pp. 549-550.
[70] Staff of House Committee on the Judiciary, *Constitutional Grounds for Presidential Impeachment* 93rd
Congress, 1974, 25.
[71] Id.
[72] Hamilton, *Federalist no. 65*, 321 (emphasis in original).

two more clear cases of treason and bribery have been excluded make things rather problematic from the strictly point of view of a criminal proceeding. Still, one cannot exclude that Trump threatened to go to the Supreme Court if the impeachment procedures continued. This was an interesting threat, even if it was always unlikely to materialize, and is worth considering as a counterfactual.

The Supreme Court plays a limited role in impeachments not only because impeachment is a political act, rather because Supreme Court justices are appointed by the president. At the time of his impeachment trial Trump had appointed two Supreme Court Justices, and in the last days of the presidential election of 2020, he and Mitch McConnell managed to circumvent again an established precedent to push through a third. To retain the Supreme Court's impartiality as a branch appointed by the president, and also its impartiality should ordinary crimes by the president in question require criminal prosecution even after his or her "high crimes" were addressed in the political proceeding of impeachment. The decision to adopt the procedure that goes through the House of Representatives and the Senate, to be certain, causes problems in terms of separation of powers yet and still. There can be no doubt about that, as that is the topic of this article. However, it was considered better to use that procedure rather than the Judiciary because the spirit of impeachment is political, not criminal. Most scholars agree, and *Nixon v. United States* affirmed, that in an impeachment procedure there can be no involvement of the Supreme Court in order to protect of the principle of separation of powers.[73]

Each time impeachment arises in the public debate, the issue also arises whether this tool is being used purely as a legal instrument or whether it is being used as a political instrument. It was predicted that impeachment would "agitate the passions of the whole community, and… divide it into parties more or less friendly or inimical to the accused".[74] With this last point from Alexander Hamilton, the argument departs from the strictly legal and returns to the political. The Framers in 1787 were not blind to the existence of political parties, but nearly all of them detested them as a source of factionalism and corruption. Madison and Hamilton were in agreement with Western political thought at the time that political parties represented a nefarious "institutionalized division of interest".[75] The greatest danger was that whichever body was chosen to decide guilt or innocence in impeachment—thereby deciding the immediate future of the nation—was

[73] *Nixon v. United States*, 506 U.S. 224, (1993), 235 reads that "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the important constitutional check placed on the Judiciary by the Framers".
[74] Id.
[75] Levinson & Pildes, 2320.; For a summary of traditional Western antiparty sentiment that guided the Framers, see G. Leonard, *The Invention of Party Politics*, Chapel Hill, 2002, pp. 18-50.

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eternally at risk of succumbing to the weight of political pressure based on partisan power competition.

> In many cases it [impeachment] will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.[76]

The case of the U.K. can shed light on how the practice developed in a comparative context. Many historians of constitutional law have made the claim that the impeachment procedure in the United Kingdom basically disappeared upon establishment of a parliamentary form of government and created a relationship of confidence between the prime minister and Parliament.[77] Instances of presidential impeachment arise now nearly every two decades since Nixon awakened the beast in 1974. The impeachment proceedings against President Clinton in the 1990s led some constitutionalists to predict that this was an attempt to 'parliamentarize' the United States' presidential form of government.[78] In other words, trying through the impeachment procedure to introduce the *sui generis* relationship of confidence between the president and Congress. In his notable text on impeachment, Professor Charles Black notes that "without any flavor of criminality or distinct wrongdoing, impeachment and removal would take on the character of a British parliamentary vote of 'no confidence'."[79] Such a profound shift would indicate an entirely new dynamic, whereby the president would become accountable to Congress, rather than to the people as he is in a presidential system.[80] This convergence with the British parliamentary practice would have to happen over time, and it is too soon to predict definitively if that will be the result of the impeachment power being used more often in Washington.[81]

The U.S. style of government remains distinct from European parliamentary government, but the party and the presidency have become more closely identified as a result of political polarization. Many scholars have studied the resurgence of partisanship in American politics that has come to characterize the nation's major political institutions. Abramowitz and Webster's work traces the rise of negative partisanship, the theory that "increasingly negative feelings toward the opposing party should result in

[76] Hamilton, *Federalist no. 65*, 321.
[77] *See generally* R. Albert, *The Fusion of Presidentialism and Parliamentarism*, *The American Journal of Comparative Law*, Vol. 57, No. 3, 2009, pp. 531–577.
[78] C. Black, Jr. & P. Bobbitt, *Impeachment: A Handbook New Edition*, Yale University Press, pp. 25-57.
[79] Id. 56
[80] Id.
[81] Levinson & Pildes, 2320.; For a summary of traditional Western antiparty sentiment that guided the Framers, see G. Leonard, *The Invention of Party Politics*, Chapel Hill, 2002, pp. 18-50.

higher levels of loyalty in all types of elections among all types of partisans".[82] Their work cites data on the growing ideological divide among political elites as well as among the American electorate. Partisan identities have become increasingly more aligned with other salient social and political divisions such as race and religion.[83] This development holds true even with regard to the ideological divide among unelected officials, as evidenced by cases in the Supreme Court being decided more often along ideological lines today than any time in recent history.[84] Another core insight relevant to this study of impeachment is that in this post-1980s world of extreme political polarization, the electoral fate of members of both houses of Congress are increasingly tied to the President and how favorably he mobilizes the public around his party's ideology and party label.[85] At the time of America's founding, elections were not competitive contests. The only federal officers directly elected were members of the House of Representatives.[86] Presidential elections by the electoral college, senatorial elections by state legislatures (until the 17th amendment), and all other elections by white male property owners "primarily serv[ed] to ratify existing social and political hierarchies".[87] Today, instead, elections are growing more nationalized, where the presidential vote in the district or state predicts the overwhelming majority of House and Senate races. Implications of this nationalization, negative partisanship, and presidential partisanship are stark for political competition, representation and governmental performance, and impeachment is no different.

The argument has been made that as elections have become more direct in the U.S., competition between political parties has shaped into the central vehicle through which constitution is interpreted, displacing the ideal type adversarial dynamics between the branches of government.[88] We have seen in real time that 23 of the 30 Republican lawmakers with a more moderate platform lost seats in the 2018 midterms.[89] This development trajectory towards a separation of powers along party lines in the U.S.

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[82] A.I. Abramowitz & S. Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, *Electoral Studies*, Vol. 41, 2016, pp. 14-15.
[83] Id., 14.
[84] *See* T.S. Clark, *Measuring Ideological Polarization on the United States Supreme Court*, *Political Res. Q.* Vol. 62, No. 1, 2009, pp. 146-157.; B.L. Bartels, *The Sources and Consequences of Polarization in the U.S. Supreme Court*, *in* James Thurber, Antoine Yoshinaka (Eds.), *American Gridlock*, Cambridge, 2015.
[85] B. Rottinghaus, *Going Partisan: Presidential Leadership in a Polarized Political Environment*, *Brookings Report*, 28 October 2013.
[86] L. Tribe, & J. Matz, *To End a Presidency: The Power of Impeachment*, New York, 2018., 208.
[87] Levinson & Pildes, 2318; *See also* R. H. Wiebe, *Self-rule: A Cultural History of American Democracy*, Chicago, 1995.
[88] Tushnet, pp. 4-7, 84-85, 237-238.
[89] B. Jones, *House Republicans who lost re-election bids were more moderate than those who won*, *Pew Research Center*, 7 December 2018.

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constitutional system has proceeded though political parties are largely invisible in the text of the written Constitution itself. This politically realist approach argues that the adversarial form of government intended to be channeled through branches has instead been separated and controlled by parties. Because of this, inter-branch competition is diminished when the White House and Congress are controlled by the same party.

The framework of historical institutionalism emphasizes political agency during critical junctures as a major factor in determining how institutions respond to crises in the moment, and how that response shapes the institutional response in the future. Historical institutionalism has a particular reverence for supposing and evaluating counterfactual scenarios. This theory holds that well-constructed counterfactuals respecting a roster of criteria such as theoretical consistency, historical consistency, and plausibility can play an important role in "assessing the causal impact of specific factors on historical outcomes".[90] The prospect of a convergence between the American impeachment power and the British vote of no confidence feature in later discussions as a potential counterfactual, or prediction, based on the current development trajectory of increasingly negative partisanship and increasingly common presidential impeachments.

The present paper argues that combination of expanding presidential power, the separation of parties, and a corrupt factionalism gripping, extremists—loyal either to the President or to the consolidation of power he mobilizes through negative partisanship—the Republican Senate majority has skewed the democratic balance in American politics far beyond what the Framers had hoped for. In light of this argument, central questions presented here are how has the impeachment power, and therefore the separation of powers, been rendered less effective in the case of Donald Trump due to negative partisan voting dynamics in the Senate; is this tool reliable in attempts to restore democratic balance or the rule of law if antidemocratic forces loyal to the president are setting the rules of the trial? The Trump impeachment trial was carried out in an agitated, divided ecosystem in Congress, yes, but the locus of that friction is at the party level. The party and ideologically unified Senate majority and White House have all but deregulated the legislative-executive relationship of accountability. The Republican party under Sen McConnell has been operating at a more extreme level of negative partisanship than the center-left Democratic party, and in doing so, has been setting numerous corrupt precedents in the legislative-executive accountability during the last year of the Trump presidency. It is for that reason that this research is primarily concerned with the way party line *divisions* have impacted consequential voter *decisions* at the elite level that will likely shape the development trajectory of the Senate for years to come.

[90] Capoccia & Kelemen, pp. 355-356.

