



## Presidential Impeachment in History and Procedure

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### Summary

To an increasing degree, impeachment has become a tool of contemporary American public policy. Since 1973, for example, at least 30 impeachment resolutions against sitting presidents have been introduced in Congress. Given his well-documented participation in the coverup of the Watergate scandal, President Richard Nixon was the subject of 17 impeachment resolutions. Five have been introduced already against President Donald Trump, three were introduced against President George W. Bush, and President Ronald Reagan and President George H.W. Bush were the subject of two resolutions each. Only one impeachment resolution was introduced against President Bill Clinton.

In the modern day, the course of action has been a directive from the House as a whole to the Judiciary Committee to begin an investigation of impeachable possible offenses. Impeachment resolutions are “privileged,” which means that a Member of the House of Representatives can, if he or she wishes, force a vote from the floor. For example, in 2018 Rep. Al Green (D-Texas) forced votes on two of the impeachment resolutions against President Trump. Both resolutions were tabled, effectively closing the door to future consideration. Rep. Green has indicated he plans to reintroduce an impeachment resolution in the First Session of the 116<sup>th</sup> Congress and force another vote on the floor.<sup>1</sup> Rep. Brad Sherman (D-Calif.) introduced a separate impeachment resolution at the beginning of the 116<sup>th</sup> Congress,<sup>2</sup> which convened January 3, 2019.

Because of this activity, and the virtual certainty that the notion of impeaching President Trump will continue throughout the 116<sup>th</sup> Congress, an objective historical and procedural analysis of impeachment is deemed crucial to

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<sup>1</sup> Cristina Marcos, “Democrat vows to move forward with impeachment, dividing his party,” The Hill, February 10, 2019 <https://thehill.com/homenews/house/429216-democrat-vows-to-move-forward-with-impeachment-dividing-his-party>

<sup>2</sup> H.Res. 13, 116<sup>th</sup> Congress (2019) <https://www.congress.gov/bill/116th-congress/house-resolution/13>

understanding the environment in which the remainder of the President's first term of office will unfold (on both sides of the political divide); regardless of whether formal impeachment proceedings actually take place. This paper explains the background of and procedures applicable to impeachment, summarizes the impeachment proceedings against the three presidents who have been subject to it, and concludes with a summary of several aspects of impeachment that are relevant to the current situation involving the Trump administration.

While not advocating for or against impeachment, this paper casts doubt on the known public case against President Trump. At the outset, for example, in the authors' view, any potential attempt to impeach President Trump based on allegations of wrongdoing that occurred before he took the oath of office would be illegitimate.

As of this writing, House Democratic leadership has downplayed any attempt to impeach the President. Committees of the House, however, appear to be quietly attempting to build a case for impeachment.<sup>3</sup> "Every day it becomes more and more difficult to say we're not interested in impeachment," one House Democrat has reportedly said.<sup>4</sup>

Policy disagreements, differing interpretations of statutes, or anger and resentment over an election are not legitimate grounds for impeachment. Violations of the law while in office or the deliberate refusal to enforce the law, however, would be. Whether the House will move forward with impeachment is of course an open question; but the effort, barring evidence of serious impropriety while in office, likely would be futile considering the Senate is controlled by Republicans; few, if any of whom, would be willing to cast a vote for conviction and removal from office. This scenario makes it no less important that we undertake to study the history, procedures and particular relevant aspects of impeachment in the current environment, to best prepare for such eventuality.

## Introduction to Impeachment

Thomas Jefferson, among the most deservedly renowned of our Founding Fathers, noted that the *Federalist Papers* constituted the very best collection of writings by which anyone could understand the purpose, nature, and structure of the government established in our Constitution. And, in what is perhaps the singularly most insightful sentence in that collection of 85 essays, author James Madison notes, "If men were angels, no government would be necessary." In

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<sup>3</sup> Doyle McManus, "Congress is already considering impeachment — but won't admit it," Los Angeles Times, February 10, 2019 <https://www.latimes.com/politics/la-na-pol-trump-impeachment-investigations-20190210-story.html>

<sup>4</sup> Paul Blumenthal, "House Democrats Are Taking Real Steps Toward Impeaching Donald Trump," Huffington Post, February 14, 2019 [https://www.huffpost.com/entry/donald-trump-impeachment-house-democrats\\_n\\_5c647b6ee4b09e2092c2987f](https://www.huffpost.com/entry/donald-trump-impeachment-house-democrats_n_5c647b6ee4b09e2092c2987f)

recognition of that universal truth, our Framers established numerous limits and checks and balances within that government structure to address such frailties and dangers posed by the inescapably imperfect nature of Man.

Thus, as a restraint on the abuse of powers that almost certainly would at some point be attempted by a future president, the process of *impeachment* was included in Article II of the Constitution – the Article describing the powers and duties of America’s chief executive. The actual removal of a president is a two-step process; described in Article I of the Constitution, which is the section of that magnificent document establishing the powers and responsibilities of the Legislative Branch.

Step One is a majority vote of the House of Representatives to “impeach” the president. This procedure can be compared favorably to the manner by which a federal grand jury considers evidence that a person *probably* has violated federal law and then issues a bill of indictment against the individual, thereby formally charging him or her with a criminal offense.<sup>5</sup>

If a president is thus “impeached” by the House, the matter shifts to the Senate, where the second phase of the process by which the wayward president is punished takes place. The Senate possesses the power to *convict* a president who has been impeached by the House. In performing this task, the Senate sits as a jury to *try* the president who has been impeached and, if a supermajority of Senators (2/3) vote in the affirmative, the individual is deemed convicted and automatically by virtue of that conviction, removed from office.

So what is it that constitutes an “impeachable offense?” Here again, the Constitution is remarkably succinct, declaring in Section 4 of Article II, that “[t]he 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>6</sup> So, aside from treason (defined in Article

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<sup>5</sup> For further discussion of the differences and similarities between an indictment and an impeachment, see the section herein below, “Instruments of Prosecution – ‘Indictment’ vs. ‘Impeachment.’”

<sup>6</sup> As is clear from the text of the constitutional language, the process of impeachment and the punishment of removal from office upon conviction of “high crimes and misdemeanors” applies not only to the President and the Vice President, but to all “civil officers” of the United States (whether serving in the Executive or the Judicial Branch). As federal law has clearly established since adoption of the Constitution, if a civil officer of the United States commits a crime while in office they may be, and often are, prosecuted by the appropriate federal official (a United States Attorney or other prosecutor) while they occupy such federal post. Thus, for “civil officers,” impeachment and removal from office upon conviction by the Senate are proceedings *in addition to* rather than *in lieu of* prosecution criminally. However, pursuant to long-standing process and opinion by the Department of Justice and the Attorney General, a sitting President may not be indicted and prosecuted for a criminal offense while in office. See, for example, Office of Legal Counsel, “A Sitting Presidents Amenability to Indictment and Criminal Prosecution,” October 16, 2000 [https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/olc-v024-p0222\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/olc-v024-p0222_0.pdf). In other words, for the highest officer in the government (i.e., the President), impeachment and

3, Section 3 of the Constitution) and bribery (defined in and made criminal by virtue of statutory law), the only basis on which a president can be impeached [and subsequently removed from office] is to have committed a “high crime or misdemeanor.” Our Constitution provides no further guidance; and indeed, the Federalist Papers – which Jefferson recommends to us as “the best commentary on the principals of government which was ever written.” – adds precious little.

Thus, has it been left to us, nine generations removed from our nation’s first – and by many measures “greatest” – generation, to determine what the term “high crimes and misdemeanors” means. While 19 individuals (mostly federal judges) have been impeached by the House since the Constitution was ratified by the states, only two presidents can claim that dubious honor – Andrew Johnson in 1868 and Bill Clinton in 1998.

As noted, while “treason” and “bribery” are defined crimes in the Constitution and the federal criminal code respectively, “high crimes and misdemeanors” is not. Precedent, however, is found in the language of the *Federalist Papers* and in the only two previous impeachments of presidents (as well as in the consideration of impeachment articles against President Nixon).

As noted in the debates surrounding the drafting and adoption of the Constitution, there was extensive debate regarding what predicate offense(s) should trigger the removal of a president. James Madison, one of the drafters and among the more active of debaters at the Constitutional Convention (and one of three authors of the *Federalist Papers*), greatly feared clothing Congress with a broad and essentially absolute power to remove a president. Thus, he successfully objected to George Mason’s proposal to make “maladministration” the grounds upon which a president could be impeached. In its stead, the Convention adopted a variation of Madison’s proposed “high crimes and misdemeanors,” a phrase well-known to those attending the Convention (based on historic precedent and on proceedings in Great Britain that were contemporaneous with the constitutional debates in the former colonies).

Thankfully, another author of the *Federalist Papers*, Alexander Hamilton, offered a degree of clarity to the term “high crimes and misdemeanors” in his essay No. 65, defining impeachable offenses as: “those offences 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.”

In the proceedings surrounding the impeachment of President Clinton, it was determined (first by Articles of Impeachment being voted favorably by the House

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removal by conviction in the Senate is the only way a President may be prosecuted and punished while in office. (Senators and Members of Congress are not considered “civil officers of the United States” for purposes of impeachment.)

Committee on the Judiciary, followed by similar action by the full House of Representatives on December 19, 1998), by conclusive evidence that Clinton had obstructed the administration of justice and perjured himself under oath in federal judicial proceedings. These offenses being criminal under federal law and relating to official judicial proceedings, and having been committed by a sitting President, concluded to in fact constitute “high crimes and misdemeanors” and therefore were “impeachable offenses.”<sup>7</sup>

The factual foundation for the 1998 findings by the House against Clinton were predicated largely on information submitted to the House of Representatives in September of that year by the Office of Independent Counsel (headed by former federal judge Kenneth Starr). This Report was *required* by the federal law that established the Independent Counsel, which mandated that he submit to the House any evidence uncovered in the course of his investigation that constituted “substantial and credible information that [President William Jefferson Clinton] committed acts that may constitute grounds for an impeachment.”<sup>8</sup> Although this Report (technically, a “Referral”) submitted by the Office of Independent Counsel<sup>9</sup> included several other grounds which the Office believed fell into the category of possible impeachable offenses, the House eventually voted out Articles on only perjury and obstruction (refusing to pass two others by majority vote, including one charging abuse of office).

The so-called “Starr Report” expanded on the evidence of perjury and obstruction beyond those instances voted on by the House, and concluded such evidence indicated a “pattern of conduct that was inconsistent with [the President’s] constitutional duty to faithfully execute the laws,” and thereby constituted an abuse of his oath of office.<sup>10</sup> Thus, in the opinion of at least those attorneys working in the Office of Independent Counsel at the time (which included a young attorney named Brett Kavanaugh), a violation of the oath of office by a president could constitute an impeachable offense.

Reading this history together – that is, the 1974 Articles of Impeachment voted by the Judiciary Committee against Nixon, the conclusions of the Independent Counsel’s Report to Congress in 1998, and the vote of the Judiciary Committee

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<sup>7</sup> In the only other impeachment proceeding in the modern era involving a President, the House Judiciary Committee in 1974 voted out Articles of Impeachment against Richard Nixon, charging him with obstruction of justice, abuse of power, and contempt of Congress; he resigned before the full House acted on those Articles.

<sup>8</sup> Section 595(c) of Title 28 of the United States Code.

