The Senate met at 1:05 p.m. and was called to order by the Chief Justice of the United States.

TRIAL OF DONALD J. TRUMP, PRESIDENT, OF THE UNITED STATES

The CHIEF JUSTICE. The Senate will convene as a Court of Impeachment. The Chaplain will lead us in prayer.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Lord, through all the generations, You have been our mighty God. As millions mourn the deaths of Kobe and Gianna Bryant and those who died with them, we think about life’s brevity, uncertainty, and legacy. Remind us that we all have a limited time on Earth to leave the world better than we found it.

As this impeachment process unfolds, give our Senators the desire to make the most of their time on Earth. Teach them how to live, O God, and lead them along the path of honesty. May they hear the words of Jesus of Nazareth reverberating down the corridors of the centuries: “And you shall know the truth, and the truth shall make you free.”

And Lord, thank You for giving our Chief Justice another birthday. Amen.

PLEDGE OF ALLEGIANCE

The Chief Justice led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

THE JOURNAL

The CHIEF JUSTICE. If there is no objection, the Journal of proceedings of the trial is approved to date.

Without objection, it is so ordered.

The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Michael C. Stenger, made the proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Donald John Trump, President of the United States.

The CHIEF JUSTICE. The majority leader is recognized.

Mr. McCONNELL. Mr. Chief Justice, as the Chaplain has indicated, on behalf of all of us, happy birthday. I am sure this is exactly how you had planned to celebrate the day.

The CHIEF JUSTICE. Thank you very much for those kind wishes, and thank you to all the Senators for not asking for the yeas and nays.

(Laughter.)

ORDER OF PROCEDURE

Mr. McCONNELL. For the information of all Senators, we should expect to break every 2 or 3 hours and then at 6 o’clock a break for dinner.

And with that, Mr. Chief Justice, I yield the floor.

The CHIEF JUSTICE. Pursuant to the provisions of S. Res. 483, the counsel for the President have 22 hours and 5 minutes remaining to make the presentation of their case. The Senate will now hear you.

The Senate will now hear you, Mr. Sekulow.

OPENING STATEMENT—CONTINUED

Mr. Counsel SEKULOW. Mr. Chief Justice, Members of the Senate, managers, what we have done on Saturday is the pattern that we are going to continue today, as far as how we are going to deal with the case. We deal with transcript evidence. We deal with publicly available information. We do not deal with speculation, allegations that are not based on evidentiary standards at all.

We are going to highlight some of those very facts we talked about very quickly on Saturday. You are going to hear more about that. I want to give you a little bit of an overview of what we plan to do today in our presentation.

You will hear from a number of lawyers. Each one of these lawyers will be addressing a particular aspect of the President’s case. I will introduce the issues that they are going to discuss, and, then, that individual will come up and make their presentation. We want to do this on an expeditious but yet thorough basis.

Let me start with, just for a very brief few moments, taking a look at where we were. One of the things that became very clear to us as we looked at the presentation from the House managers was the lack of focus on that July 25 transcript. That is because the transcript actually doesn’t say what they would like it to say. We have heard—and you will hear more—about that in the days ahead. We know about Mr. Schiff’s version of the transcript. You heard it. You saw it.

I want to keep coming back to facts—facts that are undisputed. The President, in his conversation, was clear on a number of points, but so was President Zelensky. I mentioned that at the close of my arguments earlier, that it was President Zelensky who said: No pressure, I didn’t feel any pressure.

And, again, as this kind of reading of minds of what people were saying, I think we need to look at what they actually said and how it is backed up.

It is our position as the President’s counsel that the President was at all time acting under his constitutional authority, under his legal authority, in our national interest, and pursuant to his oath of office. Asking a foreign leader to get to the bottom of issues of corruption is not a violation of an oath.

It was interesting because there was a lot of discussion the other day about Lieutenant Colonel Vindman, and one of the things that we reiterate is that...
he himself said that he did not know if there was anything of crime or anything of that nature. He had deep policy concerns. I think that is what this is really about—deep policy concerns, deep policy differences.

We live in a Constitutional Republic where you have deep policy concerns and deep differences. That should not be the basis of an impeachment. If the bar of impeachment has now reached that level, then, for the sake of the Republic, the danger that puts not just this country but our entire constitutional framework in is unimaginable. Every time there is a policy difference of significance or an approach difference of significance about a policy, are we going to start an impeachment proceeding?

As I said earlier, I don’t think this was about just a phone call. There was a pattern in practice of attempts over a 3-year period to not only interfere with the President’s capability to govern—but their way, they were completely unsuccessful at; just look at the state of where we are as a country—but also interfere with the constitutional framework.

I am going to say this because I want to be brief. We are going to have a series of lawyers address you. So it will not be one lawyer for hours and hours. We are going to have a series of lawyers address you on a variety of issues. This is how we envision the President’s defender; it is thought it would be appropriate to start with an overview, if you will, of some of the significant historical issues, constitutional issues, involving impeachment proceedings, because we don’t have a long history of that. I think that is a good thing for the country that we don’t, and I think that we would all agree. But if this becomes the new standard, the future is going to look a lot different.

We are going to hear next from my cocounsel, Judge Kenneth Starr. Judge Starr is a former judge for the U.S. Court of Appeals for the District of Columbia. He served as the 39th Solicitor General of the United States, arguing cases before the Supreme Court of the United States on behalf of the United States.

I had the privilege of arguing a case alongside Judge Starr—we were talking about this earlier—many years ago. He also served as the independent counsel during the Clinton Presidency and author of the Starr report. He testified for almost 12 hours before the Judicial Committee with regard to that report. Judge Starr is very familiar with this process. He is going to address a series of deficiencies, which are legal issues with regard to articles I and II—constitutional implications, historical implications, and legal implications of where this case now stands.

I would like to yield my time right now to Mr. Chief Justice, Ken Starr.

The CHIEF JUSTICE. Mr. Starr.

Mr. Counsel STARR. Thank you.

Mr. Chief Justice, House Managers, and staff. Members of the Senate, the majority leader, and the minority leader, at the beginning of these proceedings on January 16, the Chief Justice administered the oath of office to the Members of this body and then again on January 20, the Chief Justice was honoring the words of our Constitution, article I, section 3. We all know the first sentence of that article by heart: “The Senate shall have the sole Power to try Impeachments." That oath or affirmation, in turn, requires each Member of the Senate to do impartial justice.

This constitutionally administered oath or affirmation has been given in every proceeding in this body since 1798. Indeed, to signify the importance of the occasion, the Senate’s more recent traditions call for you, as you did, to sign the book itself. If not simply part of the record; it is entrusted to the National Archives. In contrast, Members of the House of Representatives do not take an oath in connection with impeachment. The Founders of our Constitution well knew that when an oath or affirmation should be required—the Senate, yes; the House, no. Thus, each Member of the world’s greatest deliberative body now has special—indeed unique—duties and obligations imposed under our founding document.

During the Clinton impeachment trial 21 years ago in this Chamber, the Chief Justice of the United States ruled in response to an objection that was interposed by Senator Tom Harkin of Iowa. The Senators are not sitting as jurors, Senator Harkin noted, and the Chief Justice agreed with that proposition. Rather, the Senate is a court. In fact, history teaches us that for literally decades, this body was referred to as the High Court of Impeachment. So we are not a legislative Chamber during these proceedings. We are in a tribunal. We are in court.

Alexander Hamilton has been quoted frequently in these proceedings, but in Federalist 78, he was describing the role of courts—your role—and in doing so, he distinguished between what he called the exercise of judgment on the one hand, which is what courts do, and the exercise of will or policy preferences, if you will, on the other hand. That is what legislative bodies do.

According to Hamilton, courts were to be, in his word, “impartial.” There is that word again. You know, that is a daunting task for judges struggling to do the right thing, to be impartial—equal justice under law. It is certainly hard in life to be impartial. In politics, it is not even asked of one to be impartial. But that is the task that the Constitution chose to impose upon each of you.

Significantly, in this particular juncture in America’s history, the Senate is being called to sit as the High Court of Impeachment all too frequently. Indeed, we are living in what I think can aptly be described as the “age of impeachment.” In the House, resolution after resolution, month after month, has called for the President’s impeachment.

How did we get here, with Presidential impeachment invoked frequently in its inherently destabilizing, as well as acrimonious way? Briefly told, the story begins 42 years ago. Dr. Archibald French Smith, the Justice Department took the position that, however well-intentioned, the independent counsel provisions of the Ethics in Government Act of 1978. But the new chapter was not simply the age of independent counsel; it became, unbeknownst to the American people, the age of impeachment.

I have served in the Reagan administration as Counsel and Chief of Staff to Attorney General William French Smith, the Justice Department took the position that, however well-intentioned, the independent counsel provisions of the Ethics in Government Act of 1978. But the new chapter was not simply the age of independent counsel; it became, unbeknownst to the American people, the age of impeachment.

Justice Antonin Scalia was in deep dissent. Among his stinging criticisms of that law, Justice Scalia wrote this: “The context of this statute is acrid with the smell of threatened impeachment.” Impeachment.

Justice Scalia echoed the criticism of the court in which I was serving at the time, the District of Columbia Circuit, which had actually struck down the law as unconstitutional in a very impressive opinion by renowned Judge Laurence Silberman.

Why would Justice Scalia refer to impeachment? This was a reform measure. There would be no more Saturday Night Massacres—the firing of Special Prosecutor, as he was called, Archibald Cox by President Nixon. Government would now be better, more honest, accountable. The independent counsel would be protected. But the word “impeachment” haunts that dissenting opinion, and it is not hard to discover why—because the statute, by its terms, expressly directed the independent counsel to be, in effect, an agent of the House of Representatives. And to what end? To report to the House of Representatives when a very low threshold of information was received that an impeachable offense, left undefined, may have been committed.

To paraphrase President Clinton’s very able counsel at the time, Bernie Nussbaum, this statute is a dager
aimed at the heart of the Presidency. President Clinton, nonetheless, signed the reauthorized measure into law, and the Nation then went through the long process known as Whitewater, resulting in the findings by the office which I led, the Independent Counsel, and a written report to the House of Representatives. That referral to Congress was stipulated in the Ethics in Government Act of 1978.

To put it mildly, Democrats were very much aware of what had happened. They then joined Republicans across the aisle who, for their part, had been outraged by an earlier independent counsel investigation, that of a very distinguished former judge, Lawrence Walsh.

During the Reagan administration, Judge Walsh’s investigation into what became known to the country as Iran-Contra spawned enormous criticism on the Republican side of the aisle who, for their part, had been concerned about the need for impeachment. This history leads me to reflect on the nature of your weighty responsibilities in this High Court of Impeachment—a surly and partial jurist, who was, nonetheless, acquitted by this Chamber—became an early landmark in maintaining the treasured independence of our Federal judiciary.

It took the national convulsion of the Civil War, the assassination of Mr. Lincoln, and the counter-reconstruction measures aggressively pursued by Mr. Lincoln’s successor, Andrew Johnson, to bring about the Nation’s very first Presidential impeachment. Famously, of course, your predecessors in this High Court of Impeachment acquitted the unpopular and controversial Johnson but only by virtue of Senators from the party of Lincoln breaking ranks.

It was over a century later that the Nation returned to the tumultuous world of Presidential impeachment, necessitated by the rank criminality of the Nixon administration. In light of the rapidly unfolding facts, including uncovered by the Senate select committee in an overwhelmingly bipartisan vote of 410 to 4, the House of Representatives authorized an impeachment inquiry; and, in 1974, the House Judiciary Committee, after lengthy hearings, voted again in a bipartisan manner to impeach the President of the United States. Importantly, President Nixon’s own party was slowly but inexorably moving toward favoring the removal of their chosen leader from the Nation’s highest office, who had just won reelection by a landslide. It bears emphasis before this high court that this was the first Presidential impeachment in over 100 years. It also bears emphasis that it was pow-erfully bipartisan. And it was just the vote to authorize the impeachment inquiry. Indeed, the House Judiciary chair, Peter Rodino, of New Jersey, was consistent that, to be accepted by the American people, the process had to be bipartisan.

Like war, impeachment is hell or, at least, Presidential impeachment is hell. Those of us who lived through the Clinton impeachment, including Members of this body, full well understand that a Presidential impeachment is tantamount to domestic war. Albeit thankfully protected by our beloved First Amendment, it is a war of words and a war of ideas, but it is filled with acrimony, and it divides the country like nothing else. Those of us who lived through the Clinton impeachment understand that in a deep and personal way.

Now, in contrast, wisely and judicially conducted, unlike in the United Kingdom, impeachment remains a vital and appropriate tool in our country to serve as a check with respect to the Federal judiciary. After all, in the Constitution’s brilliant structural design, Federal judges know, as this body full well knows from its daily work, of a pivoting important feature—inde-pendence from politics—exactly what Alexander Hamilton was talking about in Federalist 78: during the Constitution’s term, good behavior; in practical effect, life tenure. Impeachment is, thus, a very important protection for the people against what could be serious article III wrongdoing within that branch.

And so it is that, when you count, of the 63 impeachment inquiries author-ized by the House of Representatives over our history, only 8 have actually been convicted in this high court and removed from office, and each and every one has been a Federal judge.

This history leads me to reflect on the nature of your weighty responsibilities here in this high court as judges in the context of Presidential impeachment—the fourth Presidential impeachment. I am counting the Nixon proceedings in our Nation’s history, but the third over the past half century.

And I respectfully submit that the Senate, in its wisdom, would do well in its deliberations to guide the Nation in this world’s greatest deliberative body to return to our country’s traditions when Presidential impeachment was truly a measure of last resort. Members of this body can help and in this very proceeding restore our constitutional and historical traditions, above all, by returning to the text of the Constitu-tion itself. It is, I respectably submit, an example here in these proceedings in weaving the tapestry of what can rightly be called the common law of
Presidential impeachment. That is what courts do. They waive the common law. There are indications within the constitutional text—I will come to our history—so that this fundamental question is appropriate to be asked—you are familiar with the arguments: Was the President exercising his authority to waive a crime or to violate established law alleged?

So let’s turn to the text.

Throughout the Constitution’s description of impeachment, the text speaks almost always—without exception—in terms of crimes. It begins, of course, with treason—the greatest of crimes against the state and against we the people, but so misused as a bludgeon and parliamentary experience, to lead the Founders to actually define the term in the Constitution itself. Bribery—an iniquitous form of moral and legal corruption and the basis of so many of the 63 impeachment proceedings over the course of our history—again, almost all of them against judges, the members of Congress—other high crimes and misdemeanors. Once again, the language is employing the language of crimes. The Constitution is speaking to us in terms of crimes.

Essentially those references, when you count them—count seven, count eight—supports the conclusion that impeachments should be evaluated in terms of offenses against established law but especially with respect to the President. The Constitution requires the Chief Justice of the United States and not a political officer—no matter how honest, no matter how impartial—to preside at trial. Guided by history, the Framers made a deliberate and wise choice to cabin, to constrain, to limit the power of impeachment.

And so it was, on the very eve of the impeachment of President Andrew Johnson, that the eminent scholar and dean of Columbia Law School, Theodore Ruger, wrote this: “There is no such thing as authority that is no impeachment will lie except for a true crime—a breach of the law—which would be the subject of indictment.” I am not making that argument. I am noting what he is saying. He didn’t over-argue the case. He said “the weight of authority.” “The weight of authority.”

And so this issue is a weighty one.

Has the House of Representatives, with its violation of the separation of powers—image the two Articles of impeachment—other high crimes and misdemeanors. Once again, the language is employing the language of crimes. The Constitution is speaking to us in terms of crimes.

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Has the House of Representatives, with its violation of the Constitution’s text, consistent with the Nation’s history and Presidential impeachments, as I will seek to demonstrate, serves as a clarifying and stabilizing element. It increases predictability—to do what?—to reduce the profound danger that a Presidential impeachment will be dominated by partisan considerations—precisely the evil that the Founders warned about.

And so to history.

History bears out the point. The Nation’s most recent experience—the Clinton impeachment—even though several Members of Congress criticized the crimes. Those were crimes proven in the crucible of the House of Representatives’ debate beyond any reasonable observer’s doubt.

So too the Nixon impeachment. The articles charged crimes. What about article II in Nixon, which is sometimes referred to as abuse of power? Was that the abuse of power article—the precursor to article I that is before this court? Not at all. When one returns to article II in Nixon—approved by a bipartisan House Committee—article II of Nixon sets forth a deeply troubling story of numerous crimes—not one, not two, numerous crimes—carried out at the direction of the President himself.

And so the appropriate question: Were crimes alleged in the articles of the common law of Presidential impeachment? In Nixon, yes. In Clinton, yes, here, no—a factor to be considered as the judges of the high court. Come, the Court will, individually, to your judgment.

Even in the political cauldron of the Andrew Johnson impeachment, article XI charged a violation of the controversial Tenure of Office Act. You are familiar with it. And that act, warned expressly the Oval Office; that its violation would institute a high misdemeanor, employing the very language of constitutionally cognizable crimes.

This history represents, and I believe, may it please the court, it embodies the common law of Presidential impeachment. These are facts gleaned from the constitutional text and from the gloss of the Nation’s history.

And under this view, the commission of an alleged crime, the violation of established law, can appropriately be considered, again, a weighty and an important consideration and element of a historically supportable Presidential impeachment or removal.

Will law professors agree with this? No, but with all due respect to the academy, this is not an academic gathering. We are in court. We are not just in court. With all due respect to the Chief Justice and the Supreme Court of the United States, we are in democracy’s ultimate court.

And the better constitutional answer to the question is provided by a rigorous and faithful examination of the constitutional text and then looking faithfully and respectfully to our history.

The very divisive Clinton impeachment demonstrates that, while highly relevant, the commission of a crime is by no means sufficient to warrant the removal of our duly elected President. Why?

This body knows. We appoint judges and you confirm them and they are there for life. Not Presidents. And the President is a term of the people’s House, made a speech on the floor of the House, and there he said this:

The President is the sole organ of the Nation in its external relations, and its sole representative with foreign nations.

If that sounds like hyperbole, it has been embraced over decades by the Supreme Court of the United States, by Justices appointed by many different Presidents. The Presidency is unique. There is no other system quite like ours, and it has served us well.

As for the Presidency, impeachment and removal not only overturns a national election and perhaps profoundly affects an upcoming election, in the words of Yale’s Akhil Amar, it entails a risk, and these are Akhil’s words, “a grave disruption of the government.” Professor Amar penned those words in connection with the Clinton impeachment. “ Grave disruption of the government.” Regardless of what the President has done, “grave disruption.”

We will all agree that the Presidents, under the text of the Constitution and its amendments, are to serve out their term absent a genuine national consensus, reflected by the two-thirds majorities that the President must go away. Two-thirds. In politics and in impeachment, that is called a landslide.

Here, I respectfully submit to the court, that all fairminded persons will surely agree there is no consensus. We might wish for one, but there isn’t. To the contrary, for the first time in America’s modern history, not a single House Member of the President’s party supported either of the two Articles of Impeachment—not one in committee, not on the House floor.

And that pivotal fact puts in bold relief the Peter Rodino principle—call it the Rodino rule—impeachment must be bipartisan in nature.

Again, sitting as a court, this body should signal to the Nation the return to our traditions—bipartisan impeachments.

What is the alternative? Will the President be King? Do oversight. The tradition has done, “grave disruption.”

Again, sitting as a court, this body should signal to the Nation the return to our traditions—bipartisan impeachments.

In Iran-Contra, no impeachment was undertaken. The Speaker of the House, from Fort Worth, where the West begins, knew better. He said no. But as befits the age of impeachment, a House
resolution to impeach President Ronald Reagan was introduced. It was filed, and the effort to impeach President Reagan was supported by a leading law professor whose name you would well recognize, and you will hear it again this evening from Professor Dershowitz, who will help us identify the learned professor. But the Speaker of the people’s House, emulating Peter Rodino, said no.

So I, respectfully, submit that the Senate should close this chapter, this idiosyncratic chapter, on this increasingly disruptive act, this era, this age of resorting to the Constitution’s ultimate democratic weapon for the Presidency. Let the people decide.

There was a great Justice who sat for 30 years, Justice John Harlan, in the mid-century of the 20th century. And in a lawsuit involving a very basic question: Can citizens whose rights have clearly been violated by Federal law enforcement agencies and agents bring these damages when Congress has not so provided—no law that gave the wounded citizen a right to redress through damages?

And Justice Harlan, in a magnificent concurring opinion in Bivens v. Six Unidentified Federal Agents, stated that courts—here you are—should take into consideration in reaching its judgment—what he called factors counseling restraint.

He was somewhat reluctant to say that the Supreme Court, should grant this right, that we should create it when Congress hasn’t acted and Congress could have acted, but it hadn’t. But he reluctantly came to the conclusion that the Constitution itself empowered the Federal courts to create this right for our injured citizens, to give them redress, not just an injunctive relief but damages, money recovery, for violations of their constitutional rights. Factors counseling restraint. Factors counseling restraint.

And the Supreme Court, when it came to the view—it was so honest—and said: I came to the case with a different view, but I changed my mind and voted in favor of the Bivens family having redress against the Federal agents who had violated their rights, judging in its most impartial, elegant sense.

I am going to draw from Justice Harlan’s matrix of factors counseling restraint and simply identify these. I think there may be others.

The articles do not charge a crime for violations established. I am suggesting it is a relevant factor. I think it is a weighty factor, when we come to Presidential impeachment, not judicial impeachment.

Second, the articles come to you with no bipartisan support. They come to you as a violation of what I am dubbing the Rodino rule.

And third, as I will now discuss, the pivotally important issue of process, the second Article of Impeachment: Obstruction of Congress.

This court is very familiar with United States v. Nixon. Its unanimity in recognizing the President’s profound interest in confidentiality, regardless of the world view or philosophy of the justice, the Justices were unanimous. This isn’t just a contrivance; it is built into the very nature of our constitutional order. So let me comment, briefly.

This constitutionally based recognition of executive privilege and then companion privileges—the deliberative process privilege, the immunity of close Presidential advisers from being summoned to testify—are all firmly established in our law.

If there is a dispute between the people’s House and the President of the United States over the availability of documents or witnesses—and there is in each and every administration—then go to court. It really is as simple as that. I don’t need to belabor the point.

But here is the point I would like to emphasize. Frequently, the Justice Department advises the President of the litigation risk. It could have sought expedition. The E. Barrett Prettyman Courthouse is 6 blocks down. The judges are there. The House of Representatives, but that is the House, its 435 Members elected from across the constitutional Republic—not one, no matter how able she may be. In the people’s House, every Congressperson gets a vote. We know the concept: one person, one vote.

More generally, the President, as I reviewed the record, has consistently and scrupulously followed the advice and counsel of the Justice Department and, in particular, the Office of Legal Counsel. He has been obedient. As you know, that important office—many of you have had your own experiences professionally with that office—is staffed with lawyers of great ability. It has done such thoughtful work with both Democratic and Republican administrations. The office is now headed by a brilliant lawyer who served as a law clerk to Justice Anthony Kennedy.

