Presidential Impeachment and Removal: From the Two-Party System to the Two-Reality System

*Brian C. Kalt**

Introduction

Impeachment is not the most quotable of subjects, but in April 1970, House Minority Leader Gerald Ford managed to make it so. Spearheading a doomed attempt to impeach Supreme Court Justice William O. Douglas, Ford famously said that an impeachable offense is "whatever a majority of the House of Representatives considers to be at a given moment in history," adding that "conviction results from whatever . . . two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."[1] This idea is sometimes rendered more simply as "impeachment is whatever the House of Representatives says it is, and removal is whatever the Senate says it is."[2] Ford's statement has garnered plenty of criticism over the decades, because it seemingly ignores the Constitution's definition of impeachable offenses—high crimes and misdemeanors ("HCMs")—and substitutes Congress's political whim.[3]

But Ford's formulation illuminates something very important about impeachment. The actual legal definition of HCMs is quite broad. It is so broad, in fact, that Ford's version can be reconstructed as a *limit* on impeachment rather than as a recipe for a political free-for-all. An

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* Professor of Law and Harold Norris Faculty Scholar, Michigan State University College of Law. Special thanks to Brent Domann and Suzanne Rorhus for their research assistance.

1 116 CONG. REC. 11,913 (1970).

2 *Washington Journal* (C-SPAN television broadcast Jan. 1, 2019) (comments of Alan Dershowitz).

3 *See, e.g.*, RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 56 (1973); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 105 (3d ed. 2019) (noting critics but asserting that Ford was right as a practical matter); LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 26 (2018). It is worth noting that plenty of other constitutional powers are granted in ways that do not even purport to have limits. The pardon power, for instance, offers no guidance—let alone restrictions—as to which federal criminals the president can apply it. *See* U.S. CONST. art. II, § 2, cl. 1. The Senate's power to consent (or not) to presidential appointments is another example. *See id.* cl. 2 (Advice and Consent Clause). Whether they contain restrictions or not, though, all of these grants of power include an implicit requirement that beneficiaries be worthy, as judged solely by the decisionmaker(s).

impeachable offense is *only* what the House is willing to say is one, and a removable offense is *only* what two-thirds of the Senate is willing to say is one. Practically speaking—as Justice Douglas could have attested—this means that only a subset of HCMs are impeachable offenses, and an even smaller subset are removable offenses.

What are those subsets? An HCM is serious, official misconduct—bad acts that severely violate the public trust. Almost every President has committed offenses that arguably meet this definition. But by requiring a wide political consensus before impeaching and removing a President, the Constitution narrows the scope significantly. In the two-party system, an offense is only impeachable and removable if a significant segment of the President's own party agrees it is one.

More recently, the two parties have grown more polarized. Combined with disruptive social forces, the parties no longer simply entertain separate ideologies—often, they perceive separate versions of the facts. In our "two-reality" system, an offense might only be impeachable and removable if it qualifies as such in both realities. This narrows the scope even further.

This Article traces the evolution of impeachment from the Framers' original design (Part I), through the institution and evolution of the two-party system (Part II), to the present two-reality system (Part III). Part III concludes by considering what is left: What, in 2020, might get a President impeached and removed? (Answer—quite a few things, albeit extreme ones.) To what extent does the impeachment process constrain presidential behavior even though the prospect for removal is so narrow? (Answer—quite a lot.)

I. The Original Vision

The Constitution's impeachment provisions were influenced by two main sources: British impeachment and American state-level impeachment. British impeachment was a criminal prosecution by other means: it exposed its targets to a full range of criminal penalties, but it began before the House of Commons instead of a grand jury, and it was tried before the House of Lords instead of a criminal court.[4] While earlier practice had been broader, by the time of the American Constitutional Convention, British impeachment had settled on a different, more

[4] *See* Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 23 (2001).

focused scope: government officials accused of crimes against the Crown, like treason or bribery, or of non-crimes like gross mismanagement.[5]

American state impeachment carved out its own identity, as a way to scrutinize official misconduct rather than as a parallel criminal process.[6] Impeachment was used more robustly in the colonies and the pre-constitutional states than in Britain (where the practice was vestigial by the late 1700s and would soon die out).[7] Between 1776 and 1787, most of the new states prescribed that officials could be impeached for such relatively mild transgressions as "maladministration," "malpractice," and "misbehavior."[8]

The Constitution's Framers chose an "American" design—federal impeachment was made distinct from the criminal process, focusing instead on safeguarding public offices. Punishments upon conviction were limited to removal and disqualification from office.[9]

Initially, the Framers approved a provision to make the President (among other federal officers) impeachable for "mal-practice or neglect of duty,"[10] broad language that resembled several states' standards. As the Convention wore on, though, this language was tightened. Instead of a standard that focused on negligence (as malpractice and neglect of duty do), coverage shifted to intentional wrongdoing: "treason, bribery, or corruption," and later just treason or bribery.[11] When George Mason suggested changing the standard to "treason, bribery, or maladministration," James Madison complained that a term as vague as "maladministration" would "be equivalent to a tenure during pleasure of the Senate."[12] Mason responded by replacing "maladministration" with

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[5] *See* PETER CHARLES HOFFER & N. E. H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 8 (1984); Kalt, *supra* note 4, at 25.

[6] *See* HOFFER & HULL, *supra* note 5, at 67; Kalt, *supra* note 4, at 27–28.

[7] *See* FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 65–73 (2019) (describing pre-constitutional state impeachment). *See generally* HOFFER & HULL, *supra* note 5, at 1–95 (contrasting British and American impeachment). There was an impeachment case ongoing during the Constitutional Convention, and one more in 1806, but no British cases after that. *See* Kalt, *supra* note 4, at 26–27. Because the British parliamentary system does not feature the separation of powers, Parliament has more direct, efficient mechanisms for handling public misconduct and (more broadly) maladministration.

[8] *See* HOFFER & HULL, *supra* note 5, at 68–76; Kalt, *supra* note 4, at 30–33.

[9] *See* U.S. CONST. art. I, § 3, cl. 7.

[10] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (Max Farrand ed., 1911) [hereinafter RECORDS].

[11] 2 *id.* at 422; *see id.* at 499; BOWMAN, *supra* note 7, at 94–95.

[12] 2 RECORDS, *supra* note 10, at 550.

"other high crimes and misdemeanors," and the Convention approved that phrasing.[13]

The fact that the HCM standard was put forward as a response to Madison's complaint shows that HCMs are more serious than mere "maladministration." As Professor Frank Bowman has explained, "maladministration" encompassed the sort of "tawdry, mid-level corruption and incompetence that had been the subject of most post-revolutionary state impeachment cases."[14] HCMs are more serious: "great and dangerous offences," as Mason put it.[15]

The use of "other" in the phrase "treason, bribery, and other high crimes and misdemeanors" reinforces this more limited reading of HCM. Following the interpretive canon of *ejusdem generis*, the word "other" denotes that HCMs are things akin to treason and bribery. Using this interpretive approach, Professor Charles Black elaborated that HCMs "are offenses (1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books."[16]

As Black's last seven words suggest, something need not be a crime to be an HCM. The phrase "high crimes and misdemeanors" may sound to modern ears as though it comprises only crimes—an all too common misconception—but the Framers understood HCMs as including public misconduct that did not violate the criminal law as such.[17] The Constitution gives Presidents tremendous power. Grave abuses of that power will not necessarily be crimes, but they might nevertheless warrant removing the President immediately in order to contain the damage. Waiting until the next election might not be a sufficient remedy. That the Framers understood this is clear from both the Convention debates and the ratification debates. There, impeachment was advanced as an

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[13] *Id.* The phrase "high crimes and misdemeanors" originated in British practice. British impeachment used HCM as a sort of boilerplate. Echoing the Ford formulation in a way, an HCM was anything for which Parliament concluded someone should be impeached. The meaning of HCM was thus defined by practice and precedent. The Framers were aware of those precedents, and of the distinctly American practice of impeachment. *See* BOWMAN, *supra* note 7, at 45–46.

