The Senate met at 1:13 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 Sergeant at Arms, Michael C. Stenger, made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, 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.

Mr. CHIEF JUSTICE. The majority leader is recognized.

ORDER OF PROCEEDURE

Mr. McConnell, Mr. Chief Justice, today the Senate will conduct up to 8 hours of questions to the parties delivered in writing to the Chief Justice. As a reminder, the two sides will alternate and answers should be kept to 5 minutes or less.

The majority side will lead off with a question from the Senator from Maine, Ms. Collins. Mr. Chief Justice.

Ms. Collins. I send a question to the desk on behalf of myself, Senator Murkowski, and Senator Romney.

The CHIEF JUSTICE. This is a question for the counsel for the President:

If President Trump had more than one motive for his alleged conduct, such as the pursuit of personal political advantage, rooting out corruption, and the promotion of national interests, how should the Senate consider more than one motive in its assessment of article I?

Mr. Counsel Philbin. Mr. Chief Justice, Senators, in response to that question, there are really two layers to my answer because I would like to point out first that, even if there was only one motive, the theory of abuse of power that the House managers have presented, that the subjective motive alone can become the basis for an impeachable offense, we believe is constitutionally defective. It is not a permissible way to frame a claim of an impeachable offense under the Constitution.

I will put that aside and address the question of mixed motive. If there were a motive that was of public interest and also of some personal interest, we think it follows even more clearly that that cannot possibly be the basis for an impeachable offense. Even the House managers, as they have framed their case, they have explained—and this is pointed out in our trial memorandum—that in the House Judiciary Committee report, they specify that the standard they have to meet is to show that this is a sham investigation; it is a bogus investigation. These investigations have—there is not any legitimate public purpose. That is the language: any legitimate public purpose. That is the standard they have set for themselves in being able to make a claim under their theory of what an abuse of power offense can be.

It is a very demanding standard that they have set for themselves to meet, and they have even said—they came up, and they talked a lot about the Bidens. They talked a lot about these issues and 2016 election interference because they were saying there is not even a scintilla—a scintilla of any evidence of anything worth looking into there. And that is the standard that they would have to meet, showing that there is no possible public interest and the President couldn’t have had any smidgeon, even, of a public interest motive because they recognize that once you get into a mixed-motive situation—if there is both some personal motive but also a legitimate public interest motive—it can’t possibly be an offense because it would be absurd to have the Senate trying to consider: Well, was it 48 percent legitimate interest and 52 percent personal interest or was it the other way, was it 53 percent and 47 percent? You can’t divide it that way.

That is why they recognize that to have even a remotely coherent theory, the standard they have to set for themselves is establishing there is no possible public interest at all for these investigations. And if there is any possibility, if there is something that shows a possible public interest and the President could have that possible public interest motive, that destroys their case. So once you are into mixed-motive
land, it is clear that their case fails.

Think about it. All elected officials, to some extent, have in mind how their conduct, how their decisions, their policy directions and the like are going to affect the next election. There is always some personal interest in the electoral outcome of policy decisions, and there is nothing wrong with that. That is part of representative democracy. And to start saying well, if you have a part motive that is for your personal electoral gain that somehow is going to become an offense, it doesn’t make any sense and it is totally unworkable and it can’t be a basis for removing a President from office.

The bottom line is, once you are into any mixed-motive situation, once it is established that there is a legitimate public interest that could justify looking into something, just asking a question about something, the managers’ case fails, and it fails under their own terms. They recognize that they have to show no possible public interest. There isn’t any legitimate public interest, and they have totally failed to make that case.

I think we have shown very clearly that both of the things that were mentioned, 2016 election interference and the Biden-Burisma situation, are things that raise at least some public interest; there is something worth looking at there. It has never been investigated in the Biden situation. Lots of their own witnesses from the State Department said that on its face it appears to be a conflict of interest. It is at least worth raising a question about or asking a question about it. And there is that public interest, and that means their case absolutely fails.

Thank you.

Mr. Chief Justice. Thank you, counsel.

The Democratic leader is recognized.

Mr. SCHUMER. Mr. Chief Justice, I send the desk.

The CHIEF JUSTICE. The gentle

Mr. Manager SCHIFF. Thank you, Mr. Chief Justice.

The Senator is recognized.

Mr. THUNE. I have a question for the President’s counsel.

Mr. Chief Justice.

Mr. Manager SCHIFF. Thank you, Mr. Chief Justice.

The Senator is recognized.

Mr. SCHIFF. I would also add, in response to the last question, that if any part of the President’s motivation was a corrupt motive, if it was a causal factor in the action to freeze the aid or withhold the meeting, that is enough to convict. It would be enough to convict under criminal law.

But here there is no question about the President’s motivation. And if you have any question about the President’s motivation, it makes it all the more essential to call the man who spoke directly with the President, whom the President confided in and said he was holding up this aid because he wanted Ukraine to conduct these political investigations that would help him in the next election—if you have any question about whether it was a factor, the factor, a quarter of the factor, some of the factor, all of the factor, there is a witness a subpoena away who could answer that question.

But the overwhelming body of the evidence makes it very clear, on July 25, that phone call, the one that we see on the record. Donald Trump speaks to Gordon Sondland. That is that conversation at a Ukraine restaurant. What does Gordon Sondland—what is the President’s question of Gordon Sondland the day after that call? Is he going to do the investigations?

Counsel for the President would have you believe the President was concerned about the burden-sharing. Well, he may have had a generic concern about the burden-sharing in other contexts, but here the motivation was abundantly clear. On that phone with Gordon Sondland, the only question he wanted an answer to was, Is he going to do the investigation?

Now, bear in mind he is talking to the Ambassador to the European Union.With other persons to talk to if his real concern was about burden-sharing than the guy responsible for Europe’s burden-sharing? But did the President raise this at all? Of course not. Of course not. And if you have any question about it all, you need to hear from his former National Security Advisor. Don’t wait for the book. Don’t wait until March 17, when it is in black and white, to find out the answer to your question: Was it all the motive, some of the motive, or none of the motive?

We think, as I mentioned, the case is overwhelmingly clear without John Bolton, but if you have any question about it, you can erase all doubt.

Let me show a video to underscore—No. 2, slide 2—how important this is.

Mr. Counsel CIPOLLINE. As House managers, really their goal should be to give you all of the facts because they are asking you to do something very, very consequential—and ask yourself, ask yourself, given the facts you heard today that they didn’t tell you, who doesn’t want to talk about the facts? Who doesn’t want to talk about the facts? Impeachment shouldn’t be a shell game. They should give you the facts.

Mr. Manager SCHIFF. One last video, which is even more important and on point for Mr. Bolton—No. 3.

Mr. Counsel PURPURA. And once again, not a single witness in the House record that the President called and asked to be provided procedures that we discussed and will continue to discuss provided any firsthand evidence that the President ever linked the President’s meeting to any of the investigations.

Mr. Manager SCHIFF. We know that is not correct, right? Because, of course, Mick Mulvaney said that the money was linked to these investigations. He said, in acknowledging a quid pro quo, that they do it all the time, and we should just get over it. Gordon Sondland also said the President said, on the one hand, no quid pro quo but also made it clear that Zelensky had to go to the mic and announce these investigations.

Mr. Chief Justice. The gentle

Mr. Manager SCHIFF. Thank you, Mr. Chief Justice.

The Senator is recognized.

Mr. THUNE. I have a question for the President’s counsel.

The CHIEF JUSTICE. The President’s counsel:

Would you please respond to the arguments or assertions the House managers just made in response to the previous question?

Mr. Counsel PHILBIN. Mr. Chief Justice, the Senators, a couple of points that I would like to make.

Manager SCHIFF suggested that there was no evidence the President was actually interested in burden-sharing because he didn’t, apparently, according to David Hale, raise it in the telephone conversation he had with Gordon Sondland that Hale seems to have overheard in a restaurant in Kiev.

Let’s look at the real evidence.

As we explained, on June 24, there is an email in the record. It is an email from one person at the Department of Defense to another, with the subject line: “POTUS ‘follow-up’”—President of the United States’ follow-up—asking specifically about burden-sharing.

It reads: “What do other NATO members spend to support Ukraine?”

That was what they were following up on for the President.

In the transcript of the July 25 call itself, the President said:

We spend a lot of effort and a lot of time on Ukraine, much more than the European countries are doing, and they should be helping you more than we are. Germany does almost nothing for you. All they do is talk, and I think it is something you should really ask them about.

He goes on to say that he talks to Angela Merkel about it and that they are not really doing as much as the United States is doing. He is raising burden-sharing, and President Zelensky agreed with him.

Manager SCHIFF also suggested that there is evidence of some connection
between the military assistance and investigations into 2016 election interference because of a statement that Acting Chief of Staff Mulvaney made at a press conference, but that has been made clear in the record, since that press conference. What he was saying was garbled and/or misunderstood. He immediately clarified and said on that date: “The President never told me to withhold any money until the Ukrainians did anything related to the server."

Similarly, he issued a statement just the other day, making clear again—this is from his counsel; so it is phrased in the third person: “...nor did Mr. Mulvaney ever have a conversation with the President or anyone else indicating that Ukrainian military aid was withheld in exchange for the Ukrainian investigation of Burisma, the Bidens, or the 2016 election.” That is Mulvaney’s statement.

Lastly, as to the point of whether this Chamber should hear from Ambassador Bolton—and I think it is important to consider what that means, because it is not just a question of, well, should we just hear one witness? That is what the real question is going to be.

For this institution, the real question is, What is the precedent that is going to be set for what is an acceptable way for the House of Representatives to bring an impeachment of a President of the United States to this Chamber, and can it be done in a hurried, half-baked, partisan fashion? They didn’t even subpoena John Bolton. They didn’t even try to get his testimony. To insist now that this body will become the investigative body—that this body will have to do all of the discovery—then, this institution will have been paralyzed for months on end because it will have to sit as a Court of Impeachment while now discovery will be done. It would be Ambassador Bolton, and if there are going to be witnesses, in order for them to be there, they have to be available, fair adjudication, then, the President would have to have his opportunity to call his witnesses, and there would be depositions. This would drag on for months. Then that will be the new precedent. Then that is the way all impeachments will operate in the future, where the House doesn’t have to do the work—it does it quickly and throws it over the transom—and this institution gets derailed and has to deal with it. That is not what the Founders intended.

On Monday, President Trump tweeted, “The Democrat controlled House never even asked John Bolton to testify.” So that the record is accurate, did House impeachment investigators call John Bolton to testify? Mr. Manager SCHIFF, Senators, the answer is yes. Of course, we asked John Bolton to testify in the House, and he refused. We asked his deputy, Dr. Kupperman, to testify, and he refused. Fortunately, we asked their deputy, Dr. Fischhoff, to testify, and we did. We asked her deputy, Colonel Vindman, to testify, and he did. We did seek the testimony of John Bolton as well as Dr. Kupperman, and they refused.

When we subpoenaed Dr. Kupperman, he sued us. He took us to court. When we raised a subpoena with John Bolton’s counsel, the same counsel for Dr. Kupperman, the answer was, “Senator, you serve us with a subpoena, and we will sue you, too.” We knew, based on what we knew about House investigations, it would take months, if not years, to force John Bolton to come and testify.

Because, I think, this is an essential point to underscore, as the President’s lawyers say, “They didn’t try hard enough to subpoena.” Or “They should have subpoenaed John Bolton”—that is what they are telling you—let me show you what they are telling the court in the McGahn litigation, if we could pull up slide 38.

This is from the President’s lawyers who are in the court of appeals right now in the McGahn litigation: “The committee [meaning our committee] lacks article III standing to sue to enforce a congressional subpoena demanding testimony from an individual on matters related to his duties as an Executive Branch official.”

I mean, it takes your breath away, the duplicity of that argument. They are being hypocritical. They should have tried harder to get these witnesses. They should have subpoenaed. They should have litigated for years; and down the street in the Federal courthouse, they are arguing: Judge, you need to throw them out. They have no standing to sue to force a witness to testify.

Are we really prepared to accept that? Counsel says to think about the precedent we would be setting if you allow the House to have a President and you permit them to call witnesses. I would submit: Think about the precedent you would be setting if you don’t allow witnesses in a trial. That, to me, is the much more dangerous precedent.

I will tell you something even more dangerous, and this was something that we anticipated from the very beginning, which is that we understood, when we got to this point, they could no longer contest the facts that the President withheld military aid from an ally at war to coerce that ally into doing the President’s political dirty work. So now they have fallen back on, You shouldn’t hear any further evidence or any further witnesses on this subject.

What is more, we are going to use the end-all argument: So what? The President is free to abuse his power. We are not going to rely on a constitutional theory—a fringe theory—that even the advocates of which says is outside the consensus of constitutional law to say that a President can abuse his power with impunity. Imagine where that leads. The President can abuse his power with impunity.

That argument made by Professor Dershowitz is at odds with the Attorney General’s own expressed opinion on the subject, with Ken Starr’s expressed opinion on the subject, and with other counsel for the President. Jonathan Turley, who testified in the House, said that theory is constitutionally, effectively, nonsense. Even 60-year-old Alan Dershowitz doesn’t agree with 81-year-old Alan Dershowitz and for a reason—because where that conclusion leads us is that a President can abuse his power in any kind of way, and there is nothing you can do about it.

Are we really ready to accept the position that this President or the next can withhold hundreds of millions of dollars of military aid to an ally at war unless he gets help in his reelection? Would you say that you could, as President, withhold disaster relief from a Governor unless that Governor got his Attorney General to investigate the President’s political rival? That, to me, is the most dangerous argument of all. It is a danger to have a President engage in this conduct, and it is dangerous to have a trial with no witnesses and set that precedent. The biggest danger of all would be to accept the idea that a President could abuse his office in this way and that the Congress powerless to do anything about it. That is certainly not what the Founders intended.

The CHIEF JUSTICE. Senators from Tennessee.

Mrs. BLACKBURN. Mr. Chief Justice, I send a question to the desk on my behalf. I am also joined by Senators Loeffler, Cramer, Lee, and McSally. The CHIEF JUSTICE. Senators Blackburn, Loeffler, Cramer, Lee, and McSally ask of counsel for the President:

Is the standard for impeachment in the House a lower threshold to meet than the standard for conviction in the Senate, and have the House managers met their evidentiary burden to support a vote of removal? Mr. Counsel PHILBIN, Mr. Chief Justice, Senators, as for the standard in the House, of course, the House is not making a final determination. The structure of the Constitution, an impeachment is simply an accusation, and as in most systems where there is simply an accusation being made, the House does not have to adhere to the same standard that is used in the Senate. In most instances, House Members have suggested in debates on articles—
of whether or not to approve Articles of Impeachment—that they should have clear and convincing evidence in the view of the Members voting on it that there was some impeachable offense, and that is all—some, not even that standard. So there is simply enough evidence that an accusation can be made. It is definitely a lower standard than the standard that has to be met here in a trial for an ultimate verdict.

The Constitution speaks in terms of a conviction in the Senate. As both Professor Dershowitz and Judge Starr pointed out in their comments, everywhere in the Constitution in which there is any mention of impeachment, it is spoken of in terms of the criminal law. The offenses that define the jurisdiction for the Senate in its sitting as a Court of Impeachment are treason, bribery, and high crimes and misdemeanors. The Constitution speaks of a conviction, upon being convicted in the Senate. It speaks of all crimes being tried by a jury except in cases of impeachment—again, suggesting notions of the criminal law.

As we have noted in our trial memorandum, all of these textual references make it clear that the standards of the criminal law should apply in the trial, certainly to the extent of the burden and standard of proof to be carried by the House managers, which means proof beyond a reasonable doubt. It is very clear that there is not any requirement for proof beyond a reasonable doubt simply for the House to vote upon whether or not to approve Articles of Impeachment.

There is a very much higher standard at stake here. As we pointed out in our trial memorandum, the mere accusation made by the House comes here with no presumption of regularity at all in the Senate. The Senate is a trier of both fact and law, reviewing both factual and legal issues de novo, and the House managers are held to a standard of proving proof beyond a reasonable doubt of every element of what would be a recognizable impeachable offense.

Here they have failed in their burden of proof. They have also failed in the law. They have not stated in the Articles of Impeachment anything that on its face amounts to an impeachable offense. On that fact, I think we have demonstrated very clearly that they have not presented facts that would amount to an impeachable offense even under the theories. They have presented only part of the facts and left out the key facts. Mr. Purpura, I think, went through, very effectively, showing that there are some facts that don’t change.

The transcript of the July 25 call shows the President doing nothing wrong. President Zelensky said he never felt any pressure. His other advisers have said the Ukrainians never felt any pressure. They didn’t think there was any quid pro quo. They didn’t even know that the military assistance had been held up until the PO-LITICO article at the end of August.

The only two people with statements on record who spoke to the President, Gordon Sondland and Senator Ron Johnson, report that the President said to them there was no quid pro quo, and the aid flowed without anything ever being done related to investigations.

That is what the House managers have to rely on to make their case, and they have failed to prove their case beyond a reasonable doubt, failed even to prove it by clear and convincing evidence—failed to prove it at all, in my opinion.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from California is recognized.

Mrs. FEINSTEIN. Mr. Chief Justice, I send a question to the House managers.

The CHIEF JUSTICE. Senator Fein- stein asks the House managers:

The President’s counsel stated that “there is simply no evidence anywhere that President Trump ever linked security assistance to any investigations”—is that true?

Mr. Manager CROW. Thank you, Mr. Chief Justice, and thank you, Senator, for that question.

President’s counsel is not correct. There is, in fact, overwhelming evidence that the President withheld the military aid directly to get a personal political benefit to help his individual political campaign.

There are a couple of points that I would like to submit for your consideration.

First, look no further than the words of the President’s Acting Chief of Staff, Mick Mulvaney, who, on October 17, 2019, during a national press conference mentioned—or he was asked about the direct connection between the aid, and he said “Died he”—meaning President Trump, referring to “he”—“also mention to me in passing the corruption related to the DNC server? Absolutely—no question about that. That’s it, and that’s why we ended the money.”

He was repeating the President’s own explanation relayed directly to him.

Second, Gordon Sondland testified he spoke by phone with President Trump on September 7. The President denied there was a “quid pro quo,” but then outlined the very quid pro quo that he wanted from Ukraine.

Then he told Ambassador Sondland that President Zelensky should “go to a microphone and announce the investiga- tions... he should want to do [it].”

Third, the President’s own advisers, including the Vice President and Secretary Pompeo, were also aware of the direct connection. In Warsaw, on September 1, Ambassador Sondland told Vice President PENCE that he was concerned the delay in security assistance had become “tied to the issue of investiga- tions.” The Vice President simply nodded, tacitly acknowledging the conditionality of the aid.

Fourth, he heard from Ambassador Taylor, who, in direct emails and texts, said it was crazy to tie the security assistance to the investigations.

Five, we also know there is no other reason. The entire apparatus and structure of the Defense Department, the State Department that should have been dealing with the other legitimate reasons—you know, the policy debate that the President’s counsel wants you to believe that this is all about—they were all kept in the dark.

And the supposed interagency process that they made up several months after the fact had ended months before, during the last interagency meetings. I will make that my final point. Again, if you have any lingering questions about direct evidence, any thoughts about anything we just talked about, anything I have just relayed or that we have talked about the last week, there is a way to shed additional light on it. You can subpoena Ambassador Bolton and ask him that question directly.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Utah.

Mr. LEE. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. Senators Lee and Cruz ask of counsel for the Presi- dent:

The House managers have argued aggressively that the President’s actions con- travened U.S. foreign policy. Isn’t it the President’s place—certainly more than the place for career civil servants—to conduct foreign policy?

Mr. Manager PHILB 1N. Thank you, Mr. Chief Justice, Senators, and thank you for that question.

It is definitely the President’s place to set U.S. foreign policy, and the Constitution makes that clear. Article II, section 1 vests the entirety of the execu- tive authority in a President of the United States, and it is critically impor- tant in our constitutional structure that that authority is vested solely in the President because the President is elected by the people every 4 years. That is what gives the President demo- cratic legitimacy to have the powers that he is given under the Constitu- tion.

Our system is somewhat unique in the very broad powers that are as- signed to the Executive, but it works, and it makes sense in a democratic sys- tem precisely because he is directly ac- countable to the people for the policies that he sets.

Those who are staffers in the execu- tive branch bureaucracy are not elect- ed by the people. They have no ac- countability, and they have no legit- imacy or authority that comes from an election by the people, and so it is critically important to recognize the President sets foreign policy.

Of course, within some constraints, there are some roles for Congress in foreign affairs. To some extent, statutes can be passed, funding provisions can be passed that relate to it, but the Supreme Court has recognized time and again that the President is, as the Court said in Curtiss-Wright, the “sole organ of the nation” in foreign affairs.
So he sets foreign policy, and if staffers disagree with him, that does not mean that the President is doing something wrong, and this is a critical point because this is one of the centerpieces of the abuse of power theory that the House managers would like this body to adopt, and that is that they are going to impeach the President based solely on his subjective motive.

The premise of their case is the objective actions that were taken were perfectly permissible and within the President’s constitutional authority, but if his real reason—if we get inside his head and figure it out—then we can impeach him. And the way that they have tried to explain that they can prove that the President had a bad motive is they say: Well, we compare what did the President want to do with what the interagency consensus was.

And I mentioned this the other day. They say that the President defied and confounded every agency in the executive branch in his constitutional role assigned to him in the Constitution. He set foreign policy because that is the policy difference and a policy difference; it was a policy concern that he wanted to have. If we can show that this case is built upon a perception of what was the position and the question that was answered in the last pages, it shows that this case is built upon a policy difference and a policy difference where the President is the one who gets to determine policy because he has been elected by the people to do that.

And we are right now only a few months away from another election where the people can decide for themselves whether they like what the President has done with that authority or not, and that is the way disputes about policy like that should be resolved.

It is not legitimate to say that there is some interagency consensus that disagrees with the President, and therefore we can show he did something wrong, merely because he can be impeached. That is an extraordinarily dangerous proposition because it lacks any democratic legitimacy whatsoever. It is contrary to the Constitution, and it should be rejected by this body.

The President is the one who gets to set foreign policy because that is the role assigned to him in the Constitution.

And it was even Lieutenant Colonel Vindman, who had complained about the July 25 call, that a constitutional lawyer agreed that it was only a policy difference; it was a policy concern that he raised about the call. That is not enough to impeach a President of the United States.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from New Hampshire.

Mrs. SHAHEEN. Mr. Chief Justice, I send a question to the desk for the House managers.

The CHIEF JUSTICE. Senator SHAHEEN asks the House managers:

The President’s counsel has argued that the alleged conduct set out in the articles does not violate a criminal statute and thus may not constitute grounds for impeachment as “high Crimes and Misdemeanors.”

Does this reasoning imply that if the President does not violate a criminal statute he could not be impeached for abuses of power such as ordering tax audits of political opponents, suspending habeas corpus rights, interfering with specific political opponents or asking foreign powers to investigate Members of Congress?

Ms. Manager GARCIA of Texas. Mr. Chief Justice, Senators, I appreciate the question.

The answer is that a President can be impeached without a statutory crime being committed. That was the position and the question that was rejected in President Nixon’s case and rejected again in President Clinton’s case. It should be rejected here in President Trump’s case.

The great preponderance of legal authority confirms that impeachable offenses—of legal authority confirms that it is not defined in criminal conduct. What it includes is nearly everyone legal scholar who has studied the issue, multiple Supreme Court Justices who addressed it in public remarks, and prior impeachments in the House.

This conclusion follows that constitution, text, and structure reflects the absurdities and practical difficulties that would result were the impeachment power confined to indictable crimes.

As slide 35 shows, first, the plain text of the Constitution does not require that an offense be a crime in order for it to be impeachable.

Alexander Hamilton explained that impeachable offenses, high crimes, and misdemeanors are defined fundamentally by the abuse or violation of some public trust—some public trust. They are political as they relate chiefly to their head and figure it out—then we can impeach him. And the way that they have tried to explain that they can prove that the President had a bad motive is they say: Well, we compare what did the President want to do with what the interagency consensus was.

And I mentioned this the other day. They say that the President defied and confounded every agency in the executive branch in his constitutional role assigned to him in the Constitution. He set foreign policy because that is the policy difference and a policy difference; it was a policy concern that he wanted to have. If we can show that this case is built upon a policy difference and a policy difference where the President is the one who gets to determine policy because he has been elected by the people to do that.

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And it was even Lieutenant Colonel Vindman, who had complained about the July 25 call, that a constitutional lawyer agreed that it was only a policy difference; it was a policy concern that he raised about the call. That is not enough to impeach a President of the United States.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Louisiana.

Mr. KENNEDY. Mr. Chief Justice, I send a question to the desk for the House managers.

The Senators ask: Why did the House of Representatives not challenge President Trump’s claims of executive privilege and/or immunity during the House impeachment proceedings?

We will begin with the House managers.

Mr. Manager JEFFRIES. Mr. Chief Justice, distinguished Senators, thank you for your question. The answer is simple. We did not challenge any claims related to executive privilege because, as the President’s own counsel admitted during this trial, the President never raised the question of executive privilege.

What the President did raise was this notion of blanket defiance, this notion that the executive branch, directed by the President, could completely defy any and all subpoenas issued by the
The CHIEF JUSTICE. Senator LEAHY asks the House managers:

The President’s counsel argues that there was no harm done, that the aid was ultimately released to Ukraine, the President met with the President of Ukraine, and that this President has treated Ukraine more favorably than his predecessors. What is your response?

Mrs. Manager DEMINGS. Mr. Chief Justice, Senators, thank you for your question.

Contrary to what the White House counsel has said or has claimed—that there was no harm, no foul; that the aid eventually got there—we promised Ukraine in 2014 that if they gave up their nuclear arsenal, that we would be there for them, that we would defend them, that we would fight alongside them.

Fifteen thousand Ukrainians have died. It was interesting the other day when the White House counsel said that no American life was lost, and we are always grateful and thankful for that. But what about our friends? What about our allies in Ukraine? According to Diplomat Holmes and Ambassador Taylor, our Ukrainian friends continue to die on the frontlines, those who are fighting for us, fighting Russian aggression. When the Ukrainians have the ability to defend themselves, they have the ability to save the lives of some Senators in this room.

The aid, although it did arrive, took the work of some Senators in this room who had to pass additional laws to make sure that the Ukrainians did not lose out on 33 million additional dollars.

