

2021

## Constitutional Crises Compared: Impeachment, Brexit, and Executive Accountability

René Reyes

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

René Reyes, *Constitutional Crises Compared: Impeachment, Brexit, and Executive Accountability*, 35 Emory Int'l L. Rev. 441 (2021).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol35/iss3/3>

This Article is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

# CONSTITUTIONAL CRISES COMPARED: IMPEACHMENT, BREXIT, AND EXECUTIVE ACCOUNTABILITY

*René Reyes\**

## ABSTRACT

*The United States and the United Kingdom share a common legal history and a number of fundamental constitutional values. Some of these fundamental values may occasionally come into conflict. For example, in 2019, both the United States and the United Kingdom experienced considerable legal and political upheaval as debates over the scope of executive power and the accountability of the executive branch came to the fore. In the United States, these debates culminated in the impeachment of President Donald Trump for abuse of power and obstruction of Congress. In the United Kingdom, the furor focused on Prime Minister Boris Johnson's approach to Brexit and his attempt to prorogue Parliament. The impeachment drama and the Brexit saga were so severe that each was frequently referred to as a "constitutional crisis" in the popular press and public discourse.*

*These parallel constitutional crises and the litigation they generated afford a valuable opportunity to analyze each country's commitment to democratic accountability of the executive from a comparative perspective. The results of such an analysis may well pose a challenge to commonly held assumptions about American exceptionalism in matters of liberty and democracy. Indeed, throughout the impeachment crisis, it was frequently asserted that "Presidents are not kings"—seemingly suggesting that it is obvious that the executive department is subject to greater legal constraint under a presidential system like the United States than under a constitutional monarchy like the United Kingdom.*

*But a deeper examination of U.S. and U.K. constitutional law paints a different picture. Through an analysis of the constitutional crises of impeachment and Brexit, this Article argues that executive authority is in fact significantly more accountable to democratic control under the British model of government than under its American counterpart. While the American experience reveals that extreme claims of executive power have largely gone unchallenged and unchecked by the other branches of government, the British sequence of events testifies to an enduring constitutional commitment to popular and parliamentary sovereignty. The Article concludes by arguing that a key*

---

\* Assistant Professor, Suffolk University Law School; A.B. Harvard College, J.D. Harvard Law School.

*lesson to be drawn from these constitutional crises is that the British system may actually do more to honor the commitment to “a government of laws and not of men” that has long been said to be central to the American constitutional order.*

## INTRODUCTION

The United States and the United Kingdom share a common legal history.<sup>1</sup> To be sure, the two nations have taken somewhat different paths since the American colonies declared their independence from the British Crown in 1776.<sup>2</sup> The United States opted for a written Constitution,<sup>3</sup> for instance, while the United Kingdom steadfastly operates under an uncodified one.<sup>4</sup> The written American document reflects additional departures from the British constitutional tradition, such as providing for a President rather than a King or Queen and a Senate rather than a House of Lords.<sup>5</sup> Yet notwithstanding these differences, the U.S. and U.K. constitutional systems continue to share many fundamental features. Separation of powers,<sup>6</sup> protections for individual rights

---

<sup>1</sup> See, e.g., René Reyes, *Masterpiece Cakeshop and Ashers Baking Company: A Comparative Analysis of Constitutional Confections*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 143–44 (2020) (discussing shared U.S. and U.K. legal history) [hereinafter Reyes, *Masterpiece Cakeshop*]; *Roper v. Simmons*, 543 U.S. 551, 626 (2005) (Scalia, J. dissenting) (“It is of course true that we share a common history with the United Kingdom.”).

<sup>2</sup> See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>3</sup> For a recent analysis of why the United States adopted a written Constitution see Nikolas Bowie, *Why the Constitution was Written Down*, 71 STAN. L. REV. 1397, 1397 (2019).

<sup>4</sup> See Reyes, *Masterpiece Cakeshop*, *supra* note 1, at 125 (discussing uncodified U.K. Constitution); see also ANTHONY KING, *THE BRITISH CONSTITUTION* 5 (Oxford Univ. Press ed., 2007) (noting differences between an unwritten and an uncodified constitution); *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5, [40] (appeal taken from N. Ir., Eng., and Wales) (U.K. constitutional sources include “a combination of statutes, events, conventions, academic writings and judicial decisions”).

<sup>5</sup> See René Reyes, *May Britain Trump America When it Comes to Democracy?*, 58 VA. J. INT’L L. DIGEST 1, 1–2 (2017) (discussing differences between U.S. and U.K. constitutions) [hereinafter Reyes, *May Britain Trump America*]; Reyes, *Masterpiece Cakeshop*, *supra* note 1, at 142–43.

<sup>6</sup> See *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (“The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”); *Miller v. Sec’y of State*, [2017] UKSC 5, [41] (noting that the great majority of government powers in domestic matters in the U.K. are “vested in the three principal organs of the state”—i.e., the legislature, the executive, and the judiciary).

and freedoms,<sup>7</sup> dedication to the rule of law,<sup>8</sup> and a commitment to democracy<sup>9</sup> are but a few important examples.

Another shared feature of U.S. and U.K. constitutional law is the potential for some of these fundamental commitments to come into occasional conflict. Indeed, in 2019, both nations experienced considerable legal and political upheaval as debates over the scope of executive power and the accountability of the executive branch came to the fore. In the United States, these debates culminated in the impeachment of President Donald Trump for abuse of power and obstruction of Congress.<sup>10</sup> In the United Kingdom, the furor focused on Prime Minister Boris Johnson's approach to Brexit and his attempt to prorogue Parliament.<sup>11</sup> The impeachment drama<sup>12</sup> and the Brexit saga<sup>13</sup> were so severe that each was frequently referred to as a "constitutional crisis" in the popular press and public discourse.<sup>14</sup>

---

<sup>7</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking."); *Lee v. Ashers Baking Co. Ltd.*, [2018] UKSC 49, [37], [49]–[52] (appeal taken from N. Ir.) (discussing protections for individual rights and liberties under U.K. law).

<sup>8</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992) (describing the United States as "a nation dedicated to the rule of law"); *Miller v. Sec'y of State*, [2017] UKSC 5, [41]–[42] (discussing development of rule of law in the U.K. and explaining that "role of the judiciary is to uphold and further the rule of law").

<sup>9</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 676–77 ("Of course, the Constitution contemplates that democracy is the appropriate process for change, . . . [i]ndeed, it is most often through democracy that liberty is preserved and protected in our lives."); *R (Miller) v. The Prime Minister*, [2019] UKSC 41, [55] (appeal taken from Scot., Eng., and Wales) ("Let us remind ourselves of the foundations of our constitution. We live in a representative democracy."); see also Reyes, *May Britain Trump America*, *supra* note 5, at 1–2, 7 (analyzing and comparing role of democracy in each country's constitutional order).

<sup>10</sup> See *Articles of Impeachment Against Donald John Trump*, H.R. Res. 755, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-resolution/755/text>.

<sup>11</sup> See *Miller v. The Prime Minister*, [2019] UKSC 41, [69] (holding that prorogation was unlawful).

<sup>12</sup> See, e.g., Noah Feldman, *This is a Constitutional Crisis. What Happens Next?*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/opinion/trump-impeachment-constitution.html>; Paul Waldman, *This Is the Constitutional Crisis We Feared*, WASH. POST (Oct. 9, 2019), <https://www.washingtonpost.com/opinions/2019/10/09/this-is-constitutional-crisis-we-feared/>; Keith E. Whittington, *Trump is Creating the Worst Constitutional Crisis in 150 Years*, L.A. TIMES (Oct. 10, 2020), <https://www.latimes.com/opinion/story/2019-10-11/donald-trump-impeachment-constitution-crisis-separation-of-powers>.

<sup>13</sup> See, e.g., Heather Stewart, Severin Carrell, Daniel Boffey, & Lisa O'Carroll, *Johnson Faces New Constitutional Crisis as Brexit Talks Grind to a Halt*, GUARDIAN (Oct. 4, 2019), <https://www.theguardian.com/politics/2019/oct/04/boris-johnson-new-constitutional-crisis-no-brexid-delay>; Edward Evans & Jonathan Browning, *How Brexit Has Unleashed a U.K. Constitutional Crisis*, BLOOMBERG (July 11, 2019), <https://www.bloomberg.com/news/articles/2019-07-11/how-brexid-could-unleash-a-u-k-constitutional-crisis-quicktake>; Robert Tombs, *A Very British Constitutional Crisis*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/opinion/britain-brexid-johnson-constitution.html>.

<sup>14</sup> See *supra* notes 12 and 13.

These parallel constitutional crises and the litigation they generated afford a valuable opportunity to analyze each country's commitment to democratic accountability of the executive from a comparative perspective. The results of such an analysis may well pose a challenge to commonly held assumptions about American exceptionalism in matters of liberty and democracy. As Steven Calabresi has observed, "American popular culture overwhelmingly rejects the idea that the United States has a lot to learn from foreign legal systems, including even those of countries to which we are closely related like the United Kingdom . . . . Most Americans think instead that the United States is an exceptional country[.]"<sup>15</sup> The fact that the United States has an elected president rather than a hereditary monarch only heightens the ostensible contrast between American democracy and foreign models of government. For example, in a recent case arising out of a subpoena issued to a former White House Counsel by the House Judiciary Committee, Judge Ketanji Brown Jackson rejected a claim of absolute immunity from compliance and opined that "the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings"<sup>16</sup>—seemingly suggesting that it is obvious that the executive department is subject to greater legal constraint under a presidential system like the United States than under a constitutional monarchy like the United Kingdom.

But a deeper examination of U.S. and U.K. constitutional law paints a different picture. Through an analysis of the constitutional crises of impeachment and Brexit, this Article argues that executive authority is in fact significantly more accountable to democratic control under the British model of government than under than its American counterpart. The analysis begins in Part I by defining the contours of each country's constitutional crisis with greater specificity and detail. The discussion in this part situates each crisis in its broader context of constitutional structures and political events, and considers the ways in which those structures and events are themselves illustrative of each nation's commitment to democratic governance. Part II turns to an examination of how various elements of each nation's constitutional crises have been resolved—in the courts, in the legislature, and in the electoral process. This part analyzes Trump's victories before the bench and his acquittal in the Senate, and contrasts

---

<sup>15</sup> Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337 (2006). Cf. Reyes, *May Britain Trump America*, *supra* note 5 (critiquing idea of American democratic exceptionalism); Reyes, *Masterpiece Cakeshop*, *supra* note 1, at 141 (emphasizing the lessons that the United States and the United Kingdom can learn from one another through constitutional dialogue on matters of liberty and equality).

<sup>16</sup> *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 213 (D.D. Cir. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *rehearing en banc granted, judgment vacated October 15, 2020*, 973 F.3d 121 (D.C. Cir. 2020).

them with Johnson's setback in the courts and his defeats in Parliament. Part III then considers the implications and lessons of these events. Whereas Trump and Johnson both emerged from their respective constitutional crises still in office, the ways in which they did so bespeak significant differences between the roles played by democratic principles in each country's constitutional system. While the American experience reveals that extreme claims of executive power have largely gone unchallenged and unchecked by the other branches of government, the British sequence of events testifies to an enduring constitutional commitment to popular and parliamentary sovereignty. The Article concludes by arguing that a key lesson to be drawn from these constitutional crises is that the British system may actually do more to honor the commitment to "a government of laws and not of men" that has long been said to be central to the American constitutional order.<sup>17</sup>

## I. IDENTIFYING THE CRISES

### A. *What is a Constitutional Crisis?*

The term "constitutional crisis" can mean different things to different people. While many commentators have used the term to describe a wide range of political controversies,<sup>18</sup> some scholars would reserve its use for a narrow set of circumstances. Keith Whittington has argued that a true constitutional crisis arises "out of the failure, or strong risk of failure, of a constitution to perform its central functions."<sup>19</sup> Such a situation might take the form of an "operational crisis," in which "important political disputes cannot be resolved within the existing constitutional framework."<sup>20</sup> Or the crisis might manifest itself as one of "fidelity," in which "important political actors threaten to become no longer willing to abide by existing constitutional arrangements or systematically contradict constitutional proscriptions."<sup>21</sup> Sanford Levinson and Jack Balkin likewise argue that a genuine constitutional crisis refers to something more than conflict between government institutions, and instead is akin to "a turning point

---

<sup>17</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>18</sup> See, e.g., Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2094 (2002) ("Like local television newsmen who are quick to declare the latest rain shower to be a weather emergency, many have recently found that the words 'constitutional crisis' come readily to their lips."); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 709 (2009) ("There is hardly a disagreement in American law, however slight, that someone will not label a 'constitutional crisis.'").

<sup>19</sup> Whittington, *supra* note 18, at 2099.

<sup>20</sup> *Id.* at 2100–01.

<sup>21</sup> *Id.* at 2109–10.

in the health and history of a constitutional order.”<sup>22</sup> Their account is in many ways similar to that offered by Whittington, but Levinson and Balkin also add a third type of crisis to the list. This third type “involve[s] situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail.”<sup>23</sup>

Both of these accounts suggest that actual constitutional crises are rare occurrences. The secession of the Southern states and the ensuing American Civil War is one clear example cited both by Whittington<sup>24</sup> and by Levinson and Balkin,<sup>25</sup> but many other serious political disputes may not qualify. For instance, events like the Supreme Court’s intervention in the disputed 2000 presidential election, the Senate’s refusal to hold a hearing on President Obama’s nomination of Merrick Garland to the Supreme Court, and President Trump’s firing of FBI Director James Comey might be better described as examples of “constitutional showdowns,”<sup>26</sup> “constitutional hardball,”<sup>27</sup> or “constitutional rot.”<sup>28</sup>

Which of these taxonomic terms best suits the recent events in the United States and the United Kingdom that are the focus of this Article may be debatable. Given that these disputes were ultimately resolved through conventional constitutional mechanisms, it could be argued that they should more properly be regarded as showdowns or hardball exchanges rather than veritable crises. Nevertheless, it is clear that impeachment and Brexit were indeed regarded as constitutional crises by many contemporary observers. Whittington himself argued that the Trump administration had at least “set the stage for a constitutional crisis, one that the United States hasn’t seen in this form since the battles between Andrew Johnson and the Reconstruction Congress more than 150 years ago.”<sup>29</sup> Similarly, British historian Robert Tombs noted that while “[t]he British do not normally have constitutional crises,” tensions in the conflict between the Prime Minister and Parliament over Britain’s

---

<sup>22</sup> Levinson & Balkin, *supra* note 18, at 714.

<sup>23</sup> *Id.*; see also Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431, 439-40 (2008-2009) (comparing and analyzing definitions offered by Whittington and Levinson & Balkin).

<sup>24</sup> See Whittington, *supra* note 18, at 2119-26.

