

4-2023

## The Trump Impeachments: Lessons for the Constitution, Presidents, Congress, Justice, Lawyers, and the Public

Michael J. Gerhardt

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [President/Executive Department Commons](#)

---

### Repository Citation

Michael J. Gerhardt, *The Trump Impeachments: Lessons for the Constitution, Presidents, Congress, Justice, Lawyers, and the Public*, 64 Wm. & Mary L. Rev. 1309 (2023), <https://scholarship.law.wm.edu/wmlr/vol64/iss5/2>

Copyright c 2023 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

# William & Mary Law Review

---

VOLUME 64

No. 5, 2023

---

## THE TRUMP IMPEACHMENTS: LESSONS FOR THE CONSTITUTION, PRESIDENTS, CONGRESS, JUSTICE, LAWYERS, AND THE PUBLIC

MICHAEL J. GERHARDT\*

### ABSTRACT

*The conventional wisdom is that the two impeachments of Donald Trump demonstrated the ineffectiveness of impeachment as a remedy for serious presidential misconduct. Meeting the constitutional threshold for conviction and removal requiring at least two-thirds approval of the Senate is practically impossible so long as the members of the President's party in Congress control at least a third of the seats in the Senate and are united in opposition to his impeachment and conviction. This Article challenges this conventional wisdom and argues instead that the two Trump impeachments have enduring effects on Trump's political future and legacy, especially in light of*

---

\* Burton Craige Distinguished Professor of Jurisprudence, University of North Carolina at Chapel Hill School of Law. This Article is based on the James Gould Cutler Lecture delivered at The College of William & Mary, Marshall-Wythe School of Law, February 10, 2022. Though I testified before the House Judiciary Committee in the first impeachment proceeding against Mr. Trump and served as special counsel to the Presiding Officer, Senator Patrick Leahy, in Mr. Trump's second impeachment trial, the views expressed herein are solely my own.

*the fact that the vast majority of senators condemned his actions in his second trial and the voluminous records of his misconduct serving as the basis for his first impeachment. The Article also assesses the lessons the trials have taught about the effectiveness of various safeguards against the misconduct of presidents and the lawyers who enable their corruption.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 1312

I. IMPEACHMENT’S IMPACT ON PRESIDENTIAL  
REPUTATIONS AND LEGACIES . . . . . 1316

II. THE NONJUDICIAL PRECEDENTS ESTABLISHED IN THE TWO  
TRUMP IMPEACHMENTS AND TRIALS . . . . . 1318

III. COORDINATING CONSTITUTIONAL MECHANISMS FOR  
HOLDING PRESIDENTS ACCOUNTABLE FOR THEIR  
MISCONDUCT IN OFFICE . . . . . 1323

IV. TAKING LEGAL ETHICS SERIOUSLY . . . . . 1331

CONCLUSION: WHERE TO FROM HERE? . . . . . 1342

## INTRODUCTION

For most Americans, the two impeachment efforts directed against Donald Trump were abject failures. Though a slim majority of the public supported Trump's removal in the first impeachment effort, and a larger majority supported convicting him in the second, both trials ended with his acquittal.<sup>1</sup> The first trial concluded on February 5, 2020,<sup>2</sup> and the second trial finished a little more than a year later on February 13, 2021.<sup>3</sup> In both proceedings,<sup>4</sup> there was evidence that Trump had engaged in serious misconduct: in the first, abusing his power as President to coerce Ukraine's president to announce (unfounded) criminal investigations into then-presidential candidate Joseph Biden and obstructing Congress by refusing to comply with nearly a dozen legislative subpoenas; and in the second, inciting an insurrection by stoking supporters to storm Congress on January 6, 2021.<sup>5</sup> For many people, the two acquittals were evidence that the federal impeachment process is broken.<sup>6</sup> The constitutional threshold for conviction, requiring at least two-thirds of senators present to vote to convict,<sup>7</sup> was practically impossible to meet in both trials given that in each, the Republican majority in the Senate largely stuck together in ignoring or discounting

---

1. See *Majority Support Trump Impeachment*, MONMOUTH UNIV. (Jan. 25, 2021), [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_012521/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_012521/) [<https://perma.cc/589T-LBPW>]; see also Aaron Bycoffe, Ella Koeze & Nathaniel Rakich, *Did Americans Support Removing Trump from Office?*, FIVETHIRTYEIGHT (Feb. 12, 2020, 8:16 AM), <https://projects.fivethirtyeight.com/impeachment-polls/> [<https://perma.cc/XX63-4ZSG>].

2. See Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html> [<https://perma.cc/B8R4-UNH5>].

3. See Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, THE GUARDIAN (Feb. 13, 2021, 7:12 PM), <https://www.theguardian.com/us-news/2021/feb/13/donald-trump-acquitted-impeachment-trial> [<https://perma.cc/LMN8-LMAJ>].

4. For additional information on the Trump impeachment proceedings, see *Impeachment Related Publications*, GOVINFO, <https://www.govinfo.gov/collection/impeachment-related-publications> [<https://perma.cc/UL7U-QB5D>] (the official records for the House and Senate impeachment proceedings in 2019-2020 and 2021 against Mr. Trump).

5. See *id.*

6. See Michael Gerhardt, Opinion, *Madison's Nightmare Has Come to America*, THE ATLANTIC (Feb. 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/constitution-flawed/606208/> [<https://perma.cc/A8UZ-BWB7>].

7. U.S. CONST. art. I, § 3, cl. 6.

evidence of presidential misconduct and in opposing conviction.<sup>8</sup> For Trump's base, it was a failure of a different sort—the failure of the hateful and hate-filled Democrats to pervert the process to their own nefarious ends;<sup>9</sup> and, for many lawyers, the Senate erred in not conducting the proceedings like real trials, overseen by the Chief Justice who might have insisted on something that more closely resembled the rigorous procedures and evidentiary rules that a real trial or judicial proceeding would follow.<sup>10</sup>

Presidential impeachments are, however, never just about whether the nation's chief executive did something so wrong that he should be ousted from office prematurely. They test not just the President on trial but also the Senate, the Constitution, Presidents, members of Congress, witnesses, the lawyers on each side, and the American people. Far too many viewers—and participants—had to be retaught the basic elements and purposes of impeachments, including why senators—sitting as both jurors and judges—comprise the unique court of impeachment under our Constitution. The Framers vested senators with the ultimate power to convict, remove, and disqualify Presidents for their misconduct in office because they expected that senators had the special qualities, numbers, and temperament to rise to the occasion, to not be easily swayed by the whims of their constituents, and to be held politically accountable in their decisions.<sup>11</sup> In *Federalist 65*, Alexander Hamilton explained that senators were the ideal arbiters of whether an impeached President or other high-ranking official should be convicted because the Senate would be a “tribunal sufficiently dignified” and “sufficiently independent” of the President or factional interests aligned with the subject of impeachment.<sup>12</sup> Further, Hamilton explained, because the entire Senate was the trial body, it “could never be tied down by such strict rules, either in

---

8. See Gerhardt, *supra* note 6.

9. See Elaina Plott, *The Trump Fans Who Think Impeachment Was ‘Exactly’ What His Base Needed*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-supporters-impeachment.html> [<https://perma.cc/9Y3X-86KF>].

10. For an explanation of the differences between impeachment trials and judicial proceedings, see John Kruzell, *How Impeachment Differs from Court Trials*, THE HILL (Jan. 14, 2020, 6:01 AM), <https://thehill.com/homenews/senate/478089-how-impeachment-differs-from-court-trials/> [<https://perma.cc/2DSS-EJKZ>].

11. See THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12. *Id.* at 398.

the delineation of the offense by the prosecutors or in the construction of it by the judges,” as in common law trials.<sup>13</sup>

In the second Senate trial,<sup>14</sup> there was no question of curtailing a President’s term, as there had been in the first trial, for the obvious reason that Mr. Trump was no longer in office when the second trial began. To no impeachment scholar’s surprise, impeachment is generally designed to undo presidential elections—that is one of the major reasons for impeachment: American Presidents take their job based on the condition that they are subject to impeachment and conviction if they commit “[t]reason, [b]ribery, or other high [c]rimes and [m]isdemeanors.”<sup>15</sup> Whether a President’s misconduct merits “removal” and “disqualification”—the only two remedies the Constitution recognizes as applying to convicted officials<sup>16</sup>—can be as hard to determine as any issue a member of Congress must address, undoubtedly made harder if the President is from their own political party. The Framers, who distrusted popular majorities, would have frowned on public pressure being a factor in impeachment and conviction decision-making.<sup>17</sup> However, the ratification of the Seventeenth Amendment, which made senators directly elected by the people of their respective states,<sup>18</sup> makes such pressure relevant and inevitable. In order to work, the process requires members of Congress to have the wisdom and the courage to do not the expedient thing but the right thing—placing

---

13. *Id.*

14. On the general circumstances giving rise to Mr. Trump’s second impeachment by the House and second trial in the Senate, see generally MARK C. ALEXANDER, MICHÈLE ALEXANDRE, ERWIN S. CHEMERINSKY, DANIELLE M. CONWAY, ANTHONY W. CROWELL, GARRY W. JENKINS, KEVIN R. JOHNSON, JENNIFER L. MNOOKIN, KIMBERLY MUTCHERSON, ANDREW M. PERLMAN, CARLA D. PRATT, THEODORE W. RUGER, DANIEL P. TOKAJI & ROBERT K. VISCHER, *BEYOND IMAGINATION?: THE JANUARY 6 INSURRECTION* (2022); JAMIE RASKIN, *UNTHINKABLE: TRAUMA, TRUTH, AND THE TRIALS OF AMERICAN DEMOCRACY* (2022); MICHAEL C. BENDER, “FRANKLY, WE DID WIN THIS ELECTION”: *THE INSIDE STORY OF HOW TRUMP LOST* (2021); MARK MEADOWS, *THE CHIEF’S CHIEF* (2021). While writing this Article, a special Committee in the House of Representatives extensively investigated the causes and consequences of the storming of the Capitol on January 6, 2021. See *January 6th Committee News*, N.Y. TIMES, <https://www.nytimes.com/news-event/jan-6-committee> [<https://perma.cc/329P-QPYK>] (last updated Sept. 29, 2022).