Contrary to the President’s tweet that all of the aid arrived and that it arrived ahead of schedule—that is not true. All of the aid had not arrived.

Let’s talk about what kind of signal is sent, withholding the aid for no legitimate reason. The President talked about burden-sharing, but nothing had changed on the ground. Holding the aid, although it did arrive, withholding the aid for no legitimate reason sent a strong message that we would not want to extend any kind of partnership between the United States and Ukraine was on shaky ground. It actually undercuts Ukraine’s ability to negotiate with Russia, with which, as everybody in this room knows, it is in an active war, in a hot war.

So when we talk about “The aid eventually got there; no harm, no foul,” that is not true, Senators, and I know that you know that. There was harm and there was foul. And let us not forget that Ukraine is not an enemy. They are not an adversary. They are a friend.

The CHIEF JUSTICE. Thank you.

Senator CRUZ?

Mr. Counsel PHILBIN. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. The question is addressed to counsel for the President:

As a matter of law, does it matter if there was a quid pro quo? Is it true that quid pro quos are often in foreign policy?

Mr. Counsel DERSHOWER. Mr. Chief Justice, thank you very much for your question.

Yesterday, I had the privilege of attending the rolling-out of a peace plan by the President of the United States regarding the Israel-Palestine conflict, and I offered you a hypothetical the other day: What if a Democratic President were to authorize much money to either Israel or the Palestinians and the Democratic President were to say to Israel “No; I am going to withhold this money unless you stop all settlement growth” or to the Palestinians, “You will withhold the money Congress authorized to you unless you stop paying terrorists, and the President said “Quid pro quo. If you don’t do it, you don’t get the money. If you do it, you get the money”? There is no one in this Chamber who would regard that as in any way unlawful. The only thing that would make a quid pro quo unlawful is if the quo were in some way illegal.

Every public official whom I know believes that his election is in the public interest. Mostly, you are right. Your election is in the public interest. If a President does something which he believes will help him—or her—in the public interest—that cannot be the kind of quid pro quo that results in impeachment.

I quoted President Lincoln, when President Lincoln told General Sherman to let the troops up to Indiana so that they could vote for the Republican Party. Let’s assume the President was running at that point and it was in his electoral interests to have these soldiers put at risk the lives of many, many other soldiers who would be left behind without their company. Would that be an unlawful quid pro quo? No, because the President, A, believed it was in the national interest, but B, he believed that his own election was essential to victory in the Civil War. Every President believes that. That is why it is so dangerous to try to psychoanalyze the President, to try to get into the intricacies of the human mind. Nobody has mixed motives, and for there to be a constitutional impeachment based on mixed motives would permit almost any President to be impeached.

How many Presidents have made foreign policy decisions after checking with their political advisers and their pollsters? If you are just acting in the national interest, why do you need pollsters? Why do you need political advisers? Just do what is best for the country, and if you have mixed motives to what is in the public interest and what is in your party’s electoral interest and your own electoral interest, it

The House of Representatives, not turn over documents, not turn over witnesses, not produce a single shred of information in order to allow us to present the truth to the American people.

In the October 8 letter that was sent to the House of Representatives, there was no jurisprudence that was cited to justify the notion of blanket defiance. There has been no case law cited to justify the doctrine of absolute immunity. In fact, every single court that has considered any Presidential claims of absolute immunity such as the one asserted by the White House has rejected it out of hand.

The CHIEF JUSTICE. Counsel for the President.

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for that question.

Let me frame this partly in response to what Manager JEFFRIES said, and I went through this before. The idea that there was not blanket defiance and no explanation and no case law from the White House is simply incorrect. I put up slides showing the letter—the letter from October 18 that explains specifically that the subpoenas that had been issued because they were not authorized by a vote from the House, were invalid. And there was a letter from the White House counsel saying that. There was a letter from OMB saying that. There was a letter from the State Department saying that. There was specific rationale given, citing cases—Watkins, Rumely, and others—explaining that defect. The House managers—the House, Manager SCHIFF—chose not to take any steps to correct that.

We also pointed out other defects. We asserted the doctrine of absolute immunity for senior advisers to the President, which has been asserted by every President since the 1970s. They chose not to challenge that in court.

We also explained the problem that they didn’t allow agency counsel to be present at depositions. They chose not to challenge that in court.

These are specific legal reasons, not blanket defiance. That is a misrepresentation of the record. And there was no attempt to have that adjudicated in court. The reason there was no attempt is that the House Democrats were just in a hurry. They had a timetable. One of the House managers said on the floor here: ‘We make our moves because they want to get done all around timing for the election.’

Then, not to challenge that in court.

There are three possible motives that a political figure can have: One, a motive in the public interest, and the Israel argument would be in the public interest; the second is in his own political interest; and the third, which hasn’t been mentioned, would be in his own financial interest, his own pure financial interest, just putting money in the bank.

I want to focus on the second one for just one moment.

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is impossible to discern how much weight is given to one or the other.

Now, we may argue that it is not in the national interest for a particular President to get reelected or for a particular Senator or Member of Congress to be reelected. We are right in so far as it is not in the national interest for everybody who is running to be elected—but for it to be impeachable, you would have to discern that he or she made a decision solely on the basis of, as the House managers put it, corrupt motives, and it cannot be a corrupt motive if you have a mixed motive that partially involves the national interest, partially involves electoral, and does not involve personal pecuniary interest.

The House managers do not allege that this decision, this quid pro quo, as they call it—and the question is based on the hypothesis there was a quid pro quo. I am not attacking the facts. They never alleged that it was based on purely financial reasons. It would be a much harder case.

If a hypothetical President of the United States said to a hypothetical leader of a foreign country: Unless you build a hotel with my name on it and unless you give me a million-dollar kickback, I will withhold the funds. That is an easy case. That is purely corrupt and in the purely private interest.

But a complex middle case is: I want to be elected. I think I am a great President. I think I am the greatest President there ever was, and if I am not elected, the national interest will suffer greatly. That cannot be.

The CHIEF JUSTICE. Thank you, counsel.

Mr. DERSHOWITZ. Thank you, Mr. Chief Justice.

The CHIEF JUSTICE. I recognize the democratic leader.

Mr. SCHUMER. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. Senator Schumer’s question is for the House managers:
Would you please respond to the answer that was just given by the President’s counsel?

Mr. Manager SCHIFF. I would be delighted. There are two arguments that Professor Dershowitz makes: one that is, I have to say, a very odd argument for a criminal defense lawyer to make, and that is, it is highly unusual to have a discussion in trial about the defendant’s state of mind, intent, or mens rea.

In every courtroom in America, in every criminal case—or almost every criminal case, except for a very small sliver where there is strict liability—the question of the defendant’s intent and state of mind is always an issue. This is nothing novel here. You don’t require a mind reader. In every impeachment case—and I would assume in every impeachment case—yes, you have to show that the President was operating from a corrupt motive, and we have.

But he also makes an argument that all quid pro quos are the same and all are perfectly copacetic. Now, some of you said earlier: Well, if they could prove a quid pro quo over the military, now that would be something. Well, we have. So now the argument shifts to all quid pro quos are just fine, and they are all the same.

Well, I am going to apply Professor Dershowitz’s own test. He talked about the step test, John Rawls, the philosopher—let’s put the shoe on the other foot and see how that changes our perception of the case. I want to merge that argument with one of the other Presidential counsel’s argument when they resorted to the whataboutism about Barack Obama’s open mic.

Now, that was a very poor analogy. I think you will agree, but let’s use that analogy and let’s make it more comparable to today and see how you feel about this scenario.

President Obama, on an open mic, said to Medvedev: Hey, Medvedev, I know you don’t want to send this missile technology to Ukraine because they are fighting and killing your people. I want you to do me a favor, though. I want you to do an investigation of Mitt Romney, and I want you to announce you found dirt on Mitt Romney. It is going to help me to do that, quid pro quo, I will not give Ukraine the money they need to fight you on the frontline.

Do any of us have any question that Barack Obama would be impeached for that kind of misconduct? Is that a real argument? That would be OK, that Barack Obama asked Medvedev to investigate his opponent and would withhold money from an ally that needed to defend itself to get an investigation of Mitt Romney?

That is the parallel here. And to say, well, yes, we condition aid all the time—for legitimate reasons, yes. For legitimate reasons, you might say to a Governor of a State: Hey, Governor of the State, we will condition aid in more toward your own disaster relief. But if the President’s real motive in depriving the State of disaster relief is be because that Governor will not get his attorney general to investigate the President’s political rival, are we ready to say that the President can sacrifice the interest of the people of that State or, in the case of Medvedev, the people of our country because all quid pro quos are fine? Is it carte blanche? Is that really what we are prepared to say with respect to President’s misconduct or the next?

Because if we are, then the next President of the United States can ask for an investigation of you. They can ask for help in their next election from any foreign power, and the argument will be made: No, Donald Trump was acquitted for doing exactly the same thing; therefore, it must not be impeachable.

Now, believe in mind that efforts to cheat an election are always going to be in proximity to an election. And if you say you can’t hold a President accountable in an election year, where they are trying to cheat in that election, then you are giving them carte blanche.

So all quid pros are not the same. Some are legitimate and some are corrupt, and you don’t need to be a mind reader to figure out which is which. For one thing, you can ask John Bolton.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. GRASSLEY. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from Iowa.

Mr. GRASSLEY. I send a question to the desk.

The CHIEF JUSTICE. Senator Grassley asks counsel for the President:

Does the House’s failure to enforce its subpoenas render its “obstruction of Congress” theory unprecedented?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, the answer is yes. As far as I am aware, there has never been a prior instance in which there has been an attempt, even in the House, as in the Nixon proceeding—never mind in the Clinton proceeding, which actually left the House and came to the Senate—but I suggest that there can be obstruction of Congress when there hasn’t been anything beyond simply issuing a subpoena, getting resistance, and then throwing up your hands and giving up and saying: Oh, well, that is obstruction.

In the Clinton situation, most of the litigation was with independent counsel, and there were privileges asserted in litigation and litigation again and again, but the point is that the issues about the privileges were all litigated, and they were resolved before things came to this body.

Similarly, in the Nixon impeachment proceeding within the House, a lot of investigation had been done by the special counsel, and there was litigation over assertions of privileges there in order to get the tapes, and some tapes and transcripts had already been turned over, but, again, there was litigation about the assertion of the privilege in response to the grand jury subpoena that then fed into the House’s proceedings.

So it would be completely unprecedented for the House to attempt to actually bring a charge of obstruction into the Senate where all they can charge is: Well, we issued a subpoena, and there were legal grounds asserted for the invalidity of the subpoena, and there were different grounds, as I have gone through. I will not repeat them all in detail here. Some of those subpoenas were just invalid when issued because there was no vote. Some of the subpoenas for witnesses were invalid because senior advisors to the President had absolute immunity from compulsion. Some were there under our forcing executive branch officials to testify without the benefit of agency counsel and executive branch counsel with them. So there were various reasons asserted for the
invalidity and the defects in various subpoenas and then no attempt to enforce them, no attempt to litigate out what the validity or invalidity might be but to just bring it here as an obstruction charge is unprecedented.

I will note that House managers have said—that that they will say again today—that, well, but if we had gone to court, the Trump administration would have said that the courts don't have jurisdiction over those claims. Now, that is true. In some cases there are claims being litigated right now related to the former Counsel for the President, Don McGahn. The Trump administration's position, just like the position of the Obama administration, is that an effort by the House to enforce a subpoena in an article III court is a nonjusticiable controversy. That is our position, and we would argue that in court.

But that is part of what would have to be litigated. That doesn't change the fact that the McGahn case that once can't have it both ways. I want to make this clear. The House managers want to say that they have an avenue for going to court; they are using that avenue for going to court; and they actually told the court in McGahn that once they can't

As I explained the other day, there are mechanisms for dealing with these disputes between the executive and Congress. Fixing it in an accommodation process. They didn't do that. We offered to do that in the White House Counsel's October 8 letter. They didn't do accommodations. If they think they can sue, they have to take that step because the Constitution, the courts have made clear, requires incrementalism in disputes between the executive and the legislative branch.

So if they think that the courts can resolve that dispute, that is the next step. They should do that and have that litigated, and then things can proceed to a higher level of confrontation. But to jump straight to impeachment, to the ultimate constitutional confrontation, doesn't make sense. It is not the system that the Constitution requires, and it is unprecedented in this case. Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Michigan.

Ms. STABENOW. Thank you, Mr. Chief Justice. I send a question to the desk.

The CHIEF JUSTICE. Senator STABENOW asks the House managers:

Would the House Managers care to correct the record on any falsehoods or mischaracterizations in the White House's opening arguments?

Ms. Member LOFGREN. Mr. Chief Justice and Senators, thank you for that question. We believe that the President has claimed incorrectly there were six facts that have not been met and will not change and all six of those so-called facts are incorrect.

Let's be clear. On July 25—that is not the whole evidence before us, even though it includes devastating evidence, the President's scheme. President Trump's intent was made clear on the July 25 call, but we had evidence of information before the meeting with Mr. McGahn. I will refer to Mr. Zelensky's people telling him he had to do the investigations to get what he wanted. All of this evidence makes us understand that phone call even more clearly.

Now, the President's team claimed that Mr. Zelensky and other Ukrainians said they never felt pressured over investigations. Now, of course, they didn't say that publicly. They were afraid of the Russians finding out. But Zelensky said privately that he didn't want to be involved in U.S. domestic politics. He resisted announcing the investigations. He only relented and scheduled the CNN meeting after it became clear that he was not going to receive the support that he needed and that Congress had provided in our appropriations. That is the definition of "pressure."

Now, Ukraine—the President's lawyers say—didn't know that Trump was withholding the security assistance until it was public. Many witnesses have contested that, including the open statement by Olena Zerkal, who was then the Deputy Foreign Minister of Ukraine, that they knew about the President's hold on security matters, and in the end, once they knew, it was public, and afterward, Ukraine did relent and scheduled that testimony.

Fourth, they said no witnesses, said security was conditioned on the investigations. Not so. There was Mulvany, and we had other witnesses talking about the shakedown for the security assistance. But the important thing is, you can get a witness who talked to the President firsthand about what the President thought he was doing. Ultimately, of course, the funds—or at least some of them—were released, but the White House meeting that the President promised three different times still has not occurred, and we still don't have the investigation of the Bidens.

Getting caught doesn't mitigate the wrongdoing. The President is unpertinent, and we fear he will do it again.

The independent Government Accountability Office's assertion that the President violated Federal law when he withheld that aid. That misconduct is still going on. All the aid has not yet been released.

Finally, I would just like to say that there has been some confusion. I think I am sure it is not intentional. But the President surely does not need the permission of his staff about foreign policy. That information is offered to you as evidence of what he thought he was doing. He did not appear to be pursuing the investigations. Given the evidence, he appeared to be pursuing a corruption—a corruption of our election that is upcoming; a high crime and misdemeanor that requires conviction and removal.

I yield back.

The CHIEF JUSTICE. Thank you, counsel.

Mr. COTTON. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from Arkansas.

Mr. COTTON. I send a question to the desk for the President's counsel on behalf of myself and Senators BOOZMAN, McSALLY, BLACKBERN, KENNEDY, and TOOMEY.

The CHIEF JUSTICE. The Senators ask the President's counsel:

Did the House bother to seek testimony or litigate executive privilege during the month during which it held up the impeachment articles before sending them to the Senate?

Mr. Counsel PHILBIN. Mr. Chief Justice. Senators, no, the House did not seek to litigate any of the privilege issues during that time. In fact, they filed no lawsuits arising from this impeachment inquiry to seek to contest the bases that the Trump administration gave for resisting the subpoenas, the bases for why those subpoenas were invalid.

When litigation was filed by one of the subpoena recipients—that was Dr. Charles Kupperman, the Deputy National Security Advisor—sent to the court and sought a declaratory judgment, saying: The President has told me I shouldn't go. I have a subpoena from the House saying I should go. Please, courts, tell me what my obligation is.

I believe that was filed around October 25. It was toward the end of October.

Very shortly, within a few days, the court had set an expedited briefing schedule and scheduled the hearing for December 10. They were supposed to hear both preliminary motions to dismiss and also the merits issue.

So they were going to get a decision after the hearing on December 10 that would go to the merits of the issue, but the House managers withdrew the subpoena. The House of Representatives decided they wanted to moot out the case so they wouldn't get a decision.

So, no, the House has not pursued litigation to get any of these issues resolved. It has affirmatively avoided getting into any litigation. That seems to be at least in part based on—if you look at the House Judiciary Committee report—their assertion that under the sole power of impeachment assigned to the House, the House believes that the Constitution assigns—I believe the exact words are that it gives the House the last word, something to that effect.

I mentioned this the other day. This is the new constitutional theory that because they have the sole power of impeachment, in their view, it is actually the paramount power of impeachment and that all other constitutionally based privileges or rights or immunities are considerably diminished. In the other branches—both the judiciary and the executive—fall away, and there is nothing that can stand in the way of the
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in which they are arguing, as I quoted earlier, that Congress has no right to come to the courts to force a witness to testify. So here we are 9 months later in that litigation that they said we are compelled under the Constitution to bring, and they are saying in defense of it, that it is 9 months, and we still don’t have a decision. I think that tells you just where they are coming from. It all goes back to the President’s directive to fight all subpoenas, and they are. Nixon was impeached for far less obstruction than anything that Donald Trump did.

The argument: Well, if you impeach a President, you are overturning the results of the last election and you are tearing up the ballots in the next election. If that were the case, there would be no impeachment clause in the Constitution because, by definition, if you are impeaching a President, that President is in office and has won an election.

Clearly, that is not what the Founders had in mind. What they had in mind is, if the President commits high crimes and misdemeanors, you must remove him from office. It is not voiding the last election; it is protecting the next election. Indeed, the impeachment power was put in the Constitution not as a punishment—that is what the criminal laws are for—but to protect the country.

Now, if you say you can’t impeach a President before the next election, what you are really saying is you can only impeach a President in their second term. If that were going to be the constitutional requirement, the Framers would have put in the Constitution: A President may commit whatever high crimes and misdemeanors he wants as long as it is in the first term. That is clearly not what any rational Framer would have written, and, indeed, they didn’t do that for a reason. The Framers were concerned that, in fact, the object of a President’s corrupt scheme might be to cheat in the very form of accountability that the Constitution provides for our Constitution. It suggests that there be an accommodation process, that there be attempts to address the interests of both branches.

The House has taken the position—and in other litigation—the McGahn litigation—they are telling the courts that the courts are the only way to resolve these issues. They brought that case in August. They already have a decision in the district court. They have an appeal in the DC Circuit. It was argued on January 3. A decision could come any day. That is pretty fast for litigation. But in this impeachment, they have decided that they don’t want to do litigation. Again, it is because they had a timetable. One of the House managers admitted it on this floor. They had to get the President impeached before the election. They had no time for the courts, for anyone telling them what the rules were. They had to get it done by Christmas, and that is what they did. Then they waited around a month before bringing it here.

I think that shows you what is really behind the claims of, oh, it is urgent, then it is not urgent. It was urgent when it was our timetable to get it done by Christmas. It is not so urgent when we can wait for a month because we want to tell the Senate how to run things. It is all a political charade.

The reason—a major reason—that the Senate should reject these Articles of Impeachment.

The CHIEF JUSTICE. Thank you, counsel.

Mr. UDALL. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from New Mexico.

Mr. UDALL. Thank you for the recognition, Mr. Chief Justice. I send a question to the desk.

The CHIEF JUSTICE. Senator Udall’s question is for the House managers:

Please address the President’s counsel’s argument that House managers seek to overturn the results of the 2016 election and that the defense theory is that the President should be left to the voters in November.

Mr. Manager SCHIFF. Thank you for the question.

First, I just want to respond to something counsel just said—that 9 months is pretty fast for litigation in the courts. No, I think with the Court’s decision in the McGahn case, and we still don’t have a decision yet. What is more, that is the very case

The issue isn’t whether it is his first term or his second. It isn’t whether the election is a year away or 3 years away. The issue is, did he commit a high crime and misdemeanor? Is it a high crime and misdemeanor for a President of the United States to withhold aid to an ally at war to get help, to elicit foreign interference in our election? If you believe that it is, it doesn’t matter what term it is, it doesn’t matter how far away the election is because that President represents a threat to the integrity of our elections and, more than that, a threat to our national security.

As we have shown, by withholding that aid—and I know the argument is, no harm, no foul—we withheld aid from an ally at war. We sent a message to the Russians, when they learned of this hold, that we did not have Ukraine’s back. We sent a message to the Russians, as Zelensky was going into negotiations with Putin that that night, that Zelensky was operating from a position of weakness because there was a division between the President of the United States and Ukraine. That is immediate damage. That is damage done every day. That damage continues to this day.

The damage the President does in pushing out the Russian conspiracy theories were identified during the House proceedings—and you have heard it in the Senate—as Russian intelligence propaganda. The danger the President poses by taking Vladimir Putin’s side over his own intelligence agencies—that is a danger today. That is a danger that continues every day he pushes out this Russian propaganda.

If the Framers meant impeachment only to apply in the second term, they would have said so. But that would have made the Constitution a suicide pact. That is not what it says, and that is not how you should interpret it.

The CHIEF JUSTICE. Thank you, counsel.

Mr. PORTMAN. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from Ohio.

Mr. PORTMAN. I send a question to the desk.

The CHIEF JUSTICE. Senator Portman’s question is directed to counsel for the President:

Given that impeachment proceedings are privileged in the Senate and largely prevent other work from taking place while they are ongoing, please address the implications of allowing the House to present an incomplete case to the Senate and request the Senate to seek testimony from additional witnesses.

Mr. Counsel PHILBIN. Thank you, Mr. Chief Justice, Senators. I think this is one of the most important issues that this body faces, given these calls to have witnesses, because the House managers tried to present it as if, oh, it is just a simple question; how do you prove high crimes and misdemeanors? But in real litigation, no one goes to trial without doing discovery. No one goes to trial without having heard

House’s power of impeachment. If they issue a subpoena, the executive has to respond, and it can’t raise any constitutionally based separation of powers concerns. If you do, that is obstruction of the courts. The courts have no role. The House has the sole power of impeachment.

That is a very dangerous construct for our Constitution. It suggests that once they flip the switch on to impeachment, there is no check on their power and what they want to do. That is not how the Constitution is structured. When there are interbranch conflicts, the Constitution requires that there be an accommodation process, that there be attempts to address the interests of both branches.

we want to tell the Senate how to run things. It is all a political charade.

One of the things I said at the very opening of this proceeding is, yes, we are to try to define the intent of the Framers; but we are not to leave our common sense at the door.

But in real litigation, no one goes to trial without doing discovery. No one goes to trial without having heard
from the witnesses first. You don’t show up at trial and then start trying to call witnesses for the first time.

The implications here in our constitutional structure, trying to run things in such an upside-down way would be grave for this body as an institution because the Senate, as the question points out, it largely prevents this Chamber from getting other business done as long as there is a trial pending.

The idea that the House can do an incomplete job in trying to find out what witnesses there are, having them come testify, trying to find out the facts—just rush something through and bring it here as an impeachment and then start trying to call all the witnesses—means that this body will end up taking over that investigatory task, and all the regular business of this body will be slowed down, hindered, prevented while that goes on.

And it is not a question of just one witness. A lot of people talk right now about John Bolton, but the President would have the opportunity to call his witnesses, just as a matter of fundamental fairness. There would be a long list of witnesses if the body were to go in that direction. It would mean we would drag on for months and prevent this Chamber from getting its business done.

There is a proper way to do things and a proper way of doing things. To have had the House not go through a process that is thorough and complete and to just rush things through in a partisan and political manner and then dump it onto this Chamber to clean everything up is a very dangerous precedent to be set. As I said the other day, whatever is accepted in this case becomes the new normal. If this Chamber puts its imprimatur on this process, then that is the seal of approval for all time in the future.

If it becomes that easy for the House of Representatives to impeach a President of the United States—don’t attempt to subpoena the witnesses, never mind litigation because it takes too long, but then leave it all to this Chamber—and, as I said the other day: Remember, what do we think will happen if some of these witnesses are subpoenaed now that they never bothered to litigate about? Then there will be a litigating nothingness that leaves you with nothing. That is what would happen if we were to rush this trial, just rush a lot of things.

The CHIEF JUSTICE. Senator CARPER’s question is for the House managers.

Some have claimed that subpoenaing witnesses or documents would unnecessarily prolong this trial. Isn’t it true that deposition of the three witnesses in the Clinton impeachment trial were completed in only one day each? And, isn’t it true that the Chief Justice, as presiding officer in this trial, has the authority to resolve any claims of privilege or other witness issues, without any delay?

Mr. Manager JEFFRIES. Mr. Chief Justice, the answer is yes. What is clear is that the record compiled by the House of Representatives, where up to five depositions per week were completed, is that this can be done in an expeditious fashion.

It is important to note that the record that exists before you right now contains strong and uncontested evidence that President Trump pressured a foreign government to target an American citizen for political and personal gain, as part of a scheme to cheat in the 2020 election and solicit foreign interference. That is evidence from witnesses who came forward from the Trump administration, including individuals like Ambassador Bill Taylor, a West Point graduate and a Vietnam war hero; including individuals like Ambassador Sondland, who gave $1 million to President Trump’s inauguration; including respected national security professionals like LTC Alexander Vindman, as well as Dr. Fiona Hill—17 different witnesses, Trump administration employees, troubled by the corrupt conduct that took place, as alleged and proven by the House of Representatives.

But to the extent that there are ambiguities in your mind, this is a trial. A trial involves witnesses. A trial involves documents. A trial involves evidence. That is not a new phenomenon for this distinguished body. The Senate, in its history, has had 15 different individuals in single trial there were witnesses—every single trial. Why should this President be treated differently, held to a lower standard, at this moment of Presidential accountability?

In fact, in many of those trials, there were witnesses who testified in the Senate who had not testified in the House. That was the case most recently in the Bill Clinton trial. It certainly was the case in the trial of President Johnson. Thirty-seven out of the 40 witnesses who testified in the Senate were new—37 out of 40.

Why can’t we do it in this instance, when you have such highly relevant witnesses like John Bolton, who had a direct conversation with President Trump indicating that President Trump was withholding the aid because he wanted the phony investigations?