<sup>9</sup> The position of “Independent Counsel,” which Ken Starr occupied in 1998 after having been thus appointed by the federal appeals court for the District Court, no longer exists. Due to concerns that the position and the manner by which a person was thereto appointed ran counter to fundamental separation of powers principles between the Judicial and Executive Branches of our government, the “Independent Counsel Law” was allowed to expire without being reauthorized in mid-1999.

<sup>10</sup> The oath of office for the President is unique among all federal officials (military and civilian) in that it is expressly set forth in the Constitution, which, at Article II requires that the President, among other things, shall “take care that the Laws be faithfully executed.”

in the same year – there is considerable legal scholarship that a serious abuse or violation of a president’s oath of office or “abuse of office” could very well constitute proper grounds for impeachment. In other words, for an “impeachable offense” to pass constitutional muster, it need not allege a violation of any specific law.

While this analysis still leaves unclarified exactly what “abuse of office” or “violation of oath of office” means in practice, in both instances – 1974 and 1998 – the investigative bodies set out extensive evidence of bad acts by the respective presidents that went beyond political decisions or policy actions. Clearly, current discussions within Congress, the media, and non-governmental groups (amid speculation surrounding the still-ongoing probe being conducted by Special Counsel Robert Mueller<sup>11</sup>) speculate wildly about all manner of potentially impeachable offenses on which to base investigations and launch impeachment hearings. However, evidence of true, verifiable acts rising to the level of those that formed the bases for the 1974 and 1998 Nixon and Clinton proceedings, remains elusive at best; elusive providing constant fuel for every manner of media outlet and self-proclaimed pundit.

Pundits claim often than “impeachment” means whatever the House wants it to mean.” This is, of course, a truism in that the only requirement provided by the Constitution for impeaching a President is that he is found by a majority vote of the House to have committed a “high crime or misdemeanor” (not further defined). Notwithstanding the foregoing, and as noted herein above, there has been developed considerable history and precedent that an impeachable offense is more than whatever strikes Members of the House as contrary to how they would prefer a President conduct himself.

Policy or political disagreements, however profound or substantial, or even outright “lies” uttered by a President in the media or another public forum, never have been considered grounds for impeachment; nor should they be, at least if such decisions are to be consistent with any reasoned interpretation of the relevant provisions in Articles I and II of our Constitution.<sup>12</sup>

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<sup>11</sup> Mueller serves not as an “Independent Counsel” as did Ken Starr, but as a “Special Counsel” appointed not by the courts, but by the Deputy Attorney General (Rod Rosenstein) in 2017 (acting in place of then-Attorney General Jeff Sessions who recused himself from any matters relating to the 2016 Trump campaign or presidency) pursuant to federal law permitting such appointment by letter from the Attorney or Deputy Attorney General to investigate matters that would present a conflict of interest for the Department or other extraordinary circumstances and whose appointment is in the public interest.

<sup>12</sup> In this context, it would be appropriate to consider 18 USC §1001, which provides that an individual may be convicted of a federal felony for false statements made orally or in writing to a federal official (in any of the three branches of the government) investigating matters within their appropriate jurisdiction, even if the individual making the statement(s) was *not* under oath at the time. Thus, a false statement made in a political or other setting would not constitute an actionable offense no matter how blatant; but if made to a federal officer in the context of an “official” investigation or on an official document or proceeding, even if not under oath, it could be; and could therefore serve as the predicate for an impeachable offense.

That being said, what evidence might the House consider in determining whether that ill-defined threshold has been met? In the Clinton impeachment, it was decided that the body of evidence would be the “Starr Report,” submitted to the House by the Office of Independent Counsel as mandated by the law establishing that office. Even though evidence of other potential impeachable offenses had been developed prior to and independent of the Independent Counsel’s work by Members of the House<sup>13</sup> and by outside groups,<sup>14</sup> the Republican leadership (as was its prerogative as the majority Party) ultimately chose to limit the matters to be investigated by the Judiciary Committee to solely the Independent Counsel’s submission.

While House Rules dictate that the Judiciary Committee has final jurisdiction over impeachment, the House at times has formed a select committee and charged it with investigating evidence of possible impeachable offenses. Additionally, preliminary or supplemental evidence may be adduced and developed by *any* committee of the House; but it is the Judiciary Committee that in the end drafts any article(s) of impeachment.

The specific vehicle by which the matter then reaches the floor of the House for a vote is one or more “Article of Impeachment” set forth in a House Resolution (“H. Res. \_\_\_\_”) that has been voted out of the Judiciary Committee by a bare majority. Any Member of the House may introduce either a Resolution calling for an “Inquiry of Impeachment” directed to the Judiciary Committee as a step preliminary to introducing Articles of Impeachment, or may introduce a Resolution calling for the latter. Either way, the Resolution goes to the Judiciary Committee for action.

In the current environment, and in the absence of an “Independent Counsel” with its concomitant statutory mandate to transmit any substantial and credible evidence of an impeachable offense to the House, there exists no individual or office that is obligated to report to the House on such matters. Special Counsel Robert Mueller is under no such obligation. His report would go to the Attorney General, with further distribution to be determined by that official. Congress may or may not receive the results of Mueller’s long-tenured investigation, but more than likely would be given at least some form of report.

Several Democratic House Members have called publicly for that body to act to one degree or another on impeachment (and several outside groups, in particular Tom Steyer’s “Need to Impeach,” have issued similar calls). Additionally, several

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<sup>13</sup> Georgia Rep. Bob Barr introduced an “Inquiry of Impeachment” (H. Res. 304) on November 5, 1997, for example.

<sup>14</sup> Chief among the non-governmental groups investigating possible violations of law by the Clinton Administration was Judicial Watch, a 501(c)(4) corporation at the time headed by Larry Klayman. A report compiled by Judicial Watch was introduced into the record of the House Judiciary Committee’s impeachment hearings by Georgia Rep. Bob Barr, and remains a part of that official record.

dozen subjects involving the President, his family, other associates past and present, and foreign government links (in particular, Russia) have been laid on the table publicly to be investigated by the Democrat majority. Despite numerous investigations already underway, and notwithstanding the majority's noteworthy hiring of staff lawyers with experience in impeachment law and proceedings,<sup>15</sup> Speaker Nancy Pelosi and her leadership team are publicly tamping down – at least for the time being – any “official” talk of “impeachment.” (This is similar to the situation between the time the first Inquiry of Impeachment regarding President Clinton was introduced in November 1997 and the grand jury appearance by the President the following summer, after which the “I word” gained widespread currency.)

One of the committees gearing up for Trump-related investigations is, not surprisingly, the House Judiciary Committee now chaired by Rep. Jerrold Nadler (D-N.Y.), but his is hardly the only one. The House Oversight and Reform Committee, which enjoys the broadest oversight jurisdiction of any House committee and is headed by Rep. Elijah Cummings (D-Md.), is similarly and openly positioned; as is the Financial Services Committee chaired by Trump nemesis Rep. Maxine Waters (D-Calif.), who had previously and loudly advocated for his impeachment.

Evidence developed by investigations, hearings, and subpoenas – or any combination thereof – by these and other committees, likely will find its way to the Judiciary Committee over the course of calendar year 2019. All this in addition to whatever the Mueller “Report” or other investigations by the Administration or other prosecutorial bodies may develop and provide.<sup>16</sup>

The bottom line is that there are *no* limitations imposed by federal law, congressional rules or procedures, or any other entity or precedent that would stop the Judiciary Committee from considering any or all such evidence developed by any of these entities as evidence of impeachable offenses.

Although the Senate sits as a trial jury following a president’s impeachment by the House, there are major and important differences between a trial in federal (or state) court and a Senate trial of a person thus charged by the other House. These procedural differences play a major role in determining the success or failure of a trial in the Senate; differences that clearly were evident in the most recent presidential impeachment trial in January and February 1999.

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<sup>15</sup> See, e.g., “US House Judiciary Committee takes further steps towards Trump’s impeachment,” Press TV, February 13, 2019.

<sup>16</sup> The investigation and prosecution of former Trump attorney Michael Cohen, which clearly implicates President Trump in alleged potential violations of federal campaign laws and other possible provisions of federal law, is being handled not by Mueller’s office, but by the U.S. Attorney for the Southern District of New York.

When a prosecutor prepares to try a case in federal court<sup>17</sup> he or she can proceed with a high degree of confidence that well-established rules of procedure will guide the conduct of both prosecution and defense, with a judge serving as neutral arbiter. Thus, for example, the pre-trial collection of evidence (via tools such as depositions and interrogatories), the process of marshaling and presenting evidence, the manner by which witnesses might be presented and questioned, and the scope of evidence allowed – all are matters clearly demarcated for use according to pre-established, standard rules of procedure.

Impeachment “managers” – the rather odd label attached to the members of the House of Representatives chosen by that body to prosecute a trial in the Senate<sup>18</sup> – operate not according to any set of well- or long-established “Rules of Impeachment,” but must comply with whatever rules a majority of the Senate decides are to prevail in advance of a trial. Thus, before the commencement of an impeachment trial in the Senate, that body must by Resolution adopt a set of rules by which the trial is to be conducted. For each and every impeachment trial, there is a unique procedure which does not extend to any subsequent impeachment trial(s).

The individual presiding over, or “overseeing” the Senate trial is not a trial judge. In all impeachment trials except for that of a President, Senators themselves preside. For the trial of an impeached President, Article I Section 3 of the Constitution provides that the Chief Justice of the United States must preside.

The Senate Resolution establishing the procedures for an impeachment trial may conform in some measure to what might be termed “standard” legal procedures to which trial attorneys are accustomed; or it might not at all. This decision, of course, is made by the Party with a majority of seats in that body, and necessarily will reflect whatever notions or views that majority holds regarding the particular impeachment at hand.

Thus, in large measure, the rules can be “customized” to whatever extent the majority desires, including the degree to which that majority seeks to make the job of the managers more or less difficult, or even more or less likely to succeed.<sup>19</sup> While the term “predetermined outcome” is not likely to be

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<sup>17</sup> While the authors of this paper refer often to court proceedings and trials in *federal* court, in most respects the references and points being made refer to trials or court proceedings generally – in other words, those that could apply equally to state or federal judicial proceedings.

<sup>18</sup> There is no standard or pre-set number of impeachment managers who try an impeachment in the Senate. Following a House vote in favor of one or more Articles of Impeachment, that same body votes on a separate Resolution naming however many managers it deems appropriate (generally, as recommended by the Judiciary Committee chairman with concurrence of the House majority Party leadership). In the matter of the impeachment trial of President Clinton, there were 13 managers appointed by the House; a somewhat unwieldy number, but one consistent with the constitutional, legal and political magnitude of the issues to be decided.

<sup>19</sup> As discussed in greater detail later in this paper, such constraints posed serious problems for the ability of the impeachment managers in the Clinton impeachment trial to present their case.

encountered in any official account of any debate or other proceeding surrounding the adoption of a Resolution regarding the trial of an impeached President, willful blindness to that possibility would not constitute a realistic and objective assessment of factors to be studied in preparing for a possible impeachment of a President.<sup>20</sup>

The salient point here is that the power of the Senate to determine whether an impeached President is to be removed from office (which automatically occurs upon the rendering of a “guilty” verdict), lies not only in the high threshold of securing a 2/3 majority to convict. The procedural rules according to which an impeachment trial is to be conducted – a subject which may appear mundane or of relatively little consequence to the outside observer – can greatly influence whether that eventual verdict will be “guilty” or not. This influence can be accomplished, if desired by the majority Party, without necessarily appearing to do so.