15. U.S. CONST. art. II, § 4.

16. *Id.* art. I, § 3, cl. 7.

17. See Gerhardt, *supra* note 6.

18. U.S. CONST. amend. XVII.

the best interests of the nation and the Constitution above rank partisanship.

Given the fact that I have studied, testified in, analyzed, commented, and consulted on federal impeachments for more than thirty years, I am deeply invested in figuring out whether impeachment retains any utility or can still fulfill its original function of holding Presidents accountable for their serious misconduct in office. This Article suggests that the answers to these questions are in the affirmative. In rendering my judgment, I suggest that leaders, lawyers, and voters should acknowledge and come to terms with several major lessons. As explained below, these takeaways are recognizing (1) the practical limits of the impeachment and removal powers, the exercise of which can leave Presidents damaged and with indelible stains on their legacies (as it did for Andrew Johnson, Richard Nixon, Bill Clinton, and Donald Trump); (2) the fact that “the unitary theory of the executive” (holding that Presidents ought to be in control of the exercise of all executive power), long popular with conservative Republicans and constitutionalists,<sup>19</sup> is a dangerous weapon to use to undermine congressional powers; (3) how the second Senate trial reaffirmed the previously well-established precedent of the Senate’s conducting impeachment trials for impeached officials who were no longer in office; (4) how the constitutional mechanisms for holding Presidents accountable for their misconduct in office, including the previously overlooked Section 3 of the Fourteenth Amendment,<sup>20</sup> fit together; (5) the utility of lawyers and judges in defending the integrity of the electoral process; and (6) the need for uniformly vigorous enforcement of the rules of professional responsibility to redress and curb lawyerly misconduct in public service, including impeachment proceedings. In short, a critical examination of Trump’s two trials enriches our understanding of the viability of various constitutional mechanisms designed to hold Presidents accountable for serious misconduct in office, to

---

19. See *Morrison v. Olson*, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting) (explaining that the executive branch’s strength, unlike the legislative’s, was not “sap[ped]”); John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 *YALE L.J.F.* 374, 375 (2017).

20. U.S. CONST. amend. XIV, § 3.



uphold the rule of law and its relevance for the American people, and to implement appropriate checks on lawyerly misconduct.

### I. IMPEACHMENT'S IMPACT ON PRESIDENTIAL REPUTATIONS AND LEGACIES

The first lesson that Trump's trials teach is that the impeachment process *is* broken, as many commentators have said,<sup>21</sup> but it is not as broken as many of us think. True, the Constitution's requirement that a conviction be by a vote of at least two-thirds of the senators present is practically impossible to meet.<sup>22</sup> The nation has had four presidential impeachment trials and four acquittals: Andrew Johnson (1868), Bill Clinton (1998), Donald Trump (2020), and Donald Trump (2021).<sup>23</sup> Only the first of these—for President Andrew Johnson—came anywhere close to the threshold for conviction, falling but one vote short of the requisite two-thirds required for conviction and removal.<sup>24</sup> The practical impossibility of meeting that threshold becomes even more certain given the rise of rigid party fidelity—allegiance to political party is often stronger than allegiance to the institution of the Senate—and protecting its prerogatives—or to the Constitution. For many Americans who had held Congress in disdain before each of the impeachment proceedings against President Trump,<sup>25</sup> the outcome merely reinforced their sour opinion of the institution. And for those who think that the impeachment trial was a bust because it did not mimic civil or criminal proceedings and lacked a presiding judge to guide the proceedings, Trump's two acquittals surely reinforced their views that the whole episode was a waste of time because it lacked the seriousness of purpose they equate with judicial proceedings.

---

21. See *supra* note 6 and accompanying text.

22. See Gerhardt, *supra* note 6.

23. Dave Roos, *How Many US Presidents Have Faced Impeachment?*, HISTORY (Feb. 17, 2021), <https://www.history.com/news/how-many-presidents-impeached> [<https://perma.cc/RVG6-4NKF>].

24. See MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 32 (1st ed. 2018); see also ELIZABETH RYBICKI & MICHAEL GREENE, CONG. RSCH. SERV., R46185, THE IMPEACHMENT PROCESS IN THE SENATE 5, 10, 20 (2021).

25. See, e.g., *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/5Q6G-J9LK>] (last updated Feb. 2023).

Likely nothing can be said that will make people disdainful of the process alter their opinions, but there are several numbers that cannot be ignored. The first is that although fifty-seven votes for conviction in the second Senate impeachment trial fell ten votes short of the number the Constitution requires for conviction, fifty-seven votes for conviction represents the largest vote for conviction in any presidential impeachment trial in American history.<sup>26</sup> Perhaps more importantly, that number included seven Republicans, the most senators ever to vote to convict a President from their own party and, in doing so, risk the censure of their party.<sup>27</sup> That number is impressive but less so than in 1974, when Richard Nixon appeared likely to have been impeached and convicted had he been tried in the Senate, which, at the time, had fifty-six Democrats, one Independent (caucused with Democrats), one Conservative (caucused with Republicans), and forty-two Republicans.<sup>28</sup> Nonetheless, if we broaden our view of events in 2021, there were more than sixty-seven senators who seriously denounced Trump's involvement in the storming of the Capitol on January 6 to stop Congress from certifying the final results of the 2020 presidential election, which Trump lost.<sup>29</sup> Perhaps the most searing came from Minority Leader Mitch McConnell (R-KY), who condemned Trump for being "practically and morally responsible" for the unprecedented mob attack on Congress.<sup>30</sup> True, Senator McConnell voted to acquit (ostensibly because he opposed using the impeachment process against someone no longer in office) and later said he would support Trump if he were again the Republican nominee for President, but his censure of Trump sticks because it came from a (former) Trump ally and

---

26. See GERHARDT, *supra* note 24, at 32, 36.

27. Ian Millhiser, *The Overwhelming Strength of the Case Against Trump*, in *One Number*, VOX (Feb. 14, 2021, 10:04 AM), <https://www.vox.com/2021/2/14/22282760/trump-impeachment-senate-malapportionment-76-million-acquittal-conviction-capitol> [<https://perma.cc/96NH-KLFF>].

28. *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/A7NR-MR24>].

29. See Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SEC. (Feb. 15, 2021), <https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/> [<https://perma.cc/U2QK-LU4U>] (demonstrating the number of Republican senators who were critical of the merits of Trump's defenses).

30. 167 CONG. REC. S735 (daily ed. Feb. 13, 2021) (statement of Sen. Mitch McConnell).

powerful leader of the Senate Republicans.<sup>31</sup> Trump can relish his acquittal by ignoring the strong bipartisan condemnation of his behavior. But historians, most of the American people, and most members of Congress understand that Trump's legacy is a mess of his own making, and no amount of lying, distortion, ignoring the truth, or blaming others can change the likelihood of his dropping to the near bottom of chief executives because of his dual impeachments and indisputable corruption in office.

Yet, the further we descend into regarding corruption as simply based on party affiliation rather than misconduct, the more we have abandoned the pretense of following the rule of law in guiding public affairs. If Trump has any future in American politics, then that would say more about the state of the American polity than it does Trump and would hardly be good news for the future of the republic.

## II. THE NONJUDICIAL PRECEDENTS ESTABLISHED IN THE TWO TRUMP IMPEACHMENTS AND TRIALS

Precedents matter because they serve the important functions of facilitating stability, fairness, consistency, and predictability in constitutional law and procedures. In litigation, the most important question is often about which judicial precedent is most closely analogous to the conflict at hand. The same question arises in impeachment proceedings. In other words, precedents are not just made by judges. Congress makes them, too.<sup>32</sup> Past impeachment proceedings, in either the House or Senate, are precedents, which are not binding on subsequent Congresses but influence or inform later proceedings.<sup>33</sup> Just as is the case in constitutional law and the common law, the meaning of a precedent depends on how subsequent institutions and generations view it and how much they are willing to invest in its meaning. The fact that no other Presidents quote James Buchanan or look to him as a model reflects his

---

31. See Paul LeBlanc, *McConnell Says He'll 'Absolutely' Support Trump in 2024 if He's the GOP Nominee*, CNN (Feb. 25, 2021, 8:54 PM), <https://www.cnn.com/2021/02/25/politics/mitch-mcconnell-donald-trump-2024/index.html> [<https://perma.cc/3E4Z-WLKG>].

32. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111 (2008).

33. See *id.* at 112.

abysmal performance in office.<sup>34</sup> The same may hold true for Trump, though it is too soon to know for sure.

It is, however, not too soon to speculate on the different possible precedents that the congressional actions in the two Trump impeachments can be understood as establishing. One is that Trump's first acquittal by the Senate, rendered on February 13, 2020, may stand for the proposition that the Senate, as an institution, concluded that Donald Trump did not commit any impeachable misconduct in his interactions with Ukraine's president, including asking him for "a favor," or in refusing to comply with various House subpoenas. Similarly, the second acquittal could be read as an exoneration of Mr. Trump or a signal that not enough senators voted to convict and disqualify and therefore failed to bar Mr. Trump from ever holding presidential office again.

As to whether the two acquittals could be read in any of these ways depends on how subsequent Senates will regard these constitutional events. It is possible, perhaps likely, that there may be a third way to understand their significance—specifically, as establishing the practical impossibility of the Senate ever reaching the threshold for conviction and removal of an American President so long as the President's political party has sufficient numbers to oppose conviction and instead favor acquittal.

