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## Impeachable Speech

Katherine Shaw

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# IMPEACHABLE SPEECH

Katherine Shaw\*

## ABSTRACT

*Rhetoric is both an important source of presidential power and a key tool of presidential governance. For at least a century, the bully pulpit has amplified presidential power and authority, with significant consequences for the separation of powers and the constitutional order more broadly.*

*Although the power of presidential rhetoric is a familiar feature of the contemporary legal and political landscape, far less understood are the constraints upon presidential rhetoric that exist within our system. Impeachment, of course, is one of the most important constitutional constraints on the president. And so, in the wake of the fourth major presidential impeachment effort in our history, it is worth pausing to examine the relationship between presidential rhetoric and Congress's power of impeachment.*

*Although presidential rhetoric was largely sidelined in the 2019–2020 impeachment of President Donald Trump, presidential speech actually played a significant role in every other major presidential impeachment effort in our history. Prior to President Trump, three presidents had faced serious impeachment threats: Andrew Johnson, in 1868; Richard Nixon, in 1974; and Bill Clinton, in 1998 and early 1999. In each of these episodes, the debate around impeachment encompassed, among other things, public presidential rhetoric—lies and misrepresentations; statements that took aim at Congress or undermined the rule of law. In the case of Andrew Johnson, presidential rhetoric formed the basis of one of the articles of impeachment approved by the House of Representatives. In the case of Richard Nixon, the first article of impeachment approved by the House Judiciary Committee—though never considered by the*

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*full House—made extensive reference to the president’s public statements. And one of the possible offenses identified in Independent Counsel Ken Starr’s impeachment referral focused on Bill Clinton’s lies to the American people; an impeachment article tracking that recommendation was initially debated by the House Judiciary Committee, but the language regarding public speech was removed before the committee vote. These aspects of impeachment history have largely escaped scholarly notice, and they may prove instructive as both Congress and the public debate impeachment, as well as other possible constraints on presidential rhetoric and presidential power, in 2020 and beyond.*

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## INTRODUCTION

Since taking office in January 2017, President Donald Trump has used the bully pulpit in ways that break, often dramatically, from the rhetorical norms that preceded him.<sup>1</sup> So it is perhaps not surprising that the President's rhetoric was at the center of a number of early calls for his impeachment. One of the articles of impeachment introduced by Representative Al Green in December 2017 identified President Trump's support for "white supremacy, bigotry, racism, anti-Semitism, white nationalism [and] neo-Nazism," and accused him of "inciting hate and hostility" by "sowing discord among the people of the United States, on the basis of race, national origin, religion, gender, [and] sexual orientation."<sup>2</sup> In 2019, after President Trump told George Stephanopoulos that if offered opposition research by Russia or China prior to the 2020 election, "I think I'd take it,"<sup>3</sup> Elizabeth Warren responded by tweeting, "It's time to impeach Donald Trump."<sup>4</sup> The President's mid-2019 attack on four freshman Congresswomen, including a suggestion that they "go back . . . to the crime infested places from which they came" (all are women of color, all are American citizens, and three were born in the United States)<sup>5</sup> resulted in a House resolution

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<sup>1</sup> For discussions of presidential speech in the judicial rather than impeachment context, see Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337 (2019).

<sup>2</sup> Impeaching Donald John Trump, President of the United States, of High Misdemeanors, H.R. 646, 115th Cong. § 1 (2017); see also Osita Nwannevu, *The Case for Impeaching Trump for Bigotry*, NEW YORKER (May 26, 2019), <https://www.newyorker.com/news/our-columnists/the-case-to-impeach-trump-for-bigotry>.

<sup>3</sup> Interview by George Stephanopoulos with Donald J. Trump, President of the United States (June 16, 2019).

<sup>4</sup> Elizabeth Warren (@ewarren), TWITTER (June 12, 2019, 4:28 PM), <https://twitter.com/ewarren/status/1138951312513601536>.

<sup>5</sup> See Donald J. Trump (@realdonaldtrump), TWITTER (July 14, 2019, 5:27 AM), <https://twitter.com/realdonaldtrump/status/1150381394234941448> ("So interesting to see 'Progressive' Democrat Congresswomen, who originally came from countries whose governments are a complete and total catastrophe, the worst, most corrupt and inept anywhere in the world (if they even have a functioning government at all), now loudly....."); Donald J. Trump (@realdonaldtrump), TWITTER (July 14, 2019, 5:27 AM), <https://twitter.com/realdonaldtrump/status/1150381395078000643> ("...and viciously telling the people of the United States, the greatest and most powerful Nation on earth, how our government is to be run. Why don't they go back and help fix the totally broken and crime infested places from which they came. Then come back and show us how...."); Donald J. Trump (@realdonaldtrump), TWITTER (July 14, 2019, 5:27 AM), <https://twitter.com/realdonaldtrump/status/1150381396994723841> ("....it is done. These places need your help badly, you can't leave fast enough. I'm sure that Nancy Pelosi would be very happy to quickly work out free travel arrangements!").

condemning the statements,<sup>6</sup> as well as spurring another round of calls for impeachment.<sup>7</sup>

Still, despite these early congressional moves to link inflammatory presidential speech to impeachment, President Trump's public rhetoric played a relatively minor role in the fall 2019 impeachment hearings before the House Intelligence and Judiciary Committees, and was similarly sidelined in the President's January 2020 Senate impeachment trial. Those proceedings focused on a private phone call between President Trump and Ukrainian President Volodymyr Zelensky, as well as President Trump's efforts, both preceding and following that call, to predicate a White House meeting and military aid upon Ukrainian announcements of investigations into President Trump's political rivals.<sup>8</sup> Similarly, the two articles of impeachment approved by the House of Representatives in December 2019 focused on presidential conduct, not speech: the first article charged the President with abuse of power in his pressure campaign against Ukraine, and the second charged him with obstruction of Congress for his categorical defiance of impeachment-related subpoenas for documents and testimony.<sup>9</sup>

Although President Trump's rhetoric was *not* front and center in the impeachment proceedings against him, presidential speech has actually played a significant role in every other major presidential impeachment effort in our history. Three previous presidents have faced serious impeachment threats: Andrew Johnson, in 1868; Richard Nixon, in 1974; and Bill Clinton, in 1998 and early 1999. In each of these efforts, the debate around impeachment

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<sup>6</sup> H.R. Res. 489, 116th Cong. (2019); Sarah Ferris, Heather Caygle & Melanie Zanona, *House Condemns Trump's 'Racist' Tweets Targeting Minority Congresswomen*, POLITICO (July 16, 2019, 10:04 AM), <https://www.politico.com/story/2019/07/16/house-democrats-trump-resolution-1416782>.

<sup>7</sup> Alyssa Vaughn, *Ayanna Pressley Calls Trump a "Twitter Thug" After Latest Racist Attack*, BOS. MAG. (July 15, 2019, 11:48 AM), <https://www.bostonmagazine.com/news/2019/07/15/ayanna-pressley-trump-racist-tweets/> (quoting Ayana Pressley ("We will not be dismissed and we will not be bullied by a Twitter thug. I will continue working every day in Congress to stand up to this Administration and make heard the voices of people in the Massachusetts' 7th.")); Clare Foran, *Rashida Tlaib: "I'm Not Going Nowhere, Not Until I Impeach This President"*, CNN POL. (July 22, 2019, 3:33 PM), <https://www.cnn.com/2019/07/22/politics/trump-rashida-tlaib-squad/index.html> (quoting Rashida Tlaib at the NAACP Annual Convention in Detroit ("I'm not going nowhere, not until I impeach this President.")); Rachel Bade, *Rep. Green Files Articles of Impeachment Against Trump Despite Pushback from Democratic Leaders*, WASH. POST (July 16, 2019, 7:47 PM), [https://www.washingtonpost.com/politics/rep-green-to-file-articles-of-impeachment-against-trump-despite-pushback-from-democratic-leaders/2019/07/16/63b4c0b6-a800-11e9-ac16-90dd7e5716bc\\_story.html?utm\\_term=.92ab7a932ab2](https://www.washingtonpost.com/politics/rep-green-to-file-articles-of-impeachment-against-trump-despite-pushback-from-democratic-leaders/2019/07/16/63b4c0b6-a800-11e9-ac16-90dd7e5716bc_story.html?utm_term=.92ab7a932ab2).

<sup>8</sup> HOUSE PERMANENT SELECT COMM. ON INTEL., THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT 12 (2019), [https://intelligence.house.gov/uploadedfiles/20191203\\_-\\_full\\_report\\_\\_hpsci\\_impeachment\\_inquiry.pdf](https://intelligence.house.gov/uploadedfiles/20191203_-_full_report__hpsci_impeachment_inquiry.pdf).

<sup>9</sup> Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019).

encompassed, among other things, public presidential speech—lies and misrepresentations; statements that took aim at Congress or undermined the rule of law. In the case of Andrew Johnson, presidential rhetoric formed the basis of one of the articles of impeachment approved by the House of Representatives. In the case of Richard Nixon, the first article of impeachment approved by the House Judiciary Committee—though never considered by the full House—made extensive reference to the President’s public statements. And one of the possible offenses identified in Independent Counsel Ken Starr’s impeachment referral focused on President Clinton’s lies to the American people; an impeachment article tracking that recommendation was initially debated by the House Judiciary Committee, but the language regarding public speech was removed before the committee vote.<sup>10</sup> Taken together, these episodes show that history offers considerable—though contested—support for including presidential rhetoric within an impeachment case against a sitting president.

Of course, the significance of these historical episodes is subject to debate: reasonable minds can differ about the status *as precedent* of the early steps toward impeaching President Nixon, whose resignation foreclosed the prospect of further impeachment proceedings, or the House’s impeachments of Andrew Johnson and Bill Clinton, both of whom were acquitted by the Senate (Clinton by a significant margin, Johnson much more narrowly).<sup>11</sup> But whether or not they constitute precedent in any formal sense, these episodes do shed at least some light on the ways members of Congress, actors within the executive branch, and the public at large conceived of the relationship between presidential speech and the process of impeachment at three critical moments in our history.

A few caveats are in order before proceeding further. First, this Article is limited to presidential speech that is in some sense *public*. Although speech is a component of many of the categories of conduct we most associate with impeachment—perjury, for example, or obstruction of justice—I have not attempted a full consideration of the role of presidential speech in those sorts of impeachment charges. That is because my goal here is to connect the public presidency with impeachment history. The private speech of presidents, and the possibility that such speech might supply evidence of, or itself constitute, the sorts of “treason, bribery, or other high crimes and misdemeanors” the Constitution identifies as impeachable, are therefore outside the scope of this discussion.

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<sup>10</sup> See *infra* note 222.

<sup>11</sup> CHARLES BLACK, *IMPEACHMENT: A HANDBOOK* 1–2 (2d ed. 1998).

I also do not consider what we might learn from preliminary or inchoate efforts to impeach other presidents. There have been a number of such episodes, including those involving Presidents Andrew Jackson,<sup>12</sup> John Tyler,<sup>13</sup> and Ronald Reagan.<sup>14</sup> But the seriousness of the proceedings against Presidents Johnson, Nixon, and Clinton distinguish them from other historical episodes: all of the proceedings I consider posed existential threats to the presidents involved, and all prompted extensive discussion of the role of impeachment in our constitutional order in ways that other episodes, both earlier and more recent, did not.

I also do not consider the role of public speech in impeachment efforts involving figures other than the president, although speech did play an intriguing role in some such episodes. Chief among them was the impeachment of Samuel Chase, who in 1804 became the first and only Supreme Court Justice to be impeached by the House, based in large part on partisan statements he made while riding circuit;<sup>15</sup> he was acquitted by the Senate and went on to serve on

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<sup>12</sup> President Andrew Jackson came close to an impeachment fight when he vetoed the bill renewing the charter of the National Bank, Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576 (James D. Richardson ed., 1897) [hereinafter MESSAGES], and then circumvented Congress to move federal deposits to state banks. Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 236 (1999) (describing “a nineteenth-century version of the Saturday Night Massacre” in which “Jackson had to remove two Treasury Secretaries before he could get his plan carried out by Roger B. Taney, the future Chief Justice and chief political henchman of the President”). Jacksonian Democrats’ House majority prevented any serious consideration of impeachment, but Senator Henry Clay later orchestrated the passage of a formal Senate censure resolution. MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 29–30 (2018).

<sup>13</sup> John Tyler, who became the first vice president to ascend to the presidency when William Henry Harrison died 30 days after his inauguration, faced still more serious impeachment proceedings. GERHARDT, *supra* note 12, at 30. Tyler was widely reviled by both parties, and when he followed in Jackson’s footsteps with his aggressive use of the veto power, a special committee was created to determine whether Tyler had committed impeachable offenses. In 1843, Representative John Botts introduced articles of impeachment that accused Tyler of an “arbitrary, despotic, and corrupt abuse of the veto power.” CONG. GLOBE, 27th Cong., 3d Sess. 144 (1843) (statement of Rep. John Botts). Those articles were quickly defeated, but the committee issued a report that criticized Tyler for wielding his veto power as a “gross abuse of constitutional power” and for having “assumed . . . the whole Legislative power to himself[.]” GERHARDT, *supra* note 12, at 31.

<sup>14</sup> In the twentieth century, Ronald Reagan faced an impeachment resolution after he invaded Grenada without consulting Congress, although the resolution failed quickly in the House Judiciary Committee. LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 170–71 (2018). There were also calls for impeachment—though never any formal impeachment proceedings—over Iran-Contra. *Id.* at 172–73; LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP xv (1997).

<sup>15</sup> See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 115 (1992); GENE HEALEY, CATO INST., INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION’S IMPEACHMENT POWER 20 (2019), <https://www.cato.org/sites/cato.org/files/pubs/pdf/gene-healy-indispensable-remedy-white-paper.pdf> (describing the “triggering offense” in the Chase impeachment as a “partisan diatribe Chase had unleashed on a Baltimore grand jury”).

the Court until his death in 1811.<sup>16</sup> The role of speech in the impeachment of state officials is similarly beyond the scope of this piece.<sup>17</sup> Finally, I leave for another day any in-depth consideration of congressional and presidential efforts to shape public narratives around impeachment—also a significant part of the story of speech and impeachment.

## I. THE PRESIDENT’S WORDS IN IMPEACHMENT PROCEEDINGS: A BRIEF HISTORICAL OVERVIEW

I begin with a descriptive account of the role of presidential speech in the efforts to impeach Presidents Andrew Johnson, Richard Nixon, and Bill Clinton. Before turning to those episodes, though, this Part offers a brief overview of the major constitutional provisions governing impeachment, and highlights some of the major themes and fault lines in debates about the role of impeachment in the constitutional scheme.

Briefly, the Constitution provides that “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>18</sup> The document then divides responsibility between the two Houses of Congress, giving the power of impeachment to the House of Representatives,<sup>19</sup> and the power to *try* impeachments to the Senate.<sup>20</sup> The provision involving the Senate is the more detailed of the two. One clause instructs that when sitting “for that purpose”—that is, for the purpose of impeachment—the Senators “shall be on Oath or Affirmation,”<sup>21</sup> presumably different from the ordinary oaths administered at the beginning of each

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<sup>16</sup> See REHNQUIST, *supra* note 15, at 115; see also Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 726, 789 (2010); Robert R. Blair & Robin D. Coblenz, *The Impeachment Trials of Justice Samuel Chase*, 27 MD. L. REV. 365, 369 (1967); Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 107 (1970). For a full list of individuals who have been impeached by the House, see *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> (last visited Sept. 4, 2020).

<sup>17</sup> See generally Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 597 n.146 (2006) (collecting state constitutional provisions governing impeachment); Matthew L. Lifflander, *The Only New York Governor Ever Impeached*, 85 N.Y. ST. BAR ASS’N J. 11 (2013); Cortez A.M. Ewing, *Florida Reconstruction: 1. Impeachment of Governor Harrison Reed*, 36 FLA. HIST. Q. 299 (1958); Frederic A. Ogg, *Impeachment of Governor Ferguson*, 12 AM. POL. SCI. REV. 111 (1918).

<sup>18</sup> U.S. CONST. art. II, § 4.

<sup>19</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>20</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>21</sup> *Id.*

congressional session.<sup>22</sup> When it is the President of the United States who faces trial in the Senate, “the Chief Justice shall preside,”<sup>23</sup> and “no Person shall be convicted without the Concurrence of two thirds of the Members present.”<sup>24</sup> The document also provides that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall . . . be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”<sup>25</sup>

The Constitution’s impeachment provisions, then, are both significant in number and spare in detail.<sup>26</sup> Most significant for purposes of this Article is the language describing impeachable offenses: “Treason, Bribery, or Other High Crimes and Misdemeanors.”<sup>27</sup>

What are high crimes and misdemeanors? The drafting history offers only limited clues. Once there was consensus at the Constitutional Convention that the president *should* be subject to impeachment,<sup>28</sup> that the House and Senate, rather than the Supreme Court or a majority of state legislatures, should hold the power of impeachment,<sup>29</sup> and that the consequences of impeachment should be limited to removal from office and disqualification from future officeholding,<sup>30</sup>

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<sup>22</sup> See U.S. CONST. art. VI § 3; Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, S. Doc. No. 104-1, pt. IX, at 225–26 (1996), <https://www.govinfo.gov/app/details/SMAN-113/SMAN-113-pg223>. As Jeffrey Tulis explains, “By taking a new oath, the Senate attempts to recompose itself into a new body, a jury. The Senators signify that although they are the same individuals, they will act differently than they ordinarily do. Collectively, they are pledging to change the culture and function of the Senate as a whole.” Jeffrey Tulis, *Impeachment in the Constitutional Order*, in THE CONSTITUTIONAL PRESIDENCY 230 (2009).

<sup>23</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>24</sup> *Id.*

<sup>25</sup> U.S. CONST. art. I, § 3, cl. 7.

<sup>26</sup> There are actually two other provisions touching impeachment: Article II, Section 2, Clause 1, which provides that the President “shall have power to grant reprieves and pardons for offenses against the United States, except in Cases of Impeachment;” and Article III, Section 2, Clause 3, which states that “[t]he Trial of all Crimes, except in cases of Impeachment, shall be by jury.”

<sup>27</sup> U.S. CONST. art. II, § 4.

<sup>28</sup> FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 89 (2019) (“The primary points of contention were, first, whether a legislative power of executive removal trenched too far on the principle of the separation of powers, and, second, whether, given the length of tenure and powers of the president, impeachment was even necessary.”).

<sup>29</sup> *Id.* at 91.

<sup>30</sup> TRIBE & MATZ, *supra* note 14, at 11 (“[I]f the Senate convicts on articles of impeachment, it must remove the officials from his position of power. If it wishes, the Senate may further disqualify him from future office holdings. But unlike in England and France, where legislatures could impose capital punishment in cases of impeachment, Congress can do nothing more.”); BOWMAN, *supra* note 28, at 93 (“[The limited nature of] the impeachment remedy sometimes seems its most underappreciated feature. In the popular imagination, impeachment is often treated as if conviction still leads to drawing and quartering. But it just means the loss of

the question was whether and how to define impeachable conduct. There is limited recorded debate on these questions. In June of 1787, two North Carolina delegates initially proposed impeachment for “malpractice or neglect of duty,”<sup>31</sup> but by July the Committee of Detail had replaced that language with “Treason[,] Bribery[,] or Corruption.”<sup>32</sup> By September the Committee of Eleven had removed “corruption,” leaving just “treason or bribery.”<sup>33</sup> James Madison’s notes reflect that George Mason initially added “maladministration,” to follow “treason or bribery,” with the following speech: “Why is the provision restrained to treason and bribery only? Treason[,] as defined in the Constitution[,] will not reach many great and dangerous offences.”<sup>34</sup> After Madison objected to maladministration, reasoning that “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate,” Mason removed “maladministration” and replaced it with “high crimes and misdemeanors.”<sup>35</sup>

Nothing else in the drafting history discusses this consequential substitution, although the English antecedents of the phrase “high crimes and misdemeanors” may offer some additional insights. As Raoul Berger wrote in 1973, a comprehensive review of English impeachments from the 14th to 19th century suggests that “‘high crimes and misdemeanors’ appear to be words of art confined to impeachments, without roots in the ordinary criminal law” and with “no relation to whether an indictment would lie in the particular circumstances.”<sup>36</sup> Berger resists the suggestion that “high crimes and misdemeanors” should merely be understood as ordinary crimes “raised to the nth degree.”<sup>37</sup> Rather, on his reading, the history shows that “[i]mpeachment . . . was conceived because the objects of impeachment, for one reason or another, were beyond the reach of ordinary criminal redress.”<sup>38</sup>

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a job.”).