<sup>25</sup> See Levinson & Balkin, *supra* note 18, at 740.

<sup>26</sup> See *id.* at 713-14; see also Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 991 (2008).

<sup>27</sup> See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

<sup>28</sup> See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147 (2017).

<sup>29</sup> Whittington, *supra* note 12.

departure from the European Union had run so high that people were “willing not just to rock the political boat but to capsize it completely.”<sup>30</sup> More importantly, regardless of the precise label that is applied, the events at issue and their surrounding legal and political contexts yield important insights into the state of executive accountability and constitutional democracy in each nation. The process of identifying and understanding those insights begins below, in Part B, with a closer examination of the events themselves.

### *B. Presidential Power and the Path to Impeachment*

Questions about democratic governance and executive power in the context of Donald Trump’s presidency began to arise before he even formally assumed office. At a structural level, the very mechanisms by which Donald Trump was elected highlight some of the undemocratic elements of American government and the ways in which the President is insulated from democratic accountability. Trump lost the popular election to his Democratic opponent by a notable margin: Hillary Clinton received almost 3 million more votes than Trump in the nationwide tally.<sup>31</sup> Nevertheless, Trump prevailed under the Electoral College system, which assigns ultimate responsibility for choosing the President to a panel of electors from each state.<sup>32</sup> The number of electors allocated to each state is determined by that state’s representation in the House and Senate—and since each state is entitled to two Senators regardless of its population, citizens of lower population state enjoy relatively greater influence than citizens of higher population states.<sup>33</sup> As Michael Klarman has argued, “[t]hat result is difficult to reconcile with democratic principles: The votes of citizens in different states do not count equally in presidential elections.”<sup>34</sup> Trump was thus elected without a democratic mandate in a system that does not require majority support from the popular electorate as a condition for holding the nation’s highest executive office.

Substantive questions about Trump’s approach to the exercise of executive authority likewise predate his inauguration. When he was still only a candidate for his party’s 2016 presidential nomination, Trump called for a “total and

---

<sup>30</sup> Tombs, *supra* note 13.

<sup>31</sup> See FED. ELECTION COMM’N, FEDERAL ELECTIONS 2016—ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES, (Dec. 2017), <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf>.

<sup>32</sup> See *id.*

<sup>33</sup> See Reyes, *May Britain Trump America*, *supra* note 5, at 5–6.

<sup>34</sup> MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 626 (2017).

complete shutdown of Muslims entering the United States.”<sup>35</sup> The statement was widely condemned as contrary to American values, dangerous for national security, and inconsistent with constitutional principles.<sup>36</sup> Many of Trump’s fellow Republicans joined in the chorus of criticism—initially, even his eventual vice-presidential nominee called the proposal “offensive and unconstitutional.”<sup>37</sup> Yet Trump remained committed to the idea, and shortly after taking office, issued a series of executive orders restricting entry into the United States by nationals of several majority-Muslim nations.<sup>38</sup> Enforcement of these orders was enjoined in the lower federal courts,<sup>39</sup> prompting Trump in one instance to openly criticize the “so-called judge” who issued the injunction.<sup>40</sup> Some commentators warned that Trump’s statement could “embolden Trump loyalists in the executive branch of the government to disregard judicial orders”<sup>41</sup> and perhaps “precipitat[e] a constitutional crisis.”<sup>42</sup> Others concluded that Trump had not precipitated a true crisis, but that the executive orders were nonetheless “very unjust” and perhaps unconstitutional.<sup>43</sup> The Supreme Court, however, ultimately rejected the constitutional challenge to the third iteration of Trump’s order.<sup>44</sup> Concerns about the possibility of executive branch officials ignoring judicial orders were thereby alleviated and a deeper crisis avoided for the time being.

Additional questions about the scope of executive power arose early in Trump’s presidency in connection with his firing of FBI Director James Comey. Comey had been investigating whether Russia had interfered in the 2016 election and whether associates of the Trump campaign had coordinated with any such interference efforts.<sup>45</sup> Trump’s decision to sack Comey drew

---

<sup>35</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (internal citation omitted).

<sup>36</sup> See Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.*, CNN (Dec. 8, 2015), <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html>.

<sup>37</sup> See Cristiano Lima, *Pence Walks Back Criticism of Trump’s Muslim Ban*, POLITICO (July 15, 2016), <https://www.politico.com/story/2016/07/mike-pence-muslim-ban-225645>.

<sup>38</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2403–06 (discussing chronology and substance of orders).

<sup>39</sup> See *id.*

<sup>40</sup> See Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/>.

<sup>41</sup> *Why Gorsuch Should Condemn Trump*, ERIC POSNER (Feb. 4, 2017), <http://ericposner.com/why-gorsuch-should-condemn-trump/>.

<sup>42</sup> Jessica Schulberg & Sam Levine, *Trump Inches the U.S. Closer to Constitutional Crisis*, HUFFPOST (Feb. 5, 2017) (quoting Sen. Patrick Leahy), [http://www.huffingtonpost.com/entry/trump-constitutional-crisis-judge-robart\\_us\\_58964292e4b09bd304bba74f](http://www.huffingtonpost.com/entry/trump-constitutional-crisis-judge-robart_us_58964292e4b09bd304bba74f).

<sup>43</sup> Balkin, *supra* note 28, at 156.

<sup>44</sup> *Trump v. Hawaii*, 138 S. Ct. at 2423.

<sup>45</sup> See Peter Baker, *In Trump’s Firing of James Comey, Echoes of Watergate*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/trump-fbi-investigation-nixon.html>; Devlin Barrett, Adam

immediate comparisons to Richard Nixon's move to fire Special Prosecutor Archibald Cox in the infamous "Saturday Night Massacre"— part of the Watergate scandal that culminated in Nixon's resignation from office.<sup>46</sup> Trump subsequently claimed that he has "an absolute right to do what [he] want[s] to do with the Justice Department."<sup>47</sup> Some of his supporters agreed that the president has full authority to direct federal investigations and argued that it is not possible for the chief executive to be guilty of obstruction of justice.<sup>48</sup> But a number of scholars took a different view. As a general matter, Bruce Green and Rebecca Roiphe argued that "[p]rosecutors' professional obligation of federal independence ... limits the President's ability to control individual criminal investigations or prosecutorial decisions."<sup>49</sup> More specifically to the Comey firing, Jack Balkin suggested that "[i]f one could prove Trump's intent to obstruct the FBI's investigations, this would constitute a violation of federal obstruction of justice laws, and very likely would constitute an impeachable offense to boot."<sup>50</sup> Laurence Tribe made the case even more directly: he expressly argued that "[t]he time has come for Congress to launch an impeachment investigation of President Trump for obstruction of justice," maintaining that "Comey's summary firing . . . represented an obvious effort to interfere with a probe involving national security matters vastly more serious than the 'third-rate burglary' that Nixon tried to cover up in Watergate."<sup>51</sup>

Still more grounds for investigation and impeachment were raised relatively early in Trump's presidency. Several lawsuits were filed against Trump for alleged violations of the Constitution's Emoluments Clauses, which prohibit the President from receiving certain benefits and things of value from foreign and

---

Entous, & Philip Rucker, *President Trump Fires FBI Director Comey*, WASH. POST (May 10, 2017), [https://www.washingtonpost.com/world/national-security/comey-misstated-key-clinton-email-evidence-at-hearing-say-people-close-to-investigation/2017/05/09/074c1c7e-34bd-11e7-b373-418f6849a004\\_story.html?hpid=hp\\_interstitial\\_manual\\_37](https://www.washingtonpost.com/world/national-security/comey-misstated-key-clinton-email-evidence-at-hearing-say-people-close-to-investigation/2017/05/09/074c1c7e-34bd-11e7-b373-418f6849a004_story.html?hpid=hp_interstitial_manual_37).

<sup>46</sup> See Baker, *supra* note 45; Joe Sterling, *Comey Firing Draws Comparisons to Nixon's 'Saturday Night Massacre'*, CNN (May 10, 2017), <https://www.cnn.com/2017/05/09/politics/comey-saturday-night-massacre/index.html>; Amy B. Wang, *The Saturday Night Massacre: 'Your Commander in Chief has Given you an Order'*, WASH. POST (May 11, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/05/11/the-saturday-night-massacre-your-commander-in-chief-has-given-you-an-order/>.

<sup>47</sup> *Excerpts from Trump's Interview with the Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html>; see also Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 3 (2018) (quoting and discussing Trump's claim).

<sup>48</sup> See Green & Roiphe, *supra* note 47, at 3–4.

<sup>49</sup> *Id.* at 4.

<sup>50</sup> Balkin, *supra* note 28, at 159.

<sup>51</sup> Laurence H. Tribe, *Trump Must be Impeached. Here's Why.*, WASH. POST (May 13, 2017), [https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-374d-11e7-b4ee-434b6d506b37\\_story.html](https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-374d-11e7-b4ee-434b6d506b37_story.html).

domestic governments.<sup>52</sup> The plaintiffs asserted that Trump was violating those clauses by continuing to effectively own and maintain a financial interest in various establishments that were being patronized by foreign and domestic governments.<sup>53</sup> These asserted violations were cited as a potential legal basis for impeachment by prominent constitutional law scholars<sup>54</sup> and played a key role in the “Need to Impeach” campaign launched by Tom Steyer in 2017.<sup>55</sup> Yet despite these many arguments about constitutional crises and abuses of executive power, Democratic leaders in the House of Representatives continued to resist calls to initiate impeachment proceedings against Trump well into 2019.<sup>56</sup>

So what finally changed? In September of 2019, a whistleblower complaint emerged alleging that Trump was “using the power of his office to solicit interference from a foreign country in the 2020 U.S. election.”<sup>57</sup> The letter asserted that Trump had pressured Ukraine to investigate potential 2020 Democratic presidential candidate Joe Biden and his son.<sup>58</sup> Half of the Democratic House caucus had already called for the initiation of an impeachment inquiry by early August,<sup>59</sup> and House Speaker Nancy Pelosi

---

<sup>52</sup> See U.S. CONST. art. I, § 9, cl. 8 (foreign emoluments); U.S. CONST art. II, § 1, cl. 7 (domestic emoluments).

<sup>53</sup> See *Citizens for Resp. and Ethics in Wash. v. Trump*, 953 F.3d 178, 185–87 (2d Cir. 2020) (holding that plaintiffs from hospitality industry had standing and that dispute was ripe for review); *In re: Trump*, 958 F.3d 274 (4<sup>th</sup> Cir. 2020) (en banc) (denying Trump’s petition for writ of mandamus ordering certification of interlocutory appeal or dismissal of complaint); *Blumenthal v. Trump*, 949 F.3d 14, 17 (D.C. Cir. 2020) (holding that members of Congress lacked standing to bring action).

<sup>54</sup> See Tribe, *supra* note 51; Erwin Chemerinsky, *No, Impeachment Doesn’t Require a Criminal Act*, L.A. TIMES (Dec. 4, 2019), <https://www.latimes.com/opinion/story/2019-12-04/opinion-no-impeachment-doesnt-require-a-criminal-act>.

<sup>55</sup> See *Our Movement*, NEED TO IMPEACH, <https://www.needtoimpeach.com/movement-timeline/>; Edward-Isaac Dovere, *Tom Steyer Wants the 2020 Democrats Supporting Impeachment*, ATLANTIC (Jan. 22, 2019), <https://www.theatlantic.com/politics/archive/2019/01/billionaire-steyer-wants-2020-democrats-impeach-trump/580909/>.

<sup>56</sup> See, e.g., Joe Heim, *Nancy Pelosi on Impeaching Trump: ‘He’s Just not Worth It’*; WASH. POST MAG. (March 11, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/03/11/feature/nancy-pelosi-on-impeaching-president-trump-hes-just-not-worth-it/>; Sheryl Gay Stolberg, *Pelosi’s Leap on Impeachment: From No Go to No Choice*, N.Y. TIMES (Dec. 5, 2019), <https://www.nytimes.com/2019/12/05/us/politics/pelosi-articles-of-impeachment.html>; Lauren Gambino, *Trump Impeachment: How Pelosi Went from Holdout to Leader in Legacy-Defining Moment*, GUARDIAN (Dec. 17, 2019), <https://www.theguardian.com/us-news/2019/dec/17/trump-impeachment-how-pelosi-went-from-holdout-to-leader-in-legacy-defining-moment>.

<sup>57</sup> Letter from “Whistleblower” to *Chairs of Senate and House Intelligence Committees* (Aug. 12, 2019), available at [https://intelligence.house.gov/uploadedfiles/20190812\\_-\\_whistleblower\\_complaint\\_unclass.pdf](https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf).

<sup>58</sup> See *id.*

<sup>59</sup> See Zachary B. Wolf, *Democrats Reach Impeachment Milestone Nancy Pelosi Can’t Ignore. Now What?*, CNN (Aug. 3, 2019), <https://www.cnn.com/2019/08/02/politics/impeachment-half-of-democrats/index.html>.

agreed to move forward after these latest allegations came to light.<sup>60</sup> When the House commenced its inquiry, the President refused to cooperate.<sup>61</sup> White House counsel Pat Cipollone sent a letter to Speaker Pelosi declaring the inquiry “constitutionally invalid” and dismissing it as an attempt “[t]o [r]everse the [e]lection of 2016 and [t]o [i]nfluence the [e]lection of 2020.”<sup>62</sup> Cipollone asserted that “[b]ecause participating in this inquiry under the current unconstitutional posture would inflict lasting institutional harm on the Executive Branch . . . President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.”<sup>63</sup>

It was this blanket refusal to comply with any congressional subpoenas or other requests for information that led many observers to conclude that Trump was precipitating a constitutional crisis in the fullest sense of the term. Keith Whittington warned that Cipollone’s letter “may signal the even more alarming possibility that the president might declare the results of an impeachment trial equally illegitimate and invalid and refuse to accept the authority of Congress to remove him from office.”<sup>64</sup> Such a wholesale rejection of congressional authority would go beyond more quotidian disputes about whether particular documents should be subject to executive privilege and could instead “destabilize and dramatically alter the constitutional system itself.”<sup>65</sup> Noah Feldman similarly remarked upon the extreme nature of Cipollone’s letter.<sup>66</sup> Feldman argued that there was “no precedent in constitutional doctrine . . . supporting a president’s blanket refusal to comply with any subpoenas regardless of privilege,” and noted that Cipollone’s position “presents the president as the judge of whether a [C]ongressional inquiry into impeachment is constitutional. That obviously can’t be right.”<sup>67</sup>

It was in this context of executive intransigence that the House proceeded to approve two Articles of Impeachment in December. Although these Articles were specifically grounded in Trump’s alleged solicitation of Ukrainian election

---

<sup>60</sup> See Stolberg, *supra* note 56.