3. Beyond the Zelenskyy Call

Pursuant to Congress' power of the purse,[91] $250 million of taxpayer funds was appropriated for fiscal year 2019 for the Ukraine Security Assistance Initiative (USAI),[92] "to provide assistance, including training; equipment; lethal assistance; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine".[93] An additional $141 million was provided through the State Department-administered Foreign Military Financing Program.[94] The USAI funds were to be made available for obligation until 30 September 2019, with requirements from Congress that the Department of Defense (DOD) give 15 days advance notice of any obligation of USAI funds, and certify Ukraine had undertaken "substantial actions" on "defense institutional reforms" before 50% of the funds could be disbursed.[95] DOD certified in a letter from Under Secretary of Defense for Policy, to the Chairman of the Senate Committee on Foreign Relations 23 May 2019 that substantial action on reform had taken place in Ukraine, and described its plan for expenditure of $125 million.[96] On 21 December 2019, three days after the House voted to impeach Trump on two charges, the *Times* reported that just 90 minutes had elapsed between the Trump-Zelenskyy phone call and an email from Michael Duffey, Associate Director for National Security Programs at OMB instructing the Pentagon to "hold off on any additional DOD obligations of these funds" to Ukraine.[97] "Given the sensitive nature of the request", Duffey asked the Pentagon, "I appreciate your keeping that information closely held".[98] Like many other Trump appointees, Duffey was observed to have "virtually no relevant experience or expertise and no history" managing the issues he was given authority over, still the Ukraine Report by the House Intelligence Committee found that Mark Sandy, a career civil servant of OMB, was "deprived sign off authority" on this "exceedingly irregular" withholding of congressionally-approved aid as it was given by the Trump White House to Duffey instead.[99] Duffey was one

[91] U.S. Const. art. I, s. 9, § 7. reads that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."
[92] Pub. L. No. 115-245, § 9013, 132 Stat. at 3044–45.
[93] *Id.* § 9013, 132 Stat. at 3044.
[94] *Trump Impeachment Report*, 401-403.
[95] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, div., A, title XII, § 1246, 132 Stat. 1636, 2049 (Aug. 13, 2018).
[96] Letter from Thomas Armstrong, General Counsel for the U.S. Government Accountability Office Decision: 'Office of Management and Budget—Withholding of Ukraine Security Assistance', 16 January 2020. (hereinafter GAO Decision, 16 January 2020, 3.)
[97] Wong.
[98] Id.
[99] *Trump Impeachment Report*, p. 87. H. Perm. Select Comm. on Intelligence, *Report of the House Permanent Select Committee on Intelligence on the Trump-Ukraine Impeachment Inquiry Report Together with Minority Views*, Report 116-335, 116th Congress, 1st Session, 11 December 2019, 67-80., (hereinafter *Ukraine Report*).

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of nine administration officials that followed the White House Office of Legal Counsel's 8 October letter giving "broad orders… to prohibit all Executive Branch employees from testifying" in the House impeachment.[100]

The example of Duffey's outsized authority to sign off on withholding funds to Ukraine illustrates how two of Mettler and Lieberman's 'four threats'—political polarization and expanding presidential power (in this case, administrative)— coalesce not in theory, but in the practice of siphoning off constitutionally balanced power and authority and granting it to loyalists in a way that "distort[s] the normal functioning of democracy".[101] It was established in *Clinton v. City of New York* that the President is not vested with the power to ignore or amend any such duly enacted law,[102] instead reaffirming the President's duty to "faithfully execute" laws as enacted by Congress.[103] A December of 2019 Freedom of Information Act court order obtained 146 pages of documents including emails between Duffey and Pentagon Comptroller Elaine McCusker that made apparent the White House and OMB were fully aware of the potential violation of the Impoundment Control Act of 1974 (ICA) their hold posed.[104]

Rather than acknowledge it in impeachment testimony, Duffey's emails confirmed the months-long attempt at rationalizing the hold, even after acknowledging the legal constraints designed to outlaw it.[105]

The nonpartisan U.S. Government Accountability Office (GAO) released a decision on 16 January 2020, the morning initiating the Senate trial, pursuant to its role under the ICA that this withholding did indeed constitute an illegal violation of the ICA, crumbling in real time the White House Counsel's defense that the President committed no crimes in his course of conduct regarding Ukraine.[106] This decision to determine illegality in a threat to national security may have stirred Mitch McConnell and the 13 other Republican Senators 21 years ago, when they each held Bill Clinton's feet to the fire, each voting to impeach or convict him for one or both articles alleging perjury and obstruction of justice. A sign of the times, perhaps, is that all 15 Republican Senators (including Susan Collins, who voted to acquit Clinton) voted on 22 January to not even consider the GAO decision by choosing not to admit any new evidence not already in the House evidentiary record.

[100] *Ukraine Report*, pp. 31, 231-244.
[101] Mettler & Lieberman, 316.
[102] *See* 524 U.S. 417, 438 (1998), the President is not constitutionally authorized "to enact, to amend, or to repeal statutes".
[103] U.S. Const., Art. II, s. 3.
[104] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, § 1015, 88 Stat. 297, 336 (July 12, 1974), codified at 2 U.S.C. § 686; GAO Decision, 16 January 2020, 3.; Berger, S., *Trump's Hold on Ukrainian Military Aid was Illegal*, *Just Security*, 26 November 2019.
[105] GAO Decision, 16 January 2020, 3.
[106] Id.

When negative partisanship becomes the central organizing principle in a political system as it has in the Republican majority Senate, the increasingly common partisan voting in the legislative chambers by the majority party[107] has a greater capacity to harm democracy than that by the minority party.[108] Even majoritarian party members who defect and cooperate with the opposition are punished.[109] Another important consideration throughout this work and throughout the pursuit of evidence in support of a presidential impeachment is the distinction between which acts are within the president's power, and which constitute an abuse of that power. It is the president's constitutional privilege to set foreign policy initiatives. As such, it was not contested in this impeachment investigation whether State Department officials serve at the pleasure of the president. The Executive and Legislative branches are invited to struggle[110] over differing interests of their offices and visions for foreign policy, but it is an executive privilege to appoint ambassadors and to influence the obligation of taxpayer funds based on determinations deemed legitimate and previously approved in the ICA.

One of the first and central arguments employed by the President and loyalists to explain the withholding of the $391 million in military aid was that it was in the interest of fighting corruption in the region.[111] This would constitute an executive decision within the realm of executive constitutional authority. Consideration of the full evidentiary record uncovered by the House impeachment process, including the "Minority Report" by House Republicans proposing possible legitimate explanations for Trump's scheme, exposes this as a false pretext. The House Permanent Select Committee on Intelligence, in coordination with the Committee on Oversight and Reform and the Committee on Foreign Affairs (the "three Committees" or "the Committees") considered months of public statements by Rudy Giuliani beginning after Biden's announcement for candidacy on 25 April 2019, the President's public statements and tweets, the Zelenskyy call and over 100 hours of deposition testimony from 17 witnesses and over 30 hours of public testimony from 12 witnesses to establish the President's "corrupt intent".[112] The President and his agents working inside and outside

[107] Abramowitz & Webster, 12.; J. Bafumi, & M.C. Herron, *Leapfrog representation and Extremism: A Study of American Voters and their Members in Congress*, *Am. Polit. Sci. Rev.* Vol. 104, Iss. 3, 2010, pp. 519-542.
[108] Mettler & Lieberman, 347-349.
[109] Mettler & Lieberman, 347; F.E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*, Chicago, 2009.
[110] *See* generally R.H. Davidson, *Invitation to Struggle*: *An Overview of Legislative-Executive Relations*, *The Annals of the American Academy of Political and Social Science*, vol. 499, 1988, pp. 9–21.
[111] Republican Staff of the H. Perm. Select Comm. on Intelligence, *Rep. on Evidence in the Democrats Impeachment Inquiry in the House of Representatives*, 116th Cong., 2019, ii., (hereinafter *Minority Report*).
[112] *The Evidentiary Record Pursuant to H. Res. 798 Vol. VI: Committee Report to Accompany H. Res. 755, Impeachment of Donald J. Trump, President of the United States*,

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the U.S. government on Ukraine in the spring and summer of 2019 coordinated to undermine the anti-corruption agenda in place, ultimately endangering the U.S. and Ukrainian national security interest.

One defense strategy by the White House to detract from the impeachment procedure that was dead on arrival was the accusation that the Democrats orchestrated the whistleblower complaint. On the contrary, the whistleblower complaint was required by law. The beginning of the complaint reads: "I am reporting an urgent concern in accordance with the procedures outlined in 50 United States Code paragraph 3033 (K)(5)(A)".[113] says the following:

> An employee of an element of the intelligence community and employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaints or information to the Inspector General.[114]

This grounds the whistleblower complaint, the basis from which the impeachment would proceed, squarely within the U.S. Code. Nothing was orchestrated about the complaint; this person was simply carrying out his or her duties in accordance with his or her role in the intelligence community.

This scheme of solicitation and pressure in Ukraine was not part of the usual cut and thrust of executive foreign policy. That was made evident early on by the President's intimidation and removal of a decorated Ambassador with a specialty in anti-corruption work as he organized a chain of command more suitable to his shadow foreign policy. Ambassador Marie Yovanovitch was the highest-ranking woman ambassador in the State Department and an expert in anti-corruption measures in the region.[115] She arrived in Ukraine in August of 2015 and departed permanently in May of 2019 after a now-public campaign for her early removal from her post in Kyiv. In her impeachment testimony to the House Intelligence Committee, Yovanovitch used national security rationale to describe U.S. interests in Ukraine. "Ukraine's strategic positioning bordering Russia on its east, the… oil-rich Black Sea to its south, and four NATO allies to its west, it is critical to the security of the United States that Ukraine remain free and democratic, and that it continues to resist Russian expansionism".[116]At the direction of the Obama administration, Yovanovitch worked closely with Zelenskyy's predecessor President Poroshenko's administration to achieve significant

H. Rept. 116–346, 116th Cong., 2nd Sess., 23 January 2020, 8311., (hereinafter *House Impeachment Evidentiary Record*).
[113] 'Unclassified Whistleblower Complaint', 1.
[114] 50 U.S.C. §3033 (K)(5)(A) (2012).
[115] L. Trautman, *Impeachment, Donald Trump, and the Attempted Extortion of Ukraine*, *Pace Law Review*, Vol. 40, No. 2, 2020, 183.
[116] *Impeachment Inquiry: Marie Yovanovitch: Hearing Before the H. Perm. Select Comm. on Intelligence* 116th Cong., 15 November 2019, 22. (hereinafter *Yovanovitch Hearing*).

reforms in the sectors most vulnerable to corruption and most abused by the oligarchy, namely the federal prosecutor's office, headed by Prosecutor general of Ukraine Yuriy Lutsenko, healthcare, energy and banking sectors.[117] Yovanovitch learned from Ukrainian government officials, not Americans, that Rudy Giuliani was working with the same prosecutor general Lutsenko to remove her.[118]