<sup>31</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78–79 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

<sup>32</sup> 2 FARRAND’S RECORDS, *supra* note 31, at 145.

<sup>33</sup> *Id.* at 499.

<sup>34</sup> *Id.* at 550.

<sup>35</sup> *Id.* at 550–52.

<sup>36</sup> RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 62 (1973).

<sup>37</sup> *Id.* at 59.

<sup>38</sup> *Id.* Cass Sunstein endorses this reading of the history, arguing that “the great cases involving impeachable conduct in England usually involved serious abuses of the authority granted by public office, or, in other terms, the kind of misconduct in which someone could engage only by virtue of holding such an office.” CASS SUNSTEIN, IMPEACHMENT: A CITIZENS GUIDE 36 (2017). Josh Chafetz similarly writes that “th[e] history makes clear that ‘high crimes and misdemeanors’ was generally understood as encompassing distinctly political offenses.” Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 349 (2010); *see also* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2171 (2019) (describing English impeachment for an officer’s “having breached his oath of ‘due and faithful

Contemporaneous commentary confirms this understanding. Alexander Hamilton wrote in *Federalist 65* that impeachable offenses are “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”<sup>39</sup> Several decades later, Joseph Story’s influential *Commentaries on the Constitution* described impeachable offenses as “political” offenses.<sup>40</sup> And Alexis de Tocqueville’s *Democracy in America*, though often critiqued for incorrectly predicting that the American constitutional scheme made impeachment too easy to invoke and thus susceptible to abuse, also identified impeachment as designed to deprive a political actor “of the authority he has used to amiss.”<sup>41</sup>

The weight of recent commentary has been consistent with the basic view that impeachment does not require proof of a crime, but rather is designed to target serious abuses of authority by political actors.<sup>42</sup> Charles Black’s classic treatise on impeachment focuses on the essentially political character of impeachable misconduct, identifying high crimes and misdemeanors as behavior that strikes at the fabric of the political order, rendering the president’s continuance in office intolerable.<sup>43</sup> Black offers as an example a presidential course of action that contains elements of both speech and conduct: a presidential promise not to appoint anyone of a particular religion to public office—he uses the example of Roman Catholics—and then presidential conduct consistent with that promise.<sup>44</sup> Clearly neither the promise nor the action (really inaction) is criminal; but, Black argues, they are inconsistent with the Constitution’s prohibition on religious tests for office, as well as its guarantees of religious freedom and equality.<sup>45</sup> Though non-criminal, the conduct and speech are either unconstitutional or *anticonstitutional*.<sup>46</sup> And, significantly,

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discharge and execution of [his] Duty”).

<sup>39</sup> THE FEDERALIST NO. 65 (Alexander Hamilton).

<sup>40</sup> JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (5th ed. 1994).

<sup>41</sup> ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 101 (1838); *see also* TRIBE & MATZ, *supra* note 14, at 13–14 (discussing de Tocqueville on impeachment).

<sup>42</sup> For the opposing position, see COUNS. TO PRESIDENT DONALD J. TRUMP & OFF. WHITE HOUSE COUNS., TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP 1–2 (2020). *See also* Alan Dershowitz (@alandersh), TWITTER (Jan. 21, 2020, 4:04 PM), [https://twitter.com/AlanDersh/status/1219727550974283776?ref\\_src=twsrc%5Etfw](https://twitter.com/AlanDersh/status/1219727550974283776?ref_src=twsrc%5Etfw) (claiming that “criminal like behavior akin to treason and bribery is required [for impeachment]”).

<sup>43</sup> BLACK, *supra* note 11, at 33–37.

<sup>44</sup> *Id.* at 31.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (“I cannot believe that it would make any difference whether this conduct was criminal for general purposes; it would clearly be a gross and anticonstitutional abuse of power, going to the life of our national unity, and it would be absurd to think that president might not properly be removed for it.”). For a thoughtful argument

there is no obvious remedy other than impeachment—no criminal penalties could ever attach, and no president could ever be compelled to appoint any particular individual or class of individuals to office.<sup>47</sup>

Although making clear that the category of impeachable offenses is not coterminous with criminal offenses, Black also maintains that impeachment is *not* appropriate for the offense of maladministration—that is, poor performance, even egregiously poor, in executing the office of president.<sup>48</sup> According to Black, the remedy for maladministration is not impeachment; it is election. Recent books by Laurence Tribe and Joshua Matz,<sup>49</sup> as well as Cass Sunstein,<sup>50</sup> Michael Gerhardt,<sup>51</sup> and Frank Bowman,<sup>52</sup> all endorse Black’s core claims about the purposes of impeachment: that its goal is to target serious political misconduct, and that such misconduct need not be criminal.<sup>53</sup>

Major themes, then, during the framing of the Constitution and since, have been the kinds of conduct that should be deemed impeachable; the relationship between the criminal law and “high crimes and misdemeanors;” and the point at which misconduct or unfitness shades into impeachability. At each of the three historical moments discussed in the parts that follow, the relevant players grappled with all of these questions, with presidential speech playing an important role in each episode.

A. *Andrew Johnson: “Intemperate, inflammatory and scandalous harangues . . . peculiarly indecent and unbecoming in the chief magistrate of the United States”*

In 1868, Andrew Johnson became the first president in American history to be impeached by the House of Representatives. Johnson, who had become the “accidental President” when he ascended to the presidency after Lincoln’s 1865

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that impeachment *does* require some violation of law, see Nikolas Bowie, *High Crimes Without Law*, 132 HARV. L. REV. F. 59, 76 (2018) (arguing that “to convict someone of “high Crimes” without law . . . would . . . set a dangerous precedent, giving congressional prosecutors and judges as much unlimited discretion as Parliament once had to accuse and convict a political opponent of a crime”).

<sup>47</sup> BLACK, *supra* note 11, at 31. The House’s detailed manual on impeachment reflects the scholarly consensus that conduct need not be criminal to be impeachable. As the Manual explains, fewer than “one-third of all the articles the House has adopted have explicitly charged the violation of a criminal statute, or used the word ‘criminal’ or ‘crime.’” Impeachment, H.R. Doc No. Y 1.2:P 88/2/2017, at 612–13 (2017).

<sup>48</sup> BLACK, *supra* note 11, at 27–28.

<sup>49</sup> TRIBE & MATZ, *supra* note 14, at 40–41.

<sup>50</sup> SUNSTEIN, *supra* note 38, at 56–57.

<sup>51</sup> GERHARDT, *supra* note 12, at 59–60.

<sup>52</sup> BOWMAN, *supra* note 28, at 104–05.

<sup>53</sup> See *supra* note 47 and accompanying text.

assassination,<sup>54</sup> clashed early and often with congressional Republicans. Johnson was a Southern Democrat who had opposed secession—the reason he had been selected to appear on a “National Union” ticket when Lincoln ran for reelection in 1864—but as President worked at every turn to thwart congressional efforts at a robust Reconstruction.<sup>55</sup> Tensions between Johnson and congressional Republicans built throughout 1865 and 1866, and after Republicans dramatically increased their congressional majority during the November 1866 midterm elections, impeachment talk began in earnest. The first impeachment resolution, accusing Johnson of general corruption, unfitness for office, and abuse of the pardon and veto powers, was introduced in January 1867.<sup>56</sup> At this point there was sufficient hesitation regarding what this untested constitutional process actually required that initial efforts floundered.<sup>57</sup> But after a December 1867 State of the Union message in which Johnson inveighed against Congress and alluded to having considered using force against them,<sup>58</sup> and following Johnson’s termination of Secretary of War Edwin Stanton in violation of the Tenure of Office Act, a statute that purported to require the Senate to consent to such a move, the House moved in earnest to initiate impeachment proceedings.<sup>59</sup> The House eventually approved eleven articles of impeachment against Johnson, nine of which focused on conduct related to the Tenure of Office Act.<sup>60</sup>

But the tenth article of impeachment is the most relevant for purposes of this discussion. That article charged that President Johnson “did . . . make and deliver . . . certain intemperate, inflammatory, and scandalous harangues . . . [which] are peculiarly indecent and unbecoming in the Chief

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<sup>54</sup> Glen Elsasser, *Johnson, The Accidental President*, CHI. TRIB., Jan. 10, 1999, at 19.

<sup>55</sup> BRENDA WINEAPPLE, *THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION* xviii–xix, 148–52 (2019).

<sup>56</sup> BOWMAN, *supra* note 28, at 164–65.

<sup>57</sup> Cynthia Nicoletti, *Andrew Johnson’s Impeachment and the Pardoning Power*, J. CIV. WAR ERA (forthcoming 2020) (manuscript on file with author).

<sup>58</sup> BOWMAN, *supra* note 28, at 165; MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 75–76 (1973) (“For the first time, the President had clearly indicated that he had considered forcible resistance to Congress. He had decided against it not because his action would have been illegal or unconstitutional but because in the President’s opinion the Reconstruction Acts did not justify it.”).

<sup>59</sup> BOWMAN, *supra* note 28, at 165–66.

<sup>60</sup> The first eight articles described Johnson’s violation of the Tenure of Office Act, including his removal of Edwin Stanton and installation of Lorenzo Thomas as Stanton’s replacement. The ninth article accused Johnson of directing William H. Emory, a Major General in the Army, to disregard a statute that directed orders to issue from the President through the General of the Army, rather than to the Major General directly. *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, [www.senate.gov/artandhistory/history/common/briefing/Impeachment\\_Johnson.htm#7](http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7) (last visited Sept. 4, 2020).

Magistrate of the United States.”<sup>61</sup> The rhetoric cited was primarily targeted at Congress, and the tenth impeachment article reproduced a number of speeches in which Johnson hurled accusations at Congress, accusing it of “poison[ing] the constituents against [Johnson],” and “trying to break up the government.”<sup>62</sup> In one speech he also promised the crowd, apparently in reference to his congressional critics: “if you will stand by me in this action, if you will stand by me in trying to give the people a fair chance, soldiers and citizens . . . God be willing, I will kick them out. I will kick them out just as fast as I can.”<sup>63</sup>

Shifting the focus away from the Tenure of Office Act, and toward the rhetoric that was the focus of the tenth impeachment article, actually mirrors a recent turn in both legal and historical scholarship (and historiography) of the Johnson impeachment. For many years, the focus on the Tenure of Office Act occurred in the context of a narrative in which the Radical Republicans in Congress—in particular Congressman Thaddeus Stevens and Senator Charles Sumner—overreached badly, improperly attempting to use impeachment to remove a president over legitimate policy disagreements, and relying upon a constitutionally dubious (and later repudiated)<sup>64</sup> statute to justify their power grab. This conventional narrative, famously reflected in John F. Kennedy’s *Profiles in Courage* and more insidiously by Confederate-sympathizing expositors in the “Dunning School,”<sup>65</sup> maintained that the House’s approval of impeachment articles was at best misguided, at worst a travesty, and that the Senate was plainly correct to acquit Johnson of the charged offenses.<sup>66</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

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

<sup>64</sup> See *Myers v. United States*, 272 U.S. 52, 54 (1926) (striking down a statute requiring the president to obtain Senate approval before removing a postmaster).

<sup>65</sup> William A. Dunning, *The Undoing of Reconstruction*, ATLANTIC (Oct. 1901), <https://www.theatlantic.com/magazine/archive/1901/10/the-undoing-of-reconstruction/429219/>. See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xxi–xxii (discussing the Dunning School).

<sup>66</sup> See JOHN F. KENNEDY, *PROFILES IN COURAGE* 115–16 (1956) (singling out Kansas Republican Senator Edmund Ross, who defied his party and voted to acquit Johnson, for particular praise); DAVID O. STEWART, *IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN’S LEGACY* 315 (2009) (describing the Johnson impeachment as “a political and legal train wreck”); BERGER, *supra* note 36, at 252 (“Johnson’s trial serves as a frightening reminder that in the hands of a passion-driven Congress the process [of impeachment] may bring down the pillars of our constitutional system.”); Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 423 (2000) (referencing the general view of the “clear mistake of the Johnson impeachment”); C. Vann Woodward, *That Other Impeachment*, N.Y. TIMES, Aug. 11, 1974, at 215 (describing impeachment as relegated to the same “abysmal dustbin” as “secession,” “appeasement,” and “isolationism”). Some scholars, however, resisted this narrative. See, e.g., BENEDICT, *supra* note 58, at 126 (“Most historians have interpreted the attempt to remove President Johnson as blatantly political, insupportable in law, a blunder from which the nation was saved by seven noble

But there has been a significant shift in recent writing on Johnson's impeachment. Historian Brenda Wineapple's 2019 history *The Impeachers* recasts the struggle between Johnson and Congress, including the impeachment effort, as "neither trivial nor ignominious" but "unmistakably about race,"<sup>67</sup> and about the nature of the democracy that would take hold in the post-Civil War United States. Although Johnson had opposed secession, he was a fierce opponent of equality and universal suffrage. During his time in office as President, Johnson pardoned and then empowered Confederate officials;<sup>68</sup> dismissed systematic racial violence and terror in the South; vetoed the Freedman's Bureau Bill, the Civil Rights Act,<sup>69</sup> and the Reconstructions acts;<sup>70</sup> sought to restore the southern states to "their rightful place in a representative government" without suffrage for African Americans;<sup>71</sup> and attempted to prevent passage and ratification of the Fourteenth Amendment.<sup>72</sup> All of this, history makes clear, seems to have been animated by a desire to "keep the United States a white man's country with a white man's government."<sup>73</sup>

This, then, was the backdrop against which impeachment unfolded. Although the congressional Republicans who were the key drivers of impeachment focused their charges on Johnson's violation of the Tenure of Office Act, the seeds of their impeachment effort trace back not just to Johnson's earlier conduct vis-à-vis Reconstruction but, importantly, to his rhetoric. In Wineapple's telling, although tensions had been growing throughout 1865, an episode in early 1866 was for some the point at which the turn toward impeachment came. In an extemporaneous address to a crowd that had gathered at the White House to celebrate George Washington's birthday, Johnson "proceeded to unleash . . . a startling chain of venomous epithets and head-turning images—about decapitation and crucifixion[.]"<sup>74</sup> Johnson continued his tirade, calling the trio of Thaddeus Stevens, Charles Sumner, and Wendell Phillips traitors, claiming that "this posse of maniacs and revolutionists was

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Republican Senators who would not succumb to the political pressure around them . . . such a view is naive in the extreme."); FONER, *supra* note 65, at 335 ("Nowhere were the real reasons Republicans wished to dispose of Johnson mentioned—his political outlook, the way he had administered the Reconstruction Acts, and his sheer incompetence.").

<sup>67</sup> WINEAPPLE, *supra* note 55, at xxv.

<sup>68</sup> *Id.* at 32–33.

<sup>69</sup> *Id.* at 112–13.

<sup>70</sup> BENEDICT, *supra* note 58, at 22.

<sup>71</sup> WINEAPPLE, *supra* note 55, at 91.

<sup>72</sup> *Id.* at xxiv; BOWMAN *supra* note 28, at 161 ("Johnson did not campaign openly against the Fourteenth Amendment, but he let his views be known. . . . When asked, he advised the Southern legislatures not to ratify it.").

<sup>73</sup> BOWMAN, *supra* note 28, at 157.

<sup>74</sup> WINEAPPLE, *supra* note 55, at 116; *see also* BENEDICT, *supra* note 58, at 13–14.

conspiring to overthrow the government and book him out of his job,” and ended, “The blood that warms and animates my existence shall be poured out as the last libation as a tribute to the union to the States.”<sup>75</sup> Following this diatribe, William Lloyd Garrison wrote that Johnson might be guilty of an impeachable offense for “attacking some of [Congress’s] most estimable and distinguished members as assassins who are conspiring to take his life.”<sup>76</sup> And Senator William Pitt Fessenden responded, “The long agony is over . . . he has broken the faith, betrayed his trust, and must sink from detestation into contempt.”<sup>77</sup>

This was a significant turning point, but it would be nearly two more years before serious impeachment proceedings began. In the months that followed his tirade, Johnson vetoed the first Civil Rights Act, which then passed over his veto; worked to undermine passage of the Fourteenth Amendment; and saw his Southern policies result in devastating massacres of African Americans in Memphis and then New Orleans.<sup>78</sup> When Johnson embarked on his “swing around the circle,” a massively unsuccessful attempt to build political support in advance of the 1866 midterm elections,<sup>79</sup> he was met with criticism for these and other matters; he responded in the same register as his Washington’s birthday address, giving speeches that attacked the legitimacy of Congress and his congressional opponents. Johnson fumed about “a body, called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union, when its every step and act tended to perpetuate disunion[.]”<sup>80</sup> The speeches again took aim at congressional critics by name; at one stop he asked the crowd, “Why don’t you hang Thad[deus] Stevens and Wendell Phillips?”<sup>81</sup>

The President’s rhetoric on this tour turned public sentiment strongly against him. Following his stop in Chicago, the *Tribune*’s headline read, “The Ravings of a Besotted and Debauched Demagogue.”<sup>82</sup> Not long after, a former Johnson supporter wrote in the *New York Times*, “Was there ever such a madman in so

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<sup>75</sup> WINEAPPLE, *supra* note 55, at 116–17. This style of rhetoric toward his political adversaries was not new to Johnson; when he ran for the Tennessee legislature in 1835, he referred to his rivals as “ghouls, hyenas, and carrion crows.” *Id.* at 51–52.

<sup>76</sup> WINEAPPLE, *supra* note 55, at 117.

<sup>77</sup> *Id.*

<sup>78</sup> ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 262–64 (1988).

<sup>79</sup> WINEAPPLE, *supra* note 55, at 153.

<sup>80</sup> *Andrew Johnson: Article X*, NAT’L PARK SERV., <https://www.nps.gov/anjo/learn/historyculture/article-x.htm> (last updated Apr. 14, 2015).

<sup>81</sup> WINEAPPLE, *supra* note 55, at 156.

<sup>82</sup> *Id.*

high a place as Johnson?”<sup>83</sup> The midterm elections that followed the tour represented “a disastrous defeat for the President,” with the Republicans gaining enough seats to comfortably override any presidential vetoes.<sup>84</sup> They promptly began doing so, first with the Reconstruction Act of 1867, which divided the former Confederate states into military districts and set forth the terms of their readmission into Congress, in particular a requirement that they amend their state constitutions to create universal (male) suffrage and ratify the Fourteenth Amendment, which Congress had passed in June of 1866.<sup>85</sup> The new Congress also passed—over the President’s veto—the Tenure of Office Act, which required the President to obtain the consent of the Senate before firing a Cabinet official (and identified violation of the statute as a “high misdemeanor”).<sup>86</sup>

Early 1867 also saw the formal initiation of impeachment-related proceedings, although this first effort would be short-lived. In January, Representative James Mitchell Ashley gave a speech on the House floor that began, “I do impeach Andrew Johnson, Vice President and sitting President of the United States, of high crimes and misdemeanors.”<sup>87</sup> He offered a fairly general list that included “usurpation of power and violation of law.”<sup>88</sup> The House authorized the Judiciary Committee to open an impeachment inquiry, but the full House voted against impeachment by the end of 1867.<sup>89</sup> Just days earlier, Johnson had delivered to Congress a message that was shocking in its vitriol and racism, and that alluded to the use of force against Congress.<sup>90</sup> This moved some

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<sup>83</sup> *Id.* at 157.