Counsel has said the greatest invention in the history of jurisprudence for ascertaining the truth has been the vehicle of cross-examination. Let’s call John Bolton. Let’s call Mick Mulvaney. Let’s call other witnesses, subject them to cross-examination, and present the truth to the American people.

The CHIEF JUSTICE. Thank you. The Senator from Texas.

Mr. CORKY. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. Senators CORNYN and GARDNER ask counsel for the President:

What are the consequences to the Presidency, the President’s constitutional role as the head of the executive branch, and the advice and consent the President can expect from his senior advisers, if the Senate seeks to resolve claims of executive privilege for subpoenas in this impeachment trial without any determination by an article III court?

Mr. Counsel PHILBIN. Mr. Chief Justice, I thank the Senators for the question.

The Supreme Court has recognized that the confidentiality of communications with the President is essential—keeping those communications confidential is essential for the proper functioning of the government.

In Nixon v. United States, the court explained that this privilege is grounded in the separation of powers and essential for the functioning of the executive for this reason: In order to receive candid advice, the President has to be able to be sure that those who are speaking with him have the confidence that what they say is not going to be revealed, that their advice can remain confidential. If it is not confidential, they would temper what they say—isolated from working with the President; and the President, then, would not be able to get the best advice.
It is the same concern that underpins the deliberative process aspect of executive privilege. Even if it is not a communication directly with the President, if it is the deliberative process within the executive branch, people have to be able to come up with a decision to disclose information. That is why the Supreme Court suggested that deliberation, reviewing that evidence, that there would be severe issues raised attempting to have a National Security Advisor to the President come under subpoena to testify. That would all have to be dealt with, and that would take some time before things would continue.

So, there is a critical need for the executive to be able to have these privileges and to protect them, and that is why the Supreme Court recognized that in Nixon v. United States and pointed out that there has to be some very high showing of need from another branch of government if there is going to be any breach of that privilege.

That is why there is an accommodations process. The courts have said that, when the Congress and the legislature seek information from the executive and the executive has confidentiality interests, both branches are under an obligation to try to come to some accommodation to address the interests of both branches. But it is not a situation of simply that the Congress is supreme and can demand information from the executive and the executive must present everything. The courts have made that clear, because that would be damaging to the functioning of government.

So here, in this case, there are vital interests at stake. And one of the potential witnesses that the House managers have raised again and again is John Bolton. John Bolton was a National Security Advisor to the President. He has all of the Nation’s secrets from the time that he was the National Security Advisor, and that is precisely the area, the field, in which the Supreme Court suggested, in Nixon v. United States, there might be something approaching an absolute privilege of confidentiality in communications with the President: the fields of national security and foreign affairs. That is the crown jewel of executive privilege.

So to suggest that the National Security Advisor—well, we will just subpoena him, and he will come in; that will be easy; there will not be any problem—that is not the way it would work because there is a vital constitutional privilege at stake there, and it is important for the institution of the Office of the President, for every President, to protect that privilege, because once precedents start to set up—when one President says: Well, I will not insist on the privilege then; I will let people interview this person; I will not insist on the immunity—that sets precedent. Then the next time, when it is important to preserve the privilege, the precedent that has been set is that privilege has been weakened—and that damages the functioning of government.

So this is a very serious issue to consider. It is important. The Supreme Court has brought to our attention the proper functioning of the executive branch, for the proper functioning of our government. And there would be grave issues raised attempting to have a National Security Advisor to the President come under subpoena to testify. That would all have to be dealt with, and that would take some time before things would continue.

Thank you.

The CHIEF JUSTICE. The question from Senator Schatz is directed to the House managers:

Mr. SCHATZ. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. The question from Senator Schatz is directed to the House managers, and the question also is from Senator Feinstein:

If the President were acting in the interest of national security, as he alleges, would there be documentary evidence or testimony to support such a claim? Has any evidence like that been presented by the president’s counsel?

Mr. Manager CROW. Thank you, Mr. Chief Justice. Thank you, Senators, for the question.

The answer is yes. There are well-established processes, mechanisms, and agencies in place to pursue valid and legitimate national security interests of the United States—like the National Security Council, like the National Security Advisor, like the Secretary of Defense. And as we have well established over the last week, none of those folks, none of those agencies, would have been involved in having that deliberation, reviewing that evidence, having that discussion, or incorporated into any type of interagency review process during the vast majority of the time that we are talking about here.

From the time of the President’s call on July 25 to the time the hold was lifted, those individuals, those agencies were in the dark. They didn’t know what was happening, and, more so, not only were they in the dark, but the President and his chief for violating the Impoundment Control Act to execute his scheme. None of that suggests a valid, legitimate policy objective.

More so, the President himself and his counsel are bringing at issue the question of documents and witnesses. If we have heard in the last few days, the President was simply pursuing a valid, legitimate policy objective, if this was a specific debate about policy, a debate about corruption, a debate about burden-sharing, then, let’s have the documents that would show that. Let’s hear from the witnesses that would show that. The documents and the witnesses that we have forwarded and we have talked about how the executive privilege has been weakened—and that damages the functioning of government.

The American people in this Chamber deserve to have a fair trial. The President deserves to have a fair trial. In fact, if he is arguing that there is evidence, that there was a policy debate, so I think that hypothetical that we would see those documents, would love to see the witnesses and hear from them directly about what exactly was being debated.

The CHIEF JUSTICE. Thank you, Mr. Managed.

The Senator from South Carolina. Mr. GRAHAM. I send a question to the desk from myself and Senator Cruz.

The CHIEF JUSTICE. Senator Graham and Senator Cruz pose this question for the House managers:

In Mr. Schiff’s hypothetical, if President Obama had evidence that Mitt Romney’s son was being paid $1 million per year by a corrupt Russian company, would Romney have had authority to ask that potential corruption be investigated?

Mr. Manager SCHIFF. First of all, the hypothetical is a bit off because it presume[s] in that hypothetical that President Obama was acting corruptly or there was evidence he was acting corruptly with respect to his son. But, nonetheless, let’s take your hypothetical on its terms.

Would it have been impeachable if Barack Obama had tried to get Medvedev to do an investigation of Mitt Romney, whether it was justified or unjustified? The reality is, for a President to withhold military aid from an ally—or, in the hypothetical, to withhold it to benefit an adversary—to target their political opponent is wrong and corrupt—period, end of story.

If you allow a President to rationalize that conduct, to justify that the Nation’s security to benefit himself because he believes that his opponent should be investigated by a foreign power, that is impeachable.

If you have a legitimate reason to think that any U.S. person has committed an offense, there are legitimate ways to have an investigation conducted. There are legitimate ways to have the Justice Department conduct an investigation.

I would suggest to you that for a President to turn to his Justice Department and say, “I want you to investigate my political rival,” taints whatever investigation they do. Presidents should not be in the business of asking even their own Justice Department to investigate their rivals.

The Justice Department ought to have some independence from the political desires of the President, and one of the deeply troubling circumstances
of the current Presidency is you do have a President of the United States speaking quite openly, urging his Justice Department to investigate his perceived enemies.

That should not take place either, but under no circumstances do you go outside of the Constitution or the Executive power to investigate your rival, whether you think there is cause or you don’t think there is cause, and you certainly don’t invite that foreign power to try to influence an election to your benefit.

It is remarkable to me that we even have to have this conversation. Our own FBI Director has made it abundantly clear—and it shouldn’t require an FBI Director to say this—that if we were approached with an offer of foreign help, we should turn it down. We should, of course, certainly not solicit a foreign country to intervene in our election.

And whether we think there is cause or not, the idea that we would hold our own country’s security hostage by withholding aid to a nation at war to either damage our ally or help our adversary because they will conduct an investigation into our opponent, I can’t imagine any circumstance where that is justified, and I can’t imagine any circumstance where we would want to say the President of the United States can target his rival, can solicit, elicit foreign help in an election, can help him cheat, and that is OK, because that will dramatically lower the bar for what we have a right to expect in the President of the United States; and that is, they are acting in our interests.

I would say it is wrong for the President of the United States to be asking for political prosecutions by his own Justice Department. I would say it is wrong for the President of the United States to ask a foreign power to engage in an investigation of his political rival, particularly, where as we have shown here, there is no merit to that investigation is even more egregious. You know there is no merit to it because he didn’t even want the investigation.

The more accurate parallel, Senator, would be if Barack Obama said: I don’t even need you, Russia, to do the investigation; I just want you to announce it—because that portrays the fact there was no legitimate basis, because the President didn’t even need the investigation done. He just wanted it announced. There is no legitimate explanation for that except he wanted their help in cheating the next election.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Michigan.

Mr. PETERS. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. The question is from Senator Peters and is for the House of your own legitimate law enforcement process to ask a foreign power to investigate your rival, whether you think there is cause or you don’t think there is cause, and you certainly don’t invite that foreign power to try to influence an election to your benefit.

Alexander Hamilton described “high crimes and misdemeanors” as “offenses which proceed from the . . . abuse or violation of trust which a public officer assumes under the executive power.”

The Framers also described what it meant. It was impeachable for a President to abuse his pardon power to shelter people he was connected with in a suspicious manner. Future Supreme Court Justice James Iredell said the President would be liable to impeachment if he acted from some corrupt motive or other or if he was willfully abusing his trust.

As was later stated in a treatise summing up centuries of common law, abuse of power occurs if a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them.

So when the Framers said this—that abuse of power was impeachable—it was not just an empty, meaningless statement. Remember, the Founders had been participating with overthrowing the British Government, a King who was not accountable.

They incorporated the impeachment power into the Constitution late, actually, in the drafting of the Constitution. They knew they were giving the President many powers, and they specified, if he abused them, that those powers could be taken away.

Now, the prior articles that the Congress has had on impeachment did not include specific crimes. President Nixon was charged with abusing his power, targeting political opponents, engaging in a coverup.

There was conduct specified. Some of it was clearly criminal. Some of it was not. But it was all impeachable because it was corrupt, and it was abusing his power.

In the House Judiciary Committee, we had witnesses called by both Republicans and Democrats. The Republican-invited constitutional law expert Jonathan Turley testified unequivocally that it is not enough to establish a case for impeachment based on a non-criminal allegation of abuse of power.

Every Presidential impeachment, including this one, has included conduct that violated the law, but each Presidential impeachment has included the charges directly under the Constitution.

It is important to note that a specific criminal law violation was not in the minds of the Founders, and it wouldn’t make any sense today. You could have a criminal law violation, you could decide you have no particular reason to investigate, you could decide to make your own judgment about it. But it would have been a violation of Federal law. We would laugh at the idea that that would be a basis for impeachment. That is not abuse of Presidential powers. It might be a crime. And yet, you could have activities that are so dangerous to our Constitution, that are not a crime, that would be charged as an impeachable offense because they are an abuse of those powers. That is what everyone was worried about. That is why they put the impeachment clause in the Constitution, and, frankly, they opined that, because of the impeachment clause, no Executive would dare exceed those powers. That prediction did not prove true, which is why we are here today with President Trump having abused his broad powers to the detriment of our national interest for a corrupt purpose, his own personal interests.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

Senator.

Mr. ROUNDS. Mr. Chief Justice, I send a question to the desk on behalf of myself and Senator MURKOWSKI.

The CHIEF JUSTICE. Thank you, Senator.

The CHIEF JUSTICE. Senators Rounds and Murkowski ask counsel for the President:

Describe in further detail your contention that all subpoenas issued prior to the passage of H. Res. 660 are an exercise of invalid subpoena authority by the House committees.

Mr. Counsel PHILBIN. Mr. Chief Justice.

Thank you, Senators, for that question. As I explained the other day, this contention is based on a principle that has been laid out in several Supreme Court cases explaining that the Constitution assigns powers to each House of the legislative branch: to the House of Representatives or to the Senate. And in particular, the language of the Constitution is clear in Article I that the sole power of impeachment is assigned to the House—as to the House of Representatives as a body. It is not assigned to any committee, to a subcommittee, or to any particular Member of the House.

And in cases such as Rumely v. The United States and the United States v. Watkins, the Court has been called—there are disputes about subpoenas. They are not specifically in the impeachment context, but they establish the general rule, a principle, that whenever a committee of either body of Congress issues a subpoena to someone and that person resists the subpoena, the courts will examine what was the authority of that committee or subcommittee to issue that subpoena.

It has to be traced back to some authorizing rule or resolution from the House of Representatives itself, for example, in a House subcommittee. And the courts will examine—the Supreme Court will ask the charter of the committee’s authority. It gets its authority solely from an action by the House itself. That requires
a vote of the House, either to establish the committee by resolution or to establish by rule the standing authority of that committee. And if the committee cannot trace its authority to a rule or a resolution from the House, then those subpoenas are invalid.

The Supreme Court made clear in those cases those subpoenas are null and void because they are ultra vires; they are beyond the power of the committee to issue. They can't be enforced. Our position is very simple. There is no standing rule in the House that provides the committees that were issuing subpoenas here, under the leadership of Manager SCHIFF, the authority to use the impeachment power to issue subpoenas. Rule 10 of the House defines the legislative jurisdiction of committees. It doesn't mention the word "impeachment" even once. So no committee under rule 10 was given the authority to issue subpoenas for impeachment purposes.

This has always been the case in every Presidential impeachment in the history of the Nation. There has always been a resolution from the House, first, to authorize a committee to use the power of impeachment before it intended to issue any compulsory process. So in this case, there was no resolution from the House. The authority, the sole power of impeachment, remained with the House of Representatives itself. And Speaker PELOSI, by herself, did not have authority merely by talking to a group of reporters on September 24, to give the powers of the House to any particular committee to start issuing subpoenas. So the subpoenas that were issued were invalid when they were issued.

And then 5 weeks later, on October 31, when the House finally adopted H. Res. 660, that authorized from that point—purported to authorize from that point the issuance of subpoenas. No such resolution was adopted. There are no subpoenas that had already been issued. It didn't even attempt or purport to say the ones that have already been issued, we are going to try to retroactively give authority to that. It is a separate question about whether that could have been done legally. They didn't even attempt to do it.

This is all explained in the opinion from the Office of Legal Counsel, which is in our trial memorandum attached as appendix C. It is a very detailed and thorough opinion; it is 37 pages of legal reasoning, but it explains all of this, the basic principle that applies, generally, and the history that it has always been done this way. There has always, in every Presidential impeachment, been an authoritative resolution from the House. And the fact that there was none here—so there was no authority for those subpoenas—that means that 23 subpoenas that were issued were invalid.

And this was explained, as I pointed out the other day, in letters from the administration to the committees—a letter from the White House, from OMB, I think the State Department—and in very specific terms, they set out this rationale. That is the basis on which those subpoenas were invalid, and they were properly resisted by the administration.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Pennsylvania.

Mr. CASEY. Mr. Chief Justice, I send a question to the House counsel for a question.

The CHIEF JUSTICE. Thank you.

Senator CASEY's question is directed to the House managers:

In Federalist 65, Alexander Hamilton writes that the subjects of impeachment are "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust." Could you speak broadly to the duties, the powers, and the responsibilities of the committee?

Senator CASEY.

Mr. Manager NADLER. Mr. Chief Justice, Members of the Senate.

President Trump has the power of his office to solicit a foreign nation to interfere in our elections for his own benefit, and then he actively obstructed Congress in his attempts to investigate the abuses of power. Those abuses of power were impeachable. The key purpose of the impeachment clause is to control abuses of power by public officials; that is to say, conduct that violates the public trust.

Since the founding of the Republic, all impeachments have been based on accusations of conduct that violates the public trust. When the Framers wrote the phrase "high Crimes and Misdemeanors," they intended to capture the conduct of public officials, like President Trump, who, in their words, shall no believe the President's actions have violated this trust?

Mr. Manager NADLER. Mr. Chief Justice, Members of the Senate.

President Trump ignored the law and the Constitution in order to gain a political favor. The Constitution and his oath of office prohibited him from using his official favor to corruptly benefit himself rather than the American people. That is exactly what the President did, illegally withholding military aid and a White House meeting until the President of Ukraine committed to announcing an investigation of President Trump's opponent.

In the words of one constitutional scholar: "If what we're talking about is not impeachable, then nothing is impeachable." This is precisely the misconduct that the Framers created the Constitution, including impeachment, to protect against.

I want to add something in reference to some of the comments that were made by some of the President's counsel a few minutes ago. They talk about the subpoena power, about the failure of the House to act properly in the subpoena power because they said the House did not delegate by rule—have a resolution authorizing the committees to offer subpoenas. They apparently haven't read the fact that the House has generally delegated all subpoena power to the committees. It wasn't true at the time of the Watkins case; it wasn't true 15 years ago; but it is true now.

Second, the House power is the sole power of impeachment and the manner of its exercise may not be challenged before the President. Whether the President should be convicted upon our accusation is a question for the Senate, but how we reached our accusation is a matter solely for the House.

Finally, they talked about executive privilege, and they pointed to the Nixon case that established executive privilege; that the President has a right to private, candid advice and, therefore, executive privilege is established. The same case says that executive privilege cannot be used to hide wrongdoing and, in fact, President Nixon was ordered in that case to turn over all his material.

Third, there is a doctrine of waiver. You cannot use executive privilege or any other privilege if you waive it. The moment President Trump said that John Bolton was not telling the truth when he said that the President told him of the improper quid pro quo, he waived any executive privilege that might have existed otherwise. In other words: I am absolute. The Congress gets no information. In other words: I am absolute. The Congress cannot question what I do because I will defy all subpoenas, whatever their nature. I will make sure that the Congress gets no information. That is exactly what the Constitution in order to gain a political favor. The Constitution and his oath of office prohibited him from using his official favor to corruptly benefit himself rather than the American people. That is exactly what the President did, illegally withholding military aid and a White House meeting until the President of Ukraine committed to announcing an investigation of President Trump's opponent.

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That is the subject of our article II of the impeachment because that is a claim of absolute parliamentary power.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. MCCONNELL. Mr. Chief Justice. The CHIEF JUSTICE. The majority leader is recognized.

Mr. MCCONNELL. I want to suggest that after two more questions on each side have been accepted, as I frequently am—one more question on each side, we take a 15-minute break.

The CHIEF JUSTICE. Thank you.

The Senator from Kansas.

Mr. ROBERTS. I would like to ask the House counsel for a question.

The CHIEF JUSTICE. Thank you.

Senator ROBERTS asks:

Would you please respond to the arguments and assertions that have been made in response to the previous questions?

This is directed to the counsel for the President.
Mr. Counsel SEKULOW. Mr. Chief Justice, Members of the Senate. I want to respond to a couple.

First, with regard to the question or the issues that have been raised as it relates to witnesses, it is important to note that the Clinton impeachment proceeding, the witnesses who actually gave deposition testimony were witnesses who had either been interrogated by deposition in the House proceedings, grand jury proceedings, and then, more specifically, was Sid Blumenthal, Vernon Jordan, and Monica Lewinsky. New witnesses were not being called.

That is because the House, in their process, moved forward with a full investigation. That did not happen here.

There was another statement that was raised by Mr. Chairman SCHIFF, Manager SCHIFF, regarding the Chief Justice could make the determination on executive privilege. And again, with no disrespect to the Chief Justice, the idea that the Presiding Officer of this proceeding would determine a waiver or an applicability of executive privilege would be quite a step. There is no historical precedent. There is no historic precedent that would justify it.

But there is something else. If we get to the witnesses, for instance, if one of the witnesses to be called by the President’s lawyers was ADAM SCHIFF in the role, basically, of Ken Starr—Ken Starr presented the re-

Manager SCHIFF’s words, he talked hypothetical, but hypotheticals are actually well, that is not really the hypo-

thesis that would go to witnesses—would be a violation of fundamental fairness. Of course, if witnesses are called by the House managers through that manager’s counsel would have the opportunity to call wit-

nesses as well, which we would.

Thank you, Mr. Chief Justice.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from California.

Ms. HARRIS. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. The question from Senator HARRIS is for the House managers.

President Nixon said, “When the president does that it means that it is not illegal.” Before he was elected, President Trump said, “When you’re a star, they let you do it. You can do anything.” After he was elected, President Trump issued Executive Order 13759: “The President of the United States has been given the power under the Constitution to appoint, and if need be, to depose, any witness who might be under a cloud and might thereby be subjected to examination on issues that go to the President’s wrongdoing as committing a treasonous act. It is the kind of mentality that says that both presidents took to affect their re-

election, Senators, I think this is exactly the kind of mentality that says: No, you don’t; you are not a King.

Now, we suggested to counsel for Dr. Kupperman that, if they had a good-faith concern about testifying—if this would be really good faith and it was not only a delaying tactic, although the court says that doesn’t exist.

They said: You know, the House withdrew the subpoena on Dr. Kupperman. Why would they withdraw the subpoena on Dr. Kupperman when he already wanted to testify? It is a mystery to the country, and it is a mystery to some of us. How are private litigants able to get documents through the Freedom of Information Act that the administration has withheld from Congress? If they were operating in any good faith, would that be the case? Of course, the answer is no. What we have instead is, we are going to file separate litigation because there was actually a case already in court in-

volving Don McGahn on that very subject that was ripe for a decision. In-

stead, the decision would come out very shortly thereafter. We said: Let’s just agree to be bound by what the McGahn court decides.

They didn’t want to do that, and it became obvious once the McGahn court decision came out because the McGahn court said: There is no absolute immu-

nity. You must testify.

By the way, if you think people involved in national security—i.e. Dr. Kupperman and John Bolton, if you are listening—are somehow absolutely im-

mune, they are not.

So did Dr. Kupperman say: “Now I have the comfort I need because the court has weighed in”? The answer is, of course, not.

Counsel says: Well, we might have gotten a quick judgment in Kupperman.

Yes—in the lower court.

Do any of you believe for a single minute that they could appeal to the court of appeals and to the Supreme Court and that if the Supreme Court struck down the absolute immu-

nity argument, they wouldn’t be back in the district court, saying: “OK. He is not asking for absolute immunity any-

more. He is only asking the court to claim execu-

tive privilege over specific conversa-

tions to go to the President’s wrong-

doing”?
That is the sign of a President who believes that he is above the law, that article II empowers him to do anything he wants.

I will say this: If you accept that argument—if you accept the argument that the President of the United States can be bound to sound principles when you try to investigate his wrongdoing—there will be no force behind any Senate subpoena in the future.

The “fighting all subpoenas” started before the impeachment. If you allow a President to Congress so completely in a way that Nixon could never have contemplated, nor would the Congress of that day have allowed, you will eviscerate your own oversight capability.

Thank you.

The CHIEF JUSTICE. The majority leader is recognized.

Mr. MCDONALD. Mr. Chief Justice, I ask unanimous consent that the Senate stand in recess until 4 p.m.

There being no objection, the Senate, at 3:38 p.m., recessed until 4:06 p.m. and reassembled when called to order by the CHIEF JUSTICE.

The CHIEF JUSTICE. The Senator from Oklahoma.

Mr. INHOFE. Mr. Chief Justice, I have a question for the President’s counsel, and it is cosponsored by Senators ROUDS, WICKER, ERNST, BLACKBURN, TILLIS, CRAMER, COTTON, SULLIVAN, MCSALLY, all members of the Senate Armed Services Committee.

The CHIEF JUSTICE. The Senators ask the following question of the counsel for the President:

Mr. Cipollone, as Members of the Senate Armed Committee, we listened intently when Manager Chw was defending one of Senator Schumer’s amendments to the organizing resolution last week as he explained how he had firsthand experience being denied military aid when he needed it during his service, David Hale, Under Secretary of State for Political Affairs, confirmed that the lethal aid provided to Ukraine last year was future aid. Which would have the greater military impact: President Trump’s temporary pause of 48 days on future aid that will now be delivered to Ukraine, or President Obama’s steadfast refusal to provide lethal aid to Ukraine for 3 years—or 1,000 days—while Ukraine attempted to hold back Russia’s invasion and preserve its sovereignty?

Mr. Counsel PHILBIN. Mr. Chief Justice. Thank you, Senators for that question.

I think it was far more serious and far more jeopardy for the Ukrainians the decision of the Obama administration to not use the authority that was given by Congress—that many of you all, many Members of the House of Representatives voted for—giving the U.S. Government the authority to provide lethal aid to the Ukrainians, and the Obama administration decided not to provide that aid.

And multiple witnesses who were called in the House by the House Democrats testified that United States policy toward Ukraine got stronger under the Trump administration, in part, largely, because of that lethal aid.

Ambassador Yovanovitch, Ambassador Volker, others also testified that U.S. policy providing that aid was critical assistance to the Ukrainians on the frontlines right then is simply not true.

And now the House managers have tried to pivot away from that because they know it is not true. They say: No, it was not; it was a signal of lack of support that the Russians would pick up on. But here again, it is critical, even the Ukrainians didn’t know that the aid had been paused, and part of the reason was they never brought it up in any conversations with representatives of the U.S. Government. And as Ambassador Volker testified, representatives of the U.S. Government didn’t bring it up to them because they didn’t want anyone to know they didn’t want to put out any signal that might be perceived by the Russians or by the Ukrainians as any sign of lack of support. It was kept internal to the U.S. Government.

They pointed to some emails that someone at the Department of Defense or Department of State, Laura Cooper, received from unnamed Embassy staffers suggesting that there was a question about the aid, but her testimony was that she couldn’t even remember what the question really was, and she didn’t want to speculate. There is not evidence that any decision makers in the Ukraine Government knew about the pause.

And just the other day, another article came out—I believe it was from, at the time, the Foreign Minister Danylyuk—explaining that when the POLITICO article was published on August 28, there was panic in Kyiv because it was the first time that Ukrainians realized there was anything on the aid. So that was not something that was providing any signal either to the Ukrainians or the Russians because it wasn’t known. It was 2 weeks later, after it became public, that the aid was released.

The testimony in the record is that the pause was not significant; it was future money, not for current purchases; and it was released before the end of the fiscal year.

They point out that some of it wasn’t out the door by the end of the fiscal year. That happens every year. There is some percentage that doesn’t make it out the door by the end of the year. It is 5-year money. It is not like it is all going to be spent in the next 30, 60, 90 days anyway. So the fact that there was a little fix—Congress passed a fix to allow that $35 million to be spent; something similar happens for some amount almost every year; and aid in current fiscal year purchases—it wasn’t jeopardizing anything at the frontlines. There is no evidence about that in the record. The evidence is the contrary.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Maine is recognized.

Mr. KING. Mr. Chief Justice, I have a question for both sets of counsel, which I send to the desk.