The House may follow the guidance provided to the President by that office; the House frequently does disagree. But for the President to follow the guidance of the Department of Justice with respect to an interbranch legal and constitutional dispute cannot reasonably be viewed as an obstruction and, most emphatically, not as an impeachable offense.

History, once again, is a great teacher. In the Clinton impeachment, the House Judiciary Committee rejected a draft article asserting that President Clinton—and here are the words that were drafted: “fraudulently and corruptly asserted executive privilege.” Strong words, “fraudulently and corruptly.” That was the draft article.

In my view, having gone through the facts and with all due respect to the former President, he did. He did it time and again, month after month. We would go to court, and we would win.

Many members—not everybody—on the House Judiciary Committee agreed that the President had, indeed, improperly claimed executive privilege, rebuffed time and again by the Judiciary. But at the end of the day, that Committee, the Judiciary Committee of the House, chaired by Henry Hyde, wisely concluded that President Clinton’s doing so should not be considered an impeachable offense.

Here is the idea. It is not an impeachable offense for the President of the United States to defend the asserted legal and constitutional prerogatives of the Presidency.

This is, and I am quoting here from page 55 of the President’s trial brief, “a function of his constitutional and political judgments, not just a political judgment, but a constitutional judgment.” I would guide this court, as it is coming through the deliberation process,
to read the President's trial brief with respect to process. It was Justice Felix Frankfurter, confidante of FDR, brilliant jurist, who reminded America that the history of liberty is in large measure the history of process, procedure.

In particular, I would guide the high court to the discussion of the long history of the House of Representatives—over two centuries—in providing due process protections in its impeachment investigations. It is a richly historical discussion. The good news is, you can read the core of it in four pages, pages 62 to 66, of the trial brief. It puts in bold relief, I believe, an irrefutable fact. This House of Representatives, with all respect, sought to turn its back on its own established procedures—procedures that have been followed faithfully decade after decade, regardless of who was in control, regardless of political party. All those procedures were torn asunder. The House Members were warned at the outset: they were oathless. They could toss out their own rule book through raw power.

Here we have—tragically for the country and, I believe, tragically for the House of Representatives—in article II of these impeachment articles a runaway House. It has run away not only from its longstanding procedures; it has run away from the Constitution’s demand of fundamental fairness captured in those hallowed terms, “due process of law.” We have cared about this as an English-speaking people since the Magna Carta.

By doing so, however, the House has inadvertently pointed this court to an exit ramp. It is an exit ramp provided by the Constitution itself. It is an exit ramp built by the most noble of builders, the founding generation. Despite the clearest precedent requiring due process for the accused in an impeachment, that rule has been forgotten, all the more so in a Presidential impeachment. House Democrats chose to conduct a wholly unprecedented process in this case, and they did so knowingly and deliberately because they were warned at every turn: Don’t do it. Don’t do it that way.

And process—the process of being denied the basic rights that have been afforded to every single accused President in the history of the Republic, even to the racist Andrew Johnson denied to every single accused President in the history of the Republic, even, in the blind drive to impeach the President, President Trump, in reality, strategically, has been the best friend and supporter of Ukraine, certainly, in our recent history. These are the facts. That is what is before you.

Mr. Counsel PURPURA will now address additional facts related to these proceedings.

Fifth, the security assistance flowed on September 11, and a Presidential meeting took place on September 25 without the Ukrainian Government—without the Ukrainian Government—announcing any investigations.

Fourth, not a single witness testified that the President himself said that there was any connection between any investigation, security assistance, a Presidential meeting, or anything else.

First, the transcript shows that the President did not condition anything on investigations during the July 25 call with President Zelensky and did not even mention or promise the security assistance on the call. President Zelensky said that he felt no pressure on the call.

President Zelensky and the top Ukrainian officials did not learn of the pause on the security assistance until more than a month after the July 25 call, and the House managers’ own record—their record that they developed and brought before this Chamber—reflects that anyone who spoke with the President said that the President made clear that there was no linkage between security assistance and investigations.

There is another category of evidence that demonstrated that the pause on security assistance was distinct and unrelated to investigations. The President released the aid without the Ukrainians ever announcing any investigations or undertaking any investigations.

Here is Ambassador Sondland. (Text of Videotape presentation:)

Ms. STEFANIK. And the fact is the aid was given to Ukraine without any announcement of new investigations?

Ambassador Sondland, That’s correct. Ms. STEFANIK. And President Trump did not meet with President Zelensky Septem-ber at the United Nations, correct? Ambassador Sondland, He did. Ms. STEFANIK. And there was no announcement of investigations before this meeting? Ambassador Sondland, Correct. Ms. STEFANIK. And there was no announcement of investigations after this meeting?
Ambassador SONDLAND. That’s right.

Mr. Counsel PURPURA. So while the security assistance was paused, the administration did precisely what you would expect. It addressed President Trump’s concerns about the two issues that I mentioned on Saturday: burden-sharing and anti-corruption.

A number of law- and policymakers also contacted the President and the White House to provide input on the security assistance issue during this period, including Senator LINDSEY GRAHAM, whose segment is imprinted on September 11, 2019. On that day, the President spoke with Vice President PENCE and Senator RON PORTMAN. The Vice President, in NSC Senior Director Tim Morrison’s words, was “armed with his conversation with President Zelensky from their meeting just days earlier in Warsaw, Poland, and both the Vice President and Senator PORTMAN related their view of the importance of the assistance to Ukraine and convinced the President that the aid should be immediately halted. After the meeting, President Trump terminated the pause, and the support flowed to Ukraine.”

I want to take a step back now and talk for a moment about why the security assistance was briefly paused—again, in the words of the House managers’ own witnesses. Witness after witness testified that confronting Ukrainian corruption should be at the forefront of U.S. foreign policy towards Ukraine. Morrison testified that the President had longstanding and sincere concerns about corruption in Ukraine. The House managers, however, told you that it was laughable to think that the President cared about corruption in Ukraine, but that is not what the witnesses said.

According to Ambassador Volker, President Trump demonstrated that he had a very deeply rooted negative view of Ukraine based on past corruption, and this was based on information according to Ambassador Volker. Most people who know anything about Ukraine would think that.

Dr. Hill testified:

I think the President has actually quite publicly, and I think he was very skeptical about corruption in Ukraine. And, in fact, he is not alone, because everyone has expressed great concerns about corruption in Ukraine.

The House managers have said that the President is concerned with corruption is disingenuous. They said that President Trump didn’t care about corruption in 2017 or 2018 and he certainly didn’t care about it in 2019. Those were their words. Not according to Ambassador Yovanovitch, however, who testified that President Trump shared his concern about corruption directly with President Poroshenko—President Zelensky’s predecessor—in their first meeting in the Oval Office, when was that meeting? In June of 2017—2017.

The President also has well-known concerns about foreign aid generally. Scrutinizing and in some cases curtailing foreign aid was a central plank of his campaign platform. President Trump is especially wary of sending American taxpayer dollars abroad when other countries refuse to pitch in.

Mr. Morrison and Mr. Hale both testified at length about President Trump’s longstanding concern with burden-sharing and anti-corruption aid programs. Here is what they said:

(Text of Videotape presentation:)

Mr. RATCLIFFE. The President was concerned that the United States seemed to bear the exclusive assistance burden to Ukraine. He wanted to see the Europeans step up and contribute more security assistance.

Mr. HALE. We’ve often heard at the State Department that the President of the United States wants to make sure that foreign assistance is reviewed scrupulously and make sure that it is truly in the U.S. national interests and that we evaluate it continuously and that it meets certain criteria the President has established.

Mr. RATCLIFFE. And has the President expressed that he expected our allies to give their fair share of foreign aid as evidenced by the point that he raised during the July 25th phone call to President Zelensky to that effect?

Mr. HALE. The principle of fair burden-sharing by allies and other like-minded states is an important element of the foreign assistance review.

Mr. Counsel PURPURA. The President expressed these precise concerns to Senator RON JOHNSON, who wrote:

He reminded me how thoroughly corrupt Ukraine was and how this concerned his frustration that Europe doesn’t do its fair share of providing military aid.

The House managers didn’t tell you about this. Why not? And President Trump was right to be concerned that other countries weren’t paying their fair share. As Laura Cooper testified, U.S. contributions to Ukraine are far more significant than any individual country, and she also said EU funds tend to be on the economic side rather than for security, and Senator JOHNSON also confirmed that other countries refused to provide the lethal defensive weapons that Ukraine needs in its war with Russia.

Please keep in mind also that the pause of the Ukraine security assistance program was far from unusual or out of character for President Trump. The American people know that the President is skeptical of foreign aid and that one of his top campaign promises and priorities in office has been to avoid wasteful spending of American taxpayer dollars abroad.

Meanwhile, the same people who today claimed that President Trump was not genuinely concerned about burden-sharing were upset when, as a candidate, President Trump criticized free-riding by NATO members.

This past summer, the administration paused, reviewed, and in some cases canceled hundreds of millions of dollars in foreign aid to Afghanistan, El Salvador, Honduras, Guatemala, and Lebanon. At least some of the reviews of foreign aid undertaken at the very same time that the Ukraine aid was paused.

So what happened during the brief period of time while the Ukraine security assistance was paused? People were gathering information and monitoring the facts on the ground in Ukraine as the new Parliament was sworn in and began introducing anti-corruption legislation. Notwithstanding what the House managers would have you believe, the reason for the pause was no secret within the White House and the agencies.

According to Mr. Morrison, in a 2017 meeting with officials throughout the executive branch agencies, the reason provided for the pause by a representative of the Office of Management and Budget was that the President was concerned about corruption in Ukraine and he wanted to make sure Ukraine was doing enough to manage that corruption. In fact, as Mr. Morrison testified, by Labor Day, there had been definitive developments to demonstrate that President Zelensky was committed to the issues he campaigned on: anti-corruption reforms.

Mr. Morrison also testified that the administration was working on answering the President’s concerns regarding burden-sharing. Here is Mr. Morrison. (Text of Videotape presentation:)

Mr. CASTOR. Was there any interagency activity by either the State Department or the Defense Department coordinated by the National Security Council to look into that a little bit for the President?

Mr. MORRISON. We were surveying the data to understand who was contributing what and sort of in what categories.

Mr. CASTOR. So 3 days you evinced concerns. The interagency tried to address them?

Mr. MORRISON. Yes.

Mr. Counsel PURPURA. How else do we know that the President was awaiting information on burden-sharing and anti-corruption efforts in Ukraine before releasing the security assistance?

Because that is what Vice President PENCE told President Zelensky.

On September 1, 2019, Vice President PENCE met with President Zelensky. President Trump was scheduled to attend the World War II commemoration in Poland but instead remained in the United States to manage the emergency response to Hurricane Dorian. Remember, this was 3 days—3 days—after President Zelensky learned through the POLITICO article about the review of the security assistance. Just as Vice President PENCE and his aides anticipated, Jennifer Williams testified that once the cameras left the room, the very first question that President Zelensky had was about the status of the security assistance. The Vice President responded by asking about two things: burden-sharing and corruption.

Here is how Jennifer Williams described it:

And the VP responded by really expressing our ongoing support for Ukraine, but wanting to hear from President Zelensky, you know, that the status of the efforts were that he could then convey back to the President, and also wanting to hear if there
was more that European countries could do to support Ukraine.

Vice President PENCE knew President Trump, and he knew what President Trump wanted to hear from President Zelensky. The Vice President was echoing the Vice President’s focus on corruption and burden-sharing. It is the same, consistent themes every time.

Ambassador Taylor received a similar readout of the meeting between the Vice President and President Zelensky, including President Trump’s focus on corruption and burden-sharing. Here is Ambassador Taylor.

(Text of videotape presentation)

Ambassador TAYLOR. On the evening of September 1st, I received a readout of the Pence-Zelensky meeting over the phone from Mr. Morrison during which he told me that President Zelensky had opened the meeting by immediately asking the Vice President about the security cooperation. The Vice President did not respond substantively but said that he would talk to President Trump that morning. President Trump did not tell President Zelensky that President Trump wanted the Europeans to do more to support Ukraine and that he wanted the Ukrainians to do more to fight corruption.

Mr. Counsel PURPURA. On September 11, based on the information collected and presented to President Trump, the President lifted the pause on the security assistance. As Mr. Morrison explained, “our process gave the President the confidence he needed to approve the release of the security-sec- tor assistance.”

The House managers say that the talk about corruption and burden-sharing is a ruse. No one knew why the security assistance was paused, and no one was addressing the President’s concerns with Ukrainian corruption and burden-sharing. The House managers’ own evidence—their own record—tells a different story, however. They didn’t tell you about this, not in 21 hours. Why not?

The President’s concerns were addressed in the ordinary course. The President wasn’t caught, as the House managers allege. The managers are wrong. All of this, together with what we discussed on Saturday, demon-strates that there was no connection between security assistance and investiga-tions.

When the House managers realized their “quid pro quo” theory on security assistance was falling apart, they created a second alternative theory. According to the House managers, President Zelensky desperately wanted a meeting at the White House with President Trump, and President Trump conditioned that meeting on investiga-tions.

What about the managers’ backup ac-cusations? Do they fare any better than their quid pro quo for security as-sistance? No. No, they don’t.

A Presidential-level meeting happened without any preconditions at the first available opportunity in a widely televised meeting at the United Na-tions General Assembly in New York on September 25, 2019. The White House was working to schedule the meeting earlier at the White House or in War-saw, but those options fell through due to normal scheduling and a hurricane. The two Presidents met at the earliest available opportunity—President Zelensky ever announcing or beginning any investigations.

The first thing to know about the alleged quid pro quo for a meeting is that by the end of the July 25 call, the President instructed President Zelensky to the White House on three separate occasions, each time without any preconditions.

President Trump invited President Zelensky to an in-person meeting on their initial April 21 call. He said: “When you’re settled in and ready, I’d like to invite you to the White House.”

On May 29, the week after President Zelensky’s inauguration, President Trump sent a congratulatory letter, again, inviting President Zelensky to the White House. He said:

As you prepare to address the many challenges facing Ukraine, please know that the American people are with you and are committed to Ukraine’s vast po-tential. To help show that commitment, I would like to invite you to meet with me at the White House in Washington, D.C., as soon as we can find a mutually convenient time.

Then, on July 25, President Trump personally invited President Zelensky to participate in a meeting for a third time. He said: Whenever you would like to come to the White House, feel free to call. Give us a date, and we’ll work that out. I look forward to seeing you.

Those are three separate invitations for a meeting, all made without any preconditions.

During this time, and behind the scenes, the White House was working diligently to schedule a meeting between the Presidents at the earliest possible date. Tim Morrison, whose re sponsibilities included helping to ar- range head-of-state visits to the White House or other head-of-state meetings, testified that he understood that ar rang ing the White House visit with President Zelensky was a do-out that came from the President.

The House managers didn’t mention the work that the White House was doing to schedule the meeting between President Trump and President Zelensky; did they? Why not? They didn’t realize the White House’s involvement in other meetings outside the White House, and President Zelensky was a do-out that came from the President.

The House managers didn’t mention the work that the White House was doing to schedule the meeting between President Trump and President Zelensky; did they? Why not? They didn’t realize the White House’s involvement in other meetings outside the White House, and President Zelensky was a do-out that came from the President.

Accrding to Mr. Morrison, due to both Presidents’ busy schedule, “it be came clear that the ‘earliest opportu-nity for the two Presidents to meet would be in Warsaw’ at the beginning of September.”

The entire notion that a bilateral meeting between President Trump and President Zelensky was somehow con-
If it weren’t for Hurricane Dorian, President Trump would have met with President Zelensky in Poland on September 1, just as President Zelensky had requested and without any preconditions.

As it happened, President Zelensky met with the Vice President instead and just a few weeks later met with President Trump in New York—again without anyone making any statement about the investigations. And, once again, not a single witness in the House record that they compiled and developed under their procedures that we have discussed and will continue to discuss, provided any firsthand evidence that President ever linked the Presidential meeting to any investigations.

The House managers have seized upon Ambassador Sondland’s claim that Mr. Giuliani’s requests were a quid pro quo because arranging a White House visit for President Zelensky. But, again, Ambassador Sondland was only guessing based on incomplete information. He testified that the President told him there was any part of a condition for a meeting with President Zelensky. Why, then, did he think there was one?

In his own words, Ambassador Sondland said that he could only repeat what he heard “through Ambassador Volker from Giuliani.” So he didn’t even hear from Mr. Giuliani himself. But Ambassador Volker, who is the supposed link between Mr. Giuliani and Ambassador Sondland, thought that such a linkage existed. Ambassador Volker testified unequivocally that there was no linkage between the meeting with President Zelensky and Ukrainian investigations.

I am going to read the full questions and answers because this passage is key. This is from Ambassador Volker’s deposition testimony.

Question. Did President Trump ever withhold a meeting with President Zelensky or delay it in any way with President Zelensky until the Ukrainians committed to investigate the allegations that you just described concerning his 2016 Presidential election?

Answer. The answer to the question is no, if you want a yes-or-no answer. But the reason the answer is no is that we did have difficulty scheduling a meeting, but there was no linkage like that.

Question. You said that you were not aware of any linkage between delaying the Oval Office meeting between President Trump and President Zelensky and the Ukrainian commitment to investigate the two allegations as you described them, correct?

Answer. Correct.

Over the past week, on no fewer than 15 separate occasions, the House managers played a video of Ambassador Sondland’s testimony in which the arrogant and desperate admission of the investigations was a prerequisite for a meeting or call with the President—15 times. They never once read to you the testimony that I just did. They never once read to you the testimony that Ambassador Volker refuted what Ambassador Sondland claimed he heard from Ambassador Volker.

Here is what we know. President Trump invited President Zelensky to meet three times without preconditions. The White House was working behind the scenes to schedule the meeting. The two Presidents planned to meet when Mr. Volker had asked, and ultimately met 3 weeks later without Ukraine announcing any investigations.

No one testified in the House record that the President ever said there was a connection between a meeting and investigations, plain and simple. So much for a quid pro quo for a meeting with the President.

Before I move on, let me take a brief moment to address a side allegation that was raised in the original whistle-blower complaint and that the House managers are still trying to push.

The managers claim that President Trump ordered Vice President Pence not to attend President Zelensky’s inauguration in favor of a lower ranking delegation, according to them—single a downgrading of the relationship between the United States and Ukraine.

That is not true. As I am sure everyone in this room can greatly appreciate, we need to have a deep commitment to that visit.

First, dates of travel were limited. For national security reasons, the President and Vice President generally avoid being out of the country at the same time.

The President had scheduled trips to Europe and Japan during the period when our Embassy in Ukraine anticipated the Ukrainian inauguration would occur, at the end of May or in early June. Jennifer Williams testified that the Office of the Vice President advised the Ukrainians that if the Vice President were to participate in the inauguration, the ideal dates would be around May 29, May 30, May 31, or June 1, thus the in the United States. She said “if it wasn’t one of those dates, it would be very difficult or impossible” for the Vice President to attend.

Second, the House managers act as if no other priorities in the world could compete for the administration’s time. The Vice President’s Office was simultaneously planning a competing trip for May 30 in Ottawa, Canada, to participate in an event supporting passage of the United States-Mexico-Canada Agreement. Ultimately, the Vice President traveled to Ottawa on May 30 to meet with Prime Minister Justin Trudeau and to promote the passage of the USMCA. This decision, as you know, advanced the top administration priority and an issue that President Trump vigorously supported.

What you did not hear from the House managers was that the Ukrainian inauguration dates did not go as planned. On May 16–May 16—the Ukrainians surprised everyone and scheduled the inauguration for just 4 days later, on May 20–May 20. So think about that: May 16, May 20.

Get everybody—security, advance, everyone—to Ukraine. Jennifer Williams testified that it was very short notice, so there would have been difficult for the Vice President to attend, particularly since they hadn’t sent out the advance team.

George Kent testified that the short notice left almost no time for either proper preparations or foreign delegations to visit and that the State Department scrambled on Friday the 17th to try and figure out who was available. Mr. Kent suggested that Secretary of Energy Perry be the anchor for the delegation, as “someone who was a person of stature and whose job had relevance to our agenda.” Secretary Perry led the delegation, which also included Ambassador Sondland, Ambassador Volker, and Senator Johnson. Ambassador Volker testified that it was the largest delegation from any country there, and it was a high-level one. The House managers didn’t tell you that.

The claim that the President instructed the Vice President not to attend President Zelensky’s inauguration is based on House manager assumptions with no evidence that the President did something wrong.

Finally, as I am coming to the end, if the evidence doesn’t show a quid pro quo, what does it show? Unfortunately for the House managers, one of the few things that all of the witnesses agreed on was that the Vice President has strengthened the relationship between the United States and Ukraine and that he has been a more stalwart friend to Ukraine and a more fierce opponent of Russian aggression than President Obama. The House managers repeatedly claimed that President Trump doesn’t care about Ukraine. They are attributing views to President Trump that are contrary to his actions. More importantly, they are contrary to the House managers’ own evidence.

I don’t take your word for it. Ambassadors Yovanovitch, Taylor, and Volker all testified to the Trump administration’s positive new policy toward Ukraine based especially on President Trump’s decision to provide lethal aid to Ukraine. Ambassador Taylor testified that President Trump’s policy toward Ukraine was a substantial improvement over President Obama’s policy. Ambassador Volker agreed that America’s policy toward Ukraine has been strengthened under President Trump, whom he credited with approving each of the decisions made along the way.

Ambassador Yovanovitch testified that President Trump’s decision to provide lethal aid to Ukraine meant that our policy actually got stronger over the last 3 years. She called the policy shift that President Trump directed very significant. Let’s hear from Ambassador Taylor, Ambassador Volker, and Ambassador Yovanovitch.