<sup>61</sup> Shannon Pettypiece & Kristen Welker, *White House Refuses to Cooperate with Impeachment Investigation*, NBC NEWS (Oct 8, 2019), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/white-house-refuses-turn-over-documents-democrats-impeachment-inquiry-n1063771>.

<sup>62</sup> See Aaron Blake, *The White House’s Scathing and Legally Dubious Impeachment Letter, Annotated*, WASH. POST (Oct. 9, 2019) (quoting Cipollone’s letter in full), <https://www.washingtonpost.com/politics/2019/10/09/white-houses-scathing-legally-questionable-impeachment-letter-annotated/>.

<sup>63</sup> *Id.*

<sup>64</sup> Whittington, *supra* note 12.

<sup>65</sup> *Id.*

<sup>66</sup> See Feldman, *supra* note 12.

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

interference, the broader themes of corruption, abuse of executive authority, and disregard for the authority of coordinate branches of government that had featured in previous controversies were clearly present. Article I charged Trump with abuse of power through his dealings with Ukraine—dealings that were described as a “scheme or course of conduct for corrupt purposes in pursuit of personal political benefit” that “compromised the national security of the United States and undermined the integrity of the United States democratic process.”<sup>68</sup> Article II focused on obstruction of Congress, which was said to consist in “interpos[ing] the powers of the Presidency against the lawful subpoenas of the House of Representatives, and assum[ing] to himself functions and judgments necessary to the exercise of the ‘sole power of Impeachment’ vested by the Constitution in the House of Representatives.”<sup>69</sup>

The rumblings of a constitutional crisis that had loomed over Trump’s presidency since its earliest days had thus come to fruition. Concerns about President Trump’s use of executive authority, his respect for separation of powers, and his accountability to democratic values that had been raised since his days as a candidate had culminated in impeachment by the House of Representatives. Before examining how this impeachment dispute was resolved, the discussion now turns to a comparative overview of the parallel British constitutional crisis that was brewing over Brexit. These events will be discussed in somewhat greater detail, given that they are likely to be less familiar to the American reader.

### *C. Executive Authority, The Brexit Referendum, and Proroguing Parliament*

The basic structure of government in the United Kingdom has a number of similarities with that in the United States. While sovereignty in the United Kingdom was once located in the Crown, the powers of state gradually came to be dispersed among the same three principal branches of government that exist under American constitutional law—i.e., the legislature, the executive, and the judiciary.<sup>70</sup> But there are also important differences between the British and American models: executive authority in the United Kingdom is exercised not by a president as established in a codified Constitution, but with ministers of the government as developed through constitutional tradition.<sup>71</sup> The head of the government is the Prime Minister, who chooses Cabinet members and other

---

<sup>68</sup> *Articles of Impeachment Against Donald John Trump*, H.R. Res. 755, 116th Cong. (2019).

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *See R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5, [41].

<sup>71</sup> *See id.* at [41], [45].

government ministers.<sup>72</sup> Like the American President, the British Prime Minister is not directly elected by nationwide ballot—but nor is she elected through a system analogous to the Electoral College. Instead, the Prime Minister is usually the leader of whichever party wins the most seats in the House of Commons during a general parliamentary election.<sup>73</sup> The Prime Minister remains accountable to Parliament while in office and can be removed by a majority vote on a motion of no confidence in the government.<sup>74</sup>

The government's executive authority encompasses the administrative powers that were historically concentrated in the British Crown,<sup>75</sup> as well as “the residue of powers which remain vested in the Crown” known as the Royal prerogative.<sup>76</sup> The specific exercise of executive authority at issue in the recent British constitutional crisis centered around the United Kingdom's membership in the European Union (EU). The United Kingdom joined the political community that would eventually be known as the European Union in 1973.<sup>77</sup> The British electorate affirmed the United Kingdom's ongoing membership by a referendum authorized by Parliament in 1975.<sup>78</sup> However, some voices began to express dissatisfaction with Britain's relationship with Europe over the ensuing decades, and in 2013 Prime Minister David Cameron promised to hold a new popular vote on whether to remain in the EU.<sup>79</sup> After Cameron's Conservative Party won an outright majority in the 2015 general elections,<sup>80</sup> Parliament passed a measure providing for just such a referendum.<sup>81</sup> Voters opted to leave the EU by a margin of 52% to 48% in June 2016.<sup>82</sup>

---

<sup>72</sup> See KING, *THE BRITISH CONSTITUTION*, *supra* note 4, at 24; see also HOUSE OF COMMONS POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, *ROLE AND POWERS OF THE PRIME MINISTER*, 2014-5, HC 351, at 6 (UK).

<sup>73</sup> See KING, *THE BRITISH CONSTITUTION*, *supra* note 4, at 4.

<sup>74</sup> See Fixed-Term Parliaments Act 2011, c. 14 sec. 2; see also *R (Miller) v. The Prime Minister*, [2019] UKSC 41, [46] (“[T]he conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy.”) (internal quotations omitted).

<sup>75</sup> See *R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5, [41], [45].

<sup>76</sup> See *id.* at [47].

<sup>77</sup> See *id.* at [1], [14].

<sup>78</sup> See *id.* at [23].

<sup>79</sup> See *David Cameron Promises In/Out Referendum on EU*, BBC NEWS, (Jan. 23, 2013), <https://www.bbc.com/news/uk-politics-21148282>.

<sup>80</sup> See Michael White, *British PM David Cameron Confounds Polls to Win Second Term*, GUARDIAN, (May 8, 2015), <https://www.theguardian.com/politics/2015/may/08/british-pm-david-cameron-confounds-polls-to-win-second-term>; *Election Results: Conservatives Win Majority*, BBC NEWS (May 8, 2015), <https://www.bbc.com/news/election-2015-32633099>.

<sup>81</sup> See *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5, [31].

<sup>82</sup> See *EU Referendum Results*, ELECTORAL COMM’N, <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum>; see also René Reyes, *Legislative Sovereignty, Executive Power, and Judicial Review*:

These structural elements surrounding Britain's entry into and exit from the EU are themselves illustrative of some of the differences between the United States and the United Kingdom with respect to democratic governance. These decisions represented highly significant changes in U.K. constitutional law,<sup>83</sup> and they were determined in accordance with the results of national plebiscite. Direct democracy plays no such role in U.S. Constitutional law. As Richard Posner has emphasized, the American Constitution makes "no provision for initiatives, referenda, or recalls."<sup>84</sup> Even the original ratification of the Constitution—which is sometimes said to have been the result of a particularly democratic process<sup>85</sup>—generally took place in state conventions rather than through more participatory means like town meetings or referenda.<sup>86</sup> Amendments to the U.S. Constitution are also ratified by state legislatures or conventions rather than by nationwide popular vote.<sup>87</sup> The U.S. Constitution is thus only "incompletely democratic"<sup>88</sup> with respect to popular participation—especially when compared with recent examples in the U.K.<sup>89</sup>

Once voters had expressed their decision to leave the EU, the U.K. government declared that "[t]he will of the British people is an instruction that must be delivered."<sup>90</sup> The process of delivering on Brexit began with the resignation of David Cameron as Prime Minister. This act was itself an important recognition and illustration of executive accountability. Cameron had campaigned for Britain to remain in the European Union during the referendum debate, believing that "Britain is stronger, safer, and better off inside the EU."<sup>91</sup> But Cameron conceded that "the British people made a different decision to take

---

*Comparative Insights From Brexit*, 115 MICH. L. REV. ONLINE 91 (2017) [hereinafter Reyes, *Comparative Insights From Brexit*].

<sup>83</sup> See *R (Miller) v. Sec'y of State for Exiting the European Union*, [2017] UKSC 5, [81].

<sup>84</sup> Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1703 (2006); see also Reyes, *May Britain Trump America*, *supra* note 5, at 3.

<sup>85</sup> See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1444 (2007); see also Reyes, *May Britain Trump America*, *supra* note 5, at 2–3.

<sup>86</sup> See KLARMAN, *THE FRAMERS COUP*, *supra* note 34, at 618; see also Reyes, *May Britain Trump America*, *supra* note 5 at 4.

<sup>87</sup> See U.S. CONST. art. V.

<sup>88</sup> See Posner, *supra* note 84, at 1702.

<sup>89</sup> In addition to the referenda on membership in the EU, Britain has also held referenda on changes to parliamentary election voting systems; devolution of power to local assemblies in Scotland, Wales, and Northern Ireland; and Scottish independence. See *R (Miller) v. Sec'y of State for Exiting the European Union*, [2017] UKSC 5, [117].

<sup>90</sup> See Heather Stewart, Rowena Mason, & Rajeev Syal, *David Cameron Resigns After UK Votes to Leave European Union*, GUARDIAN (June 24, 2016), <https://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union>.

<sup>91</sup> *Id.*

a different path[.]” and “[a]s such [] the country requires fresh leadership to take it in this direction.”<sup>92</sup>

Cameron was succeeded as Prime Minister by Theresa May.<sup>93</sup> May’s government was keen to begin implementing the results of the Brexit referendum, and argued that ministers could withdraw from treaties governing Britain’s membership in the EU as a matter of Royal prerogative without awaiting further action by Parliament.<sup>94</sup> In a preview of the constitutional crisis to come, May’s claim led to a dispute over the relationships among executive authority, parliamentary sovereignty, and democratic accountability.

The U.K. Supreme Court resolved this initial dispute squarely in favor of Parliament. The Court acknowledged that the British executive was one of “the three principal organs of the state,”<sup>95</sup> and that foreign affairs were one of the areas in which ministers traditionally exercised executive authority.<sup>96</sup> But the Court also emphasized that this authority had to be exercised in a manner consistent with parliamentary legislation—for “Parliamentary sovereignty is a fundamental principle of the UK constitution[.]”<sup>97</sup> Another fundamental principle is that ministers cannot alter domestic law unless parliamentary legislation so permits.<sup>98</sup> The combination of these two fundamental principles made May’s position constitutionally untenable. The statute authorizing the Brexit referendum did not make the results of the vote self-executing or provide for ministerial implementation,<sup>99</sup> and to allow ministers to unilaterally implement withdrawal from the EU would effect significant change to domestic law.<sup>100</sup> In such circumstances, held the Court, “the change in the law must be made in the only way in which the U.K. constitution permits, namely through Parliamentary legislation.”<sup>101</sup>

May’s government responded to the U.K. Supreme Court’s decision by securing parliamentary passage of an extremely concise bill authorizing the

---

<sup>92</sup> *Id.* (internal quotations omitted).

<sup>93</sup> Anushka Asthana, Rowena Mason, & Jessica Elgot, *Theresa May to Become New PM After Tory Rival Leadsom Withdraws*, GUARDIAN (July 12, 2016), <https://www.theguardian.com/politics/2016/jul/11/theresa-may-to-become-new-pm-after-tory-rival-leadsom-withdraws>.

<sup>94</sup> *See R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5 at [5]; *see also* Reyes, *Comparative Insights From Brexit*, *supra* note 82.

<sup>95</sup> *R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5, [41].

<sup>96</sup> *See id.* at [54]–[55].

<sup>97</sup> *Id.* at [43].

<sup>98</sup> *Id.* at [50].

<sup>99</sup> *Id.* at [118]–[119].

<sup>100</sup> *Id.* at [80]–[81].

<sup>101</sup> *Id.* at [121].

Prime Minister to give notice to the EU of Britain's intention to withdraw.<sup>102</sup> May delivered this notice to European Council President Donald Tusk in March of 2017, formally commencing a two-year period for negotiating the terms of Britain's departure.<sup>103</sup> But additional conflicts between the executive and the legislature began to surface almost immediately thereafter. On March 30, the government published its "Great Repeal Bill" that would end the supremacy of EU law over U.K. law and take the country out of the jurisdiction of the European Court of Justice, while also incorporating existing EU legislation into domestic law in order to smooth the Brexit transition and avoid disruptions.<sup>104</sup> However, the bill as originally introduced would have given ministers the authority to issue regulations "to prevent, remedy or mitigate . . . any failure of retained EU law to operate effectively . . . arising from the withdrawal of the United Kingdom from the EU."<sup>105</sup> The bill further provided that such regulations could "make any provision that could be made by an Act of Parliament."<sup>106</sup>

These kinds of delegations of parliamentary power to executive branch ministers are known as Henry VIII Clauses—a reference to the Tudor monarch who "is regarded popularly as the impersonation of executive autocracy."<sup>107</sup> The inclusion of these Henry VIII Clauses in the Great Repeal Bill drew robust criticism. The First Ministers of Scotland and Wales decried the move as a "naked power grab,"<sup>108</sup> while the opposition Labour leader insisted that his party would not "hand over powers to this government to override parliament, override democracy, and just set down a series of diktats on what's going to happen in the future."<sup>109</sup> After some members of her own Conservative Party

---

<sup>102</sup> See European Union (Notification of Withdrawal) Act 2017, c. 9. (U.K.).

<sup>103</sup> See Anushka Asthana, Heather Stewart & Peter Walker, *May Triggers Article 50 With Warning of Consequences for UK*, GUARDIAN (Mar. 29, 2017), <https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk>; *Brexit: Article 50 Has Been Triggered—What Now?*, BBC NEWS (Mar. 29, 2017), <https://www.bbc.com/news/uk-politics-39143978>.

<sup>104</sup> See *Brexit: UK Sets Out Plans to Replace All EU Laws*, BBC NEWS (Mar. 30, 2017), <https://www.bbc.com/news/uk-politics-39439554>.

<sup>105</sup> European Union (Withdrawal) Bill 2017-19, HC Bill [005] cl. 7(1) (U.K.) (internal subsections omitted), available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>.

<sup>106</sup> *Id.* at 7(4) (italics in original).

<sup>107</sup> Sir David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOB. LEGAL STUD. 323, 326 (2001) (internal quotation marks omitted); see also René Reyes, *Nondelegation Doctrine in Comparative Context: Britain's Great Repeal Bill and the Shadow of Henry VIII*, 166 U. PENN. L. REV. ONLINE 71, 72 (2017) [hereinafter Reyes, *Nondelegation Doctrine in Comparative Context*].

<sup>108</sup> Heather Stewart, Ewen MacAskill & Peter Walker, *Brexit Bill to Cause Constitutional Clash with Scotland and Wales*, GUARDIAN (July 14, 2007), <https://www.theguardian.com/politics/2017/jul/13/scotland-wales-brexit-great-repeal-bill-naked-power-grab-nicola-sturgeon-carwyn-jones>.