## **The Impeachment and Trial of President Andrew Johnson**

The process for impeachment has evolved over time. An obscure process, the impeachment of a president is a time of national distress. This is true even more so today, as the power of the Executive Branch has grown far beyond the Framers’ intent; which envisioned the three branches of the federal government as having equal power, and each serving as a check on the others.

For the past several decades, Americans have come increasingly to view presidents as paternalistic figures. The occupant of the Oval Office, in the minds of most Americans, is “responsible for our economic well-being, our physical safety, and even our sense of belonging.”<sup>21</sup> The underlying causes of this phenomenon are a topic for another time. Nevertheless, the view of the Executive Branch in the 19th century was far different from that prevailing today.

Obviously, political turmoil and partisan battles have existed throughout our Nation’s history, although some periods have been more traumatic than others. Some politicians and pundits decry the partisan bickering and the state of discourse in today’s political climate, but the current environment is far from unique in this respect. There have been deadly duels fought between Members

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<sup>20</sup> On the other hand, impeachment trials of judges (which constitute the overwhelming majority of all Senate impeachment trials conducted since the adoption of the Constitution), being far less political and controversial than that of a sitting President, generally are governed by rules more akin to standard judicial rules of evidence and procedure.

<sup>21</sup> Gene Healy, “The Cult of the Presidency,” Reason, June 2008  
<https://reason.com/archives/2008/05/12/the-cult-of-the-presidency>

of Congress, and fist-fights in the halls and committee rooms were not uncommon throughout much of the 19<sup>th</sup> Century. The Civil War is at the extreme end of the spectrum; during which over the course of more than four years, approximately 620,000 people died fighting during America's internal conflict.

As the Civil War neared its bloody end, President Abraham Lincoln wanted to restore the Union as quickly as possible. With this mindset, he staked out a moderate ground. He proposed the "10 Percent Plan" as a means to bring rebel states back into the Union. The plan allowed a state that had seceded to be readmitted if 10 percent of its voters pledged allegiance to the United States. He also offered to pardon rebels and protect the property of former slave owners. The plan did not sit well with Radical Republicans who pushed plans of their own, which were rejected by Lincoln.

Lincoln's Vice President, Andrew Johnson, became President after Lincoln was assassinated by a Confederate sympathizer in April 1865. Like his predecessor, Johnson took a moderate stance toward former Confederates. Although America was slowly healing, southern states had not yet been readmitted to the Union.<sup>22</sup>

Prior to Johnson's oath of office in 1865, only five federal officials had been impeached, four of whom were judges. Two were convicted and removed from office, two were acquitted, and one was expelled from office.<sup>23</sup> One of the impeached officials, John Pickering, a federal judge from New Hampshire, was convicted and removed by the Senate for an unlawful ruling in a case over a seized ship and intoxication while serving on the bench.<sup>24</sup> The other official convicted and removed from office, West Hughes Humphreys, a federal district court judge from Tennessee, was a secessionist who accepted an appointment to serve as a judge in the Confederacy.

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<sup>22</sup> Congressional delegations from Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia were vacant during the 39<sup>th</sup> Congress. The congressional delegation from Tennessee was seated in July 1866. Delegations from Arkansas, Alabama, Florida, Louisiana, North Carolina, and South Carolina were seated in June 1868. Georgia, Mississippi, Texas, and Virginia were not seated until 1870.

<sup>23</sup> Sen. William Blount, a Democratic-Republican from Tennessee, was impeached by the House in July 1797 for conspiring with the British. The Senate expelled him from office but continued to explore the matter until 1799, when a resolution defining a senator as an officer subject to impeachment was defeated.

<sup>24</sup> "Articles of Impeachment of Judge John Pickering," Uploaded by David Arthur Walters, Scribd, Accessed January 22, 2019 <https://www.scribd.com/document/89389781/Articles-of-Impeachment-of-Judge-John-Pickering>

Nearly three years after the conclusion of the Civil War, Johnson<sup>25</sup> and the Republican-controlled Congress had irreconcilable disagreements over the reconstruction of the South, pardons for former Confederates, and legislation addressing the civil rights of former slaves. Johnson had severely criticized Congress during the 1866 midterm election, and tensions were high. Racial tension in particular had also spilled over parts of the South, including Memphis and New Orleans, with freed men massacred by whites. Dissatisfaction with Johnson's policy of leniency toward the South and his harsh public criticism of Congress was not limited to Radical Republicans in Congress, he also faced dissent inside his Administration.

Edwin Stanton had been appointed to serve as the Secretary of War in 1862 by President Abraham Lincoln; and when Johnson ascended to the presidency, Stanton was held over. Stanton enjoyed the support of Radical Republicans in Congress. He had been critical of Johnson's lenient policies toward the South, making himself a target of the President for termination. Early in 1867, Congress debated and passed legislation designed to protect Stanton.

Introduced by Sen. George Henry Williams (R-Ore.), the Tenure of Office Act,<sup>26</sup> required a president to seek the advice and consent of the Senate before removing a cabinet member previously confirmed. If the cabinet member's termination was rejected, a president would be forced to keep the official in his post. The president could suspend such a cabinet member, but not remove him without the further advice and consent of the Senate.

The Tenure of Office Act went through the normal legislative process. The bill passed the Senate in January, but it was amended in the House. The two chambers resolved the differences in a conference committee. The Senate passed the conference report for the Tenure of Office Act on February 18, 1867 by a vote of 22 to 10.<sup>27</sup> The House passed the bill the following day by a vote of 112 to 41.<sup>28</sup>

Section 6 of the Tenure of Office Act made the removal of any covered cabinet member a crime. The relevant text stated: "[E]very removal, appointment, or employment, made, had, or exercised, contrary to the provisions of this act, and

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<sup>25</sup> Johnson, a Unionist, was a slave owner from Tennessee. He freed his slaves in August 1863 and, acting as the military governor of Tennessee in October 1864, he freed all slaves in the state.

<sup>26</sup> S. 453, 39<sup>th</sup> Congress (1866) <http://memory.loc.gov/cgi-bin/ampage?collId=llsb&fileName=039/llsb039.db&recNum=2333>

<sup>27</sup> Senate Journal, 39th Cong., 2nd. Sess., February 18, 1867

<sup>28</sup> House Journal, 39th Cong., 2nd. Sess., February 19, 1867

the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment shall be deemed, and are hereby declared to be, high misdemeanors, and, upon trial and conviction thereof, every person guilty thereof shall be punished by a fine not to exceed ten thousand dollars, or by imprisonment not exceeding five years, or both said punishments in the discretion of the court."

Johnson vetoed the Tenure of Office Act on March 2, 1867 and returned the bill, considering it to be unconstitutional. The Senate<sup>29</sup> and the House<sup>30</sup> quickly overrode the veto with the constitutionally mandated two-thirds majorities. The Tenure of Office Act was then law, setting up a showdown between Johnson and Radical Republicans who dominated Congress.

Several months later, in August 1867, Johnson suspended Stanton. Johnson had previously tried, unsuccessfully, to persuade Stanton to resign. General Ulysses S. Grant served as the interim secretary of war. The Senate rejected the suspension in January 1868 and reinstated Stanton.<sup>31</sup> Johnson tried again on February 21st, naming Adjutant General Lorenzo Thomas as the interim Secretary of War. This time, Stanton refused to physically leave his office in the Department of War, which was located at the time next to the White House. Once again, the Senate reinstated Stanton.<sup>32</sup> Thomas was arrested, although the charges were eventually dropped.

On February 22, 1868, Rep. Thaddeus Stevens (R-Pa.) reported a resolution from the Select Committee on Reconstruction to impeach Johnson. The resolution was short and to the point: "Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors in office."<sup>33</sup> After unsuccessful attempts by Democratic members to delay further action, the impeachment resolution was adopted on February 24, 1868 by a vote of 128 to 47.<sup>34</sup>

Two resolutions were passed to prepare for the trial in the Senate. The first created "a committee of two" to argue the case against Johnson. The second resolution created "a committee of seven" to "prepare and report articles of

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<sup>29</sup> Journal of the Senate, 39th Cong., 2nd. Sess., March 2, 1867

<sup>30</sup> Journal of the House, 39th Cong., 2nd. Sess., March 2, 1867

<sup>31</sup> Journal of the Senate, 40th Cong., 2nd Sess., January 16, 1868

<sup>32</sup> Journal of the Senate, 40th Cong., 2ndt Sess., February 21, 1868

<sup>33</sup> Cong. Globe, 40th Cong., 2nd Sess. 1336 (1868)

<sup>34</sup> Journal of the House, 40th Cong., 2nd Sess., February 24, 1868

impeachment against Andrew Johnson” and to subpoena records and take testimony.<sup>35</sup>

Violations of the Tenure of Office Act were not the only grievances leveled by Radical Republicans against Johnson. The serious racial tensions of the time and the well-being of former slaves were a key part of the debate. Rep. William Kelley (R-Pa.) highlighted this in a floor speech: “Sir, the bloody and untilled fields of the 10 unreconstructed states, the unsheeted ghosts of the two thousand murdered negroes in Texas—I saw two thousand, because that number is reported on authority – cry, if the dead ever evoke vengeance, for the punishment of Andrew Johnson.”<sup>36</sup>

In closing the debate on the impeachment resolution, Rep. Stevens made a plea for human liberty. “The God of our fathers, who inspired them with the thought of universal freedom, will hold us responsible for the noble institutions which they projected and expect us to carry out,” Rep. Stevens told the House. He continued, “This is not to be the temporary triumph of a political party, but is to endure in its consequence until this whole continent shall be filled with a free and untrammeled people or shall be a nest of shrinking, cowardly slaves.”<sup>37</sup>

On March 2, 1868 the House passed 11 articles of impeachment against Johnson.<sup>38</sup> The charges included the removal of Stanton, the appointment of Thomas to serve in the interim, violating the Tenure of Office Act, and conspiracy to seize the Department of War. The House appointed seven impeachment managers to present the case to the Senate.<sup>39</sup>

On February 28th, Sen. Jacob Howard (R-Mich.) had submitted a report on the procedures for Johnson’s trial in the Senate.<sup>40</sup> A few days later, on March 2nd, the Senate considered the rules.<sup>41</sup> The rules provided for the impeachment managers from the House to present the articles of impeachment in the Senate, gave subpoena power to the Senate for witnesses and documents, allowed

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<sup>35</sup> *Ibid.*

<sup>36</sup> Cong. Globe, 40th Cong., 2nd Sess. 1348 (1868)

<sup>37</sup> Cong. Globe, 40th Cong., 2nd Sess. 1400 (1868)

<sup>38</sup> Journal of the House, 40th Cong., 2nd Sess., March 2, 1868

<sup>39</sup> The impeachment managers were Reps. John Bingham (R-Ohio), George Boutwell (R-Mass.), Benjamin Butler (R-Mass.), John Logan (R-Ill.), Thaddeus Stevens (R-Pa.), Thomas Williams (R-Pa.), and James Wilson (R-Iowa). Butler acted as the chief manager, largely arguing the case before the Senate.

<sup>40</sup> Journal of the Senate, 40th Cong., 2nd Sess., February 28, 1868

<sup>41</sup> Journal of the Senate, 40th Cong., 2nd Sess., March 2, 1868

Johnson or his attorney to present a defense during the trial, and required that each article of impeachment be voted on separately.