(Text of Videotape presentation): Ms. STEFANIK. The Trump administration has indeed provided substantial aid to
Ukraine in the form of defensive lethal aid, correct?  
Ambassador TAYLOR. That is correct.  
Ms. STEFANIK. And that is more so than the Obama administration, correct?  
Ambassador TAYLOR. The Trump administration.  
Ms. STEFANIK. Defensive lethal aid.  
Ambassador TAYLOR. Yes.  
Ambassador YOVANOVITCH. And the Trump administration strengthened our policy by ensuring the provision to Ukraine of antitank missiles known as Javelins.  
They are obviously tank busters. And so, if the war with Russia all—all of a sudden accelerated in some way and tanks come over the horizon, Javelins are a very serious weapon to deal with that.  
Mr. Counsel PURPURA. Ukraine is better positioned to fight Russia today than it was before President Trump took office. As a result, the United States is safer too. The House managers did not tell you about this testimony from Ambassadors Taylor, Volker, and Yovanovitch. Why not?  
These are the facts, as drawn from the House managers’ own record on which they impeached the President. This is why the House managers’ first Article of Impeachment must fail, for the six reasons I set forth when I began on Saturday.  
There was no linkage between investigations and security assistance or a meeting on the July 25 call. The Ukrainians said there was no quid pro quo and they felt no pressure. The top Ukrainians did not even know that security assistance was paused until more than a month after the July 25 call. The House managers’ record reflects that anyone who spoke with the President said that the President made clear that there was no linkage. The security assistance flowed, and the President defended it, took place, all without any announcement of investigations. And President Trump has enhanced America’s support for Ukraine in his 3 years in office.  
These facts all require that the first Article of Impeachment fail. You have already heard and will continue to hear from my colleagues on why the second article must fail. Once again, this is the case that the House managers chose to bring. This is the evidence they brought before the Senate.  
The very heavy burden of proof rests with them. They say their case is overwhelming and uncontested. It is not. They say they have proven each of the articles against President Trump. They have not. The facts and evidence of the case the House managers have brought exonerates the President.  
Thank you for your attention.  
Mr. Chief Justice, I think we are ready for a break.  
The CHIEF JUSTICE. The majority leader is recognized.  
RECESS  
Mr. McCONNELL. Mr. Chief Justice, colleagues, we will take a 15-minute break.  
There being no objection, at 2:52 p.m., the Senate, sitting as a Court of Impeachment, recessed until 3:17 p.m.; whenupon the Senate reassembled when called to order by the CHIEF JUSTICE.  
The CHIEF JUSTICE. The majority leader is recognized.  
Mr. McCONNELL. It is my understanding that, having consulted with the President’s lawyers, we are looking around 6 p.m. for dinner, and we will plow right through until 6 p.m.  
The CHIEF JUSTICE. Thank you, President’s counsel can continue with their case.  
Mr. Counsel SEKULOW. Thank you, Mr. Chief Justice.  
Mr. Chief Justice. Members of the Senate, House managers, there has been a lot of talk in both the briefs and in the discussions over the last week about one of our colleagues, former mayor of New York, Rudy Giuliani. Mayor Giuliani is one of the leaders of the President’s defense team during the Mueller investigation. He is mentioned 531 times—20 in the brief and about 511, give or take, in the arguments, including the motion day.  
We had a robust team that worked on the President during the Mueller probe, consisting of Mayor Giuliani, Andrew Economidou, Stuart Roth, Jordan Sekulow, Ben Sisney, Mark Goldfeder, Mayor Giuliani, of course, and Marty Raskin. Was one of the leading attorneys on the Mueller investigation for the defense of the President.  
The issue of Mayor Giuliani has come up here in this Chamber a lot. We thought it would be appropriate now to turn to that issue, the role of the President’s lawyer, his private counsel, in this proceeding. I would like to yield my time, Mr. Chief Justice, to Jane Serene Raskin.  
Ms. Counsel RASKIN. Mr. Chief Justice, Majority Leader McCONNELL. Members of the Senate, I expect you have heard American poet Carl Sandburg’s summary of the trial lawyer’s dilemma:  
If the facts are against you, argue the law.  
If the law is against you, argue the facts.  
If the facts and the law are against you, pound the table and yell like hell.  
Well, we have heard the House managers do some table-pounding and a little yelling, but, in the main, they have relied on hearsay, speculation, and assumptions—all reasons and one reason alone: to distract from the fact that the evidence does not support their claims.  
And what is the first tell that Mr. Giuliani’s role in this may not be all that it is cracked up to be? They didn’t subpoena him to testify. In fact, Mr. Schiff and his committee never even invited him to testify. They took a stab at subpoenaing his documents back in September, and when his lawyer responded with legal defenses to the production, the House walked away. But if Rudy Giuliani is everything they say he is, don’t you think they would have subpoenaed and pursued his testimony? Ask yourselves, why didn’t they?  
In fact, it appears the House committee wasn’t particularly interested in presenting you with any direct evidence of what Mayor Giuliani did or why he did it. Instead, they ask you to rely on hearsay, speculation, and assumption—evidence that would be inadmissible in any court.  
For example, the House managers suggest that Mr. Giuliani, at the President’s direction, demanded that Ukraine announce an investigation of the Bidens and Burisma before agreeing to a White House visit. They base their assertion to that effect by Ambassador Sondland.  
But what the House managers don’t tell you is that Sondland admitted he was speculative about that. He presumed that Mr. Giuliani’s requests were intended as a condition for a White House visit. Even worse, his assumption was on thirdhand information. As he put it, the most he could do...
Think that Mayor Giuliani had parachuted into the President’s orbit in the spring of 2019 for the express purpose of carrying out a political hit job. They would have you believe that Mayor Giuliani was only there to dig up dirt against former Vice President Biden, and nothing else. But he was pursuing the President Trump’s rival in the 2020 election. Of course, Mayor Giuliani’s intent is no small matter here. It is a central and essential premise of the House managers’ case that Mayor Giuliani’s motive was purely political. They want you to believe Mayor Giuliani was doing what good defense attorneys do. He was following a lead from a well-informed source, that, in his view, to be credible, a Ukrainian official to speak to Mayor Giuliani be- cause he knows all these things about Ukraine. As Volker put it, the President’s comment was not an instruction but just a comment. Ambassador Sondland agreed. He testified that he didn’t take it as an order, and he added that Mayor Giuliani wasn’t even specific about what he wanted us to talk to Giuliani about. So it may come as no surprise to you that after the May 23 meeting, the one during which the House managers told you the President demanded that his Ukraine team talk to Giuliani, neither Volker nor Sondland even followed up with Mr. Giuliani until July, and the July followup by Mr. Volker happened only because the Ukrainian Government put in touch with him. Volker testified that President Zelensky’s senior aide, Andriy Yermak, approached him to ask to be connected to Mr. Giuliani.

House Democrats also rely on testimony that Mayor Giuliani told Ambas- sadors Volker and Sondland that, in his view, to be credible, a Ukrainian statement on anti-corruption should specifically mention investigations into 2016 election interference and Burisma. When we learn that Mayor Giuliani was “conveying messages that President Trump wanted conveyed to the Ukrainians,” Volker said that he did not have that impression. He believed that Giuliani was doing his own communica- tion about what he believed he was interested in.

But even more significant than the reliance on presumptions, assumptions, and unsupported conclusions is the management to place in any fair context Mr. Giuliani’s actual role in exploring Ukrainian corruption. To hear their presentation, you might vember 2018, when he was contacted by someone he describes as a well-known investigator. The Washington Post and many other news outlets reported the same information. So, yes, Mayor Giuliani was President Trump’s personal attorney, but he was not on a political errand. As he has stated repeatedly and publicly, he was doing what good defense attorneys do. He was following a lead from a well-known private investigator. He was gathering evidence regarding Ukrainian election interference to defend his client against the false allegations being investigated by Special Counsel Mueller, but the House managers didn’t even allude to that possibility. Instead, they just repeated their mantra that Giuliani’s motive was purely political. That speaks volumes about the bias with which they have approached their mission.

The bottom line is, Mr. Giuliani de- fended President Trump vigorously, repeatedly, and publicly throughout the Mueller investigation and in the non-stop congressional investigations that followed, including the attempted Mueller redo by the House Judiciary Committee, which the managers would apparently like to sneak in the back door here.

The House managers may not like his style—you may not like his style—but one might argue that he is everything Clarence Darrow said a defense lawyer ought to be. An attorney for the defense is not just a lawyer. He is, of course, another obvious answer to the question, what evidence have the managers actually offered you to support that proposition? On close inspection, it turns out virtually none. They just say it over and over.

And they offer you another false di- chotomy. Either Mayor Giuliani was act- ing in an official capacity to further the President’s foreign policy objectives or he was acting as the Presi- dent’s personal attorney, in which case, they conclude, ipse dixit, his mo- tive would only be to further the Presi- dent’s political objectives. The House managers then point to various of Mr. Giuliani’s public state- ments in which he is clear and com- pletely transparent about the fact that he is, indeed, the President’s personal attorney. There you have it. Giuliani was not an adviser to the President’s foreign policy objectives, he was not on a political errand. As he said repeatedly and publicly throughout the entire Mueller investigation, it turns out Rudy was spot-on.

It seems to me we are keeping score on who got it right on allegations of FISA abuse, egregious misconduct at the highest level of the FBI, alleged collusion between the Trump campaign and Russia, and supposed obstruction of justice in connection with the spe- cial counsel’s investigation. The score is Mayor Giuliani 4, Mr. Schiff 0. But in this trial, in this moment, Mr. Giuliani is just a minor player—that shiny object designed to distract you.

Thank you, Mr. Chief Justice. I yield back to Mr. Sekulow.

Mr. Counsel SEKULOW. Mr. Chief Justice, Members of the Senate, and House managers, we are going to now move to a section dealing with the law. There are two issues in particular that my colleague Pat Philbin, the Deputy White House Counsel, will be addressing, issues involving due process and legal issues specifically in dealing with the second Article of Impeachment: Obstruction of Congress. So I yield my time now, Mr. Chief Justice, to Mr. Philbin.

Mr. Counsel PHILBIN. Mr. Chief Jus- tice, Senators, Majority Leader MCCONNELL, Minority Leader SCHUMER, the other day, as we opened our presentation, I touched on two areas: some of
the due process violations that charac-
terized the proceedings in the House
and some of the fundamental
mischaracterizations and errors that
underpinned the House Democrats’
charge for obstruction. I will complete
the presentation today on those points
to rely on two of the funda-
mentally unfair procedures that were
used in the House and their implications
in this proceeding before you now and
also address in detail the purported
charges of obstruction in the second
Article of Impeachment.

On due process, there are three funda-
mental errors that affected the pro-
ceedings in the House. The first is, as I
explained on Saturday, the impeach-
ment inquiry was unauthorized and un-
constitutional from the beginning.

No committee of the House has the
power to launch an inquiry under the
House’s impeachment power unless the
House itself has taken a vote to give
that authority to a committee. I noted
that, in cases such as Humely v. United
States and United States v. Watkins,
the Supreme Court has set out these
principles, general principles derived
from the Constitution, which assign
authority to each Chamber of the legis-
latively branch—to the House and to the
Senate—but not to individual members
or to subcommittees. For an authority
of the House to be transferred to a
committee, the House has to vote on
that.

The DC Circuit has distilled the prin-
ципles from those cases this way: “To
issue a valid subpoena, a committee or
a subcommittee must conform strictly
to the resolution establishing its inves-
tigatory powers.” That was the prob-
lem here in that there was no such res-
olution. There was no vote from the
House authorizing the issuance of sub-
poenas under the impeachment power.
So this inquiry began with nearly two
dozen invalid subpoenas. The Speaker
had the House proceed on nothing more
than press conference in which she
purported to authorize committees to
begin an impeachment power. Under
the Constitution, she lacked that au-
thority.

As the chairman of the House Judici-
ary Committee, Peter Rodino, pointed
out during the Nixon impeachment in-
quiry:

Such a resolution [from the House] has al-
ways been passed by the House. . . . It is a
necessary step if we are to meet our obliga-
tion.

So we began this process with unau-
thorized subpoenas that imposed no
compulsion on the executive branch to
respond with documents or witnesses.
I will be coming back to that point, that
threshold foundational point, when we
to the obstruction charge.

The second fundamental due process
error is that the House Democrats de-
 nied the President basic due process re-
quired by the Constitution and by the
fundamental principles of fairness in
the procedures that they used for the
hearings. I am not going to go back in
detail over those. As we heard from
Judge Starr, the House Democrats es-

essentially abandoned the principles that have governed impeachment inquiries
in the House for over 150 years. I will
touch on just a few points and respond
to a couple of points that the House
managers have made.

The first is denying due pro-
cess rights, the House proceedings
were a huge reversal from the positions
the House Democrats themselves had
taken in the recent past, particularly
in the Clinton impeachment pro-
cedure. I believe we have Manager
NADLER’s description of what was required. Per-
haps not. Manager NADLER was ex-
plaining that due process requires at a
minimum notice of the charges against
you, the right to be represented by
counsel, the right to cross-examine wit-
nesses against you, and the right to
present evidence. All of those rights
were denied to the President.

Now, one of the reasons that the
managers and the President made the
defect that we pointed out in the secret
proceedings, where Manager SCHIFF began
these hearings in the basement bunker,
is that, well, that was really just best
investigative practice; they were oper-
ating in a protective and defensive
mode by that. Those hearings operated noth-
ing like a grand jury.

A grand jury has secrecy primarily
for two reasons: to protect the direc-
tion of the investigation so others
won’t know what is being called in and
what they are saying—to keep that secret for the prosecutor to
be able to keep developing the evi-
dence—and to protect the accused be-
cause the accused might not ever be in-
dicted.

In this case, all of that information
was made public every day. The House
Democrats destroyed any legitimate
analogy to a grand jury, because that
was all public. They made no secret
of who the targets were. They issued vile calumnies about him
every day. They didn’t keep the direc-
tion of their investigation secret. Their
witness lists were published daily, and
the direction of the investigation was
open. The testimony that took place
was selectively leaked to a compliant
media to establish a false narrative
about the President.

If that sort of conduct had occurred
in a real grand jury, that would have
been a criminal violation. Prosecutors
cannot violate the Federal criminal rules, it is a criminal
offense to be leaking what takes place
in a grand jury.

Also, the grand jury explanation pro-
vides no rationale whatsoever for this
second round of hearings. Remember,
after the basement bunker—after the
secret hearings where the testimony
was prescreened—then the same wit-
nesses who had already been deposed
were put on in a public hearing where
the President was still excluded.

Ask yourself, what was the reason for
that? In every prior Presidential im-
peachment in the modern era where
there have been public hearings, the
President has been represented by
counsel and could cross-examine wit-
nesses. Why did there have to be pub-
lic, televised hearings where the Presi-
dent was excluded? That was nothing
more than a show trial.

I also addressed the other day the
House managers’ contention that they
had offered the President due process;
that when things reached the third
round of hearings in front of the House
Judiciary Committee, Manager NADLER
offered the President due process. I ex-
plained why that was illusory. There
was no genuine offer there because,
before any hearings began, other than
the law professor’s seminar on December 4,
the Speaker had already determined
the outcome, had already said there
were going to be Articles of Impeach-
ment, and the Judiciary Committee
had informed the counsel’s office that
they were going to be Articles of Impeach-
ment. There does not have to be a test
of witnesses or have any factual hearings
whatsoever. It was all done. It was
locked in. It was baked.

There was something else hanging
out there when the House managers
originally offered to allow the President some due
process rights, and that was a special
 provision in the rules for the House Ju-
diciary Committee proceedings—also
unprecedented—that allowed the House
Judiciary Committee to deny the
President any due process rights at all
if he continued to refuse to turn over
documents or not allow witnesses to
testify, so that if the President didn’t
give up his privileges and immunities
then he had been asserting over execu-
tive branch confidentiality—if he
didn’t comply with what the House
Democrats wanted—then it was up to
Chairman NADLER, potentially, to say:
No rights at all. There is a term for the
Bill of Rights. There is a Constitutional
right to a fair trial, one that the Founding
Fathers included in the Constitution.
They have been wholesale denied to
this President.

The last point I will make about due
process is this: It is important to re-
member that due process is enshrined
in the Bill of Rights for a reason. It
is not that process is just an end in itself.
Instead, it is a deep-seated belief in our
legal tradition that fair process is es-

sential for accurate decision making.

Cross-examination of witnesses, in par-
sicular, is one of the most impor-
tant procedural protections for any
American. The Supreme Court has ex-
plained that, for over 250 years, our
legal tradition has recognized cross-ex-
amination as the greatest legal engine
invented for the discovery of truth.

So why did House Democrats jettison
every precedent and every principle of
due process in the way they devise
these hearing procedures? Why did
they devise a process that kept the
President blocked out of any hearings
for 71 of the 78 days of the so-called in-
vestigation?
I submit that because their process was never about finding truth. Their process was about achieving a predetermined outcome on a timetable and having it done by Christmas, and that is what they achieved.

Now, the most elemental due process error is that the whole foundation of these proceedings was also tainted beyond repair because an interested fact witness supervised and limited the course of the factual discovery, the course of the hearings. I explained the other day that Manager SCHIFF said essentially that the President himself was why his office’s contact with the so-called whistleblower and what was discussed and how the complaint was framed, which all remained secret, to limit inquiry into that, which is relevant.

The whistleblower began this whole process. His bias, his motive, why he was doing it, what his sources were—that is relevant to understand what generated this whole process, but there was nothing about that.

So what conclusion does this all lead to—all of these due process errors that have infected the proceeding up to now?

I think it is important to recognize the right conclusion is not that this body, this Chamber, should try to redo everything—to start bringing in new evidence, bring in witnesses because the President wasn’t allowed witnesses below and redo the whole process. And that is not the conclusion.

One is, first, as my colleagues have demonstrated, despite the one-sided, unfair process in the House, the record that the House Democrats collected through that process already shows that the President did nothing wrong. It already exonerates the President.

But the second and more important reason is because of the institutional implications it would have for this Chamber. Whatever precedent is set, what is at stake here is not just what happens now as an acceptable way to bring an impeachment proceeding and to bring it to this Chamber becomes the new normal. And if the new normal is going to be that there can be an impeachment proceeding in the House that violates due process, that doesn’t provide the President or another official being impeached due process rights, that fails to conduct a thorough investigation, that doesn’t come here with facts established by the House that becomes the investigatory body and start redoing what the House didn’t do and finding new witnesses and doing things over and getting new evidence, then, that is going to be the new normal, and that will be the way that this Chamber acts and operates, and there will be a lot more impeachments coming because it is a lot easier to do an impeachment if you don’t have to follow due process and then come here and expect the Senate to do the work that the House didn’t do.

I submit that is not the constitutional function of this Chamber sitting as a Court of Impeachment, and this Chamber should not put its imprimatur on a process in the House that would force this Chamber to take on that role.

Now, I will move on to the charge of obstruction in the second Article of Impeachment.

Accepting that Article of Impeachment would fundamentally damage separation of powers under the Constitution by permanently altering the relationship between the executive and the legislative branches of government. As Manager SCHIFF said that House Democrats are trying to impeach the President for resisting legally defective demands for information by asserting established legal defenses and immunities based on legal advice from the Department of Justice’s Office of Legal Counsel. In essence, the approach here is that House Democrats are saying: When we demand documents, the executive branch must comply immediately, and the assertions of privilege or defenses to our subpoenas are further evidence of obstruction. We don’t have to go through the constitutionally mandated accommodations process to work out an acceptable solution with the executive branch. We don’t have to go to the courts to establish the validity of our subpoenas.

At one point, Manager SCHIFF said that anything that makes the House even contemplate litigation is evidence of obstruction. Instead, the House claims it can jump straight to impeachment.

What this really means, in this case, is that they are saying for the President to defend the prerogatives of his office, to defend the constitutionally grounded principles of executive branch privileges of immunities is an impeachable offense.

If this Chamber accepts that premise, that what has been asserted here constitutes an impeachable offense, it will forever damage the separation of powers. It will undermine the independence of the executive and destroy the bounds between the legislative and executive branches that the Framers crafted in the Constitution.

As Professor Turley testified before the House Judiciary Committee, “basing impeachment on this obstruction theory would itself be an abuse of power . . . by Congress.”

And I would like to go through that and explain something. I will start by outlining what the Trump administration actually did in response to subpoenas, because there are three different actions—three different legally based assertions for resisting different subpoenas that the Trump administration made.

I pointed out on Saturday that there has been this constant refrain from the House Democrats that there was just blanket defiance, blanket obstruction, as if it were unexplained obstruction—just, we won’t cooperate with that warrant. And that is not true. There were very specific legal grounds provided, and each one was supported by an opinion from the Department of Justice’s Office of Legal Counsel.

So the first is executive branch officials declined to comply with subpoenas that had not been authorized, and that is the point I made at the beginning. There was no vote from the House. Without a vote from the House, the subpoenas that were issued were not authorized. And I pointed out that in an October 18 letter from White House Counsel that specific ground was explained that wasn’t just from the White House counsel. There were other letters. On the screen now is an October 15 letter from OMB, which explains:

Absent a delegation by a House rule or a resolution of the House, none of your committees have been delegated jurisdiction to conduct an investigation pursuant to the impeachment power under article I, section 2 of the Constitution.

The letter went on to explain that legal rationale—not blanket defiance. There were specific exchanges of letters explaining these legal grounds for resisting.

The second ground, the second principle that the Trump administration asserts was that the asserted subpoenas purported to require the President’s senior advisers, his close advisers, to testify.

Following at least 50 years of precedent, the Department of Justice’s Office of Legal Counsel advised that three senior advisers to the President—the Acting White House Chief of Staff, the Legal Advisor to the National Security Council, and the Deputy National Security Advisor—were absolutely immune from compelled congressional testimony. And based on that advice from the Office of Legal Counsel, the President directed those advisers not to testify.

Administrations of both political parties have asserted immunity since the 1970s. President Obama asserted it as to the Director of the Office of Political Strategy and Outreach. President George W. Bush asserted it as to his former counsel and to his White House Chief of Staff. President Clinton asserted it as to two of his counsel. President Reagan asserted it as to his counsel, Fred Fielding, and President Nixon asserted it. This is not something that was just made up recently. There is a decades-long history of the Department of Justice providing the opinion that senior advisers to the President are immune from compelled congressional testimony, and it is the same principle that was asserted here.

There are important rationales behind this immunity. One is that the President’s most senior advisers are essentially his alter egos, and allowing Congress to subpoena them and compel them to come testify would be tantamount to allowing Congress to subpoena the President himself. And even the President’s Counsel advised him to come testify, but that in separation of powers would not be tolerated. Congress could not do more that with the
President than the President could force Members of Congress to come to the White House and answer to him.

There is also a second and important rationale behind this immunity, and that relates to executive privilege. The immunity protects the same interests that underlie executive privilege. The Supreme Court has recognized executive privilege that protects the confidentiality of the communications with the President and deliberations within the executive branch. As the Court put it in United States v. Nixon, “The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.”

So the Supreme Court has recognized the executive needs this privilege to be able to function. It is rooted in the separation of powers.

As Attorney General Janet Reno advised President Clinton, this is not a partisan issue. This is not a Republican or Democrat issue. Administrations of both parties have asserted this principle of immunity for senior advisers.

And why does it matter? It matters because the Supreme Court has explained that the fundamental principle behind executive privilege is that it is necessary confidentiality in communications and deliberations in order to have good and worthwhile deliberations, in order to have people provide their candid advice to the President. Because if they knew that what they were going to say was going to be on the front page of the Washington Post the next day or the next week, they wouldn’t tell the President what they actually thought. If you want to have good decision making, there has to be some confidentiality.

This is the way the Supreme Court put it: “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.”

That was also from United States v. Nixon.

So those are exactly the interests that are protected by having senior advisers to the President be immune from compelled congressional testimony. Because once someone is compelled to sit in the witness seat and start answering, it is very hard for them to protect that privilege, to make sure that they don’t start revealing something that was discussed.