To be sure, the second set of impeachment proceedings against Mr. Trump will likely be understood differently than Trump's characterization of the event as "persecut[ing] so unfairly" the people who were engaged in a "protest [of] the Rigged Presidential Election"<sup>35</sup> or as a vindication of the Republican National Committee's recent description of that event as an exercise of "legitimate political discourse."<sup>36</sup> To begin with, Mr. Trump was not vindicated; indeed,

---

34. See *James Buchanan's Troubled Legacy as President*, NAT'L CONST. CTR. (Apr. 23, 2020), <https://constitutioncenter.org/blog/james-buchanan-why-is-he-considered-americas-worst-president/> [<https://perma.cc/6JRV-9SJJ>].

35. Andrew Solender, *Trump Says Jan. 6 Defendants 'Persecuted So Unfairly' Ahead of Capitol Rally*, FORBES (Sept. 16, 2021, 2:38 PM), <https://www.forbes.com/sites/andrewsolender/2021/09/16/trump-says-jan-6-defendants-persecuted-so-unfairly-ahead-of-capitol-rally/?sh=2706f760ccba> [<https://perma.cc/KNP7-3DVZ>].

36. Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack 'Legitimate Political Discourse'*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> [<https://perma.cc/XT5V-TC62>] (quoting Republican National Committee).

most of the forty-three senators who voted to acquit him explained they had done so because former Presidents are not subject to impeachment.<sup>37</sup> A majority of the Senate formally voted (56-44) to acknowledge and accept jurisdiction over the trial, even though Trump was no longer in office when the trial began.<sup>38</sup> Senator Richard Burr (R-NC) explained in his post-trial statement that he had accepted that a majority of the Senate had retained jurisdiction and therefore felt he had no choice but to vote on the merits of the case.<sup>39</sup> For him, the merits were clear—he voted to convict Trump.<sup>40</sup> Others, such as Senator Charles Grassley (R-IA), said they voted against jurisdiction but accepted the decision of the Senate to hold the trial and thus they reached the merits of the case.<sup>41</sup> He voted to acquit.<sup>42</sup>

The important point is that the Senate followed its own precedent in Trump's second trial: indeed, it was not the first time the Senate accepted such jurisdiction over someone no longer in office. In fact, this was the sixth time the Senate had done that—a majority voted in the first impeachment trial in 1798 that it had jurisdiction to consider the conviction of Senator William Blount, who was no longer in office; the Senate proceeded with an impeachment trial of West Humphreys more than a year after he had abandoned his federal judgeship to join the confederacy; the Senate voted that it had jurisdiction to conduct the impeachment trial of William Belknap, who had resigned just before the House impeached him for bribery;<sup>43</sup> and the Senate proceeded with impeachment

---

37. See Goodman & Asabor, *supra* note 29.

38. 167 CONG. REC. S609 (daily ed. Feb. 9, 2021).

39. Press Release, Sen. Richard Burr, Senator Burr Statement on Vote to Convict Former President Trump on Article of Impeachment (Feb. 13, 2021), <https://www.burr.senate.gov/2021/2/senator-burr-statement-on-vote-to-convict-former-president-trump-on-article-of-impeachment> [<https://perma.cc/GE29-DMQC>].

40. See *id.*

41. Press Release, Sen. Chuck Grassley, Grassley Statement on Impeachment Trial (Feb. 13, 2021), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-on-impeachment-trial> [<https://perma.cc/N794-7QNX>].

42. See *id.*

43. See Michael J. Gerhardt, *History Shows the Senate Can Hold an Impeachment Trial After Trump Leaves Office*, JUST SEC. (Jan. 15, 2021), <https://www.justsecurity.org/74226/history-shows-the-senate-can-hold-an-impeachment-trial-after-trump-leaves-office/> [<https://perma.cc/5PAD-KMES>]; see also Michael J. Gerhardt, *The Constitution's Option for Impeachment After a President Leaves Office*, JUST SEC. (Jan. 8, 2021), <https://www.justsecurity.org/74226/history-shows-the-senate-can-hold-an-impeachment-trial-after-trump-leaves-office/>.

trials of two other judges, George English and Robert Archbald, after they had left the positions in which they had committed misconduct.<sup>44</sup> In yet another case, the Senate voted to dismiss the trial because the impeached official, Samuel Kent, had resigned from office before the start of the trial.<sup>45</sup> It is true, as one of Trump's lawyers said, that senators were free to disregard those precedents and vote their consciences; however, it is also true that in the future, senators may follow these precedents and hold an impeachment trial for someone who has left office. The Senate vote to accept jurisdiction over Trump's case is not binding, but it is persuasive authority for any senator in the future to consider.

Moreover, one has to ignore reality to suggest, as Mr. Trump and others have done, that there was no physical attack on Congress on January 6, 2021, but instead peace-loving "tourist[s]" visiting the Capitol<sup>46</sup> or Trump voters merely engaging in "legitimate political discourse" at the Capitol regarding the 2020 presidential election.<sup>47</sup> Any such characterizations are fiction: they are contradicted by a remarkable array of real, credible evidence to the contrary, including but not limited to the media's video coverage, eyewitness testimony, security cameras within the Capitol, and the guilty pleas of more than a few hundred people who stormed the Capitol on January 6, 2021.<sup>48</sup> Indeed, the Republican leader in the Senate, Mitch McConnell (R-KY), declared, "We saw it happen. It was a violent insurrection for the purpose of trying to prevent the peaceful

---

justsecurity.org/74107/the-constitutions-option-for-impeachment-after-a-president-leaves-office/ [https://perma.cc/D27G-CTH4].

44. See generally 68 CONG. REC. 339, 344, 347 (1926) (debating the House of Representatives' recommendation that charges be dismissed following Judge English's resignation); 48 CONG. REC. 8902, 8904-06 (1912) (detailing Judge Archbald's misconduct).

45. *Kent, Samuel B.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kent-samuel-b> [https://perma.cc/F9PC-LM4B].

46. See Bess Levin, *Republican Lawmakers Claim January 6 Rioters Were Just Friendly Guys and Gals Taking a Tourist Trip Through the Capitol*, VANITY FAIR (May 12, 2021), <https://www.vanityfair.com/news/2021/05/capitol-attack-tourist-visit> [https://perma.cc/JM8J-U574] (quoting Republican members of Congress).

47. See Weisman & Epstein, *supra* note 36.

48. See Madison Hall, *At Least 476 Rioters Have Pleaded Guilty for Their Role in the Capitol Insurrection So Far. This Table Shows Them All.*, INSIDER (Feb. 16, 2023, 11:56 AM), <https://www.insider.com/capitol-rioters-who-pleaded-guilty-updated-list-2021-5> [https://perma.cc/T48C-TRJA].

transfer of power after a legitimately certified election, from one administration to the next. That's what it was."<sup>49</sup>

There is yet another possible construction of the first impeachment proceedings in which the House charged then-President Trump with obstruction of Congress resulting from his refusals to comply with duly authorized legislative subpoenas directed at the White House and ten high-ranking officials in his administration. Mr. Trump and his Republican defenders in the House dismissed the precedent established when the House Judiciary Committee in 1974 approved an article of impeachment against Richard Nixon for failing to comply with four legislative subpoenas.<sup>50</sup> Instead, they asserted that Mr. Trump was acting well within the scope of his powers as President in refusing to order underlings to comply with several subpoenas issued by the House during the investigative phase of the first impeachment, on top of refusing to comply himself.<sup>51</sup> This stance derived from then-President Trump's apparent embrace of a robust conception of the "theory of the unitary executive," which posits that the President should have control over the exercise of *all* executive power.<sup>52</sup> The theory is grounded in reading the text of Article II of the Constitution as investing all "executive [p]ower" in the President<sup>53</sup> and in the need for such a theory to ensure the uniform enforcement of federal law (because all prosecutors would then serve at the pleasure of the President) and presidential accountability for the exercise of executive power by any federal official.<sup>54</sup> This construction of the scope of presidential power, especially under the circumstances of the first impeachment effort, vested Mr. Trump, in his capacity as President, with the final say over what information produced within the executive branch was covered by executive privilege and therefore could be denied to

---

49. Jonathan Weisman & Annie Karni, *McConnell Denounces R.N.C. Censure of Jan. 6 Panel Members*, N.Y. TIMES (Feb. 8, 2022), <https://www.nytimes.com/2022/02/08/us/politics/republicans-censure-mcconnell.html> [<https://perma.cc/FTA6-5X35>].

50. On the impeachment proceedings brought against Richard Nixon, see generally STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 523, 526, 528-29 (1990).

51. See Harrison, *supra* note 19, at 374-75.

52. *Id.* at 374 n.1.

53. See U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

54. See Harrison, *supra* note 19, at 374 n.1.

Congress—even in impeachment proceedings investigating presidential misconduct. Mr. Trump ordered the entire executive branch not to cooperate with what his White House Counsel characterized as a “partisan” and “unconstitutional” impeachment proceeding.<sup>55</sup> As Mr. Trump declared during the first trial, “[W]e have all the material. They don’t have the material.”<sup>56</sup> Under such an understanding of executive power, the President is able to thwart an impeachment investigation and, as a result, effectively place himself beyond the reach of the one power that the Constitution vests in Congress to address the most serious kinds of abuse of power by the President.<sup>57</sup> Such a construction of presidential power is hard to square with a constitution, such as ours, that is premised on the idea that no one is above the law.<sup>58</sup>

No doubt, the two impeachment efforts directed against Mr. Trump confirm that the federal impeachment process is primarily a numbers game, depending heavily, if not entirely, on the partisan compositions of both the House and the Senate. Time will determine what other meanings future Senates will attach to both the first and second trials of Donald Trump.

