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How Impeachment Works

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TABLE OF CONTENTS

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I. INTRODUCTION

Presidential impeachments test nearly everyone. Whereas constitutional adjudication largely tests the limits and powers of governmental institutions, presidential impeachments do that and more. They test whether and how members of Congress may fulfill their oaths to do "impartial justice according to the laws and Constitution of the United States;" whether, or to what extent, presidents have abused their powers; how well the American public and media understand the stakes and issues involved in the impeachment process; and to what extent Article III courts refrain from reviewing any aspect of impeachment trials.[1] A popular concern for most observers and commentators during the two impeachments of Donald Trump was that these institutions – particularly Congress, the President, and the media – failed the American people and the Constitution.

Why, many people have wondered, should the House of Representatives have bothered not once, but twice, to impeach Donald Trump when there was no realistic chance of securing his conviction in a Senate trial given the likely unanimity of Republicans to vote to acquit? This question led to other questions, such as whether the constitutional threshold for conviction, requiring at least two-thirds of the Senate in favor, was too demanding? Could the House have done a better job in drafting impeachment articles in either impeachment of Donald Trump? Should the focus in either impeachment have been broader or narrower than it was?[2] Was the focus in the first on Trump's negotiations with Ukraine's president and Trump's failures to comply with nearly ten congressional subpoenas too technical for most of the American public to understand or get behind? How should the impeachment process be reformed? Could the media have done a better job of informing or educating the public about impeachment in each case? How well did the lawyers prosecuting and defending Mr. Trump in the two Senate trials perform? Did they go too far and violate the norms and rules of professional responsibility? For many observers of these events, the answer to all these questions is the same—that the federal impeachment process is broken.

This Article rejects the common view of the two Trump impeachments as a constitutional debacle. It asserts, instead, that the federal impeachment process retains significant vitality as a mechanism for holding presidents accountable for misconduct in office. If we take a

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[1] *See* U.S. CONST. § 3, cl. 2; *see also* Procedure and Guidelines for Impeachment Trials in the Senate, *S. Doc. No. 93–33*, 99th Cong., 2d Session, at 61 (1986); *see generally* Michael J. Gerhardt, *Rediscovering Non-Justiciability: Judicial Review of Impeachments after Nixon*, 44 DUKE L.J. 231 (1994).

[2] *See* U.S. CONST. art. I, § 3.

step back from the tiny set of presidential impeachment trials in American history and adopt a more panoramic view of their effects and connections to other disciplinary mechanisms for presidential misconduct, it is easier to see that presidential impeachments still have bite. In fact, they can and do cripple legacies and reputations, create permanent evidentiary records of presidential misconduct, and deter some, if not the most, egregious kinds of presidential misconduct. In the aftermath of Trump's second impeachment, state officials, too, played instrumental roles in curbing his efforts to undermine the integrity of the electoral process and to commit voter fraud. In this manner, states provided a check on the president's overreaching.

Part II sets forth the surprisingly strong case against impeachment's effectiveness in holding presidents accountable for their misconduct in office, a view that I sometimes have had myself. Nonetheless, Part III both dissects that case and shows how the two impeachments of Donald Trump damaged his legacy, reputation, and power. Public opinion is not an insignificant deterrent of presidential mischief, and the two impeachments of Donald Trump took their toll in his defeat in his reelection bid. Part IV examines the extensive lawyerly misconduct in the two Trump impeachments. Lastly, in Part V, I consider some modest reforms that may help to ensure that presidential impeachment trials are constitutionally meaningful events, even when they result in the acquittal of the president.

II. IS THE IMPEACHMENT PROCESS BROKEN?

There are many reasons why legal commentators have considered the federal impeachment process to be broken. For these same reasons, I too, have been skeptical of the efficacy of the process, particularly after the two acquittals of Donald Trump.

Such skepticism is far from unwarranted. After all, no American president has ever been convicted in an impeachment trial.[3] Three presidents – Andrew Johnson (1868), Bill Clinton (1998), and Donald Trump (2020, 2021) – have been impeached by the House but acquitted in the Senate.[4] The only one of these to come close was Johnson, who fell one vote short of being convicted and removed from office.[5] These outcomes suggest that the constitutional threshold for conviction, requiring at least two-thirds approval in the Senate, may be practically impossible to meet in the case of a president. There was strong evidence in each case of presidential misconduct, with Johnson's obstruction of

[3] *See generally* Michael J. Gerhardt, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 31–38 (Oxford University Press 2018).

[4] *Id.*

[5] *Id.* at 32–33.

Reconstruction, Clinton's lying under oath and obstruction of justice, and Trump's both abusing his powers and obstructing Congress in his first impeachment and inciting insurrection in his second.

True, Richard Nixon faced a serious threat of impeachment and removal after two years of investigations into the Watergate scandal. He resigned shortly after the House Judiciary Committee approved three articles of impeachment, effectively removing the necessity for fully gearing up the impeachment process.[6] Nixon was thus an instance of a forced resignation, something that seems difficult to imagine ever happening again, particularly in light of several developments that make surpassing the constitutional threshold for conviction effectively impossible.

The first is the rise of extreme partisanship, under which each party's goal has been to vanquish the other and control the levels of government as much as possible.[7] This development was instrumental in ensuring Clinton's acquittal and Trump's two acquittals. In all three cases of impeachment, the respective president's party controlled more than a third of the Senate.[8] With virtually all of each president's partisans united in opposition to convictions, removal was never a serious possibility.

With neither Clinton nor Trump ever facing a real likelihood of ouster or sanction through impeachment, more pressure was applied to other disciplinary mechanisms, such as criminal prosecution. Ultimately, Clinton pled guilty to perjury and was appropriately sanctioned by federal district judge Susan Webber Wright; Trump has yet to face any concrete legal fallout from the misconduct that was the focus of each of his trials.[9]

The second development is the rise of the internet and social media,[10] which has largely served as an echo chamber rather than the means for educating the public on matters of civic importance. Such circumstances contrast with the hopes of such framers as James Madison that the public's interest in the intricate system of checks and balances would grow with time. As Madison wrote, "I go on this great republican principle, that the people will have virtue and intelligence to select [people] of virtue and wisdom."[11] Implicit in Madison's argument was the people's disposition to be discerning about who these people "of virtue and wisdom" would be. Instead, the proliferation of partisan news outlets, primarily interested in entertaining rather than educating the public, has made it harder for people

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[6] *Id.* at 34.

[7] *See* Michael J. Gerhardt, *Madison's Nightmare Has Come to America*, THE ATLANTIC (Feb. 13, 2020), https://www.theatlantic.com/ideas/archive/2020/02/constitution-flawed/606208/ [https://perma.cc/B6C2-UQ55].

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

to break free of the curated news that they prefer to read or watch. That difficulty, in turn, reinforces the extreme partisanship that keeps people fixed in their niche and facilitates tribalism, in which there is no objectively shared sense of reality and facts are shaped by news sources and political actors rather than the events themselves.

The third significant development is the constitutional amendment to alter the scheme for selecting senators. The original Constitution had state legislatures choose their respective senators, but the 17th amendment,[12] ratified in 1913, did away with that scheme in favor of having the people of each State vote in statewide Senate elections. While the original purpose of the amendment was to free senators – and their states – from the corrupting influence of state legislatures, the practical effect of the amendment has been to make senators acutely sensitive not to the institutional needs or responsibilities of the Senate, but to popular opinion and support within their respective states.