So for a small circle of those close to the President, for the past 40 to 50 years, administrations of both parties have insisted on this principle.

Now, the other night, House managers, when we were here very late last week, suggested that executive privilege was a distraction, and Manager NADLER called it “nonsense.”

Not at all—it is a principle recognized by the Supreme Court—a constitutional principle grounded in separation of powers.

They also asserted that this immunity has been rejected by every court that has addressed it, as if to make it seem that lots of courts have addressed this. They have all said that this theory just doesn’t fly. That is not accurate. That is not true.

In fact, in most instances, once the President asserts immunity for a senior adviser, the accommodations process between the executive branch and the legislature begins, and there is usually some compromise to allow, perhaps, some testimony, not in open hearing but in a closed hearing or a deposition, perhaps to provide some other information instead of live testimony. There is more.

But in the only two times it has been litigated, district courts, it is true, rejected the immunity. One was in a case involving former counsel to George W. Bush, Harriet Miers. The district court ordered the immunity to be immediately lifted. The Court of Appeals of the DC Circuit stayed that decision. And that decision means—to stay that district court decision—that the appellate court thought there was a likelihood of success on appeal, that the executive immunity was, at a minimum, that the issue of immunity presented “questions going to the merits, so substantial, difficult, and do not as to make them a fair ground for litigation.” The first decision was stayed.

The second district court decision is still being litigated right now. It is the McGahn case that the House has brought, trying to get testimony from former counsel to President Trump, Donald McGahn. Case was just argued in the DC Circuit on January 3. So there is no established law suggesting that this immunity somehow has been rejected by the court. It is still being litigated right now. It is an immunity that is a standard principle asserted by every administration in both parties for the past 40 years. Asserting that principle cannot be treated as obstruction of Congress.

The third action that the President took—the accommodation with the Trump administration after the Trump administration had declined to make someone available for a deposition because of the lack of agency counsel. That issue was worked out and accommodation was made, and there was some testimony provided in other circumstances. So it doesn’t always result in the kind of escalation that was seen here—straight to impeachment. The accommodation process can work things out.

House Democrats have pointed to a House rule that excludes agency counsel, but, of course, that House rule cannot override a constitutional privilege.

In the Obama administration, the Office of Legal Counsel stated that the President’s executive privilege was potentially undermined . . . the President’s constitutional authority to consider and assert executive privilege where appropriate.”

So why is agency counsel important?

As I tried to explain, the executive privilege of confidentiality for communications with the President for internal deliberative communications of the executive branch—those are important legal rights. They are necessary for the proper functioning of the executive branch, and the agency counsel is essential to protect those legal rights.

When an individual employee goes in to testify, he or she might not know—probably would not know—that the immunity that is covered by executive privilege or deliberative process privilege—not things the employees necessarily know, and their personal counsel, even if they are permitted to have their personal counsel with them—said different, it is essential for employees don’t know the finer points of executive branch confidentiality interests or deliberative process privilege. It is also not their job to protect those interests. They are the personal lawyer for the employee who is testifying, trying to protect that employee from potential legal consequences.

We usually have lawyers to protect legal rights, so it makes sense when there is an important legal and constitutionally based right at stake—the executive privilege—that there should be a lawyer there to protect that right for the executive branch, and that is the principle that the Office of Legal Counsel enjoys.

This also doesn’t raise any insurmountable problems for congressional investigations for finding information. In fact, just as recently as April of 2019, the House Committee on Oversight and Government Reform had accommodation with the Trump administration after the administration had declined to make someone available for a deposition because of the lack of agency counsel. That issue was worked out and accommodation was made, and there was some testimony provided in other circumstances. So it doesn’t always result in the kind of escalation that was seen here—straight to impeachment. The accommodation process can work things out.

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So those are the three principles that the Trump administration asserted. Now I would like to turn to the claim that somehow the assertion of these principles created an impeachable offense. The idea that asserting defenses and immunity—legal defenses and immunity in response to subpoenas, acting on advice of the Department of Justice—is an impeachable offense is absurd and is dangerous for our government. Let me explain why.

House Democrats’ obstruction theory is wrong first and foremost because, in a government of laws, asserting privileges and rights to resist compulsion is not obstruction; it is a fundamental right. In Bordenkircher v. Hayes, the Supreme Court explained that to “punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional.”

This is a principle that in the past, in the Clinton impeachment, was recognized across the board, that it would be improper to suggest that asserting rights is an impeachable offense. Harvard law professor Laurence Tribe said: “The allegation that invoking privileges and otherwise using the judicial system to shield information . . . is an abuse of power that should lead to impeachment and removal from office is not only frivolous, but also dangerous.”

Manager NADLER said that the use of a legal privilege is not illegal or impeachable itself—a legal privilege, executive privilege. Minority Leader SCHUMER, in the Clinton impeachment, expressed the same view:

(Text of Videotape presentation:)

Mr. SCHUMER. To suggest that any subject of an investigation, much less the President of the United States, has a constitutional right to resist compulsion by the courts to provide information is not only improper and wrong, it is unconstitutional.

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If the House could jump straight to impeachment, that would alter the relationship between the branches. It would suggest that the House could make itself superior over the Executive to dangle the threat of impeachment over any demand for information made to the Executive.

Impeachment under the Constitution is the thermonuclear weapon of interbranch friction, and where there is something like a rifle or a bazooka at the House’s disposal to address some friction with the executive branch, this would be akin to the incrementalism in the Constitution—not jumping straight to impeachment—that is the solution.

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The Constitution does not say that the power of impeachment is the paramount power that makes all other constitutional rights and privileges and prerogatives of the other branches fall away.

The Framers recognized that there could be partisan impeachments and there could be impeachments for the wrong reasons, and they did not strip the executive branch of any of its needs for protecting its own sphere of authority and its own prerogatives and those constitutional prerogatives. Therefore, principles of executive privilege and those immunities still survive, even in the context of impeachment.

The power of impeachment is not like the House can simply flip a switch and say now we are in impeachment, and they have constitutional kryptonite that makes the powers of the executive eliminated. So when there are these conflicts, even in the context of impeachment inquiry, the executive can continue to assert its privileges and prerogatives under the Constitution, and, indeed, it must in order to protect the institutional interests of the Office of the Presidency and to preserve the proper balance between the branches of government. The President is above the law. Not so. I say that if we cannot impeach the President that he was immune and not go or should he obey the subpoena? Now, in that case, he filed suit on October 25. The court, within a few days, set an expedited briefing schedule, but the House withdrew the subpoena on November 1 just 11 days later, in order to moot the case.

So I think litigation is a viable avenue, along with the accommodation process, as a first step. Then, if the House believes it can go to court and win, they can litigate the jurisdiction and litigate the validity of its subpoenas, that is also available to them, but impeachment as the first step doesn't make any sense.

I should point out, in part, when the House managers say they didn't have time to litigate, they didn't have time to go to the courts, but they now come to this Chamber and say this Chamber should issue some more subpoenas, this Chamber should get some witnesses that we didn't bother to fight about, what do you think will happen then? That there will not be similar assertions of privilege and immunity? That there wouldn't be litigation about that?

Then, this goes back to the point that I made. If you put your imprimatur on a process that was broken and say, yes, that was a great way to run things, this was a great package to bring here, and we will clean up the mess and issue subpoenas and try to do all the work that wasn't done, then that becomes the new normal, and that doesn't make sense for this body.

A proper way to handle things handled is to have the House—if it wants to impeach the President, it has to bring the impeachment here ready for trial—do the investigation. The information it wants to get, if there is going to be resistance, that has to be resolved, and it has to be ready to proceed, not transfer the responsibility to this Chamber to do the work that has been left off. They also assert that President Trump's assertion of these privileges is somehow different because it is unprecedented, and it is categorical. Well, it is unprecedented, perhaps, in the sense that there was a broad statement that a lot of subpoenas wouldn't be complied with, but that is because it was unprecedented for the House to begin
these proceedings without voting to authorize the committee to issue the subpoenas. That was the first unprecedented step. That is what had never happened before in history. So, of course, the response to that would be, in some sense, unprecedented. The President simply pointed out that without that vote, there were no valid subpoenas.

There have also been categorical refusals in the past. President Trump, when the Judiciary Committee on American Activities, in 1948, issued subpoenas to his administration, issued a directive to the entire executive branch that any subpoena or demand or request for information, reports, or files in the nature described in those subpoenas shall be respectfully declined on the basis of this directive, and he referred also to inquiries of the Office of the President for such response as the President may determine to be in the public interest. The Truman administration responded to none of them.

A last point on the House Democrats’ claim that privileges simply disappear because this is impeachment power of the House. They have referred a number of times to United States v. Nixon, the Supreme Court decision, suggesting that somehow determines that when you are in an impeachment inquiry, executive privilege falls away. That is not true. In fact, United States v. Nixon was not even actually addressing assertions of privilege. As Judge Starr pointed out, in the Clinton proceedings, the House Judiciary Committee concluded that the President had improperly exercised executive privilege, but it did not have the ability to second-guess the rationale behind the President or what was in his mind asserting executive privilege, and it could not treat that as an impeachable offense. It rejected an Article of Impeachment based on Clinton’s assertions of privilege.

And as the House Democrat’s own witness, Professor Gerhardt, has explained, in 1843, President Tyler similarly was investigating potential impeachment—his attempts to protect and assert what he regarded as the prerogatives of his office as he resisted demands for information from Congress. Professor Gerhardt explained Tyler’s attempt to protect and assert what he regarded as the prerogatives of his office were the function of his constitutional and policy judgment, and they could not be used by Congress to impeach him. President Trump’s resistance to congressional subpoenas was no less founded on constitutional and policy judgment, and it provides no basis to impeach him.

I would like to close with a final thought. One of the greatest issues—and perhaps the greatest issue—for your consideration in this case is how the precedent set in this case will affect the future.

The Framers recognized that there would be partisan and illegitimate impeachments. In Federalist No. 65, Hamilton and Madison warned about impeachments that reflected what he called “the persecution of an intemperate or designing majority in the House of Representatives.” That is exactly what this case presents.

Justice Story recognized that the Senate provides the proper tribunal for trying impeachments because it was believed by the Framers to have a greater sense of obligations to the future, to future generations, not to be swayed by the passions of the moment.

One of the essential questions here is, Will the Chamber adopt a standard for impeachment—a diluted standard—where fundamentally it affects the President’s capacity to do the things that are required of him? Will it look to the future, to future generations, not to be swayed by the passions of the moment. Will the Chamber adopt a standard for impeachment—a diluted standard—where fundamentally it affects the President’s capacity to do the things that are required of him? Will it look to the future, to future generations, not to be swayed by the passions of the moment.

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Biden was made U.S. point man for Ukraine called Burisma. Here is what happened very shortly after Vice President Biden was made U.S. point man for Ukraine. His son Hunter Biden ends up on the board of Burisma, working for and paid by the oligarch Zlochevsky. In February 2014, in the wake of anti-corruption uprising by the people of Ukraine, Zlochevsky flees the country, and its oligarch owner, Zlochevsky, the oligarch, is well-known.

George Kent, the very first witness that the Democrats called during their public hearings, testified that Zlochevsky stood out for his self-dealings, even among other oligarchs. House managers didn’t tell you that.

Burisma was so corrupt that George Kent said he intervened to prevent USAID from cosponsoring an event with Burisma. Do you know what this event was? It was a child’s contest, and the prize was a camera. They were so bad—Burisma—that our country wouldn’t even cosponsor a children’s event with Burisma.

In March 2014, the United Kingdom’s Serious Fraud Office opened a money laundering investigation into the oligarch, Zlochevsky, and the company Burisma. The very next month, April 2014, according to a public report, Hunter Biden quietly joins the board of Burisma.

Remember, early 2014 was when Vice President Biden began leading Ukraine policy.

Here is how Hunter Biden came to join Burisma’s board in 2014. He was brought on the board by Devon Archer, his business partner. Devon Archer was college roommates with Chris Heinz, the stepson of Secretary of State John Kerry. All three men—Hunter Biden, Devon Archer, and Chris Heinz—had all started an investment firm together.

Public records show that on April 16, 2014, Devon Archer meets with Vice President Biden at the White House. Just 2 days later, on April 18, 2014, Hunter Biden quietly joins Burisma. That is according to public reporting.

Remember, this is just 1 month after the United Kingdom’s Serious Fraud Office opened a money laundering case into Burisma, and Hunter Biden joins their board.

And not only 10 days after Hunter Biden joins the board, British authorities seized $23 million in British bank accounts connected to the oligarch Zlochevsky, the owner of Burisma. Did Hunter Biden leave the board then? No.

The British authorities also announced that they had started a criminal investigation into potential money laundering. Did Hunter Biden leave the board? No.

What happened was, then—and only then—did the company choose to announce that Hunter Biden had joined the board after the assets of Burisma and its oligarch owner, Zlochevsky, were frozen and a criminal investigation had begun. Hunter Biden’s decision to join Burisma raised flags almost immediately.

One article from May 2014 stated that, “the appointment of Joe Biden’s son to the board of the Ukrainian gas firm Burisma has raised eyebrows the world over.”

Even an outlet with bias for Democrats pointed out Hunter Biden’s activities created a conflict of interest for Joe Biden. The article stated: “The move raises questions about a potential conflict of interest for Joe Biden.”

Even Chris Heinz, Hunter Biden’s own business partner, had grave concerns. He thought that working with Burisma was unacceptable. This is Chris Heinz. He worried:

Apparently, Devon and Hunter have joined the board of Burisma, and a press release went out today. I can’t speak to why they decided to, but there is no investment by our firm in their company.

What did Hunter Biden do? He stayed on the board. What did Chris Heinz do? He subsequently stopped doing business with his college roommate Devon Archer and his friend Hunter Biden. Chris Heinz’s spokesperson said the lack of judgment in this matter was a major catalyst for Mr. Heinz ending his business relationship with Mr. Archer and Mr. Biden.

Now, the media also noticed. The same day, an ABC News reporter asked Obama White House Press Secretary Jay Carney about it. Here is what happened.

(Text of Videotape presentation):

Jay CARNEY. I would refer you to the Vice President’s Office. I saw those reports. You know, Hunter Biden and other members of the Biden family are obviously private citizens, and where they work does not reflect an endorsement by the administration or by the Vice President or President. But I would refer you to the Vice President’s Office.

Ms. Counsel BONDI. The next day, the Washington Post ran a story about it. It said: “The appointment of the Vice President’s son to a Ukrainian oil board looks nepotistic at best, nefarious at worst.” Again, “The appointment of the Vice President’s son to a Ukrainian oil board looks nepotistic at best, nefarious at worst.”

And the media didn’t stop asking questions here. It kept going. Here is an example:

(Text of Videotape presentation):

Vice President BIDEN. You have to fight the cancer of corruption.
When speaking with ABC News about his qualifications to be on Burisma’s board, Hunter Biden didn’t point to any of the usual qualifications of a board member. Hunter Biden had no experience in natural gas, no experience in the energy sector, and no experience with Ukrainian regulatory affairs. As far as we know, he doesn’t speak Ukrainian. So naturally the media has asked questions about his board membership. Why was Hunter Biden on this board?

(Text of Videotape presentation:)

Amy ROBACH. If your last name wasn’t Biden, do you think you’d’ve been asked to be on the board of Burisma?

Mr. Hunter BIDEN. I don’t know. I don’t know. Probably not.

Ms. Counsel BONDI. So let’s go back and talk about his time on the board. Remember, he joined Burisma’s board in April 2014, while the United Kingdom was facing a money laundering case against Burisma and its owner, the oligarch Zlochevsky. On August 20, 2014, 4 months later, the Ukrainian prosecutor general’s office initiates a money laundering investigation into the same oligarch, Zlochevsky. This is one of 15 investigations into Burisma and Zlochevsky, according to a recent public statement made by the current prosecutor general.

On January 16, 2015, prosecutors put Zlochevsky, the owner of Burisma, on whose board Hunter Biden sat, on the country’s wanted list for fraud—while Hunter Biden is on the board.

Then British court orders that Zlochevsky’s $23 million in assets be unfrozen. Why was the money unfrozen? Deputy Assistant Secretary Kent testified to it.

(Text of Videotape presentation:)

KENT. Somebody in the General Prosecutor’s Office of Ukraine shut the case, issued a letter to his lawyer, and that money went poof.

CASTOR. So essentially paid a bribe to make the case go away.

KENT. That is our strong assumption, yes, sir.

Ms. Counsel BONDI. He also testified that the Ukrainian prosecutor general’s office actions led to the unfreezing of the assets.

After George Kent’s confirmation, that prosecutor was out. Viktor Shokin becomes prosecutor general. This is the prosecutor you will hear about later, the one Vice President Biden has publicly said he wanted out of office.

In addition to flagging questions about previous prosecutors’ actions, George Kent also specifically voiced other concerns—this time to the Vice President’s Office—about Hunter Biden. In February 2015, he raised concerns about Hunter Biden to Vice President Biden.

(Text of Videotape presentation:)

KENT. In a briefing call with the National Security staff in the Office of the Vice President in February 2015, I raised my concern about later, the one Vice President

Ms. Counsel BONDI. But House managers didn’t tell you that.

This is all while Hunter Biden sat on Burisma’s board. Did Hunter Biden stop working for Burisma? No. Did Vice President Biden stop leading the Obama administration’s foreign policy efforts in Ukraine? No. In the meantime, Vice President Biden is still at the forefront of the U.S.-Ukraine policy. He pledges a billion-dollar loan guarantee to Ukraine contingent on its progress in rooting out corruption.

Around the same time as the $1 billion announcement, other people raised the issue of a conflict. As the Obama administration special envoy for energy policy told the New Yorker, he raised Hunter Biden’s participation on the board of Burisma directly with the Vice President himself. This is a special envoy to President Obama.

The media had questions too. On December 28, 2015, The Daily Beast published an article that Prosecutor General Shokin was investigating Burisma and its owner, Zlochevsky. Here is their quote: “The credibility of the vice president’s anticorruption message may have been damaged by the association of his son, Hunter Biden,” with Burisma and its owner, Zlochevsky.

And it wasn’t just one reporter who asked questions about the relationship between Burisma and the Obama administration. As we learned recently through reporting on FOX News, on January 19, 2016, there was a meeting between Obama administration officials and Ukrainian prosecutors.

Ken Vogel, journalist for the New York Times, asked the State Department about this meeting. He wanted more information about the meeting “where U.S. support for prosecutions of Burisma Holdings in New York and the United Kingdom and Ukraine were discussed.” But the story never ran.

Around the time of the reported story—January 2016—a meeting between the Obama administration and Ukrainian officials was held and a Ukrainian press report, as translated, says: The U.S. Department of State made it clear to the Ukrainian authorities that it was linking the $1 billion in loan guarantees to the dismissal of Prosecutor General Viktor Shokin.

Now, we all know the Obama administration, from the words of Vice President Biden himself—he advocated for the prosecutor general’s dismissal.

There was ongoing talk going on about the oligarch Zlochevsky, the owner of Burisma, at the time. We know this because on February 2, 2016, the Ukrainian prosecutor general obtained a renewal of a court order to seize the $3.1 million in assets of a court order to seize the $3.1 million in assets of the oligarch Zlochevsky.

Days after the last call, on February 24, 2016, a DC consultant reached out to
the State Department to request a meeting to discuss Burisma. We know what she said because the email was released under the Freedom of Information Act. The consultant explicitly invoked Hunter Biden’s name as a board member.

In an email summarizing the call, the State Department official says that the consultant noted that two high-profile citizens are affiliated with the company, including Hunter Biden as a board member. She added that the consultant said he hoped to talk with Hunter Biden, Secretary of State Novelli about getting a better understanding of how the United States came to the determination that the country is corrupt.

To be clear, this email documents that the U.S. Government had determined Burisma to be corrupt, and the consultant was seeking a meeting with an extremely senior State Department official to discuss the U.S. Government’s position. Her pitch for the meeting was used by Hunter Biden’s name, and according to the email, the meeting was set for a few days later.

Later that month, on March 29, 2016, the Ukrainian Parliament finally votes to fire the prosecutor general. This is the prosecutor general investigating the oligarch, owner of Burisma, on whose board Hunter Biden sat.

Two days after the prosecutor general is voted out, Vice President Biden announces that the United States will provide $55 million in security assistance to Ukraine. He soon announces that the United States will provide $1 billion in loan guarantees to Ukraine.

Let’s talk about one of the Democratic central witnesses: Ambassador Yovanovitch. In May 2016, Ambassador Yovanovitch was nominated to be Ambassador to Ukraine. Here is what happened when she was preparing for her Senate confirmation hearing.

(Text of Videotape presentation:)

Representative RATCLIFFE. Out of thousands of companies in the Ukraine, the only one that you recall the Obama-Biden State Department preparing you to answer questions about Burisma and Hunter Biden specifically. Do you recall that?

Ambassador YOVANOVITCH. Yes.

Representative RATCLIFFE. Out of thousands of companies in the Ukraine, the only one that you recall the Obama-Biden State Department preparing you to answer questions about Burisma and Hunter Biden specifically. Do you recall that?

Ambassador YOVANOVITCH. Yes.

Ms. Counsel BONDI. So she is being prepared to come before all of you—all of you—and talk about world issues, going on stage of the United States, and what did they feel the only company—the company—that it was important to brief her on in case she got a question? Burisma.

Ambassador Yovanovitch was confirmed July 2016 as the Obama administration’s choice. To close out September 2016, a Ukrainian court cancels the oligarch Zlochevsky’s arrest warrant for lack of progress in the case.

In mid-January 2017, Burisma announces that all legal proceedings against it and Zlochevsky have been closed. Both of these things happened while Hunter Biden sat on the board of Burisma. Around this time, Vice President Biden spoke of his son.

Years later now, former Vice President Biden publicly details what we know happened: his threat to withhold more than $1 billion in loan guarantees unless Shokin was fired.

Here is the Vice President.

(Text of Videotape presentation:)

Vice President BIDEN. I said I’m not—we are not going to give you the billion dollars. They said: You have no authority. You’re not the President. The President said—I said: Call him. I said: I’m telling you, you are not getting the billion dollars. I said: You are not getting the billion. I’m going to be leaving here in, I think it was about 6 hours. If the prosecutor is not fired, you’re not getting the money. Well, son of a bitch. (Laughter.) He got fired. And they put in place someone who was solid at the time.

Ms. Counsel BONDI. What he didn’t say on the video—according to the New York Times, this was the prosecutor investigating Burisma, Shokin. What he also didn’t say on the video was that his son was being paid significant amounts by the oligarch, owner of Burisma to sit on that board.

Only then does Hunter Biden leave the board. He stays on the board until April 2019. In November 2019, Hunter Biden signs an affidavit saying he “has been unemployed and has another monthly income since May 2019.”

This was in November of 2019, so we know, from after April 2019 to May 2019 through November 2019, he was unemployed, by his own statement—April 2019 to November 2019.