[14] BOWMAN, *supra* note 7, at 98.

[15] 2 RECORDS, *supra* note 10, at 550; *see* BOWMAN, *supra* note 7, at 98; GERHARDT, *supra* note 3, at 106–07. Bowman notes that some ratifiers understood gross incompetence to qualify as an HCM, given British practice. BOWMAN, *supra* note 7, at 107. Though Mason and Madison's interchange at the Convention suggested otherwise, the Convention's proceedings were secret, and thus unknown to the ratifiers. *Id.*

[16] Charles L. Black, Jr., *Part I*, *in* IMPEACHMENT: A HANDBOOK, NEW EDITION 1, 34 (2018).

[17] *See* BOWMAN, *supra* note 7, at 103–05; TRIBE & MATZ, *supra* note 3, at 44–51 (debunking at length the fallacy that HCMs must be crimes).

appropriate remedy for abusive pardons, perfidious treaties, improper emoluments, subversion of the Constitution, and other potentially non-criminal abuses.[18]

Conversely, the Framers understood that not all crimes are HCMs. In older British practice, impeachment could be used for any crime committed by a peer (i.e., an aristocrat).[19] Aristocrats were entitled to be tried outside of grubby criminal courts, in the House of Lords. Impeachment literally provided them a jury of their peers. That structure is obviously inappropriate in a democratic republic. The Constitution limits impeachment to civil officers and separates it from the criminal justice system. Any crime by civil officers could lead to a criminal trial, but unless a crime was both public enough (which is part of what "high" means here[20]) and serious enough, it was not supposed to be impeachable.[21]

Perhaps the most famous formulation of what offenses are impeachable under the Constitution appeared courtesy of Alexander Hamilton in *Federalist No. 65*. There, he wrote that impeachable offenses are "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[22]

In short, from the Framers' perspective, HCMs were defined as serious, official misconduct. Crucially, though, impeachment and removal were bounded not just by the HCM standard but by the requirement of a broad political consensus for removal. At the dawn of the Republic, there was a wide range of possibilities for how the impeachment power would play out. Before long, that range would narrow.

II. The Two-Party System

The narrowing began with the House's very first impeachment, of ex-Senator William Blount in 1797. But this first narrowing was about the

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[18] *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486 (Jonathan Elliot ed., 2d ed., Washington 1836) [hereinafter DEBATES] (emoluments); *id.* at 498 (pardons); THE FEDERALIST NO. 66, at 405–06 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (treaties); 2 RECORDS, *supra* note 10, at 550 (subverting the Constitution); *id.* at 626–27 (pardons); *see also* GERHARDT, *supra* note 3, at 19.

[19] *See* Kalt, *supra* note 4, at 24.

[20] *See* GERHARDT, *supra* note 3, at 105–06; CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE 36 (2017).

[21] *See* GERHARDT, *supra* note 3, at 106.

[22] THE FEDERALIST NO. 65, *supra* note 18, at 396 (Alexander Hamilton). Other early, leading commentators gave similar accounts. *See* GERHARDT, *supra* note 3, at 107–08 (discussing Justices Wilson's and Story's accounts).

"who" of impeachment, not the "what." The Senate dismissed Blount's case on the ground that senators are not "civil officers" subject to impeachment.[23] The vote also was not a particularly partisan affair.[24] The next case would be, though, and it would show how the two-party system affected the "what" of impeachment.

A. *Federalists, Democratic-Republicans, and Judicial Impeachment*

The Framers did not design the Constitution with a two-party system in mind.[25] They foresaw that Presidents would have both supporters and opponents in Congress, but not that these factions would harden into permanently warring camps.[26] Before long, however, federal elections saw John Adams's Federalists repeatedly squaring off against Thomas Jefferson's Democratic-Republicans.

The Election of 1800 put the Democratic-Republicans in control of the White House and both chambers of Congress. Federalists still dominated the judiciary, though, and the Democratic-Republicans wanted to do something about that. Two impeachment cases, between 1803 and 1805, reflected this partisan landscape.

1. Judge John Pickering

The first case involved a Federalist district court judge, John Pickering. Pickering showed undeniable signs of mental derangement. Late in 1802 he presided over a case while seriously intoxicated; it went badly.[27] Federalists were wary of seeking Pickering's resignation, because his replacement would be appointed by President Jefferson. But the

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[23] *See* JARED P. COLE & TODD GARVEY, CONG. RESEARCH SERV., R44260, IMPEACHMENT AND REMOVAL 3 n.22 (2015), https://perma.cc/S7U9-7QUS; GERHARDT, *supra* note 3, at 50.

[24] *See* GERHARDT, *supra* note 3, at 51–52. The House vote was apparently bipartisan, as it was "without debate or division." 7 ANNALS OF CONG. 459 (1797). In the Senate, the vote dismissing the case was 14–11. *See* 8 *id.* at 2318–19 (1797). The Federalist majority supported proceeding with the trial, but only by an 11–7 margin; the Republicans opposed it 0–7. *See Senate Vote #171 in 1799 (5th Congress)*, GOVTRACK, https://perma.cc/XZL3-RJDM. Blount had earlier been expelled from the Senate by a 25–1 vote, which was obviously bipartisan. *See* 7 ANNALS OF CONG. 43–44 (1797); *Senate Vote #26 in 1797 (5th Congress)*, GOVTRACK, https://perma.cc/ZYE8-MVF7.

[25] *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 17–19 (2005).

[26] *See* Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 295 (1999).

[27] For the lurid details, see Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 489–91 (1949).

Democratic-Republicans pounced, impeaching Pickering on March 2, 1803.[28]

The case was complicated. Though Pickering might have seemed like a lost cause, the Federalists had to think about the rest of the Federalists in the federal judiciary. The more broadly impeachable offenses were defined, the more easily the Democratic-Republicans would be able to remove and replace Federalists on the bench. The Federalists therefore staked their case on defining HCMs narrowly. They attempted to limit HCMs to actual, indictable crimes, an interpretation that would have saved Pickering if adopted given that it was no crime to be deranged.

The Democratic-Republicans shied away from premising the impeachment on Pickering's mental illness. Instead, they cast his misdeeds as judicial misconduct. They did not allege that Pickering had done anything criminal, but they also defined HCMs broadly enough that this was irrelevant. As such, the Senate convicted him—albeit on a pure party-line vote of nineteen Democratic-Republicans against seven Federalists.[29] Pickering's impeachment did not represent an expansion of Congress's impeachment powers. The Federalists' notion that HCMs had to be criminal offenses was wrong; the Democratic-Republicans' approach was entirely consistent with the Framers' notions of impeachable offenses, and with centuries of impeachment precedents (including subsequent cases).[30]

More telling was how this first successful impeachment case showed that the nascent two-party system had reshaped the impeachment power. To be impeached and removed, committing an HCM was necessary but not sufficient. A second condition was needed too: your removal had to be compatible with the ruling party's political purposes. A Federalist-dominated Congress likely would not have impeached or removed Pickering unless and until he had committed worse offenses.