<sup>109</sup> Andrew Sparrow, *Labour to Oppose 'Henry VIII Powers' Being Used to Rewrite EU Laws*, GUARDIAN (Mar. 26, 2017), <https://www.theguardian.com/politics/2017/mar/26/labour-opposes-henry-viii-powers-rewrite-eu-laws-great-repeal-bill>; see also Reyes, *Nondelegation Doctrine in Comparative Context*, *supra* note 107, at

joined in the chorus of concern, May was forced to climb down and accept committee oversight in both Houses of Parliament of any legal changes proposed by ministers.<sup>110</sup>

May was also forced to give Parliament a greater role in approving the terms of Britain's departure from the EU. A number of Conservative Members of Parliament (MPs) had again joined with opposition members in calling for a "meaningful vote" in Parliament on any deal negotiated between government ministers and the EU,<sup>111</sup> and the final version of the government's Withdrawal Act was amended to provide that the exit agreement would be ratified only if the House of Commons passed a resolution approving its terms and Parliament as a whole passed an Act providing for its implementation.<sup>112</sup> May's government completed a draft departure agreement with the EU in November of 2018.<sup>113</sup> When the agreement was put before Parliament in January 2019, it was defeated by a margin of 230 votes—"the heaviest parliamentary defeat of any British prime minister in the democratic era[.]"<sup>114</sup> May was unable to win sufficient assurances from Europe to assuage the concerns of MPs and went on to suffer second<sup>115</sup> and third<sup>116</sup> defeats on her Brexit deal. As David Cameron had done before her, May resigned her position shortly thereafter in the belief that it was in the "best interests of the country for a new prime minister to lead [the Brexit] effort."<sup>117</sup>

---

77.

<sup>110</sup> See Rowena Mason, Heather Stewart & Patrick Wintour, *Theresa May Forced to Accept New Brexit Scrutiny Committee*, GUARDIAN (Dec. 11, 2017), <https://www.theguardian.com/politics/2017/dec/11/theresa-may-forced-accept-brexit-scrutiny-committee-revolt-henry-viii-powers>; see also European Union (Withdrawal) Act 2018, c. 16 sch. 7 (U.K.).

<sup>111</sup> See Anne Perkins & Jessica Elgot, *Brexit 'Meaningful Vote': May Wins After Rebels Accept Compromise*, GUARDIAN (June 20, 2018), <https://www.theguardian.com/politics/2018/jun/20/lead-tory-rebel-dominic-grieve-accepts-brexit-meaningful-vote-compromise>.

<sup>112</sup> European Union (Withdrawal) Act 2018, c. 16 § 13 (U.K.).

<sup>113</sup> See John Henley, *Theresa May's Brexit Deal: Everything You Need to Know*, GUARDIAN (Nov. 15, 2018), <https://www.theguardian.com/politics/2018/nov/14/theresa-mays-brexit-deal-everything-you-need-to-know>.

<sup>114</sup> Heather Stewart, *May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era*, GUARDIAN (Jan. 15, 2019), <https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexit-deal-vote-by-majority-of-230>; see also *Brexit: Theresa May's Deal is Voted Down in Historic Commons Defeat*, BBC NEWS (Jan. 15, 2019), <https://www.bbc.com/news/uk-politics-46885828>.

<sup>115</sup> See Heather Stewart, *MPs Ignore May's Pleas and Defeat Her Brexit Deal by 149 Votes*, GUARDIAN (Mar. 12, 2019), <https://www.theguardian.com/politics/2019/mar/12/mps-ignore-mays-pleas-and-defeat-her-brexit-deal-by-149-votes#maincontent>.

<sup>116</sup> See Heather Stewart & Jessica Elgot, *May Hopes to Hold Fourth Vote on Brexit Deal*, GUARDIAN (Mar. 29, 2019), <https://www.theguardian.com/politics/2019/mar/29/mps-reject-theresa-mays-brexit-deal-third-time>.

<sup>117</sup> See Laura Kuenssberg, *Theresa May Quits: UK Set for New PM by End of July*, BBC NEWS (May 24, 2019) (quoting May), <https://www.bbc.com/news/uk-politics-48395905>.

Boris Johnson won the ensuing Tory leadership contest and replaced May as Prime Minister in July 2019.<sup>118</sup> He promptly proclaimed his intention to “get Brexit done” by the scheduled departure date of October 31.<sup>119</sup> But while Johnson had won a clear majority of votes in his party’s leadership race, he enjoyed no such majority supporting his Brexit agenda in Parliament.<sup>120</sup> Johnson’s ministers acknowledged that Parliament was unlikely to support the Brexit agreement previously negotiated by Theresa May, and stated the government was therefore planning to leave the EU without a deal if necessary.<sup>121</sup> Cross-party efforts involving opposition Labour and rebel Tory MPs got underway to prevent a no-deal Brexit scenario.<sup>122</sup>

It was around this time that talk of a genuine British constitutional crisis began in earnest.<sup>123</sup> At the end of August, Johnson asked the Queen to formally prorogue<sup>124</sup> Parliament for five weeks beginning in the middle of September—meaning that MPs would return only two weeks prior to the date set for Britain’s departure from the EU.<sup>125</sup> Johnson denied he was trying to prevent MPs from blocking a no-deal Brexit, but his move was met with vigorous criticism from across the political spectrum.<sup>126</sup> Labour Leader Jeremy Corbyn called it a “smash-and-grab raid against our democracy[,]”<sup>127</sup> the shadow attorney general

<sup>118</sup> See Heather Stewart, *Boris Johnson Elected New Tory Leader*, *GUARDIAN* (July 23, 2019), <https://www.theguardian.com/politics/2019/jul/23/boris-johnson-elected-new-tory-leader-prime-minister>; *Boris Johnson Wins Race to be Tory Leader and PM*, *BBC NEWS* (July 23, 2019), <https://www.bbc.com/news/uk-politics-49084605>.

<sup>119</sup> See Stewart, *Boris Johnson Elected New Tory Leader*, *supra* note 118.

<sup>120</sup> See *id.*

<sup>121</sup> See *Brexit: Government ‘Operating on Assumption of No Deal, Says Gove*, *GUARDIAN* (July 28, 2019), <https://www.theguardian.com/politics/2019/jul/28/michael-gove-government-operating-on-assumption-of-no-deal-brexit>.

<sup>122</sup> See Toby Helm & Michael Savage, *Hammond Plots with Labour to Kill Johnson’s No-Deal Brexit Plan*, *GUARDIAN* (July 28, 2019), <https://www.theguardian.com/politics/2019/jul/27/hammond-plots-with-starmer-to-kill-no-deal-brexit>; Jessica Elgot & Heather Stewart, *Jeremy Corbyn Agrees to Prioritise Legislation to Stop No-Deal Brexit*, *GUARDIAN* (Aug. 27, 2019), <https://www.theguardian.com/politics/2019/aug/27/brexit-jeremy-corbyn-prioritise-legislation-stop-no-deal-meeting-opposition-parties-labour>.

<sup>123</sup> See, e.g., Luke McGee, *The UK Can’t Even Have a Proper Constitutional Crisis*, *CNN* (Aug. 7, 2019), <https://www.cnn.com/2019/08/07/uk/the-uk-cant-have-a-constitutional-crisis-intl-gbr/index.html>.

<sup>124</sup> For an explanation of prorogation and how it differs from adjournment and dissolution, see *R (Miller) v. The Prime Minister* [2019] UKSC 41, [2]–[6] (appeal taken from Scot.) (U.K.).

<sup>125</sup> See Jessica Elgot & Heather Stewart, *Boris Johnson Asks Queen to Suspend Parliament*, *GUARDIAN* (Aug. 28, 2019), <https://www.theguardian.com/politics/2019/aug/28/chancellor-sajid-javid-fast-tracked-spending-review-fuels-talk-of-early-election>.

<sup>126</sup> See *id.*; see also René Reyes, *Boris Johnson, Brexit, and British Democracy: A Comparative Perspective*, *TELEGRAM* (Sept. 18, 2019), <https://www.telegram.com/news/20190918/as-i-see-it-boris-johnson-brexit-and-british-democracy-comparative-perspective>.

<sup>127</sup> Matthew Weaver, Amy Walker, Kate Lyone & Kevin Rawlinson, *Jeremy Corbyn Says He Will Try to ‘Politically Stop’ Prorogation with Legislation—As it Happened*, *GUARDIAN* (Aug. 29, 2019), <https://www.theguardian.com/politics/live/2019/aug/29/backlash-after-boris-johnson-prorogues-parliament-ahead-of-brexit>.

described warned it would be “the gravest abuse of power and attack on UK constitutional principle in living memory,”<sup>128</sup> and the non-partisan Speaker of the House of Commons branded it “a constitutional outrage.”<sup>129</sup> Even members of Johnson’s own party objected, with Tory MP Dominic Grieve labeling the decision “constitutionally wrong and frankly outrageous.”<sup>130</sup> Before prorogation went into effect, the House of Commons and the House of Lords quickly passed a measure referred to as the Benn Act requiring the Prime Minister to seek a three-month extension of the Brexit date if Parliament had not given approval to either a withdrawal agreement or a no-deal departure by October 19.<sup>131</sup>

Prorogation was also subjected to a legal challenge. The lower courts split on the question of justiciability,<sup>132</sup> but the U.K. Supreme Court held it was appropriate for it to consider the case and ruled the Prime Minister’s advice to the Queen to formally prorogue Parliament was unlawful.<sup>133</sup> As to the remedy, the Court held prorogation “was null and of no effect,” meaning “Parliament has not been prorogued” and was free to take whatever steps it deemed appropriate in order to resume meeting as soon as possible.<sup>134</sup> The Speaker announced that Parliament would reconvene the next day.<sup>135</sup>

Yet the resumption of Parliament did not mean the end of the constitutional crisis. To the contrary, the basic issues persisted. One issue identified by commentators was a conflict between popular sovereignty as expressed in Johnson’s determination to deliver on the results of the Brexit referendum, and parliamentary sovereignty as expressed in its opposition to a departure in the absence of an acceptable deal.<sup>136</sup> Another issue was the concern that Johnson would attempt to get around Parliament and decline to seek the extension of the

---

live-news?page=with:block-5d67e3408f082209d3223d9d#block-5d67e3408f082209d3223d9d.

<sup>128</sup> Heather Stewart & Rowena Mason, *Brexit: Shutting Down Parliament ‘Gravest Abuse of Power in Living Memory’*, GUARDIAN (Aug. 26, 2019), <https://www.theguardian.com/politics/2019/aug/26/brexit-shutting-down-parliament-gravest-abuse-of-power-in-living-memory-legal-advice>.

<sup>129</sup> Kate Proctor, *Boris Johnson’s Move to Prorogue Parliament ‘A Constitutional Outrage,’ Says Speaker*, GUARDIAN (Aug. 28, 2019), <https://www.theguardian.com/politics/2019/aug/28/boris-johnsons-move-to-prorogue-parliament-a-constitutional-outrage-says-speaker#maincontent>.

<sup>130</sup> *Id.*

<sup>131</sup> See European Union (withdrawal) (No. 2) Act 2019, c. 26 (U.K.); see also *R (Miller) v. The Prime Minister* [2019] UKSC 41, [22] (appeal taken from Scot.) (U.K.).

<sup>132</sup> Compare *Cherry v. Advoc. Gen.* [2019] CSIH 49 (justiciable), with *R (Miller) v. The Prime Minister* [2019] EWHC 2381 (QB) (non-justiciable).

<sup>133</sup> *R (Miller) v. The Prime Minister* [2019] UKSC 41, [61] (appeal taken from Scot.) (U.K.).

<sup>134</sup> *Id.* at [69]–[70].

<sup>135</sup> See Rowena Mason & Peter Walker, *MPs to Return Immediately in Wake of Supreme Court Ruling*, GUARDIAN (Sept. 24, 2019), <https://www.theguardian.com/politics/2019/sep/24/bercow-mps-return-urgent-supreme-court-ruling-suspension-parliament>.

<sup>136</sup> See Tombs, *supra* note 13; Evans & Browning, *supra* note 13.

Brexit deadline as mandated by parliamentary legislation.<sup>137</sup> Indeed, Johnson had previously declared that he would “rather be dead in a ditch” than ask for an extension,<sup>138</sup> and he continued to insist that there would be “no delay” to Brexit even as the calendar moved into October.<sup>139</sup> When Parliament had still not approved Johnson’s deal by October 19, he formally complied with the Benn Act by sending an unsigned letter to the European Council president requesting a delay until January 31, 2020—accompanied by a signed letter expressing his opposition to the extension.<sup>140</sup>

The EU agreed to the extension of the Brexit deadline.<sup>141</sup> But standing alone, this extension merely set the stage for another three months of seemingly intractable conflict between the Prime Minister and Parliament. Notably, both sides in this conflict could credibly claim to be honoring the principles of democratic accountability. On the one hand, the PM could claim to be holding Parliament accountable to the will of the majority who voted to leave the EU. Leaving the EU with or without a deal was thus about democratic accountability. On the other hand, MPs could claim to be holding Johnson accountable to the will of the majority that elected them into office. As observed by the U.K. Supreme Court, the executive “is not directly elected by the people[.]” but rather “exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that.”<sup>142</sup> Parliamentary scrutiny of the terms of Britain’s departure was thus itself a vital aspect of democratic accountability.

How was this crisis to be resolved, and how did it compare to the resolution of the American crisis simultaneously taking place on the other side of the Atlantic? Those questions are taken up in Part II below. As will be seen, Donald Trump and Boris Johnson each weathered their countries’ constitutional crises and retained their respective offices, but they did so through significantly different means with significantly different implications for executive authority and democratic accountability.

---

<sup>137</sup> See Evans & Browning, *supra* note 13.

<sup>138</sup> Kate Proctor & Peter Walker, *Boris Johnson: I’d Rather be Dead in Ditch Than Agree Brexit Extension*, GUARDIAN (Sept. 5, 2019), <https://www.theguardian.com/politics/2019/sep/05/boris-johnson-rather-be-dead-in-ditch-than-agree-brexit-extension#maincontent>.

<sup>139</sup> Steward, Carrell, Boffey & O’Carroll, *supra* note 13.

<sup>140</sup> See Daniel Boffey, *Brexit: Johnson Sends Unsigned Letter Asking for Delay, and Second Arguing Against It*, GUARDIAN (Oct. 20, 2019), <https://www.theguardian.com/politics/2019/oct/19/eu-will-grant-brexit-extension-if-johnson-sends-letter-says-brussels>; *Boris Johnson’s Brexit Delay Letters in Full*, BBC NEWS (Oct. 20, 2020), <https://www.bbc.com/news/uk-50114538>.

<sup>141</sup> See Daniel Boffey & Angelique Chrisafis, *EU Begins Planning for Trade Negotiations After UK Agrees to Brexit Extension*, GUARDIAN (Oct. 28, 2019), <https://www.theguardian.com/politics/2019/oct/28/eu-agrees-brexit-extension-to-31-january-flexextension>.