There were other rules and procedures in the resolution, including the manner in which senators could ask questions, and the wording of subpoenas and oaths. Separately, the Senate limited who could be seated in the gallery to watch the proceedings through the issuance of tickets that were good for the day printed.<sup>42</sup> The tickets were described as “a pink piece of pasteboard about the size of a dollar bill.”<sup>43</sup>

On March 4th, impeachment managers were allowed to enter the Senate chamber. As directed, the sergeant-at-arms proclaimed, “Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States.” The proclamation was made each day of the proceedings. Rep. John Bingham (R-Ohio) read the 11 articles of impeachment to the Senate.

The trial began in the Senate the following day. Chief Justice Salmon Chase presided, as required by Article I, Section 3 of the Constitution. Although the House had moved with rapid pace to pass the impeachment resolution and the subsequent articles of impeachment, the pace of the trial in the Senate was considerably slower.

Johnson retained counsel to defend him in the Senate. Among the five members of his team was Henry Stanberry, who served as Johnson’s Attorney General from July 1866 until the Senate impeachment trial, and William Evarts, an attorney from New York and, later, Johnson’s Attorney General. Johnson asked for 40 days to prepare his response to the articles of impeachment. He was afforded 10.

After the trial began on March 5, 1868, the Senate delayed further proceedings until March 18th. Johnson’s counsel presented his answers to each article of impeachment on the 23rd, as well as exhibits to bolster his case. The impeachment managers began presenting the case against Johnson on March 30<sup>th</sup>, with Rep. Butler making the opening statement.

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<sup>42</sup> Journal of the Senate, 40th Cong., 2nd Sess., March 4, 1868

<sup>43</sup> Susan Sachs, “Johnson’s Trial: 2 Bitter Months for a Still-Torn Nation,” The New York Times, January 7, 1999 <https://www.nytimes.com/1999/01/07/us/impeachment-the-past-johnson-s-trial-2-bitter-months-for-a-still-torn-nation.html>

Although his opening was quite lengthy, lasting approximately three hours, Rep. Butler concluded his remarks with an ominous warning: “Never again, if Andrew Johnson go quit and free this day, can the people of this or any other country by constitutional checks or guards stay the usurpations of executive power.”<sup>44</sup>

The impeachment managers presented the case for Johnson’s conviction and removal to the Senate through April 9th. Over the course of nearly a dozen days, the impeachment managers called witnesses to testify before the Senate and presented documents for review. Johnson’s defense team was allowed to cross-examine witnesses. Generally, senators spoke to make procedural inquiries and motions, occasionally challenging rulings made by Chase, whose authority as the presiding officer was questioned. The Senate went as far as successfully reversing the Chief Justice’s ruling on at least one occasion.

Johnson’s counsel presented his defense between April 15th and 20th. The defense team, with critical testimony from General William Sherman, was able to undermine the case presented by the impeachment managers. Sherman’s brother John, serving as a Republican Senator from Ohio, would vote for conviction on each of the three articles of impeachment.

On May 7th, the Senate began deliberations in a closed session. On May 16, 1868 Johnson was acquitted of the charge in the 11th article of impeachment, which alleged that Johnson publicly questioned the authority of Congress in August 1866 and violated acts passed by Congress, including the Tenure of Office Act. The article failed, with 35 senators voting for a conviction, one short of the constitutionally required two-thirds needed for conviction, and 19 voting for acquittal.<sup>45</sup> Seven Republicans voted for acquittal.

Only two other articles of impeachment were voted on by the Senate. On the second article of impeachment, which charged that Johnson violated the Tenure of Office Act by appointing Thomas to serve as the interim secretary of war, the result was 35 voting for conviction and 19 for acquittal. The vote was the same for the third article, which alleged that Johnson appointed Thomas without the advice and consent of the Senate.

Partisan politics hung heavily over the Johnson impeachment throughout the entire process and lingered long after his acquittal.

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<sup>44</sup> Cong. Globe, 40th Cong., 2nd Sess., Supplement to the Globe (1868)

<sup>45</sup> *Ibid.*

Years later, in 1896, Sen. Edmund Ross (R-Kan.), whose vote sealed Johnson's acquittal, would write, "What every member of the Court had sworn to do was 'impartial justice' to Andrew Johnson, and nothing less. The Counsel on neither side had taken that oath, but the Court had; and its performance of that oath was impossible without possession of all the information relating to and bearing upon the case that it was reasonably possible to obtain. That is the essential ingredient and characteristic of a fair trial."<sup>46</sup>

"That essential ingredient of judicial fairness was not shown to Mr. Johnson in this case by the Republican majority of the Senate, as the official record of the trial clearly establishes. It was an ill-disguised and malevolent partisan prosecution," he added. Ross was not reelected to the Senate by the Kansas Legislature in 1870; Nor were any of the six remaining Republican defectors.

The impartiality of some senators was a legitimate question. In 1868, the Senate president pro tempore, Benjamin Wade (R-Ohio), was next in the line of succession for the presidency because Johnson had no vice president.<sup>47</sup> Wade was considered to be a leading Radical Republican. His shadow loomed large over the trial in the Senate and arguably may have been one of the primary factors in Johnson's acquittal.<sup>48</sup>

"It was believed by many at the time that some of the Republican Senators that voted for acquittal did so chiefly on account of their antipathy to the man who would succeed to the Presidency in the event of the conviction of the President," wrote John R. Lynch decades after the impeachment proceedings and trial in the Senate. "This man was Senator Benjamin Wade, of Ohio,—President pro tem. of the Senate,—who, as the law then stood, would have succeeded to the Presidency in the event of a vacancy in that office from any cause."

"[H]e was an organization Republican,—what has since been characterized by some as a machine man,—the sort of active and aggressive man that would be likely to make for himself enemies of men in his own organization who were afraid of his great power and influence, and jealous of him as a political rival. That some of his senatorial Republican associates should feel that the best

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<sup>46</sup> Edmund Ross, "History of the Impeachment of Andrew Johnson," The Avalon Project, 1896 [http://avalon.law.yale.edu/19th\\_century/johnson.asp](http://avalon.law.yale.edu/19th_century/johnson.asp)

<sup>47</sup> Constitution Center, "The forgotten man who almost became President after Lincoln," April 15, 2018 <https://constitutioncenter.org/blog/the-forgotten-man-who-almost-became-president-after-lincoln>

<sup>48</sup> John R. Lynch, "The Facts of the Reconstruction," The Neale Publishing Company, 1913 <https://www.gutenberg.org/files/16158/16158-h/16158-h.htm>

service they could render their country would be to do all in their power to prevent such a man from being elevated to the Presidency was, perhaps, perfectly natural: for while they knew that he was a strong and able man, they also knew that, according to his convictions of party duty and party obligations, he firmly believed that he who served his party best served his country best," Lynch added.

Wade's seating during the trial was challenged by Sen. Thomas Hendricks (D-Ind.), who questioned Wade's impartiality given that he stood to succeed Johnson should he be convicted and removed from office.<sup>49</sup> In the end, Hendricks relinquished his objection allowing Wade to be seated.<sup>50</sup> Wade voted for conviction on each of the three counts for which the Senate took recorded votes.

The Tenure of Office Act was repealed by Congress in March 1887, and impeachment of a sitting president would not erupt to the surface in the nation's capital for more than a century.

## **The Inquiry into the Impeachment of President Richard Nixon**

Impeachment was a frequent topic of political and media debate during the 93<sup>rd</sup> Congress (1973-1974), and reached the boiling point in August 1974. Serious consideration of impeachment proceedings against the 37<sup>th</sup> President were rooted in the May and June 1972 break-ins at and wiretapping of the Democratic National Committee's (DNC) headquarters in the Watergate Office Building in Washington, D.C. and the related attempted cover-up, as well as President Richard Nixon's acknowledged involvement in the cover-up in a June 1972 tape recording that was made available in April 1974.

The five "Watergate burglars" were hired by high-ranking members of Nixon's reelection campaign, the Committee for the Re-election of the President.<sup>51</sup> The five actual burglars pled guilty, while two campaign officials, G. Gordon Liddy and

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<sup>49</sup> Cong. Globe, 40th Cong., 2nd Sess. 1671 (1868)

<sup>50</sup> Cong. Globe, 40th Cong., 2nd Sess. 1696 (1868)

<sup>51</sup> Carl Bernstein and Bob Woodward, "Bug Suspect Got Campaign Funds," The Washington Post, August 1, 1972 [https://www.washingtonpost.com/politics/bug-suspect-got-campaign-funds/2012/06/06/gJQAYTjKJV\\_story.html](https://www.washingtonpost.com/politics/bug-suspect-got-campaign-funds/2012/06/06/gJQAYTjKJV_story.html)

James McCord, were convicted in jury trials.<sup>52</sup> These seven would not be the only ones who found themselves in legal trouble because of the Watergate scandal; an episode in which an Attorney General of the United States, John Mitchell, served time in prison.

Impeachment resolutions had been introduced in the preceding 92<sup>nd</sup> Congress, but those resolutions were filed before the break-ins at the DNC became public knowledge. The earlier impeachment resolutions -- H.Res. 975,<sup>53</sup> introduced by Rep. William Ryan (D-N.Y.), and H.Res. 976,<sup>54</sup> introduced by Rep. John Conyers (D-Mich.) -- were filed in May 1972 over the mining of Vietnamese ports. Conyers filed another impeachment resolution, H.Res. 989,<sup>55</sup> in May 1972 on the same issue. Each of the three resolutions were referred to the House Judiciary Committee and not considered further.

In the 93<sup>rd</sup> Congress, beginning in June 1973, several resolutions were introduced that were related to impeachment, including at least a few that would have impeached the President. Others proposed inquiries into the grounds for impeachment. Nixon took steps to try to appear as though he was interested in seeking the truth about the scandal. In May 1973, he accepted the resignations of two of his advisers, H.R. Haldeman and John Ehrlichman, and Attorney General Richard Kleindienst. He also fired White House Counsel John Dean.<sup>56</sup>

Defense Secretary Elliot Richardson was tapped to serve as the next attorney general. He named Archibald Cox to serve as the special prosecutor overseeing the Department of Justice's investigation into the Watergate scandal.

Dean would later testify to investigators with the Select Committee on Presidential Campaign Activities, a special committee created to investigate the Watergate scandal, that Nixon was aware of the cover-up.<sup>57</sup> He would testify publicly before the committee in June 1973. A month later, it was revealed that

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<sup>52</sup> Lawrence Meyer, "Last Two Guilty in Watergate Plot," The Washington Post, January 31, 1973 [https://www.washingtonpost.com/politics/last-two-guilty-in-watergate-plot/2012/06/04/gJQAAQQdHJV\\_story.html](https://www.washingtonpost.com/politics/last-two-guilty-in-watergate-plot/2012/06/04/gJQAAQQdHJV_story.html)

<sup>53</sup> 118 Cong. Rec. 16286 (1972)

<sup>54</sup> 118 Cong. Rec. 16663 (1972)

<sup>55</sup> 118 Cong. Rec. 18078 (1972)

<sup>56</sup> Laurence Stern and Haynes Johnson, "3 Top Nixon Aides, Kleindienst Out; President Accepts Full Responsibility; Richardson Will Conduct New Probe," The Washington Post, May 1, 1973 [https://www.washingtonpost.com/politics/3-top-nixon-aides-kleindienst-out-president-accepts-full-responsibility-richardson-will-conduct-new-probe/2012/06/04/gJQAx7oFJV\\_story.html](https://www.washingtonpost.com/politics/3-top-nixon-aides-kleindienst-out-president-accepts-full-responsibility-richardson-will-conduct-new-probe/2012/06/04/gJQAx7oFJV_story.html)

<sup>57</sup> Carl Bernstein and Bob Woodward, "Dean Alleges Nixon Knew of Cover-up Plan," The Washington Post, June 3, 1973 [https://www.washingtonpost.com/politics/dean-alleges-nixon-knew-of-cover-up-plan/2012/06/04/gJQAgpyCJV\\_story.html](https://www.washingtonpost.com/politics/dean-alleges-nixon-knew-of-cover-up-plan/2012/06/04/gJQAgpyCJV_story.html)

Nixon had recorded his phone calls.<sup>58</sup> Cox and the Select Committee on Presidential Campaign Activities subpoenaed the recordings, but Nixon refused to hand them over, claiming executive privilege. Nixon complained that many of the conversations would be taken out of context and that the recordings included “a great many very frank and very private comments, on a wide range of issues and individuals, wholly extraneous to the committee’s inquiry.”<sup>59</sup> A federal judge ordered Nixon to turn the tapes over, but he refused and appealed the ruling. The appeal was denied on October 19, 1973 and a potential deal brokered by Nixon and Sen. John Stennis (D-Miss.) was rejected by Cox.