2. Justice Samuel Chase

On March 12, 1804, the same day that the Senate voted to convict Pickering, the House upped the ante and impeached Supreme Court Justice Samuel Chase.[31] Chase's impeachment was deeply rooted in partisanship—both Chase's and the House's. Chase was a committed Federalist. In his role as a circuit judge, he had made partisan statements

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[28] *See* 12 ANNALS OF CONG. 642 (1803); GERHARDT, *supra* note 3, at 53 (describing the partisan nature of Pickering's case).

[29] Turner, *supra* note 27, at 505.

[30] *See* BOWMAN, *supra* note 7, at 244; COLE & GARVEY, *supra* note 23, at 7–9.

[31] *See* 13 ANNALS OF CONG. 1180–81 (1804).

and rulings that nearly every Democratic-Republican in the House found impeachable.[32]

Had Chase been convicted he probably would not have been the last Federalist judge to be impeached. But he was not convicted; on the closest article, the Senate voted 19–15 against him, four votes short of the twenty-three needed for a two-thirds majority.[33] The Democratic-Republicans enjoyed a whopping 25–9 majority in the Senate, but six Democratic-Republicans were unwilling to remove Chase for being, at worst, injudicious.[34] Classifying that as a removable offense would have opened the doors to more aggressive removals of judges from the "wrong" political party, a principle the six defectors could not endorse. The Framers had meant to establish a stable judiciary, not one in which judges served at the (political) pleasure of Congress. The "pleasure of Congress" meant something very different under the two-party system than it had meant to the Framers, but the Democratic-Republicans—in the Senate, at least—restrained themselves enough to keep the judiciary stable and insulated from politics.

Put another way, this represented the converse of the lesson from Pickering's case. To be impeached and removed, suiting the ruling party's political purposes was necessary but not sufficient. There also needed to be a bona fide HCM, and there was not one here. Notably, though, Chase learned his lesson. At the same time that his acquittal established a norm against partisan impeachment, the ordeal also established a norm against openly partisan judicial activity.[35]

B. *An Aside on Judicial Versus Presidential Impeachment*

Because the vast majority of impeachment cases—and all of the convictions—have involved judges, the conventional wisdom is that the bar is lower for judges than for Presidents and other executive-branch officials.[36] This structure makes sense for a few reasons. Federal judges have lifetime appointments, so impeachment provides the only formal recourse against them. This makes it more imperative to act against judges who commit high crimes and misdemeanors. Indeed, Judges Harry

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[32] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 22 (1999). The Democratic-Republican representatives voted 72–2 to impeach; the Federalist representatives' vote was 1–30 against. *See House Vote #77 in 1804 (8th Congress)*, GOVTRACK, https://perma.cc/JJ6E-TLZT.

[33] *See* 14 ANNALS OF CONG. 669 (1805).

[34] *See* David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801–1805*, 33 WAKE FOREST L. REV. 219, 258 n.285 (1998) (tallying the votes).

[35] *See* WHITTINGTON, *supra* note 32, at 48.

[36] *See, e.g.*, SUNSTEIN, *supra* note 20, at 115.

Claiborne and Samuel Kent refused to resign even after they were convicted of crimes and sentenced to prison; impeachment and removal was the only way to stop them from collecting their salaries while behind bars.[37] In addition, impeaching judges is less disruptive; removing one judge has a relatively small impact on the judiciary, which has hundreds of judges and constant turnover. Presidents, by contrast, serve for limited terms and are answerable to the voters, so impeachment is less necessary. And Presidents stand alone atop the executive branch, so removing them is a much more consequential act.[38]

Moreover, judges have different public duties than Presidents do, so their public misconduct has a different profile. At first glance, a judge cheating on his taxes might seem like a private matter, outside the scope of his judicial duties. But judges have been impeached and convicted for tax evasion.[39] Part of a judge's job includes presiding over criminal prosecutions. If the judge is himself a criminal, it undermines the probity of the proceedings and compromises his or her ability to preside. By contrast, it is easier to classify tax evasion by a President as purely private. Indeed, in President Nixon's case, the House Judiciary Committee did just that, rejecting on that ground the article of impeachment devoted to Nixon's tax evasion.[40]

All of that said, the conventional wisdom is wrong. Overall, Presidents are much *more* vulnerable to impeachment and ouster than judges are. Fifteen federal judges have been impeached, with eleven of them drummed out of office (eight via conviction, three via resignation).[41] At least twenty-four judges have resigned under pressure before they could be impeached.[42] Only three Presidents have been impeached, and only Nixon resigned under pressure. But only forty-four people have been

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[37] *See* GERHARDT, *supra* note 3, at 30 (Kent); *The Impeachment Trial of Harry E. Claiborne (1986) U.S. District Judge, Nevada*, U.S. SENATE, https://perma.cc/Y67N-CWG9.

[38] *See* BOWMAN, *supra* note 7, at 127–28 (contrasting judicial and presidential impeachment). Impeachment is even less likely for lower executive-branch officials, given how easy it is to fire them. The only executive-branch official ever impeached was Secretary of War William Belknap in 1876, an effort that failed because of his resignation. *See* Kalt, *supra* note 4, at 100.

[39] *See* GERHARDT, *supra* note 3, at 32.

[40] *See* EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 258–59 (1999).

[41] *See* SUNSTEIN, *supra* note 20, at 108–13 (collecting cases).

[42] *See* Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 366 (1993); *id.* app. at 421–22 tbl.2 (listing twenty cases before 1993); *id.* at 337 n.19 (describing the 1993 resignation of Judge Robert Collins); Jada F. Smith, *Federal Judge to Quit Post; He Faced Abuse Charge*, N.Y. TIMES (May 29, 2015), https://perma.cc/L392-C596 (describing the 2015 resignation of Judge Mark Fuller).

President, while there have been over 3,700 federal judges.[43] That makes the rate of impeachment for judges only 0.4% and the rate of ousters (removals plus resignations under pressure) just 0.9%, versus an impeachment rate for Presidents of 6.8% and an ouster rate of 2.3%. And most recently, two of the last four Presidents have been impeached.

A President's greater vulnerability stems from the fact that HCMs are abuses of one's public authority. Presidential public authority is wider, deeper, and more freewheeling than judicial public authority. Judges make rulings and in doing so are governed by strict norms and professional ethical obligations. Presidents hire, fire, conduct diplomacy, command the military, negotiate, sign or veto legislation, and issue executive orders. There is no code of presidential ethics that defines what is proper conduct as Presidents wheel, deal, and slug their way through the free-for-all fracas that is politics.[44] With this great power comes nearly boundless opportunities for abuse.

It also brings boundless opportunities for *perceptions* of abuse. In a two-party system, any discussion of presidential misbehavior will begin with a sizeable chunk of the House—often a majority—predisposed to view the President's actions with a jaundiced eye. Judges, insulated from the rough and tumble of politics, are largely immune from this disadvantage.

C. *Democrats, Republicans, and Presidential Impeachment*

1. President Andrew Johnson

The restraint that a few Democratic-Republican senators enforced in the Chase case was echoed sixty-four years later when President Andrew Johnson was impeached by the House and acquitted by the Senate. Johnson, a Democrat, had been elected Vice President in 1864 on a National Union ticket with the Republican President, Abraham Lincoln. The idea behind the ticket was to attract pro-war Democrats and other unionists to the Republican side. It worked—Lincoln and Johnson won handily, and the Republicans secured two-thirds majorities in both the House and Senate. But this meant that when Lincoln was assassinated in April 1865, the Democrat Johnson was thrust into the presidency with the

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[43] This number of presidents only counts Grover Cleveland once. The Federal Judicial Center has a database of Article III judges available at https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export. As of September 20, 2019, there were 3,722 of them.