<sup>142</sup> *R (Miller) v. The Prime Minister*, [2019] UKSC 41, [55] (appeal taken from Scot.).

## II. RESOLVING THE CRISES

### A. *The American Crisis*

Part I noted that Donald Trump's presidency generated a significant amount of litigation challenging the constitutionality of his executive actions. Although these cases took place outside the strict confines of impeachment, they are nevertheless an important part of the broader context of debates about the scope of executive power at the heart of the American constitutional crisis. And while the Trump administration suffered some setbacks in the early stages of several cases, it often received a much more favorable hearing on further review. These cases raise questions about the extent to which an increasingly politicized federal judiciary operates as a check on executive power in the current American political climate.<sup>143</sup>

Take the example of Trump's travel ban discussed above.<sup>144</sup> The first version of the ban was enjoined by the federal district court, and the government's request for stay was denied by the Court of Appeals.<sup>145</sup> The president revoked this ban and replaced it with a new version, which was likewise met with injunctions upheld by several courts of appeals.<sup>146</sup> A third version of the travel ban was once more enjoined by a district court ruling that was yet again ultimately affirmed by the Court of Appeals.<sup>147</sup> Along the way, reports emerged that some Customs and Border Protection agents may have been defying these injunctions by continuing to detain travelers and denying them access to counsel.<sup>148</sup> Yet despite the consistent pattern of judicial rejections of the travel ban in the lower courts, a sharply divided Supreme Court upheld the final version of the president's order against statutory and constitutional challenges—with the Court's five Republican appointed Justices in the majority and its four Democratic appointed Justices in dissent.<sup>149</sup>

---

<sup>143</sup> Senate Majority Leader Mitch McConnell has made the confirmation of Trump appointed judges a priority, and has reportedly encouraged some judges to take senior status so that they can be replaced while Republicans still hold their majority. See Carl Hulse, *McConnell Has a Request for Veteran Federal Judges: Please Quit*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/mcconnell-judges-republicans.html>.

<sup>144</sup> See *supra* notes 35–44 and accompanying text.

<sup>145</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2403.

<sup>146</sup> See *id.* at 2404.

<sup>147</sup> See *id.* at 2405.

<sup>148</sup> See Edward Helmore & Alan Yuhas, *Border Agents Defy Courts on Trump Travel Ban, Congressmen and Lawyers Say*, GUARDIAN (Jan. 30, 2017), <https://www.theguardian.com/us-news/2017/jan/29/customs-border-protection-agents-trump-muslim-country-travel-ban>.

<sup>149</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2423.

An analogous pattern of early judicial intervention followed by reversals later in litigation can be seen in other cases. Consider *Committee on the Judiciary v. McGahn*,<sup>150</sup> cited above as the dispute occasioned Judge Jackson’s observation that “Presidents are not kings.”<sup>151</sup> The House Judiciary Committee (the Committee) was investigating whether Russia had interfered in the 2016 U.S. presidential election and whether Trump and his associates engaged in any misconduct.<sup>152</sup> When the Committee issued a subpoena to former White House Counsel McGahn, the President ordered him not to appear and testify.<sup>153</sup> Moreover, the Department of Justice maintained federal courts were without subject matter jurisdiction over subpoena-enforcement claims against high-level presidential aides, and that such executive branch officials “are absolutely immune from being compelled to testify before Congress if the President orders them not to do so.”<sup>154</sup> Judge Jackson emphatically rejected the claim of absolute immunity, adding “that this conclusion is inescapable precisely because compulsory appearance by dint of a subpoena is a legal construct, not a political one, and per the Constitution, no one is above the law.”<sup>155</sup> But this, too, proved to be a fleeting limit on executive authority—for the Court of Appeals subsequently reversed the decision, characterizing the case as an “interbranch information dispute” over which federal courts had no jurisdiction.<sup>156</sup> The panel’s two Republican appointed judges made up the majority, and the one Democratic appointed judge was in dissent.<sup>157</sup>

Further appellate review merely prolonged the dispute and uncertainty in *McGahn*. The D.C. Circuit Court of Appeals agreed to rehear the case en banc,<sup>158</sup> and subsequently held that the Committee had Article III standing to seek enforcement of its subpoena in federal court.<sup>159</sup> Yet the en banc panel also remanded the case back to a three-judge panel to address the remaining legal questions—and that panel once again dismissed the case, this time on the

---

<sup>150</sup> See *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019).

<sup>151</sup> See *id.* at 213; *supra* note 16 and accompanying text.

<sup>152</sup> See *McGahn*, 415 F. Supp. 3d at 156.

<sup>153</sup> See *id.* at 154.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 215.

<sup>156</sup> *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510, 513 (D.C. Cir. 2020).

<sup>157</sup> See *id.*; see also Spencer S. Hsu & Ann E. Marimow, *Former White House Counsel Don McGahn Does Not Have to Testify to House, Appeals Court Finds*, WASH. POST (Feb. 28, 2020), [https://www.washingtonpost.com/local/legal-issues/former-white-house-counsel-don-mcgahn-does-not-have-to-testify-to-house-appeals-court-finds/2020/02/28/eb846412-3c5a-11ea-baca-eb7ace0a3455\\_story.html](https://www.washingtonpost.com/local/legal-issues/former-white-house-counsel-don-mcgahn-does-not-have-to-testify-to-house-appeals-court-finds/2020/02/28/eb846412-3c5a-11ea-baca-eb7ace0a3455_story.html).

<sup>158</sup> See *U.S. House of Representatives v. Mnuchin*, 2020 WL 1228477 (D.C. Cir. 2020).

<sup>159</sup> *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020).

grounds that Congress itself had never actually authorized the House to bring a cause of action of this kind.<sup>160</sup> Even though Speaker Pelosi announced plans to seek a new appeal, there was not sufficient time for the case to be resolved before the 2020 elections.<sup>161</sup> Similar developments emerged in the Emoluments Clause cases. One suit was brought by members of Congress, but was dismissed for lack of standing by the D.C. Circuit.<sup>162</sup> Other suits brought by individual plaintiffs<sup>163</sup> and by the state of Maryland and the District of Columbia were also subject to dismissal at various stages, but were later revived on appeal.<sup>164</sup> However, these cases were likewise not resolved prior to the 2020 elections, and were dismissed as moot after Trump left office.<sup>165</sup>

The upshot is that these numerous attempts by citizens and their elected representatives to hold the President accountable in the run-up to impeachment were never fully vindicated in the courts. Instead, broad claims of executive authority succeeded in denying or delaying efforts to obtain information that may be vital to a legal and political assessment of Trump's official actions. Even during the impeachment proceedings, when Trump flatly declined to cooperate with the House investigation, it was by no means clear that the judicial branch would ultimately order compliance. Rather, there seemed to be a real possibility that the Court's more conservative Justices (two of whom had been appointed by Trump himself) "would take the position that the judicial branch should abstain from a conflict between the other two branches—a way of dodging the issue that would effectively allow them to give Mr. Trump a victory."<sup>166</sup>

Congress accordingly proceeded to address the constitutional crisis on its own, in the absence of executive cooperation, and largely without judicial assistance in enforcing its constitutionally committed powers of impeachment.

---

<sup>160</sup> Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020).

<sup>161</sup> See Spencer S. Hu & Ann E. Marimow, *Court Dismisses House Lawsuit Seeking to Enforce a Subpoena of Former White House Counsel Donald McGahn*, WASH. POST (Aug. 31, 2020), [https://www.washingtonpost.com/local/legal-issues/court-dismisses-house-lawsuit-seeking-to-enforce-a-subpoena-of-former-white-house-counsel-donald-mcgahn/2020/08/31/c693ad3e-ebaf-11ea-ab4e-581edb849379\\_story.html](https://www.washingtonpost.com/local/legal-issues/court-dismisses-house-lawsuit-seeking-to-enforce-a-subpoena-of-former-white-house-counsel-donald-mcgahn/2020/08/31/c693ad3e-ebaf-11ea-ab4e-581edb849379_story.html); Ann E. Marimow, *Biden Administration and Pelosi Lawyers at Odds in Don McGahn Subpoena Lawsuit*, WASH. POST (Feb. 18, 2021), [https://www.washingtonpost.com/local/legal-issues/don-mcgahn-subpoena-lawsuit-in-limbo/2021/02/18/d63b6a06-709d-11eb-85fa-e0ccb3660358\\_story.html](https://www.washingtonpost.com/local/legal-issues/don-mcgahn-subpoena-lawsuit-in-limbo/2021/02/18/d63b6a06-709d-11eb-85fa-e0ccb3660358_story.html).

<sup>162</sup> See *Blumenthal v. Trump*, 949 F.3d 14, 20–21 (D.C. Cir. 2020).

<sup>163</sup> See *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178 (2d Cir. 2019) (reversing order to dismiss for lack of subject matter jurisdiction).

<sup>164</sup> See *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc) (vacating panel's opinion and declining to issue writ of mandamus requested by President).

<sup>165</sup> See Adam Liptak, *Supreme Court Ends Emoluments Suits Against Trump*, N.Y. TIMES (Jan. 25, 2021), <https://www.nytimes.com/2021/01/25/us/emoluments-trump-supreme-court.html>.

<sup>166</sup> Feldman, *supra* note 12.

The House of Representatives adopted its two Articles of Impeachment for abuse of power and obstruction of Congress on December 18, 2019.<sup>167</sup> Impeachment managers then delivered the Articles to the Senate,<sup>168</sup> where the trial began in earnest on January 21, 2020.<sup>169</sup> Representative Adam Schiff's opening statements drew heavily upon monarchical metaphors similar to those invoked by Judge Jackson in the *McGahn* litigation. Schiff argued that Trump's vision about executive authority and effective immunity from indictment or impeachment "makes him a monarch, the very evil against which our Constitution and the balance of powers it carefully laid out, was designed to guard against."<sup>170</sup> The Framers included the impeachment power for such a situation: "For a man who would believe that the constitution gave him the right to do anything he wanted and practiced in the art of deception. For a man who believed himself above the law and beholden to no one. For a man, in short, who would be a king."<sup>171</sup>

Schiff also emphasized notions of electoral integrity and democratic accountability. He argued that by allegedly soliciting foreign interference in U.S. elections, Trump had attempted "to cheat" by using "official state powers—available to him and unavailable to any political opponent—to advantage himself in our democratic election."<sup>172</sup> These actions were said to have the effect of undermining ordinary democratic processes. Impeachment and removal were therefore essential, lest Americans be "left unprotected against a president who would abuse his power for the very purpose of corrupting the only other method of accountability: our elections themselves."<sup>173</sup> Failure to convict Trump would "permanently alter the balance of power among our branches of government, inviting future presidents to operate as if they too are also beyond the reach of accountability, congressional oversight, and the law."<sup>174</sup>

---

<sup>167</sup> See Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html>.

<sup>168</sup> See Nicholas Fandos & Sheryl Gay Stolberg, *House Delivers Impeachment Charges to Senate, Paving the Way for Trial*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/us/politics/impeachment-managers.html>.

<sup>169</sup> See Nicholas Fandos, *Trump Impeachment: What to Expect as the Senate Trial Begins Today*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/politics/trump.html>.

<sup>170</sup> See Read Adam Schiff's Opening Statement at Senate Impeachment Trial, CNN (Jan. 21, 2020), <https://www.cnn.com/2020/01/21/politics/chairman-schiff-opening-statement/index.html> (reproducing Schiff's statement in response to Senate Majority Leader's resolution on conduct of trial).

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

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

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

Predictably, the President's defenders offered a dramatically different account of the impeachment charges and the impeachment process. Some argued that many of the charges leveled against Trump would not necessarily constitute impeachable offenses even if they were true. For example, Alan Dershowitz maintained that "purely noncriminal conduct including abuse of power and obstruction of Congress are outside the range of impeachable offenses."<sup>175</sup> This immunity from impeachment would include conduct alleged by former National Security Advisor John Bolton. Bolton had drafted a book reportedly corroborating the claim that Trump had conditioned military aid to Ukraine on the country's willingness to assist with investigations of the President's political rivals.<sup>176</sup> Yet Dershowitz insisted that "nothing in the Bolton revelations, even if true, would rise to the level of an abuse of power or an impeachable offense[.]"<sup>177</sup> Such arguments appear to have been favorably received by members of the Senate's Republican majority; the chamber voted largely along party lines not to hear testimony from Bolton or subpoena any documents concerning his allegations.<sup>178</sup>

The remainder of Trump's impeachment trial concluded quickly. The Senate voted to acquit the President on both Articles on February 5, a mere two weeks after opening statements began.<sup>179</sup> Only a single Republican supported either charge: Utah Senator Mitt Romney voted to convict the President for abuse of power.<sup>180</sup> A chief executive who had been elected without a popular mandate, who claimed that he had "the right to do whatever I want as president,"<sup>181</sup> who insisted that his conversation with the Ukrainian leader about investigating

---

<sup>175</sup> Fred Barbash, *Madison, Hamilton, Dershowitz: One of These Men Is Not Like the Others, but for the GOP He's a Better Quote*, WASH. POST (Jan. 29, 2020) (quoting Dershowitz), <https://www.washingtonpost.com/nation/2020/01/29/dershowitz-impeachment-speech/>.

<sup>176</sup> See Michael D. Shear & Nicholas Fandos, *Bolton Revelations Anger Republicans, Fueling Push for Impeachment Witnesses*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/politics/john-bolton-impeachment-witness.html?smid=pc-the-daily>; Michael S. Schmidt & Maggie Haberman, *Bolton Was Concerned That Trump Did Favors for Autocratic Leaders, Book Says*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/politics/john-bolton-trump-book-barr.html?smid=pc-the-daily>.

<sup>177</sup> Barbash, *supra* note 175.

<sup>178</sup> See Michael D. Shear & Nicholas Fandos, *Republicans Block Impeachment Witnesses, Clearing Path for Trump Acquittal*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-impeachment-trial.html> [hereinafter Shear & Fandos, *Republicans Block Impeachment Witnesses*].

<sup>179</sup> Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html> [hereinafter Baker, *Impeachment Trial Updates*].

<sup>180</sup> See *id.*

<sup>181</sup> Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'The Right To Do Whatever I Want'*, WASH. POST (July 23, 2019) (quoting President Trump) (quotations omitted), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/>.

political rivals was “perfect[.]”<sup>182</sup> and whose expansive notions of executive authority had precipitated a constitutional crisis had once again avoided accountability. All of this took place against a backdrop of assertions that presidents are not kings, with the implicit corollary that the American system imposes greater constitutional limits on executive power than the British system from which it emerged. To test that corollary, the analysis now turns to a comparative examination of how the United Kingdom’s constitutional crisis between the executive and the legislative branches was resolved.