The calls for impeachment intensified after October 20, 1973 when Nixon asked Richardson to fire Cox. Richardson refused and instead resigned his post. Deputy Attorney General William Ruckelshaus also refused and resigned. Solicitor General Robert Bork, who was acting attorney general after the resignations of Richardson and Ruckelshaus, fired Cox.<sup>60</sup> This episode became known as the “Saturday Night Massacre.” The Department of Justice named Leon Jaworski on November 1st to succeed Cox as the special prosecutor.<sup>61</sup>

Tuesday, October 23, 1973 was the first day of legislative business after Richardson and Ruckelshaus resigned and Cox was fired. Twenty resolutions related to impeachment or investigations on the grounds for impeachment were filed during this one day. Nixon turned over the subpoenaed tapes the same day.<sup>62</sup>

House Majority Leader Tip O’Neill blasted Nixon in a speech from the floor. “He has left the people no recourse. They have had enough doubledealing. In their anger and exasperation, the people have turned to the House of

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<sup>58</sup> Lawrence Meyer, “President Taped Talks, Phone Calls; Lawyer Ties Ehrlichman to Payments,” The Washington Post, July 17, 1973 [https://www.washingtonpost.com/politics/president-taped-talks-phone-calls-lawyer-ties-ehrlichman-to-payments/2012/06/04/gJQAc9CCJV\\_story.html](https://www.washingtonpost.com/politics/president-taped-talks-phone-calls-lawyer-ties-ehrlichman-to-payments/2012/06/04/gJQAc9CCJV_story.html)

<sup>59</sup> Carroll Kilpatrick, “President Refuses to Turn Over Tapes; Ervin Committee, Cox Issue Subpoenas,” The Washington Post, July 24, 1973 [https://www.washingtonpost.com/politics/president-refuses-to-turn-over-tapes-ervin-committee-cox-issue-subpoenas/2012/06/04/gJQAWfG9IV\\_story.html](https://www.washingtonpost.com/politics/president-refuses-to-turn-over-tapes-ervin-committee-cox-issue-subpoenas/2012/06/04/gJQAWfG9IV_story.html)

<sup>60</sup> Carroll Kilpatrick, “Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit,” The Washington Post, October 21, 1973 <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>

<sup>61</sup> John Herbers, “Nixon Names Saxbe Attorney General; Jaworski Appointed Special Prosecutor,” The New York Times, November 2, 1973 <https://www.nytimes.com/1973/11/02/archives/nixon-names-saxbe-attorney-general-jaworski-appointed-special.html>

<sup>62</sup> James M. Naughton, “Nixon Statements and the Record,” The New York Times, November 20, 1973 <https://www.nytimes.com/1973/11/20/archives/nixon-statements-and-the-record-the-missing-tapes-the-uncoverup-the.html>

Representatives. It is the responsibility of the House to examine its constitutional responsibilities in this matter,” said O’Neill. “The case must be referred to the Judiciary Committee for speedy and expeditious consideration. The House must act with determined leadership and strength.”<sup>63</sup>

House Minority Leader Gerald Ford (R-Mich.) announced that Republican leadership supported the referral of a resolution to investigate Nixon to the Judiciary Committee.<sup>64</sup> By this time, Ford had been nominated by Nixon to replace Vice President Spiro Agnew, who had resigned because of a scandal unrelated to Watergate.

Although he admitted that he failed to properly manage his reelection campaign, Nixon staunchly defended himself publicly, declaring on November 17, 1973 that, “People have got to know whether or not their President is a crook,” and concluding, “Well, I’m not a crook.”<sup>65</sup> The White House acknowledged the very same day that an 18-minute segment of a June 20, 1972 recorded meeting between Nixon and Haldeman was blank.<sup>66</sup> Nixon’s secretary, Rose Mary Woods, claimed that she was responsible for five minutes of the missing audio.

In February 1974, the House passed a resolution, H.Res. 803,<sup>67</sup> that authorized the Judiciary Committee to investigate whether grounds existed for impeachment. The resolution passed by a vote of 410 to 4.<sup>68</sup> A second resolution, H.Res. 832,<sup>69</sup> was also passed. This resolution allowed for television and radio coverage of any impeachment resolution. On March 1st, seven former high-ranking Nixon staffers, including Haldeman and Ehrlichman, were indicted by a grand jury for their involvement in the scandal.<sup>70</sup>

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<sup>63</sup> 19 Cong. Rec. 34819 (1973)

<sup>64</sup> *Ibid.*

<sup>65</sup> Carroll Kirkpatrick, “Nixon Tells Editors, ‘I’m Not a Crook,’ ” The Washington Post, November 18, 1973 [https://www.washingtonpost.com/politics/nixon-tells-editors-im-not-a-crook/2012/06/04/gJQA1RK6IV\\_story.html](https://www.washingtonpost.com/politics/nixon-tells-editors-im-not-a-crook/2012/06/04/gJQA1RK6IV_story.html)

<sup>66</sup> George Lardner, Jr., “Another Tape Found Faulty, Sirica Is Told; Haldeman, Nixon Talk Is Involved,” The Washington Post, November 18, 1973 [https://www.washingtonpost.com/politics/watergate-faultytape11221973xml/2012/06/04/gJQAniW5IV\\_story.html](https://www.washingtonpost.com/politics/watergate-faultytape11221973xml/2012/06/04/gJQAniW5IV_story.html)

<sup>67</sup> H.Res. 803, 93rd Congress (1974) <https://www.congress.gov/bill/93rd-congress/house-resolution/803>

<sup>68</sup> 120 Cong. Rec. 2363 (1974)

<sup>69</sup> H.Res. 832, 93rd Congress (1974) <https://www.congress.gov/bill/93rd-congress/house-resolution/832>

<sup>70</sup> Anthony Ripley, “Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate,” The New York Times, March 2, 1974 <https://www.nytimes.com/1974/03/02/archives/federal-grand-jury-indicts-7-nixon-aides-on-charges-of-conspiracy.html>

The House Judiciary Committee subpoenaed more than 40 tapes. Days later, Jaworski subpoenaed more than 60 tapes. Rather than release the tapes, the White House submitted 1,254 pages of edited transcripts of the tapes to the House Judiciary Committee,<sup>71</sup> but this failed to satisfy the Committee. (The transcripts were of meetings that took place between September 1972 and April 1973.)

Although the White House claimed that the transcripts absolved Nixon of any wrongdoing, Jaworski sued Nixon for the release of the actual tapes. On July 24, 1974 the Supreme Court issued a landmark ruling on executive power.<sup>72</sup> In the unanimous decision, the Court ruled that Nixon must turn the tapes over to the special prosecutor, which he agreed to do.<sup>73</sup>

Between July 27 and July 30, 1974, the House Judiciary Committee voted to advance three articles of impeachment against Nixon. The articles of impeachment charged Nixon with obstruction of justice, misuse of power, and a failure to comply with subpoenas issued by the House.<sup>74</sup> The first article (obstruction) was approved by a 27 to 11 vote,<sup>75</sup> with six Republicans voting to advance the article. The second article (misuse of power) was approved, 28 to 10.<sup>76</sup> Seven Republicans voted for the second article. The third article (failure to comply with subpoenas) was approved by a vote of 21 to 17.<sup>77</sup> Two Democrats voted against the third article and two Republicans voted for it. Two other articles, one related to the unauthorized bombing of Cambodia and another related to Nixon's failure to pay income taxes, failed by separate votes of 12 to 26.<sup>78</sup>

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<sup>71</sup> Haynes Johnson, "President Hands Over Transcripts," The Washington Post, May 1, 1974 [https://www.washingtonpost.com/politics/president-hands-over-transcripts/2012/06/04/gJQA4rJ4IV\\_story.html](https://www.washingtonpost.com/politics/president-hands-over-transcripts/2012/06/04/gJQA4rJ4IV_story.html)

<sup>72</sup> United States v. Nixon, 418 U.S. 683, 1974

<sup>73</sup> John P. MacKenzie, "Court Orders Nixon to Yield Tapes; President Promises to Comply Fully," The Washington Post, July 25, 1974 <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072574-1.htm>

<sup>74</sup> H. Rept. 93-1305 (1974)

<sup>75</sup> Richard Lyons and William Chapman, "Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11," The Washington Post, July 28, 1974 <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm>

<sup>76</sup> James M. Naughton, "New Accusation," The New York Times, July 30, 1974 <https://www.nytimes.com/1974/07/30/archives/new-accusation-nixon-is-charged-with-failure-to-uphold-nations-laws.html>

<sup>77</sup> James M. Naughton, "House Panel, 21 to 17, Charges Nixon With Defying Subpoenas," The New York Times, July 31, 1974 <https://www.nytimes.com/1974/07/31/archives/house-panel-21-to-17-charges-nixon-with-defying-subpoenas-ends-its.html>

<sup>78</sup> *Ibid.*

On July 29, 1974, the Senate passed a resolution, S.Res. 370,<sup>79</sup> that directed the Rules and Administration Committee to study the rules and precedents of the Senate related to impeachment proceedings.