[44] *See* BOWMAN, *supra* note 7, at 144.

strongest congressional opposition any President has ever had.[45] In point of fact, Johnson is the only President ever to face a two-thirds opposition majority in the Senate.

Reconstruction was the central issue of the day. The Radical Republicans, who dominated Congress, favored taking a much harsher line toward the former rebels in the South, a much more liberal line toward voting rights for newly free black men, and a muscular federal military presence in the South to enforce it all. Johnson strongly opposed all of this and used his executive authority as both pardoner and commander-in-chief to get his way.[46]

There was no way to impeach Johnson over policy disagreements; there had to be an HCM. Enter the Tenure of Office Act ("Act"), by which Congress in 1867 (over Johnson's veto) had required Senate confirmation not just of presidential appointments but of certain presidential dismissals as well. The law even declared violation of it to be a "high misdemeanor," clearly referring to impeachment.[47] In apparent violation of the Act, Johnson had dismissed Secretary of War Edwin Stanton.[48] In ordinary political times, a dispute like this might have been resolved through litigation, not impeachment—the constitutionality of the Act and its applicability to Stanton were reasonable matters of dispute.[49] But the issue was not really Stanton, it was the much broader question of Reconstruction itself, and the conflict between Johnson and Congress had reached the breaking point.

In the House, other than a few votes from independent or third-party members, everything proceeded along party lines. Johnson was impeached 126–47 in February 1868. All of the major-party votes to impeach came from Republicans, and all of the votes not to impeach came from

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[45] *See Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES [hereinafter *Party Divisions (House)*], https://perma.cc/KR8K-HZK5; *Party Division*, U.S. SENATE [hereinafter *Party Divisions (Senate)*], https://perma.cc/VDR6-Y7RH. This was an interesting twist on a change that the two-party system wrought on impeachment. Under the original Constitution, the runner-up from the presidential election became Vice President. This meant that presidential impeachment and removal would overturn the election results. The two-party system quickly led to Vice Presidents being elected as part of a ticket with the President, an arrangement formalized by the Twelfth Amendment. This change had the side effect of reducing the political incentives for impeachment and removal by diminishing the associated political payoff.

[46] *See generally* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 6–25 (1973).

[47] *See* BOWMAN, *supra* note 7, at 163.

[48] It was not entirely clear that the law applied to Stanton, as he had been appointed by Lincoln and not Johnson. The law protected Stanton's tenure only during the term of the president who had appointed him, and it was easily arguable that it was now Johnson's term and not Lincoln's. *See id.*

[49] *Id.* at 173–74.

Democrats.[50] In the Senate, though, the forty-five Republicans saw ten of their number join the nine Democrats in voting to acquit Johnson.[51] The 35–19 margin was thus one vote shy of the necessary two-thirds majority.

None of the things for which Johnson was impeached were crimes. Most of the items among the eleven articles of impeachment were purportedly illegal (or unconstitutional, insofar as Johnson had a constitutional duty to take care that the laws be faithfully executed).[52] But two were not even illegal: Article 10 was for "attempt[ing] to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States" by making "intemperate, inflammatory, and scandalous harangues," and Article 11 was a catch-all that accused Johnson of denying certain powers of Congress and attempting to prevent the execution of certain statutes.[53] Article 11 was the first article voted on in the Senate following Johnson's trial.[54]

The vote was complicated. For one thing, it was not as close as it appeared. Some Republicans apparently would have voted to acquit had their votes been needed, but they were happy to cast symbolic votes to convict and let the defectors take the heat.[55]

There were also political overtones that had nothing to do with Johnson's guilt or innocence. One was that the very radical Senate President Pro Tempore Benjamin Wade was next in line for the presidency.[56] Convicting Johnson and thereby making Wade President was an unpopular prospect for moderate Senate Republicans.[57] Relatedly, the presidential election was drawing near—elevating Wade to the presidency might have boosted Wade's prospects at the expense of the more popular Ulysses Grant.[58] These were not entirely separate considerations from the

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[50] There were also four others in the House (two Independent Republicans who voted 1–1, and a Conservative and Conservative Republican, both of whom voted no), as well as numerous abstentions. For a full partisan breakdown of the vote, see *House Vote #229 in 1868 (40th Congress)*, GOVTRACK, https://perma.cc/8NYN-ACMG.

[51] *See* SUNSTEIN, *supra* note 20, at 106.

[52] *See* CONG. GLOBE, 40th Cong., 2d Sess. supp. 3–5 (1868); *see also* DAVID O. STEWART, IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY app. 3 at 331–41 (2009) (reproducing the articles).

[53] CONG. GLOBE, 40th Cong., 2d Sess. supp. 4 (1868); *accord* STEWART, *supra* note 52, app. 3 at 337–41.

[54] *See* STEWART, *supra* note 52, at 256.

[55] *See* David Greenberg, *Andrew Johnson: Saved by a Scoundrel*, SLATE (Jan. 21, 1999, 3:30 AM), https://perma.cc/JF7C-DP67. Another complication is that some senators on both sides of the vote appear to have been offered bribes. *See* STEWART, *supra* note 52, at 186–87, 424–25.

[56] Under the succession law then in effect, the President Pro Tempore was next in line for the presidency after the Vice President. *See* Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

[57] *See* VAN TASSEL & FINKELMAN, *supra* note 40, at 227.

[58] *See id.*

merits of the case against Johnson; moderates were already more favorably inclined toward him. But if the person next in line had been more moderate, Johnson might well have been convicted, despite that factor having nothing to do with whether Johnson was guilty of HCMs.

If the Ford formulation of impeachment and conviction simply meant that partisan whims would carry the day, Johnson would have been impeached years earlier than he was, and convicted by an overwhelming margin. But the Ford formulation looks for "whatever two thirds of the Senate considers to be sufficiently serious," which requires other things as well. Johnson's brazen violation of the law meant that proving an HCM was the easiest part of the case. The hard part was obtaining agreement that, politically, it was better to remove Johnson than to let him remain. For all of the reasons discussed above, enough Republicans concluded that Johnson should remain—and thus, in Ford's terms, that he had not committed a removable offense.

2. President Richard Nixon

The landscape was very different when, more than a century later, President Nixon's impeachment drama played out. Johnson's impeachment case had arisen out of a power struggle between two branches of government and between two incompatible visions of America's racial, economic, and political future. Nixon's case arose out of the fact that he was a crook. This extricated Nixon's case from politics to an extent, and thereby simplified the efforts against him.

Nixon's exit from office might seem inevitable in hindsight. Until near the very end, though, Nixon enjoyed sufficiently steadfast support from a core of congressional Republicans. Andrew Johnson had confronted a Congress controlled by the opposition party by historically lopsided margins (more than 70% of the House[59] and more than 80% of the Senate).[60] Nixon's political position was far less precarious. In 1973, the opposition Democrats held only a 243–192 (56%–44%) majority in the House and a 57–43 majority in the Senate.[61] Relatedly, Nixon himself had just been returned to office with one of the biggest popular mandates in American history, obviously more robust than the assassin's mandate that Johnson carried.[62]

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[59] *See* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS 209 (1998).

[60] *See* STEWART, *supra* note 52, at 69.

[61] *See Party Divisions (House)*, *supra* note 45; *Party Divisions (Senate)*, *supra* note 45.