The CHIEF JUSTICE. The question from Senator King is for both counsel for the President and House managers:

Assistant Trump’s former chief of staff, General John Kelly has reportedly said, “I believe John Bolton” and suggests Bolton should testify, saying, “If there are people that could contribute to this, either innocence or guilt, I think they should be heard.” Do you agree with General Kelly that they should be heard?

I think, counsel for the President, it is your turn to go first.

Mr. Counsel SEKULOW. Thank you, Mr. Chief Justice, Members of the Senate, this was a bit of a topic that I discussed yesterday, and that was the information that came out of the New York Times piece about what is purportedly in a book by Ambassador Bolton.

Now, as I said, the idea that a manuscript is not in the book—there is not a quote from the manuscript in the book; this is a perception of what the statement might be. There have been very forceful statements, not just from the President but from the Attorney General. The Department of Justice stated that while the Department of Justice has not reviewed Mr. Bolton’s content, the New York Times account of this conversation grossly mischaracterizes what Attorney General Barr and Mr. Bolton discussed.
There was no discussion of his getting any personal favors or undue influence for the investigation, nor did Attorney General Barr state that the President’s conversations with foreign leaders were improper. So again, that goes to some of the allegations that were in the article.

The Vice President said the same thing. He said: In every conversation with the President and Vice President, in preparation for our trip to Poland, the President consistently expressed his frustration that the United States was bearing the lion’s share of responsibility.

There is also an interview that Ambassador Bolton had given, I think in August, about the conversation, where he said it was a perfectly appropriate conversation. I think that information is publicly available now.

So again, to move that into a change in proceeding, so to speak, I think it is not correct. The evidence that has already been introduced, an accusation that if you get into witnesses, and I will do this very briefly—if we get down the road on the witness issue, let’s be clear, it should not be—I certainly can’t dictate to this body—it should not be, the House managers as to who the House managers get to call witnesses. And implicitly does not believe the President’s former Chief of Staff, General Kelly believes John Bolton, and the President’s lawyers get no witnesses. We would expect that if they are going to get witnesses, we will get witnesses, and those witnesses would then be all of that, not just to be clear, changes the nature and scope of the proceedings. They didn’t ask for it before.

The PRESIDING OFFICER. Thank you, counsel.

Mr. Manager SCHIFF. Senators, Mr. Chief Justice: What is the significance of the President’s former Chief of Staff saying that he believes John Bolton and implicitly does not believe the President, that Bolton should testify? It is really, at the end of the day, not a question to the desk on behalf of my staff for review. The White House Counsel’s Office was notified that it was there. The National Security Council released a statement explaining that it has not been reviewed by anyone outside NSC staff.

In terms of the second part of the question, has there been any attempt to prevent its publication or to block its publication, I think that there was some misinformation put out into the public realm earlier today, and I can read for you a relatively short letter that was sent from NSC staff to Charles Cooper, who is the attorney for Mr. Bolton, on January 23, which was last week.

It says:

Dear Mr. Cooper: Thank you for speaking yesterday by telephone with the National Security Council . . . Access Management directorate has been provided the manuscript submitted by your client, former Assistant to the President for National Security Affairs John Bolton, for prepublication review. Based on our preliminary review, the
Is it true the Trump administration approved supplying Javelin anti-tank missiles to Ukraine? Is it also true this decision came on the heels of a nearly three-year debate in Washington over whether the United States should provide lethal defense weapons to counter further Russian aggression in Europe? By comparison, did President Obama refuse to send weapons or other lethal military gear to Ukraine? Was this decision against the advice of his Defense Secretary and others, I believe that is significant.

The CHIEF JUSTICE. The question from Senator Feinstein and the other Senators is to the House managers:

The President has taken the position that there should be no witnesses, and no documents provided by the executive branch in response to these impeachment proceedings. Is there any precedent for this blanket refusal to cooperate, and what are the consequences if the Senate accepts this position here?

Ms. Manager LOFGREN. Mr. Chief Justice and Senators, President Trump has taken an extreme measure to hide this evidence from Congress. No President has ever issued an order to direct a witness to refuse to cooperate in an impeachment inquiry before this. Despite his famous attempts to conceal the most damaging evidence against him, it was clear that the President allowed senior officials to testify under oath. Not only did he allow them; he told them to go to Congress voluntarily and answer all relevant questions truthfully.

But President Trump issued a blanket order directing the entire executive branch to withhold all documents and testimony from the House of Representatives. His order was categorical. It was unprecedented and unprecendented. Its purpose was clear: to prevent Congress from doing its duty under the Constitution to hold the President accountable for high crimes and misdemeanors.

Every person who works in the White House and every person who works in every department, agency, and office of the executive branch is just unprecedented. It wasn’t about specific, narrowly defined privileges. He never asserted privileges, and the President’s counsel has mentioned over and over that he had some reason because of the subpoenas.

Well, I tell you, we adopt rules about subpoenas in the House. The Senate is a little bit more complex, I think. In January, we adopted our rules, and it allows the committee chairman to issue subpoenas, and that is what they did.

He refused to comply with those subpoenas, not because he exercised executive privilege but because he didn’t like what we were doing. He tried to say it was invalid, but it was valid.

Actually, he doesn’t have the authority to be the arbiter of the rules of the House. The House under its rules when it comes to impeachment:

Now, this refusal to give testimony, documents, and the like is still going on. We still have former or current administration officials who are refusing to testify. You know, we would not allow this in any other context. You know, if a mayor said that I am not going to answer your subpoenas, they would be dealt with harshly if it was to cover up misdeeds or crimes, as we have here. The mayor would actually go to jail for doing that.

If we allow the President to avoid accountability by simply refusing to provide any documents, any witnesses—unlike every single President who preceded him—we are opening the door not just to eliminating the impeachment clause in the Constitution. Try doing oversight. Try doing oversight, Senators, working without that in the House. If the President can just say, we are not sending any documents, any not sending any documents, any not sending any documents, any not sending any documents; we don’t have to; we don’t like your processes; we have a wholesale rejection of what you are doing—that is not the way our Constitution was created. Each body has a responsibility. There is sharing of power. I, and I know you, cherish the responsibility that we have that would be evicered if the President’s complete stalling is allowed to persist and be accepted by this body. You have to act in this moment in history.

I yield back.

The CHIEF JUSTICE. Thank you. Mrs. CAPITO. Mr. Chief Justice.
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CONGRESSIONAL RECORD — SENATE

January 29, 2020

The CHIEF JUSTICE. The Senator from West Virginia.

Mrs. CAPITO. Thank you. I send a question to the desk for the President's counsel.

The CHIEF JUSTICE. Senator Car- 
ro's question is for counsel for the President:

You said that Ukrainian officials didn’t know about the pause on aid until August 28, 2019, when it was reported in POLITICO. But didn’t Ms. Cooper, the deputy assistant secretary of defense for Russia, say that members of her staff received queries about the aid from the Ukrainian Embassy on July 25? Does that mean that Ukrainian officials knew about the hold on aid earlier than the POLITICO article?

Mr. Counsel PURPURA. Mr. Chief Justice, Members of the Senate, Senator, thank you for your question.

It does not mean that. As we explained on Saturday, the overwhelming body of evidence indicates that the Ukrainians, at the very highest lev- els—President Zelensky and his top ad- viser—were aware of the freeze in the security assistance through the August 28 POLITICO article.

I addressed this on Saturday—and so those comments will stand—the emails that Deputy Assistant Secretary of De- fense Laura Cooper testified about pre- viously. What she said was that she—her staff—had gotten emails from someone at the State Department who had had some sort of conversation with Ukrainian officials here that somehow related to the aid at a time prior to August 28. She did not know the sub- stance of the emails or whether they mention “hold,” “pause,” “review,” or anything of that nature. And she even said herself that she didn’t want to speculate as to what the emails meant and cannot say for certain what they were about.

I presented on Saturday the evidence, which, again, is referencing the common sense that would be in play here. This email mentioned by Ms. Cooper that on August 28 caused a flurry of activity among the highest ranking Ukrainian officials. Never before did they raise any questions at any of the meetings they had with the high-ranking U.S. officials through July and August. There were meetings on July 9, July 10, July 25 call, July 26, and August 27. At none of those meetings was the pause on aid re- vealed or inquired about. However, as soon as the POLITICO article came out on August 28, the Ukrainians within hours of that POLITICO article coming out. Mr. Yermak texted the article to Ambas- sador Volker and asked to speak with him. That is consistent with someone who saw it as early as July 25. That means that Ukrainian officials knew about the hold on aid earlier than the POLITICO article.

Again, this is on August 28, or right after August 28.

“The next time we met in September . . . it was in Poland for the commemoration of the beginning of the Second World War” —

The Warsaw meeting we discussed previously.

Danyliuk said, adding that he met with Bolton on the sidelines of the commemora- tion. “I had my suspicions. There was a spe- cial situation with one of our defense compa- nies that were acquired by the Chinese. And the U.S. was concerned about this. Bolton actually made the public comments about this as well. So somehow I linked this to things and tried to understand. OK, maybe this could be related to this.”

So not only did they not know until August 28 when they did find out—but they didn’t link it to any investiga- tion. Where is the quid pro quo? If it is linked to anything, it is linked to what was going on at the beginning of the Second World War in Poland.

The CHIEF JUSTICE. Thank you.

Mr. Manager CROW. Thank you, Mr. Chief Justice. Mr. Chief Justice, I have a question on behalf of Senator BALDWIN and myself, and I send it to the desk.

The CHIEF JUSTICE. The question is addressed to the House managers:

Is the White House correct in its trial memorandum and in presentations of its case that “President Zelensky and other sen- ior Ukrainian officials did not know that the security assistance had been paused” before seeing press reports on Au- gust 28, 2019, which was more than a month after the July 25 call between Presi- dents Zelensky and Trump?

Mr. Manager CROW. Thank you, Chief Justice and Senators, for the question.

The answer is no. The evidence does not show that. We know that Defense Department official Laura Cooper testi- fied that her staff received 2 emails from the State Department on July 25 revealing that the Ukrainian Embassy was “asking about security assistance,” and, in fact, that the President brought up these emails just now. I would propose that the Senate subpoena those emails and we can all see for ourselves what exactly was hap- pening.

We also know that career diplomat Catherine Croft stated that she was “very surprised at the effectiveness of my Ukrainian counterparts’ diplomatic tradecraft, as in to say they found out very early on, or much earlier than I expected them to,” and that LTC Alex Vindman testified that by mid-August he was getting questions from Ukrainians about the status of security assist- ance.

The evidence shows over and over again from the House inquiry that there was a lot of discussion, and there should be because we also know that delays matter. They matter a lot. You don’t have to take my word for it. This is not just about a 48-day delay. We now have witnesses who were actually asking about it because it was urgent. They needed it. They needed it.

You know who else was asking for it—American businesses. The contrac- tors who were going to be providing the aid were making inquiries about it because there is a pipeline.

As my esteemed Senate Armed Serv- ices colleagues know very well, pro- viding aid is not like turning on and off a light switch. You have to hire em- ployees. You have to get equipment. You have to ship it. It takes a long time for that pipeline to go. In fact, we had to come together as a Congress to pass a law to extend that timeline because we were at risk of losing it. And that law.$18 million of that aid has still not been spent.

Let’s just assume for a minute, also broadly speaking, that the President’s counsels’ argument that support for Ukraine has never been better than it is today, that under the Trump admin- istration, they are the strongest ally Ukraine has seen in years. Just assum- ing for a minute that argument to be true, it kind of makes our own argu- ment. It kind of makes our argument: Then why hold the aid? Why hold the aid? Because nothing had changed in 2016; nothing had changed in 2017; and nothing had changed in 2018. One thing had changed in 2019, and that was Vice President Biden was running for Presi- dent.

Lastly, the previous question by my Senate Armed Services colleagues framed this in terms of the military impact. They asked: What was greater in terms of military impact, not pro- viding lethal aid or a 48-day delay? Let’s not forget the reason for the delay, because there is a lot of discus- sion today about the technicalities of the delay and that the President’s
mentality, his mindset, doesn’t matter. It doesn’t matter what he intended to do. I would posit that is exactly why we are here—that it does matter what the President intended to do because in matters of national security, the American people deserve to know every fact, every detail, knowing that the President, the Commander in Chief, the person who is ultimately responsible for the safety and security of our Nation every night, has the best interests of them and their families and this country and the best interests in the mind of what was in his political campaign. That is why we are here.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Ms. COLLINS. Mr. Chief Justice.

The CHIEF JUSTICE. Senator.

Ms. COLLINS. I send a question to the desk on behalf of myself and Senator MURKOWSKI.

The CHIEF JUSTICE. Thank you.

The question is to counsel for the President:

Witnesses testified before the House that President Trump consistently expressed the view that Ukraine was a corrupt country. Before Vice President Biden formally announced his candidacy in April 2019, did Trump ever mention Joe or Hunter Biden in connection with corruption in Ukraine to former Ukrainian President Poroshenko or other Ukrainian officials, President Trump’s cabinet members or top aides, or others? If so, what did the President say to whom and when?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for that question.

Of course, I think it is important at the outset to frame the answer by bearing in mind I am limited to what is in the record, and what is in the record is determined by what the House of Representatives sought. It was their proceeding. They were the ones who ran it. They were the ones who called the witnesses. Part of the question refers to conversations between President Trump and other Cabinet members and others like that. There is not something in the record on that. It wasn’t thoroughly pursued in the record, so I can’t point to something in the record that shows President Trump, at an earlier time, mentioning specifically something related to Joe or Hunter Biden.

It is in the record that he spoke to President Poroshenko twice about corruption in Ukraine, both in June of 2017 and again in September of 2017. But there is other information publicly available and in the record that I think is important for understanding the timeline and understanding why it was that the information related to the Bidens and the Burisma affair came up when it did.

One important piece of information to bear in mind is that from the tapes we have seen, President Poroshenko was the person who Joe Biden himself went to have the prosecutor fired. So as long as President Poroshenko was still in charge in Ukraine, he was the person who Joe Biden had spoken to get the prosecutor, Shokin, fired when, according to public reports, Shokin was looking into Burisma. As long as he was still the President in Ukraine, it questioned the utility of raising an incident in which he was the one who was taking the direction from Vice President Biden to fire the prosecutor.

When you have an election in April of 2019 and you have a new President—President Zelensky—who has run on an anti-corruption platform, and there is no question of going to change things: is there going to be something new in Ukraine?” It opens up an opportunity to really start looking at anti-corruption issues and raising questions.

The other thing to understand in the timeline is that we have heard a lot about Rudy Giuliani, the President’s private lawyer, and what was he interested in Ukraine and what was his role? Well, as we know, it has been revealed that Mr. Giuliani, the President’s private lawyer, had been asking a lot of questions in Ukraine dating back to the fall of 2018, and in November 2018, he said publicly he was given some tips about things to look into. He gave a dossier to the State Department in March of this year. Remember, Vice President Biden announced his candidacy in April—April 25. In March, Rudy Giuliani gave documents to the State Department, including interview notes from interviews he conducted both with Shokin and with Yuriy Lutsenko, who was also a prosecutor in Ukraine. Those interview notes are from January 23 and January 25, 2019—so months before Vice President Biden announced any candidacy—and it goes through these interview notes, Shokin explaining that he was removed at the request of Mr. Joseph Biden, the Vice President. It explains that he had been investigating Burisma and that Hunter was on the board, and it raises all of the questions about that.

So it was Mr. Giuliani who had been, as Jane Raskin as counsel for the President explained the other day—Mr. Giuliani is looking into what went on in Ukraine: Is there anything related to 2016? Are there other things related there?

And he is given this information—tips about this—and starts pursuing that as he is digging into that in January of 2019.

We know that Mr. Giuliani is the President’s private counsel. I can’t represent specific conversations they had. They would be privileged. But we do know from testimony that the President said in a May 23 Oval Office meeting with respect to Ukraine: Talk to Rudy. Rudy knows about Ukraine. It seems from that that the President gets information from Mr. Giuliani.

Months before Vice President Biden announced his candidacy, Mr. Giuliani is looking into this issue, interviewing people, and getting information about it.

In addition, in March of 2019, articles began to be published. Then three articles were published by ABC, by the New Yorker, and by the Washington Post before the July 25 call.

On July 22, 3 days before the call, the Washington Post had an article specifically about the Bidens, that is what makes it suddenly current, relevant, probably to be in someone’s mind. That is the timeline.

The CHIEF JUSTICE. Thank you, counsel, very carefully.

Mr. Counsel PHILBIN. Thank you, Senator.

Ms. HARRIS. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from California.

Ms. HARRIS. Thank you. I send a question to the desk on behalf of Senator PATTY MURRAY and myself.

The CHIEF JUSTICE. Senators HARRIS and MURRAY ask the House managers:

The House of Representatives is now in possession of a tape of President Trump saying of Ambassador Maria Yovanovitch, “Get rid of her! Get her out tomorrow. I don’t want her out—her out. Take her out. Okay? Do it.” President Trump gave this order to Lev Parnas and Igor Fruman, two men who carried out Trump’s pressure campaign in Ukraine at the direction of Rudy Giuliani. Does the discovery of this tape suggest that if the Senate does not pursue all relevant evidence—including witnesses and witnesses—and new evidence will continue to come to light after the Senate renders a verdict?

Mr. Manager SCHIFF. The answer is yes.

What we have seen, really, over the last several weeks, since the passage of the articles in the House of Representatives, is that every week—indeed, sometimes every day—there is new information coming to light.

We know there is going to be new information coming to light. On March 17, when the Bolton book comes out, that is, if the NSC isn’t successful in redacting it or preventing much of its publication.

On that issue, I do want to mention one other thing in response to the question about the Bolton manuscript and what the White House lawyers knew. I listened very carefully to the answer to that question, and maybe you listened more carefully than I did. What I thought I heard them say in answer to the question was that they didn’t know about the manuscript and when did they know it?—”their statement was very precisely worded: The NSC unit reviewing the book did not share the manuscript. I don’t think that is a different question than whether the White House lawyers found out what is in it, because you don’t have to circulate the manuscript to have someone walk over to the White House and say: You do not want John Bolton to testify. Let me tell you you do not want John Bolton to testify. You don’t need to read his manuscript because I can tell you what is in it.
The denial was a very carefully worded one. I don’t know what White House lawyers knew and when they knew it, but they did represent to you repeatedly that the President never told a witness that he was freezing the aid to get Ukraine to do these investigations. We know that is not true. We know that from the witnesses we have already heard from, but we also know—  

There are going to continue to be revelations, and Members of this body on both sides of the aisle are going to have to answer a question each time it does: Why didn’t you want to know that when it would have helped inform your decision?  

In every other trial in the land, you call witnesses to find out what you can. Again, we are not a court of appeals; we are not confined to the record. We are not confined to the record below. There is no “below.” In answer to the Senator’s question about whether Donald Trump ever brought up the Hunter Biden problem with President Poroshenko in the past, counsel says: Well, we are confined to the record before us. You are not confined to the record in the House, nor is the President. The President could call witnesses if they existed. There is nothing to prevent them from saying: As a matter of fact, tomorrow we are going to call such and such, and they are going to testify that, indeed, Donald Trump brought up Hunter Biden to President Poroshenko. There is nothing prohibiting them from doing that.  

At the end of the day, we are going to continue to see new evidence come out all the time. Among the most significant evidence we have is related to criminality. We are not confined to the record. We know about Burisma and whether it was a coincidence that in January that he had these revelations, and Members of this body on both sides of the aisle are going to have to answer a question each time it does: Why didn’t you want to know that when it would have helped inform your decision?  

The CHIEF JUSTICE. Thank you, counsel.  

The Senator from Connecticut.  

Mr. BLUMENTHAL. Mr. Chief Justice, I have a question for the counsel for the President.  

The CHIEF JUSTICE. Thank you, counsel.  

The Senator from Nebraska.  

Mrs. FISCHER. Mr. Chief Justice, I send a question to the desk on behalf of myself, Senator CRAPO, and Senator RISCH.  

The CHIEF JUSTICE. The Senators ask counsel for the President:  

The President’s counsel has underscored the Administration’s ongoing anticorruption focus toward our allies. At what point did the United States Government develop concerns about Burisma in relation to corruption and concerns with Russia?  

Mr. Counsel PHILBIN. Mr. Chief Justice, thank the Senators for that question. I think it bears on the answer that I was last giving to the last question. This is something that became—of course, President Trump, in his conversation with President Zelensky in the July 25 call, as the transcript shows us, brought up a couple of things. He brought up burden-sharing specifically, and he raised the issue of corruption in two specifics: the specific case of potential Ukrainian interference in the 2016 election, which he had heard about and asked about, and the incident involving the firing of a prosecutor, who, according to public reports, had been looking into Burisma, the company that the Vice President’s son was involved in. That was the President’s way of pinpointing specific issues related to corruption.  

So when did it become a part of the President’s concern, those issues related to corruption in Ukraine? Of course, we have the evidence that everyone in the government—and Fiona Hill testified to this—thought that anti-corruption was a major issue for U.S. policy with respect to Ukraine. When there was a new President elected in April, President Zelensky, that brought the possibility of reform to the forefront.  

Then we know that the President was receiving information from his private attorney, Rudy Giuliani, and he spoke in the Oval Office of, Rudy knows about the Ukraine. You guys go talk to him. He was explaining to the delegation that had just returned from the inauguration for the President, for President Zelensky, that he had concerns about Ukraine because they are all corrupt. He kept saying: It is a corrupt country. I don’t know. They tried to get me in the election.  

So it draws again on, there is his specific experience with Ukrainian corruption. He read the public reports, as in the POLITICO article that has been referenced many times. The POLITICO article in January of 2017 explained a laundry list of Ukrainian Government officials who had been out there attempting to assist the Hillary Clinton campaign and spread misinformation or bad information or assist in digging up dirt on members of the Trump campaign.  

Mr. Giuliani had been investigating things related to Ukraine in 2016 and was most concerned about the Burisma situation and Vice President Biden having the prosecutor fired. So that was in January that he had these interviews he turned over to the State Department in March.  

Then there were a series, also, of public articles published. John Solomon, in The Hill, published an article in March. Rudy Giuliani tweeted about it in March. There was an ABC story in June. There was a twoword New Yorker story about the Bidens and Burisma in July. Then, on July 22, the Washington Post had an article and explained specifically on just July 22— this is 3 days before the July 25 call: the Washington Post reported that Mr. Shokin, the prosecutor, believed “his ouster was because of his interest in the company,” referring to Burisma, and he said that “had he remained in his post, he would have questioned Hunter Biden.”  

So I think it is a reasonable inference that, as there were these articles being published in close proximity to the time, this was information that was available to the President, and it became problematic as something that was a specific example of potentially serious corruption. And everybody who testified, who was asked about it—does it seem like there is an appearance of a conflict of interest? Does it seem like that is fishy? Everyone testified: Well, yes, there is at least an appearance of a conflict of interest there.  

I think it was after the information had come to Mr. Giuliani—long before Vice President Biden had announced his candidacy—that it came to the attention of the President and became something worth raising. Again, President Poroshenko is the one who fired the prosecutor. While he is still the President, there is not really as much of an opportunity or a possibility of raising that. So I think it was in that timeframe, along that arc of the timing, that it came to the President’s attention, and that is why it was raised in that timing. Thank you.
The Senator from Texas.

Mr. CRUZ. I send a question to the desk on behalf of myself and Senators Moran and Hawley. It is a question for the House managers.

The CHIEF JUSTICE. The question from the Senators to the House managers:

An August 26, 2019, letter from the Intelligence Community Inspector General to the Director of National Intelligence discussing the so-called whistleblower stated that the Inspector General “identified some indicia of an arguable political bias on the part of the Complainant in favor of a rival political candidate,” which “casts doubt on the qualities of the complaint that this likely referred to the whistleblower’s work with Joe Biden.

Did the so-called whistleblower work at any point or with Joe Biden? If so, did he work for or with Joe Biden on issues involving Ukraine, and did he assist in any material way with the quid pro quo in which Then-vice President Biden has admitted to conditioning loan guarantees to Ukraine on the firing of the prosecutor investigating Burisma.

Mr. Manager SCHIFF. Mr. Chief Justice, I thank the Senators for the question, and I want to be very careful in how I answer it so as not to disclose or give an indication that may allow others to identify the identity of the whistleblower.

First, I want to talk about why we are making such an effort to protect the identity of the whistleblower.

If you could put up slide 48, this slide shows—it may be difficult for some of you to read, so let me try to—actually, if you could hand me a copy of that as well, I hadn’t had a chance to distribute that to everyone.

It is not just that we view the protection of whistleblowers as important. Members of this body have also made strong statements about just how important it is to protect whistleblowers.

Senator GRASSLEY said: “This person appears to have followed the whistleblower protection laws and ought to be heard out and protected. We should always consider whistleblowers’ requests for confidentiality.”

Senator ROMNEY: “Whistleblowers should be entitled to confidentiality and privacy because they play a vital function in our democracy.”

Senator BURR: “We protect whistleblowers. We protect witnesses in our committee.”

Even my colleague, the ranking member, Mr. Nunes: “We want people to come forward, and we will protect the identity of those people at all cost.”

This has been a bipartisan priority and one that we have done our best to maintain, so I want to be very careful, but I want to say a few things about several things about the whistleblower.

First of all, I don’t know who the whistleblower is. I haven’t met them or communicated with them in any way. The committee staff did not write the complaint or coach the whistleblower what to say or how to complain. The committee staff did not see the complaint before it was submitted to the inspector general. The committee, including its staff, did not receive the complaint until the night before the Acting Director of National Intelligence—we had an open hearing with the Acting Director on September 26, more than 3 weeks after the legal deadline by which the committee should have received the complaint.

In short, the conspiracy theory, which I think was outlined earlier, that the whistleblower colluded with the Intel Committee staff to hatch an impeachable quid pro quo is a complete and total fiction. The very thing I think, confirmed by the remarkable accuracy of the whistleblower complaint, which has been corroborated by the evidence we subsequently gathered in all material respects.

So I am not going to go into any thing that could reveal or lead to the revelation of the identity of the whistleblower, but I can tell you, because my staff’s names have been brought into this proceeding, that my staff acted at all times with the most complete professionalism.

I am very protective of my staff, as I know you are, and I am grateful that we have such bright, hard-working people working around the clock to protect this country and who have served our committee so well. It really grieves me to see them smeared. Some of them mentioned here today have concerns about their safety, and there are online threats to members of my staff as a result of some of the smears that have been launched against them.