<sup>84</sup> FONER, *supra* note 78, at 267.

<sup>85</sup> *Id.* at 276–77.

<sup>86</sup> WINEAPPLE, *supra* note 55, at 185; Tenure of Office Act, ch. 153 Stat. at Large 430, § 1 (providing that “the Secretar[y] of War . . . shall hold [his] office[] . . . subject to removal by and with the advice and consent of the Senate”); *id.* at § 6 (“That every removal, appointment, or employment made, had, or exercised, contrary to the provisions of this act . . . shall be deemed, and are hereby judged to be, high misdemeanors[.]”).

<sup>87</sup> WINEAPPLE, *supra* note 55, at 175.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 231. For a much more detailed account of this early impeachment effort, see Nicoletti, *supra* note 57.

<sup>90</sup> “How far the duty of the President ‘to preserve, protect, and defend the Constitution’ requires him to go in opposing an unconstitutional act of Congress is a very serious and important question, . . . cases may occur in which the Executive would be compelled to stand on its rights, and maintain them regardless of all consequences. If Congress should pass an act which is not only in palpable conflict with the Constitution, but will certainly, if carried out, produce immediate and irreparable injury to the organic structure of the Government, and if there be neither judicial remedy for the wrongs it inflicts nor power in the people to protect themselves without the official aid of their elected defender . . . in such a case the President must take the high responsibilities of his office and save the life of the nation at all hazards.” 6 MESSAGES, *supra* note 12, at Third Annual Message, December 3, 1867 (emphasis added). In addition, the speech was rife with rank white supremacy; historian Eric Foner describes the speech as “probably the most blatantly racist pronouncement ever to appear in an official state paper of an American President.” FONER, *supra* note 78, at 180.

additional Republicans in the direction of impeachment,<sup>91</sup> though not enough; but the events that would form the crux of the next impeachment case were already in motion. In August of 1867, Johnson moved to suspend Secretary of War Edwin Stanton, after Stanton had refused Johnson's request that he resign (relations between Stanton, who had been Lincoln's War Secretary, and Johnson had been strained since early in Johnson's term as President, but it was Stanton's dutiful execution of Congress's Military Reconstruction Acts, with which Johnson violently disagreed, that impelled Johnson to finally move against Stanton).<sup>92</sup> In January of 1868, the Senate refused to acquiesce in Stanton's removal, and in February of 1868, Johnson fired Stanton without the Senate's consent in violation of the Tenure of Office Act.<sup>93</sup> Johnson then attempted to install the manifestly unqualified desk officer Lorenzo Thomas in Stanton's place.<sup>94</sup> Stanton refused to vacate the office, and his standoff with Thomas was memorialized in several articles of impeachment.<sup>95</sup> The Senate quickly convened in executive session, and the next day Thomas was arrested for violating the Tenure of Office Act.<sup>96</sup> That very day the House Committee on Reconstruction recommended impeachment.<sup>97</sup> Although there was still some trepidation about the wisdom of this course, Johnson's firing of Stanton seemed to crystallize for many that "Reconstruction was at stake. The law was at stake."<sup>98</sup>

Representative John Bingham began the debate on the House floor the next day, rising to pronounce, "I stand here . . . filled with a conviction as strong as knowledge that the President of the United States has deliberately, defiantly, and criminally violated the Constitution, his oath of office, and the laws of the

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<sup>91</sup> BENEDICT, *supra* note 58, at 76–77 ("The presidential message reinforced the radicals' opinion that removal was a necessity.")

<sup>92</sup> STEWART, *supra* note 66, at 93–96.

<sup>93</sup> Tenure of Office Act, ch. 153 Stat. at Large 430, § 1 (providing that "the Secretar[y] of War . . . shall hold [his] office[] . . . subject to removal by and with the advice and consent of the Senate"); *id.* at § 6 ("That every removal, appointment, or employment made, had, or exercised, contrary to the provisions of this act . . . shall be deemed, and are hereby declared to be, high misdemeanors[.]").

<sup>94</sup> STEWART, *supra* note 66, at 132–35.

<sup>95</sup> Article 4 charged that the President "did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, to hinder and prevent Edwin M. Stanton, then and there, the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States." *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, [www.senate.gov/artandhistory/history/common/briefing/Impeachment\\_Johnson.htm#7](http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7) (last visited Sept. 3, 2020).

<sup>96</sup> WINEAPPLE, *supra* note 55, at 251.

<sup>97</sup> *Id.* at 254.

<sup>98</sup> *Id.* at 259.

country.”<sup>99</sup> Debate proceeded, with some members focused narrowly on the Tenure of Office Act, and others condemning Johnson in much more sweeping terms, sometimes invoking the role of rhetoric in Johnson’s misconduct. Sydney Clarke of Kansas pronounced that “Andrew Johnson is . . . guilty as inciter and provoker of the nameless crimes which have been inflicted upon the freedmen in the South; the two thousand murders known to have been committed in the state of Texas alone; and of the thousands of similar atrocities[.]”<sup>100</sup> Johnson’s defenders responded to the crux of the case against him, that he had violated of the Tenure of Office Act, by maintaining that he had only been testing a constitutionally dubious statute, and that in any event it wasn’t clear the statute applied to Stanton at all.<sup>101</sup>

After a single day of debate, the House voted in favor of the impeachment resolution, 126 to 47, and the Speaker of the House then appointed a group to identify the specific impeachment charges.<sup>102</sup> As they set to work, the majority of the articles they drafted focused on the Tenure of Office Act. But Thaddeus Stevens “didn’t want impeachment defined in such crabbed terms,”<sup>103</sup> and Wendell Phillips concurred, explaining, “I do not care whether Johnson has stepped on a statute or not”; what mattered, he said, was that Johnson, “by either his conscience or perverseness had set himself up systematically to save the South from the verdict of the war, and the necessity of the epoch in which we now live.”<sup>104</sup> In furtherance of this vision, Stevens, together with ally Ben Butler, composed the tenth and eleventh articles of impeachment, which swept far more broadly than the others.<sup>105</sup>

The tenth article most clearly identified the kind of conduct that for many actually underlay the impeachment effort; it also focused almost exclusively on the President’s speech. That article charged the following:

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<sup>99</sup> CONG. GLOBE, 40th Cong., 2d Sess. 1340 (1868).

<sup>100</sup> *Id.* at 1390.

<sup>101</sup> *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 290 (1868) (Frederick Stone, of Maryland, arguing that the Tenure of Office Act is “as clearly unconstitutional as any act ever passed,” and that “the President, if he believes any part of the Constitution is infringed or broken, must take the means the Constitution gives him to repair it”); *see also* Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 101, 181 n.527 (2019) (“[T]here was a strong argument that Johnson had not violated the text of the statute, which appeared not to apply to holdovers from the Lincoln Administration.”).

<sup>102</sup> STEWART, *supra* note 66, at 149.

<sup>103</sup> WINEAPPLE, *supra* note 55, at 265.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the government ought inviolably to preserve and maintain,) and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, . . . make and deliver with a loud voice certain intemperate, inflammatory[,] and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries[,] jeers[,] and laughter of the multitudes . . . Which said utterances, declarations, threats[,] and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States[.]<sup>106</sup>

The article excerpted several speeches from the “swing around the circle” and just before, though intriguingly, *not* the ones containing what were arguably the most outrageous statements, in particular the suggestions that violence be done to Johnson’s main congressional antagonists. The eleventh article, though concerned with the Tenure of Office Act, also focused on Johnson’s speech, enumerating several additional speeches in which he undermined or disparaged Congress and its authority.<sup>107</sup> The eleventh article combined several distinct charges: that Johnson had not only violated the Tenure of Office Act, but also thwarted Reconstruction and disparaged Congress by charging that because it was composed of only a subset of the states, it lacked authority to act, including to amend the Constitution.<sup>108</sup>

These articles were transmitted quickly to the Senate, which began its proceedings the following month. The Senate trial was presided over by Chief

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<sup>106</sup> CONG. GLOBE, 40th Cong., 2d Sess. 4 (Supp. 1868).

<sup>107</sup> *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, [www.senate.gov/artandhistory/history/common/briefing/Impeachment\\_Johnson.htm#7](http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7) (last visited Sept. 3, 2020).

<sup>108</sup> *Id.*; STEWART, *supra* note 66, at 162.

Justice Salmon Chase, a complicated figure who harbored presidential ambitions of his own.<sup>109</sup> The House's case was prosecuted by a group of seven managers that included John Bingham, Ben Butler, and Thaddeus Stevens.<sup>110</sup> Johnson's formidable defense team included former Supreme Court Justice Benjamin Curtis (who had dissented in *Dred Scott*<sup>111</sup> and departed the Court soon after),<sup>112</sup> former Attorney General William Evarts, prominent lawyers William Groesbeck and Thomas Nelson, and former Attorney General Henry Stanberry.<sup>113</sup>

The trial proceedings, which lasted approximately five weeks, centered on the Tenure of Office Act, but trial witnesses also included reporters and stenographers who had witnessed the speeches that were the subject of the tenth article.<sup>114</sup> After testimony from a number of witnesses and lengthy arguments from both the House managers and the President's defense team, the voting began, first with the eleventh article. The vote was close and uncertain until the last moment; in the end, Senator Edmund Ross, who had pledged to vote for impeachment on the eleventh article, voted to acquit, leaving the prosecution one vote short of the required 2/3 (with rumors swirling both at the time and later that bribes or promises had influenced his vote).<sup>115</sup> Some weeks later, votes were held on the second and third articles of impeachment, with those, too, falling one vote short of the 2/3 of Senators required to convict.<sup>116</sup>

No vote was ever taken on the tenth article.<sup>117</sup> But there are indications in written statements that several Senators harbored concerns about imposing the punishment of impeachment for speech, however offensive. Senator James

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<sup>109</sup> WINEAPPLE, *supra* note 55, at 270–71; FONER, *supra* note 78, at 335.

<sup>110</sup> *History of the Impeachment of Andrew Johnson, Chapter VIII, Organization of the Court Argument of Counsel*, AVALON PROJECT (2008), [https://avalon.law.yale.edu/19th\\_century/john\\_chap\\_08.asp](https://avalon.law.yale.edu/19th_century/john_chap_08.asp).

<sup>111</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 564 (1856) (Curtis, J., dissenting).

<sup>112</sup> Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995, 2014 (1996).

<sup>113</sup> WINEAPPLE, *supra* note 55, at 276–83; BENEDICT, *supra* note 58, at 137.

<sup>114</sup> CONG. GLOBE, 40th Cong., 2d Sess. 111 (Supp. 1868).

<sup>115</sup> WINEAPPLE, *supra* note 55, at 364, 367. Indeed, during the weeks following the vote on article 11, a House Committee embarked on an expedited investigation of potential bribery and improper influence, and amassed considerable information implicating both Ross and several other Senators. But, in Brenda Wineapple's terms, "there was a great deal of smoke, . . . but no fire." *Id.* at 383.

<sup>116</sup> *Id.* at 386–87.

<sup>117</sup> Rehnquist, *supra* note 15, at 235. After narrowly surviving impeachment, Johnson limped to the end of the term he had inherited, failing to win the Democratic nomination for president in 1868 (though he later did serve as a Senator). Although Johnson was unsuccessful in restoring the South to the place he sought for it in the post-war national government, his vision and legacy in fact endured in many ways. As Jeffrey Tulis and Nicole Mellow argue, "What [Johnson] did successfully with his preemptive efforts on behalf of the South, his obstructionist politics, and his dogged rhetoric was to lay the groundwork for and guide southern states toward ultimate victory," which endured post-Reconstruction "for more than one hundred years at least." JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS 100 (2018).

Patterson noted that “in view of the liberty of speech which our laws authorize, in view of the culpable license of speech which is practiced and allowed in other branches of the Government, I doubt if we can at present make low and scurrilous speeches a ground of impeachment.”<sup>118</sup> Senator Sherman echoed this view; while indicating his support for conviction on a number of the other articles, he voiced concerns about the tenth article, arguing that “we must guard against making crimes out of mere political differences or the abuse of the freedom of speech.”<sup>119</sup>

Despite these isolated statements, the focus of the impeachment trial remained squarely on the Tenure of Office Act. And in the end, it does seem likely that the de-emphasis of Johnson’s speech and conduct vis-à-vis Congress, individual members of Congress, and Reconstruction more broadly, was a consequential choice, one that may have had repercussions both for the outcome of the country’s first presidential impeachment episode, and for the thinking about impeachment for many years to come.

*B. Richard Nixon: “False and misleading public statements . . . contrary to his trust as president and subversive of constitutional government”*

President Nixon’s 1974 resignation foreclosed the possibility of full impeachment proceedings and removal from office.<sup>120</sup> But at the time of Nixon’s departure from office—two weeks after a unanimous Supreme Court ordered him to turn over audio recordings that revealed his involvement in covering up the Watergate break-in—the House Judiciary Committee had already approved three articles of impeachment against him. And a review of the record reveals that both the articles of impeachment, and the committee proceedings that surrounded them, were very much concerned with the President’s public statements.

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<sup>118</sup> CONG. GLOBE, 40th Cong., 2d Sess. 509 (Supp. 1868).

<sup>119</sup> *Id.* at 450. Senator Sherman did note that due in part to rhetoric of the sort at issue in the tenth article, President Johnson had “justly forfeited the confidence of the people.” *Id.* Congressman John Bingham’s closing arguments responded to these general concerns with the argument that “[t]he freedom of speech guaranteed by the Constitution to all the people of the United States, is that freedom of speech which respects, first, the right of the nation itself, which respects the supremacy of the nation’s laws[.]” *Id.* at 402.

<sup>120</sup> Most commentators take as a given that Nixon would have been removed from office had he not resigned when he did. *See, e.g.*, LAURENCE TRIBE, CONSTITUTIONAL LAW, § 4-16, at 218 (1978); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON I (1999) (“Richard Nixon would have been impeached and convicted had he not resigned after the House Judiciary Committee recommended his impeachment to the full House.”); Ronald A. Cass, *The Rule of Law in Time of Crisis*, 51 HOW. L.J. 653, 671 (2008) (describing the *Nixon* case as “virtually guaranteeing that, if [Nixon] had not resigned, he would have been impeached and removed from office”).

The events underlying the impeachment effort and Nixon's resignation primarily grew out of the break-in at the Democratic National Committee's offices in the Watergate Hotel. On June 17, 1972, five men were arrested in the process of breaking into the Democrats' offices,<sup>121</sup> most likely to rearrange surveillance equipment they had previously installed.<sup>122</sup> On June 22, President Nixon publicly denied any White House ties to the break-in, telling a group of reporters, "The White House had no involvement in this particular incident."<sup>123</sup> The burglars' connections to the President's reelection campaign and the White House quickly became clear, however, and inside the White House, the President and his top advisors quickly began to strategize about how to prevent the FBI from unearthing links to both the White House and the President's campaign committee.<sup>124</sup> As the country would learn much later, the President's Oval Office recording system captured the President telling Chief of Staff H.R. Haldeman that "[the CIA] should call the FBI in and say that . . . for the country, don't go any further into this case, period."<sup>125</sup>

Despite active investigations—by the FBI, the Department of Justice, and the press—that quickly began to identify connections between the burglars and the White House, the President was easily reelected four months later, in November 1972.<sup>126</sup>

In January 1973, trial began for seven individuals charged in connection with the Watergate break-in: the five burglars arrested in the DNC offices, plus former White House aide G. Gordon Liddy and Nixon campaign official E. Howard Hunt. All were charged with "conspiring to obtain information from the Democrats by breaking into their headquarters at the Watergate, stealing their documents, photographing their correspondence, wiretapping their telephones and planting electronic eavesdropping devices in their offices."<sup>127</sup> Five of the

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<sup>121</sup> Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST (Jun. 18, 1972), <http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227.html>.

<sup>122</sup> Christopher H. Schroeder, *The Story of United States v. Nixon: The President and the Tapes*, in PRESIDENTIAL POWER STORIES 334 (2009).

<sup>123</sup> *Context of 'June 22, 1972: Nixon Denies White House Role in Watergate Burglary; Post Reporters Find Connections'*, HIST. COMMONS, <http://www.historycommons.org/context.jsp?item=a062272whitehouseconnections> (last visited June 27, 2020).

<sup>124</sup> Schroeder, *supra* note 122, at 344.

<sup>125</sup> White House Transcripts: Transcript of a Recording of a Meeting Between the President and H.R. Haldeman in the Oval Office (Jun. 23, 1972).

<sup>126</sup> David S. Broder, *Nixon Wins Landslide Victory; Democrats Hold Senate, House*, WASH. POST (Nov. 8, 1972), [https://www.washingtonpost.com/politics/nixon-wins-landslide-victory-democrats-hold-senate-house/2012/06/06/gJQAJ4bIJV\\_story.html?utm\\_term=.df65a6bebd31](https://www.washingtonpost.com/politics/nixon-wins-landslide-victory-democrats-hold-senate-house/2012/06/06/gJQAJ4bIJV_story.html?utm_term=.df65a6bebd31).

<sup>127</sup> Carl Bernstein & Bob Woodward, *Still Secret: Who Hired Spies and Why*, WASH. POST (Jan. 31, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/013173-1.htm>.

seven quickly pleaded guilty,<sup>128</sup> but two defendants, Liddy and former campaign security official James McCord, elected to go to trial. Both were convicted, and trial testimony established that Liddy had received several hundred thousand dollars in campaign funds to be spent on various “intelligence-gathering assignments.”<sup>129</sup> But the trial left open a good number of questions about the origins of the funds and other participants in the charged conduct; the federal judge who presided over the trial, John Sirica, remarked as it ended: “I am still not satisfied that all the pertinent facts that might be available . . . have been produced before an American jury.”<sup>130</sup>

Soon after the conclusion of the trial, Congress began its own investigation into the break-in. In early February 1973, the Senate voted unanimously to create a “Select Committee on Presidential Campaign Activities,” later known as the Watergate Committee.<sup>131</sup> That Committee ramped up its work quickly, and two months later, in April 1973, White House Chief of Staff Haldeman, top policy advisor John Ehrlichman, and Attorney General Richard Kleindienst all submitted their resignations; several days later White House Counsel John Dean was fired (or perhaps resigned after being asked to do so).<sup>132</sup> On the night of April 30, Nixon addressed the nation and, for the first time, accepted responsibility for the Watergate scandal, while denying knowledge of the break-in until after it had occurred.<sup>133</sup> After announcing the departures of Kleindienst, Haldeman, Ehrlichman, and Dean, Nixon also informed the public that he had selected Elliott Richardson to replace Attorney General Kleindienst.<sup>134</sup>

Both during meetings with Senators and publicly during his confirmation hearings, Richardson pledged to appoint a special prosecutor,<sup>135</sup> and the day after his confirmation he selected Harvard Law Professor and former Solicitor

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<sup>128</sup> *Id.*

<sup>129</sup> Lawrence Meyer, *Last Two Guilty in Watergate Plot*, WASH. POST (Jan. 31, 1973), [https://www.washingtonpost.com/politics/last-two-guilty-in-watergate-plot/2012/06/04/gJQAQQdHJV\\_story.html?utm\\_term=.d798c2a751e0](https://www.washingtonpost.com/politics/last-two-guilty-in-watergate-plot/2012/06/04/gJQAQQdHJV_story.html?utm_term=.d798c2a751e0).

<sup>130</sup> DONALD J. FARINACCI, *WHEN ONE STOOD ALONE: JOHN J. SIRICA’S BATTLE AGAINST THE WATERGATE CONSPIRACY—A TALE OF MORAL COURAGE* 70 (2005).

<sup>131</sup> *Select Committee on Presidential Campaign Activities*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (last visited Sept. 3, 2019).