[62] Nixon's popular margin of nearly 18 million votes is the largest of all time. His 60.7% share of the popular vote in 1972 is the third-highest percentage ever, behind only Lyndon Johnson in 1964

From the outset in 1972, as Democrats began to look for connections between the Watergate burglars and Nixon's team, then-House Minority Leader Gerald Ford (among others) dismissed the effort as a partisan "witch hunt."[63] The investigation dragged on, drawing closer to Nixon, as key aides were connected to the cover-up. The mounting scandal was a political albatross for Nixon, but he stuck to his message that he was not a crook.

The House Judiciary Committee did not start formal hearings until May 1974. Nixon retained the support of most of the committee's Republicans, but a majority of the committee approved three articles of impeachment. The articles did not charge Nixon specifically with committing crimes, focusing instead on his violation of the public trust. The strongest margin was for Article 2, which all twenty-one Democrats supported, and which seven of the seventeen Republicans supported as well.[64] Article 2 accused Nixon of violating his oath of office and his duty to take care that the laws be faithfully executed, both by interfering with the Watergate investigation and by deploying the IRS, FBI, Secret Service, and CIA against his enemies.[65] Two other articles passed by narrower margins: obstruction of justice for the massive cover-up (27–11) and contempt of Congress for disobeying congressional subpoenas (21–17).[66] These, too, did not cite Nixon for violations of the criminal code as such.

Enough committee Republicans had opposed impeachment that Nixon might have thought he could prevail in the Senate. But in parallel to the Judiciary Committee's vote, the Supreme Court unanimously ordered Nixon to release all of his recordings of White House conversations, not just cherry-picked, manipulated transcripts.[67] Those recordings revealed a "smoking gun": conversations from shortly after the Watergate break-in, showing Nixon's intimate involvement in the cover-up.[68] Nixon's protestations of innocence were revealed to be fraudulent. With this, all ten Republicans on the Judiciary Committee who had backed

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(61.1%) and Franklin Roosevelt in 1936 (60.8%). His 520–18 electoral-vote victory ranks behind only Roosevelt in 1936 (523–8) and Ronald Reagan in 1984 (525–13) among contested elections.

63 *See* STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 234 (1990).

64 *See* VAN TASSEL & FINKELMAN, *supra* note 40, at 259–60.

65 *See id.* at 263–65.

66 *See id.* at 259. Two more articles—concerning the secret bombing of Cambodia and tax evasion—failed by 12–26 votes. *Id.*

67 *See* United States v. Nixon, 418 U.S. 683, 716 (1974). Nixon had deceptively edited the transcripts to remove unfavorable material. *See* Timothy Naftali, *Richard Nixon*, *in* IMPEACHMENT: AN AMERICAN HISTORY 83, 131–32 (2018).

68 *See* KUTLER, *supra* note 63, at 535.

Nixon changed to favor impeachment in the full House.[69] Key Senate Republicans confronted Nixon with the grim reality that he faced certain defeat in a Senate trial.[70] Nixon resigned the next day. Woodrow Wilson had remarked decades earlier that Presidents would only be removed upon "[i]ndignation so great as to overcrow party interest."[71] Nixon had cleared that bar.

The Nixon impeachment case shows us two important things. First, as with the Johnson impeachment, the touchstone of impeachment was abuse of power. Even as the President's defenders insisted that impeachment required a criminal act—and even as some of the President's conduct looked criminal—the Judiciary Committee focused on the President's constitutional responsibilities and not on the criminal code. The impeachment process proceeded as the Framers intended: separate from the criminal-justice system, to protect the public from official misconduct that abused the public trust.

Second, the pivotal point in the process came not when there were enough votes to impeach Nixon but when there were enough votes to convict him. As long as he retained enough Republican support in the Senate to be acquitted, it made sense for Nixon to continue fighting. He was guilty all along, but it was only when his guilt became undeniable to Republicans that enough of them broke with him to secure a conviction. (Even then, according to the Senate Republicans advising him, Nixon still could have counted on the support of some Republican senators;[72] partisanship is a hell of a drug.)

Had the political landscape been different, it is easy to imagine Nixon surviving. If Congress had been under Republican control, the congressional investigation surely would have moved along more slowly, if it would have moved along at all.

In Johnson's case, there was no dispute about what Johnson had done. The only question was whether his actions constituted an impeachable and removable offense. Nixon's case was the opposite.[73] When Nixon's factual guilt was established, more than enough senators agreed that Nixon's offenses warranted conviction. A removable offense was only what a broad, bipartisan group of Senators said it was—and they would have said it was.

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[69] *See* David E. Rosenbaum, *Wiggins for Impeachment; Others in G.O.P. Join Him*, N.Y. TIMES (Aug. 6, 1974), https://perma.cc/HY8Q-Z98B.

[70] *See* KUTLER, *supra* note 63, at 539–40.

[71] WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 276 (1913); *see* TRIBE & MATZ, *supra* note 3, at 126–27.

[72] *See* KUTLER, *supra* note 63, at 539.

[73] *See* BOWMAN, *supra* note 7, at 180 (contrasting the Johnson and Nixon cases).

3. President Bill Clinton

When President Clinton was impeached in 1998, partisanship looked different than it had in 1974. In 1974, both parties were more diverse ideologically. Thanks to conservative southern Democrats and liberal northeastern Republicans, the parties overlapped; some Democrats were more conservative than some Republicans. In 1974, an ideological matter on which all Democrats agreed would also attract some Republican support and vice versa. By 1998, however, the parties had become more polarized and there was almost no overlap. Getting all of one party no longer ensured getting substantial numbers from the other party too.[74]

The 1990s also saw a reduction in congressional harmony.[75] Previously, partisan differences had been mitigated by the shared interest all representatives and senators had in Congress being a functional body, with its own institutional interests to defend against presidential encroachment. In an inter-branch power struggle between congressional Republicans and a Democratic President, congressional Democrats had to decide how to prioritize the "congressional" part of their identity versus the "Democrat" part of their identity. By the late 1990s, the "Democrat" part loomed larger and the "congressional" part correspondingly smaller. Congressional politics had become more of a partisan zero-sum game—just another front in the national battle between Democrats and Republicans.[76] This removed impeachment even further from the Framers' vision.

At the grassroots level, the impeachment process itself had become part of the hyper-partisan landscape. Impeachment had long been seen as an exceptional measure, but from the 1950s onward "impeachment talk" had become an increasingly common element of political rhetoric.[77] This trend accelerated through Watergate into the Clinton years. As Professor Philip Bobbitt put it, comparing the present to the 1970s, "[w]e are more inclined to treat impeachment as a political struggle for public opinion, waged in the media, and less like the grand inquest envisioned by the Constitution's Framers."[78]

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74 *See* Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RES. CTR. (June 12, 2014), https://perma.cc/6HMJ-P3PD.

75 *See* TRIBE & MATZ, *supra* note 3, at 206–07.

76 *See* BOWMAN, *supra* note 7, at 312; Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 406–15 (2009).

77 *See* TRIBE & MATZ, *supra* note 3, at 161–73 (discussing the rise of "impeachment talk," beginning in 1951 and continuing into the 1990s). *See generally* DAVID E. KYVIG, THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960 (2008).