### III. COORDINATING CONSTITUTIONAL MECHANISMS FOR HOLDING PRESIDENTS ACCOUNTABLE FOR THEIR MISCONDUCT IN OFFICE

In *Nixon v. Fitzgerald*, the Supreme Court ruled that Presidents are absolutely immune to civil actions based on their official conduct.<sup>59</sup> The Court explained that the mechanisms for addressing

---

55. Aaron Blake, *The White House’s Scathing and Legally Dubious Impeachment Letter, Annotated*, WASH. POST (Oct. 9, 2019, 9:28 AM), <https://www.washingtonpost.com/politics/2019/10/09/white-houses-scathing-legally-questionable-impeachment-letter-annotated/> [<https://perma.cc/PW6D-ACD7>].

56. Peter Wade, *Trump Brags About Concealing Impeachment Evidence: ‘We Have All the Material, They Don’t,’* ROLLING STONE (Jan. 22, 2020), <https://www.rollingstone.com/politics/politics-news/trumpimpeachment-evidence-we-have-all-the-material-they-dont-941140/> [<https://perma.cc/VDC2-2YTS>].

57. See Kimberly Wehle, Opinion, *Congress Has Lost Its Power over Trump*, THE ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/checks-and-balances-trump-has-swept-away/606013/> [<https://perma.cc/TE3H-U8Z9>].

58. This understanding of the Constitution has driven the reasoning and outcomes of a number of Supreme Court decisions, including *United States v. Nixon*, 418 U.S. 683, 706-07, 715 (1974), and, more recently, *Trump v. Vance*, 140 S. Ct. 2412, 2424, 2429 (2020).

59. 457 U.S. 731, 749 (1982).



a President's misconduct in office are impeachment, congressional oversight, presidential elections, the judgment of history, and media scrutiny.<sup>60</sup> Later, the Supreme Court recognized that Presidents are not immune to either civil<sup>61</sup> or criminal actions based on their pre-presidential misconduct.<sup>62</sup>

There is, to a significant degree, surprising consensus among legal scholars on the application of each of these to presidential misconduct. For example, legal scholars agree on much of the law of impeachment.<sup>63</sup> They largely agree on the meanings of the basic grounds for impeachment as set forth in the Constitution, namely, that they are limited to "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>64</sup> "Treason" is defined in the Constitution (though, as shown below, it could be given a more colloquial meaning);<sup>65</sup> "bribery" may sensibly be read as referring to how the common law at the time of the Founding understood the term as misuse of office for personal gain or how federal criminal statutes define bribery;<sup>66</sup> and "other high crimes or misdemeanors" were technical terms borrowed from the British system that the Framers' generation understood as "political crimes" or abuses of power.<sup>67</sup> In practice, it is well understood that not all felonies are impeachable offenses, and not all impeachable offenses are felonies.<sup>68</sup> Further, there is general agreement among historians and legal scholars that impeachment is a unique political procedure in which there are no required rules of evidence or burdens of proof.<sup>69</sup> Instead, in the

---

60. *See id.* at 757.

61. *See* *Clinton v. Jones*, 520 U.S. 681, 684 (1997).

62. *Vance*, 140 S. Ct. at 2420, 2431.

63. *See* Natasha Bertrand, *Legal Scholars, Including at Federalist Society, Say Trump Can Be Convicted*, POLITICO (Jan. 21, 2021, 2:01 PM), <https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089> [<https://perma.cc/QT5R-CSQX>].

64. U.S. CONST. art. II, § 4.

65. *See id.* art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

66. *The Impeachment Inquiry into President Donald J. Trump: The Constitutional Foundations for President Impeachment: Hearing Before the H. Judiciary Comm.*, 116th Cong. 5 (2019) (written statement of Michael Gerhardt, Burton Craige Distinguished Professor of Jurisprudence, University of North Carolina at Chapel Hill), <https://docs.house.gov/meetings/JU/JU00/20191204/110281/HHRG-116-JU00-Wstate-GerhardtP-20191204.pdf> [<https://perma.cc/MLP7-E3JK>].

67. *See* GERHARDT, *supra* note 24, at 59-60.

68. *See id.*

69. *See id.* at 90-91.

federal impeachment process, members of Congress decide for themselves which burdens to apply and how much weight to attach to different kinds of evidence.<sup>70</sup> There is also widespread recognition that the Constitution only authorizes two sanctions in the impeachment process—removal and disqualification.<sup>71</sup>

Yet, it has become common, even predictable, for the contending sides in impeachment proceedings to deviate from these basic understandings to further their agendas. They adopt different constructions of both the scope of impeachable offenses and the relevance of alternatives for sanctioning the President besides through the impeachment process. For example, the House of Representatives took the position in impeaching Andrew Johnson that impeachable offenses included abuses of power that were not codified as actual federal crimes.<sup>72</sup> In response, Johnson's counsel, including the eminent Benjamin Curtis, argued that Presidents could only be impeached, convicted, and removed from office for actual crimes that were codified as such.<sup>73</sup> The narrow construction precluded most if not all charges made against Johnson.

The first Trump impeachment proceeding tracked these different constructions, with the House approving two impeachment articles charging presidential misconduct that was not indictable criminal misconduct and Mr. Trump's defenders arguing that impeachable offenses must or should be actual crimes.<sup>74</sup> Proving the elements of criminal activity is much harder to establish than abuses of power (that is, violating the limits of presidential power), and thus the President's defenders made the Managers' burden more difficult to fulfill and created confusion over the proper scope of impeachable offenses, both of which helped to facilitate acquittals in both trials.

Moreover, Mr. Trump's counsel and Republican defenders in Congress argued in the first impeachment that the proper means of holding the President accountable for his conduct in the Ukraine

---

70. *Id.*

71. *See id.* at 107.

72. *See* MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 105 (1999).

73. *See id.* at 152-56.

74. *See* Keith E. Whittington, *Must Impeachable Offenses Be Violations of the Criminal Code?*, *LAWFARE* (Nov. 19, 2019, 12:19 PM), <https://www.lawfareblog.com/must-impeachable-offenses-be-violations-criminal-code> [<https://perma.cc/CM8V-5SDD>].

matter was popular election.<sup>75</sup> They insisted that both impeachment efforts were blatant attempts to undo his presidential election.<sup>76</sup> President Clinton's counsel and defenders in Congress made similar arguments in his defense.<sup>77</sup>

Yet the entire point behind a presidential impeachment is that the elected President did something bad in office, requiring the imposition of the most significant sanction available to Congress: conviction and removal from office.<sup>78</sup> In addressing the President's defense that his impeachment was aimed at undoing his election, House Managers were squandering precious time (and public attention), as they were forced to defend a proposition that was obvious to anyone who was familiar with the Constitution but felt the need to clear up the confusion sown by Trump's lawyers. Instead, the House should have considered adopting an article charging the President with self-dealing, which goes beyond statutory limits and encompasses corrupt practices, which the Founders understood as impeachable.

In the second impeachment proceeding brought against Mr. Trump, the defense was similar, albeit with some significant differences from his defense in his first impeachment. Mr. Trump's counsel and Republican defenders in Congress argued, as they had in the first proceedings, that the House hearings were unfair and violated basic due process of law.<sup>79</sup> They argued that due process of law required that Mr. Trump's counsel be allowed to cross-examine

---

75. See *Impeachment: Democrats Undoing 2016 Election, Say Trump Lawyers*, BBC NEWS (Jan. 25, 2020), <https://www.bbc.com/news/world-us-canada-51251395> [<https://perma.cc/YQ94-B6TN>].

76. See *id.*

77. See *Clinton Lawyers Attack Impeachment Charges: Defense Team Urges Senate Not to Undo '96 Election*, CNN (Jan. 20, 1999, 7:47 PM), <https://www.cnn.com/ALLPOLITICS/stories/1999/01/20/impeachment.01/> [<https://perma.cc/V9CB-9T5S>].

78. See Stephen I. Vladeck, Opinion, *Impeachment Does Not 'Overturn' an Election*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/opinion/impeachment-trump.html> [<https://perma.cc/QD9H-QQ6E>].

79. See Jon Greenberg, *Trump Lawyer Claims Lack of Due Process in House Impeachment. 3 Reasons the Law Doesn't Back Him Up*, POLITIFACT (Oct. 10, 2019), <https://www.politifact.com/article/2019/oct/10/trump-lawyer-claims-lack-due-process-house-impeach/> [<https://perma.cc/9MJA-UYX7>]; David Schoen Says "Snap Impeachment" Violated President Trump's Due Process Rights, C-SPAN VIDEO (Feb. 12, 2021), <https://www.c-span.org/video/?c4945686/david-schoen-snap-impeachment-violated-president-trumps-due-process-rights> [<https://perma.cc/7KA8-KNXZ>].

witnesses and do discovery during the House phase of the impeachment,<sup>80</sup> and they insisted further that, because they understood the President could only be impeached for actual felonies, the House had failed to prove each element of the crime of inciting insurrection.<sup>81</sup> They claimed further that Mr. Trump's speech was protected by the First Amendment as political speech and therefore could not be punished in an impeachment proceeding.<sup>82</sup> Lastly, they argued that once the matter got to the Senate, the Senate lacked jurisdiction because Mr. Trump had left office by the time the second trial started.<sup>83</sup>

As constitutional arguments, none of these were strong, but none of them had to be. They were made to score political points and to appeal to the political bases (and senators) opposed to ousting the incumbent President. The arguments had further sowed the seeds of confusion and discord among the public and provided the cover needed for senators to oppose conviction and, as was the case in the second trial of Mr. Trump, the Senate's assertion of jurisdiction over the matter.<sup>84</sup>

Two examples illustrate the political objectives of presidential defenses in the second Trump trial. At the outset of the trial, Rand Paul and several other Republican senators insisted that the Chief Justice of the United States should preside.<sup>85</sup> While the Constitution provides that the Chief Justice should preside over presidential impeachment trials,<sup>86</sup> the argument was made that even though Mr. Trump was no longer in office, the Chief Justice should still preside.<sup>87</sup> Obviously, the Constitution plainly does not allow two people to be President at the same time.<sup>88</sup> Because Biden was not on

---

80. See Blake, *supra* note 55.

81. See Goodman & Asabor, *supra* note 29.

82. See Summer Lin, *Trump Lawyers to Argue His Speech Before Capitol Riot Is Protected by First Amendment*, MCCLATCHY DC (Feb. 3, 2021, 12:45 AM), <https://www.mcclatchydc.com/news/politics-government/article248955004.html> [<https://perma.cc/AB7E-9262>].