Despite his resignation from the board, the media continued to raise the issue relating to a potential conflict of interest.

On July 22, 2019, the Washington Post wrote: “Prosecutor General Shokin ‘believes he was ousted because of his interest in the company,’” referring to Burisma. The Post further wrote that “had he remained in his post, he would have questioned Hunter Biden.”

On July 25, 2019, 3 days later, President Trump speaks with President Zelensky. He said:

The other thing, there’s a lot of talk about Biden’s son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it . . . It looks horrible, disgraceful.

The House managers talked about the Bidens and Burisma 400 times, but they never gave you the full picture. But here are those who did: The United Kingdom’s Serious Fraud Unit; Deputy Assistant Secretary of State George Kent; Ukraine correspondent of the ABC White House reporter; ABC “Good Morning America”; the Washington Post; the New York Times; Ukrainian law enforcement; and the Obama State Department itself. They all thought there was cause to raise the issue about the Bidens and Burisma.

The House managers might say, without evidence, that everything we have said has been debunked, that the evidence points entirely un-equivocally in the other direction. That is a distraction.

You have heard from the House managers. They do not believe that there was any concern to raise here, that all of this was baseless. And what they are saying is that there was a basis to talk about this, to raise this issue, and that is enough.

I yield my time.

The CHIEF JUSTICE. Mr. Sekulow, Mr. Counsel SEKULOW. Mr. Chief Justice, Majority Leader MCCONNELL, Democratic Leader SCHUMER, House managers, Members of the Senate, this will be our last presentation before dinner.

The next lawyer representing the President is Eric Herschmann. He is a partner in the Kasowitz firm, the law firm which has been representing the President for over two decades. He is a former prosecutor and trial lawyer, and he ran a natural gas company in the United States.

He is going to discuss additional evidence the House managers ignored or misstated and how other Presidents might have measured up under this new impeachment standard.

Mr. Counsel HERSCHMANN. Mr. Chief Justice, Members of the Senate, I am Eric Herschmann. I have the honor and privilege of representing the President of the United States in these proceedings. I have been carefully listening to and reviewing the House managers’ case. That case pretty much boils down to one straightforward contention—that the President abused his power to promote his own personal interests and not our country’s interests.

The House managers say that the President did not take the steps that they allege for the benefit of our country but only for his own personal benefit. If that is wrong, if what the President had wanted would have benefited our country, then the managers have not met their burden, and these Articles of Impeachment must be rejected. As we will see, the House managers do not come close to meeting the burden.

Last week, Manager SCHIFF said that the investigations President Trump supposedly asked President Zelensky about on the July 25 call could not have been in the country’s interest because he said they were “discredited entirely.” The House managers say that the investigations had been debunked; they were sham investigations. Now we have the question: Were they really?

The House managers in the over 21 hours of the repetitive debunkation never found the time to support these conclusory statements. Was it, in fact, true that any investigation had been debunked? The House managers do not
identify for you who supposedly conducted any investigations, who supposedly did the debunking, who discredited it. Where and when were any such investigations conducted? When were the results published? And much more left unaddressed.

Attorney General Bondi went through for you some of what we know about Burisma in its millions of dollars in payments to Vice President Biden’s son and his son’s business partner. There is no question that any rational person would understand what happened. I am going to go through some additional evidence, which was easily available to the House managers but which they never sought or considered.

Based on what Attorney General Bondi told you in this additional evidence, you can judge for yourself whether the conduct was suspect. As you know, one of the issues concerned Hunter Biden’s involvement with the Ukrainian gas company, which paid Hunter Biden millions of dollars to serve on its board of directors. He did not have any relevant expertise or experience. He had no expertise or experience in the gas industry. He had no expertise in corporate governance nor any expertise in Ukrainian law. He doesn’t, so far as we know, speak Ukrainian. So why—why—did Burisma want Hunter Biden on its board? Why did they want to pay him millions of dollars? Well, he did have one qualification. He was the son of the Vice President of the United States. He was the son of the man in charge of the Ukrainian portfolio for the prior administration. And we are to believe there is nothing to see here, that for anyone to investigate or inquire about this would be a sham—nothing to see here.

But tellingly, Hunter Biden’s attorney, on October 13, 2019, issued a statement on his behalf. He indicated that in April 2014, Hunter was asked to join the board of Burisma, then states Hunter stepped off Burisma’s board in April 2019.

Now listen to the commitment that Hunter Biden is supposedly willing to make to all of us. Hunter makes the following commitment: Under a Biden administration, Hunter will readily comply with any and all guidelines or standards a President Biden may issue to address purported conflicts of interest or the appearance of such conflicts, including any restrictions related to overseas business interests.

That statement almost tells us all we need to know. It is the rule that should have been in place in 2014 because there already was an Obama-Biden administration. What changed? What changed?

Remember a couple of minutes ago when I quoted an expert on Ukraine, the one who said that Ukraine must clean up its energy sector, the one who said that Ukraine’s senior elected officials have to remove all conflicts between their business interests and their government responsibilities. That statement almost tells us all we need to know. It is the rule that should have been in place in 2014 because there already was an Obama-Biden administration. What changed? What changed?

Vice President Biden went to Ukraine approximately 12 to 13 times. He spoke with legislators, business people, and officials. He was purportedly fighting corruption in Ukraine. He was urging Ukraine to investigate and uproot corruption.

One thing he apparently did not do, however, was to tell his son not to trade on his family connections. He did not tell his son to especially stay away from the energy sector in the very corruption-ridden country Vice President Biden was responsible for.

And Manager Schiff says: Move along; there is nothing to see here. What are the House managers afraid of finding out? In an interview with ABC in October of last year, Hunter Biden said he was on the board of Burisma to focus on principles of corporate governance and transparency.

(Text of Videotape presentation:)

Mr. HUNTER BIDEN. Bottom line is that I knew I was completely qualified to be on the board, to head up the corporate governance and transparency committee on the board. And that’s all that I focused on.

Mr. Counsel HERSCCHMANN. But when asked how much money Burisma was paying him, he responded he doesn’t want to “open his kimono” and disclose how much. He does refer to public reports about how much he was being paid, but as we now know, he was being paid far more than was reported.

(Text of Videotape presentation:)

Ms. ROBACH. You were paid $50,000 a month for your position?

Mr. HUNTER BIDEN. Look, I’m a private citizen. One thing that I do sit here and open my kimono as it relates to how much money I make or made or did or didn’t. But it’s all been reported.

Mr. Counsel HERSCCHMANN. So what was the real reason that Hunter Biden, the Vice President’s son, was being paid by Burisma? Was it based on his knowledge and understanding of the natural gas industry in Ukraine? Was he going to discuss how our government regulates the industry here? Was he going to discuss how we set gas rates? Was he going to discuss pipeline development construction or environmental impact statements? Did he know anything about the natural gas industry at all? Of course not.

So what was the reason? I think you do not need to look any further than the explanation that Hunter Biden gave during the ABC interview when he was asked why he was on the Burisma board, to head up the corporate governance committee. He said:

Here is what he had to say.

(Text of Videotape presentation:)

Ms. ROBACH. If your last name wasn’t Biden, do you think you would have been asked to be on the board of Burisma?

Mr. HUNTER BIDEN. I don’t know. Probably no. I don’t think there are a lot of things that would have happened in my life if my last name wasn’t Biden.

Mr. Counsel HERSCCHMANN. And as to the assertion that was made that his conduct was that it should be a concern to our country, Hunter Biden and his lawyer could not even keep their story straight. Compare the press release that was issued by Burisma on May 12, 2014, with Hunter Biden’s lawyer’s statement on October 13 of 2019. The May 2014 press release begins: “R. [Robert] Hunter Biden will be in charge of holding’s legal unit.” He was going to be in charge of a Ukrainian gas company owned by an oligarch’s legal unit. However, in his lawyer’s statement in October of 2019, after his involvement with Burisma came under renewed public scrutiny, he now claims: “At no
time was Hunter in charge of the company’s legal affairs.”

Which is it? What was Hunter Biden doing at Burisma in exchange for millions of dollars? Who knows? What were they looking to hide so much for his corporate governance and transparency?

But let’s take a step back and realize what actually transpired, because the House managers would have us believe this had nothing at all to do with our government, nothing at all to do with our country’s interests, nothing at all to do with our Vice President, nothing at all to do with the State Department.

It was simply private citizen Hunter Biden doing his own private business. It was purely coincidental that it was in his father’s portfolio in Ukraine, in the exact sector—the energy sector—that his father said was corrupt.

But we have a document here—again, something that House managers did not show you or even put before the House managers on these baseless Articles of Impeachment. If you look at that email, it is an email from Chris Heinz. And as Attorney Bondi already told you, he is the stepson of the then-Secretary of State John Kerry, and he was a former business partner with Hunter Biden and Devon Archer. Our Secretary of State’s stepson and our Vice President’s son are in business together.

It was sent on May 13, 2014, to the official government email addresses of two senior people at the State Department. These two people are the Chief of Staff to the Secretary of State and the Special Adviser to the Secretary of State. The subject line in the email is not “corporate transparency.” It is not “corporate governance.” It is not “here’s a heads-up.” The subject line is “Ukraine.”

Chris Heinz certainly understood the sensitivity to our U.S. foreign policy. What did Secretary of State’s stepson say about Hunter Biden and Devon Archer? He says this:

Apparently Devon and Hunter both joined the board of Burisma and a press release went out today. I can’t speak to why they did it, but they are there to help fight corruption, not that there were good corporate reasons that they are going there for corporate governance, not that they are there to enhance corporate transparency, not that they are there to help fight corruption in Ukraine, not that they are there to ensure boards of directors’ compensation and benefits are publicly disclosed—nothing like that. He cannot say those things because he knows Devon and Hunter well and he knows they have no particular qualifications, whatsoever, to do those things, especially for a Ukrainian gas company.

Instead, Mr. Heinz is planning to go on the record to say Hunter and Devon were doing through official channels to take pains to disassociate himself from what they were doing. And what did the State Department do with this information that the Secretary was上报 that they needed to know? Apparently, nothing. They did not tell Mr. Heinz to stay away. They did not tell Mr. Heinz there is no problem—nothing. But all this, the House managers want us to believe, does not even merit any inquiry. Anyone asking for one, anyone discussing one is now corrupt.

Does it matter in an inquiry why a corrupt company in a corrupt country would be paying our Vice President’s son? Does it matter? Plus, it appears, some additional expenses, and paying his business partner an additional million dollars per year? Secretary of State Kerry’s stepson thought it was important enough to report. Why wasn’t the House managers concerned?

And I ask you, why would it not merit an investigation? You know something else about Vice President Biden? Well, back in January of 2018, as you heard, former Vice President Biden bragged that he had pressured the Ukrainians—threatened them, indeed, coerced them—into firing the state prosecutor who reportedly was investigating the very company that paid millions of dollars to his son. He bragged that he gave them 6 hours to fire the prosecutor or he would cut off $1 billion in U.S. loan guarantees.

(Text of Videotape presentation:)

Vice President BIDEN. I said: We’re not going to give you the billion dollars. They said: The President is not going to give you the billion dollars. You’re not the President. The President said—I said: Call him. I said: I’m telling you, you’re not getting the billion dollars. I said: You’re not getting the billion. I’m going to be leaving here in—I think it was, what—6 hours. I looked at him and said: I’m leaving in 6 hours. If the prosecutor is not fired, you’re not getting the billion. Well, son of a bitch, he got fired, and they put in place someone who was solid at the time.

Mr. Counsel HERSCHMANN. Are we really to believe it was the policy of our government to withhold $1 billion of guarantees to Ukraine unless they fired a prosecutor on the spot? Was that really our policy? We have all heard continuously from the managers and many agree about the risks to the Ukrainians posed by the Russians. We have heard the managers say that a slight delay in providing funding to Ukraine endangers our national security and jeopardizes our interests and, therefore, the President must immediately be removed from office. Yet, they also argue that it was the official policy of our country to withhold $1 billion unless one individual was fired within a certain matter of hours. Was that really or could it ever be our United States policy?

According to the House managers’ theory, we were willing to jeopardize our Ukrainian allies unless that person happened to be investigating Burisma was promptly fired. Are we going to jeopardize a Ukrainian economy because a prosecutor was not fired in the 6-hour time period Vice President Biden demanded? Does anyone believe that ever could be our U.S. foreign policy? And, just in case, the managers or others tried to argue: No, no, no, he wasn’t serious about that; he was just bluffing. What kind of message would that send to the Russians about our support for the Ukrainians that we would bluff and bluff with the Ukrainian economy?

From 2014 to 2017, Vice President Biden claimed to be on a crusade against corruption in Ukraine. He repeatedly said corruption was endemic in Ukraine, hobbled Ukraine, how Ukraine faced no more consequential mission than confronting corruption, and he encouraged Ukraine to close the space for corrupt oligarchs who rig Ukrainian people. The Vice President railed against monopolistic behavior where a select few profit from so many sweetheart deals that has characterized that country for so long.

His last official visit to Ukraine, 4 days before he left office, he spoke out against corruption and oligarchy, that eats away like a cancer, and against corruption, which continues to eat away at Ukraine’s democracy within. Why was Vice President doing this? Was it he was concerned about corruption in Ukraine—even singling out that country’s energy sector—because corruption in Ukraine is a critical policy concern for our country?

During his whole time, what else was happening? His son and his son’s business partner were raking in over $1 million a year from what was regarded as one of the most corrupt Ukrainian companies in the energy sector, owned and controlled by one of the most corrupt oligarchs. Were Vice President Biden’s words and advice to Ukraine just hollow? According to the House managers, the answer apparently is yes, they were empty words, at least when it came to anyone questioning him. He didn’t have a sweet deal, his own son’s deal with Ukraine’s corruption and oligarchy.

Again, to raise Manager SCHIFF’s own question: What kind of message did this send to future U.S. Government officials? Your family can accept money from foreign corrupt companies? No problem. You can pay family members of our highest government officials, and no one is allowed to even ask questions.

What was going on? We have to just accept now the House managers’ conclusory statements, like “sham,” “discrediting,” even though no one has
ever investigated why. And can you imagine what House Manager SCHIFF and his fellow Democratic Representatives would say if it were President Trump’s children on an oligarch’s payroll?

And when it finally appeared that a true Ukrainian corruption fighter had assumed the country’s Presidency, President Trump was not supposed to—he was not permitted to—follow up on Vice President Biden’s own words about fighting corruption and try to make those words something other than what they do not know into an organized mob, gangster-like, fake rendition of his call? Well, I prosecuted organized crime for the American people—President Trump knows how to speak his mind.

Do you remember the fake transcript that Manager SCHIFF read when he was before the Intelligence Committee—his mob, fake rendition of the July 25 call? Well, I prosecuted organized crime for years. The type of description of what goes on—what House Manager SCHIFF tried to create for the American people—is completely detached from reality. It is as if we were supposed to believe that mobsters would invite people they do not know into an organized crime meeting to sit around and take notes to establish their corrupt intent.

Manager SCHIFF, our jobs as prosecutors are hard. If you were one—you would have had a lot easier if that were how it worked.

Think about what he is saying. Think about the managers’ position: that our President decided with corrupt intent to shake down, in their words, another foreign leader, and he decided to do it in front of everyone, in a documented conversation, in the presence of people he did not even know, just so he could get this personal benefit that was not in our country’s interest. That is how the transcript of the July 25 call demonstrates.

In February 2004, Russia began its military campaign against Ukraine. Against the advice and urgings of Congress and of many in his own administration, President Obama refused then and throughout the remainder of his presidency to provide lethal assistance to Ukraine.

In the House, Manager SCHIFF joined many of his colleagues in a letter-writing campaign to President Obama, urging “the U.S. must supply Ukraine with the means to defend itself” against Russian aggression, urging President Obama to quickly approve additional efforts to support Ukraine’s efforts to defend its sovereign territory, including the transfer of lethal defense weapons to the Ukraine military.

On March 23, the House of Representatives overwhelmingly passed a resolution urging President Obama to immediately exercise the authority by Congress to provide Ukraine with a lethal defensive weapons system.

The very next day, this Senate passed a unanimous resolution urging the President to prioritize and expedite the provision of defensive lethal and nonlethal military assistance to Ukraine, consistent with U.S. national interests and policies.

As one Senator here stated in March 2015, “Providing nonlethal equipment and night vision goggles is all well and good, but giving the Ukrainians the ability to see the Russians coming but not the ability to stop them is not the answer.”

Yet President Obama refused. He refused, even in the face of support by senior career professionals recommending he provide lethal weapons to the Ukrainians.

By contrast, what did President Zelensky and the Russians know? They knew that President Trump did—did—provide that support. That, clearly, was the most material thing to him, much more important than a meeting in the Oval Office.

The House managers also made much of the contention that President Trump supposedly wanted President Zelensky only to announce an investigation, not conduct it, but that contention makes no sense. President Trump’s call with President Zelensky was in July—July 25—of 2019—and a year and a half before our next election. Would only a bare announcement so far in advance, with no followup, really have had any effect on the election, as the managers claim? Would anyone have remembered the announcement a year or more later?

Ironically, it is the House managers who have put Burisma and its connection to the Bidens front and center in this proceeding, and now the voters will know about it and probably will remember it. Be prepared, what you wish for.

Manager SCHIFF—well, there he goes again. He is putting words in the President’s mouth that were never there. Again, look at the transcript of the July call. President Trump never asked President Zelensky about the support that President Trump had provided to Ukraine compared to the support—or more accurately, the lack thereof—that the prior administration had provided to Ukraine.

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In the House, Manager SCHIFF joined many of his colleagues in a letter-writ
in U.S. politics, but it is precisely the Democrats who politicized the issue.

Last August, they began circling the wagons in trying to protect Vice President Biden, and they are still doing it in these proceedings. They contend that the topic is highly questionable conduct displayed by Burisma and his involvement with the Ukrainian company—owned by a corrupt Ukrainian oligarch—to the son of the second highest officeholder in our land, who was supposed to be in charge of fighting corruption in Ukraine, to be a sham, debunked. But there has never been an investigation, so how could it be a sham—simply because the House managers say so?

Which brings me to yet another one of the House managers’ baseless contentions—that President Trump raised the matter with President Zelensky because Vice President Biden had just announced his candidacy for President. But, of course, it was far from a secret that Vice President Biden was planning to run.

What had, in fact, changed?

First, President Zelensky had been elected in April 2019 on an anti-corruption platform, his party took control of the Ukrainian Parliament. That made it the opportune time to raise the issue because finally there was a receptive government in Ukraine that was committed to fighting precisely the kind of highly questionable conduct displayed by Burisma in its payments to Hunter Biden and his partner, just as Joe Biden had raised years before.

Then, just a couple of weeks before President Trump’s telephone call with President Zelensky, the New Yorker magazine—not exactly a supporter of President Trump’s—ran an expose—“Will Hunter Biden Jeopardize His Father’s Position as Vice President?”

That story is two other things.

In late June, ABC News ran a story entitled “Hunter Biden’s foreign deals. Did Joe Biden’s son profit off of his father’s position as Vice President?”

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What, exactly, is the House managers’ baseless contention—that President Trump raised the matter with President Zelensky because Vice President Biden had just announced his candidacy for President. But, of course, it was far from a secret that Vice President Biden was planning to run.

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his reelection and influence the 2012 U.S. Presidential election to his advantage.

In doing so, President Obama used the powers of the Presidency in a manner that compromised the national security of the United States and undermined the integrity of the U.S. democratic process. He thus ignored and injured the interest of the Nation.

Does it sound familiar, House managers? It should, as the case against President Obama would have been far stronger than the allegations against President Trump.

President Obama’s abuse of power to benefit his own political interests was there and is here now for everyone to hear. It was a direct, unquestionable quid pro quo. No mind reading was needed there. Where were the House managers then?

And that points out the absurdity of the House managers case against President Trump. It was President Obama, not President Trump, who was weak on Russia and weak on support to Ukraine.

President Obama gave to Russia an ally in Putin in response to the defense when he decided to scrap the U.S. plans to install missile bases in Poland. Yet he criticized Senator Romney during the 2012 Presidential campaign when Senator Romney said Russia was the greatest geopolitical threat to the U.S.

President Obama caved to Russia and Australia on missile defense when he decided to scrap the U.S. plans to install missile bases in Poland. Yet he criticized Senator Romney during the 2012 Presidential campaign when Senator Romney said Russia was the greatest geopolitical threat to the U.S.

President Obama. I’m glad that you recognize that al-Qaeda’s a threat because a few months ago when you were asked what’s the biggest threat facing America, you said Russia. Not al-Qaeda, you said Russia, and the 1980s are now calling to ask for their foreign policy back because, you know, the Cold War’s been over 20 years.

Mr. Counsel HERSCHMANN. Now, when it is politically convenient, the Democrats are saying the same thing that President Obama criticized Senator Romney for saying. In fact, they are basing their entire politicized impeachment case on a version of reality, this claim that President Trump is not supporting Ukraine far more than the prior administration.

President Obama caved on missile defense in late 2009. His hot mic moment occurred in March 2012. His reelection was 8 months later. Two years later, in March 2014, Russia invaded Ukraine and annexed Crimea. President Obama refused to provide lethal aid to Ukraine to enable it to defend itself. Where were the House managers then?

The House managers would have the American people believe that there is a threat—an imminent threat—to the national security of our country for which the President must be removed immediately from the highest office in the land because of what? Because he had a phone call with a foreign leader and discussed corruption? Because he paused for a short period of time giving away our tax dollars to a foreign country? That is the theory.

It is absurd on its face. Not one American life was in jeopardy or lost by this short delay, and they know it.

And how do we know that they know it? Because they went on vacation after they adopted the Articles of Impeachment. They did not cancel their recess. They did not rush back to deliver the Articles of Impeachment to the Senate. They did not rush to deliver that supposed terrible imminent threat to our national security. What did they do?

(Text of Videotape presentation:)

Speaker PELOSI. Urgency.

Mr. SCHIFF. Timing is really driven by the urgency. Mr. SWALWELL. The urgency.

Mr. NADLER. Nothing could be more urgent.

Mr. RICHMOND. The urgency.

Speaker PELOSI. And urgent. And urgent. Mr. SWALWELL. There is an urgency, you know, to this.

Mr. NADLER. Then we must move swiftly. Mr. SWALWELL. We don’t have time to screw around.

Speaker PELOSI. It’s about urgency.

Mr. TAPPER. House Speaker NANCY PELOSI is still holding on to the Articles of Impeachment.

Mr. Counsel HERSCHMANN. Urgency? Urgency, for which you want to immediately remove the President of the United States? You sat on the articles for a month—the longest delay in the history of our country.

They adopted them on Friday, December 13, 2019—Friday the 13th—went on vacation, and finally decided after one of their Democratic Presidential debates had finished and after the BCS football championship game, that it was time to deliver the Articles of Impeachment.

What happened to their national security interest argument? Wasn’t that the reason that they said they had to rush to vote? It is urgent, they told us. No due process for this President. It is a crisis of monumental proportion. Our national security is at risk every additional day that he is in office, they tell us.