<sup>132</sup> Laurence Stern & Haynes Johnson, *3 Top Nixon Aides, Kleindienst Out; President Accepts Full Responsibility; Richardson Will Conduct New Probe*, WASH. POST (May 1, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/050173-1.htm>; *see also* Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 121 (1974).

<sup>133</sup> Carroll Kilpatrick, *Nixon Pledges No Whitewash on Watergate*, WASH. POST (May 1, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/050173-4.htm>.

<sup>134</sup> *Id.*

<sup>135</sup> RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* 16–17 (1977).

General Archibald Cox.<sup>136</sup> Cox's jurisdiction came to encompass not only Watergate but other activities of the so-called "Plumbers" operation, including the break-in at the offices of the psychiatrist of Pentagon Papers whistleblower Daniel Ellsberg, as well as allegations of exchanges of favorable treatment for campaign contributions and other campaign finance improprieties.<sup>137</sup>

Around the same time that this activity was unfolding in Congress and the executive branch, the defendants in the Watergate burglary trial were set for sentencing. In March 1973, defendant James McCord sent Judge Sirica a letter informing him that "there was political pressure applied to the defendants to plead guilty and remain silent," that "perjury occurred during the trial in matters highly material to the very structure, orientation, and impact of the government's case, and to the motivation and intent of the defendants" and that "[o]thers involved in the Watergate operation were not identified during the trial, when they could have been by those testifying."<sup>138</sup>

Following the receipt of McCord's letter, Judge Sirica took the unusual step of imposing lengthy "provisional" maximum sentences, up to 40 years, on a number of the defendants. Judge Sirica also admonished the defendants to continue cooperating with the still-ongoing grand jury proceedings. In his memoir, Sirica explains that he informed the defendants: "You will no doubt be given an opportunity to provide information to the grand jury . . . investigating the Watergate affair and to the Senate Select Committee on Presidential Campaign Activities. I sincerely hope that each of you will take full advantage of any such opportunity."<sup>139</sup>

The McCord letter, and other developments, spurred White House Counsel John Dean, who had been tasked during this time with taking "day-to-day charge of the cover-up,"<sup>140</sup> to begin cooperating with prosecutors regarding both the break-in and the cover-up. In June 1973, Dean testified before the Watergate

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<sup>136</sup> George Ladner, Jr., *Cox Is Chosen as Special Prosecutor*, WASH. POST (May 19, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/051973-1.htm>; see also *Professor Archibald Cox Honored*, HARV. L. TODAY (Oct. 8, 2003), <https://today.law.harvard.edu/professor-archibald-cox-honored/>.

<sup>137</sup> BEN-VENISTE & FRAMPTON, *supra* note 135, at 34.

<sup>138</sup> JOHN J. SIRICA, *TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON 95-97* (1979) (reproducing letter). For discussion of the trial generally, see *United States v. Liddy*, 509 F.2d 428, 432 (D.C. Cir. 1974) (affirming convictions).

<sup>139</sup> SIRICA, *supra* note 138, at 118-19; FARINACCI, *supra* note 130, at 72-73; *Mitchell v. Sirica*, 502 F.2d 375, 384 (D.C. Cir. 1974) (MacKinnon, J., dissenting) ("In an admitted effort to coerce testimony from the defendants in the Grand Jury and before the Senate investigating committee which would implicate higher officials, Judge Sirica imposed conditional maximum sentences."). These defendants were eventually given sentences from one to four years. SIRICA, *supra* note 138, at 120.

<sup>140</sup> BEN-VENISTE & FRAMPTON, *supra* note 135, at 98.

Committee, and, under a grant of testimonial immunity, detailed efforts he and others made to cover up the break-in, revealing that he had discussed these cover-up efforts with the President on a number of separate occasions.<sup>141</sup> Then in July, White House aide Alexander Butterfield revealed to the Committee (and the world) the existence of the Oval Office recording system.<sup>142</sup> In the ensuing weeks, both Special Prosecutor Cox and the Senate requested the White House tapes, and the President refused to turn them over.<sup>143</sup> Cox then secured a grand jury subpoena, while the Watergate Committee issued its own subpoena; both Judge Sirica in the District Court, and the D.C. Circuit after an appeal, concluded that the President was required to comply with the grand jury subpoena.<sup>144</sup> After the D.C. Circuit opinion, Nixon offered a compromise of written transcripts of some of the tapes; when Cox refused that offer, Nixon ordered him fired. That firing became the “Saturday Night Massacre,” after both Attorney General Richardson and Deputy Attorney General William Ruckelshaus resigned rather than carry out the order, with Solicitor General Robert Bork finally executing the President’s directive and firing Cox.<sup>145</sup> The public outcry that followed forced the President to agree to the appointment of a new Special Prosecutor, and by November 1973, Leon Jaworski had been named, with assurances of greater independence than Cox had been given.<sup>146</sup> Some Oval Office tapes were subsequently turned over, and Jaworski continued the criminal investigation Cox’s team had begun. Then on March 1, 1974, the grand jury returned indictments—for conspiracy to obstruct justice, conspiracy to defraud the United States, and other crimes—for seven of the President’s former aides,<sup>147</sup>

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<sup>141</sup> Woodward & Bernstein, *Dean Alleges Nixon Knew of Cover-up Plan*, WASH. POST (June 3, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/060373-1.htm>.

<sup>142</sup> James M. Naughton, *Surprise Witness Butterfield, Ex-Aide at White House, Tells of Listening Devices*, N.Y. TIMES (July 17, 1973), <https://www.nytimes.com/1973/07/17/archives/surprise-witness-butterfield-exaide-at-white-house-tells-of.html>; BEN-VENISTE & FRAMPTON, *supra* note 135, at 111–12.

<sup>143</sup> Schroeder, *supra* note 122, at 351; *see* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974).

<sup>144</sup> Nixon v. Sirica, 487 F.2d 700, 704 (D.C. Cir. 1973).

<sup>145</sup> Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

<sup>146</sup> LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 5* (1976).

<sup>147</sup> *See* Anthony Ripley, *Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate; Haldeman, Ehrlichman, Mitchell on List*, N.Y. TIMES (March 2, 1974), <https://www.nytimes.com/1974/03/02/archives/federal-grand-jury-indicts-7-nixon-aides-on-charges-of-conspiracy.html>. Former White House Counsel Dean had already pleaded guilty, after extensive negotiations, in October 1973, and had been cooperating with prosecutors since. *See Dean Pleads Guilty in Deal; Will Aid the Prosecution*, N.Y. TIMES (Oct. 20, 1973), <https://www.nytimes.com/1973/10/20/archives/dean-pleads-guilty-in-deal-will-aid-the-prosecution-immunity-fight.html>.

including the former Attorney General; as the country would later learn, the grand jury also named President Nixon as an unindicted co-conspirator.<sup>148</sup>

In addition to presenting Judge Sirica with these indictments, the grand jury also presented the judge with a document titled “Grand Jury Report and Recommendation,” in which the grand jury reported that it had “heard evidence that it regards as having a material bearing on matters that are within the primary jurisdiction of the House of Representatives Committee on the Judiciary in its present investigation to determine whether sufficient grounds exist . . . to impeach” President Nixon.<sup>149</sup> The Report and Recommendation, now frequently referred to as the “Watergate Roadmap,” continued: “it is the belief of the Grand Jury that it should presently defer to the House of Representatives and allow the House to determine what action may be warranted at this time by this evidence.”<sup>150</sup> On March 18, Judge Sirica directed the delivery of the Report and Recommendations, together with the referenced materials, to the House Judiciary Committee. The Report was divided into four parts, with the fourth part focused on the President’s public statements.<sup>151</sup> Without any editorializing, the fourth part simply listed twelve public presidential statements the grand jury evidently wished the Committee to consider, all involving denials of knowledge of, or involvement with, the Watergate break-in, cover-up, and other related activities.<sup>152</sup> This report was received by the Judiciary Committee, which had opened a formal impeachment inquiry the month before.<sup>153</sup>

In May 1974, after months of staff investigation, the Committee began its impeachment hearings. The opening statements were public and carried live on television, while the substantive consideration of evidence happened in

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<sup>148</sup> Anthony Ripley, *Jury Named Nixon a Co-Conspirator but Didn’t Indict*, N.Y. TIMES (June 7, 1974), <https://www.nytimes.com/1974/06/07/archives/jury-named-nixon-a-coconspirator-but-didnt-indict-st-clair-confirms.html>.

<sup>149</sup> *In re* Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives at 1, 370 F. Supp. 1219 (D.D.C. 1974) [hereinafter Roadmap], <https://www.archives.gov/files/research/investigations/watergate/roadmap/docid-70105890.pdf> (last visited Sept. 4, 2019); see Linda Charlton, *The Scene in Sirica’s Court: A Historic 13 Minutes*, N.Y. TIMES (March 2, 1974), <https://www.nytimes.com/1974/03/02/archives/the-scene-in-siricas-court-a-historic-13-minutes-special-to-the-new.html>.

<sup>150</sup> Roadmap, *supra* note 149, at 1.

<sup>151</sup> *Id.* at 3.

<sup>152</sup> *Id.* at 52–62.

<sup>153</sup> STAFF OF THE IMPEACHMENT INQUIRY, 93D CONG., REP. ON THE CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 2247–48 (Comm. Print 1974). See generally JAMES D. ST. CLAIR, JOHN J. CHESTER, MICHAEL A. STERLACCI, JEROME J. MURPHY & LOREN A. SMITH, AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT 15–16 (1974) [hereinafter ST. CLAIR MEMO], <https://ia800201.us.archive.org/27/items/analysisofconsti00stcl/analysisofconsti00stcl.pdf> (describing that the process of impeachment requires two separate actions).

executive session, behind closed doors.<sup>154</sup> The hearings, like the investigation that had preceded them, focused on Watergate, but also encompassed other potential abuses of power, including the creation of a so-called “enemies list,” the secret bombing of Cambodia, and matters relating to the use of the apparatus of government—including the Internal Revenue Service, the Federal Bureau of Investigation, and the Secret Service—against the President’s critics and political opponents.<sup>155</sup> In early July, the Committee heard testimony from nine witnesses, again opening its proceedings to the public; under the Committee’s rules, both Committee counsel and the President’s counsel questioned all of the witnesses, with counsel to the President then permitted to deliver closing remarks and a written brief.<sup>156</sup>

Meanwhile, matters were accelerating in the Special Counsel’s Office. In April 1974, Jaworski issued a subpoena for the records and tapes of certain specified conversations between the President and various aides, beyond those that had already been disclosed.<sup>157</sup> The President unsuccessfully resisted the subpoena in the district court.<sup>158</sup> Then on July 24, 1974, the Supreme Court unanimously ruled that the requested materials were not shielded by executive privilege, and that the President’s generalized interest in confidentiality was not sufficient to overcome the need for access to the materials in the context of a pending criminal proceeding.<sup>159</sup>

Three days after the Supreme Court’s decision, on July 27, 1974, the House Judiciary Committee began holding votes on proposed articles of impeachment. In the end, the committee approved three articles. The first, discussed at greater length below, charged the President with obstruction of the Watergate investigation; it was approved by the Committee 27 to 11.<sup>160</sup> The second concerned abuse of power; this far-ranging article alleged use of the IRS for unlawful taxpayer audits and investigations; use of the FBI to conduct surveillance and investigations for purposes unrelated to national security or law

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<sup>154</sup> BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 161 (1976).

<sup>155</sup> Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 23–25, 217 (1974); BOWMAN, *supra* note 28, at 190.

<sup>156</sup> Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 9 (1974).

<sup>157</sup> *United States v. Nixon*, 418 U.S. 683, 687–88 (1974). These same materials were requested during the same period of time by the Judiciary Committee via committee subpoena. *See* WOODWARD & BERNSTEIN, *supra* note 154, at 124.

<sup>158</sup> *See United States v. Mitchell*, 377 F. Supp. 1326, 1331 (D.D.C. 1974) (denying President’s motion to quash subpoena).

<sup>159</sup> *Nixon*, 418 U.S. at 713.

<sup>160</sup> Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 10 (1974).

enforcement; and the maintenance and use of a secret investigative unit inside the White House, known as “the Plumbers,” which was funded by campaign contributions and used CIA resources to engage in covert and unlawful activities.<sup>161</sup> This article was approved 28 to 10.<sup>162</sup> The third article focused on the President’s failure to comply with Committee subpoenas, and his general refusal to cooperate with congressional investigators.<sup>163</sup> This vote was closer than the others: the article was approved 21 to 17.<sup>164</sup> Two other articles of impeachment were considered but not approved by the committee. The first “charged that the President had concealed the bombing in Cambodia from the Congress and that he had submitted, personally and through his aides, false and misleading statements to the Congress concerning that bombing.”<sup>165</sup> That article failed by a vote of 12 to 26.<sup>166</sup> The second unsuccessful article charged the President with failing to report income and claiming unlawful deductions on his tax returns; it also alleged that he had received unlawful emoluments in the form of “government expenditures at his privately owned properties at San Clemente, California, and Key Biscayne, Florida.”<sup>167</sup> Like the article involving the bombing of Cambodia, this article failed 12 to 26.<sup>168</sup>

The first approved article of impeachment charged the President with unlawful activities as part of a plan “to obstruct the investigation of the Watergate break-in and to cover up other unlawful activities.”<sup>169</sup> The President’s public statements about the break-in, and his activities around the statements

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<sup>161</sup> This included, perhaps most notoriously, burglarizing the offices of the therapist of Pentagon Papers whistleblower Daniel Ellsberg. *Id.* at 161–70.

<sup>162</sup> *Id.* at 10.

<sup>163</sup> *Id.* at 2.

<sup>164</sup> *Id.* at 10–11.

<sup>165</sup> *Id.* at 217.

<sup>166</sup> *Id.* at 11. The report explained that “[e]xamining the bombing of Cambodia from the perspective of Congressional responsibility, the opponents of the article concluded that, even if President Nixon usurped Congressional power, Congress shared the blame through acquiescence or ratification of his actions.” *Id.* at 219.

<sup>167</sup> *Id.* at 11.

<sup>168</sup> The Report explained that, as to the emoluments allegations, “opponents maintained that a majority of the questionable expenditures were made pursuant to a Secret Service request, that there was no direct evidence of the President’s awareness at the time of the expenditures that payment for these items were made out of public rather than personal funds, and that this section of the Article did not rise to the level of an impeachable offense.” *Id.* at 221. As to the unsuccessful tax fraud charges, the Report explained that some members believed that “an impeachment inquiry in the House and trial in the Senate are inappropriate forums to determine the President’s culpability for tax fraud, and that this kind of offense can be properly redressed through the ordinary processes of the criminal law. Finally[,] they argued that even if tax fraud were proved, it was not the type of abuse of power at which the remedy of impeachment is directed.” *Id.* at 223.

<sup>169</sup> Richard Lyons & William Chapman, *Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11*, WASH. POST (July 28, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm>.

made by others, were at the center of this charge: “For more than two years, [Nixon] . . . continuously denied any direction of or participation in a plan to cover up and conceal the identities of those who authorized the burglaries and the existence and scope of other unlawful and covert activities committed in the President’s interest and on his behalf.”<sup>170</sup> The article described a course of conduct that included:

[M]aking false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct . . . . In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.<sup>171</sup>

The Judiciary Committee Report supported this charge with a comprehensive detailing of the President’s public statements. The list included a June 1972 news conference in which the President claimed that his press secretary had spoken accurately about Watergate when he maintained that “[t]he White House ha[d] no involvement whatever in this particular incident”;<sup>172</sup> an August 1972 speech in which the President claimed that investigations into Watergate had the White House’s “total cooperation,” and that John Dean had conducted a “complete investigation of all leads which might involve any present members of the White House Staff,” and that Dean’s investigation had uncovered that “no one in the White House Staff, no one in this Administration, presently employed, was involved in this very bizarre incident”;<sup>173</sup> and an April 1973 address in which he suggested he had been misled by staff members into believing there had been no White House or campaign involvement in the break-in or cover-up.<sup>174</sup>

The Report described the Committee’s views on the presidential conduct and rhetoric at issue in this impeachment article in this way:

President Nixon’s course of conduct following the Watergate break-in . . . required perjury, destruction of evidence, obstruction of justice,

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<sup>170</sup> Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 27 (1974).

<sup>171</sup> *Id.* at 2–3.

<sup>172</sup> *Id.* at 27.

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

<sup>174</sup> *Id.* at 28.

all crimes. *But, most important, it required deliberate, contrived, and continuing deception of the American people.* President Nixon's actions resulted in manifest injury to the confidence of the nation and great prejudice to the cause of law and justice, and was subversive of constitutional government. His actions were contrary to his trust as President and unmindful of the solemn duties of his high office. It was this serious violation of President Richard M. Nixon's constitutional obligations as President, and not the fact that violations of federal criminal statutes occurred, that lies at the heart of Article I.<sup>175</sup>

The Report's discussion of Article II, the catch-all abuse-of-power charge, also identified the President's public deception as a component of the misconduct it deemed impeachable. As the report explained, "[i]n considering this Article the Committee has relied on evidence of acts directly attributable to Richard M. Nixon himself. He has repeatedly attempted to conceal his accountability for these acts and attempted to deceive and mislead the American people about his own responsibility."<sup>176</sup>

In addition to the articles and the Committee Report, the Committee debates shed some light on the Committee's consideration of these matters—although they occurred before the release of the most damning of the Oval Office tapes. In his opening statement, House Judiciary Committee Chairman Peter Rodino foregrounded the President's public speech:

In his statement of April 30, 1973, President Nixon told the American people that he had been deceived by subordinates into believing that none of the members of his administration or his personal campaign committee were implicated in the Watergate break-in. . . . It must be decided whether the President was deceived by his subordinates . . . or whether, in fact, Richard M. Nixon, in violation of the sacred obligation of his constitutional oath, has used the power of his high office for over 2 years to cover up and conceal responsibility for the Watergate burglary and other activities of a similar nature.

Rodino continued:

*[T]he Committee has to decide whether in his statement of April 30 and other public statements the President was telling the truth to the American people, or whether that statement and other statements were part of a pattern of conduct designed not to take care that the laws*

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<sup>175</sup> *Id.* at 136 (emphasis added).

<sup>176</sup> *Id.* at 182.

*were faithfully executed, but to impede their faithful execution for his political interest and on his behalf.*<sup>177</sup>

During the debates, some members, like California Democratic Congressman Jerome Waldie, repeatedly invoked the President's public statements,<sup>178</sup> while supporters of the President, like Republican Congressman Charles Wiggins, raised concerns about the propriety of citing press conferences in articles of impeachment.<sup>179</sup>

The final Oval Office tapes, including the so-called "smoking gun" tape that conclusively established President Nixon's active involvement in the cover-up, were released several days after the committee vote.<sup>180</sup> Nixon resigned days later.<sup>181</sup> Several days after that, Congressman Wiggins and other Republicans who had initially opposed impeachment released statements indicating that they had come to support the first article of impeachment—the obstruction-of-justice charge, which relied most heavily on the President's public statements—though they continued to believe that none of the other articles satisfied the constitutional standard.<sup>182</sup>

Special Prosecutor Leon Jaworski suggested in his memoir that the President's public speeches were, if not central to his actions as prosecutor, at least atmospherically quite significant; upon learning that the White House would release the tapes and the President would make a statement acknowledging that some of the tapes revealed his involvement in the Watergate coverup, Jaworski wrote, "[T]he revelation was the end of a nightmare. The galling frustration I had experienced for long months as Nixon continued to mislead the public was over."<sup>183</sup>

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<sup>177</sup> *Debate on Articles of Impeachment: Hearings on H.R. Res. 803 Before the H. Comm. on the Judiciary*, 93d Cong. 3 (1974) (emphasis added).

<sup>178</sup> *See, e.g., id.* at 210 ("With the President less than a week after the break-in announcing to the public facts that, in fact, he knew were not true.").