83. See Goodman & Asabor, *supra* note 29; Alexander Bolton, *Paul Says Roberts's Absence 'Crystalized' Argument Against Trump Impeachment*, THE HILL (Jan. 29, 2021, 6:01 AM), <https://thehill.com/homenews/senate/536424-paul-says-robertss-absence-crystalized-argument-against-trump-impeachment/> [<https://perma.cc/C6RK-6VQH>].

84. See Goodman & Asabor, *supra* note 29.

85. See Bolton, *supra* note 83.

86. U.S. CONST. art. I, § 3, cl. 6.

87. See Bolton, *supra* note 83.

88. See, e.g., U.S. CONST. art. II, § 1, cl. 1.

trial, the responsibility for presiding over the second trial defaulted to Vice President Kamala Harris, who quickly declined, and then to Senator Patrick Leahy (D-VT), the Senate Pro Tempore, who accepted the responsibility.<sup>89</sup> Yet, the argument that Chief Justice Roberts should preside persisted because its point was to underscore that Trump required the protections accorded to presidents in impeachment trials because his alleged misconduct occurred while he was president, and perhaps even that Trump, not Biden, was the legitimate President, or both. The argument was primarily a political appeal, not a serious construction of the Constitution.

Another example of the confusion sowed by Mr. Trump's legal counsel arose late on the last day of the second impeachment trial. One of Mr. Trump's lawyers Michael van der Veen disdainfully dismissed what he termed, with a sneer, the "Raskin doctrine," or the possibility that an acquittal of Trump would license future Presidents to abuse power all they want in the last few weeks of their terms.<sup>90</sup> Van der Veen suggested that Presidents would not get away with misconduct in their final days in office because they remained liable at law for their actions. If, for example, a President incited an insurrection, then he could be prosecuted later for having done so, he argued.

Like so many arguments made during the trial, this one was politically effective but constitutionally weak because it required distorting facts and the law of impeachment. It is true that if a President murdered someone in his last week in office, then he could be prosecuted later for the crime. But that situation (putting aside the question of whether the deed was done in the President's official capacity) was not the one posed in either trial. The Framers designed impeachment to address "political crimes" or abuses of power that are not indictable offenses.<sup>91</sup> For example, Presidents may be impeached for betraying their office, though that is not a

---

89. See Susan Cornwell, *Senator Leahy, Not Chief Justice, to Preside over Trump's Second Impeachment Trial*, REUTERS, Feb. 9, 2021, 6:21 AM, <https://www.reuters.com/article/us-usa-trump-impeachment-leahy/senator-leahy-not-chief-justice-to-preside-over-trumps-second-impeachment-trial-idUSKBN2A91E9> [<https://perma.cc/5B5D-X7UH>].

90. Lindsay Watts, *Siege on Democracy: Raskin Doctrine*, FOX 5 DC, at 30:44 (Mar. 17, 2021), <https://www.fox5dc.com/podcasts/siege-on-democracy-raskin-doctrine> [<https://perma.cc/DU7W-EWMB>].

91. See *supra* notes 63-67 and accompanying text.

crime for which they could go to prison. Thus, saying that there is a remedy at law for a President's misconduct near the end of Trump's trial was mistaken, ill-informed, or misleading because the misconduct that impeachment was primarily designed to address is not redressable in a court of law. Impeachment was placed in the Constitution as the principal sanction for the misconduct not redressable in the law, and notably they provided for no timeframe for the impeachment or trial to take place. Moreover, neither Trump's lawyers nor the senators who defended Trump paid sufficient attention to original meaning. For those who care about principled originalism, every example of an impeachable offense given in the constitutional convention was an abuse of power for which there was no remedy at law. In fact, their arguments defied the original meaning, raising the question of whether they really believe it ought to guide constitutional interpretation in every context, as they profess at other times and in other hearings.

Concerned perhaps with pushback from the other side and perhaps from within their own caucus, both the House and the House Managers fell into the trap of characterizing Trump's misconduct as criminal. This allowed Trump's lawyers to exploit their mistake by insisting that the Managers prove each element of the crimes alleged, though the Managers were not obliged to do so. When the Managers did not meet the burdens assigned to them the President's lawyers, the latter argued the Managers had failed to demonstrate each of the elements of the crime of incitement to insurrections, though the Managers were not obligated to do so. Defense lawyers in impeachment trials naturally try to narrow the field of impeachable offenses to felonies, but as retired judge Michael McConnell argued, the House could have crafted the impeachment article more broadly and not in terms of any given felony, something that House Managers would have had an easier time proving in the trial.<sup>92</sup>

There was confusion, too, about the possible relevance of Section 3 of the Fourteenth Amendment, which provides in pertinent part:

---

92. See Michael W. McConnell, Opinion, *How Democrats Could Have Made Republicans Squirm*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/opinion/trump-impeachment-acquitted.html> [<https://perma.cc/8Z37-DXRG>].

No person shall be a Senator or Representative ... or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.<sup>93</sup>

Few people had thought much about whether this provision could be applied to Mr. Trump (or any President) before the second impeachment trial,<sup>94</sup> and it quickly became apparent there was no consensus on whether it should. Mr. Trump's defenders dismissed this possible sanction on the ground that it was meant to apply to former Confederates trying to run for office after the Civil War.<sup>95</sup> This was the only time during either trial of Mr. Trump that his counsel purported to rely on original meaning,<sup>96</sup> which they insist in judicial confirmation proceedings is the only permissible ground for constitutional decision-making. Even if it did apply, members of Congress and legal experts were unsure about whether Congress could decide on its own if someone was an insurrectionist or whether a court, or some other tribunal, had to issue a finding that could then become the basis for barring someone from serving in a federal office.<sup>97</sup> In any event, the Senate never formally considered the possible application of this sanction, and its potential as a mechanism for holding Presidents or other officials accountable for insurrection has been left for other occasions to clarify.

---

93. U.S. CONST. amend. XIV, § 3.

94. See Masood Farivar, *Some Lawmakers, Experts Eye 14th Amendment to Bar Trump from Future Office*, VOICE OF AM. (Feb. 4, 2021, 2:51 AM), [https://www.voanews.com/a/usa-us-politics\\_some-lawmakers-experts-eye-14th-amendment-bar-trump-future-office/6201591.html](https://www.voanews.com/a/usa-us-politics_some-lawmakers-experts-eye-14th-amendment-bar-trump-future-office/6201591.html) [<https://perma.cc/Q5TZ-CQ96>].

95. See *id.*

96. See 167 CONG. REC. S597, S600 (daily ed. Feb. 9, 2021) (statement of Bruce Castor, Lead Counsel for Mr. Trump during second impeachment trial).

97. For one of the few scholars who did, see Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 19, 2021, 1:43 PM), <https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6> [<https://perma.cc/T8X6-84CG>].

## IV. TAKING LEGAL ETHICS SERIOUSLY

Similar to how many lawyers in the Nixon administration responded to the Watergate scandal, which culminated in Richard Nixon's resignation from the presidency on August 8, 1974, lawyers within the Trump administration responded differently to the President's efforts to obstruct final certification of the 2020 presidential election and entreaties to violate laws and ethical norms. Some responses have been more effective in safeguarding the rule of law than others.

To begin with, shortly after Watergate, law schools started requiring law students to take a course in legal ethics.<sup>98</sup> The idea was to increase lawyers' awareness of the ethical rules governing their profession,<sup>99</sup> but to what extent such courses have reduced or diminished unethical lawyering is unclear. Nor would it seem that additional or different rules of professional responsibility would be any more effective at curbing lawyers' misconduct on behalf of powerful figures such as Presidents of the United States.

Second, some administration lawyers merely followed the President's demands and facilitated his most egregious misconduct. I take three examples from the two Trump impeachments, including Trump's persistent efforts to overturn the 2020 presidential election that he lost.

Two months before the first impeachment formally commenced in the House, Trump's White House counsel issued a memorandum replete with misleading and false statements of fact and law.<sup>100</sup> It reiterated the canard that the whistleblower's report (shared with the House Intelligence Committee) was a "false version" of then-President Trump's phone call with Ukraine's president on July 25, 2019, though no evidence was ever produced undermining the account.<sup>101</sup> Indeed, there was nothing false about the report. It was corroborated by virtually every witness who testified before the

---

98. See Mark Hansen, *Watergate and the Rise of Legal Ethics*, A.B.A. J., Jan. 2015, at 51.

99. See *id.*

100. See *Read the White House Letter in Response to the Impeachment Inquiry*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/interactive/2019/10/08/us/politics/white-house-letter-impeachment.html> [<https://perma.cc/525F-JRSX>].

101. See *id.*



House Intelligence Committee, and, surely much to the President's chagrin, the people testifying against him were not Democrats but people from within his own administration.<sup>102</sup> It is an understatement to suggest that those testifying in defiance of the president's wishes were courageous and committed to the rule of law. It does not just strain credulity but decimates it to maintain that everyone who has testified under oath in these hearings is lying while only the President is telling the truth.