A final development impeding the functioning of the federal impeachment process is the popularity of the "unitary theory of the executive" among conservative lawyers and presidents.[13] This theory posits that the president should have control over the exercise of all executive power. It is grounded in reading the text of Article II of the Constitution as investing all "executive power" in the president and in the need for such a theory to ensure the uniform enforcement of federal law.[14] This construction of the scope of presidential power, vested Mr. Trump, in his capacity as president, with the final say over what information produced within the executive branch was covered by executive privilege and therefore could be denied to Congress. Meaning, even in his own impeachment proceedings investigating presidential misconduct, he could control what information Congress could receive. Mr. Trump ordered the entire executive branch not to cooperate with what his White House Counsel characterized as a "partisan" and "unconstitutional" impeachment proceeding.[15] As Mr. Trump declared during the first trial, "[W]e have all the material. They don't have the material."[16] Under such an

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[12] U.S. CONST. amend. XVII.

[13] *See generally* STEVEN CALABRESI & CHRISTOPHER YOO, THE UNITARY EXECUTIVE: FROM WASHINGTON TO BUSH (Yale University Press 2008).

[14] *See* U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States . . .").

[15] Aaron Blake, *The White House's scathing and legally dubious impeachment letter, annotated*, THE WASHINGTON POST (Oct. 9, 2019), https://www.washingtonpost.com/politics/2019/10/09/white-houses-scathing-legally-questionable-impeachment-letter-annotated/ [https://perma.cc/7NFJ-GXSC].

[16] Peter Wade, *Trump Brags About Concealing Impeachment Evidence: 'We Have All the Material, They Don't'*, ROLLING STONE (Jan. 20, 2022), https://www.rollingstone.com/politics/politics-news/trump-impeachment-evidence-we-have-all-the-material-they-dont-941140/ [https://perma.cc/9PZU-5966].

understanding of executive power, the president is able to thwart an impeachment investigation and effectively place himself beyond the reach of the one power that the Constitution vests in Congress to address the most serious kinds of abuse of power by the president.[17]

Indeed, appearing to follow such a conception of executive power, Trump went reputedly further to destroy – or have his staff destroy – documents rather than share them with Congress, as the House's subpoenas had requested, or the National Archives, as federal law required. Such a construction of presidential power is hard to square with a constitution, such as ours, that is premised on the idea that no one is above the law.[18] Indeed, if Trump was able to amass enough power to thwart Congress's impeachment investigation under the pretext of protecting executive privilege, then there is little reason to believe that future presidents would refrain from abusing their executive authority to remain in office. The unitary theory of the executive thus has given rise to widening concerns that it may become a basis for presidents to destroy incriminating evidence, silence dissent, or undertake any other actions to prevent Congress from impeaching, convicting, and removing them from office.

For many, the convergence of these developments has drained the federal impeachment process of whatever original utility it once had as a check on presidential misconduct. Yet, as the next part shows, the convergence of these factors does not tell the full story of how impeachment works.

III. HOW IMPEACHMENT WORKS

If we adopted a more panoramic view of impeachment, going beyond the small number of presidential impeachment trials to the effects of impeachment and how impeachment coordinates with other mechanisms for holding presidents – and their lawyers – accountable for their misconduct, it is clear that impeachments have more sting than many people have recognized. Four presidential impeachment trials are a tiny data set from which to derive broad conclusions. They do not comprise, in other words, much common law at all. There are just too few cases from which we can draw any broader lessons about the actual efficacy of the federal impeachment process.

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[17] Kimberly Wehle, *Congress Has Lost Its Power Over Trump*, THE ATLANTIC (Feb. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/02/checks-and-balances-trump-has-swept-away/606013/ [https://perma.cc/YGF9-DVN5].

[18] This understanding of the Constitution has driven the reasoning and outcomes of a number of Supreme Court decisions, including United States v. Nixon, 418 U.S. 683 (1974), and, more recently, Trump v. Vance, 140 S. Ct. 2412 (2020).

Indeed, the numbers do not all point in one direction: While fifty-seven votes for conviction in the second Senate impeachment trial fell ten short of the number the Constitution requires for conviction, fifty-seven votes for conviction are the most votes for conviction in any presidential impeachment trial in American history.[19] Perhaps more importantly, that number included seven Republicans—the most senators ever to vote to convict a president from their own party and risk the censure of their party by doing so.[20] But that is not all. If we broaden our view, there were more than sixty-seven senators who seriously denounced Trump's involvement in the storming of the Capitol on January 6, 2021, to stop Congress from certifying the final results of the 2020 presidential election, which Trump lost.[21] Perhaps the most searing came from Minority Leader Mitch McConnell (R-KY), who condemned Trump for being "practically and morally responsible for the unprecedented mob attack on Congress."[22] True, Senator McConnell voted to acquit – ostensibly because he opposed using the impeachment process against someone no longer in office – and later said he would support Trump if he were again the Republican nominee for president, but his criticism of Trump sticks because it came from a (former) Trump ally and powerful leader of the Senate Republicans.[23]

While Trump can relish his acquittal only by ignoring the strong bipartisan condemnation of his behavior, historians, most of the American people, and many, if not most, members of Congress will not. They understand that Trump has tarnished his own legacy, and no amount of lying, protesting the truth, or blaming others can change the likelihood of his dropping to the near bottom of chief executives because of his dual impeachment and corruption in office. If Trump has any future in

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[19] Aaron O'Neill, *Votes for Presidential Impeachment in the U.S. Senate in 1868-2021*, STATISTA (June 21, 2022), https://www.statista.com/statistics/1085077/impeachment-vote-us-senate-clinton-johnson/ [https://perma.cc/3BDN-ANWN].

[20] Barbara Sprunt, *7 GOP Senators Voted to Convict Trump. Only 1 Faces Voters Next Year*, NPR (Feb. 15, 2021), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/15/967878039/7-gop-senators-voted-to-convict-trump-only-1-faces-voters-next-year. [https://perma.cc/QQ8G-A9XX].

[21] *See* Senate Trial Proceedings from the Congressional Record (2021), https://www.govinfo.gov/collection/impeachment-related-publications [https://perma.cc/996F-CC6P]; *see also* Ian Millhiser, *The overwhelming strength of the case against Trump, in one number*, VOX (Feb. 14, 2021), https://www.vox.com/2021/2/14/22282760/trump-impeachment-senate-malapportionment-76-million-acquital-conviction-capitol [https://perma.cc/UH7G-X7XD].

[22] U.S. News Staff, *READ: McConnell Speech After Trump's Impeachment Trial Acquittal*, U.S. NEWS (Feb. 14, 2021), https://www.usnews.com/news/politics/articles/2021-02-14/read-mcconnell-speech-after-trumps-impeachment-trial-acquittal.

[23] *Id.*

American politics, that says more about the state of the American polity than it does Trump.

The relative rarity of presidential impeachments – with only three presidents actually impeached for misconduct – does not foreclose the possibility that they may have deterrent effects on possible presidential (and other) misconduct. For example, Richard Nixon chose not to defy the Supreme Court ordering him to turn over White House tapes to the special prosecutor investigating him based in part on the likelihood any such defiance would be disastrous for him politically (his popularity would plummet further) and would surely have increased the likelihood there were enough votes in the Senate to convict and remove him from office.[24] In 2019, Special Counsel Robert Mueller documented White House Counsel Don McGahn's threat to quit his post if the President fired Mueller and Trump's subsequent reluctance not to terminate Mueller.[25] White House counsel Pat Cippolone had pledged to quit if Trump persisted in trying to thwart the peaceful transition to the Biden Administration. And while, in the immediate aftermath of the attack on the U.S. Capitol on January 6, 2021 he did not follow through,[26] it did force Trump to look for ways to maneuver around both Cippolone's office and the Acting Attorney General to cobble together an ad hoc team that would fight to keep President Trump in the White House, a team that proved to be quite ineffective.[27] In other less well-documented instances, presidents may have opted to forego some misbehavior out of the fear that they would be impeached.