78 Philip Bobbitt, *Part II*, *in* IMPEACHMENT: A HANDBOOK, NEW EDITION, *supra* note 16, at 63, 66.

President Clinton's administration had faced aggressive congressional investigations in other matters, especially after the Republicans won control of both chambers in 1994, but nothing had been serious enough to raise the specter of impeachment. In September 1998, though, Independent Counsel Kenneth Starr issued a report to the House Judiciary Committee detailing grounds for impeachment, arising out of Clinton's efforts to conceal his sexual relationship with White House intern Monica Lewinsky. The report alleged that Clinton had lied under oath in a deposition and to a grand jury, and had influenced others to lie under oath by encouraging them, deceiving them, or rewarding them for doing so.[79]

The House Judiciary Committee pressed on with its impeachment inquiry, confident that impeachment was a winning issue for Republicans. This confidence was misplaced. Clinton's approval ratings were high, and throughout the process polls showed only about a third of the public supported impeachment.[80] In November 1998, the Democrats picked up five seats in the House—the first time in sixty-four years that a President's party had gained seats in a midterm election.[81]

Undaunted, in December the House Judiciary Committee approved four articles of impeachment by a stark party-line vote, with all twenty-one Republicans voting to impeach on at least one article, and all sixteen Democrats voting not to.[82] The vote in the full House featured a sharp partisan divide as well. A total of 223 Republicans voted to impeach on at least one article, against only 5 who voted not to impeach on anything. On the Democratic side, only 5 representatives voted to impeach on at least one article, while 201 voted against every article.[83] There was some nuance—the vote tallies differed for each article, and enough Republicans voted against the third and fourth articles to defeat them. Still, it was a striking example of the Ford formulation of impeachability. Clinton's

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[79] *See* THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR 172–95, 221–43 (1998).

[80] *See* Michael R. Kagay, *Presidential Address: Public Opinion and Polling During Presidential Scandal and Impeachment*, 63 PUB. OPINION Q. 449, 453 tbl.3 (1999) (approval ratings); *id.* at 460 tbl.8 (support for impeachment).

[81] *See* Alison Mitchell & Eric Schmitt, *The 1998 Elections: Congress—The Overview; G.O.P. in Scramble over Blame for Poor Showing at the Polls*, N.Y. TIMES (Nov. 5, 1998), https://perma.cc/9T6D-DHBR.

[82] *See* Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745, 746 n.4 (2000); *cf.* Black, *supra* note 16, at 10 (noting that party-line impeachments are suboptimal and that impeachers will want to avoid them if at all possible).

[83] Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 97–98 nn.463–44 (1999). This includes Rep. Bernie Sanders as a Democrat; though an independent, he caucused with the Democrats.

offenses were impeachable, but only because Republicans had a majority in the House.

The result in the Senate was an equally striking demonstration of the Ford formulation of removability. There were not enough Democrats—not even a unanimous chorus of Republicans—willing to conclude that President Clinton's offenses were HCMs that warranted his removal from office. Clinton's defense included attempts to deny that he had done anything wrong, but the evidence against him was strong; Clinton surely would have been convicted had the only question been whether he had lied under oath.[84] But there was another question, and on this Clinton fared much better: Were his offenses sufficiently serious or sufficiently connected with his public duties to qualify as HCMs? Few if any Democratic senators thought so.[85] This was in line with public opinion. Polling data showed that while most Republican voters supported impeaching Clinton, plenty (along with the overwhelming majority of Democrats) did not.[86] Indeed, in the wake of the House's impeachment vote, Clinton's approval rating shot up to 72%.[87]

As in the Chase and Johnson cases, the Senate had restrained itself where the House had not. Unlike those cases, though, and like the Nixon case, the opposition party did not have enough votes in the Senate to remove the President all by itself. But where Nixon's party in the Senate concluded he had to go, Clinton's party in the Senate concluded he had to stay. Taken together, the Nixon and Clinton cases put the Ford formulation in perspective. Under normal circumstances, a removable offense is only what a broad, bipartisan consensus in the Senate says is one.

III. The Two-Reality System

A. *Fake News and the Death of Objective Truth*

In recent decades, the notion of objective truth has taken a beating. One factor is the fragmented media landscape. Decades ago, the media

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[84] *See* GERHARDT, *supra* note 3, at 177 (noting that only sixteen senators said they believed the case against Clinton had not been proven); *id.* at 191 (noting condemnation of Clinton's behavior by his defenders).

[85] *See id.* at 177 (noting that twenty-seven of the thirty-eight senators who explained their votes said that they did not consider the conduct alleged to have constituted HCMs).

[86] *See Clinton: Scandals II*, POLLINGREPORT.COM, https://perma.cc/J92X-LC4V (reproducing Newsweek polling data from December 1998).

[87] Kagay, *supra* note 80, at 453 tbl.3.

essentially reported one version of the facts. There were lots of journalists working in parallel, but once a story broke, consumers of the news could count on hearing the same basic facts—whether from ABC, CBS, or NBC, and whether from their hometown newspaper or from the *New York Times*. Some people—particularly conservatives like Nixon—viewed the media as dominated by biased liberals. But while people varied in their level of skepticism toward the news, everyone was roughly on the same page.[88]

Today, by contrast, news sources vary greatly. Not only do they apply different levels of skepticism or credulity to particular stories, but they also offer widely differing coverage. People have diametrically variant views of the facts surrounding many matters—President Obama's birthplace, Hillary Clinton's emails, rates of crime by immigrants, the nature of Russian interference in the 2016 election, and on and on—depending on whether they follow news media associated with liberals or news media associated with conservatives.[89]

In addition to a fragmented news media, people's social lives have become more polarized. In the past, Americans interacted much more regularly with people whose views differed from theirs. Today, social media allows people to stay inside a bubble of mostly like-minded people who reinforce and amplify each other's beliefs even when they are wrong, and who ignore or dismiss contrary views even when they are widely held. As anyone whose social media feeds include politically outspoken people from both sides can attest, it is hard to believe that they are both talking about the same President and the same events.

Further complicating things is the apparent campaign by the Russian government (among others) to sow discord in the United States. Armies of bots and trolls are hard at work spreading misinformation and stoking divisions in American society. The object of these efforts is not just to spread lies—it is to undermine the notion of objective truth itself. Worn out by a steady assault of "fake news," Americans will be unable to accept at face value anything they hear from their government or their media—a zero-reality system, in essence.[90]

This state of affairs is a threat to a healthy democratic society. Its effect on impeachment is an apt example. Consider Watergate as it happened versus how something similar would play out today. It took a figurative "smoking gun" to bring Nixon down. There was no disagreement that covering up the Watergate burglary was an

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88 *See* BOWMAN, *supra* note 7, at 313.

89 *See id.*

90 *See* TRIBE & MATZ, *supra* note 3, at 204–05, 211–12; *cf.* BOWMAN, *supra* note 7, at 314 (noting President Trump's own efforts to undermine the media's credibility).

impeachable and removable offense. The disagreement was over whether Nixon had done it or not. Enough congressional Republicans were protective of Nixon and skeptical of his accusers that he survived a good long while. But once the truth emerged and key Republicans abandoned Nixon, he was done.

In 2020, a successful impeachment and removal would still require a smoking gun, but the fractured media landscape makes it much harder to produce evidence that is broadly accepted. After Robert Mueller issued his report in April 2019 on Russian interference in the 2016 election, polls showed that similar majorities of Republicans and Democrats thought the report was fair.[91] Citing his inability to prosecute a sitting President, Mueller did not address the question of whether Trump had committed a crime. Nevertheless, the report detailed numerous instances in which President Trump and his team obstructed Mueller's investigation.[92] The report said what it said. But so did the two respective bubbles in which tens of millions of Americans hear and discuss the news. As such, polling showed that 81% of Democrats surveyed thought Trump had obstructed justice, while 77% of Republicans thought he had not.[93] It quickly became clear that President Trump was not going to be removed because of anything in the Mueller report.