The unsavory threats and unprecedented smear campaign against this long-serving ambassador blossomed into illegal witness intimidation.[119] The House Permanent Select Committee on Intelligence (HPSCI), in its response to the President's answer to the articles of impeachment against him, noted the illegality of the witness intimidation, and made the connection between this antagonistic attitude from the President towards Yovanovitch and his vague insinuation that she would "go through some things" on the Zelenskyy call.[120] The treatment of Yovanovitch was not unique. In just two months, the President himself made over 100 public statements questioning the motives and accuracy of whistleblower's account.[121] Trump encouraged government officials on both sides of the aisle to violate protections afforded the anonymous sources by the Inspector General Act of 1978,[122] and the Privacy Act of 1974, the latter was passed after the Nixon White House was exposed trying to embarrass and discredit a whistleblower.[123] Most chillingly, the President issued a threat against the whistleblower and those who provided information to the whistleblower regarding the President's misconduct, suggesting that they could face the death penalty for treason.[124] Herein lies the violation of the Intelligence Community Whistleblower Protection Act (ICWPCA), it does not prohibit revealing the identity of a whistleblower, but it does prohibit retaliation against any member of the intelligence community that files a disclosure classified as an "urgent concern".[125]

In the July 25 call, President Zelenskyy asked specifically for a show of support from President Trump in the form of javelin tomahawk missiles and energy assistance to help strengthen Ukraine's fight for independence

[117] V. L. Morelli, *Ukraine: Current Issues and U.S. Policy*, Congressional Research Service, 2019, 1.
[118] 'Yovanovitch Hearing'.
[119] 18 U.S. Code § 1512.
[120] 'Yovanovitch Hearing', 22.
[121] 'HPSCI Report', pp. 366-367.
[122] Pub. L. 95–452, §1, Oct. 12, 1978, 92 Stat. 1101.
[123] 5 U.S.C. § 552a.; S. Kohn, *Setting the Record Straight on the Legal Protections for the Ukraine Whistleblower: 'No One Volunteers for the Role of Social Pariah'*, *Nat. L. Rev.*, Vol. 9, No. 365.
[124] 'Listen: Audio of Trump Discussing Whistleblower at Private Event: That's Close to a Spy,' *Los Angeles Times*, 26 September 2019.
[125] 50 USC §3234.

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from Russia.[126] 90 minutes after the call, the $391 million in Ukraine aid was frozen.[127] The day Nancy Pelosi announced the impeachment inquiry into Trump, he released an edited transcript of the call he refers to even presently as 'perfect'. Referring to Yovanovitch, he told his foreign counterpart that "the former ambassador from the United States, the woman, was bad news".[128] President Trump then did the unthinkable and made a vague threat against his former ambassador's safety, promising that she "was going to go through some things".[129] And so, Ambassador Yovanovitch did "go through some things", and only with a supplemental investigation in the Senate could the public learn to what extent her poor treatment was carried out at the direction of the President himself.

Political appointees in the Department of State are generally relieved of their positions during administration transitions, but there is not precedent for a career ambassador to be removed from her post weeks before the scheduled end of an assignment, and only two months after she had been invited by the Department to extend her appointment an extra year.[130] The smear campaign by the President's personal lawyer to discredit Yovanovitch on Fox News was carried out in open view of the public. A trail of emails, text messages, and documents shared by one of Giuliani's clients, Soviet-born American citizen Lev Parnas, with the House Intelligence Committee revealed the wide scope of the scheme to illegally surveil and remove Yovanovitch, which The President himself appeared to refer to as "tak[ing] her out" in an audio recording dating back to 2018. Yovanovitch was later relieved of her position on an urgent call to Kyiv at 1 a.m. one morning in April "without any explanation" from a supervisor, other than that it was "for [her] security", not related to an attack on Kyiv, but that "people were concerned" specifically "for [her] well-being".[131] She departed Kyiv permanently in May, making the president's threats two months later that she "would go through some things" all the more conspicuous.

Adding to, and perhaps explaining, the incredible decision by Republican lawmakers in the Senate not to pursue new evidence or witnesses in the Ukraine case in Washington is the trail of $675,000 in illegal campaign donations made to 14 Republican federal and state candidates and political organizations made by figures central to the scheme to remove Yovanovitch.[132] Lev Parnas and Igor Fruman, two Soviet-born businessmen

[126] Memorandum from the White House, *Telephone Conversation with President Zelenskyy of Ukraine*, 25 July 2019, 2n, (hereinafter 'Trump-Zelenskyy July 25 Call Record').
[127] E. Wong, *Officials Discussed Hold on Ukraine Aid After Trump Spoke with Country's Leader*, *New York Times*, 21 December 2019.
[128] 'Trump-Zelenskyy July 25 Call Record'.
[129] Ibid., 4.
[130] 'Yovanovitch Hearing', 22.
[131] 'Yovanovitch Hearing', 126.
[132] J. Bykowicz, *Indicted Donors Spread Campaign Cash Widely*, *Wall Street Journal*, 11 October 2019.

and clients of Rudy Giuliani, were indicted in 2019 by federal prosecutors from the Southern District of New York working in concert with the FBI on four counts related to a conspiracy to "violate the ban on foreign donations and contributions in connection with federal and state elections".[133] Parnas and Fruman orchestrated a straw donor scheme and a foreign donor scheme involving $675,000 paid to 14 Republican candidates and groups in order to "advance their business interests and the political interests of at least one Ukrainian government official…in violation of campaign finance laws".[134]

Impeachment is a political process, but these campaign finance violations blurred the line between the political and the criminal, while bridging the gap between the President's scheme in Ukraine, this faction of the Republican party, and making more credible the idea that a cover-up would benefit them both. Fruman remained loyal to Giuliani and the President, but Parnas broke after the October indictment and FBI arrest, acquiescing to the 10 October subpoena to provide statements, text messages, and even the first signed documents in the case indicating that actions taken by Giuliani in Ukraine were "with [the] knowledge and consent" of President Trump.[135] Most disturbing in Parnas' windfall of evidence not admitted in the Senate were communications with Mr. Robert Hyde, then a Republican candidate for congressional office in the 5th district of Connecticut, who became the subject of FBI investigation for receiving some of the above-mentioned illegal campaign donations paid in exchange for his help to remove Yovanovitch. In March of 2019 Hyde sent Parnas number of text messages indicating that he had someone in Kyiv with eyes on Ambassador Yovanovitch's every move, and that "They are willing to help if we/you would like a price."[136]

Fruman and Parnas found the right price to bait an 11-term Republican State Representative from Texas Mr. Pete Sessions, later referred to as "Congressman-1" in the unsealed Grand Jury indictment brought against the two businessmen.[137] Sessions confirmed in a statement that he met with Parnas and Fruman, two Florida residents "with no discernible connection to his congressional district or even the state of Texas" after they exceeded the individual donation limit to his re-election campaign.[138] The SDNY indictment reads that the donations helped them

[133] U.S. Attorney's Office, Southern District of New York, 'U.S. v. Lev Parnas et al Indictment: Lev Parnas and Igor Fruman Charged with Conspiring to Violate Straw and Foreign Donor Bans', *United States Department of Justice*, 10 October 2019., (hereinafter 'U.S. v. Lev Parnas et al Indictment').
[134] Bykowicz.
[135] 'Letter to the Committee on the Judiciary', H. Perm. Select Comm. on Intelligence, 14 January 2020, 1., (hereafter referred to as 'HPSCI Letter, 14 January 2020').
[136] HPSCI Letter, 14 January 2020, 2.
[137] C. Edmondson *Ukraine Scandal Snags Pete Sessions'* Congressional Comeback Bid, *New York Times*, 10 October 2019.
[138] Bykowicz.

buy access to Sessions "in order to advocate for the ouster of the U.S. ambassador to Ukraine".[139] Sessions made his case against Yovanovitch in a May 2018 letter from Sessions to Secretary of State Mike Pompeo calling for her removal based on rumors of her "disdain for the current administration".[140] This letter brings the present argument out from the shadows of Trump and associates' foreign policy back to official acts by the Department of State that went uninvestigated and in many ways unacknowledged by the Senate's sham trial.

In a defiant display of loyalty to the President, and disregard for the House's constitutional duty to conduct oversight, the State Department "refused to produce a single document in response to its subpoena", withholding documents deemed responsive from Congress with no valid legal basis.[141] When pressed by the House Foreign Affairs Committee to defend the seasoned and decorated Ambassador Yovanovitch from character attacks and worse from the President and his agents, Secretary Pompeo's office issued a false rationale for her dismissal, saying that her assignment end date had come.[142]

A central strength in the case for Trump's impeachment and one that should have moved the necessary four Republican senators to vote with the opposition party to allow new evidence was that his withholding of congressionally approved foreign aid was illegal, and the OMB knew this and maintained the hold despite illegality. OMB Director Mulvaney and Associate Director Michael Duffey declined lawful subpoenas to investigate claims that corroborated direct witness testimony that "military aid to Ukraine was withheld at the direction of the President and that the White House was informed doing so may violate the law".[143] The two relevant budgetary statutes that implicated by Trump withholding military aid for Ukraine are the apportionment authority and the Impoundment Control Act (ICA).[144] Even after acknowledging the legal constraints, Trump's own White House OMB discussed over email ways to get around the illegality to continue holding up the funding. When asked directly if OMB held up the money for a political investigation, Mulvaney confirmed that the President had "expressed concerns" about Ukraine's involvement in the hacked DNC server from 2016 and Burisma, the Ukrainian natural gas company on which Hunter Biden was a board member, "and that's why we held up the

[139] 'U.S. v. Lev Parnas et al Indictment'.
[140] Letter from Congressman Pete Sessions to Secretary of State Michael Pompeo, 18 May 2018.
[141] *Ukraine Report*, 20.
[142] R. Gramer, *State Department Misled Congress on Ouster of Ukraine Ambassador*, *Foreign Policy*, 25 November 2019.
[143] 'Chairman Schiff Statement on New Documents Detailing Trump's Decision to Withhold Military Aid to Ukraine', *H. Perm. Select Comm. on Intelligence*, 2 January 2020.
[144] S. Berger, *Trump's Hold on Ukrainian Military Aid was Illegal,Just Security*, 26 November 2019.

money".[145] Mulvaney responded to reporters' outrage saying "We do this all the time. Get over it".[146] In this assertion, Mulvaney may have been correct that presidents have made a practice of directing and authorizing the growth of the "presidential administration" as a way of broadening and entrenching the expansion of presidential power.[147]