Moreover, the public seems to have understood the federal impeachment process, including the scope of impeachable offenses, better than commentators might have recognized. Indeed, while the public largely believed that Clinton had committed the misconduct charged in the two impeachment articles approved by the House, they did not believe the

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[24] *See* Jeff Shesol, *When Presidents Think About Defying the Courts*, THE NEW YORKER (Feb. 9, 2017), https://www.newyorker.com/news/news-desk/when-presidents-think-about-defying-the-courts [https://perma.cc/5PAD-4X2T].

[25] Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, But Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html/ [https://perma.cc/GRJ2-685H].

[26] Pamela Brown, *White House Counsel Considering Resigning, Sources Say*, CNN (Jan. 8, 2021), https://www.cnn.com/2021/01/08/politics/pat-cipollone-white-house-counsel/index.html [https://perma.cc/NA5P-X2CT].

[27] Matt Zapotosky, Devlin Barrett, & Carol D. Leoning, *Trump entertained plan to install an attorney general who would help him pursue baseless election fraud claims*, THE WASHINGTON POST (Jan. 22, 2021), https://www.washingtonpost.com/national-security/trump-justice-department-overturn-election/2021/01/22/b7f0b9fa-5d1c-11eb-a976-bad6431e03e2_story.html [https://perma.cc/HPV5-MDA7].

misconduct was impeachable.[28] Even within the Senate, more than sixty-seven senators denounced Clinton for his misconduct.[29]

More recently, a slight majority of Americans supported the effort to convict and remove Trump based on the House Intelligence Report in the first impeachment, and nearly sixty-percent of the American people supported Trump's conviction, even after he had left office.[30] Most of the forty-three senators who voted to acquit Trump in his second trial explained they did so on their beliefs that former presidents are not subject to impeachment.[31] Yet, a majority of the Senate formally voted (56–44) to acknowledge and accept jurisdiction over the trial even though Trump was no longer in office when the trial began.[32] Senator Richard Burr (R-NC) explained in his post-trial statement on why he voted to convict Trump that he had accepted that a majority of the Senate had retained jurisdiction and therefore felt he had no choice but to vote on the merits of the case.[33] For him, the merits were clear—he voted to convict Trump.[34] Some others, like Senator Charles Grassley (R-IA), voted against jurisdiction but accepted the decision of the Senate to hold the trial and thus reached the merits of the case.[35] He voted to acquit.[36] And there were more than sixty-seven senators who delivered post-trial statements condemning Trump's misconduct.[37] Thus, even if the media failed to do more to enrich popular understanding of the law of impeachment in either trial, the public still got the message of the House Managers in each of the Trump impeachments. The public's take in each impeachment of Trump

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[28] MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 180 (3d ed., University of Chicago Press, 2019).

[29] *Id*.

[30] "*Majority Support Trump Impeachment*," MONMOUTH POLLING (Jan. 25, 2021), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_012521/ [https://perma.cc/SJ2L-LJUA]; Aaron Bycoffe, Ella Koeze, & Nathanial Rakich, "*Did Majority Support Removing Trump from Office?*", FIVETHIRTYEIGHT (Feb. 12, 2020), https://projects.fivethirtyeight.com/impeachment-polls/ [https://perma.cc/NC5B-H226].

[31] S. REP. NO. 117-28 at 17 (2021).

[32] S. REP. NO. 117-24 at 21 (2021).

[33] *Senator Burr Statement on Vote to Convict Former President Trump on Article of Impeachment*, RICHARD BURR (Feb. 13, 2021), https://www.burr.senate.gov/2021/2/senator-burr-statement-on-vote-to-convict-former-president-trump-on-article-of-impeachment [https://perma.cc/CB5H-CX6Q].

[34] S. REP. NO. 117-28 at 17 (2021).

[35] S. REP. NO. 117-24 at 21 (2021) (vote for jurisdiction); S. REP. NO. 117-28 at 17 (2021) (vote to acquit).

[36] S. REP. NO. 117-28 at 17 (2021).

[37] Michael J. Gerhardt, *Impeachment Still Matters*, SLATE (Mar. 5, 2021), https://slate.com/news-and-politics/2021/03/donald-trumps-two-impeachments-mattered.html [https://perma.cc/G8BY-FQZC].

may have helped to put Biden into the White House. In other words, the more people who thought Trump should be convicted, the less support he had in critical jurisdictions for winning a second term.

In both Trump impeachment proceedings,[38] there was evidence that Trump had engaged in serious misconduct. In the first, multiple witnesses with first-hand knowledge reported Trump's request for a personal "favor" from Ukraine's President Zelensky in exchange for Zelensky's announcing the opening of criminal investigations into then-presidential candidate Joseph Biden.[39] In addition, Trump himself admitted – and never denied – that he had defied Congress's investigation by refusing to comply with nearly a dozen legislative subpoenas.[40] In his second impeachment, there was video (aired on every network) of Trump's urging an insurrection by stoking supporters to storm Congress on January 6, 2021. Such evidence undoubtedly stained Trump's legacy. If the evidence and the public's conclusion that Trump should have been convicted in each of these trials do not prevent Trump from being elected president in 2024, it will say much more about the American people than it does about the effectiveness of the federal impeachment process.

IV. LAWYERLY MISCONDUCT IN DEFENDING TRUMP

Another failure in each of the two impeachment trials of Donald Trump was the encouragement of lawyers' unethical misconduct. This is, of course, a failure on the lawyers' part, even if Trump did not command it. For example, some administration lawyers merely acquiesced to the president's demands and facilitated his most egregious misconduct. I take three examples from congressional investigations into possible Trump misconduct, including Trump's persistent efforts to overturn the presidential election that he lost and destruction of documents that the Presidential Records Act requires be preserved for the National Archives.[41]

One example is a memorandum from Trump's White House Counsel issued in response to the initial impeachment investigation in early October 2019. The Memorandum was replete with misleading and false

[38] *E.g.*, S. REP. NO. 116-22 at 2 (2020) (2020 impeachment); S. REP. NO. 117-25 at 26 (2021) (2021 impeachment).

[39] *See* S. REP. NO. 116-22 at 22 (2020).

[40] *Id.* at 4.

[41] *Cf.* Nixon v. General Services Administration, 433 U.S. 425, 440 (1977); Earlier this year, the Supreme Court rejected Trump's efforts to bar the House Committee investigating his involvement in the January 6th riot from gaining access to documents produced on behalf of his presidency. Melissa Quinn, *Supreme Court Rejects Trump Request to Shield Release of Records to January 6 Committee*, CBS NEWS (Jan. 20, 2022), https://www.cbsnews.com/news/trump-supreme-court-january-6-document-release/ [https://perma.cc/S6YH-SLVE].

statements of fact and law.[42] It reiterated the canard that the whistleblower's report – shared with the House Intelligence Committee – was a "false account" of then-President Trump's July 25, 2019, phone call with Ukraine's president, though no evidence was ever produced undermining the account.[43] Indeed, there was nothing false about it. In fact, it was corroborated by virtually every witness who testified before the House Intelligence Committee.[44] Even worse, the people testifying against were not Democrats but were people from within Trump's own administration. It is an understatement to suggest that those testifying in defiance of the President's wishes were courageous and committed to the rule of law. It does not just strain credulity but decimates it to maintain that everyone who has testified under oath in these hearings is lying while only the President is telling the truth.