### *B. The British Crisis*

As discussed above,<sup>183</sup> the actions of the British executive were also subject to litigation during the Brexit saga that culminated in the United Kingdom’s contemporaneous constitutional crisis. The decisions in these cases stand in stark contrast to the results in many of the disputes surrounding Trump’s use of executive power. Whereas Trump’s expansive assertions of executive authority often enabled him to avoid scrutiny even from Congress, both Theresa May and Boris Johnson saw their executive actions held to closer account. Recall, for instance, that when May sought to implement the results of the Brexit referendum by giving the EU notice of Britain’s intention to withdraw, the U.K. Supreme Court held that this Royal prerogative could not be exercised without legislative authorization.<sup>184</sup> This conclusion followed from the fundamental principle of parliamentary sovereignty.<sup>185</sup> A further conclusion that follows from this principle is that the Prime Minister does not enjoy anything approaching the kind of absolute immunity from oversight asserted by the Trump administration, much less “the right to do whatever they want”<sup>186</sup> by virtue of their office—for the British executive’s democratic legitimacy derives entirely from the confidence of Parliament, to which the government always remains accountable for its actions.<sup>187</sup>

The same principles of parliamentary sovereignty and democratic accountability lay behind the U.K. Supreme Court’s decision that Boris Johnson’s attempt to prorogue Parliament was unlawful. The Court described representative democracy through the House of Commons as one of the

---

<sup>182</sup> See Shear & Fandos, *Republicans Block Impeachment Witnesses*, *supra* note 178.

<sup>183</sup> See *supra* notes 90–101, 132–35 and accompanying text.

<sup>184</sup> See *R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5, [121].

<sup>185</sup> See *id.* at [43].

<sup>186</sup> Brice-Saddler, *supra* note 181.

<sup>187</sup> See *R (Miller) v. The Prime Minister*, [2019] UKSC 41, [55] (appeal taken from Scot.).

foundations of the British constitution,<sup>188</sup> and framed the primary question in the case as “whether the Prime Minister’s action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.”<sup>189</sup> The Court answered this question in the affirmative.<sup>190</sup> The imminent Brexit deadline would bring a fundamental change in U.K. constitutional law, and prorogation would prevent Parliament in their role as “the democratically elected representatives of the people” from having a voice in how that change would come about.<sup>191</sup> While the Court acknowledged that ministers must have “a great deal of latitude” in making decisions within their constitutional remit, it concluded that there was no evidence that would justify the government’s decision to prorogue Parliament for five weeks at such a crucial juncture.<sup>192</sup>

Here again, this unambiguous judicial reaffirmation of Parliament’s role in holding the British executive accountable contrasts with many of the judicial responses to Congress’ efforts to do the same with respect to the American executive. For example, one might frame the question raised by presidential refusals to respond to congressional subpoenas in similar terms as the question raised by prime ministerial attempts to prorogue Parliament—i.e., as whether the action had the effect of frustrating or preventing the constitutional role of the legislature in holding the government to account. Indeed, the House Judiciary Committee framed their claim in nearly just such a manner in the *McGahn* case: it argued “that the Executive Branch’s assertion of a constitutional privilege [was] obstructing the Committee’s investigation.”<sup>193</sup> But whereas the U.K. Supreme Court held that Johnson’s move to prorogue was unlawful, the original panel in the D.C. Circuit Court of Appeals held that although Trump’s “obstruction may seriously and even unlawfully hinder the Committee’s efforts to probe presidential wrongdoing . . . it is not a ‘judicially cognizable’ injury.”<sup>194</sup> The D.C. Circuit Court took a similar position with respect to justiciability in the Emoluments Clause suit brought by members of Congress. The Court noted that its “standing inquiry is ‘especially rigorous’ in a case like this, where ‘reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was

---

<sup>188</sup> *See id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See id.* at [57].

<sup>192</sup> *Id.* at [58].

<sup>193</sup> Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510, 517 (D.C. Cir. 2020) (internal citations omitted).

<sup>194</sup> *Id.*

unconstitutional.”<sup>195</sup> Both cases were said to implicate separation of powers concerns, further counseling against judicial intervention.<sup>196</sup>

It should be emphasized that justiciability and separation of powers are not uniquely American principles, so the different outcomes reached by the U.S. and U.K. courts cannot be explained simply with reference to those doctrines. To the contrary, the U.K. Supreme Court directly engaged with and rejected such arguments in ruling against Johnson’s attempt to prorogue Parliament. Counsel for the Prime Minister had maintained that the case did “not raise any legal question on which the courts can properly adjudicate[,]”<sup>197</sup> and that the decision to prorogue was among the “excluded categories” or questions of “high policy” that were not susceptible to judicial review.<sup>198</sup> But the Court concluded that while “the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it.”<sup>199</sup> Nor would resolving the inter-branch dispute violate separation of powers. Rather, the courts have the “particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.”<sup>200</sup> Thus, “by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be *giving effect* to the separation of powers.”<sup>201</sup>

The different outcomes reached by the American and British courts had different implications for the American and British constitutional crises. In the United States, executive defiance of congressional subpoenas came in the context of investigations into whether unconstitutional or impeachable conduct occurred. Even if the decisions dismissing congressional suits and enforcement actions were ultimately reversed after further review, such reversals would obviously come far too late to have an impact on the constitutional crisis surrounding Trump’s now-concluded impeachment dispute. In the United Kingdom, executive attempts to commence Brexit without legislative approval and to prorogue Parliament at a key moment were promptly checked and their impacts limited. Each jurisdiction’s courts attended to questions of justiciability

---

<sup>195</sup> *Blumenthal v. Trump*, 949 F.3d 14 at 20 (D.C. Cir. 2020).

<sup>196</sup> *See McGahn*, 951 F.3d 510 at 516; *Blumenthal*, 949 F.3d 14 at 20.

<sup>197</sup> *R (Miller) v. The Prime Minister*, [2019] UKSC 41, [28] (appeal taken from Scot.).

<sup>198</sup> *Id.* at [36].

<sup>199</sup> *Id.* at [31].

<sup>200</sup> *Id.* at [39].

<sup>201</sup> *Id.* at [34] (emphasis added).

and separation of powers, but resolved those questions in opposite ways based on contrasting notions of executive authority and democratic accountability.

The judicial forum was not the only context in which resolution of the American and British constitutional crises unfolded in dramatically divergent directions. Whereas Donald Trump implacably denied the very legitimacy of impeachment and refused to cooperate with congressional efforts to hold him democratically accountable for his actions, Boris Johnson affirmatively encouraged parliamentary action to submit his Brexit agenda to democratic scrutiny. Specifically, Johnson moved for Parliament to call an early general election on three separate occasions during the Brexit crisis: after passage of the Benn Act on September 4 requiring the Prime Minister to seek an extension of the Brexit deadline if no departure deal had been approved;<sup>202</sup> immediately before the beginning of the attempted prorogation of Parliament on September 9;<sup>203</sup> and again on October 28 after Parliament had resumed sitting and still not approved his Brexit plans.<sup>204</sup> Each of these attempts failed to receive the two-thirds majority required for a snap election under the Fixed-Term Parliaments Act.<sup>205</sup> In response, Johnson secured passage of a bill by a simple majority vote creating a one-off exception to the Fixed-Term Act and setting an early election for December 12.<sup>206</sup>

To be sure, these efforts to call an early election could be characterized as attempts by the Prime Minister to get around parliamentary resistance to his Brexit approach. But the route taken around Parliament was one that led directly into the electorate; the voters themselves would have an almost immediate opportunity to hold the government accountable and to weigh in on the proper path forward. Johnson's Conservative Party would ultimately prevail in the

---

<sup>202</sup> See Andrew Sparrow, Simon Murphy, Kate Lyons, & Jedidajah Otte, *UK Government Fails in Bid to Call Election for 15 October—As it Happened*, *GUARDIAN* (Sept. 4, 2019), <https://www.theguardian.com/politics/live/2019/sep/04/brexit-crisis-boris-johnson-mps-bill-blocking-no-deal-eu-no-deal-parliament-politics-live>; *Boris Johnson's Call for General Election Rejected by MPs*, *BBC NEWS* (Sept. 4, 2019), <https://www.bbc.com/news/uk-politics-49584907>.

<sup>203</sup> See Rowena Mason, *Boris Johnson Loses Sixth Vote in Six Days as Election Bid Fails*, *GUARDIAN* (Sept. 9, 2019), <https://www.theguardian.com/politics/2019/sep/09/mps-order-johnson-to-hand-over-aides-messages-about-prorogation>; *Brexit: Boris Johnson's Second Attempt to Trigger Election Fails*, *BBC NEWS* (Sept. 10, 2019), <https://www.bbc.com/news/uk-politics-49630094>.

<sup>204</sup> See Mason, *supra* note 203; *Boris Johnson Fails in Third Attempt to Call Early General Election*, *GUARDIAN* (Oct. 28, 2019), <https://www.theguardian.com/politics/2019/oct/28/boris-johnson-third-attempt-general-election-fails>; Tom Edgington, *Could There be an Early General Election?*, *BBC NEWS* (Oct. 28, 2019), <https://www.bbc.com/news/uk-politics-49004486>.

<sup>205</sup> See Fixed-Term Parliaments Act 2011, c. 14 § 2; see also *supra* notes 202–04.

<sup>206</sup> See Early Parliamentary General Election Act 2019, c. 29; see also Peter Walker, *MPs Poised to Vote Through Plan for December Election*, *GUARDIAN* (Oct. 29, 2019), <https://www.theguardian.com/politics/2019/oct/29/rush-to-election-slowed-mp-stella-creasy-backbench-labour-amendment>.

general election, winning a Tory majority of seventy-eight seats.<sup>207</sup> Johnson thereby retained his position as Prime Minister, much as Trump retained his position as President. Yet if the outcome for each holder of executive office was similar, the process of resolving the constitutional crisis they each helped to precipitate was not. The British courts were more consistent and emphatic than their American counterparts in checking the scope of executive power, and Parliament was far more successful than Congress in asserting its constitutional role in holding the executive to account. Just as importantly, the British people played a much more direct and democratic part than the one played by American voters in resolving their country's constitutional crisis. The lessons to be drawn from these divergent experiences are explored in Part III below.

### III. INTERPRETING THE CRISES

#### A. *The Limits of Separation of Powers as a Check on Presidential Authority*

The details and denouements of the constitutional crises in the United States and the United Kingdom reveal significant differences between each country's commitments to executive accountability and democratic governance. Starting with the United States, the record that emerges from Donald Trump's impeachment saga is replete with robust claims of executive authority that have been insulated from democratic scrutiny and have largely gone unchecked by other branches of government. This suggests that the Constitution's separation of powers provisions are not always up to the task they were designed to accomplish. Structural separation is said to be "a vital check against tyranny,"<sup>208</sup> one that secures liberty and promotes government accountability.<sup>209</sup> But these goals can be served only if and to the extent that each branch is willing to play its constitutional role in checking and balancing the others. When the same political party controls multiple branches of the federal government, the structural safeguards of separation of powers can be undermined by the corrosive effects of shared political interests.<sup>210</sup>

---

<sup>207</sup> See Heather Stewart & Rowena Mason, *Boris Johnson Leads Tories to Historic General Election Win*, GUARDIAN (Dec. 13, 2019), <https://www.theguardian.com/politics/2019/dec/13/boris-johnson-leads-tories-historic-general-election-win>; *Election Results 2019: Boris Johnson Returns to Power with Big Majority*, BBC NEWS (Dec. 13, 2019), <https://www.bbc.com/news/election-2019-50765773>.

<sup>208</sup> *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

<sup>209</sup> See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008); see also Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 349 (2016).

<sup>210</sup> See Daryl J. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 1, 3 (2006) ("Few aspects of the founding generations's political theory are now more cluely anachronistic than their vision of legislative-executive separation of powers.").

The constitutional crisis surrounding Trump's impeachment highlights this point with particular force with respect to executive accountability. The Articles of Impeachment adopted by the Democratic-controlled House were fundamentally about the accountability of the President—accountability to the voters in the form of a fair electoral process untainted by foreign interference, and accountability to Congress in the form of an investigatory and impeachment proceeding unobstructed by executive recalcitrance.<sup>211</sup> The Republican-controlled Senate, however, showed little appetite for meaningful exploration of these charges. The Senate impeachment trial barely lasted a fortnight, and the chamber voted not even to call witnesses or review documents that might substantiate the charges against Trump.<sup>212</sup> The President's expansive claims of executive authority and effective immunity from congressional oversight thus went un rebutted by the very branch that separation of powers theory implies should be zealously safeguarding its own constitutional prerogatives.<sup>213</sup>

Nor has the judicial branch been consistently willing and able to ensure executive accountability when the legislative branch has not. Many of the documents sought by the House of Representatives in connection with its investigations of the President were not produced, and the enforceability of the subpoenas has yet to be unambiguously affirmed by the courts.<sup>214</sup> The absence of judicial enforcement paired with the ideological alignment of the judges in these cases raises questions about the political independence of the courts. Indeed, both Trump and Senate majority leader Mitch McConnell have placed considerable emphasis on federal judicial appointments. Trump released a list of possible Supreme Court nominees when he was still a candidate for office in 2016, reportedly with guidance from conservative groups like the Federalist Society and the Heritage Foundation.<sup>215</sup> He subsequently nominated current Justice Neil Gorsuch to the bench after McConnell and Senate Republicans refused for several months to take any action on Barack Obama's nomination of

---

<sup>211</sup> See Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019), <https://www.congress.gov/116/bills/hres/755/BILLS-116hres755enr.pdf>.

<sup>212</sup> See *supra* note 178 and accompanying text.

<sup>213</sup> See, e.g., THE FEDERALIST No. 51 (James Madison) ("But the greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department[] the necessary constitutional means and personal motives to resist encroachments of the others."); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (analyzing historical origins and purposes of separation of powers in United States constitutional law).

<sup>214</sup> See *supra* notes 157–65 and accompanying text.

<sup>215</sup> See Alan Rappoport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

Merrick Garland to the seat.<sup>216</sup> By June 2020, the Senate had confirmed 200 of Trump's judicial nominees and filled every vacancy on the Courts of Appeals—a milestone that McConnell trumpeted as “a victory for the rule of law and for the Constitution itself.”<sup>217</sup> Trump has attempted to make the composition of the courts an issue in the 2020 election as well, tweeting that “horrible & politically charged decisions coming out of the Supreme Court are shotgun blasts in the face of people that are proud to call themselves Republicans or Conservatives” and “We need more Justices or we will lose our 2nd. Amendment & everything else. Vote Trump 2020!”<sup>218</sup>

Perhaps not surprisingly, the increasing partisanship of the judiciary has been on display in suits involving Trump himself. In one of the Emoluments Clause cases cited above, the Fourth Circuit rejected en banc the President's request to dismiss claims brought by the District of Columbia and the State of Maryland.<sup>219</sup> The majority consisted of nine judges who had been nominated by Democratic presidents, while the dissent was comprised of six judges who had been appointed by Republicans.<sup>220</sup> The lead dissenting opinion accused plaintiffs of “seeking to harness the coercive machinery of legal process to drag the President through what are coming to seem more and more like interminable proceedings,” and suggested that “something other than law [was] afoot” in the majority's analysis.<sup>221</sup> For its part, a concurring opinion lamented that “the public's confidence and trust in the integrity of the judiciary suffer greatly when judges who disagree with their colleagues' view of the law accuse those colleagues of abandoning their constitutional oath of office[.]”<sup>222</sup> and implied

---

<sup>216</sup> See Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>.