<sup>179</sup> *Id.* at 222 ("I am . . . concerned, Mr. Chairman, about this almost scurrilous charge that the President of the United States lied to the American people, not incidentally to an investigator, lied to the American people as the result of a press conference.").

<sup>180</sup> *President's Statement About Disclosure*, N.Y. TIMES (Aug. 6, 1974), <https://www.nytimes.com/1974/08/06/archives/presidents-statement-about-disclosure-tapi-at-variance-with-certain.html>.

<sup>181</sup> Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A01.

<sup>182</sup> *See* Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 359–60 (1974).

<sup>183</sup> JAWORSKI, *supra* note 146, at 209.

C. *Bill Clinton: “Mis[leading] his family, his friends and staff, and the Nation to conceal the nature of his relationship with Ms. Lewinsky”*

Presidential statements, including public statements, also played a significant role in the early stages of the impeachment of President Bill Clinton; although the language explicitly identifying the President’s public statements was stripped out of the relevant article of impeachment during debates in the House Judiciary Committee, the Committee’s (and the President’s) treatment of that language, and of the presidential speech at issue, is a fascinating and underappreciated dimension of the story of Bill Clinton’s impeachment.

On September 9, 1998, Independent Counsel Kenneth Starr delivered to the House of Representatives the document that came to be known as the “Starr Report.”<sup>184</sup> He did so pursuant to the now-lapsed Independent Counsel statute, which required an independent counsel to “advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel’s responsibilities under this chapter, that may constitute grounds for an impeachment.”<sup>185</sup> Although Starr’s initial 1994 appointment under the Independent Counsel statute had directed him to investigate possible crimes related to real estate investments Bill and Hillary Clinton made while still in Arkansas,<sup>186</sup> Starr was eventually granted additional authority to investigate a number of unrelated matters—including, most significantly, potential perjury and obstruction of justice involving President Clinton’s affair with White House intern Monica Lewinsky.<sup>187</sup> In the end, that conduct was the subject of both the Starr Report and the impeachment proceedings that grew out of it.

The narrative portion of the Starr Report contained a detailed account of President Clinton’s relationship with Lewinsky.<sup>188</sup> The second half of the report listed eleven “Acts that May Constitute Grounds for Impeachment.”<sup>189</sup> Five of

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<sup>184</sup> See Communication from Kenneth W. Starr, Independent Counsel, Transmitting a Referral to the United States House of Representatives Filed in Conformity with the Requirements of 18 U.S.C. § 595(c), H.R. REP. No. 105-310, at 1 n.1 (1999) [hereinafter Starr Report].

<sup>185</sup> *Id.*

<sup>186</sup> See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 605 (1998).

<sup>187</sup> *In re Madison Guar. Sav. & Loan Ass’n*, 1998 WL 472444 (D.D.C. Jan. 16, 1998).

<sup>188</sup> Starr Report, *supra* note 184, at 11–95.

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

the “Acts” involved lies under oath, in a variety of settings;<sup>190</sup> five involved obstruction of justice and attempts to obstruct justice.<sup>191</sup>

The last of the eleven “Acts” swept most broadly and did not track any particular criminal offense. Its opening summation argued: “There is substantial and credible information that President Clinton’s actions since January 17, 1998, regarding his relationship with Monica Lewinsky have been inconsistent with the President’s constitutional duty to faithfully execute the laws.”<sup>192</sup> This section of the report contained the most extensive discussion of public speech. It reiterated the charges from the first ten grounds: that the President “attempted to conceal the truth about his relationship with Ms. Lewinsky from the judicial process in the *Jones* case,” a civil suit against the President by former state employee Paula Jones,<sup>193</sup> and that he also “lied under oath to the grand jury.”<sup>194</sup> But it also focused on statements the President had made publicly, rather than in the *Jones* litigation or before Starr’s grand jury. As the report detailed, “[t]he President . . . misled the American people and the Congress in his public statement of January 26, 1998, in which he denied ‘sexual relations’ with Ms. Lewinsky.”<sup>195</sup> The report emphasized that “the President’s emphatic denial to the American people was false. And his statement was not an impromptu comment in the heat of a press conference. To the contrary, it was an intentional and calculated falsehood to deceive the Congress and the American people.”<sup>196</sup> The report then discussed a public statement made in August 1998: “[T]he president again made false statements to the American people and Congress, contending that his answers in his civil deposition had been ‘legally accurate.’”<sup>197</sup> This section of the report also pointed to statements by the President’s Cabinet, staff members, and the First Lady, all of whom relied upon and amplified the President’s denials.<sup>198</sup> As the report summarized, “[c]oupled with the President’s firm denial, the united front of the President’s closest

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<sup>190</sup> *Id.* at III (outlining charges and grounds for impeachment in I–IV, VIII).

<sup>191</sup> *Id.* at III–IV (outlining charges and grounds for impeachment in V–VII, IX–X).

<sup>192</sup> *Id.* at 204. The report was accompanied by detailed appendices. *See, e.g.*, Communication from the Office of the Independent Counsel, Kenneth W. Starr, Independent Counsel, Transmitting Appendices to the Referral to the United States House of Representatives Pursuant to 28 U.S.C. § 595(c), H.R. DOC. No. 105-311 (1998).

<sup>193</sup> *See Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>194</sup> Starr Report, *supra* note 184, at 204.

<sup>195</sup> *Id.* This report focused on the speech in which the President famously maintained, “I did not have sexual relations with that woman, Ms. Lewinsky.” *What Clinton Said*, WASH. POST (Jan. 26, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/whatclintonsaid.htm>.

<sup>196</sup> Starr Report, *supra* note 184, at 205.

<sup>197</sup> *Id.* at 204, 210.

<sup>198</sup> *Id.* at 206.

advisors helped shape perception of the issue.”<sup>199</sup> In its conclusion to this section, the report maintained that the President “made and caused to be made false statements to the American people about his relationship with Ms. Lewinsky,” that he also “made false statements about whether he had lied under oath or otherwise obstructed justice,” and that “this represent[ed] substantial and credible information that may constitute grounds for impeachment.”<sup>200</sup>

Congress publicly released the report two days after receiving it;<sup>201</sup> on the same day, the President issued a response to the report. The response explained, “The President has acknowledged misleading his family, staff and the country about the nature of his relationship with Ms. Lewinsky, and he has apologized and asked for forgiveness.”<sup>202</sup> But the response argued that this “personal failing does not constitute a criminal abuse of power. If allowing aides to repeat misleading statements is a crime, then any number of public officials are guilty of misusing their office for as long as they fail to admit wrongdoing in response to any allegation about their activities.”<sup>203</sup> Later, the response drew a contrast to President Nixon’s false statements, explaining that those statements “were part of a scheme to obstruct justice through the perjury of his senior staff, through payoffs to criminal defendants, and through use of the [CIA] to thwart an FBI investigation into crimes in which he was involved . . . . Merely to describe that conduct makes clear how different it is[.]”<sup>204</sup>

Events moved quickly after public release of the Starr Report and the President’s initial response. Less than a month after Congress received the report, the House Judiciary Committee voted to open a formal impeachment inquiry,<sup>205</sup> and days later, on October 8, the full House approved the inquiry resolution by a vote of 258 to 176.<sup>206</sup> On November 9, the Judiciary Committee’s Subcommittee on the Constitution held a hearing on the “Background and

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 210. The last section of the Report also discussed at length the President’s invocation of executive privilege. *Id.* at 206–09.

<sup>201</sup> T.A. Frank, “*This Is Unfortunate*”: *The Starr Report, Celebrating Its 20th Anniversary, Was the Prologue to the Trump Age*, VANITY FAIR (Sept. 3, 2018), <https://www.vanityfair.com/news/2018/09/the-starr-report-20th-anniversary-trump-age>.

<sup>202</sup> COMM. ON JUDICIARY, PRELIMINARY MEMORANDUM OF THE PRESIDENT OF THE UNITED STATES CONCERNING REFERRAL OF THE OFFICE OF THE INDEPENDENT COUNSEL, H.R. REP. No. 105-317, at VII (1998).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 54.

<sup>205</sup> Peter Baker & Juliet Eilperin, *Panel Votes Along Party Lines for Impeachment Inquiry*, WASH. POST (Oct. 6, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/president100698.htm>.

<sup>206</sup> Peter Baker & Juliet Eilperin, *Clinton Impeachment Inquiry Approved; 31 House Democrats Back GOP*, WASH. POST (Oct. 9, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/president100998.htm>.

History of Impeachment,”<sup>207</sup> featuring testimony by a number of scholars of history and the Constitution.

Impeachment hearings began on November 19, 1998. After opening statements by the Chair and Ranking Member, Independent Counsel Ken Starr testified.<sup>208</sup> He provided a detailed summary of the contents of the report, including describing the President’s “political strategy” for responding to public reporting on his relationship with Monica Lewinsky:

First, the President denied the truth publicly and emphatically . . . political polling led to Hollywood staging. The President’s California friend and producer Harry Thomason flew to Washington and advised the President that the President needed to be very forceful in denying the relationship. On Monday, January 26, in the Roosevelt Room, before Members of Congress and other citizens, the President provided a clear and emphatic public statement denying the relationship. The President also made false statements to his Cabinet and to his aides. They then spoke publicly and professed their belief in the President.<sup>209</sup>

On December 4, the House Judiciary Committee began debating articles of impeachment.<sup>210</sup> On December 11, the Committee approved three articles on a party-line vote.<sup>211</sup> Two accused the President of perjury, both before Ken Starr’s grand jury and in civil depositions in the *Jones* litigation; one alleged obstruction of justice in both the *Jones* case and the Starr investigation.<sup>212</sup> The next day, December 12, the Committee considered a fourth article—one much more concerned with the public-facing statements and actions of the President. The initial draft of that article, captioned “Abuse of Power,” largely tracked the eleventh section of the Starr Report, alleging that the President had “misused and abused his office and impaired the administration of justice” in the following ways:

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<sup>207</sup> *Background and History of Impeachment: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. (1998).

<sup>208</sup> Hearing on the Impeachment Inquiry: William Jefferson Clinton, President of the United States, C-SPAN (Nov. 19, 1998), <https://www.c-span.org/video/?115430-1/impeachment-inquiry-pt-1>; *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 14 (1998), <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-9.pdf>.

<sup>209</sup> *Impeachment Inquiry: William Jefferson Clinton*, *supra* note 208, at 25.

<sup>210</sup> Guy Gugliotta & Juliet Eilperin, *Panel Scraps Clinton Fund-Raising Probe*, WASH. POST (Dec. 4, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach120498.htm>.

<sup>211</sup> Peter Baker & Juliet Eilperin, *House Panel Passes 3 Impeachment Articles Against President Clinton*, WASH. POST (Dec. 12, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach121298.htm>.

<sup>212</sup> *Id.*

(1) As President, using the attributes of office, William Jefferson Clinton willfully made false and misleading public statements for the purpose of deceiving the people of the United States in order to continue concealing his misconduct and to escape accountability for such misconduct.

(2) As President, using the attributes of office, William Jefferson Clinton willfully made false and misleading public statements to members of his cabinet, and White House aides, so that these Federal employees would repeat such false and misleading statements publicly, thereby utilizing public resources for the purpose of deceiving the people of the United States, in order to continue concealing his misconduct and to escape accountability for such misconduct. The false and misleading statements made by William Jefferson Clinton to members of his cabinet and White House aides were repeated by those members and aides, causing the people of the United States to receive false and misleading information from high government officials.

...

In all of this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law, to the manifest injury of the people of the United States.<sup>213</sup>

The first two paragraphs of this fourth Article, then, focused on public lies and misrepresentations, both those made by the President directly, and those made by subordinates—who either acted upon the urging or instruction of the President or simply repeated the President’s untrue statements.

As debate in the House Judiciary Committee began on this fourth article, Pennsylvania Representative George Gekas, a Republican, introduced an amendment to strike several paragraphs from the article—the two excerpted above, and one about assertions of executive privilege—leaving only one paragraph regarding perjury before, and refusal to respond to requests from, the Judiciary Committee.<sup>214</sup> Then-Congressman Chuck Schumer voiced his strong support for the amendment: “The most absurd thing in this entire bill of impeachment is to say that, when the President speaks to the public or his Cabinet, quote, ‘for the purposes of deceiving people of the United States in

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<sup>213</sup> Impeachment of William Jefferson Clinton, President of the United States, H.R. REP. No. 105-830, at 85 (1998).

<sup>214</sup> *Id.* at 84; see PETER BAKER, BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON 214–15 (2000).

order to continue concealing his misconduct,' that that should be an article of impeachment."<sup>215</sup> Others echoed this sentiment.<sup>216</sup>

The Gekas amendment was adopted by a vote of 29 to 5, with three Members voting present.<sup>217</sup> Representative Goodlatte, who voted for the amendment, explained his vote this way:

I think that no one should take from the decision to delete these three sections of the article that we don't severely abhor the actions of the President in regard to these three sections. I believe that the allegations contained in them are all true. I believe the President of the United States did lie to the American people. I do believe the President lied to his cabinet and others, and I think that he hoped that in so doing that they would carry forth his lies and I think that is wrong as well. But, I . . . don't believe that any of these . . . items are impeachable offenses. And as a result, I'll support this amendment.<sup>218</sup>

The House Committee's Impeachment Report devoted substantial attention to the elimination of these sections of the fourth article. The Report explained that "several members had expressed grave concern regarding the President's lies to the American people with respect to the Paula Jones lawsuit, Monica Lewinsky[,] and his potential criminal culpability."<sup>219</sup> It elaborated: "The . . . public trust . . . was deliberately abused by President Clinton when he made these false statements. . . . The political powers that accompany the Office of the President do not include misleading the American public in an attempt to avoid or thwart federal investigation."<sup>220</sup> The Report explained, however, that "it was the measured judgment of most Committee members that these statements did not rise to the level of an impeachable offense, although the Committee does believe that Presidential lies to the American public could constitute an impeachable offense in other circumstances."<sup>221</sup>

After adopting the Gekas Amendment, the House Judiciary Committee approved the amended fourth article by the same 21 to 16 party-line vote as the first three articles, and the four articles proceeded to the floor of the House of

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<sup>215</sup> *Testing of a President; Excerpts from the House Judiciary Committee's Debate on Article IV*, N.Y. TIMES (Dec. 13, 1998), <https://www.nytimes.com/1998/12/13/us/testing-president-excerpts-house-judiciary-committee-s-debate-article-iv.html>.

<sup>216</sup> *Id.* (including the statements of Representatives Robert Goodlatte and Howard Coble).

<sup>217</sup> Impeachment of William Jefferson Clinton, H.R. REP. NO. 105-830, at 84.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 86.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 89.

Representatives.<sup>222</sup> On December 19, 1998, the full House approved two of the four articles of impeachment, one for perjury and one for obstruction of justice, making Clinton the first President to be impeached since Andrew Johnson.<sup>223</sup>

Following the House vote, the President filed a formal answer to the articles of impeachment. That answer offered this concession: “The President acknowledges that . . . he misled his family, his friends and staff, and the Nation to conceal the nature of his relationship with Ms. Lewinsky.”<sup>224</sup> In light of the fact that the article based on public lies and misstatements had *not* been approved by the full House, it is telling that the President nevertheless chose to address those matters in his response.

On January 7, 1999, the second presidential impeachment trial in history began in the Senate, with Chief Justice William Rehnquist presiding.<sup>225</sup> Procedurally, the Senate drew heavily on the precedent of the Johnson impeachment.<sup>226</sup> The trial took just over a month, with the House Managers focusing their case on establishing the elements of perjury and obstruction of justice, and Clinton’s team offering a narrative of private misconduct unrelated to what they maintained were the core purposes of impeachment—punishing and deterring political offenses and violations of public trust. Both sides made reference to public statements, although those statements were not a part of the formal impeachment charges. The House Managers’ trial memo linked perjury to public statements in its opening summation, charging that “By his pattern of lies under oath, misleading statements and deceit, he has seriously undermined the integrity and credibility of the Office of President and thereby the honor and integrity of the United States.”<sup>227</sup> Later, in a section captioned “Effect on Office

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<sup>222</sup> Frank C. Aukofer, *Measure Heads to House for Debate: 4<sup>th</sup> Impeachment Count Approved; Censure Rejected; Vote by Full Chamber May Come This Week*, MILWAUKEE JOURNAL-SENTINEL, Dec. 13, 1998, at A1. Following the final vote, the President gave a Rose Garden statement in which he said “Nothing—not piety, nor tears, nor wit, nor torment—can alter what I have done. . . . I must make my peace with that. I must also be at peace with the fact that the public consequences of my actions are in the hands of the American people and their representatives in the Congress. Should they determine that my errors of word and deed require their rebuke and censure, I am ready to accept that.” Baker & Eilperin, *supra* note 211.

<sup>223</sup> Peter Baker & Juliet Eilperin, *Clinton Impeached: House Approves Articles Alleging Perjury, Obstruction*, WASH. POST (Dec. 20, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach122098.htm>.

<sup>224</sup> Answer of President William Jefferson Clinton to the Articles of Impeachment, S. REP. NO. 106-2, at 29 (1999), <https://www.govinfo.gov/content/pkg/CDOC-106sdoc2/pdf/CDOC-106sdoc2.pdf>.

<sup>225</sup> Joan Biskupic, *Rehnquist to Transform Senate into Jury*, WASH. POST (Jan. 7, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/rehnquist010799.htm>.

<sup>226</sup> This may well have been because Chief Justice Rehnquist was a student of that historical episode; fifteen years earlier he had written a book about the impeachment trials of both Andrew Johnson and Supreme Court Justice Samuel Chase. See REHNQUIST, *supra* note 15.

<sup>227</sup> *Trial Memorandum of the House of Representatives*, WASH. POST (Jan. 11, 1999), <https://www>.

of the Presidency,” the same trial memo argued that the President’s lies and misstatements, both under oath and more generally to the public, undermined both the “econom[y] and national defense”; the memo maintained that “the President is the spokesman for the government and the people of the United States concerning both domestic and foreign matters,” so that when “that spokesman is guilty of a continuing pattern of lies, misleading statements, and deceits over a long period of time, the believability of any of his pronouncements is seriously called into question. . . . what does that do to confidence in the honor and integrity of the United States?”<sup>228</sup>

On February 12, after private deliberations, the perjury charge failed by a vote of 45 to 55,<sup>229</sup> and the obstruction of justice charge failed by a vote of 50 to 50.<sup>230</sup>

Most Senators provided some public explanation for their votes, many mentioning the President’s public statements. Senator Carl Levin voted against impeachment but expressed support for a censure resolution, explaining, “While I do not believe the President’s conduct in his private, consensual sexual relationship should have become the business of the American public, it did in fact become so, and when it did the President had the duty to tell the truth.”<sup>231</sup> Daniel Akaka, another Senate Democrat who voted against impeachment, agreed that “[c]ertain facts are indisputable” and that among those were that “the President lied to the American people and to his wife and daughter about an extramarital affair.”<sup>232</sup> Still, he concluded, “impeachment and removal from office should only be used for crimes against the country or threats to our national security,” a standard he maintained was not satisfied here.<sup>233</sup>

## II. ANALYSIS: IMPEACHABLE SPEECH

This Part attempts to identify some of the general themes that emerge from considering these three historical episodes together. It first asks about the

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washingtonpost.com/wp-srv/politics/special/clinton/stories/housetext011199.htm.

<sup>228</sup> *Id.*

<sup>229</sup> *Senate Vote on Perjury*, WASH. POST (Feb. 12, 1999), [http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/rollcall1\\_021299.htm](http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/rollcall1_021299.htm).

<sup>230</sup> *Senate Vote on Obstruction of Justice*, WASH. POST (Feb. 12, 1999), [https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/rollcall2\\_021299.htm](https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/rollcall2_021299.htm).

<sup>231</sup> *Statement of Sen. Levin*, WASH. POST (Feb. 13, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/levintext021399.htm>.

<sup>232</sup> *Statement of Sen. Akaka*, WASH. POST (Feb. 13, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/akakatext021399.htm>.