The Memorandum repeatedly insisted that the President's call was "appropriate" because his concern was with corruption in Ukraine.[45] If the President had such a concern, it is striking that it was never mentioned anywhere in his speeches or, more pertinent to the impeachment, in any of Trump's calls with Ukraine's president. Indeed, the word "corruption" does not appear in the transcript. The president had no general concern about corruption in that country but instead, as numerous witnesses attested and new documents produced after the impeachment confirm, his concern was always about the Bidens.[46] In the infamous July 25th call with the President of Ukraine, Trump mentioned the Bidens five times.[47] He did not otherwise mention corruption. The evidence found by the House Intelligence Committee showed that a systematic effort to create a shadow operation to get rid of the United States' exemplary ambassador in Ukraine was all done for the purpose of putting pressure on Ukraine to agree merely to the announcement of an investigation against the Bidens.[48] There was, in fact, no concern about an actual investigation, just

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[42] *E.g.*, WHITE HOUSE MEMORANDUM IN RESPONSE TO THE IMPEACHMENT INQUIRY 1-2 (Oct. 8, 2019) (on file with the NY Times) [hereinafter "*White House Memo*"].

[43] *Id.* at 2.

[44] *E.g.*, S. REP. NO. 116-22 at 2 (2020).

[45] *E.g.*, *White House Memo*, *supra* note 42 at 2.

[46] *E.g.*, S. REP. NO. 116-22 at 2 (2020); *see also* "*Trump asked Ukraine president in phone call 'if you can look into' Biden and his son*", CNBC (Sept. 25, 2019), https://www.cnbc.com/2019/09/25/trump-asked-ukraine-president-if-you-can-look-into-biden-and-his-son-in-phone-call.html [https://perma.cc/5AKE-J4XW].

[47] *Read Trump's phone conversation with Volodymyr Zelensky*, CNN (Sept. 26, 2019), https://www.cnn.com/2019/09/25/politics/donald-trump-ukraine-transcript-call/index.html [https://perma.cc/4S7N-39UD].

[48] *Committee Releases Ambassador Bill Taylor's Deposition Transcript As Part of Impeachment Inquiry*, H.R. PRESS RELEASE (Nov. 6, 2019),

the announcement, and the reason why is obvious—to promulgate dirt on a likely rival in the next presidential election.

The Memorandum repeatedly complained that the House did not afford the president "due process."[49] Constitutional "due process," generally speaking, requires notice of a hearing and an impartial decision-maker.[50] Throughout the House's impeachment proceedings, Republicans on the Intelligence and Judiciary Committees proclaimed "due process" was a problem.[51] Yet, the very same Republicans who made this complaint had been invited to or participated in the closed-door depositions they complained were not open to them. Moreover, "due process" does not apply to these proceedings, since "due process" applies to the government when it is depriving someone of "life, liberty, or property." In an impeachment, none of those are at risk, so the clause does not apply. The President had the safeguards, and more, throughout the House proceedings. He was given a great deal of fair process – including being invited to attend the testimony of constitutional law scholars and even to question them – but he or his White House Counsel turned the opportunities down. Ultimately, their point was to reap the political or partisan benefits of making such complaints rather than actually setting any record straight.

Further, the Memorandum declared that no one had "direct knowledge" of the problematic call with Zelensky and that the House's evidence was nothing but "speculation and hearsay."[52] To begin, these were political talking points, not genuine legal arguments. Numerous prosecutions and impeachments have turned on indirect or circumstantial evidence; the Constitution does not forbid this, nor do the rules of either the House or the Senate. Moreover, key witnesses with "direct knowledge" of the call were ordered by the President not to testify.[53] The President's lawyers defended the President's refusals to comply with House subpoenas related to the House's investigation of the July 25th call on the ground that as president, Trump was entitled to assert legal defenses

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https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=797 [https://perma.cc/L2ZF-6JKZ].

[49] *E.g.*, *White House Memo*, *supra* note 42 at 3.

[50] *See Amdt5.4.5.4.6 Impartial Decision Maker*, *Constitution Annotated*, https://constitution.congress.gov/browse/essay/amdt5-4-5-4-6/ALDE_00000886/ [https://perma.cc/2ZPT-TPNR].

[51] Alison Durkee, *GOP Flatters Trump with Impeachment Report Claiming He Didn't Do Anything Wrong*, VANITY FAIR (Dec 2, 2019), https://www.vanityfair.com/news/2019/12/republican-impeachment-report-house-intelligence-committee-trump [https://perma.cc/7P8E-65JM].

[52] S. DOC. NO. 116-12, at 152–53 (2020), https://www.govinfo.gov/content/pkg/CDOC-116sdoc12/pdf/CDOC-116sdoc12-pt3.pdf [https://perma.cc/WCQ8-EV8E].

[53] *Id.* at 187.

in response to them. But that was not, nor could it be, the case when he ordered the entire executive branch not to cooperate with the inquiry.[54]

That was not a defense. That was obstruction.

The Memorandum also suggested that the two articles of impeachment the House was preparing to approve in 2019 were "impermissibly duplicitous" and that impeachable offenses must be "violations of established law."[55] Abuse of power, charged in the first article, is not "duplicitous" in the least. One merely needs to read the constitutional convention debates and *The Federalist Papers* to know the Framers put impeachment in the Constitution as a check on abuse of power.[56] The Memorandum never bothered to consider, as Rule 3.3 counsels, what an abuse of power is.[57] In fact, it is the exercise of power in violation of the Constitution. So, it did violate a law, in this case the supreme law of the land.

In addition, the Memorandum argued that the fact that the president is unique among federal officials is precisely why he may not be impeached, convicted, and removed for abuse of power.[58] As Trump himself explained early in his presidency, the Constitution enabled him "to do whatever I want."[59]

According to the Memorandum, the only means for holding the president accountable for misconduct in office was through elections.[60] That was exactly what Mr. Trump wanted—to be able, in the Ukraine situation, to turn the circumstance to his personal advantage and condition the congressional appropriations for Ukraine on meeting *his* personal benefit. The Memorandum insisted that removing Trump on the basis of

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[54] *Id.* at 191–92.

[55] *Id.* at 172–73, 251–52.

[56] *See Madison Debates*, (July 19, 1787), https://avalon.law.yale.edu/18th_century/debates_719.asp [https://perma.cc/3ZZT-2XK9]; *See also Federalist Papers: No. 77*: *The Appointing Power Continued and Other Powers of the Executive Considered From the New York Packet*, (April 4, 1788), https://avalon.law.yale.edu/18th_century/fed77.asp [https://perma.cc/L3TD-RERL].

[57] MODEL RULES OF PRO. CONDUCT r. 3.12 (Am. Bar Ass'n, Discussion Draft 1983); *Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/ [https://perma.cc/TH8W-V8FV]

[58] S. DOC. NO. 116-12, at 161 (2020), https://www.govinfo.gov/content/pkg/CDOC-116sdoc12/pdf/CDOC-116sdoc12-pt3.pdf [https://perma.cc/7R6Y-HSBR].

[59] Michael Brice-Saddler, *While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want'*, THE WASHINGTON POST (July 23, 2019), https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/ [https://perma.cc/VK42-QBVE].