Finally, the enormous and public political pressure placed on the Department of Justice (DOJ) by the Trump administration from inauguration illuminates a central example of the extensive politicization and transformation of the federal bureaucracy under this President. Announcing public investigations into political opponents is a strategic weapon for the Trump administration to undermine the credibility of foes and uncooperative agencies. This Ukraine election scheme is evidence of this practice of politicizing the federal bureaucracy. DOJ under William Barr has departed from a number of precedents established to maintain its independence from the Executive branch and has acquiesced instead to politicized pressure from the Trump White House to the detriment of the office. Whereas the Inspector General of the Intelligence Community had already determined that the whistleblower complaint was "credible" and of "urgent concern",[148] the House Intelligence Committee *Ukraine Report* determined that newly appointed Acting Director of National Intelligence (DNI) Maguire took the liberty of "withholding the complaint from the Congressional Intelligence Committees, in coordination with the White House and the Department of Justice".[149]

Chairman of the House Intelligence Committee Adam Schiff remarked that inaction by the DOJ forced his committee to follow up with the complaint themselves, providing the initial smoking gun for initiating the impeachment inquiry into President Trump. Independent Counsels had carried out the Mueller investigation, as well as the impeachment investigations into Clinton and Nixon. Significant for this impeachment, however, is that President Trump had again appointed staunch loyalists to consequential oversight positions so as to transform their departmental response to suit his ends. Though pressure from the President has remained consequential on the DOJ, as evidenced by his firing of Jeff Sessions during the Mueller investigation, his choice of William Barr to replace Sessions was in itself causally decisive for the trajectory of the Justice Department under Trump. Barr is a famously conservative proponent of unfettered executive power. His 1989 internal memorandum as Assistant AG to President

[145] Press Briefing by Acting Chief of Staff Mick Mulvaney, 17 October 2019.; *Ukraine Report*, 139.
[146] Id.
[147] E. Kagan, *Presidential Administration*, *Harv. L. Rev.*, Vol. 114, No. 8, 2001, pp. 2245-2385.
[148] U.S. Department of Justice, Office of Legal Counsel, *Urgent Concern' Determination by the Inspector General of the Intelligence Community*, 2019, 2.
[149] *Ukraine Report*, 16.

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George H.W. Bush argued that the *qui tam* provisions of the False Claims Act[150] giving private citizens the right to litigate on behalf of the U.S. government were "patently unconstitutional" and that they "may well be the most important separation of powers question".[151] It also asserted that legislation requiring the president to submit reports to Congress prohibit the President from exercising authority as head of a unitary Executive, arguing that the President may prohibit executive agencies from sharing information with Congress.[152] Barr was against the Hatch Act congressional investigations following the Nixon resignation, and "favored the broadest pardon authority" in Bush, Sr.'s pardoning of six people involved in the Iran-Contra affair.[153] Weeks after his appointment to AG under Trump, Barr engaged in a standoff with Congress over releasing the full *Mueller Report*, and was held in contempt of Congress in a May 2019 vote of 24-16 by the House Judiciary Committee that would later impeach Trump.[154] Although President Trump did claim in 2017 that he had the "absolute right to do what I want with the Justice Department", he had in Barr an AG that did not disagree with him.[155]

These prior opinions by Barr are relevant because they serve to explain why Donald Trump could lean on Attorney General (AG) Barr to denigrate the impeachment inquiry and instead personally request help from the U.K., Australia, and Ukraine in investigating his own CIA and FBI for the 2016 Russian meddling probe.[156] An investigation of the nation's investigators. Nearly one month after the President was impeached for abuse of power and obstruction of Congress, the White House Office requested and was granted an opinion, shocking to some, from the DOJ Office of Legal Counsel arguing that President Trump had not obstructing the House impeachment by defying subpoenas at all, precisely because the House had not yet formally voted to authorize the impeachment at their time of issue.[157] This gave the President's defense team fodder, albeit paper thin, for

[150] 31 U.S.C. 3729-3733 (1994).
[151] 'Common Legislative Encroachments on Executive Branch Constitutional Authority', 13 Op. O.L.C. 248, 1989 OLC LEXIS 28 (July 27, 1989), 207, 209., (hereinafter referred to as 'Common Legislative Encroachments')
[152] Id., 255.
[153] C. Johnson, *William Barr Supported Pardons in An Earlier D.C. Witch Hunt': Iran-Contra, NPR*, 14 January 2019.
[154] N. Fandos, *House Panel Approves Contempt for Barr After Trump Claims Privilege Over Full Mueller Report, New York Times*, 8 May 2019.
[155] M.S. Schmidt & M.D. Shear, *Trump Says Russia Inquiry Makes U.S. 'Look Very Bad,The New York Times*, 28 December 2017.
[156] B. Devlin, S. Harris & M Zapotosky, *Barr personally asked foreign officials to aid inquiry into CIA, FBI activities in 2016, The Washington Post*, 1 October 2019.
[157] U.S. Department of Justice Office of Legal Counsel, *Memorandum for Pat A. Cipollone Counsel to the President Re: House Committees' Authority to Investigate for Impeachment*, 19 January 2020.

reinforcing the scheme to cover up the obstruction that was covering up the Ukraine scheme.[158] A cover-up of a cover-up.

General findings from a joint investigation by two apolitical ethics agencies reported eight main concerns about the DOJ policy regarding the rule of law under Trump and Barr, specifically:

> 1) the rollout of the report of Special Counsel Mueller and Mr. Barr's involvement in both presenting it and later redacting it; 2) the involvement of the DOJ in the alleged Ukraine matter; 3) the use of politicized counter-investigations and possible coordination of such investigations across the branches to undercut the origins of the Russia probe; 4) the interference on the part of the DOJ in on-going investigations and prosecutions for political purposes, including advising the president on the use of the pardon power.[159]

It is hard to capture the rapidly evolving situation on the ground in Washington today, but recent reporting reveals that AG Barr had just acquiesced to another extensive public pressure campaign by the President and others to break a 40-year precedent of non-interference by the DOJ in investigating election results that were not yet certified by the electoral college. Of course, if Barr was willing to assist President Trump in an abuse of power or subversion of legal precedent, Madison's ideal view of separation of powers would suggest members of each house should step in and perform its function of inter-branch accountability to and honor its constitutional duty as well as defend its own position. Instead, there has been a sort of joining forces of federal agencies that should remain apolitical under this reality of separation of parties rather than separation of powers. As a result, foreign powers have observed over the course of the last two presidential elections that candidates for federal office in the U.S. can themselves participate as agents in foreign and domestic election meddling schemes.

4. After Impeachment: Critiquing the Senate Trial

The timeline for impeachment was compressed. That does not mean it was a partisan process. However, concrete considerations did have to be made regarding the procedure's timeline. The DNC had close to 60 days after completing the impeachment in the House to pivot the Democratic machine to mobilize fully behind presidential primary voting contests featuring both Biden and Harris. Initially, Pelosi was hesitant to pursue impeachment because of its damaging effect it could wreak on an electorate, but she decided that it could not wait. The core of the Constitution holds that the American people should govern themselves and choose their own

[158] Id.
[159] Center for Ethics and the Rule of Law Ad Hoc Working Group, Report on the Department of Justice and the Rule of Law Under the Tenure of Attorney General William Barr, *Center for Ethics and the Rule of Law* & *Citizens for Responsibility and Ethics in Washington*, 12 October 2020, 6.

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representatives. An Executive that would seek to hold power at the expense of the will of the voters is a type of electoral treachery familiar to the Framers. King George III "resorted to influencing the electoral process and the representatives in Parliament in order to gain [his] treacherous ends."[160] With these considerations, the House moved decisively. Still, the new evidence captured above continued to emerge, and the President continued to taunt witnesses online. Chairman of the HPSCI Adam Schiff argued that this all confirmed the charges brought against the President. "President Trump asserted the prerogative to nullify Congress's impeachment power itself. He placed himself above the law and eviscerated the separation of powers" was the House Managers' reply to the President's response to the articles of impeachment.[161] Still, McConnell proceeded with a rules resolution that drew bipartisan consternation that it would produce a rushed trial with little evidence in the dark of night. Both President Trump and Senator Mitch McConnell show how the adversarial system of government fails to function if there is no political will among the legislature to check egregious presidential abuses of power. One outright disregards the system of checks and balances in America and the other emphasizes this disregard by manipulating institutionalized practices.

Over two weeks in January and February 2020, the Senate held trial. A Senate conviction, removal, and disqualification requires an affirmative vote by a two-thirds supermajority. Due to the 53-47 Republican majority, including two Independents that caucus with Democrats, a guilty verdict was highly unlikely. Given that every preceding impeachment featured an investigation by the Senate, new evidence, and witness testimony, one may have predicted that their noticeable absence in this trial would be highly unlikely as well. McConnell said "[t]he Senate is meant to act as judge and jury. To hear a trial. Not to re-run the entire fact-finding investigation".[162] By pushing the Senate to investigate, McConnell argued that the Democrats would push the Senate down a trajectory that would set a nightmarish precedent for the constitutional separation of powers. This article posits that this precedent has been set, but not by the Democrats. The manner in which this faction pursued its own pattern of undermining legitimate national security concerns and the rule of law is, to put it plainly, a cover-up. Two weeks into the Senate procedure vaguely resembling a trial, only 9% of Republicans supported removal compared to 84% of Democrats.[163] It came

[160] G.S. Wood, *The Creation of the American Republic, 1776–1787*, Chapel Hill, 1998, 33.
[161] Letter from U.S. House of Representatives Impeachment Managers, *Replication of The United States House of Representatives to the Answer of President Donald J. Trump to the Articles of Impeachment*, 20 January 2020.
[162] Statement by Majority Leader Mitch McConnell, *McConnell on Impeachment Procedures: The Senate's Duty is to Conduct a Trial, Not Re-Do House Democrats* Homework for Them, 17 December 2019.
[163] S.G. Stolberg and C. Hulse, *Alexander Says Convicting Trump Would Pour Gasoline on Cultural Fires*, *New York Times*, 31 January 2020.

to pass that Trump was cleared by 52 votes to 48 on the first article for abuse of power, with Mitt Romney becoming the first ever Senator to vote to convict a president of his own party.[164]