<sup>217</sup> Carl Hulse, *With Wilson Confirmation, Trump and Senate Republicans Achieve a Milestone*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/trump-senate-judges-wilson.html> (internal quotations omitted).

<sup>218</sup> See Quint Forgy, *After Week of Supreme Court Defeats, Trump Says He'll Release New Shortlist of Potential Justices*, POLITICO (June 18, 2020), <https://www.politico.com/news/2020/06/18/trump-supreme-court-daca-327952> (quoting Donald J. Trump).

<sup>219</sup> See *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc) (denying Trump's petition for writ of mandamus ordering certification of interlocutory appeal or dismissal of complaint); see also *supra* notes 53, 163 and accompanying text.

<sup>220</sup> See *In re Trump*, 958 F.3d 274; see also Josh Gerstein, *Appeals Court Greenlights Emoluments Suit Against Trump*, POLITICO (May 14, 2020), <https://www.politico.com/news/2020/05/14/appeals-court-greenlights-emoluments-suit-against-trump-257884>.

<sup>221</sup> *In re Trump*, 958 F.3d at 308 (Wilkinson, dissenting).

<sup>222</sup> *Id.* at 289–90 (Wynn, concurring).

that at least one dissenter was “disparaging the judges in the majority as political hacks[.]”<sup>223</sup>

Such open partisan division on the bench compounds doubts about the sufficiency of the American model of separation of powers as a check on executive overreach. If judges are going to join Senators in regarding challenges to Presidential action as mere political disagreements, how is the executive to be held to account? One seemingly obvious answer is through the ballot box in the next presidential election. Indeed, some Republican Senators invoked the then-forthcoming 2020 election as a reason for voting to acquit Trump.<sup>224</sup> Lamar Alexander, for example, concluded that while the President had done something “clearly inappropriate,” the Senate should not substitute its judgment for that of the voters by convicting Trump and possibly removing him from eligibility for office.<sup>225</sup> By this rationale, acquittal served, rather than undermined, democratic accountability by leaving the ultimate verdict to the people themselves.

But the presidency and impeachment of Donald Trump highlight several ways in which elections are a highly imperfect mechanism of enforcing executive accountability. First, the President is insulated from democratic accountability by virtue of the Electoral College system—so even if a significant majority of voters decided that Trump had abused the powers of his office and cast their ballots accordingly, he could nevertheless have won reelection.<sup>226</sup> Second, some of the charges levelled against Trump concerned the integrity of the electoral process itself. By allegedly soliciting foreign interference, Trump was accused of attempting to corrupt and pervert the very mechanism by which some of his defenders argued he should be judged.<sup>227</sup> Moreover, as 2020 summer polls showed the President trailing his presumptive Democratic opponent, Trump began preemptively questioning the legitimacy of the coming election and declined to commit to accepting its results.<sup>228</sup>

---

<sup>223</sup> *Id.* at 290.

<sup>224</sup> Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html>.

<sup>225</sup> Sheryl Gay Stolberg & Carl Hulse, *Alexander Says Convicting Trump Would ‘Pour Gasoline on Cultural Fires’*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/alexander-impeachment-witnesses.html>. For discussion of the discretionary nature of disqualification from future office after conviction in the Senate, see John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 662–63 (1999).

<sup>226</sup> See *supra* notes 31–34 and accompanying text.

<sup>227</sup> See *supra* notes 171–73 and accompanying text.

<sup>228</sup> See Marshall Cohen, *‘Things Could Get Very Ugly’: Experts Fear Post-Election Crisis as Trump Sets the Stage to Dispute the Results in November*, CNN (July 21, 2020), <https://www.cnn.com/2020/07/20/politics/disputed-election-crisis-trump/index.html>.

Finally, the judiciary's failure to ensure executive compliance with subpoenas may have deprived voters of potentially critical information in their assessment of Trump's fitness for reelection. The House's subpoena of an unredacted version of Special Counsel Robert Mueller's report into alleged Russian interference in the 2016 election is an instructive example. The Committee on the Judiciary made clear that its inquiry into whether Trump may have obstructed justice in connection with Mueller's investigation was ongoing even after the original Articles of Impeachment against the president had been approved, and argued that it had a particularized need to access Mueller's report and related materials.<sup>229</sup> Regardless of whether these materials were ever released directly to the public, they could have informed the House's decision about whether new Articles of Impeachment were in order, which may in turn have informed voters' decisions about whether Trump should be reelected to the presidency. The Supreme Court granted certiorari on the enforceability of the Committee's subpoena,<sup>230</sup> but stayed enforcement in the meanwhile<sup>231</sup>—meaning that even if compliance were ultimately ordered, it would almost certainly come too late to play a role in the 2020 election.

Similar observations can be made with respect to two additional highly-anticipated cases decided at the end of the Supreme Court's 2019–2020 term: *Trump v. Mazars*<sup>232</sup> and *Trump v. Vance*.<sup>233</sup> While these cases did not directly involve the impeachment crisis, they nevertheless have important implications for executive accountability. The *Mazars* case arose out of efforts by three House committees to obtain tax returns and other information about Trump's finances, ostensibly for the purpose of guiding “legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U.S. elections”<sup>234</sup>—i.e., in furtherance of the House's legislative rather than impeachment powers.<sup>235</sup> Trump argued that all subpoenas seeking the President's information—including nonprivileged, personal information—should be subject to a showing of “demonstrated, specific need” before they can be enforced.<sup>236</sup> The Court declined to adopt the heightened standards urged by the President, noting that they would “risk seriously impeding Congress in

---

<sup>229</sup> See *In re* Application of the Comm. on the Judiciary, U.S. House of Representatives v. Dep't of Justice, 951 F.3d 589 (D.C. Cir. 2020) (holding that the District Court did not abuse discretion in concluding that Committee established particularized need for materials).

<sup>230</sup> See Dep't of Justice v. House Comm. on Judiciary, No. 19-1328, 2020 WL 3578680 (2020).

<sup>231</sup> See Dep't of Justice v. House Comm. on Judiciary, 140 S. Ct. 2800 (2020).

<sup>232</sup> 140 S. Ct. 2019 (2020).

<sup>233</sup> 140 S. Ct. 2412 (2020).

<sup>234</sup> *Trump v. Mazars*, 140 S. Ct. 2019, 2022 (2020).

<sup>235</sup> See *id.* at 2028.

<sup>236</sup> *Id.* at 2032.

carrying out its responsibilities.”<sup>237</sup> But at the same time, the Court also noted that “[w]ithout limits on its subpoena powers, Congress could ‘exert an imperious controul’ over the Executive Branch and aggrandize itself at the President’s expense, just as the Framers feared.”<sup>238</sup> The Court therefore remanded the case for further proceedings and held that enforceability of the subpoenas should be governed by an assessment of a range of factors, including the availability of other sources for the information sought by Congress; whether the requests were no broader than reasonably necessary; the evidence offered by Congress to show that the information would advance a valid legislative purpose; and the extent of the burden the subpoenas would impose on the President.<sup>239</sup>

*Trump v. Vance* likewise involved a subpoena for information about the President’s taxes and financial records, but this subpoena was issued by the New York County District Attorney’s Office rather than by Congress.<sup>240</sup> Trump argued that “a sitting President enjoys absolute immunity from state criminal process” and that the subpoena was therefore unenforceable.<sup>241</sup> The U.S. Supreme Court unanimously rejected this argument.<sup>242</sup> By a narrower margin, the Court also rejected the argument that information sought in connection with a state grand jury investigation must be shown to be “critical” for “specific charging decisions” and that the subpoena be a “last resort” in the sense that the evidence is otherwise unavailable and necessary before the expiration of the President’s term in office.<sup>243</sup> The majority reiterated the principle “that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding.”<sup>244</sup> However, the Court once again remanded the case for further proceedings that would allow Trump to raise more particularized constitutional challenges to compliance with specific subpoena demands.<sup>245</sup>

The decisions in *Mazars* and *Vance* are undoubtedly important for their rejection of the heightened enforceability standards advanced by Trump and for their reiteration of presidential amenability to at least some subpoenas. But while the cases may have represented legal defeats for the President in some ways,

---

<sup>237</sup> *Id.* at 2033.

<sup>238</sup> *Id.* at 2034 (citation omitted).

<sup>239</sup> *Id.* at 2036.

<sup>240</sup> 140 S. Ct. 2412, 2416 (2020).

<sup>241</sup> *Id.*

<sup>242</sup> *See id.* at 2429.

<sup>243</sup> *Id.* (internal citations and quotations omitted).

<sup>244</sup> *Id.* at 2431.

<sup>245</sup> *Id.*

they also represented practical victories in other ways. A majority of Americans believed that Trump had a responsibility to release his tax returns,<sup>246</sup> as every other President has done over the past four decades.<sup>247</sup> Yet Trump repeatedly avoided disclosing this information to the public.<sup>248</sup> *Mazars* and *Vance* presaged the possibility that the President's returns might at least be disclosed to Congress or to the District Attorney's Office, but both cases were remanded to the lower courts—where Trump would have the opportunity to raise additional arguments against disclosure of the information at issue. Once again, even if Trump's financial records would eventually be turned over to prosecutors, the delays caused by litigation meant that this disclosure would not take place before the 2020 presidential election.<sup>249</sup> The ability of voters to hold the executive accountable may have been impaired accordingly.

Congressional passivity and judicial inconsistency with respect to executive authority has thus contributed to a situation in which the mechanisms of electoral oversight have themselves been weakened, leaving the President far less susceptible to democratic accountability than conventional notions of American democratic exceptionalism might assume. The degree of executive insulation from accountability as revealed by America's recent constitutional crisis is all the more striking when compared to the insights revealed by Britain's crisis, the lessons of which are explored below.

### *B. Parliamentary Sovereignty, Judicial Independence, and Democratic Accountability*

If the dominant theme that emerges from impeachment is one of unchecked executive authority, the dominant themes that emerge from Brexit are those of popular and parliamentary sovereignty. Both Theresa May and Boris Johnson saw their attempts to use executive powers repeatedly frustrated—whether those attempts involved transmitting notice of Britain's departure from the EU without

---

<sup>246</sup> See *Public Mood Turns Grim; Trump Trails Biden on Most Personal Traits, Major Issues*, PEW RSCH. CTR. (June 30, 2020) (poll finding that 56% of respondents believe that Trump has responsibility to publicly release returns), <https://www.pewresearch.org/politics/2020/06/30/publics-mood-turns-grim-trump-trails-biden-on-most-personal-traits-major-issues/>.

<sup>247</sup> See Katie Rogers, *Trump on Releasing His Tax Returns: From 'Absolutely' to 'Political Prosecution'*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/politics/trump-taxes.html>.

<sup>248</sup> David Jackson, *Donald Trump Says He Won't Give His Tax Returns to Congress*, USA TODAY (Apr. 10, 2019), <https://www.usatoday.com/story/news/politics/2019/04/10/donald-trump-says-he-wont-give-his-tax-returns-congress/3421119002/>.

<sup>249</sup> See Jonah E. Bromwich, *Manhattan D.A. Now Has Trump's Tax Returns*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/nyregion/trump-taxes-vance-supreme-court.html>.

parliamentary legislation;<sup>250</sup> giving ministers Henry VIII powers to modify domestic law after Brexit;<sup>251</sup> leaving the EU in the absence of an approved deal;<sup>252</sup> or proroguing Parliament for several weeks just prior to the departure deadline.<sup>253</sup> And while the British model of parliamentary governance is often said to involve greater party discipline than the American congressional system,<sup>254</sup> Tory MPs actually showed much greater independence in standing up for their branch's constitutional prerogatives during Brexit than their Republican congressional counterparts did during impeachment. Whereas not a single House Republican voted to impeach Trump<sup>255</sup> and only one Republican Senator voted to convict the President,<sup>256</sup> a number of prominent Conservative MPs joined in the opposition to the Prime Ministers' moves at various points.<sup>257</sup> More than twenty MPs even defied the most stringent form of party discipline and had the whip withdrawn for refusing to support the Government and voting instead to block a no-deal Brexit.<sup>258</sup> While this meant that they no longer represented the Conservative Party, they retained their seats in Parliament and some declared their intention to stand for reelection.<sup>259</sup>

Parliament's self-assertiveness was also resoundingly reinforced by the U.K. Supreme Court, especially in comparison to Congress' limited support from the bench in its own struggles with the executive. In some respects, the more active role taken by the British Court may seem counterintuitive. After all, the American federal judiciary is a co-equal branch of government,<sup>260</sup> and it has long been "emphatically the province and duty of the [American] judicial department

---

<sup>250</sup> See *supra* notes 93–101 and accompanying text.

<sup>251</sup> See *supra* notes 102–110 and accompanying text.

<sup>252</sup> See *supra* notes 111–122 and accompanying text.

<sup>253</sup> See *supra* notes 123–135 and accompanying text.

<sup>254</sup> See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643–44 (2000) (arguing that "ordinarily, individual self-preservation leads most MPs to support the leadership through thick and thin," and that "the PM can do lots of harsh things early if she thinks they will pay off in political support later, without risking electoral retribution in the meantime").

<sup>255</sup> See Weiyi Cai, et al., *Impeachment Results: How Democrats and Republicans Voted*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/interactive/2019/12/18/us/politics/trump-impeachment-vote.html>.

<sup>256</sup> See Baker, *Impeachment Trial Updates*, *supra* note 179.

<sup>257</sup> See Elgot, *infra* note 253.

<sup>258</sup> See Jessica Elgot, *Tory MPs to Seek Legal Advice After Having Whip Withdrawn*, GUARDIAN (Sept. 4, 2019), <https://www.theguardian.com/politics/2019/sep/04/tory-mps-to-seek-legal-advice-after-having-whip-withdrawn>; *Brexit Showdown: Who Were the Tory Rebels Who Defied Boris Johnson?*, BBC NEWS (Sept. 5, 2019), <https://www.bbc.com/news/uk-politics-49563357>.

<sup>259</sup> See Elgot, *supra* note 258.