The House managers also used the same excuse for not issuing subpoenas for documents—no time for the normal judicial review. They even complained about the judicial review process sitting in this Chamber before the Chief Justice of the U.S. Supreme Court—a judicial review in which the judge agreed to an expedited schedule. Even that was not good enough for them when they issued the subpoenas.

One of the lawyers for the subpoenas wrote to the House general counsel: “We are dismayed that the House committees have chosen not to join us and are running from the judicial branch of this momentous constitutional question as expeditiously as possible.”

He continued: “It is important to get a definitive judgment from the judicial branch determining their constitutional duty in the place of conflicting demands of the legislative and executive branches.”

Isn’t that the point? Isn’t that how our system of government works? Isn’t that how it has always worked? Isn’t that how it is supposed to work?

These same Democrats defended other administrations who fought judicial review of congressional subpoenas, and I think we all remember Fast and Furious.

The same attorney, when he wrote to the House chair, said:

The House chairmen, Mr. SCHIFF and Mr. NADLER, seem to think that the Trump lawsuit is intended to delay or otherwise obstruct the committees’ vital investigatory work.

He continued:

Nor has this lawsuit been coordinated in any way with the White House any more than there has been coordinated with the House of Representatives. If the House chooses not to pursue through subpoenaed testimony, let the record be clear that is the House’s decision and not the White House’s. The administration blaimes the White House by blaming you if you don’t subpoena witnesses and have them before you.

Yet even in the face of this overwhelming evidence, they claim that the President is to blame for their decision to withdraw their own subpoenas or not issue others. Their choice, but the President is responsible. That is one of their claims. It is ludicrous.

They are blaming the President because they decided by their own votes to not seek judicial review and enforcement of their own subpoenas and for some witnesses never even issued subpoenas. In their minds, that is impeachable.

Manager NADLER spoke eloquently back before the House Judiciary Committee hearing in December of 1998. He said:

There must never be a narrowly voted impeachment or an impeachment substantially supported by one of our major political parties and largely opposed by the other. Such an impeachment would lack legitimacy, would produce divisiveness and bitterness in our politics for years to come, and will call into question the very legitimacy of our political institutions.

Manager NADLER was right then, and it is equally true today. Divisiveness and bitterness. Divisiveness and bitterness. Listen to his words. Impeachments by one party cause divisiveness and bitterness in our country. That is what a partisan impeachment leads to.

Sadly, when Manager NADLER eloquently warned against divisiveness and bitterness, the House did not follow his admonition. They did not heed his advice, and that is one of the reasons we are sitting here today with Articles of Impeachment that are not found in our Constitution or the evidence and are brought simply for partisan politics.

This is a sad day for all of us. This is not a time to give out souvenirs, the pens used to sign two Articles of Impeachment, trying to improperly impeach our country’s representative to the world.

This is not the time to try to get digs in that the President will always be impeached because we had the majority and we could do it to you and we did it to you. It is wrong. It is not what the American people deserve or want.

Sadly, the House managers do not trust their fellow Americans to choose their own President. They do not think
that they can legitimately win an election against President Trump, so they need to rush to impeach him immediately. That is what they have continually told the American people, and that—that is a shame.

We, on the other hand, trust our fellow Americans to choose their President. Choose your candidate. Let the Senators who are here who are trying to become the Democratic nominee try to win that election, and let the American people choose.

Maybe—maybe they are concerned that the American people like historically low unemployment. Maybe the American people like that their 401(k) accounts have done extremely well. Maybe the American people like prison reform and giving people a second chance.

Tellingly, some of these House managers worked constructively with this administration to give Americans a second chance. That was the public interest. That is what the country demands. That is what society deserves.

Maybe the American people like an administration that is fighting the opioid epidemic. Maybe the American people like secure borders. Maybe the American people would be horrified. “worst nightmare” and that they believe that President Trump—a President who has kept his promises and delivered on them.

If you think Americans want to abandon our prosperity and our unprecedented successes under this President, then convince the electorate in November at the ballot box. Do not try to improperly interfere with an election that is only months away, based on these Articles of Impeachment.

In your trial memorandum that you submitted here before the Senate, you speak about the Framers of the Constitution believing that President Trump’s alleged conduct is their “worst nightmare” and that they would be horrified.

In fact, sadly, sadly, it is the House managers’ conduct in bringing these baseless Articles of Impeachment that would clearly be their and our worst nightmare.

Thank you.

The CHIEF JUSTICE. The majority leader is recognized.

RECESS

Mr. MCCONNELL. Mr. Chief Justice, I think we are looking at a 45-minute break for dinner.

I ask unanimous consent that the Senate stand in recess.

There being no objection, at 6:01 p.m., the Senate, sitting as a Court of Impeachment, recessed until 6:45 p.m., and thereupon reassembled when called to order by the Chief Justice.

The CHIEF JUSTICE. The Senate will come to order. Ready to proceed?

Mr. Counsel SEKULOW. Yes, sir.

Mr. Chief Justice, Members of the Senate, House managers, we are going to do two things this evening. We are going to first hear from former independent counsel Robert Ray. He is going to discuss issues of how he was involved in the investigation, the legal issues, the methods of how that works, and then we will conclude this evening with a presentation from Professor Dershowitz.

With that, I yield my time, Mr. Chief Justice, to Robert Ray.

Mr. Counsel RAY. Mr. Chief Justice, Members of the Senate, distinguished House managers, and may it please this Court of Impeachment, I stand before you today in defense of my fellow Americans, who in November 2016 elected Donald Trump to serve the people as their President. Their reasons for that vote were as varied as any important decisions are, but their collective judgment, accepted as legitimate under our Constitution, is deserving of my respect and yours.

For only the third time in our Nation’s history, the Senate is convened to try the President of the United States on Articles of Impeachment. Those articles do not allege crimes. The Constitution, the Framers’ intent, and historical practice all dictate that well-founded Articles of Impeachment allege both that a high crime has been committed, and that, as such, removal from office is warranted only when such an offense also constitutes an abuse of the public trust; that is, in the case of the President, a violation of his oath of office. Both are required and necessary conditions.

I am here this evening in this Chamber distinctly privileged to represent and defend the President of the United States on the facts, on the law, and on the constitutional principles that must be preserved. I speak as a member of the Senate, in deciding the great question of whether these articles warrant, with or without witnesses, the removal of the President from office.

Because there is and can be no basis in these articles on which the Senate can or should convict a President on what is alleged, the President must not be removed from office. That judgment is reserved to the people in the ordinary course of elections, the next of which is months away.

Now, 40 years ago, in 1980, I first came to Capitol Hill as a legislative intern for a Congressman who only 6 years earlier had played an important and critical role in the impeachment proceedings against President Richard Nixon. The Congressman of whom I speak, whom I came to respect immensely, served then in 1974, in the House Judiciary Committee. He was tasked in the summer of 1974, together with his colleagues, in evaluating and determining whether House managers here have Articles of Impeachment.

Those articles included the crime of obstruction of justice, abuse of power, and obstruction of Congress. But unlike how House managers—and, indeed, the entire House—45 years later in December 2019 proceeded here, bipartisan consensus in 1974, among both House Democrats and House Republicans, was the opposite. Indeed, it became apparent then, that narrow partisan views aside, the House Judiciary Committee would step into the breach only insofar as evidence of criminal Presidential conduct warranted.

The tapes of Oval Office conversations involving the President provided that evidence. The Supreme Court, in effect, overruled the claim of executive privilege and ordered the release of the tapes to the House Judiciary Committee.

As a result, 3 days later, the high crime of obstruction of justice, including suborning perjury tethered to a second Article of Impeachment—"contrary to his trust as President."

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Thank you.
on by the House Judiciary Committee along party lines by a vote of 21 to 17. Republicans objected then to the third article in the face of the President’s good-faith prior claim to executive privilege by withholding certain evidence until such time as the matter was definitively resolved by the Supreme Court.

My point in mentioning these three votes by the House Judiciary Committee is simply this: Count votes, and do the math. I understand that you all have been blessed by your phrasing and, thus, a calculator app, so I will do it for you.

A 27-to-11 vote was not only bipartisan, as I have indicated, but overwhelmingly so—indeed, over 70 percent; that is to say, greater than a two-thirds supermajority.

That vote sent a powerful signal to the full House and indeed the Senate that impeachment was overwhelmingly bipartisan and, therefore, politically and legally legitimate.

President Nixon’s fate was sealed, and the result was inevitable. Thus, less than 2 weeks after that initial committee vote on impeachment, the President resigned.

During the course of those proceedings, my Congressmen commented simply and plainly that it was, in his words, “a great American tragedy.” But the greater point was—and is—that impeachment was never designed or intended to be used to paralyze the government; indeed, it was evident in nullifying the votes of millions of Americans, and, thus, their Senators, on their vote in favor of the President’s removal from office.

That judgment was, of course, within the body’s discretion to render, and it is the President’s decision to excoriate the body politic to warrant the President’s removal from office.

To supplement that cited statement 56 years ago, in 1970, from then-Congressman Jerry Ford in connection with the prospect of potentially impeaching a Supreme Court Justice, Ford pointedly clarified that executive branch impeachments are different because voters can remove the President, the Vice President, and all persons holding office at their pleasure at least every 4 years. To remove a President in mid-term—it has been tried before and never done—would indeed, he said, require crimes of the magnitude of treason and bribery.

Professor Akhil Amar of Yale Law School made largely the same point during the Clinton impeachment about the danger presented through Presidential impeachment of transforming an entire branch of government:

When they remove a duly elected President, they undo the votes of millions of ordinary Americans on Election Day. This is not something that Senators should do lightly, lest we slide toward a kind of parliamentary government that our entire structure of government was designed to repudiate.

In hammering home the constitutional uniqueness of Presidential impeachment, he emphasized the case of Richard Nixon and distinguished it from Andrew Johnson; that is to say, only when extremely high crimes and gross abuses of official power indeed pose a threat to our basic constitutional system, a threat as high and truly as malignant to democratic government as treason and bribery, he reasoned, would the Senate ever be justified in nullifying the votes of millions of Americans and removing a President from office.

My point is this: History—our American history—matters. To listen to how the House managers would have it, Articles of Impeachment are merely—as Chuck Ruff warned a generation ago—empty vessels into which can be poured any number of charges, even those considered and abandoned.

At least in the case of President Clinton’s impeachment, the articles actually charged crimes. The Senate thereafter determined, by its vote in that case, in effect, that while those crimes—perjury and obstruction of justice—may have been committed, those crimes were not high enough crimes damaging to the body politic to warrant the President’s removal from office.

That judgment was, of course, within this body’s discretion to render, and it has been accepted as such by the country—whether you agreed with it or
not—as legitimate. It is also one that is historically consistent with Hamilton’s views and Madison’s, too, concerning the proper scope of impeachment as applied to a President.

When I entered the scene and succeeded President Clinton following impeachment, nonetheless, was warranted consistent with the Department of Justice’s Principles of Federal Prosecution. That matter was exhaustively considered in the midst of a Federal grand jury investigation that I commissioned in order to decide, first, whether crimes, in fact, had been committed. I found that they had, and I later said so publicly in the final report expressly authorized and mandated by Congress concluding the Lewinsky investigation.

Significantly, though, I also determined that the prosecution of the President, while in, or once he left office, would not be in the national interest, given alternative available means, short of prosecution, in order to hold the President accountable for his conduct. That included a written acknowledgement by the President 2 years after his Senate trial that his testimony under oath before the grand jury had, in fact, been false and a related agreement to suspend his law license.

The price paid by President Clinton was indeed high, and it stemmed, in part, from his Senate trial that his words, read the transcript, demonstrated that beyond any doubt. In my view, the call transcript itself demonstrates that beyond any doubt.

I should add here also that any effort to conflate that this purported thing of value also constitutes an illegal foreign campaign contribution to the President of the United States is with doubt as a matter of law. Indeed, the Justice Department has, for so, too, have courts which have struggled since at least the early 1990s with application of the Federal anti-corruption laws to situations like this when an in-kind benefit in the form of campaign interference or assistance is alleged to be illegal. None of this would permit the requisite finding supported by clear and unmistakable evidence of a violation of law necessary to sustain impeachment as an abuse of power.

Turning now to what the House managers have alleged, regarding the first article, the House Judiciary Committee report on impeachment contains a rather extraordinary statement. It says as follows: “Although President Trump’s actions need not rise to the level of a criminal violation to justify impeachment, his conduct here was criminal.” So, in short, we needn’t bother in an impeachment Article I to charge President with a crime, implicitly recognizing that there is insufficient evidence to prove that such a crime was committed, but we are going to say that the President’s conduct was criminal nonetheless. Aside from being exceedingly unfair to call something criminal and not stand behind the allegation and actually charge it, it just ain’t so.

Today, Hon. Jeffries argue before this body that he and his team have overwhelming evidence of an explicit—his word, not mine—quid pro quo by the President; that is, an explicit, purported, and provoked exchange by President Trump of something of personal benefit to himself in return for an official act by the U.S. Government.

As I have explained as far back as November of last year in a TIME magazine cover story, the problem with this legal theory is that an unlawful quid pro quo is limited to those arrangements that are corrupt; that is to say, only those that are clearly and unmistakably improper are therefore illegal. And, in the eyes of the law, the specific exchange involving the Bidens might bring President Trump is, at best, nebulous.

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Thus, during the past 4 months alone, we have witnessed the endless procession of legal theories used to sustain this partisan impeachment—from treason to quid pro quo, to bribery, to extortion, to obstruction of justice, to soliciting an illegal foreign campaign contribution, to the Impeachment Control Act—to who knows what all is next.

What you are left with, then, are constitutionally deficient articles abandoning any pretense of the need to allege a crime, that is, a specific prohibited act, a crime. If you will, in order to damage the President politically in an election year.

It is, I submit, decidedly not in the country’s best interest to have the President accountable for his crimes that is, an explicit, purported, and provoked exchange by President Trump of something of personal benefit to himself in return for an official act by the U.S. Government.

The lesson for me was a simple one that I am sure every American citizen, whatever their own experience or political perspective, can understand: Be humble and act with humility. Never be too sure that you are right.

Bill Clinton was the elected official although crimes had been committed, my tenure as independent counsel that, he and his team have overwhelming evidence of an explicit—his word, not mine—quid pro quo by the President; that is, an explicit, purported, and provoked exchange by President Trump of something of personal benefit to himself in return for an official act by the U.S. Government.

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upon his military experience, and hav-
ing listened in on the call, by a supe-
rior officer—in this case, the Com-
mander in Chief—as the same thing as an
order in the chain of command.
While all of this may be true in the
military, it goes without saying that
President Zelensky, as the leader and
head of a sovereign nation, was not and
is not in our military chain of com-
mand.
I say that to you, Members of the
Senate, as the son of a U.S. Army col-
nel and Vietnam war veteran buried in
Arlington National Cemetery and as
the father of a U.S. Army major cur-
cently serving with President Trump's
Space Force Command in Aurora, CO,
near Denver.
With all due respect, Lieutenant
Colonel Vindman’s testimony in this
regard is at best, I submit to you, dis-
torted and unpersuasive.
Next, a highly explicit link be-
tween foreign aid and the investiga-
tions, or the announcement of them, is
weak. The most that Ambassador Gordon
Sondland was able to give was his
presumption that such a link likely ex-
isted. Sondland was flatly contradicted by
the President’s express denial of the exist-
ence of a quid pro quo to Ambassador
Sondland as well as to Senator Ron
Johnson.
The President was emphatic to Am-
bassador Sondland. The President said:
I want nothing. I want no quid pro quo. I
just want Zelensky to do the right thing, to
do what he ran on.
And to Senator Johnson, the same
two, short, two words: “No way.”
Recognizing this flaw in the testi-
mony, House managers have focused
instead on an alternate quid pro quo
rational, that the exchange was condi-
tioned on a foreign head-of-state meet-
ing at the White House in return for
Ukraine publicly announcing an inves-
tigation of the Bidens.
In the House Judiciary report, it
states as follows: “It is beyond ques-
tion that the two words are ‘No way.’
This constitute a ‘formal exercise of gov-
ernmental power’ within the meaning of
McDonnell.”
Not so fast. Actually, the Supreme
Court in McDonnell helpfully boiled it
down to only those acts that constitute
the formal exercise of government
power and that are more specific and
focused than a broad policy objective.
An exchange resulting in meetings,
events, phone calls, as those terms are
typically used as being routine, ac-
cording to the Supreme Court’s defi-
nition of an official act, do not count.

The fact that the meeting involved
was a formal one, with all of the
trappings of a state visit by the Presi-
dent of the United States, makes
no difference. The Supreme Court is
talking about an official act as a
formal exercise of decision-making power,
not the formality of the visit. Even if
the allegations were true, this could not
constitute a quid pro quo.
I should know. I argued, in effect, the
contrary proposition in United States
v. Sun-Diamond before the Supreme
Court over 20 years ago in 1999. That
proposition lost—unanimously. The
vote was 9 to 0.
In any event, the coveted meeting—and
it was, after all, just a meeting, whether
the President was not—was permanently
withheld. It later happened between the two Presidents
at the United Nations in New York
City at the first available opportunity
in September 2019.
Finally, the argument by Chairman
Jerry Nadler that this call by Presi-
dent Trump with President Zelensky
represented an “extortionate demand”
is patently ridiculous. The essential
element of the crime of extortion is
pressure. No pressure was exercised or
exerted during the call. Ukrainian offi-
cials, including President Zelensky
himself, have since repeatedly denied
that any such pressure existed. Indeed,
the contrary, the evidence strongly
suggests Ukraine was perfectly capable
of resisting any efforts to entangle
itself in United States domestic party
politics and partisanship.
What, then, remains of the first Arti-
cle of Impeachment? No crimes were
committed. Indeed, no crimes were
defined. That definition was left
what exactly is left? It is not treason.
Ukraine is our ally, not our enemy
or our adversary. And Russia is not
our enemy, only our adversary. It is
not bribery. There is no quid pro quo. It
is not extortion.
It is not an illegal foreign campaign
contribution. The benefit of the an-
nouncement of an investigation is not
tangible enough to constitute an in-
kind campaign contribution war-
ning prosecution under Federal law.
It is also not a violation of the Im-
pendment Control Act. Let’s take a
look at that last one for a moment,
shall we. The U.S. Government Ac-
countability Office, an arm of the U.S.
Congress, in its wisdom, has de-
cided, contrary to the position of the
executive branch Office of Management
and Budget, OMB, that while the Presi-
dent may temporarily withhold funds
from obligation—but not beyond the
end of the fiscal year—he may not do
so with vague or general assertions of
policy priorities contrary to the will of
Congress.
The President’s response to this
interbranch dispute between Congress
and the White House was to assert
his authority over foreign policy to
determine the timing of the best use of
funds. Ultimately, this is a dispute
that has constitutional implications
under separation of power principles,
about which this body is well famil-
lar.
It pits the President’s constitutional
prerogatives to control foreign policy
against Congress’s reasonable expecta-
tion that the President will comply
with the Constitution’s faithful execu-
tion of the law requirement of his oath
of office.
This issue has come up before with
other Presidents. There is a huge con-
stitutional debate among legal scholars
about who is right. Law review articles
have been written about it, one as re-
cently as last June in the Harvard Law
Review.
Congress, through its arm, the GAO,
had an opposing view from that of the
administration and OMB—big surprise.
I am reminded of one of President
Kennedy’s famous press conferences,
where he was asked to comment about
a report that the Republican National
Committee had voted that concluded he
was a total failure as President. He famously quipped: “I am
sure that it was passed unanimously.”
That is all that this is here: politics.
No more, no less. And in the end, what
are we talking about? The temporary
hold was lifted and the funds were re-
leased, as they had to be under the law
and as acknowledged was required by
none other than Acting Chief of Staff
Mick Mulvaney, 19 days before the end
of the fiscal year in 2019.
In any event, an alleged violation of
the Impoundment Act cannot more sus-
tain an Impeachment Article than can
an assertion of executive privilege in
opposition to a subpoena. And, without
a final decision of a court ordering
complicity with that subpoena.
Mere assertion of a privilege or ob-
jection in a legitimate interbranch dis-
pate is a constitutional prerogative. It
should never result in an impeachable
offense for abuse of power or obstruc-
tion of Congress. And, yet, in a last-
ditch effort to reframe its first Article
of Impeachment on abuse of power,
House managers, as part of the House
Judiciary Committee, have gone back
into history—always a treach-
erous endeavor for lawyers. They now
argue that President Andrew Johnson’s
impeachment, from over 150 years ago
following the end of the Civil War and
during reconstruction, was not about a
violation of the Tenure of Office Act,
which, after all, was the violation of
law charged as the principle Article of
impeachment but, instead, rested on
his use of power with illegitimate mo-
tives.

In an ahistorical sleight of hand
worthy only of the New York Times
recent “1619” series—a series, by the
way, roundly criticized by two of my Prince-
ton Civil War and reconstruction his-
tory professors as inaccurate—House
managers now claim that President
Johnson’s removal of Lincoln’s Sec-
retary of War Edwin Stanton without
Congress’s permission in violation of a
constitutional statute, later found to be
unconstitutional, is best understood
with the benefit of revisionist hind-
sight to be motivated not by his desire
to violate the statute but on his illegit-
imate use of power to undermine recon-
structive efforts or to combat African
American efforts following the Civil War.
That all may be true, but it is an-
other thing altogether to claim that
that motive actually was the basis of
Johnson’s impeachment. Professor
Laurence Tribe, who was the source for
this misguided reinterpretation of the
Johnson impeachment, simply sub-
stitutes his own self-described, far
more compelling basis for Johnson’s removal from office from the one that the House of Representatives actually voted on and the Senate considered at his impeachment trial.

There has been an awful lot of that going on in this impeachment inquiry. I have subjectively interpreted the ones for the ones that the principles actually and explicitly insist on.

At any rate, a President’s so-called illegitimate motives in wielding power can no more frame and legitimate the Johnson impeachment than recasting the Nixon impeachment as really about his motives in defying Congress over the country’s foreign policy in Vietnam. Again, all of that may be true, but it has nothing to do with impeachment. Not only that, it is also bad history.

As recognized 65 years ago by then-Senate John F. Kennedy in his book “Profiles in Courage,” President Johnson was saved from removal from office by only the conscience of one courageous Senator who recognized the legislative overreach that the Tenure of Office Act represented.

Quoting now from Senator Edmund G. Ross in “Profiles in Courage,” who explained as follows:

The independence of the executive office as a coordinate branch of the government was on trial. . . . If . . . the President must step down . . . upon insufficient proofs and from particular considerations of the office of President would be degraded.

So, too, here. Contrary, apparently to the fashion now, Senator Ross’s action eventually was praised and accepted several decades after his service and again many years later by President Kennedy as a courageous stand against legislative mob rule. Professor Dershowitz will have more to say about one other courageous Senator from that impeachment. More on that later.