Most interesting was the strictly partisan hold McConnell and the Senate Republicans were able to keep on the rules of the trial. With the polarized climate and the fierce party loyalty that defines this Majority Leader, it was expected that McConnell's draft resolution on the rules for the impeachment trial would show bias in favor of President Trump. Political decisions play a significant role in the rules and proceedings that are drafted by the ruling party in the Senate. Such issues can be as controversial as impeachment and as minute as taking recess in Senate proceedings. Thus, in pursuit of equal fairness that recusal provides in any other jury, the practice of recusing oneself should be normalized when government officials openly admit their explicit bias. Each side was originally given 24 hours over two days, making it necessary for House managers to make their case to the Senate in the "dark of night", past midnight, and out of the public view.[165] Moderate Republicans pushed back against the proposed rules and the inaccurate comparison with the Clinton trial rules. Sen. Murkowski of Alaska in particular voiced concerns about the "mishandled" and rushed House process, and only mildly rebuked McConnell's choice to work "hand-in-glove with the defense".[166]

The most reliably moderate Republicans criticized the House for declining to pursue Bolton and Mulvaney's impeachment testimony in the courts, ignoring the compelling rationale Special Counsel Mueller's Report made, and the House Committees reiterated during impeachment, about the trade-off of "weigh[ing] the costs of potentially lengthy constitutional litigation, with resulting delay in finishing [the] investigation, against the anticipated benefits for [the] investigation and report".[167] The President had made clear that he intended a complete stonewall, "war" on impeachment.[168] For this reason, Ramirez and Clem interpret Mueller's soft critiques of the limitations of the judicial branch in governmental matters more forcefully, and recommend amending the existing regulations provide for expedited judicial review in questions relating to the rule of law that "address interbranch authority, executive oversight, or separation of powers,

[164] M. Leibovich, *Romney, Defying the Party He Once Personified, Votes to Convict Trump*, *New York Times*, 5 February 2020.
[165] Statement by House Speaker Nancy Pelosi, *Statement on McConnell Cover-Up Resolution*, 21 January 2020.
[166] S. Gurman, *Murkowski 'Disturbed' by McConnell's Senate Impeachment Strategy*, *Wall Street Journal*, 26 December 2019.
[167] Mueller, R.S., *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Office of Special Counsel, U.S. Dept. of Justice, app. C, C-2., 2019, (hereinafter *Mueller Report Volume II* app. C).
[168] C. Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, *New York Times*, 24 April 2019.

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in addition to the role of the Special Counsel".[169] Ultimately McConnell would make concessions only to his Republican colleagues. The handwritten changes to his rules resolution brought the Trump trial closer to the Clinton precedent, extending the timeline for the seven House Impeachment Managers to make their case against the President from 24 hours over two days to 24 hours over three days.[170] The unprecedented proposal of not admitting the House's evidentiary record without a vote was changed to state that prior evidence would be admitted unless there was a motion from the President's team to throw out evidence.

The Republican majority went on to reject 11 amendments championed by Democratic Leader Schumer, including subpoenaed documents from the White House and the rejection of key witnesses at the trial.[171] One of the amendments allowed more time for officials to file motions; Collins defected. Chairman of the House Judiciary Committee Jerrold Nadler called the party line vote of 53-47 against nearly all 11 amendments votes "against an honest consideration of the evidence against the President... vote[s] against an honest trial", and a "shameful cover-up".[172] This allegation of a cover-up on the Senate floor elicited a fiery reaction from the GOP. White House counsel Cipollone rebutted Nadler, harkening back to the separation of parties principle in his factual claim that "This is the United States Senate. You're not in charge here".[147] The President would go on that day to taunt congressional Democrats' failed attempts at subpoenaing documents at, of all places, the World Economic Forum in Switzerland, with his admission of another inconvenient and unconstitutional truth that "We have all the material. They don't have the material".[173] This outright disregard for legal democratic norms of evidence, witnesses, and the subpoena power of Congress does amount to a cover-up. Rather than this accusation serving to embarrass or discredit the party orchestrating said cover-up, Sen Rand Paul (R-KY) put words to another true sign of the times saying, "all it does is serve to unify [Republicans]".[174]

By the late stages of the Constitutional Convention of 1787, the delegates were in agreement that only the Senate was up to the task of conducting a presidential impeachment trial with the "requisite neutrality".[175] No other body was sufficiently dignified nor independent from

[169] *See* Ramirez & Clem, 14, and the article more generally for specific recommendations regarding making the judicial branch more responsive as a check on executive authority.
[170] *See* final resolution at S. Res. 483, *To provide for related procedures concerning the articles of impeachment against Donald John Trump, President of the United States*, 116th Cong., 2nd Sess., 21 January 2020.
[171] M. DeBonis, K. Demirjian, & R. Bade. *Senators urge House impeachment managers to tone it down after testy debate, The Washington Post*, 22 January 2020.
[172] Id.
[173] Id.
[174] Id.
[175] Hamilton, *Federalist no. 65*, 321.

the president to serve as a depositary fit for the trust a presidential trial would call for.[176] Jane Chong, former law clerk on the U.S. Court of Appeals for the Third Circuit, put simply: "this is not the Senate the Framers imagined".[177] GOP senators had committed explicitly and preemptively to acquit President Trump even before the House inquiry was complete. Democratic leaders assessed comments such as Sen. Graham's pledge on 14 December to do "everything" he could to make sure the Trump trial would "die quickly"[178] and McConnell's 17 December assertion that there is "not anything judicial about [i]mpeachment"[179] as evidence that their Republican counterparts were loyal to the President, not the Constitution.[180]

Under President Trump's direction, twelve current or former Administration officials refused to testify as part of the House's impeachment inquiry, ten of whom did so in defiance of duly authorized subpoenas. Senate trial rules, a banal procedural technicality on its face, allowed 51 of 52 Senate Republicans (Mitt Romney was the only defection) to hear no evil and see no evil in President Trump's abuses of power, obstruction of Congress, and betrayals of American national security interests, public trust, and election integrity. The mechanisms or the ideology joining the GOP legislators and their executive is lacking the appropriate independence and as such is lacking sufficient dignity. "I'm not an impartial juror", Mitch McConnell told reporters, "This is a political process. There is not anything judicial about it. Impeachment is a political decision."[181] Such statements were not predictions but promises made concrete by the political reality of separation of parties, and the ideologically unified GOP majority.

Part of the measurable effects of polarization is the quality of oversight one party chooses to exercise over its president. Hyper-polarization has both fostered and exposed an unwillingness by Republicans in the Senate to serve as a deliberative body with the requisite neutrality for checking and balancing this rogue executive. Political polarization is not a static process, and it has not developed equally on both ends of the spectrum. It festers, feeds on itself, and cannibalizes the moderate middle of the political spectrum, but it also poisons the attitudes and behaviors of the public at

[176] Id.
[177] J. Chong, *This Is Not the Senate the Framers Imagined*, *The Atlantic*, 21 January 2020.
[178] T. Law, *This Thing Will Come to the Senate and It Will Die Quickly. GOP Leaders Moving to Reject House Democrats' Impeachment Case*, *Time*, 15 December 2019.
[179] C. Hulse, *Mitch McConnell, Master of the Blockade, Plots Impeachment Strategy*, *New York Times*, 20 December 2019.
[180] Press Release from Speaker Nancy Pelosi, *Dear Colleague on Senator McConnell's Untrue Claims Regarding Impeachmen'*, 7 January 2020.; Letter from Senate Minority Leader Chuck Schumer, *Senator McConnell's Misleading Claims About the Clinton Trial Process*, January 2020.
[181] T. Barrett & A. Zaslav, *Mitch McConnell: 'I'm not an impartial juror' ahead of Senate impeachment trial*, *CNN*, 18 December 2019.

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large.[182] The question of what GOP ideology is unified around is beyond the scope of this work. In the last year of Trump's presidency, the loudest voices in the GOP leadership have not united to find solutions for issues such as protecting and defending the Constitution from domestic and foreign threats posed by President Trump, protecting American life or livelihoods during the pandemic, or committing to a peaceful transition of power. Through negligence, these issues have blossomed into crises. There is no simple solution for either of them. The strength of a democratic government system, however, is not its ability to quash all antidemocratic forces preemptively, but instead look at how it can marshal the power of checks and balances to properly address threats to the Constitution as they arise. The concept of polarization at imbalanced extremes may simplify and make more predictable outcomes of interbranch contestation in our governmental system, but it complicates and compromises its democratic legitimacy.

Donald Trump is the first president to face the voters after impeachment. The closing arguments at his impeachment trial by his supporters reasoned that it should be the voters that decide on the president's behavior, not Senators.[183] This argument has the potential for credibility when made in general, good faith. If made as rationale for loosening oversight over a president who has demonstrated extensive election interference, it is not a good faith argument nor is it politically wise or constitutionally sound. Furthermore, this argument applies more readily to the electoral accountability central to the Westminster system, and can be contrasted directly with the ideals of the form of accountability idealized in the Madisonian intragovernmental which operates in the intervals between elections.[184] The American presidential system of government relies on monitoring by Congress in between elections in order to maintain democratic standards of rule by accountable legislatures and a contained Executive. Levinson and Pildes remind us that parliamentary critics of the American system of separation of powers often consider its systems of political accountability as too diffuse. The Westminster style of accountability allows one ruling party, where possible, to set the policy agenda and bring their vision to life in the political arena. If unsuccessful—or if disasters ensue—the public know who to blame. With the trend towards congressional abdication, "virtually all responsibility for important issues—

[182] J. McCoy & M. Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, *Annals of the American Academy of Political and Social Science* Vol. 681, 2019, 257; P. Pierson & E. Schickler, *Madison's Constitution Under Stress: A Developmental Analysis of Political Polarization*, *Annual Review of Political Science*, Vol. 23, 2020.
[183] *See generally* Majority opinions, *116th Proceedings and Debates of the Congress*, Senate Congressional Record, 2nd Sess., Vol. 166, No. 24.
[184] Levinson & Pildes, pp. 2325-2328.

and therefore motivation to do something about them" falls on the President, who has "become increasingly imperial and omnipotent.[185]

The public's vote for president is not a referendum on any one action by the president. A presidential election is an opportunity for voters to weigh the comparative strength of the candidates, their platforms, and parties. Most importantly it is the only act undertaken by the entirety of the American electorate. As such, it is the singular instance the nation is invited to collectively exercise their democratic right to vote and aid in determining the future of the nation. By critiquing the Senate's trial following the impeachment procedures, the article also critiques actions taken by political factions that undermine the political constitution and citizens' innate, democratic rights.