I can tell you there is no one who could understand the plight of Ambassador Yovanovitch more than some of my staff who have been treated to the same kind of smears and now have concerns over their own safety. They acted at all times with the utmost propriety and integrity.

Your Senate Intelligence Committee—and your chairman and vice chair—can tell you—we encourage whistleblowers to come to their committee, and so do we. When they do, we try to figure out, is their complaint within the scope of jurisdiction of the intelligence community? If it is, we then suggest they get a lawyer or we suggest they talk to the inspector general, which is what happened here.

The whistleblower did exactly what they should—except, for the President, that is unforgivable because the whistleblower was attempting to do with the overwhelming majority of these documents, not a wit. There is no absolute immunity from providing documents. The vast, vast majority don’t have anything to do with privilege, and, if they did, there would be redactions, very specific redactions. None of that happened.

Now, the administration hasn’t produced a single document, not one single document. That is extraordinary. They can argue executive privilege and absolute immunity. Most of that has nothing to do with the overwhelming majority of these documents, not a wit. There is no absolute immunity from providing documents. The vast, vast majority don’t have anything to do with privilege, and, if they did, there would be redactions, very specific redactions. None of that happened.

Are you allowed to draw an adverse inference that the reason why the President’s team, which has possession of those emails regarding inquiries by Ukraine into why the aid was frozen—those emails would be redacted, very specific redactions. If they won’t show you those emails. Those emails would confirm that Ukraine knew the aid was withheld,
just like the former Deputy Foreign Minister of Ukraine said publicly when she told the New York Times: Yes, we knew; by the end of July, we knew—this is the Deputy Foreign Minister at the time—we knew the aid was frozen, but I didn’t know it. By Andriy Yermak not to mention it. I had a trip planned to Washington to talk to Congress, and I was told not to go. Why? Because they didn’t want it public.

Are you entitled to draw an inference that somebody ordered them to turn over—all the State Department records; the fact that they won’t allow John Bolton’s notes to be turned over; they won’t let Ambassador Taylor’s notes to be turned over—should you draw an adverse inference? You are darned right you should.

They say: Well, the President only told Sondland “no quid pro quo.” They leave out the other half where Sondland told Taylor: But he said, no quid pro quo, and you have to go to the mike and announce these investigations.

Well, Ambassador Taylor wrote down the notes of that conversation. That took place right after that call with the President. Are you allowed to draw an adverse inference from the fact that they don’t want you to see Ambassador Taylor’s notes, from the fact they don’t want you to see Ambassador Taylor’s cable? You are darned right you should draw an adverse inference.

Finally, with respect to who has become a central witness here, I think the adverse inference screams at you as to why they don’t want John Bolton. But you shouldn’t rely on an inference here, not when you have a witness who is willing to come forward. There is no need for inference here. It is just a need for a subpoena.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. THUNE. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from South Dakota.

Mr. THUNE. I have a question to send to the desk:

The CHIEF JUSTICE. Senator Thune’s question is for counsel for the President:

Would you please respond to the arguments or assertions the House Managers just made in response to the previous questions?

Mr. Counsel PHILBIN. Mr. Chief Justice.

Thank you, Senator, for the questions.

I haven’t read recently the case that was cited about the missing witness rule. So I can’t say specifically what is in it, but I am willing to bet that the missing witness rule does not apply when there has been a valid assertion of a privilege or other immunity for keeping the witness out of court. For example, if they tried to subpoena the defendant’s lawyer and the defendant said, “Wait, I have attorney-client privilege; you can’t subpoena him,” they are not going to be able to get an adverse inference from that.

That is critical because, as I have gone through multiple times—and you know, we keep going back and forth on this—they keep representing that there was a blanket defiance and there was no explanation and there was no legal basis for what the President was doing. And it is just not true. There were letters back and forth. I put them up on the screen. There were specific immunities asserted. There were specific legal deficiencies in the subpoenas that were sent.

This is important because if you are going to impeach the President of the United States, turning square corners and proceeding by the law matters. For the House managers to come here and say it was blanket defiance, it was unprecedented, you have to draw an adverse inference against them because they didn’t respond to any of our document subpoenas—all the document subpoenas were issued without authorization. Maybe they disagree with us, but they can’t just say we provided no rationale and you have to draw an adverse inference against them because that’s a specific legal rationale provided.

They didn’t try to engage in the accommodation process, and they didn’t try to go to court. And now, yes, it is true that our position is that when they go to the court, article III courts don’t have jurisdiction over that. Their position is, article III courts do have jurisdiction over that.

They believe that they can get a court order to require us to comply with a valid subpoena, but they never tried to establish in court that their subpoenas were valid. We have an assertion of a legal deficiency on one side. They think it is different. They don’t want to go to court to get it resolved.

We have the assertion of absolute immunity from congressional compulsion for senior advisers to the President. It has been asserted by virtually every President since Nixon. They try to say: Oh, it is not relevant. We don’t have to worry about that.

Every President since Nixon, virtually, has asserted that. It has only been addressed by two district courts—trial-level courts. The first one rejected it, and its decision was stayed by the appellate court, which means the appellate court thought probably you got it wrong or, at a minimum, it is a really difficult question; we are not sure about that. And the second district court decision is being litigated right now. They are litigating it. And when Charlie Kupperman went to court, they were trying to do something reasonable to say: Oh, well, we don’t want to litigate this with you; you should just agree to be bound by the McGahn decision. What is the saying? Every litigant gets his day in court.

Why shouldn’t Charlie Kupperman get to have his counsel argue that issue on his behalf? That is what he wanted. He didn’t want to say: I am going to litigate it to the other people litigating the other case. I’ve got my case. I want to make the arguments.

But they wouldn’t have that. So they mooted out the case. They withdrew the subpoena to moot out the case because they didn’t want to go to the hearing in front of Judge Leon on December 10.

They have also pointed out, as if it is some outrage, that documents have been more readily produced under FOIA than in response to their subpoenas. But what that actually shows is that when you turn square corners and follow the law and make a request to the administration that follows the law, the administration follows the law and responds. And that is right. The documents were produced. Information came out. But they didn’t get it because they issued invalid subpoenas, and they didn’t try to do anything to establish the validity of their subpoenas.

If you are going to be sloppy and issue invalid subpoenas, you are not going to get a response. But if some respondent follows FOIA and submits a FOIA request, they get a response.

To act like the Trump administration has done some blanket denial of everything simply isn’t accurate, and there is no basis for any adverse inference because there is a specific privilege or basis for every reason not to produce something.

The CHIEF JUSTICE. Thank you, counsel.

Ms. HASSAN. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from New Hampshire.

Ms. HASSAN. Thank you, Mr. Chief Justice.

I send a question to the desk for the House managers.

The CHIEF JUSTICE. Senator Hassan’s question is for the House managers:

Did acting Chief of Staff Mick Mulvaney waive executive privilege in his October 17 testimony or anyone else.

Mr. Manager JEFFRIES. Mr. Chief Justice, distinguished Members of the Senate, I thank you for that question. Mick Mulvaney has absolutely waived executive privilege. He has never asserted executive privilege. In fact, as President’s counsel has acknowledged, they have not asserted executive privilege once. President’s counsel has said, when we made that point during our opening arguments, that was technically true. No, it is true. It is not an alternate fact; it is a fact. You have never asserted executive privilege in connection with Mick Mulvaney’s testimony or anyone else.

It was not asserted as it relates to any of the 17 witnesses who testified, 12 of whom testified publicly.

The other phony arguments that have been articulated, respectfully, are that the House needed to vote in order for the subpoenas to be valid. There is nothing in the Constitution that required the full House to vote, nothing...
The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Alaska.

Ms. MURKOWSKI. Mr. Chief Justice, I send a question to the desk on behalf of myself and Senator Young and Senator CRAPO. The question is to be directed to both parties.

The CHIEF JUSTICE. Thank you.

The CHIEF JUSTICE. The question is for the House manager:

Mr. Manager JEFFRIES. Thank you, Mr. Chief Justice.

The House managers have a question.

The CHIEF JUSTICE. Thank you.

The CHIEF JUSTICE. Thank you.

Ms. LOFGREN. Mr. Chief Justice, Senators, there is no court case on this. The House needs strong evidence, but it has never been decided beyond a reasonable doubt, as the President’s counsel has suggested, and, as the Supreme Court has suggested, the Constitution does not specify either the House’s evidentiary burden of proof or the Senate’s.

I would note that the House Judiciary Committee held itself to a clear and convincing standard of proof in the Nixon matter, which requires that the evidence of wrongdoing must be substantially more probable to be true than it is improbable. The degree of fact must have a firm belief in its factuality.

In the Clinton case, the House did not commit to any particular burden of proof. And I would recommend against including an express standard; instead, it speaks of conviction. It speaks of finding the facts and any inferences from those facts without legal technicalities.

It has been opined that, in the end, it is up to each Senator to make a judgment, and I think there is much truth in that. Your oath holds you to a finding of impartial justice, and I trust that each and every one of you is holding that oath very dear to your heart and will find the facts and lead to a just result for our country, the Constitution, and for a future that hopefully is as free as our past has been.

I yield back.

Mr. Manager PHILBIN. Mr. Chief Justice, Senators, thank you for the question.

I think that the Constitution makes it clear in the terms that it speaks of impeachment, all are related to the criminal law. It speaks of an offense. It speaks of conviction. It speaks of a trial in saying that crimes shall be tried by a jury except in the case of impeachment.

In both that and the gravity of a Presidential impeachment, which is an issue of breathtaking importance for the country and could cause tremendous disruption to our government, both counsel are in favor of traditional criminal standard of proof beyond a reasonable doubt.

In the Clinton impeachment, Senators—both Republicans and Democrats—repeatedly advocated in favor of that standard.

Senator Russ Feingold then said: in making a decision of this magnitude, it is best not to err at all. If we must err, however, we should err on the side... of respecting the will of the people.

Similarly, Senator Barbara Mikulski said:

The U.S. Senate must not make the decision to remove a President based on a hunch that the charges may be true. The strength of our Constitution and the strength of our tradition dictate that the Senate be sure beyond a reasonable doubt.

The preponderance standard is wholly insufficient. That means just 50.1 percent. You think it is a little more likely than not. That is not sufficient to remove the President. Even clear and convincing evidence is not. It has to be beyond a reasonable doubt.

As Senator Rockefeller explained at the time of the Clinton impeachment, that means “it is proven to a moral certainty that the facts are clear.” That is the standard the Senate should apply because the gravity of the issue before you would not permit applying any lesser standard.

Thank you.

Mr. BOOKER. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from New Jersey.

Mr. Chief Justice, I send a question to the desk to be asked of the House manager.

The CHIEF JUSTICE. Senator BOOKER’s question is for the House manager:

Every court that has considered the matter has asserted that the President cannot assert a privilege to protect his own misconduct, to protect wrongdoers, in the impeachment inquiry. This has not been asserted as it relates to any single document. Executive privilege gives President Trump a qualified form of confidentiality when he does get advice from his aides in order to carry out the duties of his office.

As I know you are all aware, it is often the case in congressional investigations that a President will claim executive privilege over a very small subset of materials. In that case, what the executive branch usually does and should do is to produce everything that it can and then provide a log of documents in dispute or permit a private review of the documents that have been contested.

That is not what has occurred in this case because the President has ordered the entire executive branch to defy our constitutionally inspired impeachment inquiry. Blanket defiance is what has taken place, and there is no right to do that.

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generalized assertion of privilege must yield to the demonstrated need for evidence in the pending trial, and the Federal court here in DC has recognized that Congress’s need for information and for documents during an impeachment inquiry is particularly compelling.

Turning to the facts of this matter briefly, any argument that every single document requested by Congress is subject to privilege or some form of absolute immunity is absurd. There are countless questions, scheduling emails, photographs, correspondence with outside parties like Rudolph Giuliani. These are all important pieces of evidence for you to consider and are not the types of materials subject to any reasonable claim of executive privilege.

If you want a fair trial, it should involve documents. Given the nature of these proceedings, documents like Ambassador Bolton’s notes and Lieutenant Colonel Vindman’s Presidential decision papers should also be provided to you so you can seek the truth, the whole truth, and nothing but the truth.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. KENNEDY. Senator Moran, my colleague from Kansas, and I send a question to the desk for counsel for the President.

The CHIEF JUSTICE. Thank you.

The question is for counsel for the President:

What did Hunter Biden do for the money that Burisma holdings paid him?

Ms. Counsel BONDI. Thank you for the question.

Mr. Chief Justice, Senators, as far as we know, Hunter Biden has said he “attended a couple of board meetings a year.” Here is what we do know: Hunter Biden did attend one board meeting in Monaco. Now, we also heard that when Zlochevsky—the owner of Burisma—fled the Ukraine, he wished to go to Monaco. So Hunter Biden did attend a board meeting in Monaco. We also know that Hunter Biden went to Norway on a fishing trip, and he took his daughter and his nephew. So he took two of Joe Biden’s children with him on a fishing trip to Norway with Zlochevsky. That is as much as we know, other than his statement that he attended one or two board meetings.

Factualy, that is what he said, and the timeline shows that, again, Devon Archer was on the board with him, and then Hunter Biden remained on the board. Factualy, in the record, that is as much as we know that he did involving Burisma and Zlochevsky.

The Norwegian trip was in June of 2015. He remained on the board until April of 2019. We also know that, prior to then, a Ukrainian court in September of 2016 canceled Zlochevsky’s arrest warrant. We also know, on December 15, Vice President Poroshenko called President Poroshenko. Then, in mid-January 2017, Burisma announced all legal proceedings against the company and Zlochevsky had been closed.

The CHIEF JUSTICE. The Democratic leader is recognized.

Mr. SCHUMER. Mr. Chief Justice, I send a question to the desk for both the counsel for the President and the House managers.

The CHIEF JUSTICE. Senator Schumer, your question proceeds as follows:

The House Managers say the President demands absolute immunity. The President’s counsel disputes this. Can either of you name a single witness or document to which the President has given access to the House when requested?

I believe it is time for counsel for the President to go first.

Mr. Counsel PHILBIN. Mr. Chief Justice, I thank you and Minority Leader Schumer for the question.

Let me try to be clear and distinguish a couple of things.

The House managers have said there was blanket defiance. That is the way they characterized it—that we are not going to give you anything and that is all we said. It was just a blanket defiance. We are not going to respond.

What I have tried to explain several times is that that was not the President’s counsel specifically articulated responses to different requests based on different legal rationales because there were different problems with different subpoenas.

One problem is that all of the subpoenas up till now were not validly authorized. So those subpoenas we said we were not going to respond because they were not validly issued. It was not an assertion of executive privilege. It was not an assertion of absolute immunity. It wasn’t anything else. It was the fact that they were not validly authorized.

They pointed out that, aha, we subpoenaed—I think they mentioned—Acting Chief of Staff Mulvaney after October 31. That didn’t rely on the fact that the subpoena was not authorized. It pointed out the doctrine of the absolute immunity of senior advisers to the President. This is not some blanket absolute immunity for the entire executive branch. It doesn’t apply to all of the subpoenas they issued. As we explained in our brief, it applies to three. There were three people they subpoenaed as witnesses that, on this basis alone, the President declined to make available—Assistant to the President, Legal Advisor to the National Security Council John Eisenberg, and Deputy National Security Adviser Kupperman. I believe, but it is in our brief. It was those three who had immunity—a doctrine asserted by every President since Nixon.

Then there was a different problem with some of the subpoenas. As to some of the other witnesses who were not senior advisers to the President, the President did not assert that they had immunity. Instead, those subpoenas refused to allow those executive branch personnel to have executive branch counsel accompany them. There is an OLC opinion that has been published—it is online and cited in our trial memorandum—stating it is unconstitutional to refuse to allow executive branch counsel to protect privileged information during questioning, and therefore, it is not valid to force them to appear without that counsel.

The CHIEF JUSTICE. Thank you, Counsel.

Ms. Manager LOFGREN. Mr. Chief Justice and Senators, you know, we have received nothing as part of our impeachment inquiry.

It is worth pointing out that the House committees that subpoenaed before the House vote had standing authority under the House rules, and they were the Oversight Committee, which has the standard authority to investigate any matter at any time, as does the Foreign Affairs Committee. It has the authority, under the rules of the House, to issue a subpoena to anyone. Now, we also heard that the House committees that issued the subpoenas. They did, and they were defied.

The idea of absolute immunity has never been upheld by any court, and it is really incomprehensible to think that somehow this concept of absolute immunity has lurked in hiding, for centuries, for Presidents to use it in this day. When you think of the two cases—the Miers case and the McGahn case—the courts completely rejected the idea of absolute immunity.

On the slide, there was a decision recently made in the McGahn case, and here is what it reads: “Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not Kings…. Those are the judge’s words, not mine. “[C]ompulsory appearance by dint of a subpoena is a legal construct, not a political one, and per the Constitution, no one is above the law.” The President is not permitted by the Constitution or by the law to assert any kind of absolute immunity. That does not exist in America, and as the judges pointed out, that would be something that a King would assert. I am not saying that, but I will say this. It is something our Founders set up our checks and balances to prevent. Nobody has absolute power in our system of government—not the Senate and House, not the President, not the judiciary. This is unprecedented and just wrong as a matter of law and as a matter of the Constitution.

Thank you.

The CHIEF JUSTICE. Thank you.

The Senator from Georgia.

Mr. PERDUE. Thank you, Mr. Chief Justice.

I send a question to the desk for both the counsel to the President and the House managers on behalf of Senator Cruz and me.

The CHIEF JUSTICE. The question, on behalf of Senators Cruz and Perdue, reads as follows:

You refused to answer the question on political bias. Are the House Managers refusing
to tell the Senate whether or not the so-called whistleblower had an actual conflict of interest? There are 7 billion people on planet earth; almost all had no involvement in Biden or Ukraine. Are the House Managers unwilling to say whether the so-called whistleblower was a FACT WITNESS who directly participated in (and could face criminal or civil) or Joe Biden demanding Ukraine fire the prosecutor who was investigating Burisma? And why did you refuse to transmit to the Senate the Inspector General's transcripts?

It is addressed to both sides. I think, perhaps, the House managers should go first.

Mr. Manager SCHIFF. With respect to the right of the President and his allies to try to shift the focus to the inspector general of the intelligence community—a highly respected veteran of the Justice Department—in his handling of the whistleblower's complaint, does not release the transcripts of its engagements with inspectors general on sensitive matters because doing so risks undercutting an important mechanism for the committee to conduct oversight. The transcripts remain properly classified in conformity with IC requirements, to protect sensitive information. The IGIC made every effort to protect the whistleblower's identity and briefed us with the expectation that it would not be made public, and we are trying to honor that expectation.

With respect to allegations of bias on the part of the whistleblower, let me just refer you to the conclusion of the inspector general's, which is, after examining the whistleblower, the whistleblower's background, any potential allegations of any bias, the whistleblower drew two conclusions: The whistleblower was credible. Meaning, given whatever was received or not—the inspector general found that whistleblower to be credible. The inspector general also found that the whistleblower's complaint was urgent and that it needed to be provided to Congress. The inspector general further found that it was being filed in violation of the law, in violation of the statute. For that, he is being attacked.

Now, counsel for the President rely on an opinion of the Office of Legal Counsel as its justification for violating the Whistleblower Protection Act and not transmitting the complaint to Congress. The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. Counsel SEKULOW. Thank you, Mr. Chief Justice and Members of the Senate.

Fage 5 of the inspector general's report states: "Although the inspector general's preliminary review identified some indicia of an arguable political bias on the part of the Complainant—" now, that is in the actual statement. He goes on to say: [involving] a rival political candidate, such evidence does not change his view about the credible nature of the concern," or what appears to be credible; but to argue that it does not include an issue of political bias, the inspector general himself says that that is in fact—at least he said the preliminary reviews indicate some political bias.

Now, there have been reports in the media that the individual may have worked for Joe Biden when he was Vice President, that he may have had some area under his watch involving Ukraine.

I also thought it was interesting that Manager SCHIFF just talked about the importance of how they control the process as a means, and I related to the whistleblower's reports because of the sensitive nature of those. Do we not think that the sensitive nature of information shared by the President's most senior advisers should not be subject to the same type of protections? Of course, it has to be.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from West Virginia.

Mr. MANCHIN. Mr. Chief Justice, I send a question to the desk for both the President's counsel and the House managers.

The CHIEF JUSTICE. The question from Senator MANCHIN reads as follows: "The Framers took the words "high crimes and misdemeanors" straight out of English law, where it had been applied to impeachments for 600 years before our Constitution was written. The Framers were fully aware when they chose those words that Parliament had impeached officials for "high crimes and misdemeanors" that were not indictable crimes. The House was repeatedly impeached, and the Senate has convicted, officers for "high crimes and misdemeanors" that were not indictable crimes. Even Mr. Dorshowitz said in 1998 that an impeachable offense "certainly doesn't have to be a crime." What has happened in the past 22 years to change the original intent of the Framers and the historic meaning of the term "high crimes and misdemeanors?"

It is counsel for the President's turn.

Mr. Counsel DERSHOWITZ. Mr. Chief Justice, Senators, what happened since 1998 is that I studied more, did more reading, and I found, like any academic, altered my views. That is what happens. That is what professors ought to do, and I keep reading more, and I keep writing more, and I keep refining my views.

In 1998 the issue before this Senate was not whether a crime was required; it was whether the crime that Clinton was charged with was a high crime. When the impeachment was over, the issue was whether a crime was required.

Actually, 2 years earlier, in a book and then an op-ed, I concluded—not on an academic basis—but I concluded that you could impeach for abuse of power and that that was impeachable, and the Framers rejected abuse of power.

So the Framers didn't want to adopt the British approach. They rejected it by rejecting maladministration. And what is a metaphor or what is a synonym for maladministration? Abuse of power. And whether the Framers rejected abuse of power.

Mr. Congressman SCHIFF asked a rhetorical question: Can a President engage in abuse of power with impunity? In my tradition we answer questions with questions, and so I would throw the question back: Can a President engage in maladministration with impunity?

That is a question you might have asked James Madison had you been at the Constitutional Convention. And he would say: No. A President can engage in that with impunity, but it is not an impeachable crime. Maladministration is not impeachable, and abuse of power is not impeachable.

The issue is not whether a crime is required. The issue is whether abuse of power is a permissible constitutional offense, and the answer history is clearly, unequivocally no. If that had ever been put to the Framers, they would have rejected it with the same certainty they rejected maladministration.

The CHIEF JUSTICE. Thank you, counsel.

Mr. Manager NADLER. Mr. Chief Justice, Members of the Senate, it was always understood that the prime purpose of impeachment was to deal with abuse of power.

The first draft at the Constitutional Convention said "treason or bribery." That was rejected because it wasn't inclusive enough.

Somebody put—Mason proposed maladministration. Found too vague—so they said "high Crimes and Misdemeanors." That was a well-understood term in English law. It was a well-understood term in the Warren Hastings impeachment going on in England. It meant, primarily, abuse of power. That is the main meaning of high crimes and misdemeanors.
Charles Pinckney said those “who be- have amiss or betray their public trust”; Edmund Randolph, “mis-behaves”; I quoted Justice Story the other day. Every impeachment in American history has been for abuse of power in one form or another.

The idea that you have to have a crime—bribery is right there in the Constitution: “Treason, Bribery or other . . . crimes.” Bribery was not made a statutory crime until 1837. So there couldn’t have been impeachment?

The fact of the matter is that crimes and impeachment are two different things. Impeachments are not punishments for crimes. Impeachments are protections of the Republic against a President who would abuse his power, who would aggrandize power, who would threaten liberty, who would threaten the separation of powers, who would threaten the powers of the Congress, who would try to arrogate power to himself.

That is why punishment upon conviction for impeachment only goes to re- moval from office. You can’t put him in jail, as you could for a crime. You can’t fine him, as you could for a crime.

They are two different things. An impeachable offense need not be a crime, and a crime need not be an impeachable offense—two completely different tests understood that way throughout American history and by all scholars—all scholars—in our history except for Mr. Dershowitz.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from North Carolina.

Mr. BURR. Mr. Chief Justice, I send a question to the desk for counsel to the President.

The CHIEF JUSTICE. Senator Burr asks:

We have seen the House managers repeatedly playing video clips of Acting Chief of Staff Mick Mulvaney’s press conference, in which they claim he said there was a quid pro quo. How do you respond to the House managers’ allegations, Mr. Mulvaney supported their claims in his press conference?

Mr. Counsel PURPURA. Mr. Chief Justice, Members of the Senate, Senator, thanks for the question.

We respond as Mr. Philbin did earlier today with that, which is Mr. Mulvaney has issued two statements—one after his press conference and then one Monday after the New York Times article concerning Mr. Bolton’s alleged manuscript—alleged statements in his manuscript.

So I think the easiest thing is just to read them to understand what he said and to put it into context for everyone in the Chamber.

This is from—this is the day of the press conference.

Once again, the media has decided to mis- construe my comments to advance a biased and political witch hunt against President Trump. Let me be clear, there was absolutely no between Ukrainian military aid and any investigation into the 2016 election. The president never told me to

In the first meeting, the Ukrainians naturally wanted to raise the topic of getting the White House meeting that President Zelensky so desperately wanted.

And after raising the issue, at some point Ambassador Sondland said: No, no, we have got a deal. They will get the meeting once they announce the investigations.

And this is the point where Ambassador Bolton stiffened. You can look up Dr. Hill’s exact words. I am paraphrasing here. But this is the point where Ambassador Bolton stiffens and he ends the meeting.

Hill then goes, follows Sondland and the delegation into another part of the White House where the meeting continues between the American delegation and Ukrainian delegation, and there it is even more explicit, because in that second meeting, Sondland brings up the Bidens specifically.

So at that point, that specific conversation is a reference to the quid pro quo over the White House meeting. And we know, of course, from other documents, the testimony about the quid pro quo about the White House meeting, and all the efforts by Giuliani to make sure that the specific investigations aren’t mentioned in order to make this happen.

We don’t take my word for it. We can bring in John Bolton and ask him exactly what he was referring to when he described the drug deal.

Now, did Bolton describe and discuss this drug deal with the President? We certainly appear from what we know about this manuscript that they did talk about the freeze on aid.

And whether John Bolton understood and at what point he understood that the drug deal was even bigger and more painful than he supposed that it involved not just a meeting but involved the military aid, there is one way to find out.