[60] S. DOC. NO. 116-12, at 161 (2020), https://www.govinfo.gov/content/pkg/CDOC-116sdoc12/pdf/CDOC-116sdoc12-pt3.pdf [https://perma.cc/M7F6-D4N2].

the misconduct set forth in the House's two impeachment articles "would permanently weaken the Presidency and forever alter the balance among the branches of government in a manner that offends the constitutional design established by the Framers."[61] That was a strong claim. The White House lawyers were wishing for Trump as president to do exactly what they argued Congress wished for itself—not to be subject to the Constitution's system of checks and balances. If impeachment was not legitimate because it was "partisan,"[62] and the President, according to his lawyers, was not subject to civil or criminal accountability while he was in office, then he was effectively above the law. There would be no bar to him abusing his power by attempting to rig the presidential election.

To be sure, it made eminent sense for Trump's lawyers to make political appeals in a political proceeding, particularly since they had enough votes in the Senate to preclude conviction. Yet, Trump's lawyers in the second trial claimed, with the Senate and nation listening, that "the entire premise of [Trump's] remarks [on January 6] was that the democratic process would and should play out according to the letter of the law."[63] This was pure fiction. Instead, according to Trump's lawyers, he was urging his Vice-President to reopen the certification of the election and "send it back to the states," even though Pence had no such power.[64] Trump's lawyers insisted that he had "encouraged those in attendance to exercise their rights peacefully and patriotically."[65] Technically, this was true. Trump uttered a sentence roughly along those lines, but his lawyers neglected to mention that Trump's statement contrasts with his using the word "fight" twenty times. Michael Van der Veen declared that "at no point was the president informed the vice president was in any danger,"[66] but Senator Tommy Tuberville (R-AL), whom Trump urged to continue to protest the election, told Trump that Vice-President Pence had to be

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[61] *Id.* at 145.

[62] The fact that one political party's members in Congress overwhelmingly support a piece of legislation often has nothing to do with whether or not it is constitutional. The same dynamic is true with impeachment.

[63] Zack Beauchamp, *The real reason Trump's impeachment defense was so bad*, VOX (Feb. 12, 2021), https://www.vox.com/policy-and-politics/22280400/trump-impeachment-defense-bruce-castor-bad [https://perma.cc/GP3C-XKYB].

[64] Aaron Glantz, *Read Pence's full letter saying he can't claim 'unilateral authority' to reject electoral votes*, PBS (Jan. 6, 2021), https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes [https://perma.cc/Y8NX-JX45].

[65] Beauchamp, *supra* note 63.

[66] Vanessa Romo, *Republicans Seek Clarity On What Trump Knew About Pence's Safety*, NPR (Feb. 12, 2021), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/12/967517591/republicans-seek-clarity-on-what-trump-knew-about-pences-safety [https://perma.cc/PZ5F-NZB7].

taken out of the chamber for his safety.[67] Trump's lawyers blamed "the Democrats" for not starting the trial before Trump's term ended, but they pointedly did not acknowledge the fact that Mitch McConnell, as Majority Leader, refused to accept the articles until the day before Biden's inauguration. Van der Veen also told the Chamber that "[o]ne of the first people arrested was a leader of antifa," a claim decisively proven false.[68]

A third example of Trump's lawyers likely violating federal laws and/or ethical norms is their destruction of White House records that federal law requires be preserved for the National Archives. During each of the impeachment proceedings against Trump, there were rumors his lawyers were destroying or withholding documents or records of his possible misconduct. Such misbehavior has begun to come to light during the January 6th Committee's inquiries into Trump's involvement in, and knowledge of, the storming of the Capitol to prevent final congressional certification of the 2020 presidential election. There is no question that federal law requires preservation of official presidential records – including visitor logs at the White House and records of phone calls to and from the President – regardless of whether they reveal presidential misconduct. Yet, it is fair to assume that Trump himself did not personally destroy all possibly pertinent documents but had his lawyers do the dirty work. Mr. Trump's lawyers likely would defend any such destruction on the basis of their broad constructions of the unitary theory of the executive—that it is unconstitutional for Congress to compel or require the president to take any actions with respect to the documents he preserves, edits, or destroys. Yet, that defense is squarely at odds with Supreme Court precedent to the contrary.[69] Hence, the lawyers' (presumed) misconduct violates clearly established law and thus also violates ethical rules mandating that lawyers do not take any actions to impede the administration of justice.[70]

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[67] *Id*.

[68] Philip Bump, *It didn't take long for Trump's attorneys to blame Jan. 6 on antifa*, THE WASHINGTON POST (Feb. 12, 2021), https://www.washingtonpost.com/politics/2021/02/12/didnt-take-long-trumps-attorneys-blame-jan-6-antifa [https://perma.cc/MD7S-HM3F].

[69] *See supra* note 18 and accompanying text.

[70] Besides Rule 3.3 requiring truthfulness and candor from attorneys, including those working in the public sector, two other rules plainly bar any government lawyers, including those who worked for Trump, from destroying evidence of criminal or other misconduct. MODEL CODE OF PRO. RESP. r. 3.3 (Am. Bar Ass'n 1983). *See* MODEL CODE OF PRO. RESP. r. 3.4 (Am. Bar Ass'n 1983) (requiring that legal counsel refrain from obstructing lawful investigations, falsifying evidence, and knowingly disobeying "the rules of a tribunal"); MODEL CODE OF PRO. RESP. r. 8.4 (Am. Bar Ass'n 1983) (requiring lawyers to refrain from engaging in misconduct "prejudicial to the administration of justice.").

Yet another response of administration lawyers to presidential directives that they engage in illegal conduct is to resign in protest over or publicly take issue with the president's orders. In Watergate, this was famously done when Attorney General Eliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than comply with the President's order that they dismiss the Special Prosecutor investigating the President's misconduct.[71] In contrast, Mr. Trump's Attorney General, William Barr, allowed the White House to announce his departure a week ahead of time and made no public statement about his reasons for doing so.[72] Ethics complaints were subsequently filed against Barr before the disciplinary board of the District of Columbia Bar, which dismissed the complaints on the ground that it "did not intervene in matters that are currently and publicly being discussed in the national political arena."[73]

Other Trump administration officials chose not to resign. For example, Chief White House Counsel Pat Cipollone, who led the president's defense in the first impeachment trial, did not resign. Rather than pronouncing falsehoods and misrepresentations before the Senate in the first trial, he and several Justice Department officials reportedly threatened to resign during a White House meeting in which Mr. Trump announced his plans to appoint loyalists in the Justice Department to overturn the election results through voter fraud investigations. Trump carried through with his plan, and Mr. Cipollone did not leave office until after the inauguration of President Biden. While Mr. Cipollone might privately claim that he remained to prevent presidential misconduct, his failure to resign stands in marked contrast with the public testimony of Nixon's White House Counsel John Dean—who reported details of Nixon's misconduct while in office and resigned shortly thereafter.[74] Later, he was disbarred in both Virginia and the District of Columbia for his complicity in obstructing justice and sent to prison for several

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[71] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, THE WASHINGTON POST (Oct. 21, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm [https://perma.cc/5MSK-QB2Z].

[72] Allie Malloy, Devan Cole, Christina Carrega & Kevin Liptak, *Attorney General William Barr Resigns*, CNN (Dec. 15, 2020), https://www.cnn.com/2020/12/14/politics/william-barr-out-as-attorney-general/index.html [https://perma.cc/2UVG-KDGP].

[73] Jacqueline Thomsen, *An Ethics Complaint Against Bill Barr Was Rejected, and It Has Lawyers Worried*, NAT'L L. J. (June 9, 2021), https://www.law.com/nationallawjournal/2021/06/09/an-ethics-complaint-against-bill-barr-was-rejected-and-it-has-lawyers-worried/?slreturn=20220429115758 [https://perma.cc/7MS9-MVMU].