5. Presidential Impeachments: Case Studies in Critical Junctures

The constitutional framework providing for the impeachment procedure is key, but the social and political context is important when understanding how and why an impeachment gains enough support to pass with a simple majority vote in the House. It is true that impeachment is divisive, but movements to impeach also gain steam during particularly divided moments. Touching on the social and political contexts preceding past impeachments will allow us to make sense of today's level of political polarization in the wider trajectory of democratic development in the United States. Mettler & Lieberman argue that more than any individual leader, that the presence of one or more of the four historic threats to American democracy, political polarization, conflict over social and political exclusion, high and growing economic inequality and excessive executive power are the causes for the critical juncture the United States finds itself in today.

The House of Representatives resolved on 18 December 2019 to impeach Donald John Trump for high crimes and misdemeanors, making him only the third president to face this sanction.[186] In the most critical assessment, Donald Trump's patterns of behavior betray peculiar parallels to some of the worst—and ultimately, impeachable—offenses by the three previous presidents to have faced this sanction. An exhaustive listing of all similarities and differences between the three other impeachments and the Trump case would be beyond the scope of this work. Like Andrew Johnson, he is endorsed or supported openly by anti-Black organizations claiming a false sense of racial superiority, and often refuses to or avoids denouncing them.[187] Like Richard Nixon, Donald Trump was caught in the act of abusing his authority as president to derail the presidential campaign of his

[185] *See* Kagan, pp. 2310-2312; T.M. Moe & W.G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. Econ. & Org*, Vol. 132, No. 138, 1999, 15.
[186] H.Res.755, *Articles of Impeachment Against Donald John Trump*.
[187] M. Quinn, *Stand Back and Stand By': Trump Declines to Condemn White Supremacists at Debate, CBS News*, 30 September 2020.

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political rival. Whereas Nixon enlisted the help of domestic agencies such as the IRS and the CIA, Donald Trump was observed on at least three occasions soliciting a foreign government to take detrimental action against his rival in a presidential race.[188] Like Bill Clinton, Donald Trump was accused by multiple women of sexual assault, harassment, and even rape. Whereas Clinton abused his power as President by encouraging the forging of affidavits to cover up his sordid sexual affairs, Trump's lawyer Michael Cohen served prison time for arranging hush payments to a now-famous adult entertainer on behalf of the President.[189]

5.1. Johnson (1868)

This is not the worst episode of hyper-polarization or negative partisanship in U.S. history. The Civil War fought between fiercely socially and ideologically divided political parties reminds us that it can get much worse. The nation's first impeachment was just another symptom of the extreme ideological animosity between the Southern Democrats' acceptance of white supremacy as a governing principle of the nation, and the 'radical' Republican agenda of granting Black Americans equal protection under the law. The first case of presidential impeachment was that against Andrew Johnson. Johnson was a proud, virulently anti-Black racist Southern Democrat opposed to ending slavery and Black Codes in the South. Newly inaugurated Republican President Abraham Lincoln and the Senate had resolved at its inception that the Civil War would be fought not to end slavery, but to "preserve the Union".[190] In a politically adept decision, Lincoln reached across the aisle to appoint Johnson, the only Southern Democratic Senator to oppose secession, as first a military ally in the Civil War and later as Lincoln's Vice President.[191] The movement to secede from the Union created a critical juncture that rendered the American political institutions more fluid for a time. The nation had to be reconstructed, and the political status of Southern states needed redefinition in post-Civil War America. Congress tried to seize this moment to legislate social change, but Johnson worked with Southern senators to undercut congressional authority to mold the Union into a truly biracial democracy.

As the consensus in Lincoln's Republican party on the future of the African-American population shifted gradually, the war to preserve the Union "[become] a war to create a more perfect Union" by ending the institution of slavery.[192] Andrew Johnson spent only one year as part of this

[188] 'Mueller Report', Vol. I, 49.
[189] K. Breuninger & D. Mangan, *Feds End Probe of Hush Money That Trump Lawyer Michael Cohen Directed to Stormy Daniels, Karen McDougal, CNBC*, 17 July 2019.
[190] R. Berger, *Impeachment: The Constitutional Problems*, Cambridge MA, 253.; M. Lomask, *Andrew Johnson: President on Trial*, 1960, 20.
[191] S.E. Morison, *Oxford History of the American People*, Oxford, 1965.
[192] W.R. Brock, *An American Crisis: Congress and Reconstruction 1865-1867*, London, 1963, 168.

visionary bipartisan administration before Lincoln's assassination, and as such, Johnson ascended to the presidency while "the country was in the throes of a second founding". President Johnson is quoted as saying "This is...a country for white men, and by God, as long as I am President, it shall be a government for white men", [193] a statement encapsulating his commitment to violate the Constitution "to preserve institutions and practices that had nearly killed the Union".[194] Due to a new majoritarian rule by Southern Democrats in the Senate after the three-fifths compromise was struck down, Johnson had the numbers to see these declarations through. Taken together, the 11 articles of impeachment brought against Johnson alleged that through firing moderates, appointing formerly Confederate cabinet members and war generals, and vetoing the nation's first civil rights legislation he was practicing an "illegitimate use of power to undermine Reconstruction and subordinate African-Americans".[195] At a critical juncture wherein progressive Republicans sought to reshape America into a biracial democracy, Johnson and his supporters were agents empowered not only to block this trajectory of development of the American legal and social institutions, but to plunge the nation back into bloodshed.

Scholars now agree that it was for these reasons, not the oversimplified explanation that Johnson violated the Tenure of Office Act, that Congress determined that the risks of not impeaching Johnson were greater than the risks of impeaching him.[196] They also agree that the decision by the House to focus on the Tenure of Office act was "shaky", and obscured the far more compelling, mortal threat Johnson posed to "the nation—and to civil and political rights—as reconstituted after the Civil War".[197] Though they were not successful in convicting him—his presidency survived by one vote in the Senate—impeachment worked to deliver their primary goal. After acquittal, Johnson acceded to most of Reconstruction and appointed moderates to his cabinet. Had the Senate refused to hear new evidence against Johnson or to hear from witnesses, this may have emboldened Johnson in his incitement of anti-Black laws and attacks.

History has judged the Johnson impeachment harshly, either based on the merits of the case against Johnson, or the failure of the House to "plead and prosecute their best case on [these] merits".[198] A crucial lesson from the first case of presidential impeachment is that even in cases where "the offense consists not of a single atrocity, but rather an accumulation of bad acts into a terrifying pattern", it is necessary to present accurate, specific articles of

[193] A. Gordon-Reed, *Andrew Johnson: The American Presidents Series: The 17th President, 1865-1869*, New York, 2011, 112.
[194] Tribe & Matz, 55.
[195] The trial of Andrew Johnson, President of the United States, Cong. Globe, 40TH Cong. 2d Sess., 1868.
[196] Tribe & Matz, pp. 55, 111-112.; *See, generally* M.L. Benedict, *The Impeachment and Trial of Andrew* Johnson, 1999.
[197] Tribe & Matz, 55.
[198] Id., 111.

impeachment that can stand alone.[199] John Labovitz argued in 1978 that an overly narrow focus on singular, discrete impeachable offenses "guts an impeachment case of the very factors—repetition, pattern, coherence—that tend to… warrant[] the removal of a president from office".[200] While one evil act might be all that is necessary to warrant impeachment, the "mosaic theory" adding up individual tiles could reveal a horrific picture, as is the practice in privacy law.[201] In Johnson's case, not one of his individual acts against Congress—"vetoes, speeches, nonenforcement policies, misinterpretations of the law, or neo-Confederate acts"—met the standard of a high crime or misdemeanor on its own.[202] Though they were not successful in convicting him—his presidency survived by one vote in the Senate—impeachment worked to deliver their primary goal. After acquittal, Johnson acceded to some tenets of Reconstruction and appointed moderates to his cabinet. Yet, in the ultimate assessment, institutionalized racism Johnson fought Congress for continued to allow white supremacist terror to carry on in the South largely unabated, duly elected Black politicians were intimidated or executed, and the Reconstruction agenda for equitable social progress was ultimately derailed, just as Congress feared. The 116th House Committees, along with the Committees that impeached Clinton and Nixon, assessed Johnson's actions in the aggregate, the limited options left to constrain him, and Southern Democrats' ultimate impact on Reconstruction policy.

5.2. Nixon (1974)

The 1974 case of Richard Nixon, though ending prematurely in his resignation, is similar to the Trump case in many ways. Their similarly corrupt motivations for obtaining damaging information on political rivals and confidential information from the Democratic National Committee stands out. The Watergate break-in of June 1972 was but one offensive laid out by Nixon during his "weaponized presidency".[203] The only two Republican presidents to suffer an impeachment investigation are also linked by their extensive abuse of the federal bureaucracy to both secure personal and partisan advantage in an election, and when that did not work, to mount an extensive cover-up of these misdeeds.[204] Where the House Judiciary Committee of 1974 had improved upon the shaky precedent set over 100 years prior in the Johnson case was in its encompassing use of 'obstruction

[199] Id.
[200] J. Labovitz, *Presidential Impeachment*, New Haven, 1978, pp. 129–130.
[201] O.S. Kerr, 'The Mosaic Theory of the Fourth Amendment', *Mich. L. Rev*, Vol. 111, 2012, 311.
[202] Tribe & Matz, 112.
[203] Mettler & Lieberman, 247.
[204] *See e.g.*, M. Koncewicz, *They Said No to Nixon: Republicans Who Stood Up To the Presidents Abuses Of Power*, Oakland, 2018; S. Kutler, *The Wars of Watergate*, New York, 1990, 406.

of justice' as the first article of impeachment, which "wisely mixed the particular and the pattern".[205] The first article of impeachment against Nixon built on the 17 June 1972 unlawful entry at Watergate with the subsequent "course of conduct… to delay, impede, and obstruct investigation" into that and other "unlawful and covert activities".[206] Dozens of individual tiles such as perjury, misuse of the CIA, making false public statements, and others would not warrant impeachment on their own, but as part of the mosaic that was the "single overarching offense" of obstruction of justice, the House was able to fit together a damning, years-long record of Nixon's abuses.[207]