And I would add this in terms of Mr. Mulvaney’s counsel.

The CHIEF JUSTICE. Thank you, Mr. Counsel.

Mr. Manager SCHIFF. Maybe I will add it later.

Mr. HOEVEN, Mr. Chief Justice.

The CHIEF JUSTICE. The President’s counsel has 2½ minutes.

Mr. Counsel PHILBIN. Thank you, Mr. Chief Justice. Thank you, Senator, for the question.

The question asks about what Ambassador Bolton meant in a comment that is purported hearsay by someone else saying what he supposedly said. But what we know is that there are conflicting accounts of the July 10 meeting at the White House.

Dr. Hill says that she heard Ambassador Sondland say one thing. He de- nies that he said that. Dr. Hill says she
went and talked to Ambassador Bolton, and Bolton said something to her about what was said in the meeting where he wasn’t there, and he was saying something about it, calling it a drug deal.

And what he meant by that—I am not going to speculate about it. It is a hearsay report of something he said about a meeting that he wasn’t in, characterized in some way, and I am not going to speculate about what he meant by that.

The CHIEF JUSTICE. Thank you.

Mr. HOEVEN. Thank you, Mr. Chief Justice. I have a question for myself and also for Senator PORTMAN and Senator BOOZMAN. It is for the President’s counsel, and I am sending it to the desk.

The CHIEF JUSTICE. The question from the Senators is as follows:

In September of 2019, the security assistance aid was released to Ukraine. Yet, the House of Representatives did not subject President Trump conditioned the aid on an investigation of the Bidens. Did the Ukrainian President or his government ultimately meet any of the alleged requirements in order to receive the aid?

Mr. Counsel PURPURA. Mr. Chief Justice.

Thanks, Senator, for the question. The very short answer is no. I think that is fair. I think we demonstrated in our presentation on Friday and Monday that the aid was released. The aid flowed. There was a meeting at the U.N. General Assembly. There was a meeting previously scheduled in Warsaw, precisely as President Zelensky suggested, and there was never any announcement of any investigations undertaken regarding the Bidens, Burisma, the 2016 election, no statements made, and no investigations announced or begun by the Ukrainian Government.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Virginia.

Mr. WARNER. Mr. Chief Justice, I send a question to the desk for the House managers.

The CHIEF JUSTICE. Senator WARNER’s question is:

Do you know about additional information related to Russia disseminating President Trump’s or Rudolph Giuliani’s conspiracy theories? Should the Senate have this information before we deliberate on the Articles of Impeachment?

Mr. Manager SCHIFF. Mr. Chief Justice, Senators, I think there are three categories of relevant material here.

The first, we do have access to, and that is the supplemental testimony of Jennifer Williams, and I would encourage you all to read it. I think it sheds light very specifically on the Vice President and what he may or may not know vis-a-vis this scheme. So I would encourage you to read that submission.

There was a second body of intelligence that the committees have provided that is relevant to this trial that you should also read, and we should figure out the mechanism that would permit you to do so because it is directly relevant to the issues we are discussing and pertinent.

There is a third category of intelligence, too, which raises a very different problem, and that is that the intelligence communities are for the first time refusing to provide to the Intelligence Committee. That material has been gathered. We know that it exists. But the NSA has been advised not to provide it.

Now the Director says that this is the Director’s decision, but nevertheless there is a body of intelligence that is relevant to the requests that we have made that is not being provided. That raises a very different concern than the one before this body, and that is, are now other agencies like the intelligence community that we require to speak truth to power, that we require to provide us with the best intelligence, now also withholding information at the urging of the administration? That is, I think, a deeply concerning and new phenomenon. That is a problem that we had previously with other Departments that have been part of the wholesale obstruction, but now it is rearing its ugly head with respect to the IC.

But the shorter answer to the question of, apart from Jennifer Williams, are there other relevant materials? The answer is yes, and I would encourage that you and we work together to find out how you might access them.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The majority leader.

Mr. McCONNELL. Mr. Chief Justice, the next two questions—one from each side—would be the last before we break for dinner. I would ask that following the next two questions, the Senate stand in recess for 45 minutes.

The CHIEF JUSTICE. Thank you.

The Senator from Alabama.

Mr. SHELBY. I send a question to the desk.

The CHIEF JUSTICE. Thank you. Senator SHELBY’s question is directed to counsel for the President.

How does the “abuse of power” standard advanced by the House Managers differ from “maladministration”—an impeachment standard rejected by the Framers? Where is the line between such an “abuse of power” and a policy disagreement?

Mr. Counsel DERSHOWITZ. Mr. Chief Justice, I will address this.

Senators, thank you very much for that question because that question I think hits the key to the issue that is before you today.

When the Founders rejected maladministration—and recall that it was introduced by Mason and rejected by Madison on the ground that it would turn the new Republic into a parliamentary democracy where a Prime Minister—in this case, a President—can be removed at the pleasure of the legislature.

Remember, too, that in Britain, impeachment was not used against the Prime Minister, and neither was a vote of no confidence; it was used against lower level people.

So maladministration was introduced by Mason, and Madison said no, it was just too vague and too general.

What is maladministration? If you look it up in the dictionary and you look up synonyms, the synonyms include abuse, corruption, misrule, dishonesty, misuse of office, and misbehavior.

Even Professor Nicolas Bowie, a Harvard professor who was in favor of impeachment, so this is an admission by a strong supporter of the President—he is in favor of impeachment—he says abuse of power is the same as misconduct in office, and he says that his research leads him to conclude that a crime is required.

By the way, the Congressman was just completely wrong when he said I am the only scholar who supports this position. In the 19th century, which was closer in time to when the Framers wrote, Dean White of Columbia Law School wrote that “the weight of authority” was in favor of requiring a crime. That was 1867—“the weight of authority is in favor of requiring a crime.” Justice Curtis came to the same conclusion. Others have come to a similar conclusion.

You ask what happened between 1998 and the current time to change my mind. What happened between the 19th century and 20th century to change the mind of so many scholars to tell you what happened. What happened is that the current President was impeached.

If, in fact, President Obama or President Hillary Clinton would have been impeached, the weight of current scholarship would clearly be in favor of my position because these scholars do not pass the “shoe on the other foot” test. These scholars are influenced by their own bias, by their own politics, and their views should be taken with that in mind. They simply do not give objective assessments of the constitutional history.

Professor Tribe suddenly had a revelation himself. At the time Clinton was impeached, he said: Oh, the law is clear. You cannot—you cannot—charge a President with a crime while he is a sitting President.

Now we have our current President. Professor Tribe got woke, and with no apparent new research, he came to the conclusion: Oh, but this President can be charged while sitting in office.

That is not the kind of scholarship that should influence your decision. You can make your own decisions. Go back and read the debates, and you will see that I am right that the Framers rejected vague, open-ended criteria—abuse of power.

And what we had was the manager making a fundamental mistake again. She gave reasons why we have impeachment. Yes, we feared abuse of power. Yes, we feared criteria like maladministration. That was part of the reason. We feared incapacity. But none
of those made it into the criteria because the Framers had to strike a balance. Here are the reasons we need impeachment, yes. Now, here are the reasons we fear giving Congress too much power. So we strike a balance. How did they strike it? Treason, a serious criminal offense. The Constitution and turn it, in the words of one of the Senators at the Johnson trial, to make every Member of the Senate, every Member of Congress, be able to define it from within their own bosom.

We heard from the other side that every Senator should decide whether you need proof beyond a reasonable doubt or proof by a preponderance. Now we hear that every Senator should decide on abuse of power.

The CHIEF JUSTICE. Thank you.

Mr. Counsel DERSHOWITZ. Thank you, Mr. Chief Justice.

The Senator from Maryland.

Mr. CARDIN. Mr. Chief Justice, I have a question on behalf of Senator MARKEY and myself, and I send it to the desk.

The CHIEF JUSTICE. Thank you.

The question is as follows: Supreme Court Justice Byron White, in a concurring opinion in Nixon v. United States (1969), acknowledged that the Senate “has very wide discretion in specifying impeachment trial procedures,” but stated that the Senate “would abuse its discretion” if it were to adopt a procedure that could not be deemed a trial by a reasonable judge. If the Senate does not allow for additional evidence and the testimony of key witnesses with firsthand knowledge of President Trump’s actions and intentions, would a “reasonable judge” conclude these proceedings constitute a constitutionally fair trial?

Mr. Manager SCHIFF. I think the answer is no. I don’t know that we need to look to the words of a prior Justice to tell us that a trial without witnesses is not really a trial. It is certainly not a fair trial. If the House moves forward with impeachment and it comes before the Senate and wants to call witnesses and wants to make its case and is told “Thou shalt not call witnesses,” that is not a fair trial.

I tell the American people understand that without reading the case law. They go to jury duty themselves and stand that without reading the case. I read you a list of 40 American Presidents who have been accused of abuse of power. Should every one of them have been impeached? Should every one of them have been removed from office? It is too vague a term.

Reject my argument about crime. Reject it if you choose to. Do not reject my argument that abuse of power would destroy—destroy—the impeachment tribunals of the Constitution and turn it, in the words of one of the Senators at the Johnson trial, to make every Member of the Senate, every Member of Congress, be able to define it from within their own bosom.

We heard from the other side that every Senator should decide whether you need proof beyond a reasonable doubt or proof by a preponderance. Now we hear that every Senator should decide on abuse of power.

The CHIEF JUSTICE. Thank you.

Mr. Counsel DERSHOWITZ. Thank you, Mr. Chief Justice.

The Senator from Maryland.

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The CHIEF JUSTICE. Thank you.

The question is as follows: Supreme Court Justice Byron White, in a concurring opinion in Nixon v. United States (1969), acknowledged that the Senate “has very wide discretion in specifying impeachment trial procedures,” but stated that the Senate “would abuse its discretion” if it were to adopt a procedure that could not be deemed a trial by a reasonable judge. If the Senate does not allow for additional evidence and the testimony of key witnesses with firsthand knowledge of President Trump’s actions and intentions, would a “reasonable judge” conclude these proceedings constitute a constitutionally fair trial?

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I tell the American people understand that without reading the case law. They go to jury duty themselves every year, and they see that the first thing that takes place after a jury is sworn in is the government makes its opening statement, the defense makes theirs, and then begins the calling of witnesses.

I do want to take this opportunity to respond to Professor Dershowitz’s argument about what the impeachment trial. You can say things about Alan Dershowitz, but you cannot say he is unprepared. He is not unprepared today. He was not unprepared 21 years ago. And to believe that he would not have read 21 years ago what Mason had to say or Hamilton to say—I am sorry. I don’tbuy that. I think 21 years ago he understood that maladministration was rejected but so was a provision that confined the impeachable offenses to treason and bribery alone was rejected.

I think the Alan Dershowitz from 21 years ago understood that, yes, while you can’t impeach for a policy difference, you can impeach a President for abuse of power. That is what he said 21 years ago. Nothing has changed since then.

I don’t think you can write off the consensus of constitutional opinion by saying they are all Never Trumpers. All the constitutional law professors—in fact, let’s skip from Professor Turley, who was in the House defending the President, and see what he had to say recently.

(Text of Videotape presentation:)

Professor TURLEY. Abuse of power, in my view, is clear. You can impeach a President for abuse of power and you can impeach a President for noncriminal conduct.

Mr. Manager SCHIFF. We can’t argue plausibly that his position is owing to some political bias, right? Just a few weeks ago, he was in the House arguing a case for my GOP colleagues that the President shouldn’t be impeached.

Now, he did say: Well, if you can actually prove these things, if you can prove—as, indeed, we have—that the President abused his power by conditioning military aid to help his reelection campaign, yes, that is an abuse of power. You can impeach with that kind of abuse of power, and that is exactly what we have here.

We are not required to leave our common sense at the door. If we are to interpret the Constitution now as saying that a President can abuse their power—and I think the professor suggested before the break that he can abuse his power in an unconstitution way to help his reelection and you can’t do anything about it—you can’t do anything about it because if he views it as in his personal interest, that is just fine. He is allowed to do it.

None of the Founders would have accepted that kind of reasoning. In fact, the idea that the core offense that the Founders protected against—that core offense is abuse of power—is beyond the reach of Congress through impeachment would have terrified the Founders. I will say that you can’t imagine any number of abuses of power—a President who withholds aid from another country at war as a thank you for that ad

versary allowing him to build a Trump Tower in a country. OK, that may not be criminal, but are we really going to say that we are going to have to permit a President of the United States to withhold military aid as a thank you for business proposition his business?

Now, counsel acknowledges that a crime is not necessary but something akin to a crime. Well, we think there is a crime here of bribery or extortion—conditioning official acts for personal favors. That is bribery. It is also what these Founders understood it to be. And you cannot argue—even if you argue well, under the modern definition of bribery, you have got to show such and such—you cannot plausibly argue that it is not akin to bribery. It is bribery. But it is certainly akin to bribery.

That is the import of what they would argue—that, no, the President has a constitutional right. Under article II, he can do anything he wants. He can abuse his office and do so sacrificing national security, undermining the integrity of the elections, and there is nothing Congress can do about it.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The question is for counsel for the President.

Ms. MCSALLY. I send a question to the desk on behalf of myself and Senators Scott from Florida, HAWLEY, and HOEVEN.

The CHIEF JUSTICE. Thank you.

The question is for counsel for the President.

Ms. MCSALLY. I send a question to the desk on behalf of myself and Senators Scott from Florida, Senator HAWLEY, and Senator HOEVEN.

Chairman SCHIFF just argued that “we think there’s a crime here of bribery or extortion,” or “something akin to bribery.” Do the articles of impeachment charge the President with bribery, extortion, or anything akin to it? Do they allege facts sufficient to prove either crime? If not, are the House Managers’ discussion of crimes they neither alleged nor proved appropriate in this proceeding?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for that question.

None of the Articles of Impeachment do not charge the crime of bribery, extortion, or any other crime. And that is a critical point because, as the Supreme Court has explained, “No principle of procedural due process is more clearly established than that of notice of the charge . . . and the chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused.”
That was the Supreme Court in Cole v. Arkansas.

The Court has also explained that for over 130 years, a court cannot permit—it has been the rule that ‘a court cannot permit—this is the rule in criminal law, and it is also the case for impeachments.

It is the House’s responsibility to make an accusation and a specific accusation in Articles of Impeachment. The House counsel has argued that they put in the articles were abuse of power on a vague standard that they made up and obstruction of Congress. They put some discussion about other things in a House Judiciary Committee report, but they did not put that in the Articles of Impeachment.

And if this were a criminal trial in an ordinary court and Mr. Schiff had done what he just did on the floor here and about crime about crimes of bribery and extortion that were not in the indictment, it would have been an automatic mistrial. We would all be done now, and we could go home. Mr. Schiff knows that because he is a former prosecutor.

It is not permissible for the House to come here, failing to have charged—failing to have put in Articles of Impeachment any crime at all, and then to start arguing that, actually, oh, we think there is some crime involved, and, actually, we think we actually proved it, even though we provided no notice we were going to try to prove that.

It is totally impermissible. It is a fundamental violation of due process.

Scholars have pointed out those rules apply equally in cases of impeachment. Charles Black and Philip Bobbitt explained in their work "Impeachment: A Handbook" that is regarded as one of the authorities—collecting sources of authoritative statements.

The senator’s role is solely one of acting as an impartial juror. The reason why we are here has nothing to do with the President’s children or the Bidens’ children. This is about the President’s wrongdoing.

Mrs. Manager DEMINGS. Mr. Chief Justice, and to the Senators, thank you so much for that question. Let me just preface what I am about to say with this statement: This has been a tough few days. It has been a trying time for each of us and for our Nation.

But I just want to say this in response to the question that has been posed. I stand before you as the mother of three sons. I am sure that many of you in this Chamber have children—sons and daughters—and grandchildren that you think the world of. My children’s last name is Demings. So, when you go home tonight, I wonder if there are people who associate my sons with their mother and their father.

I just believe, as we go through this very tough, very difficult debate about whether to impeach and remove the President of the United States, that we stay focused. The last few days we have seen many distractions. Many things have been said to take our minds off of the truth, off of why we are really here.

In my former line of work, I used to call it a conflict of interest—what is an oligarch who was repeatedly under investigation for corruption, for money laundering, and other offenses.

Contemporaneous press reports speculated that Hunter Biden’s role with Burisma might undermine U.S. efforts led by his father then, at that time, to promote the U.S. anticorruption message abroad, including in the United States and its efforts to stop corruption.

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for that question. And the straightforward answer is, yes, the evidence does show that it would be in the interest of the United States. In fact, the evidence on that point is abundant.

Here is what we know: Hunter Biden was appointed to the board of an energy company in Ukraine without any apparent experience that would qualify him for that position. He was appointed shortly after his father, the Vice President, became the Obama administration’s point man for policy on Ukraine.

We know that his appointment raised several red flags at the time. Chris Heinz, the stepson of the then-Secretary of State, severed his business relationship with Hunter citing Hunter’s lack of judgment in joining the board of that company, Burisma, because Burisma was owned by an oligarch who was repeatedly under investigation for corruption, for money laundering, and other offenses.

The Washington Post said: “The appointment of the Vice President’s son to a Ukrainian oil board looks nepotistic at best, nefarious at worst.”

There were other articles. There was one that reported: “The credibility of the United States was not helped by the fact that Hunter had been on the board of the directors of Burisma.”

There was another article saying: “Sadly, the credibility of Mr. Biden’s
message may be undermined by the association of his son with a Ukrainian natural-gas company, Burisma Holdings, which is owned by a former government official suspected of corrupt practices.

And went on: Reports from the Wall Street Journal said that activists here—that is, in the Ukraine—say that the U.S.’s anti-corruption message is being undermined as his son receives money from a former Ukrainian official who is under investigation for graft.

At the same time, within the Obama administration, officials raised questions. The Special Envoy for Energy Policy, Amos Hochstein, raised the matter with the Vice President. Similarly, Deputy Assistant Secretary of State Kent testified that he, too, voiced concerns with Vice President Biden’s office.

Everyone who was asked in the proceedings before the House of Representatives testified that there was at least an appearance of a conflict of interest when Mr. Biden’s son was appointed to the board of this company. That included Ambassador Yovanovitch, Deputy Assistant Secretary Kent, Lieutenant Colonel Vindman, Jennifer Williams,57 Ambassador Volker,7 Ambassador Taylor,8 and Ambassador Pyatt. They all agreed there was an appearance of a conflict of interest.

Even in the transcript of the July 25 telephonic phone call, President Zelensky himself acknowledged the connection between the Biden and Burisma incidents, the firing of the prosecutor who reportedly had been looking into Burisma, when Vice President Biden openly acknowledged he leveraged a billion dollars in U.S. loan guarantees to make sure that that particular prosecutor was fired. He openly acknowledged it was an explicit quid pro quo: You don’t get a billion dollars in loan guarantees unless and until that prosecutor is fired. Mr. President, your plane is leaving in 6 hours, he said on the tape.

And when the President, President Trump, raised this in the July 25 call, President Zelensky recognized that this related to corruption, and he said: “The issue of the investigation of the case”—and he’s referring to the case of Burisma—“is actually the issue of making sure to restore the honesty, so we will take care of that . . . .” And he later said in an interview that he recognized President Trump was not saying to him things are corrupt in Ukraine, and he was trying to explain, no, we are going to change that; there is not going to be corruption.

So that explicit exchange in the July 25 call shows that President Zelensky recognized that Biden-Burisma incidents had an impact on corruption and anti-corruption. And so it was definitely undermining the U.S. message on anti-corruption, and it was a perfectly legitimate issue for the President to pursue with Vice President Zelensky to make clear that the United States did not condone anything that would seem to interfere with legitimate investigations and to enforce the proper anti-corruption message.

Thank you.
The CHIEF JUSTICE. Thank you, counsel.
The Senator from Illinois, Mr. DURBIN, Mr. Chief Justice, I send a question to the desk.
The CHIEF JUSTICE. Thank you. Senator DURBIN’s question is directed to the House managers:

Would you please respond to the answer that was just given by the President’s counsel?

Ms. Manager GARCÍA of Texas. Mr. Chief Justice, Senators, the President sought Ukraine’s help in investigating the Bidens only after reports suggested Vice President Biden might enter the 2020 Presidential race and would seriously challenge President Trump in the polls. President Trump had no interest in Biden’s Obama-era Ukraine work in 2017 or 2018 when Biden was not running against Trump.

None of the 17 witnesses in the impeachment inquiry provided any credible evidence—no credible evidence—to support the allegation that former Vice President Biden acted inappropriately in any way in Ukraine. Instead, witnesses testified that the former Vice President was carrying out official U.S. policy in coordination with the international community when he advocated for the ouster of a corrupt Ukrainian official. In short, the allegations are simply unfounded. President Trump’s own handpicked special envoy to Ukraine, Ambassador Kurt Volker, knew they were unfounded too. He testified that he confronted the President’s attorney, Mr. Giuliani, about these conspiracy theories and told him that “it is simply not credible to me that Joe Biden would be influenced in his duties as Vice President by money or things for his son or anything like that. I’ve known him a long time. He’s a person of integrity, and that is not credible.”

Giuliani acknowledged that he did not find one of the sources of these allegations, a former Ukrainian prosecutor, to be held credible. So even Giuliani knew the allegations were false.

Our own Justice Department confirmed that the President never spoke to the Attorney General about Ukraine or any investigation into Vice President Biden. President Trump genuinely believed that there was a legitimate basis to request Ukraine’s assistance in law enforcement investigations, there are specific formal processes that he should have followed. Specifically, he could have asked the DOJ to make an official request for assistance through the mutual legal assistance treaty.

It is worth noting, the President only cares about Hunter Biden to the extent that he is the Vice President’s son and, therefore, may be perceived to smear a political opponent. But President Trump specifically mentioned Vice President Biden in asking for the removal of the former prosecutor on that July 25 call. That is what he wanted, not an investigation into Hunter Biden. This is yet another reason you know that there is no basis for investigating Vice President Biden.

Can we get slide 52 up?
The timing shows clearly that despite the fact that this conduct occurred in 2015, it wasn’t until Vice President Biden began consistently beating Trump in national polls in the spring of 2019 by significant margins that the President targeted Biden. He was scared of losing. The President wanted to cast a cloud over a formidable political opponent. This wasn’t about any genuine concern of wrongdoing. The evidence proves that. This was solely about the President wanting to make sure that he could do whatever it took to make sure that he could win. So he froze the critical money to Ukraine to coerce Ukraine to help him attack his political opponent and secure his reelection.

The President of the United States cannot use our taxpayer dollars to pressure a foreign government to do his personal bidding. No one is above the law.

I yield back.
The CHIEF JUSTICE. The question is from Senator Scott of South Carolina.
Mr. SCOTT of South Carolina. Thank you, sir.

I send a question to the desk on behalf of myself, Senators CRAPO and GRAHAM, for the White House counsel.
The CHIEF JUSTICE. The question is from Senator Scott of South Carolina and other Senators to the White House counsel:

House managers claim that the Biden/Burisma affair has been debunked. What agency within the government or independent investigation led to the debunking?

Mr. Counsel HERSCHMANN. Mr. Chief Justice, Members of the Senate, there is no evidence in the record about any investigation, let alone debunked, of Mr. Biden, discredited, or, as Manager JEFFRIES told you tonight, phony.

The House managers haven’t cited any evidence in the record because none exists. A couple of days ago, I read to you a quote and statement from Vice President Biden dealing with corruption in Ukraine. What I didn’t tell you was he made those statements before the Ukrainian Parliament directly.

Trump spoke about the historic battle of corruption. He spoke about fighting corruption, specifically in the energy sector. He spoke about no sweetheart deals. He said oligarchs and nonoligarchs must play by the same rules.

Corruption siphons away resources from the people. It blunts economic growth, and it affronts the human dignity.

Those were Vice President Biden’s words. So the real question is this: Is corruption related to the energy sector in Ukraine run by a Ukrainian oligarch who is paying our Vice President’s son and his son’s business partner millions of dollars for no apparent
legitimate reason while his father was overseeing our country’s relationship with Ukraine merit any public inquiry, investigation, or interest? The answer is yes.

Simply saying it didn’t happen is ridiculous. With all due respect to the House managers and citing to our children, the message to our children, especially when you oversee a corruption in trying to root it out in another country, is to make sure your children aren’t benefiting from it. That is what should be happening—not to sit there and say that it is OK.

The House managers don’t deny that there is a legitimate reason to do an investigation. They just say it was debunked: it is a sham; it is delegitimate; but they don’t tell you when it happened.

We all remember the email that Chris Heinz sent. Keep this in mind. He is the then-Senator John Kerry, Chris Heinz. He sends an official email to the State Department, to the chief of staff to John Kerry, and special assistant. The subject is Ukraine. There is no question when you look at that email that it is a warning shot to say: I don’t know what they are doing, but we are not invested in it.

He is taking a giant step back.

Think about the words, and remember the video that we saw about Hunter Biden. What did he say? I am not going to “open my kimono”—I am not going to “open my kimono”—when he was asked how much money he was making. In one month—in one month alone—what he earned in a year. And you don’t think that merits inquiry?

Does anyone here think, when they say he is a done deal then- Secretary of State John Kerry, he sends an email to that email to the chief of staff to John Kerry, and special assistant. The subject is Ukraine. There is no question when you look at that email that it is a warning shot to say: I don’t know what they are doing, but we are not invested in it.

They just say: Yes, you get those four witnesses. And the White House and the President’s counsel get what? Mr. SCHUMER. Whatever you want. Mr. Counsel SEKULOW. Whatever I want. That is what you said, Mr. Schumer.

Whatever I want? Here’s what I want. I want ADAM SCHIFF. I want Hunter Biden. I want Joe Biden. I want the whistleblower. I want to also understand something else: Despite the, obviously, is an undercurrent. But to say that this is not going to extend this proceeding—months, because understand something else: Despite the, you know, executive privilege and other nonsense, I suspect Manager SCHIFF—smart guy—he is going to say: Wait a minute, I have some speech and debate privileges that may be applicable to this.

I am not saying that they are. But they may raise it. It would be legitimate to raise it. So this is a process that we would be—this would be the first of many weeks.

I think we have to be clear. They put this forward in an aggressive and fast-paced way, and now they are saying “Now we need witnesses”—after 31 or 32 times you said you proved every aspect of your case. That is what you said.