[74] Michael S. Rosenwald, *John Dean is Trump's latest target. Here's how Dean took down Nixon.*, THE WASHINGTON POST (June 10, 2019), https://www.washingtonpost.com/history/2019/06/10/john-dean-is-trumps-latest-target-heres-how-he-took-down-nixon/ [https://perma.cc/B9UL-GLEQ].

months.[75] In contrast, Cipollone, after leaving the White House at the end of Trump's term, joined several other Trump White House lawyers in opening the D.C. office of a prominent Los Angeles law firm.[76]

With William Barr gone, Trump elevated a mid-level Justice Department official, Jeffrey Clark, to Acting Attorney General,[77] and accepted outside pro bono counsel from John Eastman, a well-known conservative constitutional scholar, who joined Mr. Trump in rallying supporters to storm the Capitol on January 6, 2021.[78] Subsequently, Clark has been facing complaints of unethical conduct before the disciplinary board of the D.C. Bar.[79] The Senate Judiciary Committee issued a report critical of Clark's brief tenure as Acting Attorney General,[80] and the House Committee investigating the January 6th attack on Congress has issued a contempt charge against Clark for his failure to comply with a subpoena ordering him to appear before the committee.[81] Eastman, too, has faced considerable backlash for his role in the January 6th insurrection—including being forced to relinquish his position as a tenured law professor at Chapman University, where he was once dean of the law school, fending off document requests from the House Committee investigating the

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[75] *John Dean Disbarred in District of Columbia*, N.Y. TIMES (Oct. 3, 1974), https://www.nytimes.com/1974/10/03/archives/john-dean-disbarred-in-district-of-columbia.html [https://perma.cc/6AE7-UC6B].

[76] Peter Jeffrey, *Trump Lawyer Cipollone to Open Washington Office for LA Firm*, BLOOMBERG LAW (Oct 7, 2021, 9:51 AM), https://news.bloomberglaw.com/business-and-practice/top-trump-lawyer-cipollone-to-open-washington-office-for-la-firm [https://perma.cc/2BCP-GJ29].

[77] Amanda Carpenter, *Who is Jeffrey Clark and Why Does He Matter?*, THE BULWARK (Dec. 7, 2021, 5:13 AM), https://www.thebulwark.com/who-is-jeffrey-clark-and-why-does-he-matter/ [https://perma.cc/654C-KFQ5].

[78] Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html [https://perma.cc/28U2-6KK9].

[79] Lauren Stiller Rikleen, John T. Montgomery & James F. McHugh, *Disciplinary Complaints Await Former AAG Jeffrey Clark*, BLOOMBERG LAW (Oct. 18, 2021, 3:01 AM), https://news.bloomberglaw.com/legal-ethics/disciplinary-complaints-await-former-aag-jeffrey-clark [https://perma.cc/FP2J-N7Q2]; *See* Katie Benner, *Ethics Board Moves to Penalize Jeffrey Clark, Who Aided Trump in Election Plot*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/us/politics/jeffrey-clark-dc-bar-justice.html [https://perma.cc/K3C8-3LK3].

[80] Melissa Quinn, *Senate report reveals new details about Trump's efforts to push Justice Department to overturn election*, CBS NEWS (Oct. 7, 2021 8:43 PM), https://www.cbsnews.com/news/trump-2020-election-justice-department-senate-judiciary-committee-report/ [https://perma.cc/BZ7K-VCVL].

[81] Luke Broadwater, *Possible Contempt Charge Hangs Over Trump Justice Dept. Official*, N.Y. TIMES (Jan. 5, 2022), https://www.nytimes.com/2021/12/01/us/politics/jeffrey-clark-contempt-congress.html [https://perma.cc/9LF4-VY8C].

January 6th riots, and facing requests for his disbarment submitted to the disciplinary board of the District of Columbia bar.[82]

V. REFORMING PRESIDENTIAL IMPEACHMENT

It is easy to poke holes in the federal impeachment process. Indeed, a useful tactic among those defending presidents against the threat of impeachment has been to create uncertainty and confusion over the law of impeachment. If, for example, the House impeaches a president for misconduct that is not codified as a felony in federal law, his defenders might argue that only actual indictable felonies should count as impeachable offenses, thus effectively narrowing the scope of possible impeachable offenses a president might commit. If the president were charged by the House with committing a federal crime, one defense might be arguing that the House Managers have not shown how each element of the crime has been committed. Additionally, the president's lawyers could argue that the crime alleged is not impeachable either because it does not cause serious injury to the republic or was done in the president's official capacity. They might also argue that the procedures employed in the House and/or Senate violate "due process of law,"[83] which supposedly might require additional safeguards such as cross-examination of hostile witnesses (which may well have taken place), allowing the presence of the targeted president and/or his counsel at every phase of the impeachment proceedings, or sharing with the defense all evidence (and witnesses) supporting the case for impeachment. Such defenses invite House Managers to go into the weeds, or technicalities, of impeachment law at the likely risk of losing public interest or confidence in the process.

The more difficult matters have to do with finding ways to fix the process short of a constitutional amendment (which is practically impossible). I examine several relatively modest reforms that can be done with minimal modifications of the process. Their success primarily depends on developing or fortifying the political will to ensure that the process remains meaningful.

The first proposal is to follow several models of bipartisanship in congressional inquiries. One such model is how the House Judiciary Committee proceeded when investigating Nixon's involvement in the Watergate burglary. At that time, the House Judiciary Committee moved slowly to build confidence in its consideration of Nixon's possible impeachment. Toward that end, the Committee staff was not technically divided into a majority or minority but instead was tasked to operate

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[82] Paul Rosenzweig, *Legal Ethics, Bar Discipline and John Eastman*, LAWFARE (Oct. 20, 2021 3:31 PM), https://www.lawfareblog.com/legal-ethics-bar-discipline-and-john-eastman [https://perma.cc/F4QX-449K].

[83] U.S. CONST. amend. V.

jointly to the fullest extent possible. It ended up producing a widely respected report on the background of the federal impeachment process. That report is now considered the gold standard of historical work done on the federal impeachment process and is an invaluable historiography.

A second model currently exists in the United States Senate, particularly within the Intelligence Committee. The Senate Intelligence Committee is designed to function in nonpartisan fashion. Although there is a chair and deputy chair, the two generally issue joint statements, and the eight members of the majority party and seven of the minority are also encouraged by resolution and practice to speak with one voice.[84] The collaboration involved in Committee work gives both the Committee and its work special stature in the Senate.

The successful model in national security could easily be adapted to the impeachment context. If and when the Senate conducts investigations that might implicate presidential misconduct, its leadership can choose to assign the matter to a select committee modeled after the Senate's own Intelligence Committee. Given its organization, a select committee investigating possible presidential misconduct differs dramatically from the Senate Judiciary Committee, whose membership has long been split down the middle ideologically and with little or no capacity for bipartisan proceedings on politically sensitive matters—indeed matters involving the protection of the nation's security from presidential abuse.

It is not hard to imagine the impediments to reforms designed to eliminate or reduce strident partisanship in impeachment proceedings. Members of the House stubbornly refuse to do anything that could advantage members of the opposing party. If, however, members were tasked with developing a plan to take effect 10 years hence, they might be forced to take the longer view—in which the institutional interests of the House are taken seriously. These include doing work that withstands the test of time, as did the work of the bipartisan House committee charged with investigating Watergate. Further, future Houses and Senates could follow other practices employed in Congress's Watergate investigation, including but not limited to: select committees, whose membership must have equal numbers of members from each party; joint staffs; and even joint schedules of the steps to be undertaken whenever a congressional inquiry has revealed evidence of possible presidential misconduct that warrants an impeachment inquiry.