The memorandum repeatedly insisted that the President's call was "[a]ppropriate" because his concern was with corruption in Ukraine.<sup>103</sup> If the President had such a concern, it is striking that it was never mentioned anywhere in his speeches or, more pertinent to the impeachment, in any of Trump's calls with Ukraine's president.<sup>104</sup> Indeed, the word "corruption" does not appear in the transcript of Trump's call with Ukraine's president.<sup>105</sup> The President had no general concern about corruption in that country but instead, as numerous witnesses attested and new documents produced after the impeachment confirm, his concern was always about the Bidens.<sup>106</sup> In the famous July 25 call with the president of Ukraine, the President mentioned the Bidens three times.<sup>107</sup> He did not otherwise mention corruption.<sup>108</sup> The evidence found by the House Intelligence Committee also revealed that there was a systematic effort to create a shadow operation to get rid of the United States' exemplary ambassador in Ukraine, all done for the purpose of putting pressure on Ukraine to agree merely to the announcement

---

102. See Karoun Demirjian, Mike DeBonis & Matt Zapotosky, *Trump Said His Ukraine Call Was 'Perfect.' Impeachment Witnesses Testified Otherwise.*, WASH. POST (Nov. 19, 2019, 8:40 PM), [https://www.washingtonpost.com/politics/lt-col-alexander-vindman-reveals-in-testimony-that-he-told-an-intelligence-official-about-trumps-call-with-ukrainian-leader/2019/11/19/61c46b16-0ae4-11ea-8397-a955cd542d00\\_story.html](https://www.washingtonpost.com/politics/lt-col-alexander-vindman-reveals-in-testimony-that-he-told-an-intelligence-official-about-trumps-call-with-ukrainian-leader/2019/11/19/61c46b16-0ae4-11ea-8397-a955cd542d00_story.html) [<https://perma.cc/Q7JB-LY87>].

103. Trial Memorandum of President Donald J. Trump from Pat A. Cipollone, Couns. to President 99 (Jan. 20, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/01/ukraine-clearinghouse-Trial-Memorandum-of-President-Donald-J.-Trump-january-20-2020.pdf> [<https://perma.cc/5AMX-AEJH>].

104. See *Full Document: Trump's Call with the Ukrainian President*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/interactive/2019/09/25/us/politics/trump-ukraine-transcript.html> [<https://perma.cc/MVA6-DFJJ>].

105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

of an investigation against the Bidens.<sup>109</sup> There was, in fact, no concern about an actual investigation, just the announcement, and the reason why is obvious—to promulgate dirt on a likely rival in the next presidential election.

The memorandum repeatedly complained that the House did not afford the president “due process.”<sup>110</sup> Throughout the House’s impeachment proceedings, Republicans on the Intelligence and Judiciary Committees proclaimed “due process” was a problem.<sup>111</sup> Yet, the very same Republicans who made this complaint had been invited to or participated in the closed-door depositions they complained were not open to them.<sup>112</sup> Moreover, “due process” does not apply to these proceedings because “due process” applies to the government when it is depriving someone of “life, liberty, or property.”<sup>113</sup> In an impeachment, none of those interests are at risk, so the Clause does not apply. Even if it did, basic due process requires notice of a hearing and an impartial decision maker.<sup>114</sup> Yet, the President had these safeguards, and more, throughout the House proceedings. He was given lots of fair process (including being invited to attend the testimony of constitutional law scholars and even to question them),<sup>115</sup> but he and his White House counsel turned the opportunities down. Their point was to reap the political or partisan benefits of making such complaints rather than actually setting any record straight.

Further, the memorandum argued that there were no witnesses with “direct knowledge” of the call or the President’s role and the evidence was nothing but “speculation based on hearsay.”<sup>116</sup> To begin with, these were political talking points, not genuine legal arguments. Numerous prosecutions and impeachments have turned on indirect or circumstantial evidence; neither the Constitution nor the rules of either the House or the Senate forbid this. Moreover, key witnesses with direct knowledge of the call were ordered by the

---

109. See H.R. REP. NO. 116-335, at 25 (2019).

110. See, e.g., Trial Memorandum of President Donald J. Trump, *supra* note 103, at 6.

111. See, e.g., H.R. REP. NO. 116-335, at 355-56.

112. See *id.* at 177-78.

113. U.S. CONST. amend. XIV, § 1.

114. See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

115. See H.R. REP. NO. 116-335, at 177.

116. Trial Memorandum of President Donald J. Trump, *supra* note 103, at 87, 96.

President not to testify.<sup>117</sup> The President's lawyers defended the President's refusals to comply with House subpoenas related to the House's investigation of the July 25 call on the ground that as President, Trump was entitled to assert legal defenses in response to them, but that was not, nor could it have been, the case when he ordered the entire executive branch not to cooperate with the inquiry.<sup>118</sup> That was not a defense. That was obstruction.

The memorandum also suggested that the two articles of impeachment the House was preparing to approve in 2019 were "impermissibly duplicitous" and that impeachable offenses must be "violations of established law."<sup>119</sup> Abuse of power, charged in the first article,<sup>120</sup> is not "duplicitous" in the least. One merely needs to read the Constitutional Convention debates and *The Federalist Papers* to know the Framers put impeachment in the Constitution as a check on abuse of power.<sup>121</sup> The memorandum never bothered to consider, as Section 3.3 of collected House precedent counsels, what an abuse of power is.<sup>122</sup> In fact, it is the exercise of power in violation of the Constitution.<sup>123</sup> So, the impeachment articles did allege a violation of "established law," in this case the supreme law of the land.

In addition, the memorandum argued that the fact that the President is unique among federal officials is precisely why he may not be impeached, convicted, and removed for abuse of power.<sup>124</sup> As Trump himself declared early in his presidency, the Constitution enabled him "to do whatever [he] want[ed]."<sup>125</sup>

According to the memorandum, the only means for holding President Trump accountable for any alleged misconduct in office

---

117. See H.R. REP. NO. 116-335, at 193.

118. See *id.* at 175.

119. Trial Memorandum of President Donald J. Trump, *supra* note 103, at 15, 109.

120. H.R. Res. 755, 116th Cong. (2019).

121. See, e.g., THE FEDERALIST NO. 65, at 330 (Alexander Hamilton) (Ian Shapiro ed., 2009).

122. See 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at 423-24 (1977).

123. See *id.*

124. Trial Memorandum of President Donald J. Trump, *supra* note 103, at 24.

125. Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want,'* WASH. POST (July 23, 2019, 9:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> [<https://perma.cc/AA8S-225N>]. Trump repeated the assertion several other times during his presidency. See *id.*

was through elections.<sup>126</sup> Of course, this was exactly what Mr. Trump wanted—to be able, in the Ukraine situation, to turn the circumstance to his personal advantage and use congressional appropriations to Ukraine for *his* personal reasons and to benefit himself. The memorandum insisted that removing Trump on the basis of the misconduct set forth in the House’s two impeachment articles “would permanently weaken the Presidency and forever alter the balance among the branches of government in a manner that offends the constitutional design established by the Founders.”<sup>127</sup> That was a strong claim; the White House lawyers were wishing for Trump as President to do exactly what they argued Congress wished for itself—not to be subject to the Constitution’s system of checks and balances. If impeachment were not legitimate because it was “partisan”<sup>128</sup> and, according to his lawyers, the President was not subject to civil or criminal accountability while he was in office,<sup>129</sup> then he would be effectively free to try to rig elections or abuse his power any way he wished without any fear of constitutional sanction.

To be sure, it made eminent sense for Trump’s lawyers to make political appeals in a political proceeding, particularly because they had enough votes to acquit to prevent a conviction. Yet, Trump’s lawyers in the second trial claimed, with the Senate and nation listening, that “the entire premise of [Trump’s] remarks [on January 6] was that the democratic process would and should play out according to the letter of the law.”<sup>130</sup> This was pure fiction. Instead, he was urging his Vice President to reopen the certification of the election and “send it back to the States,” even though Vice President Pence had no such power.<sup>131</sup> Trump’s lawyers insisted that he had “encouraged those in attendance to exercise their rights ‘peacefully and patriotically,’”<sup>132</sup> a fact that was true, but they neglected to

---

126. Trial Memorandum of President Donald J. Trump, *supra* note 103, at 17-18.

127. *Id.* at 1.

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

129. *See* Trial Memorandum of President Donald J. Trump, *supra* note 103, at 1-3, 43-44.

130. 167 CONG. REC. S667-68 (daily ed. Feb. 12, 2021) (statement of Mr. Van der Veen).

131. *See id.* at S618 (daily ed. Feb. 10, 2021) (statement of Rep. Joseph Neguse).

132. *Id.* at S667 (daily ed. Feb. 12, 2021) (statement of Mr. Van der Veen).

mention how this Trump statement contrasted with Trump's use of the word "fight" or "fighting" twenty times.<sup>133</sup> Michael Van der Veen declared that "[a]t no point was the President informed the Vice President was in any danger,"<sup>134</sup> but Senator Tommy Tuberville (R-AL), whom Trump called to urge to continue to protest the election, told Trump that Vice President Pence had to be taken out of the chamber for his safety.<sup>135</sup> Trump's initial response was to do nothing. The House Managers' final piece of evidence was an affidavit from a congresswoman who said that the House Minority Leader informed her of his inability to get Trump to issue a strong statement telling the mob to disperse. Trump's lawyers blamed the "Democrats" for not starting the trial before Trump's term ended,<sup>136</sup> but they conveniently left out the fact that Mitch McConnell, as Majority Leader, refused to accept the articles until the day before Biden's inauguration.<sup>137</sup> Van der Veen also told the Chamber, "[o]ne of the first people arrested was a leader of antifa," a claim decisively proven false.<sup>138</sup>

Third, lawyers have resigned in protest over or publicly taken issue with Presidents' requests that they break the law or impede official investigations of presidential misconduct in office. In Watergate, this was famously done when Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigned rather than comply with the President's order that they dismiss the Special Prosecutor, who was investigating the President's misconduct.<sup>139</sup> In contrast, Mr. Trump's Attorney General,

---

133. *Id.* at S632 (daily ed. Feb. 10, 2021) (statement of Rep. Madeleine Dean).