An important precedent made clear by the Nixon impeachment was one argued previously by George Mason at the Convention, the determination that "*attempts* to subvert the Constitution",[208] whether successful or not, constitute a threat to society and subject the President to removal.[209] The House Judiciary Committee investigating Trump reported that the Johnson and Nixon cases affirm the Framers' understanding that whereas the president engages in acts deemed illegal or with improper motivations, he has abused his power, and where such grave abuses of power "inflict substantial harm on our political system… they warrant his impeachment and removal".[210]

Mettler and Lieberman argue that Nixon's executive overreach was a maturation of precedents set to weaponize the presidency begun by Roosevelt during WWII, and as such illustrates an extreme in the antidemocratic threat of 'expanding presidential power'.[211] Nixon's use of the U.S. Cold War surveillance apparatus against domestic political rivals was shocking, but it was not new: the FBI COINTELPRO program had famously targeted Martin Luther King, Jr. and other Civil Rights leaders in the 1950s and 1960s before many, like King, were assassinated.[212] Economically, Americans were more equal during Nixon's first presidential

[205] Tribe & Matz, 114.
[206] L. Deschler, *Deschler's Precedents of the United States House of Representatives*, U.S. Government Publishing Office, Vol. 3, 1974, 639.
[207] Tribe & Matz, 114.
[208] C.R. Sunstein, *Impeachment: A Citizen's Guide*, London, 2017, 47.
[209] *See Report of the H. Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States*, H. Rep. No. 93-1305, 1974, pp 82-136., *(hereinafter Committee Report on Nixon Articles of Impeachment, 1974.*
[210] *Trump Impeachment Report*, 48.; *See also Staff Report on Constitutional Grounds for Presidential Impeachment: Modern Precedents*, 1998 pp. 6–7; Minority Staff of House Committee on the Judiciary, *Constitutional Grounds for Presidential Impeachment: Modern Precedents Minority Views*, 105th Cong., 1998. pp. 3–4, 8–9, 13–16.; *Committee Report on Nixon Articles of Impeachment*, 1974, 139.
[211] Mettler & Lieberman,
[212] A. Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan*, Philadelphia, 1978, pp. 98–100; T. Weiner, *Enemies: A History of the FBI*, New York, 2012, 88.

campaign in 1968 than they had ever been.[213] The lip service to the Civil Rights cause, the growing counterculture movement against the Vietnam War, and the rising Black Power movement were all evidence of another of Mettler and Lieberman's 'four threats' to American democracy: the social conflict over who belonged in the political community. With his "southern strategy", Nixon stoked racial tensions to distinguish the Republican party from Lyndon B. Johnson's Democratic party as a way to attract Southern white voters fed up with the marching before, and the rioting in 100 cities after, King's assassination in 1967.[214] John Ehrlichman, a Nixon aide, described the southern strategy in plain terms decades later, saying the Nixon administration "had two enemies: the antiwar left and black people… by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities."[215] In this way, Nixon's presidency built the modern foundation for the political polarization and anti-Black ideology of some extremist factions of the Republican party today. In this way, Nixon's presidency and his impeachment were both cause and effect of three of the 'four threats' against U.S. democracy, expanding presidential power, social conflict over who belongs in the polity, and political polarization.

5.3. Clinton (1999)

To continue the comparison, Trump's consensual sexual indiscretions and sexual assault allegations rival those of Bill Clinton, though they did not take place while Trump held public office. The Bill Clinton impeachment trial was a 21-day process controlled by a Republican Senate. Donald Trump's trial was over a week shorter than Clinton's at 13 days.[216] It has been said that history repeats itself, first as a tragedy, then as a farce.[217] The deeply disturbing public threat posed by Richard Nixon's abuse of power in the Watergate scandal found a mirror in the disturbing private threat President Clinton's abuse of power posed to his young female aides. Both had betrayed the public trust. Both were found by the presiding House of Representatives to have abused their power. For all the talk in this current era of hostile partisanship derailing deliberation and cooperation in American politics, the Clinton impeachment was another turning point in the devolution of the quality of trust, shared values, and respect between

[213] R. Mickey, *Paths Out of Dixie: The Democratization of Authoritarian Enclaves in America's Deep South, 1944–1972*, Princeton, 2015.
[214] J.D. Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Presidential Campaign*, *The Historian*, Vol. 64, No. 2, 2002, pp. 354.
[215] V. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, *Studies in American Political Development* Vol. 21, 2007, pp. 230-265.; D. Baum, *Legalize It All*, *Harper's Magazine*, Vol. 332, 2016, 22.
[216] *See Report of the Committee on the Judiciary, Impeachment of William Jefferson Clinton*, Report H. Report 105–830. House of Representatives, 105th Congress 2d Sess., 16 December 1998., (hereinafter *Clinton Impeachment Report*)
[217] K. Marx, *The Eighteenth Brumaire of Louis Bonaparte*, New York, 1963.

parties in Congress.[218] Each instance of presidential impeachment gives Congress the opportunity to debate anew and reinterpret for that specific case what constitutes high crimes and misdemeanors. Many scholars are in agreement that the pursuit of President Clinton for impeachment, conviction, and removal on the grounds of private indiscretions rather than a betrayal of his duty to public office has cast a long shadow over the institution of impeachment and the chambers charged with exercising this function.

In late 1998, 31 Democrats joined the Republican majority in the full House vote in authorizing the impeachment inquiry into President Clinton.[219] He was impeached on article one by a close vote of 228-206, where five members of each party in the 105th House of Representatives crossed party lines to cast their vote for or against impeaching Clinton.[220] On article three—article two perjury in the civil lawsuit brought by Paula Jones was rejected—Clinton was impeached by an even more narrow margin of 221-212 for obstruction of justice.[221] Republicans controlled the Senate with 55 out of the hundred seats, and because impeachment would require 67 Senators, he could reasonably expect to be acquitted as long as his sordid affairs did not sway 12 Democrats. They were not swayed, in fact, on 12 February 1999 Clinton was acquitted on article one for perjury before the grand jury (45-55) with ten Republicans voting to acquit.[222] The departures in the Trump impeachment trial from the 1999 Clinton precedent were stark. In 1999 the Senate unanimously drafted and passed the rules for impeachment. Democrats were shut out of the process of drafting rules for the Trump trial. In both cases the Senate voted to decide on witnesses later on in the trial, after opening statements. 55 senators, including ten Republicans, voted to acquit on the perjury count.[223] The vote on the second article was closer, 50 to 50, but still far short of the two-thirds vote required for conviction. Five Republicans voted "not guilty" on the second article obstruction of justice. Any claim Mitch McConnell made to abide by the Clinton precedent in Trump's impeachment trial regarding timing of the votes regarding witnesses ignored the fact that the three approved videotaped deposition testimonies voted up by a majority of Senators to be included in the trial were from witnesses had already testified in his House impeachment investigation before a grand jury.[224] The witnesses Democrats requested—Mulvaney, Bolton, White House budget official Michael Duffey and White House aide Rob Blair—were subpoenaed and blocked by the WH,

[218] J.A. Engel, J. Meacham, T. Naftali, & P. Baker.
[219] Id. 200., *Clinton Impeachment Report.*
[220] J.A. Engel, J. Meacham, T. Naftali, & P. Baker., 191.
[221] Id., 252.
[222] Id., 200.
[223] Id., 200.; H. Res 611, *Articles of Impeachment Against William Jefferson Clinton*, 105th Cong., 2nd Sess., December 19, 1998.
[224] D. Obeidallah, *Andrew Johnson's Impeachment Trial Had 41 Witnesses, Clinton's Had 3, and Now Some GOP Senators Want Zero, CNN*, 13 January 2020.

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and the Democrats, the only members of the Senate that voted to hear from witnesses, did not have time to fight the vote in the Supreme Court. In the trial, there was no recourse for the Senate's resounding votes of 'nay'.

6. Public Trust, Predictions & Counterfactuals

It can be abstract to conceptualize situations where public trust in political and expert leadership can have life and death consequences for citizens. The coronavirus pandemic has proven itself a serious challenge to public health and safety as well as to economies even given a coherent, swift national response from other wealthy nations. In the United States, the incoherent government response and patchwork state lockdowns and closures were no match for the acutely infectious nature of the virus. The President's hostility to Democratic governors and mayors has evolved into a chilling denial of federal assistance to fight the virus and save lives in blue states.[225] The human consequences of COVID-19 in the States implies that this President Trump either lacks the capacity or willingness to respond appropriately to situations requiring cooperation. Needless to say, this has greatly undermined state efforts to flatten the curve of their coronavirus infection rates. Not only has the President continued to be a leading provocateur of the anti-mask sentiment, but Stanford researchers also analyzed coronavirus data from 18 Trump presidential campaign rallies held between the 20 June Tulsa, Oklahoma rally and 22 September, ultimately finding that the President was actively spreading the virus on the campaign trail. "Our estimate of the average treatment effect… implies that [Trump rallies]… resulted in more than 30,000 incremental confirmed cases of COVID-19" and "likely led to more than 700 deaths (not necessarily among attendees)".[226]

The first counterfactual to explore briefly is the possibility that the House declined to impeach Donald Trump. Failing to impeach a corrupt president is tolerating corruption and can invite a destructive culture to take root. Of course, either party hoarding power to the detriment of the union, the separation of powers and or the rule of law should be held to task. The antidemocratic behavior we are seeing now from the President in reaction to the election results is at least some vindication of the House's decision to impeach him, and on an expedited timeline sensitive to preserving the integrity of said elections. Mitch McConnell has helped make the Senate the most powerful body in the U.S. government. His choice to wield the full force of that power to admit openly to being partial against this case, to refuse witnesses and to refuse to properly try an impeached president indicates the

[225] Y. Abutaleb, A. Parker, J. Dawsey, P. Rucker, *How Trump's Pandemic Missteps Led to a Dark Winter*, *The Washington Post*, 20 December 2020
[226] B.D. Bernheim, N. Buchmann, Z. Freitas-Groff, S. Otero, *The Effects of Large Group Meetings on the Spread of COVID-19: The Case of Trump Rallies*, (Working Paper) Stanford Department of Economics, 20 October 2020.

ground is already fertile for this destructive culture. Declining to impeach President Trump would have been an open invitation for future electoral interference and more erosion of the separation of powers. This was not a viable option.