He just said he did. Well, then, I don’t think we need any witnesses. Thank you.

The CHIEF JUSTICE. Thank you. counsel.

The Senate from Oregon. Mr. MERKLEY. Thank you, Mr. Chief Justice.

On behalf of the Senator from New Mexico, MARTIN HINCHIK, and myself, I have a question to send to the desk.

The CHIEF JUSTICE. The question from Senator MERKLEY and other Senators is for counsel.

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, to address your question specifically, the allegation that came out in the New York Times article about a conversation that is allegedly reported in the manuscript between the President and Ambassador Bolton and officials, lawyers in the White House Counsel’s Office learned about that allegation for the first time on Sunday afternoon when the White House was contacted by the New York Times.

In terms of the classification review, it is conducted at the NSA. The White House Counsel’s Office is not involved in classification review, determining what is classified or not classified.

I can’t state the specifics. My understanding is that it is conducted by career officials at the NSA, but it is handled by the NSA. I am not in a position to give you full information on that.

My understanding is, it is being done by career officials. But it is not being done by lawyers in the White House Counsel’s Office.

I hope that answers your question, Senator.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Alaska. Mr. SULLIVAN. Mr. Chief Justice, I send a question to the desk on behalf of myself and Senator LANKFORD for the President’s counsel:

The CHIEF JUSTICE. Thank you.

The question from Senators SULLIVAN and LANKFORD to the counsel for the President:

There has been conflicting testimony about how long the Senate might be tied up in obtaining additional evidence. At the beginning of this trial, the minority leader offered amendments to obtain additional evidence in the form of documents and deposition from several federal agencies. If the Senate had adopted all 11 of these amendments, how long do you think this impeachment trial would take?

Mr. Counsel SEKULOW. Mr. Chief Justice, Members of the Senate, it would take a long time. It would take a long time just to get through those motions.

But there have been 17 witnesses. We are talking about, now, additional witnesses that the managers have put forward and that Democratic Leader SCHUMER has discussed. He has discussed four witnesses in particular, as if this body—if it were to grant witnesses would say: Yes, you get those four witnesses. And the White House and the President’s counsel get what?

Mr. Counsel SEKULOW. Whatever you want. Mr. Counsel SEKULOW. Whatever I want. That is what you said, Mr. Schumer.

Whatever I want? Here’s what I want. I want ADAM SCHIFF. I want Hunter Biden. I want Joe Biden. I want the whistleblower. I want to also understand something else: Despite the, you know, executive privilege and other nonsense, I suspect Manager SCHIFF—smart guy—he is going to say: Wait a minute, I have some speech and debate privileges that may be applicable to this.

I am not saying that they are. But they may raise it. It would be legitimate to raise it. So this is a process that we would be—this would be the first of many weeks.

I think we have to be clear. They put this forward in an aggressive and fast-paced way, and now they are saying “Now we need witnesses”—after 31 or 32 times you said you proved every aspect of your case. That is what you said.

He just said he did. Well, then, I don’t think we need any witnesses. Thank you.

The CHIEF JUSTICE. Thank you. counsel.

The Senator from New Jersey. Mr. MENENDEZ. Mr. Chief Justice, I send a question to the desk and refer it to the House managers.

The CHIEF JUSTICE. The question is from Senator MENENDEZ to the House managers:

President Trump has maintained that he withheld U.S. security assistance to Ukraine because he was concerned about corruption.
Yet, his purported concern about corruption did not prevent his Administration from sending congressionally-appropriated assistance to Ukraine more than 45 times between January and June 2019, totaling more than $1.5 billion. So why did the President suddenly become concerned about corruption in early 2019?

Mr. Manager CROW, Mr. Chief Justice, Senator, thank you for the question.

He became concerned about corruption supposedly in early 2019 because Vice President Biden was running for election for the Presidency. That is what the President said in August 2020.

But the facts show nothing has changed. In the words of Lieutenant Colonel Vindman and other witnesses, the conditions on the ground had not changed.

So when I look at all of this, whether it is the late need of witnesses after you prove your case, whether privileges apply or not apply—Senator SCHUMER said: We get anybody we want—we would be here for a very, very long time, and that is not good for the United States.

Thank you. The CHIEF JUSTICE. Thank you, counsel.

The Democratic leader is recognized. Mr. SCHUMER. I have a question for the desk.

The CHIEF JUSTICE. Senator SCHUMER's question is for the House managers: Would you please respond to the answer that was just given by the President's counsel?

Mr. Manager SCHIFF. I think we can all see what is going on here, and that is, if the House wants to call witnesses, if you want to hear from a single witness, if you want to hear what John Bolton has to say, we are going to make this endless. We, the President's lawyers, are going to make this endless. We promise you, we are going to want ADAM SCHIFF to testify. We want Joe Biden to testify. Hunter Biden. We are going to want the whistleblower. We are going to want everyone in the world. If you dare, if you have the unmitigated temerity to want witnesses in a trial, we will make you pay for it with endless delay. The Senate will never be able to go back to its business.

That is their argument.

How dare the House assume there will be witnesses in a trial. Shouldn't the House have known when they undertook its investigation that the Senate was never going to allow witnesses; that this would be the first impeachment trial in the history of the Republic with no witnesses?

So Mr. Sekulow wants me to testify. I would like Mr. Sekulow to testify about his contact with Mr. Parnas or Mr. Cipollone about the efforts to implement the President's fight on all subpoenas. I would like to ask questions about—well, I would like to ask questions about the President and put him under oath. But we are not here to indulge in fantasy or distraction; we are here to talk about people with pertinent and probative events here. I want to ask what happens. It sounds like, to me, that this is— they are acting like this is some municipal traffic court proceeding. I remind everybody that we are talking about—under their Articles of Impeachment, they are requesting the removal of the President of the United States. So, you know, they are already saying in the media that their ongoing investigation here, they are going to continue to investigate. So are we going to be doing this every 3 weeks, every month except in the summer? There is an election months away. The people should have a right to vote. My colleague Pat, Chairman, the White House counsel, said that.

First, the publicly released records of President Trump's April 21 and 25 calls to President Zelensky never mention the word "corruption" despite the fact that the talking points for these calls prepared by his own staff listed "corruption.

Second, in May 2019, the State Department certified to Congress Ukraine had "taken substantial actions for the purposes of decreasing corruption" and met the anti-corruption benchmarks this very body established when it appropriated $250 million of those funds.

Third, if the July 25 call, President Zelensky had already established his anti-corruption bona fides, having introduced a number of reform bills in Ukraine.

Fourth, on July 26, the day after his call with President Zelensky, President Trump spoke to Ambassador Sondland, who was in Ukraine. The one question the President asked Ambassador Sondland was not about corruption but about whether or not President Zelensky was going to do the investigations.

Fifth, the released aid—as your question points out, Senator, the President released the aid in 2017 and in 2018, and he released it in 2019 only after having gotten caught. In the words of Lieutenant Colonel Vindman and other witnesses, the conditions on the ground had not changed.

So we are hearing a lot tonight about the concern about corruption, Burisma, Russia, but the facts still matter here. We are here for one reason and one reason only: The President of the United States withheld foreign aid that he was happy to give in the 2 prior years; that suddenly, we are to believe, that he was happy to give in the 2 prior years; and one reason only: The President of the United States withheld foreign aid and one reason only: The President of the United States withheld foreign aid and one reason only: The President of the United States withheld foreign aid because nothing has changed.

This leads us inevitably to only one conclusion, and that is that the President of the United States used taxpayer dollars—the American people's money—to withhold aid from an ally at war to benefit his political campaign.
make decisions about whether a witness is material or not, whether it is appropriate to put a whistleblower or not, whether to—whether a particular passage in a document is privileged or not. It is not going to take months of litigation, although that is what the President is threatening.

They are doing the same thing to the Senate they did to the House, which is, you try to investigate the President, you try to try the President, we will tie you and your entire Chamber up in knots for years and months. And you know something? They will if you let them.

You don’t have to let them. You can subpoena John Bolton. You can allow the Chief Justice to make a determination in camera whether something is relevant, whether it deals with Ukraine or Venezuela, whether it is privileged or it isn’t, whether the privilege is being misused to hide criminality or wrongdoing. We don’t have to go up and down the courts; we have perfectly good Chief Justice sitting right behind me who can make these decisions in real time. So don’t be thrown off by this claim: Oh, if you even think about it, we are going to drag this along for delays like you have never seen. We are going to call witnesses that will turn this into a circus.

It shouldn’t be a circus. It should be a fair trial. You can’t have a fair trial without witnesses.

I think when I was asked that question before, I answered in the affirmative—in the negative. You can’t have a fair trial without witnesses, and you shouldn’t presume that when a House impeaches, the Senate trials from now on will be witness-free, will be evidence-free. That is not what the Founders intended. If it was, they would have made you the court of appeals. But they didn’t. They made you the court of fact. They expected you to hear from witnesses, to hear from witnesses. They expected you to evaluate their credibility.

Don’t take my word for it about John Bolton. Look, I am no fan of John Bolton’s—although I like him a little more than I used to—but you should hear from him. You should want to. Don’t take General Kelly’s view for it. Make up your own mind whether you are to believe him or Mick Mulvaney. Will you believe John Bolton or the President? Make up your own mind. Yes, we proved our case, counsel. We proved it overwhelmingly. But you chose to contest the fact that the President withheld military aid to coerce an ally. You chose to contest it. You chose to make John Bolton’s testimony relevant, pertinent. If you had stipulated the President did as he is charged, then you might make the argument that you are making here, but you haven’t. You contested it. And now you want to say: But the Senate should not hear from this witness. That is not a fair trial. It is not even the appearance of fairness. You can’t have a fair trial without basic fairness.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Louisiana, Mr. CASSIDY. Mr. Chief Justice, I send a question to the desk on behalf of myself and Senator Risch, both to the White House counsel and the House managers.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Question from Senator CASSIDY and Senator Risch to both parties, beginning with the President’s counsel first:

We saw a video of Mr. NADLER saying: “There was no quid pro quo, no impeach or an impeachment supported by one of our major political parties and opposed by the other. Such an impeachment will lack legitimacy, will produce divisiveness and unction in our politics for years to come, and will call into question the very legitimacy of our political institutions.”

Given the well-known dislike of some House Democrats for President Trump and the stated desire of some to impeach before the President was inaugurated, and the strictly partisan vote in favor of impeachment; and the current proceedings typify that which Mr. NADLER warned against 20 years ago?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for the question. The simple answer is yes. These proceedings typify the sort of proceedings that Mr. White House counsel NADLER warned against 20 years ago. It was a purely partisan impeachment. And it has been clear that at least some factions on the other side of the aisle—the Democratic side of the aisle—were looking for some way to impeach the President from the day he was sworn in and even before the day he was sworn in, and that is dangerous for our country.

To allow partisan venom and enmity like that to take hold and become the norm for driving impeachments is exactly what the Framers warned against. It is in Federalist No. 65, Hamilton warned against it. He warned against persecution by an intemperate and designing majority. And the House of Representatives found that is exactly what the Framers did not want impeachment to turn into. Yet that is clearly what it is turning into here.

Both Manager NADLER and Democratic Leader SCHUMER, in the video that we saw, were president in forewarning that, if we start to go down this road, one thing that seems to be sure in Washington is that what goes around comes around. If it is done once to one party, it will happen again to the other party next time to the other party once the office of the President changes hands. Then we will be in a cycle. It will get worse and worse, and it will be more and more, and every President will be impeached. That is not what the Framers intended, and this body shouldn’t allow it to happen here.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

Manager JEFFRIES. The evidence is overwhelming that President Trump pressured a foreign government to target an American citizen for personal and political gain as part of President Trump’s corrupt effort to cheat and solicit foreign interference in the 2020 election.

There is a remedy for that type of stunning abuse of power, and that remedy is in the Constitution. That remedy is impeachment and the consider-
quó but that Zelensky needs to go to the mic, and what is more, he should want to—no quid pro quo but quid pro quo.

This reminds me of something that came up earlier. Why would the President engage in this kind of shake-down with others being within earshot? You know, I think this question comes up in almost every criminal trial. Why would the defendant do that?

Sometimes it is very hard to fathom, and sometimes it is just that people make mistakes. In this case, I think the President truly believes that he is above the law. He truly believes that he is above the law. It doesn’t matter who is listening. It doesn’t matter who is listening. If it is good for him—I guess this is a version of Dershowitz’ argument—if it is good for him, it is good for the state because he is the state. It helps his reelection, it is good for America, and whatever means he needs to effectuate his election, whether it is withholding military aid or what have you, as long as it helps him get elected, well, it is good for America is the state. That is why I think he is so irate when people come forward and blow the whistle, not just the whistleblower but people like John Bolton or General Kelly.

You might ask the question: Why do so many people who leave this administration walk away from this President with such conviction that he is undermining our security that you cannot believe what he says? Think about this: The President’s now former Chief of Staff, General Kelly, doesn’t believe the President of the United States; he believes John Bolton. I mean, can everybody be disgruntled? Can it all be a matter of bias? I think we know the answer. I think we know the answer. I mean, how do you believe a President to whom the Washington Post has documented so many false statements? The short answer is, you can’t.

I remember, early in his Presidency, many of us talked about how once as President, you lose your credibility, and once as President, your country or your friends or allies around the world cannot rely on your word and just how disruptive and dangerous it is to the country. So, can’t accept the denial. It is too large a deal.

Indeed, if you look at the Wall Street Journal article that Senator Johnson was interviewed in, when he had that conversation with Sondland and had that sinking feeling because he didn’t want those two things tied together, everyone understood they were tied together. It was as simple as two plus two equals four.

So can you rely on a false exculpatory? You can’t with this President. And so, I thought there was an accusation and probably, given the President’s track record, a lot less than other accused. But at the end of the day, we have people with firsthand knowledge who don’t have to rely on his false exculpatory. You don’t have to rely on Mick Mulvaney’s recanting what you all saw so graphically on TV. How does somebody say, without a doubt, this was a factor, that this is why he did it?

By the way, Alan Dershowitz lost a criminal case in which he argued that if a corrupt motive is only part of the motive, you can’t convict. And the court said: Oh, yes, you can. If a corrupt motive is any part of it, you can convict. So he has lost that argument before, and he makes this argument again before this court. It shouldn’t be any more availing here than it was there.

At the end of the day, though, there is no more interested party here than the President of the United States, and I think we have seen he will say whatever he believes suits his interest. Let’s instead rely on the evidence and rely on others, and one is just a subpoena away.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senate from Colorado.

The CHIEF JUSTICE. Thank you. The question from Senator Gardner is for counsel to the President:

Arguments have been made that any assertion of privilege is indicative of guilt and that the House’s assertion of Impeachment power cannot be questioned by the Executive. Is that interpretation of the House’s impeachment power consistent with the Constitution, and what protects the Executive from the House abusing the Impeachment power in the future?

Mr. Counsel PHILBIN. Mr. Chief Justice and Senators, thank you for that question.

The House managers’ assertion that any effort to assert a privilege or assert a legal immunity to decline disclosure of evidence that closing a sign of guilt is not the law. It is, actually, fundamentally contrary to the law.

Legal privileges exist for a reason. We allow people to assert their rights. It is a basic part of the American justice system. Asserting your rights—asserting privileges and immunities to process rights even if it means limiting the information that might be turned over to a tribunal—is not and cannot be treated as evidence of guilt.

To the second part of the question, as to the House managers’ theory that the power of impeachment means that the President can’t resist any subpoena that they issue pursuant to the power of impeachment, it is not consistent with the Constitution. The Constitution gives the House the sole power of impeachment, which means only that the House is the only place—the only part of the government—that has that power. It doesn’t say that they have a paramount power of impeachment that trumps individual rights or privileges or immunities. It doesn’t mean that executive privilege suddenly disappears.

The House managers a number of times have cited Nixon v. United States or—I might get it reversed now—United States v. Nixon. It was the case involving the President in 1974. The Supreme Court determined that the President could not use a balancing of interests, assertions of executive privilege would have to give way, but it did not say that there was just an absolute, blanket rule that any time there is an allegation of wrongdoing or that there may be an impeachable offense going on in the background, that executive privilege just disappears. That is not the rule from that case. In fact, even in that context, the Court pointed out that there may be an absolute immunity or privilege in the field of foreign relations and national security, which is the field we are dealing with here.

The Framers recognized that there could be partisan and illegitimate impeachments. They recognized that the House could impeach for the wrong reasons, but they didn’t leave the executive branch totally defenseless to that. Executive privilege and immunities related to executive but that there may be an absolute immunity for senior advisors, still applies even in the context of an impeachment. That is part of the checks and balances in the Constitution. They don’t fall away simply because the House may now want to proceed on impeachment.

It is necessary for the proper functioning of the government and the separation of powers for the executive branch to retain the protection of confidentiality interests, to protect the prerogatives of the Office of the Presidency. For any President to fail to assert those rights and to protect them would do lasting damage to the Office of the Presidency for the future.

I think that is a critical point to understand in that there is a danger in the legal theory that the House managers are proposing here because it would do lasting damage to the separation of powers—to the absolute immunity for senior advisors, to the executive branch—because the House says: Ah, now we want to proceed, and we'll do lasting damage to the separation of powers. We'll do lasting damage to our government—to have the idea be that, as soon as the House flips the switch that they want to start proceeding on impeachment, the executive has no defenses and has to open every file and display everything. That is not the way the Framers had it in mind, because the executive branch has to have still its defenses for its sphere of authority under the Constitution. That is part of the checks and balances in the Constitution.

And before I sit down, I would just like to close by going back to the Senator who asked the question about the review process in the Bolton book. I believe I was clear about this, but I just wanted to make it clear to the extent the Senator was asking for an assurance that only career officials in the NSC review it for classification review.

I don’t make that assurance because it is an NSC process, and I am not sure. At the levels of the process, there might be other reviews. So I didn’t intend to give and I don’t want it to be
understood as giving that assurance to you.

Thank you.
The CHIEF JUSTICE. Thank you, counsel.

Ms. WARREN. Mr. Chief Justice, I send a question to the desk for House managers and counsel to the President.

The CHIEF JUSTICE. Thank you. The Presiding managers will respond first to this question from Senator WARREN.

If Ukrainian President Zelensky called President Trump and offered dirt on President Trump’s political rivals in exchange for President Trump’s promise to do something that would yield him 100 million dollars in military aid, that clearly would be bribery and an impeachable offense. So why would it be more acceptable—and somehow not impeachable—for the reverse, that is, for President Trump to propose the same corrupt bargain?

Mr. Manager NADLER. Bribery is obviously an impeachable offense. Bribery is contained within the accusation at the House level of abuse of power.

We explained in the Judiciary Committee report that the practice of impeachment in the United States has tended to envelop charges of bribery within the broader standard of other high crimes and misdemeanors. That is the historical standard.

The elements of bribery are clearly established here. The abuse of power is clearly established here. But the highest standard of proof is beyond a reasonable doubt, and these facts have been proven not beyond a reasonable doubt, beyond any doubt.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for the question.

I think what this hypothetical shows, what Manager NADLER shows, is this is an effort to try to smuggle into Articles of Impeachment that do not mention any crime the idea that there is some crime alleged here. There is not, and I went through that earlier.

The definition of Impeachment specifies a theory of the charge here that is abuse of power. They do not allege the elements of bribery or extortion. They don’t mention bribery or extortion.

If the House managers had wanted to bring in a theory of any kind, they would have put them in the Articles of Impeachment, just the way a prosecutor, if he wants to put someone on trial for bribery, he has got to put it in the indictment.

If you don’t, and you come to trial and then try to start arguing that, “well, actually, we think there is bribery going on here,” that is impermissible. It is prosecutorial misconduct.

And so a hypothetical that is contrary to what the facts were here, to try to suggest that maybe there is some element of bribery, that is all beside the point. We have specific facts. We have evidence that has been presented in the record. We have a specific Article of Impeachment. It doesn’t say bribery. It doesn’t say extortion. And there is no way to get that into this case at this point because the House managers had the opportunity to frame their case. They had every opportunity to frame it any way they wanted because they controlled the whole process. They controlled all the evidence that went in. They controlled all the evidence with the witnesses that were called, and they could frame it any way they wanted, and they didn’t put in any crime. There is no crime asserted here. It is not part of the Articles of Impeachment, and it can’t be considered now.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Kansas.

Mr. MORAN. Thank you, Mr. Chief Justice. I submit to the desk a question on my behalf and on behalf of Senator CORNYN.

The CHIEF JUSTICE. The question from Senator MORAN and Senator CORNYN is for counsel to the President:

Is it true that in these proceedings that the Chief Justice can rule on the issue of production of exhibits and the testimony of witnesses over the objection of either the managers or the President’s counsel? Would a determination by the Chief Justice be subject to judicial review?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for the question, and let me answer it this way—lay out my understanding of the process.

If we were going to start talking about subpoenaing witnesses, subpoenaing documents, having things come into evidence that way, the first question would be subpoenaed to have to be issued to the witnesses or for the documents, and if those subpoenas were resisted on the grounds of some privilege or immunity, then that would have to be sorted out because if the President asserted, for example, the immunity of a senior adviser to the President or an executive privilege over certain documents, then the Senate would have to decide whether it was going to fight that assertion and how—through some accommodation process and negotiation—or if the Senate were going to go to court to litigate that. And that whole process would have to play out. That would be the first stage, and that would have to be gone through anytime the President resisted the subpoena on the witnesses or documents. That would take a while.

Then, once there had been everything resolved on a subpoena, or something like that, it sounds like the question asks further, in terms of questions here in the trial, of admissibility of particular evidence. It is my understanding, then, that the Presiding Officer—the Chief Justice—could make an initial determination if there were objections to admissibility, but that all such determinations could be challenged by the Members of the Senate, and would be subject to a vote.

So it would not be—I think there were some suggestions earlier—that we don’t need any other courts; we don’t need anything involved with anyone else because the Chief Justice is here.

That is not correct. On the subpoenas at the front end, that is not going to be something that is determined just with all respect, sir—just by the Chief Justice. That is something that would have to be sorted out at the courts or by negotiation with the executive branch.

Then, once we are here on specific evidentiary objections, if we have a witness and there are objections during depositions that have to be resolved, or by a witness on the stand, if there are objections to particular documents—authentication or things like that—the Chief Justice could make initial ruling, but every one of those rulings could be appealed to this body to vote by a majority vote on whether the evidence would come in or not.

And you might want to consider rules whether you are going to have the Federal Rules of Evidence apply or some modified rules of evidence, and all of that would have to be sorted out.

I don’t think that we would get to the stage, then, of any determinations in evidence here being in any way appealed to the courts, but that would be a process that this body would have to decide what would be admissible in evidence in the trial.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Minnesota.

Ms. SMITH. Thank you, Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. Thank you.

The question from Senator SMITH is to the House managers:

The President has stated multiple times in public that his actions were perfect—yet he refuses to allow Bolton, Mulvaney, and others to testify under oath. If the President’s actions are so perfect, why wouldn’t he allow fact witnesses to testify under oath about what he has said publicly?

Mr. Manager SCHIFF. Well, the short answer is, if the President were so confident that this was a perfect call and that those around him would agree that there was nothing nefarious going on, he would want witnesses to come and testify. But, of course, he doesn’t. He doesn’t want his former National Security Advisor to testify. He doesn’t want his current Chief of Staff to testify. He doesn’t want those that were heading OMB to testify. He doesn’t want you to hear from any of them.

Now, I think that is pretty indicative that he knows what they have to say
and he doesn’t want you to hear what they have to say. He doesn’t want you to see any of the myriad of documents that he has been withholding from this body as he did from the House.

But I also want to address the last question, if I could. Is the Chief Justice empowered to change the Senate rules to adjudicate questions of witnesses and privilege? And the answer is yes.

Can the Chief Justice make those determinations quickly? The answer is yes.

Is the Senate empowered to overturn the Chief Justice? Under certain circumstances.

If the vote is 50 or is the vote two-thirds? That would be something that we would have to discuss with the Parliamentarian and with the Chief Justice.

But the Chief Justice has the power to do it, and, what is more, under the Senate rules, you want expedited process? We are here to tell you: We will agree to the Justice’s ruling on witnesses, on their materiality, on the application or nonapplication of privilege. We agree to be bound by the Chief Justice. We will not seek to litigate an adverse ruling, and we will not seek to appeal an adverse ruling.

Will the President’s counsel do the same? And, if not, just as the President doesn’t trust what these witnesses have to say, the President’s lawyers don’t want to rely on what the Chief Justice’s rulings might be.

Now, why is this so? They, as we, understand the President will be fair. I am not for a moment suggesting they don’t think the Chief Justice is fair—quite the contrary. They are afraid he will be fair. They are afraid he will make a fair ruling. That should tell you something about the weakness of their position.

They don’t want a fair trial with witnesses. They don’t want a fair Justice to adjudicate these questions. They just want to suggest to you that they will delay and delay and delay.

I think it was Thomas Paine who said: Those who would enjoy the blessings of liberty must undergo the rigors of defending it—the fatigues of defending it.

Is it too much fatigue for us to hear from a witness? Is that how little effort we are willing to put into the blessings of freedom and liberty? Is that how little fatigue we are willing to incur?

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Nebraska.

Mr. SASSE. I send a question to the members of the Senate.

The CHIEF JUSTICE. Thank you, Mr. Counsel CIPOLLONE. Thank you, Mr. Chief Justice, Members of the Senate.

In elaborating on the golden rule of impeachment, I would say principle No. 1, if we listen to what the Democratic Senators said in the past and the House managers and other Members of the House, that should guide us, and that principle is—and it is a principle based on precedent that you shouldn’t have a partisan impeachment.

If you have a partisan impeachment, that, in and of itself, is a dangerous thing because that means that there is not the bipartisan support that even the Speaker of the House has said you would need to even begin to consider the impeachment of a President because it is the overturning of an election. They don’t dispute that it is the overturning of an election.

In addition, it is the removal of this President from an election that is occurring just months from now, which I think is another important principle. I think in fact here is that there is actually bipartisan opposition to this impeachment. Democrats voted against it in the House of Representatives. That is an important principle.

The other principle would be that if you have a process that is unprecedented—if you have a process that is unprecedented—that should be something that ought to be considered. Always in the past there has been a vote authorizing an impeachment. Why? Because they say the House is the sole authority of impeachment—but that is the House, not the Speaker of the House at a press conference. That is another important consideration.