In 2016, before the Iowa Caucuses, candidate Donald Trump marveled at the loyalty of his base, commenting, "I could stand in the middle of Fifth Avenue and shoot somebody and wouldn't lose any voters, okay?" Trump was exaggerating, but he exposed a fundamental fact about the media landscape. Imagine that President Trump did, in fact, shoot somebody in the middle of Fifth Avenue, and that this caused Democrats to begin impeachment proceedings in the House.

In the past—both under the Framers' constitutional vision and under the two-party version of impeachment—the principal debate would probably have been about whether such a murder would qualify as an HCM. Trump's defenders would argue that impeachment is for abuses of the public trust, not for private misconduct. The President, they would say, could be prosecuted after leaving office. In the meantime, as long as he was carrying out his official duties properly, impeachment would be inappropriate.[94] Those favoring impeachment would emphasize that the presidency requires moral authority and respect for the law, both of which

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[91] *See* Dhrumil Mehta, *Both Parties Think the Mueller Report Was Fair. They Just Completely Disagree on What It Says*, FIVETHIRTYEIGHT (May 3, 2019, 5:58 AM), https://perma.cc/5E5Q-NPLE.

[92] *See generally* 2 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

[93] Mehta, *supra* note 91.

[94] The perennial (and wrong) argument by impeachment opponents that HCMs must be crimes would not make an appearance here, since murder is obviously a crime.

are inconsistent with being a cold-blooded killer. They would cite any number of leading commentators who, after establishing that HCMs are supposed to be public offenses, make exceptions for personal offenses that are heinous enough (like murders).[95] It is impossible to predict how the case would turn out. That would depend on political factors, like the party balance in Congress, the President's approval rating, and the exact circumstances of the crime.

Today, however, there might be another layer to the impeachment fight. If at all possible, Trump-friendly media outlets would trumpet Trump's side of the story, perhaps that the shooting was obviously an accident, that someone else had done it, or that it had been self-defense. They could cast doubt on reporting by the mainstream media by seizing on inaccuracies—and there are always inaccuracies—and using them to dismiss the entirety of the reporting as fake news. They could level their own accusations of misconduct or bias against figures on the other side. Within days, tens of millions of people might believe that the President was a cold-blooded killer trying to get away with murder, while tens of millions of other people would believe that the President was the victim of a biased, lying media and biased, lying prosecutors determined to perpetrate a coup to distract from their own wrongdoing.

In such a case, there would be little room for any sort of middle ground; critical skepticism would be unwelcomed by both sides. Pointing out inaccuracies—and again, there are always inaccuracies—would be treated as identifying oneself with the other side, not as an earnest attempt at finding the truth. "Only a Republican wingnut would believe that the bullets were that caliber." "Only a liberal moonbat would believe that the President could have had a clear view down that dark alley." The trolls and bots would pour whatever fuel they had on whatever fires there were.

To be sure, cases could have ambiguous facts in the old days too, and people have always had a natural tendency to interpret facts in the light most favorable to their own side. But the current situation is more extreme. As the two parties have become more polarized in Congress, their bases' views of the facts have become more polarized as well. For a moderate Republican in 1974 to question Nixon's truthfulness was a much less risky proposition. Today, embracing the other side's version of the truth means embracing the other side, period. Any members of Congress who do that are signing their own death warrants in the next primary election.

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[95] *See, e.g.*, BOWMAN, *supra* note 7, at 228–29; SUNSTEIN, *supra* note 20, at 134; Black, *supra* note 16, at 35.

This brings us back to the Ford formulation. An impeachable offense is *only* what a majority of the House is willing to say is one. Historically that was a significant limitation. In the first 200 years of the presidency, many Presidents faced a censorious House controlled by the opposition. But only Andrew Johnson (who, because of an unlikely twist of fate, faced stronger opposition numbers in the House than any other President ever has) and Richard Nixon (whose HCMs were so repellent that many representatives in his own party voted against him) faced serious impeachment efforts. It was only when congressional comity had ebbed enough in the 1990s that a partisan minority first thought it would be worthwhile to push through an obviously doomed case—only then, in other words, that the Ford formulation could not be understood as a limit on impeachment.

But in the Senate, the Ford formulation—a removable offense is *only* one for which two-thirds of the Senate is willing to eject the target from office—remains a limitation on removals. Getting sixty-seven votes in the Senate means getting a sizable portion from the President's own party.[96] Polarized partisanship means that it is even harder to split off such a large chunk of a party like this. Now, in a two-reality system, it is harder still. Unless the President commits an offense that qualifies as an HCM under both sides' versions of reality, there must be enough senators willing to break not just with the President but with his base's version of the facts.[97] That is a very tall order.

B. *Impeachment in 2020*

The divergence just described, under which the House is more likely than ever to impeach while the Senate is less likely than ever to convict, can create a paradoxical situation when a President does bad things while the opposition controls the House. On one hand, a polarized, partisan House majority will be quick to conclude that the President's offenses are HCMs for which he should be held accountable. On the other hand, the House leadership will be reluctant to spend political capital on an undertaking doomed to fail in the Senate.

The latter reluctance is well-founded. Agenda space is limited on Capitol Hill, and impeachment sucks up a lot of it; much less gets done in the midst of a serious impeachment process. In addition to requiring a large investment of time and energy, impeachment also can be costly politically. If swing voters oppose impeachment but a party's base favors

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[96] *See* GERHARDT, *supra* note 3, at 181–82.

[97] *See* Jeffrey A. Engel, *Conclusion*, *in* IMPEACHMENT: AN AMERICAN HISTORY, *supra* note 67, at 205, 218.

it, forcing an impeachment vote will put representatives and senators facing tough re-election battles between a rock and a hard place.

The effect on swing voters is one thing; the effect on the other side's voters is yet another. One of the hallmarks of a highly partisan environment is a lack of consideration of what the other side might think or do. Impeachment advocates sometimes claim that pursuing the President is worthwhile even if it does not result in a conviction. Impeachment holds the President accountable, they say. It forces his supporters to go on record defending the President's execrable conduct. These things are true. But they ignore the ways in which the President's counter-narrative can use the impeachment as a way to rally his base. If the President's supporters find his conduct unobjectionable, the impeachment effort will not hurt him and may help him. Impeachment proponents might find this unfathomable, but their incredulity will not move the political needle. This is the two-reality system in action.

Impeaching Bill Clinton had the immediate result of improving his approval rating and gaining seats for his party in the House. His own side believed that he was guilty of wrongdoing, but imagine the political hay he could have made of being persecuted by the Republicans for something that, according to tens of millions of his ardent followers, he had not even done. If the President's offense is egregious enough to the opposition's base, the incentive to defer to reality in the Senate will not be enough to stop impeachment in the House. But the opposition has a problem if the only way to placate its base is to fire up the President's base.

The House's leadership barreled ahead with impeachment in 1998, but it showed restraint during the George W. Bush administration (when many rank-and-file Democrats wanted to consider impeaching the President, but Speaker Nancy Pelosi scotched the idea) and in the Trump administration when the Mueller Report was released (ditto).[98] Still, that restraint ended in September 2019 when Pelosi finally opened an impeachment inquiry. It became clear even before the House impeached President Trump on December 18, 2019 that Trump would be acquitted by the Senate. It will not be clear until November 2020 what the true political effect of the impeachment effort really was. But it certainly appears that a new paradigm has taken hold—one in which impeachment happens to around half of the Presidents, because the House is now willing to proceed even when its efforts are doomed to fail in the Senate.

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[98] *See* KYVIG, *supra* note 77, at 377–78 (describing the Bush situation).