A second proposal is for the House Judiciary Committee to use in its impeachment inquiries prominent legal counsel that are approved by at least two-thirds of the entire committee. Of course, a requirement of

[84] *See generally About the Committee: Overview of the Senate Select Committee on Intelligence Responsibilities and Activities*, U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, https://www.intelligence.senate.gov/about [https://perma.cc/YS2W-WYU7] (last visited May 28, 2022).

unanimity can be easily scuttled by just one or two members who did not wish to play nicely with the other side. To avoid that problem, a two-thirds rule almost certainly will require some bipartisan support, which can be used to appoint a lawyer of sufficiently great stature such that he or she will be respected by members of both parties. This is no knock on any of the lawyers who staffed the House impeachment proceedings against Nixon, Clinton, and Trump; however, this proposal would allow the Committee to avoid hyper-partisan debate that spreads misinformation about the process or impedes an accurate understanding of it.

Watergate provides a good example of this approach: the Committee Democrats and Republicans each hired prominent, widely respected outside counsel to assist with the inquiry, John Doar for the majority and Albert Jenner, Jr., for the minority.[85] Doar was a Republican, who had previously served as Assistant Attorney General for Civil Rights in the Department of Justice from 1960 to 1967.[86] Jenner, a Democrat, had previously served as an assistant counsel to the Warren Commission, chair of the advisory committee developing the Federal Rules of Evidence, and name partner of one of the country's most prestigious law firms. Together, Doar and Jenner ensured a high level of professionalism in the operations of the Judiciary Committee.[87] Without taking anything away from the outside legal counsel employed by the majority in the first House impeachment of Donald Trump, hiring outside counsel with no partisan stake in the outcomes has the potential to lend credence to the investigations of possible presidential misconduct.

A third reform is to hold the lawyers in the process to the highest standards of professionalism. Lawyers who lie and spread falsehoods violate basic rules of professional conduct, and lawyers who work in the House or for any of the subjects of impeachment are no less obliged to follow the rules of professional responsibility in their work. Thus, at the very least, the Committee should adopt a referral mechanism enabling a majority of its members to refer lawyers who have violated the rules of professional responsibility to appropriate disciplinary authorities.

A fourth proposal is to consider limiting only certain portions of the hearings for public viewing. Television seems to bring out the best – and

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[85] Stephen Bates, *Road Map to Impeachment Proceedings? What Watergate Can Teach Us About Unsealing the Mueller Report*, LAWFARE (Apr. 3, 2019, 1:05 PM), https://www.lawfareblog.com/road-map-impeachment-proceedings-what-watergate-can-teach-us-about-unsealing-mueller-report [https://perma.cc/A2YW-XMDW].

[86] *A Champion of Civil Rights: John Doar Awarded the Medal of Freedom*, THE UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES (May 29, 2013), https://www.justice.gov/archives/opa/blog/champion-civil-rights-john-doar-awarded-medal-freedom/ [https://perma.cc/L33H-NUVG].

[87] *See The Impeachment Inquiry*, *in* CQ ALMANAC 1974, available at https://library.cqpress.com/cqalmanac/document.php?id=cqal74-1223105 [https://perma.cc/ARH5-3ENA].

the worst – of members of Congress. Grandstanding or playing to constituents does not edify anyone about the intricacies of the impeachment process. Having some hearings held behind closed doors, or at least not open to news coverage, could lower the temperature of the proceedings. Just as the Supreme Court has been reluctant to allow media coverage of oral arguments because of concerns that the justices or lawyers will play to the crowds and grandstand, the House should be more reluctant to allow coverage of every phase of the proceedings for public consumption.

Fifth, the House and Senate leadership each should consider hiring permanent staff for their respective impeachment inquiries. The people hired as permanent staff would be chosen by House leadership, in consultation with the House minority, but they would not depend on the Committee's composition to keep their jobs. Instead, they could be appointed to ten-year terms during which they are assigned the responsibilities of serving as staff in any impeachment inquiries, regardless of which party controls the White House or the House of Representatives.

Last, but far from least, three safeguards proved effective in curbing Trump's worst impulses and excesses in his final few months in office. To some observers, each was a surprise, though each was instrumental in protecting the integrity of the 2020 presidential election and the rule of law.

First, state and federal judges rejected largely dubious claims made by lawyers trying to overturn the "rigged presidential election" in sixty-one out of the sixty-two cases filed,[88] with Trump's one victory not making a difference to the final tally in the outcome of Pennsylvania's popular vote in the 2020 presidential election.

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[88] William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/ [https://perma.cc/KH2Y-WY75]; A Brookings Institution Report suggests that the data is slightly more complicated in that "Trump's election litigation efforts failed decisively, even though more judges than is generally assumed found his lawyers' arguments persuasive." Russell Wheeler, *Trump's judicial campaign to upend the 2020 election: A failure, but not a wipe-out*, BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/ [https://perma.cc/9W97-UB9X]; Wheeler notes that there were 13 cases filed in federal court, all the outcomes of which were not in Trump's favor and in which every Trump appointee voted against Trump. *Id.* The state court litigation, which occurred in seven battleground states Trump lost, went almost entirely against Trump, with one state court judge ruling in his favor in an inconsequential case but "Thirty-five percent of decisions by Republican-affiliated state court judges were for Trump." *Id.*

The second safeguard checking Trump's efforts to overturn the election was federalism, a notion usually championed by Republican presidents and judges and justices appointed by Republican presidents. Starting on the day of the presidential election through early January 2021, many lawyers and state officials were tasked with protecting the integrity of the electoral process in their respective jurisdictions. Perhaps the most notable were Republican officials in the two hotly contested states of Arizona and Georgia. In Arizona, Republican state officials not only certified the outcome in Biden's favor but also issued a ninety-three-page report that found efforts within the State to overturn the outcome were based almost entirely on misleading or false claims.[89]

In Georgia, both the Republican Governor and Republican Secretary of State steadfastly stood by the integrity of the outcome of the presidential election there and resisted Trump's personal pleas for them to overturn the election result.[90] The Republican Secretary of State went further to record a long phone conversation in which Trump repeatedly asked his office "to find 11,780 votes, which is one more than we have" and thus declare him the winner of Georgia's popular vote and electors.[91] The Republican Secretary of State and his counsel resisted and certified Biden's win in Georgia. Trump is now under criminal investigation for possible voter fraud in Georgia based on the taped recording of his conversation with Georgia officials.[92]

Finally, it appears that at least sixteen people have been disciplined for breaching the rules of professional responsibility in the jurisdictions in which they have been licensed to practice law. Perhaps the two most notable of these attorneys are Rudy Giuliani, who has had his bar license suspended in both New York[93] and the District of Columbia for false

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[89] *See* Michael Wines, *Arizona Vote Review Is 'Political Theater' and 'Sham,' G.O.P. Leaders Say*, N.Y. TIMES (May 17, 2021), https://www.nytimes.com/2021/05/17/us/arizona-audit-trump.html [https://perma.cc/Q7VQ-ZGDR].

[90] Felicia Sonmez, *Georgia leaders rebuff Trump's call for special session to overturn election results*, THE WASHINGTON POST (Dec. 6, 2020, 10:45 PM), https://www.washingtonpost.com/politics/brian-kemp-trump-election-results/2020/12/06/4c5db908-37d4-11eb-9276-ae0ca72729be_story.html [https://perma.cc/5VQ6-KKXK].

[91] Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html [https://perma.cc/5XQ6-4T48].