<sup>260</sup> See, e.g., *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989) ("In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches."); see also Reyes, *Comparative Insights From Brexit*, *supra* note 82, at 92–93.

to say what the law is.”<sup>261</sup> In contrast, the principle of parliamentary sovereignty means that the British judiciary is not fully co-equal,<sup>262</sup> and “it is not open to judges to apply or develop the common law in a way which is inconsistent with the law laid down in or under statutes, [i.e.] by Acts of Parliament.”<sup>263</sup> But the fact that the British judiciary is not co-equal does not mean that it is not independent. Quite to the contrary, judicial independence in Britain can be traced at least as far back as the Act of Settlement of 1701.<sup>264</sup> This Act “removed the power of the King to appoint judges at pleasure and introduced new protections: tenure during good behavior and fixed judicial salaries.”<sup>265</sup> Erin Delaney has emphasized that these arrangements were originally understood as promoting the independence of individual judges rather than as creating “a separate and independent branch,”<sup>266</sup> but they do demonstrate that the concept of judicial independence has venerable roots in the U.K.

The contrasting ways in which the U.S. and U.K. judicial branches have exercised their independence during their respective constitutional crises highlights another comparative insight that has important implications for executive accountability: as American courts have become increasingly politicized, their British counterparts have become more insulated from political pressures. The United Kingdom’s highest judicial body was formerly part of the House of Lords, and judicial appointments were supervised by a senior member of the Cabinet in the person of the Lord Chancellor.<sup>267</sup> But as part of the Constitutional Reform Act of 2005,<sup>268</sup> the United Kingdom created a separate Supreme Court housed in its own building and provided for the retitling of the Law Lords as Supreme Court Justices.<sup>269</sup> The Act significantly limited the role of the executive in appointing members of the bench by setting forth statutory qualifications for appointments and by establishing a selection commission for Justices.<sup>270</sup> Following amendments to the Constitutional Reform Act that were

---

<sup>261</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Reyes, *Comparative Insights From Brexit*, *supra* note 82, at 97.

<sup>262</sup> See Reyes, *Comparative Insights From Brexit*, *supra* note 82, at 96–97.

<sup>263</sup> *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5, [45]; see also Reyes, *Comparative Insights From Brexit*, *supra* note 82, at 97.

<sup>264</sup> 12 & 13 Will. 3, c. 2.; see also *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 at [41–42].

<sup>265</sup> Erin Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate Over Judicial Appointments in the United Kingdom*, 14 INT’L. J. CONST. L. 752, 754 (2016).

<sup>266</sup> *Id.* (emphasis omitted).

<sup>267</sup> See *id.* at 754–55; see also SELECT COMMITTEE ON THE CONSTITUTION, JUDICIAL APPOINTMENTS 2010–12, HL 272 (Mar. 28, 2012), <https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf>.

<sup>268</sup> 2005 c. 4 (U.K.).

<sup>269</sup> See *id.* at §§ 23–31; see also Delaney, *supra* note 265, at 755.

<sup>270</sup> See 2005 c. 4 § 25–31; see also Delaney, *supra* note 265, at 755.

passed in 2013, the selection commission for the Supreme Court must include at least one senior judge; at least one member of each of the judicial appointments commissions for England & Wales, Scotland, and Northern Ireland; and at least one person who is not a member of the legal profession.<sup>271</sup> Notably, no provision was made for inclusion of members of the executive or of Parliament on the commission.<sup>272</sup> And while the Lord Chancellor has authority to request reconsideration of or reject a recommended candidate, she may exercise this authority only on certain grounds that must be stated in writing.<sup>273</sup>

Insulating British judges from the political process to this degree has led to some suggestions that judges themselves are now too removed from democratic accountability.<sup>274</sup> But even proponents of greater parliamentary involvement in judicial appointments have stopped well short of calling for anything resembling the American confirmation process. Former Lord Chancellor Jack Straw, for example, stated while he favored a parliamentary role in Supreme Court appointments, he “would not suggest having public hearings—certainly nothing like the kind of obscenity that happens in the US.”<sup>275</sup> Defenders of the system have pointed out that judges are still democratically accountable despite the depoliticization of the appointment process, by virtue of the fundamental principle of parliamentary sovereignty—for if “Parliament does not like the view the judges form of the law, Parliament is sovereign and Parliament can change it.”<sup>276</sup> Such arguments led a House of Lord’s Select Committee on the Constitution to conclude that “[i]n the United Kingdom judges’ legitimacy depends on their independent status and appointment on merit, not on any democratic mandate.”<sup>277</sup>

Moreover, as evidenced by the U.K. Supreme Court’s role in reaffirming legislative sovereignty and in declaring Boris Johnson’s attempt to prorogue Parliament unlawful, the judiciary’s independent and depoliticized status has left it much more willing than U.S. courts have been to check executive action in

---

<sup>271</sup> See Crime and Courts Act 2013, c. 22, § 4, sch. 13 (Eng.); *Appointments of Justices*, SUPREME COURT (April 2016), <https://www.supremecourt.uk/about/appointments-of-justices.html>; see also Delaney, *supra* note 265, at 755, 761.

<sup>272</sup> See Delaney, *supra* note 265 at 755–56.

<sup>273</sup> See The Supreme Court (Judicial Appointments) Regulations 2013, S.I. 2013/2193 part 5 reg. 21; *Appointments of Justices*, SUPREME COURT, *supra* note 271.

<sup>274</sup> See Delaney, *supra* note 265, at 756–61.

<sup>275</sup> House of Lords Select Committee on the Constitution, JUDICIAL APPOINTMENTS PROCESS: ORAL AND WRITTEN EVIDENCE; see also Delaney, *supra* note 265, at 760.

<sup>276</sup> Delaney, *supra* note 265, at 757 (internal quotations and brackets omitted).

<sup>277</sup> Select Committee on the Constitution, 25<sup>th</sup> Report of Session 2010–12: *Judicial Appointments*, HOUSE OF LORDS at [46] (Mar. 28, 2012); see also Delaney, *supra* note 265, at 759.

times of constitutional crisis. And while the American judicial branch's decisions have arguably had the practical effect of impairing the ability of voters to hold the President accountable, the British judiciary's decisions had the opposite impact. The invalidation of prorogation meant that the Prime Minister would not be able to avoid parliamentary scrutiny of his Brexit approach, which in turn meant that Johnson would have to appeal directly to the public to resolve the standoff. The constitutional crisis that originally arose from one exercise of popular sovereignty in the form of the Brexit referendum was thus ultimately ended through another exercise of popular sovereignty in the form of an election. Democratic accountability was a fundamental value from end to end.

### CONCLUSION

Chief Justice John Marshall observed more than two hundred years ago that “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”<sup>278</sup> In a like vein, Judge Ketanji Brown Jackson reminded her readers much more recently that “Presidents are not kings.”<sup>279</sup> Both statements reflect the view that federal executive authority in the United States is subject to important limits, and the President is accountable to the other branches and to the people for abuses of that power. The impeachment of Donald Trump poses a challenge to that view. Trump and his defenders repeatedly presented an expansive vision of executive authority, ranging from the broad assertion that the president can do “whatever [he] want[s]”<sup>280</sup> to more specific claims that he has an absolute right to prevent executive officials from testifying before Congress<sup>281</sup> and that he is immune from state criminal process while in office.<sup>282</sup> When the House of Representatives sought to investigate Trump for alleged abuse of power pursuant to its impeachment authority, the President precipitated a genuine constitutional crisis by flatly refusing to provide any information or otherwise cooperate with the inquiry.<sup>283</sup> While this refusal led to additional charges of obstruction of Congress,<sup>284</sup> the Senate swiftly acquitted the President with only a single Republican voting to convict on either of the two Articles of Impeachment.<sup>285</sup> For its part, an increasingly politicized judiciary was neither rapid nor resolute in enforcing compliance with subpoenas

---

<sup>278</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>279</sup> *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 213 (D.D.C. 2019).

<sup>280</sup> *See supra* note 179 and accompanying text.

<sup>281</sup> *See supra* notes 149–156 and accompanying text.

<sup>282</sup> *See supra* notes 238–243 and accompanying text.

<sup>283</sup> *See supra* notes 62–67 and accompanying text.

<sup>284</sup> *See supra* note 69 and accompanying text.

<sup>285</sup> *See supra* note 178 and accompanying text.

issued in suits and investigations challenging Trump's actions and activities.<sup>286</sup> The result was that the ability of voters to hold Trump accountable in the 2020 presidential election was compromised by the absence of potentially relevant information about his exercise of executive authority.

The limits and failures of these attempts to check the President appear to have emboldened him even further. In the immediate aftermath of his acquittal in the Senate, the Washington Post reported that “Trump—simmering with rage, fixated on exacting revenge against those he feels betrayed him and insulated by a compliant Republican Party—is increasingly comfortable doing so to the point of feeling untouchable.”<sup>287</sup> The President's actions included public criticism of the recommendations made by career prosecutors in the sentencing of a longtime Trump associate Roger Stone, Jr., who had been convicted on charges including lying to Congress and witness tampering.<sup>288</sup> Trump also criticized the presiding judge and the Department of Justice, which intervened and overruled the sentencing recommendations made by the prosecutors in the case.<sup>289</sup> Several observers raised alarm about perceived political meddling in the criminal justice system,<sup>290</sup> and even Trump's own Attorney General William Barr lamented that the president's comments “make it impossible for me to do my job and to assure the courts and the prosecutors in the department that we're doing our work with integrity.”<sup>291</sup> Trump eventually commuted the sentence altogether before Stone reported to prison in a move that Republican Senator Mitt Romney labeled “unprecedented, historic corruption.”<sup>292</sup>

Trump also continued to make broad claims of executive authority in other contexts post-impeachment. For example, with respect to governors' decisions about the closing and re-opening of their states during the Coronavirus crisis, Trump claimed that “the president of the United States calls the shots” and has “total authority” over the issue.<sup>293</sup> The claim was widely rejected by legal

---

<sup>286</sup> See *supra* notes 149–161, 227–235 and accompanying text.

<sup>287</sup> Phillip Rucker, Robert Costa & Josh Dawsey, *Trump Seeks to Bend the Executive Branch as Part of Impeachment Vendetta*, WASH. POST (Feb. 12, 2020), [https://www.washingtonpost.com/politics/trump-seeks-to-bend-the-executive-branch-as-part-of-impeachment-vendetta/2020/02/12/8b712e18-4dc9-11ea-9b5c-eac5b16dafa\\_story.html?arc404=true](https://www.washingtonpost.com/politics/trump-seeks-to-bend-the-executive-branch-as-part-of-impeachment-vendetta/2020/02/12/8b712e18-4dc9-11ea-9b5c-eac5b16dafa_story.html?arc404=true).

<sup>288</sup> See *id.*

<sup>289</sup> See *id.*

<sup>290</sup> See *id.*

<sup>291</sup> Katie Benner, *Barr Says Attacks from Trump Make Work 'Impossible'*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/william-barr-trump.html>.

<sup>292</sup> Peter Baker, Maggie Haberman, & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>.

<sup>293</sup> See Tim Arango et al., *Trump Insists He Has 'Total' Authority to Supersede Governors*, N.Y. TIMES

scholars and received pushback from governors, with New York Governor Andrew Cuomo offering the familiar refrain that “[w]e don’t have a king in this country.”<sup>294</sup> But as common as the comparison between presidents and monarchs has become, the analysis in this Article has demonstrated that it is far from axiomatic that executive authority is more limited under the American presidency than it is under the British monarchy. Today, the authority of the Crown is exercised through an executive branch that is far more democratically accountable than its American analogue. The U.K. Supreme Court clearly and consistently reiterated the principle of parliamentary sovereignty throughout the Brexit crisis—a crisis that had its fundamental origins and ends in the will of the voters. While the U.S. crisis over impeachment was resolved in a manner that largely reaffirmed the power of the President, the U.K. crisis was resolved in a manner that largely reaffirmed by power of the people.

Of course, a more democratically accountable and responsive political system may pose concerns of its own. James Madison warned long ago of the need to guard against the tyranny of the majority,<sup>295</sup> and the American model of separation of powers is said to be a safeguard against such risks.<sup>296</sup> But again, the foregoing analysis suggests that structural separation alone may not be enough to counter partisan commonalities among the various branches of government. Moreover, the British model of parliamentary sovereignty combined with an independent and de-politicized judiciary seems to safeguard values like liberty and equality at least as effectively as the American model does. The United Kingdom has been ahead of the United States in taking such steps as abolishing slavery, ending capital punishment, providing health care to all without charge at the point of use, and legislating marital equality for same-sex couples.<sup>297</sup> Even in areas like religious freedom that are sometimes cited as examples of U.S. exceptionalism, British citizens enjoy a degree of liberty that is comparable to that of Americans notwithstanding the continued existence of the established Church of England.<sup>298</sup> As Bruce Ackerman has observed, “[t]he real-world operation of the ‘Westminster’ model has provided critics with a club to batter American self-confidence. Given the British success in avoiding the

---

(Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/coronavirus-updates.html>.

<sup>294</sup> See Charlie Savage, *Trump’s Claim of Total Authority in Crisis Is Rejected Across Ideological Lines*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/trump-total-authority-claim.html>.

<sup>295</sup> See THE FEDERALIST No. 51 (Madison) (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”).

<sup>296</sup> See *id.*

<sup>297</sup> See Reyes, *May Britain Trump America*, *supra* note 5, at 11–12.

<sup>298</sup> See René Reyes, *The Mixed Blessings of (Non-)Establishment*, 80 ALB. L. REV. 405 (2016); see also MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 88 (3d ed. 2011)

inexorable slide into tyranny predicted by Madison and Montesquieu, perhaps we should give up on the very idea of separation of powers?”<sup>299</sup>

The core argument of this Article is not that Americans should give up on separation of powers, but rather that they should perhaps temper assumptions of American exceptionalism with respect to executive authority and democratic accountability. This is part of a broader argument in favor of greater openness to comparative constitutional dialogue concerning matters of liberty and equality—values that are not uniquely American.<sup>300</sup> Such dialogue may reveal that the United States does in fact have “a lot to learn from foreign legal systems, including [] those of countries to which we are closely related like the United Kingdom.”<sup>301</sup> Indeed, one lesson that may be learned is that Presidents are not the equivalent of contemporary kings—to the contrary, when left unchecked, they can be something far more powerful and dangerous.

---

<sup>299</sup> Ackerman, *supra* note 254, at 640.

<sup>300</sup> See, e.g., Reyes, *May Britain Trump America*, *supra* note 5, at 13–14; Reyes, *Masterpiece Cakeshop*, *supra* note 1, at 140–45.

<sup>301</sup> Calabresi, *supra* note 15, at 1337.