

January 31, 2020

## To the United States Senate

The signatories of this letter are professors of law and scholars of the American constitution who write to clarify that impeachment does not require proof of crime, that abuse of power is an impeachable offense, and that a president may not abuse the powers of his office to secure re-election, whatever he may believe about how beneficial his continuance in power is to the country.

### **Impeachable conduct does not require proof of any crime.**

Impeachment for “high Crimes and Misdemeanors” under Article II of the U.S. Constitution does not require proof that a president violated any criminal law. The phrase “high Crimes and Misdemeanors” is a term of art consciously adopted by the drafters of the American constitution from Great Britain. Beginning in 1386, the term was frequently used by Parliament to describe the wide variety of conduct, much of it non-criminal abuses of official power, for which British officials were impeached.

The phrase “high crimes and misdemeanors” was introduced into the American constitution by George Mason, who explained the necessity for expanding impeachment beyond “treason and bribery” by drawing his colleagues’ attention to the ongoing parliamentary impeachment trial of Warren Hastings. Hastings was charged with a long list of abuses of power that his articles of impeachment labeled “high crimes and misdemeanors,” but which even his chief prosecutor, Edmund Burke, admitted were not prosecutable crimes. On George Mason’s motion, the Philadelphia convention wrote into our constitution the same phrase Parliament used to describe Hastings’ non-criminal misconduct.

No convention delegate ever suggested that impeachment be limited to violations of criminal law. Multiple founders emphasized the need for impeachment to extend to plainly non-criminal conduct. For example, James Madison and George Nicholas said that abuses of the pardon power should be impeachable. Edmund Randolph believed that violation of the foreign emoluments clause would be.

Thus, Alexander Hamilton’s famous observation in *Federalist 65* that impeachable offenses “are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself” was not merely an advocate’s rhetorical flourish, but a well-informed description of the shared understanding of those who wrote and ratified the Constitution.

Since ratification, one senator and multiple judges have been impeached for non-criminal behavior. The first federal official impeached, convicted, and removed for “high crimes and misdemeanors” was Judge John Pickering, whose offenses were making bad legal rulings, being drunk on the bench, and taking the name of the Supreme Being in vain.

Among presidents, the tenth and eleventh articles of impeachment against President Andrew Johnson charged non-criminal misconduct. The first and second articles of impeachment against President Richard Nixon approved by the House Judiciary Committee allege both criminal and

non-criminal conduct, and the third alleges non-criminal obstruction of Congress. Indeed, the Nixon House Judiciary Committee issued a report in which it specifically rejected the contention that impeachable conduct must be criminal.

The consensus of scholarly opinion is that impeachable conduct does not require proof of crime.

### **Abuse of power is an impeachable high crime and misdemeanor**

It has been suggested that abuse of power is not an impeachable high crime and misdemeanor. The reverse is true. The British Parliament invented impeachment as a legislative counterweight to abuses of power by the Crown and its ministers. The American Framers inserted impeachment into our constitution primarily out of concern about presidential abuse of power. They inserted the phrase “high crimes and misdemeanors” into the definition of impeachable conduct in order to cover non-criminal abuses of power of the type charged against Warren Hastings.

As Edmund Randolph observed at the Constitutional Convention, “the propriety of impeachments was a favorite principle with him” because “[t]he Executive will have great opportunities of abusing his power.” In *Federalist 65*, Hamilton defined “high crimes and misdemeanors” as “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”

This understanding has often been expressed in the ensuing centuries. For example, in 1926, the House voted to impeach U.S. District Judge George English. The Judiciary Committee report on the matter reviewed the authorities and concluded:

Thus, an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or betrayals of trusts, for inexcusable negligence of duty [or] for the tyrannical abuse of power.

Two of the three prior presidential impeachment crises have involved charges of abuse of power. The eleventh article of impeachment against President Andrew Johnson alleged that he abused his power by attempting to prevent implementation of reconstruction legislation passed by Congress in March 1867, and thus violated Article II, Section 3, of the constitution by failing to “take care that the laws be faithfully executed.” The second article of impeachment against Richard Nixon charged a litany of abuses of presidential power, including “interfering with agencies of the Executive Branch.”

Even if no precedent existed, the constitutional logic of impeachment for abuse of presidential power is plain. The president is granted wide powers under the constitution. The framers recognized that a great many misuses of those powers might violate no law, but nonetheless pose immense danger to the constitutional order. They consciously rejected the idea that periodic elections were a sufficient protection against this danger and inserted impeachment as a remedy.

The consensus of scholarly opinion is that abuse of power is an impeachable “high crime and misdemeanor.”

### **A President may not abuse his powers of office to secure his own re-election**

Finally, one of President Trump’s attorneys has suggested that so long as a president believes his re-election is in the public interest, “if a president did something that he believes will help get him elected, in the public interest, that cannot be the kind of quid pro quo that results in his impeachment.” It is true that merely because a president makes a policy choice he believes will have beneficial political effects, that choice is not necessarily impeachable. However, if a president employs his powers in a way that cannot reasonably be explained except as a means of promoting his own reelection, the president’s private conviction that his maintenance of power is for the greater good does not insulate him from impeachment. To accept such a view would be to give the president *carte blanche* to corrupt American electoral democracy.

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Distinguishing between minor misuses of presidential authority and grave abuses requiring impeachment and removal is not an exact science. That is why the Constitution assigns the task, not to a court, but to Congress, relying upon its collective wisdom to assess whether a president has committed a “high crime and misdemeanor” requiring his conviction and removal.

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