<sup>233</sup> *Id.*

function and limits of congressional precedent in debates about impeachment, then explores the intersection of impeachment with the rhetorical presidency. It next categorizes the forms of presidential speech that have figured in presidential impeachment proceedings, and it concludes by identifying and evaluating potential constitutional defenses to attempts to predicate impeachment in part or in full on presidential speech.

### A. *The Function of Precedent in Impeachment*

When it comes to debates about impeachment, one important antecedent question concerns the value of congressional precedent.<sup>234</sup> Even if the history revealed a clear congressional consensus about the proper objects of impeachment at particular moments in time, it is far from clear that such history would *bind* any future Congress in the same way a precedent of the Supreme Court presumptively binds a future Supreme Court.<sup>235</sup> But the question is purely hypothetical: as the foregoing discussion makes clear, impeachment history is complex and contested, with each of the key presidential impeachment precedents reflecting a sharp division between House and Senate, and a degree of internal division within each chamber.<sup>236</sup> Still, the political branches have long placed significant weight on their own past practice, even if, as is often the case, past practice is subject to conflicting interpretation; indeed, “[a]ll established political orders incorporate the institutional memory embodied in ‘long-term accretions of practice.’”<sup>237</sup> That is emphatically not to suggest that the particular offenses identified in the three episodes described above, or the conclusions reached by the decisionmakers in those cases, circumscribe the options available to any future Congress. But the history is relevant, and it warrants consideration.<sup>238</sup>

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<sup>234</sup> This question is especially important because in impeachment, *all* relevant precedent is political-branch precedent. See *Nixon v. United States*, 506 U.S. 224, 226 (1993) (concluding that a challenge to the Senate’s impeachment procedures presents a nonjusticiable political question).

<sup>235</sup> Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 646 (1999) (“If impeachment is a mixed operation of law and politics, the appropriate role of ‘precedent’ is uncertain.”).

<sup>236</sup> Cf. BENEDICT, *supra* note 58, at 29 (describing the 1868 Congress considering Andrew Johnson’s impeachment as having “two distinct lines of precedents on which to draw. On one hand, an investigator might argue that the true precedents for impeachment were those set by the House of Representatives in presenting impeachments to the Senate. On the other, he might insist that the true precedents lay in how the Senate decided the cases”).

<sup>237</sup> Trevor Morrison & Samuel Issacharoff, *Constitution by Convention*, 109 CALIF. L. REV. (forthcoming 2020); JAMES MADISON, *Speech in Congress on Presidential Removal Power*, in JAMES MADISON: WRITINGS 453 (Jack Rakove ed., 1999) (“[I]f it relates to a doubtful part of the constitution, . . . an exposition of the constitution may come with as much propriety from the legislature as any other department of government.”).

<sup>238</sup> Cf. Keith Whittington, *A Formidable Weapon of Faction?*, 55 WAKE FOREST L. REV. (forthcoming

It is also possible to question the wisdom of relying on impeachments that were not “successful” in any ultimate sense. On this logic, because none of the three impeachments I consider resulted in the president’s conviction and removal from office by the Senate, these historical chapters offer little guidance as to the correct constitutional definitions or standards. (And the Nixon impeachment, which is broadly viewed as involving presidential conduct that clearly *did* warrant not only impeachment but conviction and removal, rests on a historical counterfactual.) But that criticism applies to any sustained thinking about impeachment that grapples with history, since no president has ever been removed by the Senate. And even without any removals, history surely offers insights into what individual members and each house of Congress heard, said, and concluded regarding the circumstances under which impeachment and removal are justified. Indeed, many scholars have maintained that when it comes to impeachment, “the Nation’s practice between ratification and the present is no less important for interpretive purposes than the Nation’s understanding in 1787 and 1788.”<sup>239</sup> And impeachment involves core separation-of-powers questions, where historical practice has long been relied upon in judicial interpretation;<sup>240</sup> if courts consider history in this sphere, surely it is appropriate for Congress to do the same. One final rejoinder is that in impeachment, as elsewhere in law and politics, failure and success may not stand in a relationship of strict opposition. For example, although Congress did not actually impeach and remove President Nixon, the general goal of holding to account a lawless president was still arguably achieved.<sup>241</sup> And although Andrew Johnson

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2020) (manuscript at 11) (“The history of federal impeachments has built up some precedents that can help cabin disagreements over how the impeachment should be used, but is has not—and probably cannot—eliminate the prospect of future disputes over the impeachment power.”).

<sup>239</sup> Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 281 (1998). See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 886 (1996) (identifying “the need to reinterpret or ‘translate’ the Framers’ commands in ways that take account of, for example, changes in factual knowledge and social understandings that have occurred since the Constitution was adopted”).

<sup>240</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”); see also *NLRB v. Canning*, 573 U.S. 513, 514 (2014) (explaining that because the Recess Appointments Clause concerns the separation of powers, “in interpreting the Clause, we put significant weight upon historical practice”) (emphasis omitted). For scholarly discussions of “gloss” analysis, see generally Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 59 (2017) (“For judicial application of gloss, which is this Essay’s principal focus, there are at least four . . . justifications: deference to the constitutional views of nonjudicial actors; limits on judicial capacity; Burkean consequentialism; and reliance interests.”); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 479 (2012) (reexamining “the premises and implications of the idea of institutional acquiescence in particular, and of the role of historical practice more generally”).

<sup>241</sup> Examples from other spheres abound. See TULIS & MELLOW, *supra* note 117, at 5 (offering a new understanding of three critical constitutional “antimoments,” and arguing that the Anti-Federalists, Andrew Johnson, and Barry Goldwater, all of whom were “regarded by their contemporaries as the losers in the

emerged victorious from his Senate trial, he failed even to secure his party's nomination for president later that same year.<sup>242</sup>

### B. *Impeaching "The Rhetorical President"*

The next significant question concerns the relationship between the full flowering of the "rhetorical presidency" and the constitutional politics of impeachment. As Jeffrey Tulis demonstrates in his canonical *The Rhetorical Presidency*, the vision of the founding generation, which informed the practice of virtually every president until the twentieth century, rejected the use of presidential popular or mass rhetoric,<sup>243</sup> instead creating a set of general prescriptions under which most presidential rhetoric "would be *written*, and addressed principally to *Congress*,"<sup>244</sup> and where the president's limited public-facing speeches would "emphasize[] popular instruction in constitutional principle and the articulation of the general tenor and direction of presidential policy, while tending to avoid discussion of the merits of particular policy proposals."<sup>245</sup>

The framers seem to have been driven here by an acute fear of the dangers of demagoguery. As Keith Whittington explains, "At the time of the founding, demagoguery was seen as a central threat to the stability of democratic regimes, and popular rhetoric was associated with the power to sway the masses behind a charismatic leader who would break the fetters of constitutional office."<sup>246</sup> And indeed, the figure of the demagogue stalks much founding-era writing. The very first of the Federalist Papers warned of the "perverted ambition" of men who "hope to aggrandize themselves by the confusions of their country."<sup>247</sup> *Federalist 85*, Hamilton's closing argument in support of the Constitution, argued that adoption of the Constitution was needed to impose restraints on "the ambition of powerful individuals in single States, who may acquire credit and influence enough, from leaders and favorites, to become the despots of the

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immediate contests in which they engaged," still "decisively shaped the subsequent course of American politics"); cf. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945 (2010) (in litigation, "[l]oss may yield . . . indirect effects").

<sup>242</sup> Johnson also entered a number of compromises with congressional Republicans during the pendency of his impeachment, perhaps most significantly agreeing to nominate the moderate John Schofield as his War Secretary. See STEWART, *supra* note 66, at 225.

<sup>243</sup> JEFFREY TULIS, *THE RHETORICAL PRESIDENCY* 9 (2d ed. 2017); see also Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017).

<sup>244</sup> TULIS, *supra* note 243, at 46.

<sup>245</sup> *Id.* at 47.

<sup>246</sup> Whittington, *supra* note 66, at 435.

<sup>247</sup> THE FEDERALIST NO. 1 (Alexander Hamilton).

people;” Hamilton went on to warn that failure to ratify the Constitution could lead to “the military despotism of a victorious demagogue.”<sup>248</sup> While neither the first nor the last of the Federalist Papers mentioned impeachment directly, others did, including the famous *Federalist 65*;<sup>249</sup> and of course, the Constitution whose adoption the Federalist collection urged contained impeachment as an important check on the president.<sup>250</sup> James Madison made the connection between demagoguery and impeachment more explicit in a 1789 speech on the topic of the presidential removal power, in which he warned about “unworthy” leaders<sup>251</sup> as well as “ambitious or designing characters.”<sup>252</sup> While Madison explained that the trust the Constitution reposed in the president was a “high one, and in some degree perhaps a dangerous one,”<sup>253</sup> he also noted the presence of the impeachment remedy—available “at all times”<sup>254</sup>—in a way that arguably linked impeachment to presidential abuses that were rhetorical in character. And George Washington’s Farewell Address warned of “cunning, ambitious, and unprincipled men” who would “usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust domination.”<sup>255</sup>

Writing several decades later, James Fenimore Cooper warned that “the true theater of a demagogue is democracy,” and elaborated on the nature of the demagogue, in now-classic formulations: a leader whose goal is to “advance his own interests, by affecting a deep devotion to the interests of the people,” who “appeals to passion and prejudices rather than to reason,” and who is “a man of intrigue and deception, of sly cunning and management.”<sup>256</sup>

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<sup>248</sup> THE FEDERALIST NO. 85 (Alexander Hamilton); *see also* Bob Bauer, *A President’s Words Matter, Part II: Impeachment Standards and the Case of the Demagogue*, LAWFARE (Oct. 11, 2017, 7:30 AM), <https://www.lawfareblog.com/presidents-words-matter-part-ii-impeachment-standards-and-case-demagogue>.

<sup>249</sup> *See supra* note 39 and accompanying text.

<sup>250</sup> *Id.*

<sup>251</sup> MADISON, *supra* note 237, at 454; *see also* Bauer, *supra* note 248 (surveying founding-era materials).

<sup>252</sup> MADISON, *supra* note 237, at 453.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 454.

<sup>255</sup> George Washington, *Washington’s Farewell Address 1796*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) (last visited Aug. 10, 2020).

<sup>256</sup> JAMES FENIMORE COOPER, *On Demagogues*, in THE AMERICAN DEMOCRAT AND OTHER POLITICAL WRITINGS 99–100 (1838). More recent writings on demagoguery borrow heavily from this formulation, though also emphasizing the centrality of identifying and exploiting divisions. Patricia Roberts-Miller, for example, writes that “demagoguery is discourse that promises stability, certainty, and escape . . . by framing public policy in terms of the degree to which and the means by which . . . the out-group should be scapegoated for the current problems of the in-group.” PATRICIA ROBERTS-MILLER, DEMAGOGUERY AND DEMOCRACY 33 (2017); *see* MICHAEL SIGNER, DEMAGOGUE: THE FIGHT TO SAVE DEMOCRACY FROM ITS WORST ENEMIES 35 (2009) (“As Cooper recognized, true demagogues meet four rules: (1) They fashion themselves as a man or woman of the common people, as opposed to the elites; (2) their politics depends on a powerful, visceral connection with the

On Tulis's telling, this founding-era limitation on popular presidential rhetoric effectively shaped the office of president until the administrations of Teddy Roosevelt, who coined the term "the bully pulpit,"<sup>257</sup> and Woodrow Wilson, under whom the presidency acquired its contemporary rhetorical character.<sup>258</sup> For at least a century, then, popular rhetoric has been a core feature of presidential governance. And there is no real question that today, it is widely understood that "Presidents have a *duty* constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspire the population."<sup>259</sup>

All of the episodes discussed above occurred within a framework in which presidential rhetoric had already taken on its contemporary character. Both Nixon and Clinton held the office well within the age of the "rhetorical president" (albeit with differing access to modes of mass communication).<sup>260</sup> And although Johnson's administration predated the early twentieth-century shift, Tulis identifies Johnson as the "exception that proves the rule"—a nineteenth-century president who alone ignored the then-applicable limitations on popular presidential rhetoric, and faced formal sanction in the form of impeachment.<sup>261</sup>

There are several possible lessons to draw from considering the rhetorical presidency alongside questions of impeachment practice. First, the contemporary presidency's imperative of constant public address may mean that it is critical to draw clear boundaries around the categories of presidential speech that might be subject to impeachment; any other approach might open the door to routine invocation of the impeachment process, of the sort de Tocqueville warned against,<sup>262</sup> for something that has become a central feature of the

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people that dramatically transcends ordinary political popularity; (3) they manipulate this connection, and the raging popularity it affords, for their own benefit and ambition; and (4) they threaten or outright break established rules of conduct, institutions, and even the law."); ADAM HODGES, *WHEN WORDS TRUMP POLITICS* 15 (2020) (defining demagoguery as a term used "to designate leaders who use prejudicial appeals rather than rational arguments to mobilize the people"); *see also* JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 4–5 (2016); STEPHEN F. KNOTT, *THE LOST SOUL OF THE AMERICAN PRESIDENCY: THE DECLINE INTO DEMAGOGUERY AND THE PROSPECTS FOR RENEWAL* xiv (2019).

<sup>257</sup> DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* xi (2013) ("The essence of Roosevelt's leadership . . . lay in his enterprising use of the 'bully pulpit,' a phrase he himself coined to describe the national platform the presidency provides to shape public sentiment and mobilize action.")

<sup>258</sup> TULIS, *supra* note 243, at 3–4.

<sup>259</sup> *Id.* at 4.

<sup>260</sup> SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* 2, 11–12 (3d ed. 1997).

<sup>261</sup> TULIS, *supra* note 243, at 87–90.

<sup>262</sup> *See supra* note 41 and accompanying text.

contemporary presidency. Indeed, during each of the impeachment episodes discussed above, some members of Congress raised concerns about too cavalierly concluding that presidential speech might be impeachable. Then-Congressman Chuck Schumer, for example, described the original fourth article of impeachment against Bill Clinton as “absurd” for its identification of lies to the public and the Cabinet as impeachable.<sup>263</sup> As Schumer elaborated, “I think . . . if that article is significant enough for impeachment . . . then you could find people of goodwill and total honesty feel that every President should be impeached under that article—every single one.”<sup>264</sup>

On the other hand, it may be precisely *because* we have moved so far from the conception of presidential rhetoric that animated the framers that it is necessary to take seriously the possibility of impeachment for at least some categories of presidential speech. The dissolution of the original constraints on presidential speech may mean that impeachment is the only remaining constitutional mechanism for responding to certain categories of presidential rhetoric. If the norms and expectations that once constrained presidential speech have ceased to operate, perhaps the impeachment mechanism must adapt to these new conditions.

### C. Lies and Misstatements

What, then, does the history show about the categories of presidential speech that might be subject to impeachment? As is clear from the sections above, lies and misstatements played a significant role in the impeachment proceedings against both Richard Nixon and Bill Clinton. False statements are of course central to perjury, which, under federal law, consists of intentional false sworn statements;<sup>265</sup> in some cases, even unsworn false statements to federal officials, including to Congress, may constitute crimes.<sup>266</sup> And indeed, in the case of Bill Clinton, lies before the grand jury and in the *Jones* civil lawsuit formed the basis of two of the stand-alone impeachment charges approved by the House Judiciary Committee, and one approved by the full House. But my interest here is

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<sup>263</sup> *Testing of a President; Excerpts from the House Judiciary Committee’s Debate on Article IV*, N.Y. TIMES (Dec. 13, 1998), <https://www.nytimes.com/1998/12/13/us/testing-president-excerpts-house-judiciary-committee-s-debate-article-iv.html>.

<sup>264</sup> *Id.*

<sup>265</sup> The general federal perjury statute, for example, states that “Whoever— (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath, states or subscribes any material matter which he does not believe to be true[.]” 18 U.S.C. § 1621.

<sup>266</sup> 18 U.S.C. § 1001.

primarily in the kinds of lies that are *not* or not necessarily indictable felonies: lies that are made before the public, outside of the context of any formal legal proceedings.

The first article of impeachment against Richard Nixon, approved by the Judiciary Committee 27 to 11,<sup>267</sup> supplies the best example of this category. That article charged that: “For more than two years, Richard M. Nixon continuously denied any direction of or participation in a plan to cover up and conceal the identities of those who authorized the burglaries and scope of other unlawful and covert activities committed in the President’s interest and on his behalf,”<sup>268</sup> including “making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States.”<sup>269</sup>

One way to understand the Judiciary Committee’s inclusion of Nixon’s public lies in this article is as representing the position that lies of this sort—that is, those with a tight connection to a course of conduct, or particular acts, that may *themselves* be deemed by Congress to constitute “high crimes and misdemeanors”—may properly be subject to impeachment. Here, the President’s lies were one component of an effort to conceal misconduct, where both the misconduct and the overall concealment constituted abuses of authority. Another possibility is that the Committee concluded that these lies were in some sense *political*, perhaps beyond the sense in which Hamilton described the political nature of impeachable conduct in *Federalist* 65:<sup>270</sup> here, the lies were designed to conceal acts linked to a political contest—burglarizing an opponent’s campaign offices—with the goal of entrenching the President, a political actor, in power.

By contrast, in the case of Bill Clinton, the Judiciary Committee appears to have concluded that at least some presidential lies and untruths, in particular those that pertain to private rather than political actions by the President, should be disregarded when pursuing impeachment. Recall that the Committee considered and debated including Clinton’s public lies about Monica Lewinsky—in particular his denials of any relationship with Lewinsky—in the fourth article of impeachment. It is telling that despite the Committee’s composition—it was controlled by Republican members who did not hesitate to

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<sup>267</sup> See *supra* note 160 and accompanying text.

<sup>268</sup> Impeachment of Richard M. Nixon, President of the United States, H.R. REP. NO. 93-1305, at 27 (1974).

<sup>269</sup> *Id.* at 22.

<sup>270</sup> THE FEDERALIST NO. 65 (Alexander Hamilton) (describing impeachable acts as “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust”).

vote to impeach President Clinton over perjury and obstruction of justice—it determined that the President’s public lies about Monica Lewinsky had no place in an impeachment article.<sup>271</sup> As the Committee Report explained, although “the public trust . . . was deliberately abused by President Clinton” when he made false statements to the public,<sup>272</sup> those statements “did not rise to the level of an impeachable offense.”<sup>273</sup> The Committee did conclude by noting, however, that “Presidential lies to the American public could constitute an impeachable offense in other circumstances.”<sup>274</sup>

The 1998 Judiciary Committee was not alone in drawing this distinction. Bob Bauer, for example, has written that “[w]hat a president lies *about* makes all the difference in judging whether his falsehoods rise to the level of an impeachable offense. Some blatant misrepresentations, while reprehensible, matter only in the court of public opinion and at the polls.”<sup>275</sup> As an example of the sort of presidential lie that would cross the line to impeachable, Bauer offers a president’s lies to conceal his efforts to solicit foreign election interference<sup>276</sup>—tracking the basic distinction identified above. And Helen Norton, who has written extensively about lies by government officials, argues that although under extreme circumstances some government lies might undermine due process or free speech principles,<sup>277</sup> most of the time “political remedies” like impeachment represent the best check on official falsehoods.<sup>278</sup>

#### D. Incitement

Consider, next, the possibility of impeachment for presidential statements that in some sense constitute incitement—that are designed to lead and likely to lead, in the doctrinal formulation courts typically use,<sup>279</sup> to imminent lawless

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<sup>271</sup> See *supra* notes 205–213 and accompanying text.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Bob Bauer, *Some Presidential Lies Are Impeachable Offenses*, ATLANTIC (Oct. 22, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/some-presidential-lies-are-impeachable-offenses/573421/>.