On July 31, 1974, the recording of a June 23, 1972 meeting with Haldeman revealed that Nixon was involved in the cover-up. On the tape recording, Nixon agreed with Haldeman's suggestion that Haldeman and Ehrlichman approach CIA Director Richard Helms and the Agency's Deputy Director Vernon Walters, to urge them to ask FBI Director Patrick Gray to end the investigation into the Watergate break-in.<sup>80</sup> The tape was released publicly on August 5th.<sup>81</sup>

Nixon's advisers urged him to resign.<sup>82</sup> Senate Minority Leader Hugh Scott (R-Pa.), House Minority Leader John Rhodes (R-Ariz.), and Sen. Barry Goldwater (R-Ariz.) attended a meeting with Nixon at the Executive Mansion on August 7, 1974 to brief the President on his severely dwindling congressional support and the strong likelihood of impeachment and conviction in the Senate.<sup>83</sup>

On August 8, 1974, Nixon resigned the office of president effective at noon the following day, ending the impeachment proceedings before a vote on the articles of impeachment in the House<sup>84</sup> and thereby becoming the only person ever to resign from the presidency. Gerald Ford, who was confirmed as Vice President in December 1973, was sworn in as the 38th President of the United States. Exactly one month later, on September 8, 1974, Ford pardoned Nixon for any and all crimes he "has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974."<sup>85</sup>

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<sup>79</sup> S.Res. 370, 93rd Congress (1974) <https://www.congress.gov/bill/93rd-congress/senate-resolution/370>

<sup>80</sup> RichardNixonLibrary, "'Smoking Gun': Richard Nixon and Bob Haldeman discuss the Watergate break-in, June 23, 1972," YouTube, June 23, 2014 <https://www.youtube.com/watch?v=ehKRQ0N-dlg>

<sup>81</sup> John Herbers, "Tapes Released," The New York Times, August 6, 1974 <https://www.nytimes.com/1974/08/06/archives/tapes-released-president-still-hopefu-that-the-senate-will-vote-for.html>

<sup>82</sup> James M. Naughton, "Nixon Slide From Power: Backers Gave Final Push," The New York Times, August 11, 1974 <https://www.nytimes.com/1974/08/12/archives/nixon-slide-from-power-backers-gave-final-push-former-defenders.html>

<sup>83</sup> Peter Grier, "Richard Nixon's resignation: the day before, a moment of truth," The Christian Science Monitor, August 7, 2014 <https://www.csmonitor.com/USA/Politics/Decoder/2014/0807/Richard-Nixon-s-resignation-the-day-before-a-moment-of-truth>

<sup>84</sup> On August 20, 1974, the House passed a resolution, H.Res. 1333, to accept the House Judiciary Committee's report on grounds for impeachment against Nixon. The resolution passed by a vote of 412 to 3. The report included the articles of impeachment against Nixon.

<sup>85</sup> Proclamation No. 4311 (1974) <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg2502.pdf>

## The Impeachment and Trial of President Bill Clinton

The Office of the Independent Counsel was created by the Ethics in Government Act of 1978 as a means to investigate current and former high-ranking government officials under circumstance in which normal investigation and prosecution by the Department of Justice was infeasible or inappropriate. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit was responsible for naming the independent counsel.

Kenneth Starr was named as the independent counsel in August 1994, shortly after the Office of the Independent Counsel was reauthorized. Starr was responsible for the investigation of the Whitewater scandal and the inquiry into the suicide of Vince Foster, a deputy White House counsel and former law firm associate of Hillary Clinton's in Arkansas (at the Rose Law Firm). He would oversee other investigations into the Clinton White House, including the civil suit brought against Clinton by Paula Jones, an employee of the Arkansas Industrial Development Commission when Clinton served as governor of the state, and who she alleged sexually harassed her.

In 1994, Jones filed a civil suit against Clinton in which she asked for damages of \$700,000.<sup>86</sup> Clinton argued that he could not be sued civilly until the end of his term in office. The Supreme Court rejected this argument.<sup>87</sup> This civil lawsuit was settled (for \$850,000) in November 1998, shortly before formal impeachment proceedings began in the House. A former White House intern, Monica Lewinsky, submitted an affidavit in the Jones case in which she denied having a sexual relationship with Clinton.<sup>88</sup> Clinton also denied the relationship during his deposition in the Jones case.<sup>89</sup>

In January 1998, news broke that Clinton had an improper relationship with Lewinsky between November 1995 and March 1997. Starr was allowed to expand his investigation into the Jones case to investigate the possibility of perjury and obstruction of justice. Clinton publicly denied any relationship with Lewinsky, claiming in a January 1998 press conference, "I did not have sexual

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<sup>86</sup> The Washington Post, Jones v. Clinton, Accessed on February 4, 2019  
<https://www.washingtonpost.com/wp-srv/politics/special/pjones/docs/complaint.htm>

<sup>87</sup> 520 U.S. 681 (1997)

<sup>88</sup> The Washington Post, "The Lewinsky Affidavit," Accessed on February 4, 2019  
<https://www.washingtonpost.com/wp-srv/politics/special/pjones/docs/lewinskyaffidavit.htm>

<sup>89</sup> The Washington Post, "President Clinton's Deposition," Accessed on February 4, 2019  
<https://www.washingtonpost.com/wp-srv/politics/special/clintonstories/clintondep031398.htm>

relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time; never. These allegations are false.”

One of Lewinsky’s colleagues, Linda Tripp, turned over recordings of conversations between her and Lewinsky, along with other information to Starr and the grand jury. In July 1998, Lewinsky received immunity from prosecution in exchange for her testimony to the grand jury.

During his August 1998 testimony to the grand jury investigating the possibility of perjury and obstruction, Clinton was asked whether his denial of a relationship with Lewinsky was a false statement. He somewhat famously declared (under oath), “It depends on what the meaning of the word ‘is’ is. If the – if he – if ‘is’ means is and never has been, that is not – that is one thing,” Clinton answered. “If it means there is none, that was a completely true statement.”<sup>90</sup>

In September 1998, only weeks after Clinton’s testimony, Starr submitted his report to the House on possible impeachable offenses.<sup>91</sup> The report alleged that President Clinton committed perjury and obstructed justice. Two days after the submission of the report, the House passed<sup>92</sup> a resolution authorizing its public release, but sealing the voluminous files that constituted extensive additional evidence relating to the President (those files remain sealed to this day, and will stay sealed until and unless the House passes a Resolution unsealing them).<sup>93</sup>

The report documented 11 grounds for Clinton’s impeachment. According to the report, the “substantial and credible information” that were grounds for impeachment were the five times Clinton lied under oath during the Jones case, the two times he lied to the grand jury investigating the potential perjury and obstruction that occurred during the Jones case, and the two times he obstructed justice. Witness tampering and abuse of office were also included among the possible grounds for impeachment.

On October 8, 1998, the House passed a resolution<sup>94</sup> directing the Judiciary Committee to begin an investigation into whether grounds existed for

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<sup>90</sup> The Washington Post, “Clinton’s Grand Jury Testimony, Part 4,” Accessed on February 4, 2019 [https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/bctest092198\\_4.htm](https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/bctest092198_4.htm)

<sup>91</sup> The Washington Post, “The Starr Report,” Accessed on December 9, 2018 <https://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/icreport.htm>

<sup>92</sup> House Roll Call Vote 425, 105<sup>th</sup> Congress (1998) <http://clerk.house.gov/evs/1998/roll425.xml>

<sup>93</sup> H.Res. 525, 105<sup>th</sup> Congress (1998) <https://www.congress.gov/bill/105th-congress/house-resolution/525>

<sup>94</sup> H.Res. 581, 105th Congress (1998) <https://www.congress.gov/bill/105th-congress/house-resolution/581>

impeachment based on the “Starr Report.” In December 1998, the Committee produced a report that outlined the impeachable offenses it concluded by majority vote Clinton committed,<sup>95</sup> and referred an impeachment resolution to be considered by the whole House.<sup>96</sup> The resolution consisted of four articles of impeachment against President Clinton. Article I accused Clinton of lying under oath to the grand jury. Article II alleged that Clinton had committed perjury during his deposition in the Jones case. Article III was an obstruction of justice charge related to Clinton’s attempts to cover up his relationship with Lewinsky. Article IV was the abuse of power allegation.

Because of the controversy surrounding Clinton, the media covered the impeachment proceedings extensively. After all, the country had not experienced impeachment proceedings for nearly 25 years. Surrogates for Clinton spun the matter as House Republicans riding a moral high horse against a president who made a mistake, but not one that warranted impeachment.

During the floor debate on the impeachment resolution in December 1998, House Judiciary Committee Chairman Henry Hyde (R-III.) opened the debate by focusing on the rule of law. “After months of argument, hours of debate, there is no need for further complexity. The question before this House is rather simple. It is not a question of sex. Sexual misconduct and adultery are private acts and are none of Congress’ business. It is not even a question of lying about sex. The matter before the House is a question of lying under oath. This is a public act, not a private act. This is called perjury,” Hyde said. “The matter before the House is a question of the willful, premeditated, deliberate corruption of the Nation’s system of justice. Perjury and obstruction of justice cannot be reconciled with the Office of the President of the United States.”<sup>97</sup>

House Minority Leader Dick Gephardt (D-Mo.) opened the debate for the Democrats by invoking the military action that was underway in Iraq against Saddam Hussein’s regime. The action, Operation Desert Fox, was a response to Iraq interfering with United Nations Special Commission inspectors tasked with ensuring that Iraq’s weapons of mass destruction were being dismantled.

“I guess I am worried also that some of us do not want to be inconvenienced. Our young people are inconvenienced today who are in the Persian Gulf. They are

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<sup>95</sup> H. Rept. 105-830 (1998) <https://www.congress.gov/congressional-report/105th-congress/house-report/830/>

<sup>96</sup> H.Res. 611, 105<sup>th</sup> Congress (1998) <https://www.congress.gov/bill/105th-congress/house-resolution/611>

<sup>97</sup> 144 Cong. Rec. H11776 (1998)

being shot at, and they stand in danger, and with all my heart I believe the least we could do is postpone this debate to a different day," Gephardt argued. "But I know I have lost that debate and the decision has been made. We are here."

The Missouri Democrat also argued that Republicans were seeking to overturn the results of the 1996 president election and urged the House to consider "the values" of "[r]espect, trust, fairness, forgiveness." Gephardt said, "In Lincoln's Gettysburg Address he prayed this prayer, that this Nation shall have a new birth of freedom, and that this government of the people, by the people, for the people should not perish from this earth. I pray today that you will open up this people's house and let the people's voice come in and let fairness reign."<sup>98</sup> The Minority Leader's admonition failed to move a majority of the House.

Although the impeachment resolution consisted of four articles, the House agreed to only two, Article I<sup>99</sup> and Article III.<sup>100</sup> Article II<sup>101</sup> and Article IV<sup>102</sup> failed. The impeachment resolution with the two House-approved articles was transmitted to the Senate. The House subsequently passed a resolution<sup>103</sup> appointing managers for the proceedings in the Senate.<sup>104</sup> Because the matter overlapped the 105<sup>th</sup> Congress and the 106<sup>th</sup> Congress, the managers were subsequently reappointed in the 106<sup>th</sup> Congress.<sup>105</sup> The overlap between congresses did not require the House to impeach Clinton a second time. Consideration of removal simply carried over to the 106<sup>th</sup> Congress.

Within days of the 106<sup>th</sup> Congress being seated on January 3, 1999, the impeachment managers were allowed to present the two articles of impeachment in the Senate. The proclamation that was made before each day of the proceedings against Johnson more than 130 years before was repeated in the very same Senate chamber: "Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of

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<sup>98</sup> 144 Cong. Rec. H11778 (1998)

<sup>99</sup> House Roll Call Vote 543, 105<sup>th</sup> Congress (1998) <http://clerk.house.gov/evs/1998/roll543.xml>

<sup>100</sup> House Roll Call Vote 545, 105<sup>th</sup> Congress (1998) <http://clerk.house.gov/evs/1998/roll545.xml>

<sup>101</sup> House Roll Call Vote 544, 105<sup>th</sup> Congress (1998) <http://clerk.house.gov/evs/1998/roll544.xml>

<sup>102</sup> House Roll Call Vote 546, 105<sup>th</sup> Congress (1998) <http://clerk.house.gov/evs/1998/roll546.xml>

<sup>103</sup> H.Res. 614, 105<sup>th</sup> Congress (1998) <https://www.congress.gov/bill/105th-congress/house-resolution/614>

<sup>104</sup> The impeachment managers were Reps. Bob Barr (R-Ga.), Ed Bryant (R-Tenn.), Steve Buyer (R-Ind.), Charles Canady (R-Fla.), Chris Cannon (R-Utah), Steve Chabot (R-Ohio), Lindsey Graham (R-S.C.), George Gekas (R-Pa.), Asa Hutchinson (R-Ark.), Henry Hyde (R-Ill.), Bill McCollum (R-Fla.), James Rogan (R-Calif.), and Jim Sensenbrenner (R-Wis.).