[92] Kevin Johnson & Bart Jansen, *Georgia prosecutor seeks grand jury to investigate possible Trump 'criminal disruptions' on 2020 election*, USA TODAY (Jan. 20, 2022, 1:17 PM), https://www.usatoday.com/story/news/2022/01/20/georgia-fulton-county-prosecutor-grand-jury-investigate-donald-trump/6594162001/ [https://perma.cc/MLF4-UM2J].

[93] *See* Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021),

statements and lies made in court filings and public appearances regarding the 2020 presidential election and other matters,[94] and Sidney Powell, who has been fined heavily for her misrepresentations in court and is facing disbarment.[95] Moreover, the 65 Project has been formed to identify all the lawyers who broke ethical rules in challenging the results of the 2020 presidential election.[96] Its work will undoubtedly make it harder for the lawyers involved to evade their professional obligations.

Presumably, high-ranking executive branch officials, such as cabinet secretaries and the Attorneys General, have little or no fear that they will ever be sanctioned or disciplined for deviating from the rules of professional responsibility. True, Nixon's Attorney General John Mitchell was disbarred in New York after he was convicted and sentenced to prison for perjury and obstruction of justice.[97] Yet, in the absence of such convictions, it is far from clear or certain that Attorney Generals or other federal prosecutors will face disciplinary proceedings for ever doing the president's bidding. Given that most disciplinary proceedings are held behind closed doors, we do not yet know, and may never know for sure, how the complaints against other Justice Department or Trump lawyers went nowhere.

Regrettably, there is little, if any, evidence indicating that the Rules of Professional Responsibility, federal laws, ethical norms, and traditions constrained White House counsel and other lawyers within the administration from facilitating Trump's impeachable (and unlawful) misbehavior. Shortly after Watergate, law schools started requiring law students to take a course in legal ethics.[98] The idea was to increase lawyers' awareness of the ethical rules governing their profession, but it is unclear to what extent such courses have reduced or diminished unethical lawyering. Nor would it seem that additional or different rules of

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https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html [https://perma.cc/46AF-V46K].

[94] Christina Wilkie & Dan Mangan, *Rudy Giuliani's DC law license is suspended*, CNBC (July 7, 2021, 6:24 PM), https://www.cnbc.com/2021/07/07/rudy-giulianis-dc-law-license-is-suspended-.html [https://perma.cc/R8FP-QZ53].

[95] Erik Larson, *Sidney Powell Sanctioned by Judge Over False Election Claims*, BLOOMBERG (Aug. 25, 2021, 5:35 PM), https://www.bloomberg.com/news/articles/2021-08-25/powell-gop-election-fraud-lawyers-sanctioned-by-michigan-judge [https://perma.cc/N4Q9-DRAJ].

[96] THE 65 PROJECT, https://the65project.com/ [https://perma.cc/ZW68-ZEMW] (last visited May 28, 2022).

[97] Morris Kaplan, *Mitchell Disbarred As Lawyer in State*, N.Y. TIMES (July 4, 1975), https://www.nytimes.com/1975/07/04/archives/mitchell-disbarred-as-lawyer-in-state-mitchell-is-disbarred-in.html [https://perma.cc/8XDQ-7Z5D].

[98] *See* Mark Hansen, *1965-1974: Watergate and the rise of legal ethics*, ABA JOURNAL (Jan. 1, 2015, 5:10 AM), https://www.abajournal.com/magazine/article/1965_1974_watergate_and_the_rise_of_legal_ethics [https://perma.cc/EDR3-C9G2].

professional responsibility would be any more effective at curbing lawyers' misconduct on behalf of powerful figures such as the president of the United States.

If the House January 6th Committee becomes aware of lawyers' participation in the facilitation of illegal misconduct, their misconduct should be made public and their names forwarded to appropriate jurisdictions for discipline and possible disbarment. Even if there were lawyers who opposed illegal activity within the administration, they failed (as far as we now know) to report the misconduct of other lawyers to appropriate authorities and, as a result, violated Rule 8.3 of the Rules of Professional Conduct.[99]

Lawyers, as a profession, are duty-bound to be truthful and candid, especially in legal proceedings. They thus had crucial roles in not becoming complicit with or facilitating untruths, falsehoods, and misleading characterizations of the law and facts. One has to ignore reality to suggest, as Mr. Trump and others have done, that there was no physical attack on Congress on January 6, 2021, but instead "tourists" visiting the Capitol,[100] or Trump voters merely engaging in "legitimate political discussion" regarding the 2020 presidential election at the Capitol. Any such characterizations are contradicted by a remarkable array of real, credible evidence to the contrary, including but not limited to the media's video tapes, eyewitness testimony, security cameras within the Capitol, and the guilty pleas of more than 200 people who stormed the Capitol on January 6, 2021. Indeed, the Republican leader in the Senate, Mitch McConnell (R-KY), declared, "We saw it happen. It was a violent insurrection for the purpose of trying to prevent the peaceful transfer of power after a legitimately certified election, from one administration to the next. That's what it was."[101]

VI. CONCLUSION: WHERE TO FROM HERE?

We have hardly seen the last of impeachment. This is not because members of Congress have developed a taste for the process (no one involved has ever said afterwards they relished the experience) or that it has become a partisan weapon each side may use for its own inappropriate purposes. It is because it has had more impact than its critics acknowledge.

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[99] MODEL RULES OF PRO. CONDUCT r. 8.3 (Am. Bar Ass'n 2020).

[100] *See* Bess Levin, *Republican Lawhttpmakers Claim January 6 Rioters Were Just Friendly Guys and Gals Taking a Tourist Trip through the Capitol*, VANITY FAIR (May 12, 2021), https://www.vanityfair.com/news/2021/05/capitol-attack-tourist-visit [https://perma.cc/HZ7E-EHFA].

[101] Jonathan Weisman & Annie Karni, *McConnell Denounces R.N.C. Censure of Jan. 6 Panel Members*, N.Y. TIMES (Feb. 8, 2022), https://www.nytimes.com/2022/02/08/us/politics/republicans-censure-mcconnell.html [https://perma.cc/K689-GL45].

In the rarified world of presidents, legacies matter. In Trump's case, his legacy will likely not be what he wants, for it will be a legacy in which his two impeachments and fallout from post-presidential investigations in Congress and by prosecutors will be front and center.

Once we move beyond Trump and the presidency, there is much work to be done in Congress and in the bar to protect against any future presidents' manifesting greater disdain for the rule of law than even Trump did. In Congress, reforming the federal impeachment process itself is long overdue. We need only to look to the past for guidance. For example, the special committees assembled in the Senate and the House Judiciary Committees – each of which spent nearly two years investigating the possible origins of the Watergate break-in and considering possible impeachment charges against Richard Nixon – remain a model for how such inquiries should be done. In the House, there was a bipartisan staff, which wrote the definitive report on the history of the federal impeachment process; and the cooperation of Democratic and Republican senators in uncovering the misconduct of the president ensured that their inquiries stand the test of time.

Perhaps the most important option for leaders and lawyers is to make clear to everyone what higher power(s) they serve, especially when the Congress and nation face possible constitutional crises. Is it their party and their own political ambitions, or is it the institution to which they have been elected, the clients they represent, and the Constitution and rule of law? It should be incumbent for every official to make crystal clear the principles, not the party, that they serve. The deep polarization of the American people, leading to deep polarization in Congress, makes such reforms unlikely, unless or until voters from both parties agree on the importance of having representatives and senators who are able not to see each other as enemies of the republic but instead as partners, who are genuinely committed to working together for the common good of the United States.