134. *Id.* at S722 (daily ed. Feb. 13, 2021) (statement of Rep. David Cicilline).

135. *See id.* at S723.

136. *Id.* at S671 (daily ed. Feb. 12, 2021) (statement of Mr. Van der Veen).

137. *See id.* at S669.

138. Daniel Funke, *Trump Impeachment Defense Lawyer Wrongly Singles Out Antifa in Capitol Riot*, POLITIFACT (Feb. 12, 2021), <https://www.politifact.com/factchecks/2021/feb/12/michael-van-der-veen/trump-impeachment-defense-lawyer-wrongly-singles-o/> [https://perma.cc/W6VT-3WW5]. At one point late in the second impeachment trial, Van der Veen approached the House Managers, something usually barred by Senate rules, and made threatening gestures in response to criticisms House Managers made about his arguments in the trial. *See* Katherine Tully-McManus, *Senate Trial's Last Day Punctuated by a Chaotic Morning, Objections and a North Carolina Surprise*, ROLL CALL (Feb. 13, 2021, 5:48 PM), <https://rollcall.com/2021/02/13/senate-trials-last-day-punctuated-by-a-chaotic-morning-objections-and-a-north-carolina-surprise/> [https://perma.cc/JA92-EY2K].

139. *See* Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*,

William Barr, allowed the White House to announce his departure a few weeks after the 2020 election and made no public statement about his reasons for doing so.<sup>140</sup> Ethics complaints were subsequently filed against Barr before the disciplinary board of the District of Columbia Bar, which dismissed the complaints on the ground that the board “will not intervene in matters that are currently and publicly being discussed in the national political arena.”<sup>141</sup>

Other Trump administration officials chose not to resign. For example, Chief White House Counsel Pat Cipollone, who led the President’s defense in the first impeachment trial, did not resign, though reportedly he and several Justice Department officials threatened to resign at a White House meeting during which Mr. Trump announced his plans to appoint loyalists in the Justice Department to overturn the election results through voter fraud investigations.<sup>142</sup> Trump backed down, and Mr. Cipollone did not leave office until after the inauguration of President Biden.<sup>143</sup> While Mr. Cipollone might privately claim that he remained in his position to constrain presidential misconduct, his failure to ever resign stands in marked contrast with the public testimony of Nixon’s White House Counsel John Dean, who reported details of Nixon’s misconduct in office.<sup>144</sup> Two weeks after Dean testified, Nixon resigned.<sup>145</sup> After Dean’s testimony, Dean was disbarred in both

---

WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm> [<https://perma.cc/5V5E-CVCG>].

140. Allie Malloy, Devan Cole, Christina Carrega & Kevin Liptak, *Attorney General William Barr Resigns*, CNN (Dec. 15, 2020, 4:30 AM), <https://www.cnn.com/2020/12/14/politics/william-barr-out-as-attorney-general/index.html> [<https://perma.cc/U66H-XAX3>].

141. Jacqueline Thomsen, *An Ethics Complaint Against Bill Barr Was Rejected, and It Has Lawyers Worried*, LAW.COM (June 9, 2021, 5:13 PM), <https://www.law.com/nationallawjournal/2021/06/09/an-ethics-complaint-against-bill-barr-was-rejected-and-it-has-lawyers-worried/> [<https://perma.cc/77VH-BJBB>].

142. See Bart Jansen, *Pat Cipollone, Former White House Counsel, Will Testify Friday Before Jan. 6 Committee*, USA TODAY (July 6, 2022, 4:38 PM), <https://www.usatoday.com/story/news/politics/2022/07/06/house-jan-6-committee-pat-cipollone-testify/7821055001/> [<https://perma.cc/M8LG-8CNY>].

143. See *id.*

144. See Michael S. Rosenwald, *John Dean Is Trump’s Latest Target. Here’s How Dean Took Down Nixon.*, WASH. POST (June 10, 2019, 3:49 PM), <https://www.washingtonpost.com/history/2019/06/10/john-dean-is-trumps-latest-target-heres-how-he-took-down-nixon/> [<https://perma.cc/J6WM-FCET>].

145. See *id.*

Virginia and the District of Columbia for his complicity in obstructing justice and was sent to prison for several months.<sup>146</sup> In contrast, after leaving the White House at the end of Trump's term, Cipollone joined several other Trump White House lawyers in opening the D.C. office of a prominent Los Angeles law firm.<sup>147</sup>

With William Barr gone, Trump sidestepped his White House counsel and elevated a mid-level Justice Department official Jeffrey Clark to Acting Attorney General<sup>148</sup> and accepted outside pro bono counsel from John Eastman, a well-known conservative constitutional scholar, who joined Mr. Trump in rallying supporters to storm the Capitol on January 6, 2021.<sup>149</sup> Subsequently, Clark has been facing complaints of unethical conduct before the disciplinary board of the D.C. Bar.<sup>150</sup> The Senate Judiciary Committee also issued a report critical of Clark's brief tenure as Acting Attorney General,<sup>151</sup> and the House Committee investigating the January 6 attack on Congress has issued a contempt charge against Clark for his failure to comply with a subpoena ordering him to appear before the committee.<sup>152</sup> Eastman has faced considerable backlash for his role

---

146. *John Dean Disbarred in District of Columbia*, N.Y. TIMES (Oct. 3, 1974), <https://www.nytimes.com/1974/10/03/archives/john-dean-disbarred-in-district-of-columbia.html> [<https://perma.cc/6SZY-2GXT>].

147. See David Yaffe-Bellany & Jennifer Jacobs, *Trump Lawyer Cipollone to Open Washington Office for LA Firm*, BLOOMBERG L. (Oct. 7, 2021, 10:51 AM), <https://news.bloomberglaw.com/business-and-practice/top-trump-lawyer-cipollone-to-open-washington-office-for-la-firm> [<https://perma.cc/9LCL-Z5FM>]. Subsequently, behind closed doors, Mr. Cipollone reportedly testified under oath as part of the House's January 6th Committee's investigation.

148. See Amanda Carpenter, *Who Is Jeffrey Clark and Why Does He Matter?*, THE BULWARK (Dec. 7, 2021, 5:13 AM), <https://www.thebulwark.com/who-is-jeffrey-clark-and-why-does-he-matter/> [<https://perma.cc/6P3C-NRVP>].

149. See Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html> [<https://perma.cc/BK5W-6XHW>].

150. See Lauren Stiller Rikleen, John T. Montgomery & James F. McHugh, *Disciplinary Complaints Await Former AAG Jeffrey Clark*, BLOOMBERG L. (Oct. 18, 2021, 4:01 AM), <https://news.bloomberglaw.com/legal-ethics/disciplinary-complaints-await-former-aag-jeffrey-clark> [<https://perma.cc/SQ82-HV5S>].

151. See Melissa Quinn, *Senate Report Reveals New Details About Trump's Efforts to Push Justice Department to Overturn Election*, CBS NEWS (Oct. 7, 2021, 8:43 PM), <https://www.cbsnews.com/news/trump-2020-election-justice-department-senate-judiciary-committee-report/> [<https://perma.cc/V6LS-4LB8>].

152. See Luke Broadwater, *Possible Contempt Charge Hangs over Trump Justice Dept. Official*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2021/12/01/us/politics/jeffrey-clark-contempt-congress.html> [<https://perma.cc/J4F3-Q428>].

in the January 6 insurrection, including being forced to relinquish his position as a law professor at Chapman University, where he was once dean of the law school.<sup>153</sup> He faces requests for his disbarment submitted to the California Bar's Office of Chief Trial Counsel.<sup>154</sup>

Trump's acquittals underscored another troubling development in attempted presidential impeachments. Presidents have unique resources to stymie congressional investigations or impeachments, the most important of which are the substantial staffs and officials within the White House and across the executive branch who are devoted to keeping both him and them in power. Such resources are available to any modern president who may be threatened with impeachment.

The investment of an entire institution in thwarting impeachment poses a formidable challenge to any effort to make Presidents accountable for their misconduct in office. Even Andrew Johnson, hated within the Republican Party that controlled Congress during his impeachment, had access to the best lawyers from within his administration and the country to defend him or at least the institution of the presidency from congressional overreaching. Nixon enjoyed significant support from within his party and administration in opposition to his impeachment until shortly before he resigned from office.<sup>155</sup> Clinton had his White House Counsel's Office and his Justice Department heavily invested in his defense, just as Donald Trump later did during his first impeachment.<sup>156</sup> Even during Trump's second impeachment, the lawyers who had worked for him in the White House and in the Justice Department and

---

153. See Michael T. Nietzel, *John Eastman Retires from Chapman University*, FORBES (Jan. 13, 2021, 9:33 PM), <https://www.forbes.com/sites/michaelt Nietzel/2021/01/13/john-eastman-retires-from-chapman-university/> [<https://perma.cc/6KDS-B7Q4>].

154. See Paul Rosenzweig, *Legal Ethics, Bar Discipline and John Eastman*, LAWFARE (Oct. 20, 2021, 3:13 PM), <https://www.lawfareblog.com/legal-ethics-bar-discipline-and-john-eastman> [<https://perma.cc/2HQV-A985>].