C. *Removal in 2020*

The dynamics of impeachment and removal in a two-party system remain. Once a case moves to the Senate, those who like the President will argue that what he did was not a crime (they will act as if this matters) or that it was not serious enough. They will argue this principally because they do not want the President removed, and these arguments are the way to achieve that end. Those who already opposed the President will argue the opposite, for the opposite reason.

But sixty-seven is a lot of senators and, as described above, the two-reality system brings this to another level altogether. It was hard enough during the Clinton impeachment to find agreement about the proper definition of HCMs or about how much the President's actions constituted a breach of the public trust. It would be nearly impossible in the case of President Trump to bridge the gap between those who saw the Mueller Report as a damning litany of HCMs and those who read the exact same Report as "clear[ing Trump] of anything impeachable."[99] The same is true for the gap between those who think the President's call to Ukrainian President Zelensky was "perfect" and those who think it was an unforgivable abuse of power.

The key question is, given our transition from a two-party system to a two-reality system, is anything a removable offense anymore? Luckily, the answer is yes. One can imagine offenses that qualify as removable in both realities, as well as some that break through the reality barrier separating the two sides.[100]

Several factors would make this more likely. One is politics. While the two-reality system can insulate a President from the ire of the other side, it does not make him politically invincible on his own side. Especially at the margins, there might be enough voters who turn against a President to leave him vulnerable if he looks weak or ineffective. If the economy slows, for instance, the President's narrative might blame others—the opposition, conspiracists, or other malign forces—but even if his side embraces that narrative they might question whether the President is the best person to lead the fight against the others. Rivals could emerge; there is nothing about a two-reality system that prevents internal power struggles and backstabbing. Worse, the President might be caught in a scandal at odds with his narrative. A President whose bad acts are consistent with what voters already knew of his nature will be harder to impeach and remove, but the opposite (say, a "law and order" President

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[99] *See* Glenn Thrush, *As Democrats Agonize, G.O.P. Is at Peace with Doing Nothing on Mueller's Findings*, N.Y. TIMES (Apr. 25, 2019), https://perma.cc/2PSM-LGGD.

[100] *See* BOWMAN, *supra* note 7, at 314.

who now appears to be a petty, venal crook) could be politically devastating. At a certain point, the President's political position would pass a tipping point. If his side's media turns against him, the end could come very quickly.

Severity and clarity could also tee up a removable offense. A President might do something that is hard enough to spin, that is simple enough, and that is awful enough that even his supporters cannot countenance it. The deeper we sink into our two-reality system, the higher these bars will be set. Only the most blatant acts will be impossible to spin. Only the simplest actions will be impossible to obfuscate. Only the most heinous of crimes will be impossible to ignore or forgive. But we have not yet sunk that deep. Above, it was possible to imagine a President avoiding impeachment after shooting someone on Fifth Avenue. Still, if the context, the video evidence, and the President's responses were not just so, it is fairly easy to imagine a President being impeached for shooting someone in the street.

One final factor is something of a *deus ex machina*. The two-reality system depends on each party's base being controlled by voters who subscribe to one or the other reality. As the party's base goes, so go its elected representatives in Congress, given their desire to be reelected. But that is not the only model of representation. On the day President Nixon resigned, he still enjoyed the support of a majority of Republican voters but, crucially, had lost the support of a majority of Republican senators.[101] This Edmund Burke model ("[y]our representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion"[102]) still lingers somewhere. At a certain point, perhaps, when the distance becomes too great between politicians' understanding of what is true and right and their base's version of it, some politicians will stop trying to straddle the two. They will attempt to lead their voters to the truth they know rather than capitulate to something they know to be false. They will defend the institutional interests of Congress (if the President's offense implicates them) over the political interests of their party. They will do so knowing that if they fail, they will lose their jobs, but that it will be worth it. A case this extreme is at least possible.[103]

All of that said, the impeachment process has clearly moved far afield from the Framers' vision. In *Federalist No. 65*, Hamilton worried about factionalism creeping into impeachment cases, such that the results

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101 *See* TRIBE & MATZ, *supra* note 3, at 147.

102 Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *reprinted in* 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 447 (London, Henry G. Bohn 1854).

103 *See* TRIBE & MATZ, *supra* note 3, at 199; Engel, *supra* note 97, at 222–23.

would "be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."[104] Partisanship brought Hamilton's nightmare into being. The two-reality state breaks things down even further—the comparative strength of the parties is now inextricably linked with the question of whether there has been a real demonstration of innocence or guilt.

D. *The True Power of Impeachment*

The impeachment process is about more than just impeachment and removal itself. Nixon was the only President driven from office by the impeachment process. Technically, only three Presidents have been impeached and zero have been convicted. But *every* President has been constrained by the possibility of impeachment and removal. As Professor Cass Sunstein has put it, analogizing impeachment to the mythical Sword of Damocles, "The value of the sword is not that it falls, but rather, that it hangs."[105]

A President who knew that he would maintain his power for four years, come hell or high water, would tend to act with less restraint than a President who knew that if he abused his power he might be cast out of office. Even the best of Presidents must make decisions that take them to the margins of their own principles. The fewer barriers that they face there, the more likely they are to push on through.

And that is the best of Presidents. What about the worst of them? There are other checks on the President besides impeachment—judicial review, for one, and the need for political standing to advance a legislative agenda in Congress, for another. But presidential power cannot always be checked by judges. Moreover, Presidents can wield plenty of power without passing new legislation: The President is the nation's chief diplomat and the commander-in-chief of the military. He controls the federal executive branch, through his power to appoint and remove the civil officers who lead it. He has vast regulatory power granted to him by various statutes passed by past Congresses. He has the power to pardon.

All of these freestanding powers are constrained by the possibility of impeachment.[106] Without impeachment, the only real political check remaining would be the possibility that angry voters could make the President and his party pay at the polls. But without impeachment, Presidents would be more easily able to abuse their powers to get

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104 THE FEDERALIST NO. 65, *supra* note 18, at 397 (Alexander Hamilton).

105 SUNSTEIN, *supra* note 20, at 53.

106 *See* TRIBE & MATZ, *supra* note 3, at 13–14 (quoting Alexis de Tocqueville on the deterrent effect of impeachment).

themselves reelected,[107] and to get sympathetic cronies elected to succeed them. Presidents would find it much easier to cover up politically embarrassing offenses if Congress lacked the powerful authority to investigate attached to impeachment. And Presidents could abuse their power to pardon, protecting themselves and their accomplices from facing federal justice if the opposition ever managed to get elected. Even those who oppose President Trump most fervently—those who decry his actions and question what meaning the impeachment process can possibly have if Trump remains in office—can imagine things Trump would have done differently had he been told at the outset of his term that he was immune from impeachment.

Presidents have, over the centuries, expanded their power far beyond that which earlier Presidents enjoyed, and far beyond what the Framers intended. But they have only been able to do so with Congress's collaboration. Presidents unconstrained by impeachment would not have had to wait for congressional complicity; they would have been able to assume new powers sooner and more forcefully, constrained only by judicial review. Without impeachment, one suspects that the constitutional order would have transmogrified—if not fallen apart entirely—fairly quickly.

Conclusion

The bottom line is that the scope of removability is narrower now than it was 21, 46, 152, and 233 years ago. By definition, this means that Presidents can get away with more now than they could in the past. This includes everything from breaching the constitutional limits on presidential power to engaging in venal, self-dealing behavior. But the impeachment process is not a dead letter—yet.

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[107] As William Davie put it at the Constitutional Convention, according to Madison's notes, "If [the President] be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected." 2 RECORDS, *supra* note 10, at 64.