For now, the point is that our history demonstrates that Presidents should not be subject to impeachment based upon bad or ill motives, and any thought to the contrary should strike you, I submit, as exceedingly dangerous to our constitutional structure of government.

If that were the standard, what President would ever be safe by way of impeachment from what Hamilton described as the “persecution of an intemperate or designing majority in the House of Representatives”?

The central import of the abuse of power Article of Impeachment—indeed, when added together with the obstruction of justice article—is a result not far off from what one citizen tweet I saw back in December described as article I, Democrats don’t like President Trump; article II, Democrats can’t beat President Trump.

President Trump is not removable from office just because a designing majority in the House, as represented by the House managers, has no jurisdiction to consider that the President abused the power of his office during the July 25 call with President Zelensky. The Constitution requires more. To ignore the requirement of proving that a crime was committed is to sidestep the constitutional design as well as the lessons of history.

I know that many of you may come to conclude, or may have already concluded, that it’s a bit of a slam dunk. I have said on any number of occasions previously—and publicly—that it would have been better, in attempting to spur action by a foreign government in coordinating law enforcement efforts with our government, to have done so through proper channels. While the President certainly enjoys the power to do otherwise, there is consequence to that action, as we have now witnessed. After all, that is why we are all here.

But it is another thing altogether to claim that such conduct is clearly and unmistakably impeachable as an act of power. There can be no serious question that this President, or any President, acts lawfully in requesting foreign investigations into possible corruption, even when it might potentially involve another politician.

To argue otherwise would be to engage in the specious contention that a President is excused of any matter, any candidate enjoys absolute immunity from investigations during the course of a campaign. I can tell you that is not the case from my own experience. I did so during 2000 in investigating Hillary Clinton while she was running for office to become a U.S. Senator from New York, to which she was elected.

My point simply is this: This President has been impeached and stands on trial here in the Senate for allegedly doing something indirectly about which he was entirely permitted to do directly. That cannot form a basis as an abuse of power article sufficient to warrant his removal from office.

Turning now to the second Article of Impeachment, as we argued in our written trial brief, at the outset, it must be noted that it is at least a little odd for House managers to be arguing that President Trump somehow obstructed Congress when he declassified and released what is the central piece of evidence in this case. And that is, of course, the transcript of the July 25 call, as well as the call with President Zelensky that preceded it on April 21, 2019.

Release of that full call record should have been the end of this claim of obstruction, but apparently not. Instead, again, relying on the United States v. Nixon, House managers have proffered a broad claim to documents and witnesses in an impeachment inquiry, notwithstanding the Nixon court’s limited holding that an objection by the President based on executive privilege could only be overcome in the limited circumstances presented there where the President had already voluntarily invented to the preparation of the defense by his coconspirators in pending cases awaiting trial following indictments. In other words, a defendant’s Sixth Amendment right to a fair trial in collateral proceedings was what the court actually found dispositive in rejecting the President’s claim of privilege to prevent Congress from gaining access to the Watergate tapes.

All subsequent administrations have defended that narrow exception against any general claim of access to executive branch confidential communications, documents, and witnesses who are the President’s closest advisers.

Thus, it should be a matter of accepted wisdom and historical premise that a President cannot be removed from office for invoking established legal rights, defenses, privileges, and immunities, even in the face of subpoenas from House committees. Back in 1998, Professor Tribe called out any argument to the contrary as frivolous and dangerous.

House managers respond now by arguing, nonetheless, that the President has no right to defy a legitimate subpoena, particularly, I suppose, when their impeachment efforts are at stake. And thus, it is an issue rising to the level of interbranch conflict that in our system of government only accommodation between the branches and, ultimately, courts can finally resolve.

The House chose to forgo that course and to plow forward with impeachment. House managers cannot be heard to complain now that their own strategic choice can form any basis to place blame on the President for it and, worse yet, to then impeach him on that basis and seek his removal from office. That is no basis at all, as Professor Jonathan Turley persuasively has explained.

Compliance with a legitimate subpoena is enforced over a claim of executive privilege or Presidential immunity only when a court with jurisdiction says so in a final decision.

In sum, calling a subpoena legitimate, as House managers have done, does not make it, and an analogy taken from baseball, which I believe the Chief Justice might appreciate, makes the point: A longtime major league umpire named Bill Klem, who worked until 1941 after 37 years in the big leagues, was once asked during a game by a player whether a ball was fair or foul. The umpire replied: It ain’t nothing until I call it.

I say the same thing to Chairman SCHIFF now. It’s not a legitimate and, therefore, enforceable subpoena until a court says that it is.

Preceding the Clinton impeachment and, indeed, in response to demands not just from the Whitewater independent counsel but also from several of the independent counsel investigations that were ongoing at that time—and, again, I know, I was in one of them—the White House repeatedly asserted claims of executive privilege. Many of those claims were litigated for months, not weeks, and in some cases for years.

When I hear Mr. SCHIFF’s complaint that the House’s request for former
White House Counsel Don McGahn's testimony, grand jury material, and other documents has been drawn out since April of last year, I can only say in response: Boohoo.

Did I think at the time that many of those claims were frivolous and an abuse of the judicial process? Of course. And, indeed, that was the determination of the House Judiciary Committee during the Clinton impeachment. What did they do about it? Nothing. The committee properly concluded that those assertions of privilege, even if ill-founded, did not constitute an impeachable offense. Did I believe that the Clinton administration's actions in this regard have adversely impacted our investigation? You bet I did. And I said so in the final report. But never did I seriously consider that those efforts by the White House, although endlessly frustrating and damaging to the independent counsel's investigation, would constitute the commission of justice or any related impeachable offense for obstruction of Congress. Instead, I and my colleagues did the best that we could in reaching an accommodation with the White House where possible or through litigation, when necessary, in order to complete the task at hand, to the best of our ability to do so.

Any contention that what has transpired here involving this administration's assertion of valid and well-recognized privileges and immunities is somehow contrary to law and impeachable is ludicrous. In short, to acquiesce in the majority principle, anarchy . . . in some form, is all that is left.

This impeachment and the refusal to accept the results of the last election in 2016 cannot be left to stand. For the reasons stated, the Articles of Impeachment, therefore, should be rejected, and the President must be acquitted.

Members of the Senate, thank you very much.
With that, Mr. Chief Justice, I yield back to Mr. Sekulow.

Thank you.

Mr. Counsel SEKULOW. Mr. Chief Justice, we are going to now delve into the constitutional issues for a bit and our presenter is Professor Alan Dershowitz. He is the Felix Frankfurter Professor Emeritus of Harvard Law School. After serving as a law clerk for Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia, he served as a law clerk for Justice Arthur Goldberg at the U.S. Supreme Court. At the age of 28, Professor Dershowitz became the youngest tenured professor at Harvard Law School. Mr. Dershowitz spent 50 years as an active faculty member at Harvard, teaching generations of law students, including several Members of this Chamber, in classes ranging from criminal law to constitutional law, criminal procedure, constitutional litigation, legal ethics, and even courses on impeachment. He will address the constitutional issues raised by these articles.

Mr. Counsel DERSHOWITZ. Mr. Chief Justice, distinguished Members of the Senate, our friends, lawyers, fellow lawyers, it is a great honor for me to stand before you today to present a constitutional argument against the impeachment and removal not only of this President but of all and any future Presidents who may be charged with the unconstitutional grounds of abuse of power and obstruction of Congress.

I stand before you today because I loved my country and our Constitution. Everyone in this room shares that love. I will argue that our Constitution and its terms, high crimes and misdemeanors, don't encompass the two articles charging abuse of power and obstruction of Congress. In offering these arguments, I stand in the footsteps and in the spirit of Justice Benjamin Curtis, who was of counsel to impeached President Andrew Johnson and who explained to the Senate that the principle was at stake than the fate of any particular president” and of William Evarts, a former Secretary of State, another one of Andrew Johnson’s lawyers, who reportedly said that he had come to the defense table not as a “partisan,” not as a “sympathizer,” but to “defend the Constitution.”

The Constitution, of course, provides that the Senate has the sole role and power to try all impeachments. In everything that we do, the Senate must consider three issues in this case.

The first is whether the evidence presented by the House managers establishes, by the appropriate standard of proof—proof beyond a reasonable doubt—that the factual allegations occurred.

The second is whether, if these factual allegations occurred, did they rise to the level of abuse of power and/or obstruction of Congress?

Finally, the Senate must determine whether abuse of power and obstruction of Congress are constitutionally authorized criteria for impeachment.

The first issue is largely factual and I leave that to others. The second is a combination of traditional and constitutional law, and I will touch on those. The third is a matter of pure constitutional law. Do charges of abuse and obstruction rise to the level of impeachable offenses under the Constitution?

I will begin, as all constitutional analysis begins, with the text of the Constitution governing impeachment. I
will then examine why the Framers selected the words they did as the sole criteria authorizing impeachment. In making my presentation, I will transport you back to a hot summer in Philadelphia and a cold winter in Washington. I will introduce you to the patriots and ideas that helped shape our great Nation.

To prepare for this journey, I have immersed myself in a lot of dusty old volumes of 18th and 19th century history. I ask your indulgence as I quote from the wisdom of our Founders. This return to the days of yesteryear is necessary because the issue today is not what the criteria of impeachment should be, but what a legislative body or a constitutional body might today decide are the proper criteria for impeachment of a President but what the Framers of our Constitution actually chose and what they expressly and implicitly meant.

I will ask whether the Framers would have accepted such vague and open-ended terms as "abuse of power" and "obstruction of Congress" as governing criteria by close review of the history that they did not and would not accept such criteria for fear that these criteria would turn our new Republic into a British-style parliamentary democracy in which the Chief Executive’s tenure would be, in the words of James Madison, father of our Constitution, "at the pleasure" of the legislature.

The conclusion I will offer for your consideration is similar, though not identical to, that advocated by a highly respected Justice Benjamin Curtis, who as you know, dissented from the Supreme Court’s notorious decision in Dred Scott, and who, after resigning in protest from the High Court, served as counsel to President Andrew Johnson in the Senate impeachment trial. He argued that "there can be no misdemeanor without a law, written or unwritten, express or implied." In so arguing, he was echoing the conclusion reached by Dean Theodore Dwight of the Columbia Law School, who wrote in 1867, just before the impeachment, that "unless the crime is specifically named in the Constitution—treason and bribery—"impeachments, like indictments, can only be instituted for crimes committed against the statutory law of the United States." As Judge Starr said earlier today, he as the judge of authority being on the side of that proposition at a time much closer to the framing than we are today.

The main thrust of my argument, however, and the one most relevant to these current distinguished Members of the Senate is that even if that position is not accepted, even if criminal conduct were not required, the Framers of our Constitution implicitly rejected—and, if it had been presented to them, would have explicitly rejected—such vague terms as "abuse of power" and "obstruction of Congress" as among the enumerated and defined criteria for impeaching a President.

You will recall in the many Articles of Impeachment against President Johnson were accusations of non-criminal but outrageous misbehavior, including ones akin to abuse of power and obstruction of Congress. For example, article X charged Johnson "did attempt to bring into disgrace, ridicule, hatred, contempt and reproach, the Congress of the United States."

Article XI charged Johnson with denying that Congress was authorized by the Constitution to exercise the legislative power and denying that "[t]he legislation of said Congress was obligatory upon him." Those are pretty serious charges.

Here is how Justice Curtis responded to these noncriminal charges:

My first position is, that when the Constitution speaks of treason, bribery, and other crimes and misdemeanors, it refers to, and includes only, high criminal offenses against the United States, made by so many laws of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.

I will briefly review those other provisions of the Constitution with you. Judge Curtis’s interpretation is supported by the impeachment opinions compelled—by the constitutional text. Treason, bribery, and other high crimes and misdemeanors are high crimes. Other high crimes and misdemeanors must be akin to treason and bribery. Curtis cited the Latin phrase ‘Noscitur a sociis,’ meaning for my pronunciation—referring to a classic rule of interpretation that when the meaning of a word that is part of a group of words is uncertain, you should look to the other words in that group that provide interpretive context.

The late Justice Antonin Scalia gave the following current example. If one speaks of Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors, the last noun does not change. According to Senator Walton, who is a great competitor, but in business, or Napoleon, a great competitor on the battlefield. Applying that rule to the groups of words “treason, bribery, or other high crimes and misdemeanors,” the last five words should be interpreted to include only serious criminal behavior akin to treason and bribery.

Justice Curtis then reviewed the other provisions of the Constitution that, he said, followed it. He started with the provision that says “the President of the United States shall have Power to grant Reprieves and Pardons”—listen now—"for Offenses against the United States, except in Cases of Impeachment." He cogently argued that if impeachment were not for “offenses against the United States”—was not based on an offense against the United States—there would have been no need for any constitutional requirement for impeachment.

He then went on to a second proviso: “The trial of all crimes, except in cases of impeachment, shall be by jury.” This demonstrated, according to Curtis, that impeachment requires a crime, but unlike other crimes, it does not require a jury trial. You are the judge and the jury. He also pointed out that an impeachment trial, by the “exclusion" of the Constitution, requires an "acquittal" or "conviction," judgments generally rendered only in the trials of crimes.

Now, President Johnson’s lawyers, of course, argued in the alternative, as all lawyers do when there are questions of fact. They argued that since Johnson did not violate the Articles of Impeachment, as you heard from other lawyers today but, even if he did, that the articles do not charge impeachable offenses, which is the argument that I am making before you this evening. Justice Curtis’s first position, however, was that the articles did charge an impeachable offense because they did not allege “high criminal offenses against the United States.”

According to Harvard historian and law professor Nikolas Bowie, Curtis’s constitutional arguments were persuasive to at least some Senators who were no friends of President Johnson’s, including the coauthors of the 18th and 19th Amendments. As Senator William Pitt Fessenden later put it, “Judge Curtis gave us the law, and we followed it.”

Senator James W. Grimes echoed Curtis’s argument by refusing to accept "an interpretation" of high crimes and misdemeanors that changes “according to the law of each Senator’s judgment, enacted in his own bosom after the alleged commission of the offense.” Though he desperately wanted to see President Johnson, whom he despised, out of office, he believed that an impeachment removal without the violation of law would be “construed into approval of impeachments as part of future political machinery.”

Today, Professor Bowie has an article in the New York Times in which he repeats his view of “impeachment requires a crime,” but he now argues that the Articles of Impeachment do charge crimes. He is simply wrong. He is simply wrong because, in the United States v. Hudson—a case decided almost more than 200 years ago now—the U.S. Supreme Court ruled that Federal courts have no jurisdiction to create common law crimes. Crimes are only what are in the statute book.

So Professor Bowie is right that the Constitution requires a crime for impeachment but wrong when he says that common law crimes can be used as a basis for impeaching even though they don’t appear in the statute books. Now, I am not here arguing that the current distinguished Members of the Senate are in any way bound—legally
bound—by Justice Curtis’s arguments or those of Dean Dwight, but I am arguing that you should give them serious consideration—the consideration to which they are entitled by the eminence of their author and the role they may have played in the outcome of the closest precedent to the current case I want to be clear. There is a nuanced difference between the arguments made by Curtis and Dwight and the argument that I am presenting here today based on my reading of history. Curtis and Dwight thought there must be a specific violation of preexisting law. He recognized that, at the time of the Constitution, there were no Federal criminal statutes. Of course not. The Constitution established a national government, so we couldn’t have statutes prior to the establishment of our Constitution and our Nation.

This argument is offered today by proponents of this impeachment on the claim that the Framers could not have intended the criteria for impeachment to criminal-like behavior. Justice Curtis addressed that issue and that argument head-on. He pointed out that crimes such as bribery would be actionable crimes "by the laws of the United States, which the Framers of the Constitution knew would be passed." In other words, he anticipated that Congress would soon enact statutes punishing and defining crimes such as burglary, extortion, perjury, etcetera. He anticipated that, and he based his argument, in part, on that.

The Constitution already included treason as a crime, and that was defined in the Constitution itself, and then it included other crimes; but what Justice Curtis said is that you could include laws, "written or unwritten, express or implied"—by which he meant common law, which, at the time of the Constitution, there were many common crimes—and they were enforceable, even federally, until the Supreme Court, many years later, decided that common law crimes were no longer part of Federal jurisdiction.

So the position that I have derived from history would include—and this is a word that will upset some people—criminal-like conduct akin to treason and bribery. There need not be, in my view, conclusive evidence of a technical element—time and place—were absent. What Curtis and Dwight and I agree upon—and this is the key point in this impeachment case; please understand what I am arguing—is that purely non-criminal conduct, including abuse of power and obstruction of Congress, are outside the range of impeachable offenses. That is the key argument I am presenting today.

This view was supported by text writers and judges close in time to the founding. William Blackstone, whose 1819 treatise on criminal law was a Bible among criminal law scholars and others, defined "high crimes and misdemeanors" as "such immoral and unlawful acts as are nearly allied, and to equal moral influence in guilt, to a felony; and yet, owing to the absence of some technical circumstances"—technical circumstances—"do not fall within the definition of a felony." Similar views were expressed by some State courts. Others disagreed. But here is what she said:

Impeachment is whatever Congress says it is. There is no law. But this lawless view would place Congress above the law. It would place Congress above the Constitution. For Congress to ignore the specific words of the Constitution itself and substitute its own judgments would be for Congress to disregard that it is accusing the President of doing—and no one is above the law, not the President and not Congress.

This is precisely the kind of view expressly rejected by the Framers, who feared having a President serve at the "pleasure" of the legislature, and it is precisely the view rejected by Senator James Grimes when he refused to accept impeachment of crimes and misdemeanors that would change "according to the law of each Senator’s judgment, enacted in his own bosom." The Constitution requires, in the words of Gouverneur Morris, that the concept of impeachment be "enumerated and defined." Those who advocate impeachment today are obliged to demonstrate how the criteria accepted by the House in this case are enumerated and defined in the Constitution.

The compelling textual analysis provided by Justice Curtis is confirmed by the debate in the Constitutional Convention, by the Federalist Papers, by the writings of William Blackstone, and, I believe, by the writings of Alexander Hamilton, which were heavily relied on by lawyers at the time of the Constitution’s adoption.

There were at the time of the Constitution’s adoption two great debates that went on, and it is very important to understand the distinction between these two great debates. It is hard to imagine today, but the first was, Should there be any power to impeach a President at all? There were several members of the founding generation and of the Framers of the Constitution who said no—no, a President shouldn’t be allowed to be impeached. The second—and the second is very, very important in our consideration today—is, If a President is to be subject to impeachment, what should the criteria be? These are very different issues, and they are often erroneously conflated.

Let’s start with the first debate.

During the broad debate about whether a President should be subject to impeachment, proponents of impeachment used such epithets as "unfit," "obnoxious," "corrupt," "misconduct," "misbehavior," "negligence," "malpractice," "perfidy," "treachery," "incapacity," "peculation," and "maladministration." They worried that a President might "pervert his administration into a scheme of speculation and oppression"; that he might be "corrupted by foreign influence"; and, yes, this is important—that he might have "great opportunities of abusing his power.

Those were the concerns that led the Framers to decide that a President must be subject to impeachment, but not a single one of the Framers suggested that the need for an impeachment and removal mechanism should automatically be accepted as a specific criterion for impeachment. Far from it.

Gouverneur Morris aptly put it: "[C]orruption and some other offenses . . . ought to be impeachable, but . . . the cases ought to be enumerated and defined."
The great fallacy of many contemporary scholars and pundits, and, with due respect, Members of the House of Representatives is that they fail to understand the critical distinction between the broad reasons for needing an impeachment mechanism and the carefully executed and defined criteria that should authorize the deployment of this powerful weapon.

Let me give you a hypothetical example that might have faced Congress, or, certainly, will face Congress.

Let us assume that there is a debate over regulating the content of social media—whether we should have regulations or criminal, civil regulations over Twitter or Facebook, etc. et cetera. In the debate over regulating the social media, proponents of regulation might well cite broad dangers, such as false information, inappropriate content, hate speech. Those are good reasons for having regulation; but when it came to enumerating and defining what should be prohibited, broad dangers would have to be balanced against other important policies, and the resulting legislation would be much narrower and more carefully defined than the broad dangers that necessitated some regulation.

The Framers understood and acted on this distinction. But I am afraid that many scholars and others and Members of Congress fail to see this distinction, and they cite some of the fears that led to the need for an impeachment mechanism. They cite them as the criteria themselves. That is a deep fallacy, and it is crucially important that the distinction be sharply drawn between arguments made in favor of impeaching and the criteria then decided upon to justify the impeachment specifically of the President.

The Framers understood this, and so they got down to the difficult business of enumerating and defining precisely which offenses, among the many that they feared or about which they might contend, should be impeachable as distinguished by those left to the voters to evaluate.

Some Framers, such as Roger Sherman, wanted the President to be removable by “the National legislature” at its “pleasure,” much like the Prime Minister can be removed by a simple vote of no confidence by Parliament. That view was rejected.

Benjamin Franklin opposed decidedly the making of the Executive “the mere creature of the legislature.”

Gouverneur Morris was against “a dependence of the Executive on the Legislature, considering the Legislature”—you will pardon me for quoting this—“a great danger to be apprehended. . . .”

I don’t agree with that.

James Madison expressed concern about the President being improperly dependent on the legislature. Others worried about a feeble executive.

Here are three and other arguments against turning the new Republic into a parliamentary democracy, in which the legislature had the power to remove the President, the Framers set out to strike the appropriate balance between the broad concerns that led them to vote for a provision authorizing the impeachment of the President and the need for specific criteria not subject to legislative abuse or overuse. Among the criteria proposed were: malpractices, neglect of duty, malconduct, neglect in the execution of office, and—and this word we will come back to talk about—maladministration.

It was in response to that last term, a term used in Britain, as a criteria for impeachment that Madison responded: “So vague a term will be equivalent to a tenure during the pleasure of the Senate.”

Upon hearing Madison’s objections Colonel Mason withdrew “maladministration” and substituted “other high crimes and misdemeanors.”

Had a delegate proposed inclusion of “abuse of power” or “obstruction of Congress” as enumerated and defined criteria for impeachment, history strongly suggests that Madison would have similarly opposed it, and it would have been rejected.

I will come back to that argument a little later on when I talk specifically about abuse of power.

Indeed, Madison worried that a partisan legislature could even misuse the word “misdemeanor” to include a broad array of noncrimes, so he proposed moving the trial to the nonpartisan Supreme Court. The proposal was rejected.

Now, this does not mean, as some have suggested, that Madison suddenly changed his mind and favored such misuse to expand the meaning of “misdemeanor” to include broad terms like “misbehavior.” No, it only meant that he feared—he feared that the word “misdemeanor” could be abused. His fear has been proved prescient by the subsequent history of the Constitution.

The debate is only over the words “and misdemeanors.” The Framers of the Constitution were fully cognizant of the fact that the word “misdemeanor” was a species of crime.