<sup>105</sup> H.Res. 10, 106<sup>th</sup> Congress (1999) <https://www.congress.gov/bill/106th-congress/house-resolution/10>

impeachment against William Jefferson Clinton, President of the United States.” Chief Justice William Rehnquist presided over the trial proceedings.

Chairman Hyde presented and read the articles of impeachment to the Senate. Chief Justice Rehnquist and each senator took the oath. The oath simply was: “Do you solemnly swear that in all things appertaining to the trial of the impeachment of William Jefferson Clinton, President of the United States, now pending, you will do impartial justice according to the Constitution and laws, so help you God?” As in a traditional court of law, senators responded, “I do” and signed the “Official Oath Book.”

In the following days, before the impeachment managers presented the case for impeachment, the Senate unanimously passed a resolution allowing Clinton to file his response to the articles of impeachment and the impeachment managers to provide documents to be made available to senators.<sup>106</sup>

The resolution limited the time for impeachment managers to 24 hours. Clinton was given equal time to present his defense. President Clinton was represented by a legal team that included White House Counsel Charles Ruff and White House Deputy Counsel Cheryl Mills.<sup>107</sup> Clinton’s defense team was allowed to represent him on the floor of the Senate.

The Senate passed a resolution establishing the procedures for the trial of President Clinton, which greatly hampered the impeachment managers’ ability to present their case.<sup>108</sup> For example, the managers were not allowed to call any live witnesses, the evidence they were permitted to introduce was limited to such evidence as already was in the public domain (i.e., the “Starr Report”),<sup>109</sup> and they were not permitted to depose any witness.<sup>110</sup>

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<sup>106</sup> S.Res. 16, 106<sup>th</sup> Congress (1999) <https://www.congress.gov/bill/106th-congress/senate-resolution/16>

<sup>107</sup> The Washington Post, “Defense Who’s Who,” January 19, 1999 <https://www.washingtonpost.com/wp-srv/politics/special/clinton/defense.htm>

<sup>108</sup> S.Res. 30, 106<sup>th</sup> Congress (1999) <https://www.congress.gov/bill/106th-congress/senate-resolution/30>

<sup>109</sup> The Office of Independent Counsel Referral to the House in September 1998 was made public by House Resolution adopted shortly after its transmittal to the Hill. However, the extensive background and supplemental evidence that accompanied the Referral (which filled many file drawers and boxes), was sealed by House Resolution and remains under seal to this day. Therefore, none of the information and evidence contained in that voluminous document cache could be introduced by the Managers in presenting their case against President Clinton.

<sup>110</sup> The Senate did relent late in the trial and permitted the Managers to take sworn depositions of three witnesses; but the time and other constraints placed on the conduct of those depositions severely limited their usefulness for the prosecution.

The resolution adopted for the conduct of the Senate trial reflected the lack of senatorial enthusiasm for considering the matter in the first place. Appearing at a press conference in January 1999, Senate Majority Leader Trent Lott (R-Miss.) told reporters that senators would “have a bipartisan Senate conference so that we can talk to each other and listen to each other and understand what we’re actually suggesting as to how we should proceed.”<sup>111</sup> His counterpart, Sen. Tom Daschle (D-S.D.), echoed the sense of bipartisanship.

The impeachment managers and the defense counsel presented their case to the Senate over six days, three consecutive days each. Before voting on the articles, Senators asked impeachment managers and the defense counsel questions and review excerpted video testimony from key witnesses.<sup>112</sup> The Senate voted to deliberate in a closed-door session before publicly voting to acquit President Clinton of both charges on February 12, 1999.<sup>113</sup>

Sen. Dianne Feinstein (D-Calif.) introduced a resolution to censure Clinton the same day he was acquitted in the Senate.<sup>114</sup> Although that resolution was cosponsored by 37 of her colleagues, consideration of the resolution was blocked by Sen. Phil Gramm (R-Texas) and his objection was sustained.<sup>115</sup>

## **Aspects of the “Case” Against President Trump**

### **Instruments of Prosecution – “Indictment” vs. “Impeachment”**

The procedural differences between an article of impeachment and a bill of indictment are fundamental. A bill of indictment is the formal instrument by which an individual is charged with violation of either a federal or a state serious criminal offense.<sup>116</sup>

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<sup>111</sup> Federal News Service, “We Will Have a Bipartisan Senate Conference,” January 8, 1999 <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/leaders010899.htm>

<sup>112</sup> During the entire trial, only a single objection was lodged by a Senator against arguments made by the Managers, and it was summarily upheld by the Chief Justice.

<sup>113</sup> Article I (perjury) was rejected by a vote of 45 to 55. Article II (obstruction) failed by a 50 to 50 vote. These are roll call votes 17 and 18 in 1999.

<sup>114</sup> S.Res. 44, 106<sup>th</sup> Congress (1999) <https://www.congress.gov/bill/106th-congress/senate-resolution/44>

<sup>115</sup> Senate Roll Call Vote 19, 106<sup>th</sup> Congress (1999) [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=106&session=1&vote=00019](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=1&vote=00019)

<sup>116</sup> While a person may be charged with a misdemeanor offense (that is, one that upon conviction carries a sentence of one year or less) through an indictment, this normally would be the case only if the indictment charges more serious – that is, felony – offenses. Another “charging document,” often used by prosecutors to charge a misdemeanor, or a plea to a felony, is an “accusation,” which effect is similar to that of an indictment in that it formally charges an individual with a specific violation of the law of the jurisdiction in which returned.

An indictment may (and usually is) drafted by the prosecuting authority (the United States Attorney in the federal system, and the district attorney in the state counterpart<sup>117</sup>) and then presented to a grand jury of citizens, who would hear witnesses, receive evidence from the prosecutor. Then, if it is determined by vote that a crime or crimes has or have been committed, the grand jury would return a “true bill” formally charging the person (who then becomes a “defendant”). The burden of proof by which the grand jury determines to return a true bill is simply “probable cause” that the person committed the offense as presented by the prosecutor. This is far less than the “beyond a reasonable doubt” burden of proof that applies in the subsequent trial of the case.

Another important difference between grand jury proceedings and impeachment hearings is that the former is conducted according to rigorous secrecy rules.

Although the prosecutor largely orchestrates the proceedings before the grand jury, the grand jury formally is an instrument of and administered by the court, not the prosecutor. The foreperson of the grand jury signs the true bill if so voted by the requisite majority of members of the grand jury.

An “article of indictment” charges an official (in this memo for purposes of analysis, the President of the United States) with an impeachable offense; that is, a “high crime [and] misdemeanor.” There is no “burden of proof” *per se*. It is simply whatever the House Judiciary Committee, operating as a body akin to a grand jury, determines to be the case. An article of impeachment voted affirmatively by a majority of members of the Judiciary Committee then goes to the floor of the House for a vote. If a majority of members vote “aye” as to a particular article, the President is thereby and, on that article, impeached.

While an indictment may contain several “counts,” each setting forth the provision of the relevant (state or federal) criminal statute which the defendant is deemed to have violated and the facts on which that violation is based, an article of impeachment will contain only a single charged violation.<sup>118</sup>

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<sup>117</sup> There are 93 United States Attorney positions in the U.S.; one for each federal judicial district. Each United States Attorney is nominated by the President (and serves at the pleasure thereof) and subject to confirmation by the Senate (though rarely with any controversy, and very rarely even with any confirmation hearings). District Attorneys are elected by citizens in each state, generally for four-year terms, and assert jurisdiction within their respective state judicial circuit; in major metropolitan areas, this area is a county, and in more rural and less populous areas, may include several counties.

<sup>118</sup> In the impeachment of President Clinton, four separate articles of impeachment were voted out by the Judiciary Committee, but only two were adopted by majority vote of the full House –

## **Statutes of Limitations for Indictments and Impeachments**

In order to ensure fairness and due process in our criminal justice systems, both federal and state, criminal violations are constrained by “statutes of limitations.” These are time limits, calculated from the date of the alleged offense (or in some instances, when it might reasonably have been discovered), within which the prosecuting authority must bring a case formally or thereafter is barred from doing so. There is an exception for the crime of murder, which has an indefinite statute of limitations. A person may be charged with murder regardless of how long after the alleged offense occurred the charges are brought.

The “law” for charging a president with an impeachable offense, by passing an article of impeachment against him, is simpler. A president may be charged with an impeachable offense – a high crime or misdemeanor – at any time while in office, but only while in office. All acts by a president before being sworn into office (theoretically, any time before noon on January 20<sup>th</sup> of the year in which he takes his oath of office) are subject to punishment only through standard criminal procedures that would otherwise apply to him not as president but as a private citizen. This is the case unless, of course, the new president was elected president while serving as vice-president, in which case he could be subject to impeachment for high crimes or misdemeanors in that capacity.

In the case of President Trump, allegations that he engaged in criminal or “impeachable” acts while a candidate, or even as President-elect between Election Day 2016 and noon on January 20, 2017, are *not* and should not be considered grounds on which Congress could legitimately impeach him.<sup>119</sup> This principle should prevail even if the alleged bad acts were undertaken in his capacity as President-elect, based on the simple fact that impeachment is a [constitutional] remedy – the sole remedy – to punish “public” actions taken by a president as president. This is a legal impossibility if the individual is not yet sworn into office.

Importantly, Congress may employ its oversight power to inquire into whether a president is executing the laws and appropriations passed by Congress (and signed into law by the president) in a manner consistent with the letter and the intent of the legislation and the legislative history. And, if such oversight

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perjury and obstruction. The broader Article, charging “abuse of office,” was not adopted by the House.

<sup>119</sup> See, a synopsis of this issue in *Stop the Impeachment Fishing Expedition*, by David Rivkin and Elizabeth Price Foley, in the Wall Street Journal, February 14, 2019.

investigation yields evidence that the president has failed to do so in a manner that rises to the level of a high crime or misdemeanor, such acts (or failures to act) may be legitimate basis on which to inquire into an impeachable offense.

A further “line” crucial to understanding the appropriate basis on which the House properly may inquire into whether a president has committed an impeachable offense, is that between violations of law rising to the level of an impeachable offense and violations of “policy” that, while perhaps touching on vital national security or other important public policy matters, remain just that – policy disagreements.

Increasingly, it is such “policy disagreements” – whether based on substantive disagreements between the Legislative and Executive Branches, or on more complex and subtle issues involving differences in interpreting foreign intelligence information as the basis for subsequent policy decisions – that often appear to provide fodder for congressional investigations of a president with a view toward possible impeachment. Despite surface appeal attaching to many such issues (going back, for example, to the “weapons of mass destruction” intelligence fiasco during the administration of George W. Bush) that may generate headlines and trigger congressional investigations, such matters do not and should not be considered appropriate grounds on which to pursue impeachments.