155. See Amelia Thomson-DeVeaux, *It Took a Long Time for Republicans to Abandon Nixon*, FIVETHIRTYEIGHT (Oct. 9, 2019), <https://fivethirtyeight.com/features/it-took-a-long-time-for-republicans-to-abandon-nixon/> [<https://perma.cc/V8DW-AJ3T>].

156. See, e.g., Kristin Welker, Hallie Jackson, Peter Alexander, Carol E. Lee, Monica Alba & Jane C. Timm, *'We Are All Mad': Trump, White House Fume as House Debates Impeachment*, NBC NEWS (Dec. 18, 2019, 5:00 PM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/we-are-all-mad-trump-white-house-fume-house-debates-n1103876> [<https://perma.cc/2D22-UG5Y>].



throughout the executive branch were largely silent or opposed to the proceedings. None of this bodes well for government lawyers as a safeguard against presidential misconduct.

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

The first was the judiciary. State and federal judges overwhelmingly rejected dubious claims made by lawyers trying to overturn the "rigged" presidential election in sixty-one out of the sixty-two cases filed,<sup>157</sup> with Trump's one victory not making a difference to the final tally in the outcome of Pennsylvania's popular vote in the 2020 presidential election.<sup>158</sup>

The second was federalism. Ironically, it is a notion usually championed by Republican Presidents, officials, and judges and Justices. Besides the state judges who rejected false claims asserted by lawyers representing the President, many state executive officials were tasked with protecting the integrity of the electoral process in their respective jurisdictions. Perhaps the most notable were Republican officials in two hotly contested states, Arizona and Georgia. In Arizona, Republican state officials not only certified the outcome in Biden's favor but also issued a ninety-three-page report that found efforts within the state to overturn the outcome were based almost entirely on misleading or false claims.<sup>159</sup>

---

157. William Cummings, Joey Garrison & Jim Sargent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/UJT6-A53R>]. A Brookings Institution report suggests that the data is slightly more complicated in that "Trump's election litigation efforts failed decisively, even though more judges than is generally assumed found his lawyers' arguments persuasive." Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> [<https://perma.cc/P23E-2T85>]. Wheeler notes that there were thirteen cases filed in federal court, all the outcomes of which were not in Trump's favor and in which every Trump appointee voted against Trump. *See id.* The state court litigation, which occurred in seven battleground states Trump lost, went almost entirely against Trump, but "[t]hirty-five percent of decisions by Republican-affiliated state judges were for Trump." *Id.*

158. Cummings et al., *supra* note 157.

159. *See* Michael Wines, *Arizona Vote Review Is 'Political Theater' and 'Sham,' G.O.P.*

In Georgia, both the Republican Governor and the Republican Secretary of State steadfastly stood by the integrity of the outcome of the presidential election there and resisted Trump's personal pleas for them to overturn the election result.<sup>160</sup> The Republican Secretary of State went further to record a long phone conversation in which Trump repeatedly asked his office "to find 11,780 votes, which is one more than we have" and thus declare him the winner of Georgia's popular vote and electors.<sup>161</sup> The Republican Secretary of State (and his counsel) resisted and certified Biden's win in Georgia.<sup>162</sup> Trump is now under criminal investigation for possible election interference in Georgia.<sup>163</sup>

A less effective safeguard was, however, lawyers who were supposed to police themselves. While it is concededly difficult to come up with exact figures, several lawyers have been sanctioned for misleading or lying to federal and state courts or other tribunals in pushing claims that the presidential election was somehow stolen from Donald Trump. Disciplinary hearings based on ethics complaints are usually held behind closed doors, and thus their outcomes are not always released to the public. Nonetheless, it appears that at least a dozen people have been disciplined for breaching the rules of professional responsibility in the jurisdictions in which they have been licensed to practice law.<sup>164</sup> Perhaps the two

---

*Leaders Say*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/05/17/us/arizona-audit-trump.html> [<https://perma.cc/C7VE-W32Q>]; Jeremy Duda, *Maricopa County Rebuts 'Audit' Findings, GOP's Bogus Election Claims*, AZ MIRROR (Jan. 5, 2022, 5:45 PM), <https://www.azmirror.com/2022/01/05/maricopa-county-rebuts-audit-findings-bogus-election-claims/> [<https://perma.cc/L932-52W2>].

160. See Felicia Sonmez, *Georgia Leaders Rebuff Trump's Call for Special Session to Overturn Election Results*, WASH. POST (Dec. 6, 2020, 10:45 PM), [https://www.washingtonpost.com/politics/brian-kemp-trump-election-results/2020/12/06/4c5db908-37d4-11eb-9276-ae0ca72729be\\_story.html](https://www.washingtonpost.com/politics/brian-kemp-trump-election-results/2020/12/06/4c5db908-37d4-11eb-9276-ae0ca72729be_story.html) [<https://perma.cc/N2RG-8GPW>].

161. Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html> [<https://perma.cc/V3JX-XGLZ>].

162. *Id.*

163. Kevin Johnson & Bart Jansen, *Georgia Prosecutor Seeks Grand Jury to Investigate Possible Trump 'Criminal Disruptions' on 2020 Election*, USA TODAY (Jan. 20, 2022, 4:16 PM), <https://www.usatoday.com/story/news/2022/01/20/georgia-fulton-county-prosecutor-grand-jury-investigate-donald-trump/6594162001/> [<https://perma.cc/FN3G-4QGW>].

164. See Melissa Heelan, *Election Fraud Cases Sow Doubts About Legal Profession's Future*, BLOOMBERG L. (Sept. 14, 2021, 5:45 AM), <https://news.bloomberglaw.com/us-law-week/election-fraud-cases-sow-doubts-about-legal-professions-future> [<https://perma.cc/79YJ-64CA>].

most notable of these attorneys are Rudy Giuliani, who had his bar license suspended in both New York<sup>165</sup> and the District of Columbia for false statements made in court filings and public appearances regarding the 2020 presidential election and other matters;<sup>166</sup> and Sidney Powell, who has been fined heavily for her misrepresentations in court and is facing disciplinary sanctions.<sup>167</sup>

Presumably, high-ranking executive branch officials, who are lawyers, have had little or no fear that they will ever be sanctioned or disciplined for deviating from the rules of professional responsibility. True, Nixon's Attorney General John Mitchell was disbarred in New York after he was convicted and sentenced to prison for perjury and obstruction of justice.<sup>168</sup> Yet, in the absence of such convictions, it is far from clear or certain that attorneys general or other federal prosecutors will ever face disciplinary proceedings for doing the president's bidding. Given that most disciplinary proceedings are not public or publicly reported, we do not yet know, and may never know for sure, why the complaints against other Justice Department or Trump lawyers went nowhere.

#### CONCLUSION: WHERE TO FROM HERE?

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

---

165. Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html> [https://perma.cc/ZW4Q-KQMT].

166. Christina Wilkie & Dan Mangan, *Rudy Giuliani's DC Law License Is Suspended*, CNBC (July 7, 2021, 6:24 PM), <https://www.cnbc.com/2021/07/07/rudy-giulianis-dc-law-license-is-suspended-.html> [https://perma.cc/XX4A-KBM7].

167. Erik Larson, *Sidney Powell Sanctioned by Judge over False Election Claims*, BLOOMBERGL (Aug. 26, 2021, 10:24 AM), <https://www.bloomberglaw.com/us-law-week/powell-gop-election-fraud-lawyers-sanctioned-by-michigan-judge> [https://perma.cc/E9Z4-QR8L].

168. Morris Kaplan, *Mitchell Disbarred as Lawyer in State*, N.Y. TIMES (July 4, 1975), <https://www.nytimes.com/1975/07/04/archives/mitchell-disbarred-as-lawyer-in-state-mitchell-is-disbarred-in.html> [https://perma.cc/FRN8-C7HT].

of Presidents, legacies matter. In Trump's case, his legacy will hardly be what he wants, for it will be a legacy defined in part by his two impeachments and fallout from his post-presidential investigations in Congress. If prosecutors indict or convict him of illegal misconduct, it cannot be hidden from the judgment of history.

Once we move beyond Trump and the presidency, there is much work to be done in Congress and in the bar to protect against any future Presidents manifesting contempt for the rule of law (and calling, as Trump has done, for suspending the Constitution to redress his claims that he unfairly lost an election).<sup>169</sup> In Congress, reforming the federal impeachment process itself is long overdue. We need only to look to the past for guidance. For example, the Special Committee assembled in the Senate and the House Judiciary Committee, which each spent nearly two years investigating the possible origins of the Watergate break-in and considering possible impeachment charges against Richard Nixon, are still models for how such inquiries should be done. The records of the majority and minority staffs working together, the Committee producing the definitive report on the history of the federal impeachment process, and Democratic and Republican members of Congress cooperating in uncovering the misconduct of the president, have withstood the test of time. If those models cannot be replicated, the media and the public may still hold leaders accountable.

Perhaps the most important option for leaders and lawyers is to be transparent in specifying the higher authorities they serve, especially when any of them is abdicating power or broaching the limits of their powers. Is it party fidelity or their own political ambitions that they serve? Or is it the institutions to which they have been elected or appointed, the Constitution, or the rule of law? It should be incumbent on every official to be transparent in explaining the principles, not the party, that they serve. The deep polarization of the American people, leading to profound divisions in Congress, makes such reforms unlikely, unless the voters and leaders from both parties agree on the importance of having representatives and senators see each other not as enemies or as

---

169. Kristen Holmes, *Trump Calls for the Termination of the Constitution in Truth Social Post*, CNN (Dec. 4, 2022, 4:34 PM), <https://www.cnn.com/2022/12/03/politics/trump-constitution-truth-social/index.html> [<https://perma.cc/3DEP-7239>].

unpatriotic but rather as servants with rock-solid fidelity to the common good of the American people, the rule of law, and the Constitution. And to call to account anyone who falls short of such commitment.