The next counterfactual and a recommendation for the future is consideration of bypassing a decidedly partial Senate trial, one that, in making a mockery of the American legal system, would only set further antidemocratic precedent and harm to a further extent the separation of powers. The House took the advice of one legal advisor to delay handing off the articles of impeachment for nearly one month. This was an alternative course of action for the House, a creative response in which the House took a more assertive role during this fluid period we are characterizing as a critical juncture. While some liken the House Managers to prosecutors in the case of impeachment, they are not. House managers act as prosecutors in impeachment cases, but there is not constitutional affirmative to deliver an indictment.[227] For this reason, we recommend that in future impeachments when the Executive and the Senate both threaten to interpose their constitutional powers to neutralize an impeachment inquiry, the House could bypass the Senate trial altogether. Harvard Law Professor Laurence Tribe deals specifically with this issue, using the Nixon precedent to argue that:

> The Constitution's design suggests that the Senate, unlike any trial jury, is legally free to engage in politics in arriving at its verdict. And the House, unlike any grand jury, can conduct an impeachment inquiry that ends with a verdict and not just a referral to the Senate for trial.[228]

After Nixon lost *United States v. Nixon*, and the smoking gun tape put the nail in the coffin of his presidency, the House concluded the impeachment proceedings against Nixon by drafting "particularized findings" less in the nature of accusations to be assessed by the Senate than in the nature of "determinations of fact and law", a type of verdict of guilt delivered by the House, expressly stating that the president was indeed guilty as charged.[229] The less ideologically-divided (less factious) Congress that impeached Nixon did seize its moment after his resignation to push through bipartisan reforms to check the Nixon-era abuses of power, they established the House and Senate Judiciary independent counsels and protected them from dismissal by the president. The financial disclosure requirements Trump has been fighting for five years now were birthed during this time, and many campaign finance laws were put into place. A future path for a House of Representatives could be to think more creatively about how, when, and if

[227] Tribe & Matz, 147.
[228] L.H. Tribe, *Impeach Trump. But Don't Necessarily Try Him in the Senate*, *The Washington Post*, 6 June 2019.
[229] Id.

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the House involves the Senate in impeachment proceedings if it has pre-committed to whitewashing the trial and protecting its president.

The last counterfactual is a consideration that the U.S. practice of impeachment is converging with the British vote of confidence. From the perspective of the modern British parliamentary system, impeachment may seem unnecessarily disruptive. Prime Ministers lose the confidence of the House all the time, and the heavens do not fall. In fact, some may assert that the opposite is true. This counterfactual could be conceptualized in a more realistic way if instead we consider normalizing impeachment. Former Obama campaign advisor David Axelrod supposed that normalizing impeachment would be "another hammer blow to our democracy",[230] and from the perspective of the McConnell vendetta against Obama, his prediction has merit. Some scholars have argued that instead of 'normalizing' impeachment into an everyday partisan weapon, the concept refers more to reconceptualizing impeachment the way we consider veto overrides or presidential cabinet rejections by the Senate: infrequent, constitutional, yet not automatically assumed to be illegitimate by "impeachment phobia".[231] The political culture that shies away from a tool its Founders deemed indispensable and necessary is a culture dooming itself to bad governance. A final consideration from Levinson and Pildes is that ironically, political parties could be the redemption for the American presidential system and its weakening intergovernmental accountability if steps were taken towards "the doctrine of '(responsible) party government".[232] In this arrangement, officials in government unite across branch lines to challenge the Framers' design, and conquer that which is anachronistic, crafting a fusion of formally separate Executive and Legislative branches into "the second-best approximation of Westminster".[233]

7. Conclusion

This analysis encourages concerned parties to look beyond political polarization as a trend or a nuisance, the dynamics at work shaping American political parties and partisan moods are also shaping electoral oversight, constitutional interpretation by the legislature, and the scope of executive authority. Partisan moods are also detracting from the political will for the separation of powers. Impeachment exists to restore democratic constitutionalism. Vulnerabilities in the American electoral oversight regime that are welcomed to persist based on one side's assessment of their

[230] D. Axelrod, *Twitter*, April 8, 2018.
[231] G. Healy & K.E. Whittington, *Resolved, Impeachment Should be Normalized*, SAGE, 2021, 19-22.
[232] Levinson & Pildes, 2326.; *See generally* A. Ranney, *The Doctrine of Responsible Party Government: It's origins and Present State*, Champaign, 1954.
[233] Id.

partisan value is a pressing threat to democratic constitutionalism. A bipartisan effort to pass aggressive, fully funded election security legislation in early 2019 may have circumvented the need for impeachment at year's end. By December, at the tail end of the House impeachment proceeding exposing direct threats to the integrity of the elections, members of the Election Assistance Commission lamented the partisanship that resulted in "sporadic attention and funding" from Washington to secure state elections. Funds appropriated in 2019 were "⁅a⁆ year late and a billion dollars short" to have much impact on the 2020 presidential race.[234] Had the Republican-led Senate taken a strong position to address the 2016 election meddling by passing the 'H.R. 1— For the People Act of 2019', Congress would have had ample time and funding to "expand Americans' access to the ballot box, reduce the influence of big money in politics, and strengthen ethics rules for public servants".[235] The one-time $1,200 stimulus was not nearly enough to sustain the average individual American through these nine months of the pandemic, let alone the direct payment made to families. Refusal by Republican leaders to prioritize any substantial economic relief for average and lower income sections of the population could be understood as an economic consequence of political hyper-polarization.

The tool of impeachment exists to preserve the American political system, but "it can do so only if that same political system rises to the occasion in times of constitutional crisis."[236] Politics drives the American system of government, not the other way around, and for that reason, the political system of today would be unrecognizable to the Framers. Especially relevant for this discussion on impeachment have been historical and contemporary divergences in three main areas: power competition between branches of government, legislative-executive accountability, and constitutional interpretation by the legislature, or popular constitutionalism. "The degree and kind of competition between the Legislative and Executive branches very significantly, and may all but disappear, depending on whether the House, Senate and presidency are divided or unified by political party".[237] It has been established above that through unified or divided government, legislative choice is the "nation's primary means of coordinating the actions of the nation's basic institutions".[238] Through electoral choice of legislators—and more indirectly, the people—are actively interpreting the written Constitution more frequently than the Supreme Court.[239]

[234] M. Parks, *Congress Allocates $425 Million For Election Security in New Legislation*, *NPR*, 16 December 2019.U.S. Election Assistance Commission report to the Senate Committee on Rules and Administration, *Oversight of the U.S. Election Assistance Commission*, Washington, 15 May 2019.
[235] *H.R.1*, 116th Congress, 1st Session, 14 March 2019.
[236] L. Tribe, 331.
[237] Levinson & Pildes, 2315.
[238] Tushnet, 2015, 6.
[239] Id.

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The Ukraine election interference scandal was a discrete snapshot of what can be understood to be the Trump doctrine—soliciting foreign election interference, abuse of power, and obstructing justice. The cost of President Trump's pattern of abusing power and obstruction of efforts to check his abuses is a tangible erosion of the public trust, acute politicization of federal bureaucracies, and undermining of the American electoral system. In this way, he can be deemed an enemy of the Constitution, and as such an enemy of American democracy. However, the Republican faction of the Senate has seized the multiple critical junctures brought about by the Trump administration to aid and abet the President in his undermining of democracy. The GOP blunting the blow of impeachment for Trump's latest election interference scandal likely emboldened the President's refusal to concede the 2020 election, causing more social tension and public mistrust than Americans should have to handle during the most dangerous months of the pandemic. The cost of congressional complicity in the President's scheme is the type of injustice whose ripple effects will compromise Congress' ability to pursue respectable justice in the future. The effect on public trust has been profoundly negative. This Trump impeachment trial has exposed new cracks in the façade of our democracy that will endure even if Trump and family do depart the White House and make room for Joe Biden in 2021.

Special Counsel Robert Mueller feared that Trump's practice of not reporting "hostile foreign power… trying to influence an election" could become a "new normal".[240] New practices build on old practices, and the Trump doctrine is unfolding still in patterns of more overt soliciting or accepting of foreign election assistance, abuse of power, obstruction of justice, and politicization of the federal bureaucracy. A president cannot normalize foreign or domestic election interference on his own, and so the success of these efforts rest on support from the increasingly extremist faction on the political right. Ramirez and Clem found that our judicial system may be providing opportunities for authoritarian Executive due to inadequate measures for holding a president criminally liable. Three weaknesses in the existing infrastructure of our separation of powers can be addressed in the courts without excessive delay. First, costly and time-consuming judicial branch procedure have rendered it voiceless in moments of systemic constitutional crisis involving the executive overreach. The proposal named above for amending existing regulations to allow for expedited judicial review in questions relating "address interbranch authority, executive oversight, or separation of powers, in addition to the role of the Special Counsel" would be an immediate deterrent to future Trumpist politicians.[241] Next, the DOJ opinion on not indicting a sitting

[240] E. Groll & A. MacKinnon, *Mueller Fears Trump's Embrace of Russian Interference Could Be a 'New Normal*, *Foreign Policy*, 24 July 2019.
[241] *See* Ramirez & Clem, 14.

president is not in the Constitution, it was handed down by unelected lawyers beholden to the Executive branch, in practice it "completely insulates a sitting president from criminal prosecution".[242] In practice, because of uncertainty around the statute of limitations, criminal chief executives are insulated after leaving office as well.[243] The suggestion of tolling, or pausing, the statute of limitations could address the legal constraint of indicting a sitting president while also taking the onus of accountability off of DOJ officials bound to the president.[244] Finally, federal law should institute an affirmative duty to report any and all foreign interference in any election contest for service to the U.S. government. Mueller reported that campaign officials in 2016 in contact with Russians knew the Russians' aim to assist the Trump campaign; with only norms instead of laws to guide their behavior, they opted not to report it. [245] Two bills proposed in 2019 stand ready to establish this affirmative duty, the first being the Foreign Influence Reporting in Elections (FIRE) Act,[246] and the other is the Duty to Report Act, both with requirements for reporting to all or select bodies such as the Federal Election Commission, the FBI, and respective national committees.[247]

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[242] Id., 39.
[243] Id.
[244] Id.
[245] Id. pp. 32-34.
[246] S. 1562, 116th Cong. § 2(a) (2019).
[247] Ramirez & Clem, 32-34.