## **Federal Election Laws Prosecutions**

Seven years ago, in 2012, former Democratic candidate Sen. John Edwards was indicted and tried for violating federal campaign laws. More specifically, he was charged with failing to report as campaign expenditures monies paid by a supporter of his to the candidate’s mistress who had mothered his child out-of-wedlock. Federal prosecutors, however, were unable to secure a conviction.

The Edwards case highlights the manner in which the complex (bordering on byzantine) federal campaign laws construed to investigate and prosecute candidates for federal office who have engaged in acts viewed as contrary to generally accepted norms of moral behavior. In the case of the former South Carolina Senator, the transgression was having fathered a child out of wedlock and then taken steps directly and/or indirectly to keep that incident hidden from the public (and the media). According to this prosecution theory, such a maneuver thereby “benefits” the candidate’s federal campaign and is therefore a

donation. Not publicly reporting it as such constitutes a technical violation of the federal campaign finance laws carrying criminal penalties.

This appears to be at least one of the roads down which the U.S. Attorney for the Southern District of New York in Manhattan is traveling in pursuing a conviction against former Trump lawyer Michael Cohen. The theory appears to be that, during his 2016 presidential campaign (i.e., before Trump was sworn into office), Trump directed that money held by Cohen for Trump (or reimbursed to Cohen by Trump) be paid by Cohen to prevent publication of stories concerning the candidate's relations with one or two women while he was married to Melania Trump.

If this resulted in, and was intended to result in, a "benefit" to the Trump campaign, the prosecution theory holds that failure to report it on FEC (Federal Election Commission) disclosure forms constituted a criminal violation of those laws by the candidate.

The tenuousness of this theory – and the difficulty faced by prosecutors – in making a link "beyond a reasonable doubt" between a candidate simply deciding to use his own money (or in Edwards' case, a supporter deciding to use their money) to protect their family reputation and not make a direct (or arguably, even indirect) monetary contribution to their campaign coffers, was evident in the 2012 Edwards case.

In the current matter involving Cohen's prosecution and plea, his assertions as part of his plea deal that Trump "knew" of and "approved" if not "directed" the payments, have been cited by Democrats in the House as a basis for an impeachment inquiry if not article of impeachment.

The evidence that has thus far been made available publicly in the Cohen matter, even if assumed to be true, appears to have occurred *before* Trump was sworn into office. Therefore, absent new evidence that such interactions or conspiracy continued after January 20, 2017, the evidence underlying the Cohen plea could be, at most, a basis for a potential prosecution of Trump, but not an impeachment. But this analysis comes with a caveat.

Testimony by Cohen before the House Committee on Oversight and Reform on February 27, 2019, while sensational and clearly adverse to the President, added little if any hard evidence that the President engaged in any violations of law after he was sworn in as President in January 2017. But, relevant evidence and investigations in both the House of Representatives and in the Southern District of New York remains fluid, and clearly could play into a charge that a *conspiracy*

to violate federal campaign finance laws continued *into* 2017 (as alleged, for example, by Cohen that a \$35,000 check dated August 1, 2017 and signed by Mr. Trump payable to Cohen was an “installment” on a “hush money” re-payment dating back to the 2016 campaign). Thus, the line between pre-presidential bad acts (which could provide a basis for a potential post-presidential prosecution but not an impeachment) and actions undertaken by a president while in office (which could constitute a “high crime or misdemeanor”), remains blurred.

### **Abuse of Judicial Proceedings to Create Grounds for Impeachment**

Yet another tool employed with increasing frequency by critics of the current President, and which may find its way into the impeachment debate, is that of the judicial injunction. It works thus:

- The President issues an Executive Order or other Presidential Proclamation with which his critics in Congress and in state governments (usually state attorneys general) disagree.
- Those critics seek a federal District Court Judge most likely to favorably consider a motion to enjoin the presidential action from taking effect.
- Increasingly, and contrary to historical and judicial precedent, federal District Court Judges are issuing injunctions against presidential actions, as in immigration policy for example, that apply nationwide (as contrasted to the normal procedure which would call for an injunction only within the jurisdiction of that federal district within which the judge sits).
- The injunction then takes effect, but is immediately appealed to the federal Court of Appeals within which the District Court is located; often in today’s environment this will be either the Ninth Circuit or the D.C. Circuit, both of which are populated largely by judges with a far more liberal outlook on such matters as come before them than is this Administration.
- The case may eventually find its way to the United States Supreme Court for resolution.

The point here is not to delve into a lesson in federal law of injunctions, but rather to highlight that once the President’s critics have secured such a “victory” by way of a federal court determination that the President “exceeded” his authority in issuing the Executive Order or Proclamation in the first instance, *that judicial*

*finding* then can be cited as an “unlawful” abuse of power by the President and, *ipso facto*, a proper basis on which to pursue impeachment.

Conversely, if the Supreme Court (or a Court of Appeals) were to rule in favor of the President – that he properly interpreted and acted within his lawful, executive powers, critics in the House likely would not be deterred in their quest for citing the underlying action as a potential high crime or misdemeanor. Their argument likely would be that the criteria for determining a “violation of the law” and “an impeachable offense” are different and distinct, and the latter can be found even if the former is not.

All this is nothing more than impeachment alchemy – a clever exercise to transform a policy disagreement into an arguable abuse of power or possible unlawful act and therefore an impeachable offense. But at its core, such proceedings are an abuse of judicial proceedings to accomplish a political end and do *not* belong in any category of constitutionally-legitimate impeachable offenses.

The recent (and ongoing, as of the date of this memorandum) dispute over the President’s declaration of a “National Emergency” at the southern border as the basis to invoke the 1976 National Emergencies Act (NEA)<sup>120</sup> and thereby set in motion shifting of funds appropriated for non-wall building construction by military personnel under the Department of Defense to such construction activities, presents such a scenario. The President’s declaration already has spurred congressional and judicial challenges.

The issue at the heart of this dispute surrounding a “national emergency” at our country’s southern border, however, appears more one of *interpretation* of the law (the terms of which are, fortunately or unfortunately depending on which side one finds oneself on, vague and imprecise), rather than a *violation* thereof. In our analysis of “impeachment,” a *policy* interpretation of a statute that *should* not be a basis for considering an article of impeachment relating thereto. Of course, such analysis based on history, legal precedent (which admittedly is not clearly dispositive), and policy considerations is not likely to stop critics from concluding otherwise.

## **Mueller’s “Obstruction of Justice” Theory**

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<sup>120</sup> P.L. 94-412, <http://www.gpo.gov/fdsys/pkg/STATUTE-90/pdf/STATUTE-90-Pg1255.pdf>

In June 2018, then-private citizen William P. Barr, now confirmed as Attorney General of the United States, wrote a lengthy memorandum to Deputy Attorney General Rod Rosenstein titled, “Mueller’s ‘Obstruction’ Theory.”<sup>121</sup> In it, Barr expounded at length on his view that none of the events surrounding or Trump’s actual firing of former FBI Director James Comey constituted obstruction of justice as applicable to President Trump.

In thus debunking a potential conclusion of the as-yet unfinished report of the Special Counsel, the now-Attorney General in essence concluded that this episode, including Trump’s comments to Comey regarding the “Russia Probe” and the investigation of then-National Security Advisor Michael Flynn, and the eventual firing of Comey, does not and cannot legally constitute “obstruction of justice.” Barr’s analysis reflects the President’s inherent and customary power to comment on investigations within the Executive Branch which he heads, and his plenary power to fire subordinate officials (especially “for cause” in the case of the FBI Director).

If Barr’s analysis is correct, then these acts, even if considered by the House of Representatives as possible articles of impeachment, would fail as a legitimate basis for impeachment (and, even if so found by the political process in that body, should not be deemed grounds on which to convict the President). Barr expounds at length in his memo about the negative, practical effects that would befall a presidency if Mueller’s “obstruction” theory were deemed a lawful and constitutional basis on which to force the President to submit to subpoena and be forced to answer question by the Special Counsel, or as a possible basis constituting substantial grounds on which the House of Representatives might consider impeachment.<sup>122</sup>

It must be recognized, however, that Barr noted that his analysis of Mueller’s obstruction theory was based on information and evidence only available publicly at that time and not on any confidential information to which he was not then privy and that may form an important part of Mueller’s actual work product. Barr,

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<sup>121</sup> “June 2018 Barr Memo to DOJ,” Uploaded by Quinta Jurecic, Scribd, Accessed February 19, 2019 <https://www.scribd.com/document/396090342/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction-Theory-1>

<sup>122</sup> As noted elsewhere in this memorandum, the Special Counsel’s only obligation under the document charging him to investigate matters as directed by the Deputy Attorney General in 2017, is to report to the Attorney General upon conclusion of his work. Unlike the statutory obligation under which the former Independent Counsels (including ultimately, Kenneth Starr) operated, which mandated that those offices transmit to the House any evidence uncovered in the course of their work any substantial and significant evidence of possible impeachable offenses, the Special Counsel operates under no such obligation; which would not necessarily prevent him from including such evidence or analysis in his report to the Attorney General.

now Attorney General and Mueller's superior, would have access to additional information that might bear on and alter his analysis regarding the Flynn and Comey matters or such additional material included or to be included in Mueller's work product not available previously to Barr.

Such additional evidence could bear on obstruction of justice as a legitimate and possibly substantive basis for an impeachment inquiry involving President Trump. A scenario might, for example, be predicated on other efforts by the President that could evidence requisite deliberate intent to influence the conduct of an investigation or aspect of an ongoing investigation (or to head off or derail a potential or likely one) targeting or focusing on Trump rather than on a third person such as Flynn or Comey. For example, one possible direction such an investigation could take would consider recent media stories alleging the President impliedly or indirectly (or perhaps even directly) tried to have the ongoing investigation being conducted by the United States Attorney for the Southern District of New York (including the so-called Cohen prosecution) shifted to another office or prosecutor more sympathetic or beholden to Trump.

The point being, there are numerous directions in which an obstruction investigation could go, beyond the ones analyzed by Bill Barr in his memo last summer which necessarily focused largely on the Flynn and Comey matters. Obstruction of justice is, after all, the single most common criminal charge which has figured in presidential impeachments, including those involving Nixon and Clinton. One reason for this is the breadth of the federal obstruction of justice statute and the many diverse circumstances in which conversations can become entangled when discussing pending or potential criminal investigations;<sup>123</sup> to say nothing of the option available to a prosecutor or impeachment advocate considering a possible violation of 18 USC 1001.<sup>124</sup>

## Conclusion

Two things are clear from reviewing the current climate between the President and the House, and between the Administration and the media generally (even in

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<sup>123</sup> 18 USC 1503, for example, provides in pertinent part: "(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any . . . officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). . . . imprisonment for not more than 10 years, . . .

<sup>124</sup> See, e.g., fn.12 *supra*.

the absence of some new bombshell “smoking gun”). First, talk of impeachment, and movement in that direction by the Democrat majority in the House *will* continue. Second, despite such historic and procedural materials as are available to House Members, lawyers, and advocates for impeachment — including such materials set forth in this memo — strict adherence to those historic and procedural norms and rules will not necessarily dictate the final decisions reached.

Therefore, it is all the more important that Members and Senators on *both* sides of the aisle advocate strongly, openly, and consistently that the processes and underpinnings of “impeachment” be understood, considered and followed to the highest degree possible. To proceed otherwise would undermine not only notions of fundamental fairness, but the very foundations on which public discourse and policy is intended to be conducted in our Republic; and would set dangerous precedent that members of both major political parties, in both the Legislative and Executive branches of our government will come to regret in generations to come.

## About the Authors

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