The book that was most often deemed authoritative was written by William Blackstone of Great Britain, and I think that Blackstone and Hamilton also support this view.

There is no disagreement over the conclusion that the words “treason, bribery, or other high crimes”—those words require criminal behavior. The debate is only over the words “and misdemeanors.” The Framers of the Constitution were fully cognizant of the fact that the word “misdemeanor” was a species of crime.

The book that was most often deemed authoritative was written by William Blackstone of Great Britain, and I think that Blackstone and Hamilton also support this view.

The general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms.

Mere synonymous terms. He went on:

Though, in common usage, the word “crimes” is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of “misdemeanors” only.

Interestingly, though, he pointed out that misdemeanors were not always so gentle.

There was a category called “capital misdemeanors,” where if you stole somebody’s pig or other fowl, you could be sentenced to death, but it was only for a misdemeanor. Don’t worry. It is not for a felony. But there were misdemeanors that were capital in nature.

Moreover, Blackstone wrote that parliamentary impeachment “is a prosecution”—a prosecution—“of already known and established law [presented] to the highest and Supreme Court of criminal jurisdiction”—analogous to this great court.

He observed that “[a] commoner [can be impeached] but only for high misdemeanors: a peer may be impeached for any crime”—any crime.

This certainly suggests that Blackstone deemed high misdemeanors to be a species of crime.
Hamilton is a little less clear on this issue, and not surprisingly because he was writing—in Federalist No. 65, he was writing not to define what the criteria for impeachment were, he was writing primarily in defense of the Constitution as written and less to define what the criteria authorizing impeachment include—as inde-

pendent grounds for impeachment—

misconduct, abuse, or violation. If anything, he was contracting them to re-

quire, in addition to proof of the specified crimes, also proof that the crime must be of a political nature.

This would exclude President Clinton's private, non-political crimes. In one recent interpreta-

tion, this is happening. Hamilton’s view was cited by Clinton’s advocates as contracting, not expanding, the meaning of “high crimes.”

Today, some of these same advocates, you look at the same words and cite them as expanding its meaning.

Clinton was accused of a crime—perjury—and so the issue in his case was not whether the Constitution required a crime for impeachment. Instead, the issue was whether Clinton’s alleged crime could be classified as a “high crime” in light of the personal nature.

During the Clinton impeachment, I stated in an interview that I did not think that a technical crime was required but that I did think that abusing a public trust could be considered. I said that.

At that time, I had not done the ex-
tensive research on that issue because it was irrelevant to the Clinton case, and I was not fully aware of the con-

flicts of power. So I simply accepted the academic consensus on an issue that was not on the front burner at the time.

But because this impeachment di-

rectly raises the issue of whether criminal behavior is required, I have gone back and read all the relevant his-
torical material, as nonpartisan aca-
demics should always do, and have now concluded that the Framers did intend to limit the criteria for impeachment to criminal-type acts akin to treason, bribery, and they certainly did not in-
tend to extend it to vague and open-

ended and noncriminal accusations such as abuse of power and obstruction of Congress.

I published this academic conclusion well before I was asked to present the argument to the Senate in this case. My switch in attitude, purely aca-
demic, purely nonpartisan.

Nor am I the only participant in this pro-
ceeding who has changed his mind. Several Members of Congress, several Sena-

tors expressed different views re-

garding the criteria for impeachment when the subject was President Clinton than they do now.

When President was Clinton, my colleague and friend Professor Laurence Tribe, who is advising Speaker PELOSI now, wrote that a sitting Presi-
dent could not be charged with a crime. Now he has changed his mind. That is what academics do and should do, based on new information.

If there are reasonable doubts about the intended meaning of “high crimes and misdemeanors,” Senators might consider resolving these doubts by reference to the legal concept known as leniency.

Leniency goes back to hundreds of years before the founding of our coun-

dy. It required that in construing a criminal statute that is capable of more than one reasonable interpretation, the interpretation that favors the defendant should be selected unless it conflicts with the intent of the statute.

It has been applied by Chief Justice Marshall, Justice Oliver Wendell Holmes, Felix Frankfurter, Justice Antonin Scalia and others.

Now, applying that rule to the interpre-
tation of “high crimes and mis-
demeanors” would require that these words be construed narrowly to require criminal-like conduct akin to treason and bribery rather than broadly to en-
compass abuse of power and obstruc-

tion of Congress.

In other words, if Senators are in doubt about the meaning of “high crimes and misdemeanors” the rule of leniency should incline them toward ac-
cepting a narrower rather than a broad interpretation, a view that rejects abuse of power and obstruction of Con-

gress as within the constitutional cri-
teria. Now, even if the rule of leniency is not technically applicable to impeach-

ment—that is a question—certainly, the policies underlying that rule are worthy and deserving of consideration as guides to constitutional interpre-
tation.

Now, here I am making, I think, a very important point. Even if the Sen-

ate were to conclude that a technical crime is not required for impeachment, the critical question remains—and it is the question I now want to address my-
self to—do abuse of power and objec-
tion of Congress constitute impeach-
able offenses?

The relevant history answers that question clearly in the negative. Each of these charges suffers from the vice of being “so vague a term that they will be equivalent of tenure at the pleasure of the Senate,” to quote again the Father our Constitution.

Abuse of power is an accusation eas-
ily leveled by political opponents against controversial presidents. In our long history, many Presidents have been accused of abusing their power. I will now give you a list of Presidents who in our history have been accused of abusing their power.

They could be subject to impeachment under the House managers’ view of abuse: George Washington, for refusal to turn over documents relating to the Jay Treaty; John Adams for signing and enforcing the Alien and Sedition laws; and Thom-

as Jefferson, for purchasing Louisiana without congressional authorization.

I will go on—John Quincy Adams; Martin Van Buren; John Tyler, “arbitrary, despotic and corrupt use of the veto power”; James Polk—here I quote Abraham Lincoln; Abraham Lin-

coln accused Polk of abusing the power of his office, “contemptuously dis-

regarding the Constitution, usurping
the role of Congress, and assuming the role of dictator.” He didn’t seek to impeach him, just sought to defeat him.

Abraham Lincoln was accused of abusing his power for suspending the writ of habeas corpus during the Civil War; Grant, Grover Cleveland, William McKinley, Theodore Roosevelt, William Taft, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Jimmy Carter, and Ronald Reagan—concerning Iran-Contra, and now I say, Professor Laurence Tribe said the following: “What lies behind this impeachment is the most serious breach of duty by the President, a breach that may well entail an impeachable abuse of power.”—George H.W. Bush. “The following was released today by the Clinton-Gore campaign: In the past weeks, Americans have begun to learn the extent to which George Bush and his administration have abused their governmental power for political purposes.”

That is how abuse of power should be used, Professor Blackman said. It should be issued as statements of one political party against the other. That is the nature of the term. Abuse of power is a political weapon, and it should be levied against political opponents. Let the public decide if that is true.

Barack Obama, the House Committee on the Judiciary held an entire hearing entitled “Obama Administration’s Abuse of Power.”

By the standards applied to earlier Presidents, any controversial act by a Chief Executive could be denominated as abuse of power. For example, past Presidents have been accused of using their foreign policy, even their war powers, to enhance their electoral prospects. Presidents often have mixed motives that include partisan personal benefits, along with the national interest.

Professor Josh Blackman, constitutional law professor, provided the following interesting example:

In the context of the Civil War, President Lincoln encouraged General William Sherman to allow soldiers in the field to return to Indiana to vote.

What was Lincoln’s primary motivation, the professor asks.

He wanted to make sure that the government of Indiana remained in the hands of Republican loyalists who would continue the war until victory. Lincoln’s request risked undercutting the military effort by depleting the ranks. Moreover, during this time, soldiers in the remaining States faced greater risks than did the returning Hoosiers.

The professor continues:

Lincoln had personal motives. Privately, he sought victory for his party, but the President, as a President and as a party leader and Commander in Chief made a decision with life-or-death consequences.

Professor Blackman used the following relevant conclusion from his other historical events. He said:

Politicians routinely promote the understanding of the general welfare while at the back of their minds considering how these actions would increase their popularity. Often the two concepts overlap. What is good for the country is good for the official’s reelection.

Like all human beings, Presidents and other politicians, persuade themselves that their actions seen by their opponents as self-serving are primarily in the national interest. In order to conclude that such mixed-motive actions constitute an abuse of power, opponents must psychoanalyze the President and attribute to him a singular, self-serving motive. Such a subjective probing of motives cannot be the legal test for abuse of power that could result in the removal of an elected President.

Yet this is precisely what the managers are claiming. Here is what they said: “Whether the President’s real one actually in his mind, are at the time legitimate.”

What a standard, what was in the President’s mind—actually in his mind? What was the real reason? Would you want your actions to be probed for the ‘real reason’ why you acted? Even if a President were—and it clearly shows in my mind that the Framers could not have intended this psychoanalytical approach to Presidential motives to determine the distinction between what is impeachable and what is not.

Here, I come to a relevant and contemporaneous issue: Even if a President—any President—were to demand a quid pro quo as a condition to sending aid, then, the President obviously was a highly disputatious matter in this case—that would not, by itself, constitute an abuse of power.

Consider the following hypothetical case that is in the news today as the Israeli Prime Minister comes to the United States for meetings. Let’s assume a Democratic President tells Israel that foreign aid authorized by Congress will not be sent or an Oval Office meeting will not be scheduled unless the Israeli settlements—quid pro quo. I might disapprove of such a quid pro quo demand on policy grounds, but it would not constitute an abuse of power.

Quid pro quo alone is not a basis for abuse of power. It is part of the way foreign policy has been operated by Presidents since the beginning of time. The claim that foreign policy decisions can be deemed abuses of power based on subjective opinions about mixed or sole motive indefensibility was interested only in helping himself demonstrate the dangers of employing the vague, subjective, and politically malodorous phrase “abuse of power” as a constitutionally permissible criteria for the removal of a President.

Now, it follows from this that, if a President—any President—were to have done what “The Times” reported about the content of the Bolton manuscript, that would not constitute an impeachable offense. Let me repeat it. Nothing in the Bolton revelations, even if true, would rise to the level of an abuse of power or an impeachable offense. That is clear from the history.

That is clear from the language of the Constitution. You cannot turn conduct that is not impeachable into impeachable conduct simply by using words like “quid pro quo” and “personal benefit.”

It is inconceivable that the Framers would have intended so politically loaded and promiscuously deployed a term as “abuse of power” to be weaponized as a tool of impeachment. It is precisely the kind of vague, open-ended, and subjective phrase that the Framers feared and rejected.

Consider the term “maladministration.” I want to get back to that term because it was a term explicitly rejected by the Framers. Recall that it was raised, Madison objected to it, and it was then withdrawn, and it was not a part of the criteria. We all agree that maladministration is not a ground for impeachment. If the House were to impeach a President on a temporaneous issue: Even if a President were to demand a quid pro quo as a condition to sending aid, then, the President obviously was a highly disputatious matter in this case—that would not, by itself, constitute an abuse of power.

Maladministration is a “high misdemeanor” that is punishable by the method of parliamentary impeachment, wherein such penalties, short of death, are inflicted. He included among it imprisonment. In other words, you can go to prison for maladministration. Despite this British history, Madison insisted it be rejected as a constitutional criteria for impeachment because it was a term explicitly rejected by the Framers.

Blackstone denominated maladministration as a “high misdemeanour” that is punishable “by the method of parliamentary impeachment, wherein such penalties, short of death, are inflicted. He included among it imprisonment. In other words, you can go to prison for maladministration. Despite this British history, Madison insisted it be rejected as a constitutional criteria for impeachment because it was a term explicitly rejected by the Framers. Recall that it was raised, Madison objected to it, and it was then withdrawn, and it was not a part of the criteria. We all agree that maladministration is not a ground for impeachment. If the House were to impeach a President on a temporaneous issue: Even if a President were to demand a quid pro quo as a condition to sending aid, then, the President obviously was a highly disputatious matter in this case—that would not, by itself, constitute an abuse of power.

Now what is maladministration? It is comparable in many ways to abuse of power. Maladministration has been defined as “abuse, corruption, misrule, dishonesty, misuse of office, and misbehavior.” Professor Bowie in his article in today’s “New York Times” equates abuse of power with “misconduct in office”—misconduct in office—thus supporting the view that, when the Framers rejected maladministration, they also rejected abuse of power as a criteria for impeachment.

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power as an enumerated and defined criteria for impeachment. By expressly rejecting maladministration, they implicitly rejected abuse.

Nor would the Framers have included obstruction of Congress as among the enumerated defined criteria. It, too, is vague and undefined, especially in the constitutional system in which, according to Hamilton in Federalist No. 78, "the legislative body" is not themselves "the constitutional judge of their powers" and the "use to which they put on them" is not "conclusive upon other departments." Instead, he said, "the courts were designed as an intermediate body between the people [as declared in the Constitution] and the legislature" in order "to keep the latter within the limits assigned to their authority."

Under our system of separation of powers and checks and balances, it cannot be an "obstruction of Congress" for a President to demand judicial review of a legislative act. Nor can the President be impeached for "the use they put on them." The legislature is not the "Constitutional judge of their own powers," including the power to issue subpoenas. The courts were designated to resolve disputes between the executive and legislative branches, and it cannot be obstruction of Congress to invoke the constitutional power of the courts to do so.

By their very nature, words like "abuse of power" and "obstruction of Congress" are vague, open-ended, and do not charge impeachment. They include such cases as misconduct or conduct that the President could be impeached if it is part of a "crime against the Constitution." Would any American today accept a legal system in which prosecutors could charge a citizen with abuse of conduct? Can you imagine, abuse of conduct? Professor Tribe, as I mentioned, argued that under the criteria of abuse of power, President Ronald Reagan should have been impeached.

The Framers would never have included obstruction of Congress as among the approved offenses. Professor Tribe said they would be impeached. Would any American today accept a legal system in which prosecutors could charge a citizen with abuse of conduct? Can you imagine, abuse of conduct? Professor Tribe, as I mentioned, argued that under the criteria of abuse of power, President Ronald Reagan should have been impeached.

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Would any American today accept a legal system in which prosecutors could charge a citizen with abuse of conduct? Can you imagine, abuse of conduct? Professor Tribe, as I mentioned, argued that under the criteria of abuse of power, President Ronald Reagan should have been impeached.

So what is an impeachable offense? Let me give you an example. The House managers tossed around words even vaguer and more open-ended than "abuse" and "obstruction" to justify their case for removal. These words include "trust," "truth," "honesty," and finally "right." These aspirational words are not criminal. But they demonstrate the failure of the managers to distinguish alleged political sins from constitutionally impeachable offenses.

In any event, it is the actual articles that charge abuse of power and obstruction of justice—neither of which are in the Constitution. It is the actual articles on which you must all vote, not on the more specific list of means included in the text of the articles.

In any event, it is the actual articles that charge abuse of power and obstruction of justice—neither of which are in the Constitution. It is the actual articles on which you must all vote, not on the more specific list of means included in the text of the articles.
at the pleasure of the legislature, as it was and still is in Britain. So they set the standards and the criteria high, requiring not sinful behavior—not dishonesty, distrust, or dishonor—but treason, bribery, or other high crimes and misdemeanors.

I end this presentation today with a nonpartisan plea for fair consideration of my arguments and those made by counsel and managers on both sides. I willingly acknowledge that the academic consensus is that criminal conduct is required for impeachment and that abuse of power and obstruction of Congress are sufficient. I have read and respectfully considered the academic work of many colleagues who disagree with my view and the few who accept it. I do my own research, and I do my own thinking, and I have never bowed to the majority on intellectual or scholarly matters.

What concerns me is that during this impeachment proceeding, there have been efforts to respond to my arguments and other people’s arguments opposed to the impeachment of this President. Instead of answering my arguments and those of Justice Curtis and Professor Bowie and others on their merits and possible demerits, they have simply been rejected with negative epithets.

I urge the Senators to ignore these epithets and to consider the arguments and counterarguments on their merits, especially those that agree rather than disagree with the unconstitutional vagueness of abuse of power and obstruction of Congress.

I now offer a criteria for evaluating conflicting arguments. The criteria that I offer have long called the “shoe on the other foot” test. It is a colloquial variation of the test proposed by the great legal and political thinker, my former colleague, John Rawls. It is simple in its statement but difficult in its application.

As a thought experiment, I respectfully urge each of you to imagine that the person being impeached were of the opposite party of the current President but that in every other respect, the facts were the same.

I have applied this test to the constitutional arguments I am offering today. I would be making the same constitutional arguments in opposition to the impeachment on these two grounds regardless of whether I voted for or against the President, regardless of whether I agreed or disagreed with his or her policies. Those of you who know me know that is the absolute truth. I am nonpartisan in my application of the Constitution. Can the same be said for all of my colleagues who support this impeachment, especially those who opposed the impeachment of President Bill Clinton?

I first proposed the shoe test 20 years ago in evaluating the Supreme Court’s decision in Bush v. Gore, asking the Justices to consider how they would have voted had it been Candidate Bush, rather than Gore, who was several hundred votes behind and seeking a re-count. In other words, I was on the other side of that issue. I thought the Supreme Court in that case favored the Republicans over the Democrats, and I asked them to apply the “shoe on the other foot” test.

I now respectfully ask this distinguished Chamber to consider that heuristic test in evaluating the arguments you have heard in this historic Chamber. It is an important test because how you vote on this case will serve as a precedent for voters of different parties, different backgrounds, and different perspectives vote in future cases.

Allowing a duly-elected President to be removed on the basis of standardless, subjective, ever-changing criteria—abuse of power and obstruction of Congress—risks being “construed,” in the words of Senator Grimes, a Republican Senator from Iowa, who voted against impeaching President Andrew Johnson, “as impacting approval of impeachments as part of future political machinery.”

As I began, I will close. I am here today because I love my country. I love the country for which my grandparents and made them into great patriots and supporters of the freest and most wonderful country in the history of the world. I love our Constitution—the greatest and most enduring document in the human kind.

I respectfully urge you not to let your feelings about one man—strong as they may be—establish a precedent that would undo the work of our Founders, institutional future of our children, and cause irreparable damage to the delicate balance of our system of separation of powers and checks and balances.

As Justice Curtis said during the trial of Andrew Johnson, a greater principle is at stake than the fate of any particular President. The fate of future Presidents of different parties and policies is also at stake, as is the fate of our constitutional system. The passions and fears of the moment must not blind us to our past and to our future.

Hamilton predicted that impeachment would agitate the passions of the whole community and enlist all their animosities, partialities, influence, and interest on one or the other. The Senate—the Senate—was established as a wise and mature check on the passions of the moment with “a deep responsibility to future Presidents of different parties and policies.

I respectfully urge the distinguished Members of this great body to think beyond the emotions of the day and to vote against impeaching on the unconstitutional articles now before you. To do so would agitate the passions of the moment and to prevent the voters from deciding his fate on the basis of these articles would neither do justice to this President nor to our enduring Constitution. There is no conflict here. Impeaching would deny both justice to an individual and justice to our Constitution.

I thank you for your close attention. It has been a great honor for me to address this distinguished body on this important matter. Thank you so much for your attention.

The CHIEF JUSTICE. The majority leader is recognized.

I am sorry. Are you complete?

Mr. Cipollone.

Mr. Counsel CIPOLLINE. Mr. Chief Justice, Majority Leader MCCONNELL, Democratic Leader SCHUMER, Senators, don’t worry, this won’t take very long. We are going to stop for the day, and we will continue with our presentations tomorrow. I just had three observations that I wanted to briefly make for you.

First of all, thank you very much, Professor Dershowitz and all the presenters from our side today.

I was sitting here listening to Professor Dershowitz, and believe it or not, my mind went back to law school, and I began thinking, how would this impeachment look as a law school hypothetical?

So how would we answer that question? And I found myself thinking maybe that is a good way to think about it.

The question would go something like this: Imagine you are a U.S. Senator and you are sitting in an impeachment trial. The Articles of Impeachment before you had been passed on a purely partisan basis for the first time in history. In fact, there was bipartisan opposition to the Articles of Impeachment. They have been trying to impeach the President from the moment of his inauguration for no reason—just because he won.

The articles before you do not allege a crime or even any violation of the civil law. One article alleges obstruction of Congress simply for exercising longstanding constitutional rights that every President has exercised. The President was given no rights in the House of Representatives. The Judicial Committee conducted only 2 days of hearings.

You are sitting through your sixth day of trial. The House is demanding witnesses from you that they refused to seek themselves. When confronted with expedited court proceedings regarding subpoenas they had issued, they actually withdrew those subpoenas.

They are now criticizing you in strong, accusatory language if you don’t capitulate to their unreasonable demands and sit in your seats for months. An election is only months away, and for the first time in history, they are asking you to remove a President from the ballot. They are asking you to do something that violates all past historical precedents that you have studied in class and principles of democracy and take the choice away from the American people. It would tear apart the country for generations and change our constitutional system forever.

Question: What should you do?

Your first thought might be, that is not a realistic hypothetical. That could never happen in America.
But then you would be happy because you would have an easy answer and you can be done with your law school exam, and it would be—you immediately reject the Articles of Impeachment.

Bonus question: Should your answer depend on your political party?
Answer: No.

My second observation is, I actually think it is very instructive to watch the old videos from the last time this happened, when many of you were making so eloquently—more eloquently than we are—the points that we are making about the law and precedent. But that is not playing a game of “gotcha”; that is paying you a compliment.

You were right about those principles. You were right about those principles. And if you will not listen to me, I urge you to listen to yourselves. You were right.

The third observation I had sitting here today is, Judge Starr talked about that we are in the age of impeachment, in the age of constant investigations. Imagine—if all of that energy were being used to solve the problems of the American people. Imagine if the age of impeachment were over in the United States. Imagine that.

I was listening to Professor Dershowitz talking about the shoe-on-the-other-foot rule, and it makes a lot of sense. I would maybe put it differently. I would maybe call it the golden rule of impeachment. For the Democrats, the golden rule could be, do unto Republicans as you would have them do unto Democrats. And hopefully we will never be in another position in this country where we have another impeachment but vice versa for that rule.

Those are my three observations. I hope that is helpful. Those were the thoughts I had listening to the presentations.

At the end of the day, the most important thought is this: This choice belongs to the American people. They will get to make it months from now.

The Constitution and common sense and all of our history prevent you from removing the President from the ballot. There is no basis for it in the facts. There is simply no basis for it in the law. I urge you to quickly come to that conclusion so we can go have an election.

Thank you very much for your attention.
Thank you, Mr. Chief Justice.
The CHIEF JUSTICE. The majority leader is recognized.

ADJOURNMENT UNTIL 1 P.M. TOMORROW

Mr. McConnelL Mr. Chief Justice, I ask unanimous consent that the trial adjourn until 1 p.m., Tuesday, January 28, and that this order also constitute the adjournment of the Senate.

There being no objection, at 9:02 p.m. the Senate, sitting as a Court of Impeachment, adjourned until Tuesday, January 28, 2020, at 1 p.m.