<sup>276</sup> *Id.*

<sup>277</sup> Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 75–76 (2015) (“The government’s lies violate the Due Process Clause when they directly deprive individuals of life, liberty, or property or when they are sufficiently coercive to constitute the functional equivalent of such deprivations.” and “violate the Free Speech Clause when they are sufficiently coercive of their targets’ beliefs or speech to constitute the functional equivalent of the government’s direct regulation of that expressive activity.”).

<sup>278</sup> *Id.* at 108; see also HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 227–28 (2019).

<sup>279</sup> As Neal Katyal has suggested, and as the discussion above presumes, when Congress engages in constitutional interpretation—either in the context of impeachment or generally—it need not adhere to judicial formulations. Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW &

action.<sup>280</sup> The Andrew Johnson saga supplies the most significant precedent here, although in some ways Congress's *failure* to more explicitly identify incitement is the most striking aspect of the tenth and eleventh articles of impeachment. Recall that during one of Johnson's most notorious "swing around the circle" speeches, Johnson asked the crowd, "Why don't you hang Thad[deus] Stevens and Wendell Phillips?"<sup>281</sup> Earlier, he had described those same congressional figures as a "posse of maniacs and revolutionists" that were "conspiring to overthrow the government."<sup>282</sup> And yet the Reconstruction Congress did not focus on this speech, even in the two articles of impeachment that took the most direct aim at the President's rhetoric and conduct beyond just the Tenure of Office Act. Despite its omissions, Congress did identify presidential speech that could be broadly understood as constituting incitement—in particular its reference to Johnson's "loud threats and bitter menaces"—in the tenth impeachment article.<sup>283</sup>

Both the tenth article of impeachment against Andrew Johnson, and the general purposes of impeachment, suggest that presidential rhetoric that shades into incitement may be an appropriate subject of impeachment. Under the general understanding of impeachment outlined in Part I, "high crimes and misdemeanors" must both be committed by "public men"<sup>284</sup>—that is, individuals holding some public office—and must "strike at the fabric of the political order."<sup>285</sup> The invitation or encouragement of violence, in particular political violence, would seem to fit squarely within those specifications: threatening to the political order, fundamentally different when emanating from a public figure than from a private individual, and consistent with the type of demagoguery discussed in the preceding section. And it is here that the public nature of today's presidency may be most relevant, and most dangerous: a president who engages in incitement or encouragement of political violence has

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CONTEMP. PROBS. 169, 169–70 (2000). Still, since none of the impeachment episodes discussed above grappled explicitly with incitement, it is useful to at least consider judge-made law here.

<sup>280</sup> The Supreme Court's most famous articulation of this standard appears in *Chaplinsky v. New Hampshire*, in which the Court explained that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 571–72 (1942); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

<sup>281</sup> WINEAPPLE, *supra* note 55, at 156.

<sup>282</sup> *Id.* at 116.

<sup>283</sup> CONG. GLOBE, 40th Cong., 2d Sess. 4 (Supp. 1868).

<sup>284</sup> THE FEDERALIST NO. 65 (Alexander Hamilton).

<sup>285</sup> See *supra* note 43 and accompanying text.

a uniquely powerful platform from which to do so. Even in 1866 and 1867, Johnson's utterances were amplified through the press and reached many ears. Today's presidents can, of course, reach far larger audiences.

*E. "Anticonstitutional" Statements and Conduct*

A Congress contemplating impeachment might also consider statements, particularly if made repeatedly, that are in some sense antithetical to constitutional values, or "anticonstitutional," to use Charles Black's term.<sup>286</sup> To be sure, impeachment precedent is thinnest when it comes to this category of presidential rhetoric. Still, this is one possible way to frame the real reasons Congress moved to impeach Andrew Johnson—that through both words and deeds he had allied himself with the Southern states that had waged war to retain slavery, and that he spoke and acted in ways designed to undermine both the Constitution's (then-nascent) equality principles, and members of Congress, a co-equal branch of government, in violation of core separation-of-powers principles.<sup>287</sup> All of that seems clearly to have been, if not unconstitutional, at least anticonstitutional, and arguably to have formed the real basis of the impeachment effort.<sup>288</sup> On this view, there is some historical support for the position that a sustained enough set of anticonstitutional rhetorical moves by the president should be considered in the context of impeachment.

Impeachment precedent aside, there is substantial recent scholarly support for taking this possibility seriously. Although the term "anticonstitutional" does not appear frequently in the literature, scholars have argued that both Article II and settled constitutional practices impose certain substantive obligations on the president. Daphna Renan characterizes these obligations as "structural norms," which she argues are "constitutive of a constitutional 'ethos' that touches but does not begin or end" with either Article II or judicial precedent.<sup>289</sup> These norms include investigatory independence, limits on self-dealing and the role of

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<sup>286</sup> BLACK, *supra* note 11, at 31 ("I cannot believe that it would make any difference whether this conduct was criminal for general purposes; it would clearly be a gross and anticonstitutional abuse of power, going to the life of our national unity, and it would be absurd to think that a president might not properly be removed for it.").

<sup>287</sup> Cf. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2268 (2018) (arguing that notwithstanding the early (and then-controversial) examples of the Alien & Sedition Acts, presidential acceptance of "the legitimacy of a political opposition has since become widely recognized as a core component of a working constitutional government").

<sup>288</sup> Cf. Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 182 (2018) ("[T]o violate a constitutional convention is to engage in behavior that is *anticonstitutional*, as opposed to *unconstitutional*.").

<sup>289</sup> Renan, *supra* note 287, at 2193.

politics, and fact-based deliberative decision-making.<sup>290</sup> Andrew Kent, Ethan Leib, and Jed Shugerman argue in a similar vein that the Take Care Clause imposes a direct set of requirements on the president, among them requirements that the president act within the scope of the office, avoid using the office for personal gain, and engage in “diligent, careful, good faith, and impartial execution of law.”<sup>291</sup> And Corey Brettschneider argues that both the Oath Clause and the Take Care Clause impose on presidents an affirmative duty to support principles like equality, religious freedom, and respect for individual rights generally.<sup>292</sup>

Although none of these works is focused on impeachment, they provide some potential guidance regarding the types of presidential words or actions that might be deemed unconstitutional. And, if these obligations genuinely bind the president, it is difficult to imagine any judicial enforcement mechanism.<sup>293</sup> Perhaps, then, as Charles Black writes, “We ought to understand, as most senators and congressmen understand, that Congress’s responsibility to preserve the forms and the precepts of the Constitution is greater, rather than less, when the judicial forum is unavailable, as it sometimes must be.”<sup>294</sup>

#### F. *Beyond “High Crimes and Misdemeanors”*

This discussion has remained focused, as did the three historical impeachments discussed above, on “high crimes and misdemeanors.” But the Constitution also identifies two additional bases for impeachment: treason and bribery.<sup>295</sup> Although presidential impeachment history contains no direct lessons for these constitutional categories, it is likely the case that treason can be committed through speech, in addition to conduct. Passing an enemy information regarding military strategy, for example, could constitute speech rather than (or, as well as) conduct; and it would likely satisfy the constitutional test of “adhering to their [e]nemies, giving them [a]id and [c]omfort.”<sup>296</sup> And

<sup>290</sup> *Id.* at 2207, 2215, 2221.

<sup>291</sup> Kent et al., *supra* note 38, at 2178.

<sup>292</sup> COREY BRETTSCHEIDER, *THE OATH AND THE OFFICE: A GUIDE TO THE CONSTITUTION FOR FUTURE PRESIDENTS* 111–71 (2018).

<sup>293</sup> *But see* Richard Schragger, *Unconstitutional Government Speech* 4, 6–7, (Univ. Va. Sch. L., Pub. L. & Legal Theory Rsch. Paper Series, Research Paper No. 2019–56, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3468469](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468469) (arguing that courts already do recognize, albeit in underdeveloped and undertheorized ways, certain sorts of expressive wrongs by government actors).

<sup>294</sup> BLACK, *supra* note 11, at 22–23; *see also* David E. Pozen, *Self-Help and the Separation of Powers*, 124 *YALE L.J.* 2, 8 (2014).

<sup>295</sup> U.S. CONST. art. II, § 4.

<sup>296</sup> U.S. CONST. art III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”). The federal treason statute, 18 U.S.C.

even public-facing speech could potentially qualify; providing an enemy with information about war plans in full public view could, in theory, constitute treason under the Constitution.<sup>297</sup> Indeed, the Constitution contemplates some treason happening in something like public view, limiting the possibility of conviction for treason this way: “No [p]erson shall be convicted of Treason unless on the [t]estimony of two [w]itnesses to the same overt [a]ct, or on [c]onfession in open [c]ourt.”<sup>298</sup> It is possible that because the Constitution uses the word “Act” something more than speech is required to qualify as treason;<sup>299</sup> but, on the other hand, the “conviction” for which this high evidentiary burden is imposed is distinct from impeachment, the punishment for which extends only to removal from office and potential disqualification from future officeholding.<sup>300</sup>

Bribery, too, could in theory be accomplished in part through public speech; and, unlike treason, there have been impeachments (though not of presidents) that actually involved bribery allegations.<sup>301</sup> Although most transactions involving bribery are conducted in secret, it is certainly possible that a president could offer or solicit a bribe in public view; if that were to occur, a bribery-based impeachment, one that relied heavily on public statements, might well be appropriate.

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§ 2381, slightly expands on the constitutional standard and provides for penalties that include death.

<sup>297</sup> The country’s very first impeachment, of Senator William Blount—often viewed as establishing the precedent that members of Congress cannot be impeached—was predicated upon Blount’s involvement in a conspiracy to assist British officials with a plan to take possession of certain U.S. territories. David Currie, *The First Impeachment: The Constitution’s Framers and the Case of Senator William Blount*, 42 AM. J. LEGAL HIST. 427, 427–28 (1998) (book review). Although Blount was expelled by the Senate rather than impeached, *id.* at 427, the fact pattern is one that, in the case of an enemy in the constitutional sense, and an officer subject to impeachment, could lead to a treason-based impeachment. And, in 1862, Judge West Humphreys was impeached and removed from office after he declared his support for secession and the Confederacy; the impeachment documents, however, listed high crimes and misdemeanors, not treason, as the basis for the impeachment. *See* Impeachment of West H. Humphreys, Judge of the United States District Court of Tennessee, H.R. REP. NO. 37-44, at 1–2 (1862).

<sup>298</sup> U.S. CONST. art. III, § 3, cl. 1.

<sup>299</sup> *But see* Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 430 (2015) (raising questions about the viability of the speech/conduct distinction).

<sup>300</sup> U.S. CONST. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”).

<sup>301</sup> Several federal judges, including Alcee Hastings, G. Thomas Porteous, and Robert Archbald have been impeached for conduct involving bribery. *See List of Individuals Impeached by the House of Representatives*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> (last visited Sept. 4, 2020).

### G. Constitutional Shields

When the president's words *have* figured in impeachment inquiries, Congress has been presented with First Amendment defenses. Even as early as the 1868 trial of Andrew Johnson, when understandings of the First Amendment's reach and meaning were far more circumscribed than they are today,<sup>302</sup> Johnson's counsel suggested (though did not develop the argument in written submissions) that the charge in article ten "relat[ed] to freedom of speech or its exercise by the citizens of the United States, or by this respondent as one of the said citizens or otherwise;" as to article eleven, the response repeated that "[t]he President denies specifically the charges, standing upon his right to freedom of speech as set forth in the answer to the preceding article."<sup>303</sup> Defense attorney Ben Curtis's opening statement during the Senate trial further developed this point: "[T]his prohibition in the Constitution against any legislation by Congress in restraint of the freedom of speech is necessarily an absolute prohibition . . . . What is the law to be? . . . The only rule I have heard, . . . is that you may require the speaker to speak properly." He continued: "Who are to be the judges whether he speaks properly? In this case the Senate of the United States, on the presentation of the House of Representatives of the United States; and that is supposed to be the freedom of speech secured by this absolute prohibition of the Constitution."<sup>304</sup> Here Curtis seemed to suggest that article ten identified nothing more serious than breaches of protocol or decorum, and that the very inclusion of presidential statements in the article was inconsistent with the guarantees of the First Amendment.

President Nixon's attorneys referenced Johnson's answers in their written filings before the House Judiciary Committee, although they failed to develop any First Amendment argument<sup>305</sup>—and of course, President Nixon's resignation foreclosed any real debate on these questions. Still, some commentators did engage with the issue at the time. In 1975, Raoul Berger took sharp issue with even the suggestion that the First Amendment could be invoked in the way Nixon's attorneys were gesturing toward: "[T]he Bill of Rights was designed to secure protection to the people against the government, not to

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<sup>302</sup> See, e.g., Tabatha Abu El-Haj, "Live Free or Die"—Liberty and the First Amendment, 78 OHIO ST. L.J. 917, 917 (2017) ("Recent years have witnessed an extraordinary expansion of the First Amendment.").

<sup>303</sup> 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 884–85 (1907).

<sup>304</sup> 1 BENJAMIN ROBBINS CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS 412 (Benjamin R. Curtis ed., 1879).

<sup>305</sup> ST. CLAIR MEMO, *supra* note 153, at 56 ("President Johnson . . . noted that the charges in Articles ten and eleven were protected by the freedom of speech guaranteed by the Constitution.").

insulate government officers from accountability . . . . For example, the . . . [F]irst [A]mendment is concerned with ‘the right of the people peaceably to assemble,’ not of officers of government against whom protection was thus guaranteed.”<sup>306</sup> This Nixon-era exchange could presage future debates about both the scope and the substantive protection of the First Amendment when it comes to presidential speech.<sup>307</sup>

Outside of the impeachment context, there are of course First Amendment cases that grapple with government officials *as* speakers. The *Pickering/Garcetti* line of cases attends to the speech rights of government employees, creating a standard that is understood to grant public employees very limited First Amendment rights when they speak pursuant to their official duties.<sup>308</sup> But it is not clear whether or how the reasoning in these cases would have any application to the unique figure of the president, who is clearly not a government “employee” in the same sense as the officials at issue in the Court’s cases, and where the “sanction” of impeachment is surely distinct from other sorts of professional consequences public employees might face over the content of their speech.<sup>309</sup>

Other precedent could support the argument that a president’s speech is in some sense protected from sanction by the First Amendment. Perhaps most relevant here is *Bond v. Floyd*, in which the Supreme Court held that the First Amendment prevented the Georgia legislature from refusing to seat Julian Bond, based on speeches he had made criticizing the Vietnam War and the federal government generally.<sup>310</sup> A president might invoke this case to support the argument that a Congress pursuing impeachment based in part on speech is

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<sup>306</sup> Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 871 (1975).

<sup>307</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1771 (2004) (“Questions about the boundaries of the First Amendment are not questions of strength—the degree of protection that the First Amendment offers—but rather are questions of scope—whether the First Amendment applies at all.”).

<sup>308</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”); see Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 (2015).

<sup>309</sup> I am putting to one side a line of cases holding that when government is acting as speaker, including when it advances particular policy positions, the First Amendment grants it more leeway than when it is regulating private speech; as the Court has held, the First Amendment does not “require government to maintain . . . neutrality when its officers and employees speak” about governmental endeavors. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 206–07 (2015); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 989 (2004) (considering government participation in public debate).

<sup>310</sup> *Bond v. Floyd*, 385 U.S. 116, 137 (1966).

engaging in a form of impermissible viewpoint discrimination. And government officials have of course asserted violations of First Amendment interests in other arenas; in *McConnell v. FEC*, for example, Senator Mitch McConnell brought a court challenge to much of the newly enacted Bipartisan Campaign Reform Act (BCRA).<sup>311</sup> Still, as with the government speech cases discussed above, it is not at all clear how these cases might be implicated in a dispute involving the president, let alone an impeachment case.

Although none of this has been tested in the impeachment context, there have been some recent suggestions that the invocation of presidential speech in litigation might raise First Amendment concerns. Judge Kozinski made this claim in an opinion regarding one of the challenges to President Trump's first "travel ban" executive order.<sup>312</sup> Dissenting from the denial of rehearing en banc, Judge Kozinski criticized the panel for citing "a trove of informal and unofficial statements from the President and his advisers."<sup>313</sup> This approach, Kozinski warned, threatened to "chill campaign speech, despite the fact that our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'"<sup>314</sup> Given the near-constant campaigning in which an incumbent president might engage, this argument could be extended to virtually every statement a president makes—including in the context of an impeachment inquiry.<sup>315</sup>

Presidential lies and misstatements may also intersect with First Amendment arguments in the context of impeachment. In recent years, the Supreme Court has announced something approaching a First Amendment right to lie,<sup>316</sup> at least under some circumstances, and lower courts have struck down a number of state statutes prohibiting lies or false statements.<sup>317</sup> It is not difficult to imagine

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<sup>311</sup> 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010). The *McConnell* Court did not question the ability of McConnell and other plaintiffs to maintain their First Amendment challenge to the core provisions of BCRA—and where it did find challengers lacked the ability to challenge certain ancillary provisions of BCRA, it did so based on the remoteness of the harm. *Id.* at 226 ("Because Senator McConnell's current term does not expire until 2009, the earliest day he could be affected by § 305 is 45 days before the Republican primary election in 2008. This alleged injury in fact is too remote temporally to satisfy Article III standing.")

<sup>312</sup> *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* (citing *McCutcheon v. FEC*, 572 U.S. 185, 191–192 (2014)).

<sup>315</sup> Jenna Johnson, 'Life is a Campaign': After a Difficult First Month, Trump Returns to His Comfort Zone, WASH. POST (Feb. 18, 2017, 10:22 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/02/18/after-one-month-in-the-white-house-trump-returns-to-the-campaign-trail-for-a-dose-of-adoration/>.

<sup>316</sup> *United States v. Alvarez*, 567 U.S. 709, 715, 729–30 (2012); *see also* Leslie Kendrick, *How Much Does Speech Matter?*, 129 HARV. L. REV. 997, 998 (2016).

<sup>317</sup> *See, e.g., Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 469 (6th Cir. 2016) (striking down Ohio's "political false-statements" law); *281 Care Comm. v. Arneson*, 766 F.3d 774, 795 (8th Cir. 2014) (finding law

government officials, including potentially presidents, invoking these cases as a defense against an impeachment article based on lies and misstatements.

Still, there are strong responses to these arguments. First, as a general matter, the Constitution's conspicuous failure to protect presidential speech in the way it protects legislative speech may be significant. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."<sup>318</sup> The provision has been understood to grant legislative-branch officials immunity from criminal and civil penalties for actions and statements within the sphere of legislative activity.<sup>319</sup> Although this kind of legislative immunity is far from absolute,<sup>320</sup> it is nevertheless significant that the Constitution singles out legislative speech for protection—and that no analogous privilege or protection has ever been understood to extend to the statements of the president.

Moreover, the president's access to the bully pulpit would seem to supply a compelling argument against allowing the president to utilize the First Amendment as a shield, in impeachment proceedings or otherwise. On virtually any theory of the First Amendment, its core purposes are to protect individual speech and expression *from* governmental interference;<sup>321</sup> it would accordingly

prohibiting false statements in conjunction with ballot initiatives neither "narrowly tailored [n]or necessary to preserve fair and honest elections and prevent a fraud on the electorate"); cf. Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765, 768 (2017) ("[T]o the extent false noncommercial speech is deemed to have value, if only indirectly, false commercial speech should be seen as serving the very same values.").

<sup>318</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>319</sup> See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975); *Doe v. McMillan*, 412 U.S. 306, 312–13 (1973); *United States v. Brewster*, 408 U.S. 501, 516 (1972); *Powell v. McCormack*, 395 U.S. 486, 502–03 (1969); see also Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351, 371–84 (2014) (explaining the immunity that the provision is understood to provide).

<sup>320</sup> See *Hutchinson v. Proxmire*, 443 U.S. 111, 130–32 (1979) (permitting lawsuit against Senator based on materials he distributed outside of the legislature, on the grounds that "neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process"); *Gravel v. United States*, 408 U.S. 606, 625–26 (1972) (concluding that Senator Gravel's activities surrounding publication of the Pentagon Papers were "not part and parcel of the legislative process" and thus not covered by the Speech or Debate Clause); JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 229 (2017) (critiquing the Court's unduly narrow vision of the clause, and arguing: "real legislative authority is, in fact, largely constructed through the processes of public engagement, and the Speech or Debate Clause ought to be understood to facilitate those processes"); see also JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 106 (2007) (noting that the purpose of the Speech or Debate Clause is "to preserve legislative independence, not supremacy" (quoting *Brewster*, 408 U.S. at 508)).

<sup>321</sup> See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591–94 (1982); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334–35 (1991); Genevieve

be perverse to allow the amendment's use to further augment the powers of the president, who already has access to the most powerful speech platform in the country.<sup>322</sup>

### III. PRESIDENT TRUMP AND IMPEACHABLE SPEECH

This brief final Part does not attempt to comprehensively assess the degree to which President Trump's rhetoric should have figured in the impeachment proceedings that concluded with his February 2020 Senate acquittal. Those proceedings for the most part did *not* involve public presidential speech, focusing instead on the President's decision to withhold military assistance and other official government acts from Ukraine in order to induce that country to announce political investigations into the President's political rivals.<sup>323</sup> The two impeachment articles that grew out of the House's investigation into those events charged President Trump with abuse of power and obstruction of Congress.<sup>324</sup> Nothing in the articles themselves discussed public speech, although the lengthy committee report that accompanied them did;<sup>325</sup> public presidential speech was also invoked a number of times in the House and Senate, though again it did not play a central role.<sup>326</sup>

Instead of a detailed post-mortem of the Trump impeachment,<sup>327</sup> this Part suggests a few of the ways the history and analysis offered here might prove relevant to the public and Congress in 2020 and beyond, both as perspective on the recently-concluded impeachment proceedings, and for purposes of potential future impeachment efforts.

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Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2120 (2018).

<sup>322</sup> Any move to cloak the President's speech in the protections of the First Amendment might suggest parallels to developments in First Amendment doctrine in the Roberts Court, which has on some accounts transformed First Amendment freedoms from "weapons of the weak into one more resource that wealthy interests could deploy to preserve their advantages." Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1959–60 (2018); see also Burt Neuborne, *Taking Hearers Seriously*, 91 TEX. L. REV. 1425, 1426–29 (2013) (describing the First Amendment's shifting ideological valence).

<sup>323</sup> Phillip Bump, *Assessing a Key Impeachment Argument: Trump's Desired Investigations Were Only for His Own Benefit*, WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/politics/2020/01/23/assessing-key-impeachment-argument-trumps-desired-investigations-were-only-his-own-benefit/>.

<sup>324</sup> H.R. Res. 755, 116th Cong. § 1, 2 (2019).

<sup>325</sup> HOUSE PERMANENT SELECT COMM. ON INTEL., TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT 148–49 (2019) [hereinafter TRUMP-UKRAINE IMPEACHMENT REPORT].

<sup>326</sup> See SPECIAL COUNS. ROBERT S. MUELLER, III, 1 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 19 n.36 (2019) [hereinafter MUELLER REPORT].

<sup>327</sup> There will surely be plenty of these to come (and some already in print). See, e.g., NEAL KATYAL & SAM KOPPELMAN, IMPEACH: THE CASE AGAINST DONALD TRUMP 10–14 (2019).

### A. *Lies & Misstatements*

First, the history suggests that the fact that the President has lied, even lied repeatedly, is likely not in itself sufficient to warrant impeachment: what matters is what kinds of lies the President tells, and whether and how they relate to a broader pattern of abuse of office, or of public trust. Frank Bowman takes the position that although it may not be politically advisable to pursue impeachment based purely or primarily on presidential lies, after a point, “chronic lying may be a political offense in the Hamiltonian sense insofar as it cripples the liar in the performance of his presidential duties.”<sup>328</sup> He elaborates: “[C]hronic presidential lies do not merely render the president himself ineffectual, but also damage every other branch and function of American government . . . pervasive lying *by a president* tends to undermine the entire constitutional order.”<sup>329</sup>

Bowman’s argument is intriguing; and, although it lacks substantial support in impeachment history, it is also the case that President Trump’s propensity to lie distinguishes him from previous presidents.<sup>330</sup> But it does seem clear that not all presidential lies are equally relevant or equally consequential; rather, the history suggests that particular types of presidential lies, where those lies are connected to acts that are themselves subversive of the political order, might figure in an impeachment charge. So, in the case of President Trump (or a future president whose rhetoric resembles that of President Trump), lies that are tied to concealing the pursuit of election assistance from a foreign country, or to concealing the commingling of personal business activities with official presidential duties and functions, might serve as a component of an impeachment proceeding or charge that also encompasses the election interference, improper business activities, or other underlying conduct that itself may constitute “high crimes and misdemeanors.”

### B. *Incitement*

The history also suggests that presidential speech might be analogized to incitement in the impeachment context. In the case of President Trump, there are at least two contenders for an inquiry into something like incitement. The first, which may fall somewhere between incitement and solicitation, involves

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<sup>328</sup> BOWMAN, *supra* note 28, at 274.

<sup>329</sup> *Id.*

<sup>330</sup> See, e.g., David Leonhardt, Ian Prasad Philbrick & Stuart A. Thompson, *Trump’s Lies vs. Obama’s*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html>; Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump Has Made 12,019 False or Misleading Claims over 928 Days*, WASH. POST (Aug. 12, 2019), <https://www.washingtonpost.com/politics/2019/08/12/president-trump-has-made-false-or-misleading-claims-over-days/>.

invitations to foreign actors and foreign governments to interfere in U.S. elections. There are a number of such examples of conduct already in the public domain. One involves then-candidate Trump's public request that Russia pursue emails from Hillary Clinton's private email server during the 2016 election. In July of 2016, the day after Wikileaks's first release of documents stolen from the DNC and Clinton campaign chair John Podesta, then-candidate Trump said during a press conference: "Russia, if you're listening, I hope you find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press."<sup>331</sup> According to the Mueller Report, within five hours of that press conference, "a Russian intelligence service began targeting email addresses associated with Hillary Clinton for possible hacks."<sup>332</sup> Although President Trump's written answers to questions from Mueller's office maintained that this comment had been made "in jest and sarcastically,"<sup>333</sup> Congress could certainly conclude that the sequence of events detailed in the Mueller Report at least warranted consideration for impeachment. And at the time of this writing, President Trump has made several similar public requests in connection to the 2020 election. On one occasion he essentially invited China to investigate Joe Biden;<sup>334</sup> on several others, he publicly echoed his private requests to Ukraine to investigate both Biden and the 2016 elections.<sup>335</sup> And in fact, these events *were* invoked by the House impeachment managers.<sup>336</sup> But those things remained at the periphery of the theory of impeachment, seeming to serve more as atmospherics than a core component of the impeachment case.

The second type of speech in this category is one several commentators have alluded to, although not always in the context of impeachment: incitement of violence, both against the President's critics and toward members of particular groups. A number of presidential statements (whether delivered in person or via Twitter) could prove relevant here. To choose just a few examples involving

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<sup>331</sup> David A. Graham, *Trump's Plea for Russia to Hack the U.S. Government*, ATLANTIC (July 27, 2016), <https://www.theatlantic.com/politics/archive/2016/07/trump-pleas-for-russia-to-hack-classified-american-information/493244/>; Erica R. Hendry, *Trump Asked Russia to Find Clinton's Emails. On or Around the Same Day, Russians Targeted Her Accounts*, PBS (July 13, 2018), <https://www.pbs.org/newshour/politics/trump-asked-russia-to-find-clintons-emails-on-or-around-the-same-day-russians-targeted-her-accounts>.

<sup>332</sup> MUELLER REPORT, *supra* note 326.

<sup>333</sup> *Id.*

<sup>334</sup> Phillip Rucker, Rachael Bade & Colby Itkowitz, *Trump Publicly Calls on China to Investigate Bidens*, WASH. POST (Oct. 4, 2019), [https://www.washingtonpost.com/politics/trump-publicly-calls-on-china-to-investigate-bidens/2019/10/03/2ae94f6a-e5f2-11e9-b403-f738899982d2\\_story.html](https://www.washingtonpost.com/politics/trump-publicly-calls-on-china-to-investigate-bidens/2019/10/03/2ae94f6a-e5f2-11e9-b403-f738899982d2_story.html).

<sup>335</sup> TRUMP-UKRAINE IMPEACHMENT REPORT, *supra* note 325.

<sup>336</sup> See Noah Weiland, *Impeachment Briefing*, N.Y. Times (Jan. 22, 2020), [https://messaging-customers.nytimes.com/template/oakv2?uri=nyt://newsletter/a576ceaa-9dcf-4e10-8653-57878b4619b7&te=1&nI=impeachment-briefing&emc=edit\\_ib\\_20200226](https://messaging-customers.nytimes.com/template/oakv2?uri=nyt://newsletter/a576ceaa-9dcf-4e10-8653-57878b4619b7&te=1&nI=impeachment-briefing&emc=edit_ib_20200226) (describing House Managers playing video clips of President Trump "publicly calling on Ukraine and China to investigate Joe Biden").

President Trump, the President has tweeted images of violence against representations of those in the media he perceives as his adversaries, like CNN,<sup>337</sup> refused to condemn white supremacist violence that resulted in a nonviolent protestor's death in 2017 in Charlottesville, Virginia, instead insisting that both sides included "very fine people";<sup>338</sup> and tweeted, in response to protests over the police killing of George Floyd, that "when the looting starts, the shooting starts."<sup>339</sup>

In the wake of a 2019 mass shooting in El Paso, Texas, by an avowed white supremacist whose manifesto mirrored much of President Trump's anti-immigrant rhetoric,<sup>340</sup> a number of commentators made the explicit tie to incitement. Conservative columnist Bret Stephens wrote that "[t]he right's attempt to downplay the specifically ideological context of the El Paso massacre is a transparently self-serving effort to absolve the president of moral responsibility for his demagogic rhetoric . . . . The president is guilty, in a broad sense, of a form of incitement."<sup>341</sup> And a former national leader of the anti-abortion movement—who on his own account is no stranger to political violence—cautioned, "If Mr. Trump doesn't stop spewing derision, then angry and tortured souls like the mass murderer in El Paso will continue to take him seriously."<sup>342</sup>

### C. "Anticonstitutional" Speech & Demagoguery

Finally, let us return to a set of actual articles of impeachment introduced in the House Judiciary Committee in December 2017. Those articles accused President Trump of speech and actions that likely fall short of actual incitement,

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<sup>337</sup> See Donald J. Trump (@realdonaldtrump), TWITTER (July 2, 2017, 9:21 AM), <https://twitter.com/realdonaldtrump/status/881503147168071680>.

<sup>338</sup> Rosie Gray, *Trump Defends White-Nationalist Protestors: 'Some Very Fine People on Both Sides'*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protestors-some-very-fine-people-on-both-sides/537012/>.

<sup>339</sup> See Donald J. Trump (@realdonaldtrump), TWITTER (May 29, 2020, 12:53 AM), <https://twitter.com/realdonaldtrump/status/1266231100780744704>. Twitter determined that this last tweet violated its rules about glorifying violence, and accordingly placed it behind a warning that required users to click through to access the tweet. See Davey Alba, Kate Conger & Raymond Zhong, *Twitter Adds Warnings to Trump and White House Tweets, Fueling Tensions*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/technology/trump-twitter-minneapolis-george-floyd.html>.

<sup>340</sup> Peter Baker & Michael D. Shear, *El Paso Shooting Suspect's Manifesto Echoes Trump's Language*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html>.

<sup>341</sup> Bret Stephens, *Trump's Rhetoric and Conservative Denial*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/opinion/trump-el-paso-shooting-nationalism.html?action=click&module=Opinion&pgtype=Homepage>.

<sup>342</sup> Rob Schenk, *My Words Led to Violence. Now Trump's Are Too*, TIME (Aug. 6, 2019), <https://time.com/5645371/trump-rhetoric-violence/>.

but that are nevertheless antithetical to constitutional principles like equality, religious freedom, and a free press. Those articles alleged that Trump had associated the presidency “with causes rooted in white supremacy, bigotry, racism, anti-Semitism, white nationalism [and] neo-Nazism,” and accused him of “sowing discord among the people of the United States, on the basis of race, national origin, religion, gender, and sexual orientation.”<sup>343</sup>

Those articles were voted down by the House in July 2019, the very month of the phone call between President Trump and Ukrainian President Zelensky at the heart of the Ukraine impeachment saga.<sup>344</sup> And they represented a very different theory of presidential misconduct from the one that grounded President Trump’s actual impeachment. The 2017 articles grappled much more directly with the truly unprecedented character of President Trump’s speech: President Trump’s propensity to use the bully pulpit to insult, to scapegoat, to self-aggrandize, to spread falsehoods and misinformation—in short, to demagogue.<sup>345</sup> As Jeffrey Tulis wrote just a few months into President Trump’s Administration, “If President Trump exercises the office in the same demagogic manner that he campaigned, he might actualize the Founder’s nightmare scenario: a corrosive leader posing an existential threat to the constitutional order.”<sup>346</sup>

Clearly, President Trump’s use of rhetoric has not changed dramatically during his first three years in office.<sup>347</sup> A recent *New York Times* analysis examined the President’s 11,000 tweets between January 20, 2017, and November 1, 2019, and found that “more than half of the president’s posts—5,889—have been attacks; no other category even comes close.”<sup>348</sup> Targets of

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<sup>343</sup> H.R. Res. 646, 115th Cong. (2017); see also Nwanevu, *supra* note 2; Jamelle Bouie, *Andrew Johnson’s Violent Language—and Trump’s*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/opinion/andrew-johnsons-violent-language-and-trumps.html>.

<sup>344</sup> Julie Hirschfield Davis & Nicholas Fandos, *House Votes to Kill Trump Impeachment Resolution*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/us/politics/house-impeachment-trump.html>.

<sup>345</sup> See H.R. Res. 646.

<sup>346</sup> TULIS, *supra* note 243, at 224. Just weeks before President Trump’s inauguration, law professor and Federalist Society stalwart Steven Calabresi told AALS plenary sessions that if, as President “Trump begins to display unevenness of temperament or racism as president, then it will be necessary to consider impeaching him.” Steven Calabresi, Co-Founder, Federalist Soc’y, Address at the Association of American Law Schools Annual Meeting: Why Law Matters (Mar. 8, 2017).

<sup>347</sup> If the specifics of President Trump’s rhetorical innovations distinguish him from previous presidents, the fact of his having broken with past practice is, perhaps paradoxically, quite consistent with presidential history; as Stephen Skowronek has famously written, “Disruption of the status quo ante is basic to the politics presidents make.” See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 4 (1993).

<sup>348</sup> Michael D. Shear, Maggie Haberman, Nicholas Confessore, Karen Yourish, Larry Buchanan & Keith Collins, *How Trump Reshaped the Presidency in over 11,000 Tweets*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/us/politics/trump-tweets.html>.

criticism or attack have included political opponents, journalists, current and former executive-branch officials, members of Congress, private individuals,<sup>349</sup> and federal judges.<sup>350</sup> Even prominent members of the President's own party concede that "we have never had a president so . . . brazen in his abusive attacks on the courts, the press, Congress (including members of his own party), and even senior officials within his own administration."<sup>351</sup> In the immediate run-up to the 2020 election, President Trump has focused his attacks on voting by mail; he has even floated the idea of delaying the election.<sup>352</sup> Again, some of the President's rhetoric in this vein appeared in the President's impeachment proceedings.<sup>353</sup> But the President's *rhetoric* as such was not on trial.

As Bob Bauer writes, "The challenge is to identify with reasonable precision when a leader has departed from the accepted, rough-and-tumble political rhetoric—from the standard license afforded to a politicians' speeches and utterances—and has become a demagogue."<sup>354</sup> Even if it *were* possible to identify some such line, it is not entirely clear that demagoguery alone warrants impeachment under the precedents of the last 230 years. But the history detailed above suggests that the mere fact that demagoguery is speech does not require us to deem it off-limits in debates about impeachment. This may be particularly true if the presidential rhetoric in question can be tied to particular sorts of presidential misconduct or abuse of office.

Indeed, one of the key lessons of the Johnson saga may be that it is better for the Congress to be forthright about its view of presidential failings, including those that are primarily rhetorical—although it is also important to avoid a slide

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nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html.

<sup>349</sup> *Id.*

<sup>350</sup> Michael Conway, *Trump's Twitter Attacks on Judge Amy Berman Show His Disrespect for the Rule of Law*, NBC NEWS (Feb. 19, 2020), <https://www.nbcnews.com/think/opinion/trump-s-twitter-attacks-judge-amy-berman-jackson-show-his-ncna1138406>.

<sup>351</sup> See Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATL. MONTHLY, Oct. 2017, at 60 (available at <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921>).

<sup>352</sup> See Steven G. Calabresi, *Trump Might Try to Postpone the Election. That's Unconstitutional*, N.Y. TIMES (July 30, 2020) <https://www.nytimes.com/2020/07/30/opinion/trump-delay-election-coronavirus.html>.

<sup>353</sup> See, e.g., *The Impeachment Inquiry into President Donald J. Trump: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 658 (2019) (describing President Trump as having "publicly attacked witnesses before, after, and even during their testimony"); see also Senator Kamala Harris, Statement on Final Day of Impeachment Trial (Feb. 5, 2020) (transcript available at <https://www.rev.com/blog/transcripts/donald-trump-impeachment-trial-final-day-transcript-february-5-2020-key-moments>) ("[President Trump] has shown us through his words and actions that he thinks he is above the law.").

<sup>354</sup> Bob Bauer, *A President's Words Matter, Part II: Impeachment Standards and the Case of the Demagogue*, LAWFARE (Oct. 11, 2017), <https://www.lawfareblog.com/presidents-words-matter-part-ii-impeachment-standards-and-case-demagogue>.

into treating maladministration as impeachable. In Johnson's case, rather than take explicit aim at Johnson's sabotage of the Reconstruction project, racist and anticonstitutional rhetoric and conduct, and general unfitness for the presidency, congressional opponents primarily pointed to Johnson's removal of Stanton. There may be a lesson here regarding the wisdom of focusing on these sorts of discrete acts, rather than broader patterns of conduct as well as rhetoric, when making the case for impeachment.

### CONCLUSION

Benjamin Franklin is often credited with making the case at the Constitutional Convention that impeachment offered, in the words of Laurence Tribe and Joshua Matz, "a civilized answer to problems once solved by assassins and revolutionaries."<sup>355</sup> The Constitution, then, did contemplate a president who became so intolerable that election was not a sufficient check on his power. But the precise point at which impeachment would be warranted was left open in the document, and intervening Congresses have struggled to answer that question with reference to the presidential conduct and background conditions of the time.

The rise over the last century of the "rhetorical presidency,"<sup>356</sup> in which presidents are expected to take their messages directly to the American people—a trend that has accelerated dramatically in the age of Trump—may mean thinking in new ways about the relationship between speech and impeachment. On the one hand, the emergence of the rhetorical presidency may counsel hesitation before invoking impeachment for something that has become a core feature of presidential governance; on the other hand, the full blossoming of the rhetorical presidency in the digital age means that presidents have access to a powerful tool of self-help in impeachment.<sup>357</sup> The very power and reach of the presidential platform also amplifies the potential dangers that can flow from a lawless president's speech—and may require us to think in new ways about the checking mechanism of impeachment.

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<sup>355</sup> TRIBE & MATZ, *supra* note 14, at 2; 2 FARRAND'S RECORDS, *supra* note 31, at 65; *see also* Chafetz, *supra* note 38, at 349 (stating that, in the constitutional scheme, "impeachment was an attempt to domesticate, to tame, assassination").

<sup>356</sup> TULIS, *supra* note 243.

<sup>357</sup> Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 351 (1999) (describing, in a Congress-President standoff over impeachment, the "institutional advantage of a President over his political foes").