Another important consideration is all of the historical precedents related to rights given to a President in a process have been violated. We haven’t seen anything like that in our history. The President’s counsel wasn’t able to attend, wasn’t allowed to cross-examine witnesses, wasn’t allowed to call witnesses; and they are coming here and basically asking you, No. 1, to call witnesses that they had refused to pursue, but, more importantly, I think what they are saying is, do what they did—or only what they want. Don’t allow the President to call witnesses that the President wants. That doesn’t work. That is not due process.

The other important principle there is, we hear a lot about fairness, but in the American justice system fairness is about fairness to the accused. Fairness is about fairness to the accused. So how can you suggest that what we are going to do is, we are going to have a trial. We will get the witnesses and prosecutors that we want, even though you got to cross-examine none of the witnesses that we called, and have we got a deal for you: Let’s call another witness, but you call none. That is another principle.

And I think the reality is that what Professor Dershowitz said is true. I think, when you are thinking about impeachment, as much as we can as human beings, we should think about it in terms of a President in a partisan impeachment regardless of party, and how would we treat a President of our own party in similar circumstances? I think that is the golden rule of impeachment.

I don’t think we have to guess here because I think we have lots of statements from Democrats when we were here last time around and principles. As I said, I agree with them, I agree with those principles. I just ask that they be applied here.

That is my answer. Thank you.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Illinois.

Mr. DURBIN. Mr. Chief Justice, I send a question to the members of the Senate.

The CHIEF JUSTICE. Thank you.

Senator DURBIN asks the House managers:

If President Trump were to actually invoke executive privilege in this proceeding, would he be required to identify the specific documents or communications containing sensitive material that he seeks to protect?

Mr. Manager NADLER. As stated before, executive privilege is a very limited privilege that must be claimed by the President. He has at no time claimed executive privilege. Rather, he has claimed absolute immunity, a non-existent concept that every court that has ever considered it has rejected. Instead, he has simply said: We will oppose all subpoenas. We will deny to the House all information—all information. Whatever they want, they can’t have. This is well beyond the pale, and it is intended to be because he fears the facts.

The facts are, he tried to extort a foreign government through withholding military aid that this Congress had voted—he broke the law to withhold the aid that this Congress had mandated be sent to them in order to pressure them into announcing an investigation of his political opponent. Those are the facts. Those facts are proven beyond any doubt at all.

So what do we have? We have a diversion after diversion, diversions about what Hunter Biden may have done in Ukraine—irrelevant, whatever he did in Ukraine. The question is, Did the President withhold foreign military aid in order to extort a foreign government into helping him rig an American election?

We hear diversions about privilege. We hear questions about witnesses. We know he is telling the Senators don’t allow witnesses. Why? Because he knows what the witnesses will say.

We hear arguments from his counsel: We can’t talk to the witnesses. We can’t talk to the witnesses. The House shouldn’t have voted if it didn’t have proof positive. We had proof positive. We voted it. It
doesn’t mean we shouldn’t have more proof if it comes forward.

There is no argument that Mr. Bolton shouldn’t be permitted to testify. He is not going to waste our time. He has told us he will testify with a subpoena.

So all of these questions are diversions. They are diversions by a President who is desperate because we have proven the facts that he threatened a foreign government—not just threatened them, did, in fact, withhold mandated military aid from them in order to serve his political purposes, for private political purposes. We know that.

Everything else is a diversion.

No witnesses—because maybe those witnesses will testify in a way he doesn’t want.

Privilege—when you are dealing with accusations of wrongdoing against the President, the Supreme Court told us in the Nixon case, privilege yields.

So all of these arguments are diversions. Keep your eye on the facts. The facts we have proven. And let’s see if the additional witnesses—and as Mr. Schiff said, witnesses should not be a threat, not to the Senate, not to anybody else. And it is not going to waste too much time because the Chief Justice can rule on relevant questions—questions of relevancy or privilege or anything else.

But the facts are the facts. The President’s actions are a danger to the United States. He has tried to rig the next election. He has abused his power and he must be brought to heel and the country must be saved from his continuing efforts to rig our elections.

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Utah.

Mr. ROMNEY. Mr. Chief Justice, I submit a question to the desk.

The CHIEF JUSTICE. Thank you.

The Senator from Nevada.

Mrs. Manager DEMINGS. Mr. Chief Justice, I have a question for the President:

On what specific date did President Trump first order the hold on security assistance to Ukraine and did he explain the reason at that time?

Mr. Counsel PHILBRIN. Mr. Chief Justice, Senator, thank you for the question.

I don’t think that there is evidence in the record of a specific date—the specific date—but there is testimony in the record by individuals at OMB and elsewhere were aware of the hold as of July 3, and there is evidence in the record of the President’s rationale from even earlier than that time.

There is an email from June 24 that has been publicly released. It was publicly released in response to a FOIA request that is from one DOD staffer up to the Chief of Staff of DOD—excuse me, sorry—from the Chief of Staff down to a staffer from DOD relating on the subject line: POTUS follow-up. Follow-up from a meeting with POTUS, President of the United States, explaining questions that had been asked about Ukraine assistance, which were specifically: What was the funding used for, i.e., did it go to U.S. firms; who funded it; and what do other NATO members spend to support Ukraine?

So from the very beginning, in June, the President had expressed his concern about burden-sharing, what do other NATO members do. And he goes on to say, later in the July 25 transcript, there was—the President asked President Zelensky specifically. He raised the issue of burden-sharing. Again, showing that was his concern. In addition, there was, I believe, testimony that he was aware from OMB that the President had expressed concerns about corruption and that there was a review process to consider corruption in Ukraine.

So the evidence in the record shows that the President raised concerns at least as of June 24; that people were aware of the hold as of July 3; the President’s concerns about burden-sharing were in the email on June 24; they were reflected in the July 25 call. Similarly, there is testimony from later in the summer that the President had raised concerns about corruption in Ukraine. So that is the evidence in the record that reflects the President’s concerns about burden-sharing.

The CHIEF JUSTICE. Thank you, counsel. The Senator from Nevada.

Ms. CORTEZ MASTO. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. The question from Senator Cortez Masto is to the President:

The President’s counsel has claimed that the President was unfairly excluded from House impeachment processes. Can you describe the due process President Trump received during House proceedings compared to previous presidents? Did President Trump take advantage of any opportunities to have his counsel participate?

Mrs. Manager DEMINGS. Mr. Chief Justice, and thank you so much for that question.

Let me make this plain. The President is not the victim here. The victim in this case is the American people. President Trump was invited to attend and participate in all of the Judiciary Committee hearings. He could have had Mr. Cipollone, Mr. Sekulow, or any of the other attorneys who have joined at the counsel table participate throughout the Judiciary Committee proceedings in the House. They could have attended all of the Judiciary hearings, and imagine this—cross-examine witnesses, raise objections, present evidence favorable to the President, if they had any to present, and they could have requested to have President Trump’s own witnesses called.

But President Trump refused to participate. He wrote to the House, and I quote: “If you are going to impeach me, do it now, fast, so we can have a fair trial in the Senate.”

In every event, President Trump was asked, orally and in writing, to provide evidence during the Intelligence Committee investigation, but he refused, as we have already said over and over again, to produce any documents or allow witnesses to testify. We thank God for the 17 public servants who came forward in spite of the President’s efforts to obstruct.

In addition, Republican Members in Congress had an equal opportunity to participate in the depositions and the hearings in both the Intelligence and the Judiciary Committee hearings. Republican Members called three witnesses during the Intelligence Committee’s hearings and an additional witness during the Judiciary Committee hearing.

Of course, a House impeachment inquiry is not a full-blown criminal trial. We do not know that. But this is a trial, and, obviously, the President is being afforded every due process right during these proceedings.

The CHIEF JUSTICE. Thank you.

Ms. MURKOWSKI. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from Alaska.

Ms. MURKOWSKI. Mr. Chief Justice. I send a question to the desk.

The CHIEF JUSTICE. Thank you.

Senator MURKOWSKI’s question is for the House managers:

In early October, Mr. Cipollone sent the letter saying none of the subpoenas issued by the House were appropriately authorized and thus invalid. When the House passed their resolution authorizing the impeachment inquiry, and granting subpoena power to the Intelligence and Judiciary Committees, the body could have addressed the deficiency the White House pointed out and proclaimed those subpoenas as valid exercises of the impeachment inquiry. Alternatively, the House could have reissued the subpoenas after the resolution was adopted. Please explain why neither of those actions took place.

Ms. Manager GARCIA of Texas. Mr. Chief Justice, Senator, I appreciate your question.

These arguments, plain and simple, are a red herring. The House’s impeachment inquiry and its subpoenas were fully authorized by the Constitution, House rules, and precedent. It is for the House, not the President, to decide how to conduct an impeachment inquiry.

The House’s autonomy to structure its own proceedings for impeachment inquiry is rooted in two provisions of article I of the Constitution. First, article I vests the House with the “sole Power of Impeachment.” It contains no requirements—no requirements—as to how the House must carry out that responsibility.

Second, article I states that the House is empowered to determine the rules of proceedings. Taken together, these provisions give the House sole discretion to determine the manner in which they investigate, deliberate, and vote for grounds of impeachment.

In exercising its responsibility to investigate and consider the impeachment of a President of the United States, the House is constitutionally entitled to receive all information from the executive branch concerning the President’s misconduct. The Framers, the courts, and past Presidents have
recognized and honored Congress's right to information in an impeachment investigation and is critical as a safeguard to our system of divided powers; otherwise, a President could hide his own wrongdoing to prevent Congress from discovering impeachable misconduct, effectively nullifying—nullifying—Congress's impeachment power.

That is precisely what President Trump has tried to achieve here. The President has asserted the power to determine for himself which congressional subpoenas he will respond to and those that he will not. The President's counsel would have you believe that each time anyone in the executive branch gets a subpoena, it is open season for creative lawyers in the White House and DOJ to start inventing theories about House rules and parliamentary precedent.

This is not how the separation of powers works, and to accept that argument, I would undermine the House's and Senate's ability to provide oversight of the executive branch. It would also make impeachment a nullity.

The President argues that there was no resolution fully authorizing the impeachment inquiry, but, again, there is no requirement for the full House to take a vote before conducting an impeachment inquiry. President Trump and his lawyers invented this theory.

As Chief Judge Howell of the U.S. District Court in DC has stated, and this is a direct quote: “This [claim] has no textual support in the U.S. Constitution [or] the governing rules of the House.”

The Constitution itself says nothing about how the House may exercise its sole power of impeachment, but instead confirms the House shall have the sole power to determine the rules of its own proceedings. This conclusion is also confirmed by precedent. Numerous judges have been subjected to impeachment investigations in the House and even impeached by the House and convicted by the Senate without any previous vote of the House authorizing an impeachment inquiry.

As recently as the 114th Congress, the Judiciary Committee considered impeaching the IRS Commissioner following a referral from another committee and absent a full House vote. The Judiciary Committee then began an investigation into President Clinton's conduct for 4 months before approval of a full House resolution.

The House rules also do not preclude committees from inquiring into the potential grounds for impeachment. Instead, those rules vest the relevant committees of the House with robust investigatory powers, including the power to issue subpoenas.

Each of the three committees that conducted the initial investigation of President Trump’s conduct in Ukraine—Intelligence, Oversight, and Foreign Affairs—indisputably had oversight jurisdiction over these matters.

The President's counsel has pointed to the Nixon impeachment with a full House.

The CHIEF JUSTICE. Thank you very much. Thank you.

Ms. Manager GARcia of Texas. Thank you, Mr. Chairman.

The CHIEF JUSTICE. The Senator from Rhode Island.

Mr. WHITEHOUSE. Mr. Chief Justice, I send a question to the desk, and because my question references an earlier question I have already posed to the President—earlier question as a reference to provide it to the Office of the Parliamentarian in case it should be of interest.

The CHIEF JUSTICE. Thank you.

The question from Senator Whitehouse is to counsel for the President:

White House counsel refused to answer a direct question from Senator Collins and Senator MURkowski, saying he could only cite to the record. Five minutes afterward White House counsel read recent newspaper stories to the Senate from outside the House record. Could you please give an accurate and truthful answer to the Senators' question? Did the President ever mention the Bidens in connection to corruption in Ukraine before Vice President Biden announced his candidacy in April 2019? What did the President say to whom, and when?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senator, thank you for the question.

I don’t think that I refused to answer the question at all. We had been advised by the President and his lawyers that they were going to object if we attempted to introduce anything that was not either in the public domain—or things that were in the record. And so I can’t—I am not in a position to go back into things that the President might have said in private, and there has been no discovery into that. It is not part of this inquiry, so I can’t go telling now about things that the President might have said in private to his Cabinet Members. I am not in a position to say that. I can tell you what is in the public, and I can tell you what is in the record. I answered the question fully to the best of my ability based on what is in the public domain and what is in the record.

I would like to take a moment to also respond to the last question that was posed by Senator MURkowski with respect to the vote on authorizing the issuance of subpoenas because there has always been a vote from the full House to authorize any impeachment inquiry into a Presidential impeachment. It was that way in the Johnson impeachment. It was that way in the Nixon impeachment. There are references to the fact that the House Judiciary Committee began some investigatory work before the House actually voted on the resolution—I think it was Resolution 809—to authorize the impeachment inquiry. The House managers simply gathered things that were in the public domain or that had been already gathered by other committees, and there was no compulsory process issue. And in fact, Chairman Rodino of the House Judiciary Committee specifically determined, when there was a move to have the House Judiciary Committee issue subpoenas after the President invoked his 5th Amendment privilege, that the committee lacked the authority to issue any compulsory process until there had been a vote by the full House authorizing the committee to do that.

This is not some esoteric special rule about impeachment as opposed to the authority to legislate. There is no rule that gives you the power to use the authority of impeachment to issue compulsory process.

Rule 10 doesn’t mention impeachment at all. The word doesn’t appear in it. That is why it has always been the understanding that there must be a vote from the House to authorize the House Judiciary Committee or in this case—it was contrary to all prior practice—it was given to Manager Schiff’s committee and other committees the authority to use the power of impeachment to issue subpoenas.

It was very clear to the House of Representatives that the position of the executive branch was that all of the subpoenas issued before H. Res. 660 were invalid on their face, and Senator MURKOWSKI’s question is exactly correct: There was no effort in H. Res. 660 either to attempt to retroactively authorize those subpoenas or to tell the House or the Senate—retroactively authorize those subpoenas or then to reissue them under H. Res. 660, so the subpoenas remained invalid. There was no response from the House to that. Thank you.

The CHIEF JUSTICE. Thank you, counsel.

Mr. HAWLEY. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from Missouri.

Mr. HAWLEY. Mr. Chief Justice, I send to the desk a question for both counsel for the President and the House managers on my own behalf and on behalf of Senator Cruz, Senator Daines, and Senator Braun.

The CHIEF JUSTICE. Thank you.

The President's counsel will respond first to the question from Senator HAWLEY and the other Senators:

When he took office, Viktor Shokin, Ukraine’s Prosecutor General, was sent to investigate Burisma. Before Vice President Joe Biden pressed Ukrainian officials on corruption, including pushing for the removal of Shokin, did the White House, the Office of the Vice President legal counsel issue ethics advice approving Mr.
Biden’s involvement in matters involving corruption in Ukraine or Shokin, despite the presence of Hunter Biden on the board of Burisma, a company widely considered to be corrupt. Did Vice President Biden ever ask Hunter Biden to step down from the board of Burisma?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for the question.

We are not aware of any evidence that then-Vice President Biden sought any ethics opinion. We are aware that both Amos Hochstein and Deputy Assistant Secretary of State Kent testified—in the private domain. Deputy Assistant Secretary of State Kent testified—that Mr. Shokin was in the public domain. Deputy Assistant Secretary Kent testified that although he raised that issue with Vice President Biden of the potential appearance of a conflict of interest with his son Hunter being on the board of Burisma. Deputy Assistant Secretary Kent testified that although he raised that issue with Vice President Biden, the President’s Office—the Vice President was busy dealing then with the illness of his other son, and there was no action taken. So from what we know, there wasn’t a request to seek an ethics opinion. We are not aware of an ethics opinion having been issued. Although the issue was flagged for the Vice President’s Office, we are not aware that Vice President Biden asked his son to step down or that any other action was taken. And I believe that Vice President Biden has said that he never discussed—he said publicly he never discussed his son’s overseas business dealings with him.

Thank you.

The CHIEF JUSTICE. Thank you, counsel.

Mrs. Manager DEMINGS. Mr. Chief Justice and Senator, I appreciate your question. That the client’s office, the President’s Office, the Vice President’s Office—the Vice President was busy dealing then with the illness of his other son, and there was no action taken. So from what we know, there wasn’t a request to seek an ethics opinion. We are not aware of an ethics opinion having been issued. Although the issue was flagged for the Vice President’s Office, we are not aware that Vice President Biden asked his son to step down or that any other action was taken. And I believe that Vice President Biden has said that he never discussed that issue with Vice President Biden, the President’s Office—the Vice President was busy dealing then with the illness of his other son, and there was no action taken. So from what we know, there wasn’t a request to seek an ethics opinion. We are not aware of an ethics opinion having been issued. Although the issue was flagged for the Vice President’s Office, we are not aware that Vice President Biden asked his son to step down or that any other action was taken. And I believe that Vice President Biden has said that he never discussed—he said publicly he never discussed his son’s overseas business dealings with him.

Thank you.

Mr. Manager NADLER. Mr. Chief Justice, Members of the Senate, Mr. Giuliani played a key role in President Trump’s monthslong scheme to pressure Ukraine to announce political investigations to benefit the President’s reelection campaign. Remarkably, the President’s defense is wrapper themselves—Rudy Giuliani’s involvement in Ukraine while trying to minimize his role. There is overwhelming evidence—not just testimony but texts, call records, and other corroborating documents—establishing Mr. Giuliani’s key role in executing the President’s pressure campaign beginning in early spring 2019 with a smear campaign against Ambassador Yovanovitch and then throughout the summer. Everyone knew that Rudy Giuliani was the gatekeeper to the President on Ukraine.

On May 10, Mr. Giuliani canceled the trip to Ukraine, during which he planned to dig up dirt on former Vice President Biden and on a discredited conspiracy theory having been issued. Although the issue was flagged for the Vice President’s Office, we are not aware that Vice President Biden asked his son to step down or that any other action was taken. And I believe that Vice President Biden has said that he never discussed—

First, every witness asked about this topic testified that Mr. Shokin was widely considered to be an ineffective prosecutor who did not prosecute corruption. Shokin was so corrupt that the entire free world—the United States, the European Union, the International Monetary Fund—pressed for his office to be cleaned up. So I would caution you to be skeptical of anything that Mr. Shokin claims.

Second, witnesses, including our own anti-corruption advocate, Ambassador Yovanovitch—remember that very dedicated anti-corruption Ambassador—testified that Shokin’s removal made it more likely that investigations of corrupt European—Ukrainian companies would move forward. Let me repeat that. The client’s office, the President’s Office—the Vice President’s Office—the Vice President was busy dealing then with the illness of his other son, and there was no action taken. So from what we know, there wasn’t a request to seek an ethics opinion. We are not aware of an ethics opinion having been issued. Although the issue was flagged for the Vice President’s Office, we are not aware that Vice President Biden asked his son to step down or that any other action was taken. And I believe that Vice President Biden has said that he never discussed—

Third, Burisma was not under scrutiny at the time Joe Biden called for Shokin’s ouster, according to the National Security Council on Ukraine, an organization several witnesses testified is effective at fighting corruption.

Shokin’s office investigated Burisma, but the probe focused on a period before Hunter Biden joined the company. But, again, another investigation was warranted. Dismissing Shokin would have made that more likely. The CHIEF JUSTICE. Thank you, Mr. King. Mr. Chief Justice, The CHIEF JUSTICE. The Senator from Maine.

Mr. King. Mr. Chief Justice, I have a question for the House managers I will send to the distinguished ranking member.

The CHIEF JUSTICE. Thank you, Senator King’s question for the House managers reads as follows:

Mr. Rudolph Giuliani was in Ukraine exclusively on a political errand—by his own admission—so doesn’t the President’s mention of Giuliani by name in the July 25th call conclusively establish the real purpose of the call?

Mr. Manager NADLER. Mr. Chief Justice, Members of the Senate, Mr. Giuliani played a key role in President Trump’s monthslong scheme to pressure Ukraine to announce political investigations to benefit the President’s reelection campaign. Remarkably, the President’s defense is wrapper themselves—Rudy Giuliani’s involvement in Ukraine while trying to minimize his role. There is overwhelming evidence—not just testimony but texts, call records, and other corroborating documents—establishing Mr. Giuliani’s key role in executing the President’s pressure campaign beginning in early spring 2019 with a smear campaign against Ambassador Yovanovitch and then throughout the summer. Everyone knew that Rudy Giuliani was the gatekeeper to the President on Ukraine.

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Third, Burisma was not under scrutiny at the time Joe Biden called for Shokin’s ouster, according to the National Security Council on Ukraine, an organization several witnesses testified is effective at fighting corruption.
Mr. Giuliani insisted that Ukraine look at an American citizen on behalf of his client, President Trump.

Finally, during the pendency of the impeachment proceedings, Mr. Giuliani has not ceased in his efforts to dig up dirt to benefit the President.

In December, he again traveled to Ukraine to meet with Ukrainian officials, which he described as a secret assign- ment, and after which, the President reportedly called him immedi- ately upon landing and asked, “What did you get?” to which Mr. Giuliani responded, “More than you can imag- ine.”

It is worth noting that in Ms. Raskin’s presentation about Giuliani—

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. Manager NADLER.—he repeated requests for investigations into Biden, not into corruption.

Mr. RUBIO. Mr. Chief Justice.

The CHIEF JUSTICE. The Senator from Florida.

Mr. RUBIO. I send a question to the desk on behalf of myself, Senators SASS, BRAUN, RISCH, MCSALLY, ROB- ERTS, and HOEVEN.

The CHIEF JUSTICE. Thank you.

The question from Senator RUBIO and the other Senators is for counsel for the President:

How would the Framers view removing a President without an overwhelming con- sensus of the American people? What is, after all, the basis of Articles of Impeachment supported by one political party and opposed by the other?

Mr. Counsel DERSHOWITZ. Mr. Chief Justice, thank you.

Senators, Alexander Hamilton ad- dressed that issue very directly. He said the greatest danger of impeach- ment is if it turns on the votes of one party being greater than the votes of another party in either House. So I think they would be appalled to see an impeachment going forward in viola- tion of the Schumer rule and the rules of other Congressmen that were good enough for us during the Clinton im- peachment but seemed to have changed dramatically in the current situation.

The criteria that have been set out are so lawless, they basically para- phrase Congresswoman MAXINE WATERS, who said: There is no law. Anything the House wants to do to im- peach, the Impeachment is what is happening today. That places the House of Representatives above the law.

We have heard much about, no one is above the law. The House of Represent- atives is not above the law. They may not use the MAXINE WATERS—Gerald Ford made the same point, but it was about the impeachment of a judge. Judges are different; there are many of them. There is only one President.

But to use that criteria, that it is whatever the House says it is, whatever the Senate says it is, turns those bod- ies into lawless bodies, in violation of the intent of the Framers.

Manager SCHIFF confused my argu- ment when he talked about intent and motive.

You have said I am not a constitu- tional lawyer, but you admitted I am a criminal lawyer. And I have taught criminal law at Harvard...

There is an enormous distinction be- tween intent and motive. If somebody shoots somebody, the intent is that when you pull the trigger, you know a bullet will leave and will hit somebody and may kill them. That is the intent to kill them. Motive can be revenge. It could be money. It almost never is taken into consideration, except in ex- treme cases. There are cases where mo- tive counts.

But let’s consider a hypothetical grow- ing out of a situation that we have discussed. Let’s assume that President Obama had been told by his advisers that it really is important to send le- thal weapons to the Ukraine, but then he gets a call from his pollster and his political strategist. We know it is in the national interest to send le- thal weapons to the Ukraine, but we are telling you that the leftwing of your party is really going to give you a hard time if you start selling lethal weapons to the Ukraine, potentially, with Russia. Would any- body here suggest that was impeach- able? Or let’s assume President Obama said: I promised to bomb Syria if they had chemical weapons, but I am now told by my pollsters that bombing Syria would hurt my electoral chances. Certainly not impeachable at all.

So let me apply that to the current situation. As you know, I said pre- viously there are three levels of pos- sible motive.

One is, the motive is pure—only in- terest is in the way of what is good for the country. In the real world, that rarely happens.

The other one is, the motive is com- pletely corrupt—I want money, kick- back.

But then there is the third one that is so complicated and that is often mis- understood. When you have a mixed motive—a motive in which you think you are doing good for the country, but you are also doing good for yourself. You are doing good for me; you are doing good for thee. You are doing good, and you altogether put it in a bundle in which you are satisfied that you are doing absolutely the right thing. Let me give you a perfect exam- ple of that from the case.

The argument has been made that the President of the United States only became interested in corruption when he learned that Joe Biden was running for President. Let’s assume hypo- thetically that the President was in his second term, and he said to himself: You know, Joe Biden is running for President. I really should now get con- cerned about whether his son is corrupt because he is the vice-president—he is not running against me; I am fin- ished with my term—but he could be the President of the United States. And

if he is the President of the United States and he has a corrupt son, the fact that he has announced his can- didacy is a very good reason for upping the interest in his son. If he wasn’t running for President, he is a has-been. He is the former Vice President of the United States. OK, big deal. But if he is running for President, that is an enor- mous big deal.

So the difference—the House man- agers would make—is whether the motive is in his first term or his second term, whether he is running for reelection or not running for reelection. I think they would have to con- cede that, if he was not running for re- election, this would not be a cross mo- tive but would be a mixed motive but leaning on the side of national interest. If he is running for reelection, suddenly that turns it into an impeachable of- fense.

The CHIEF JUSTICE. Thank you. Thank you, counsel.

The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. Chief Justice, I submit a question to the desk di- rected to the House managers.

The CHIEF JUSTICE. Thank you. The question is for the House managers:

I was on the trial committee for the last impeachment trial in the Senate, which in- volved Judge Thomas Porteous, who was ul- timately removed. During that time, the Senate trial committee heard from 26 wit- nesses, 17 of whom had not previously testi- fied in the House. What possible reason could there be for allowing 26 witnesses in a judi- cial impeachment trial and hearing none for a President’s trial?

Mr. Manager SCHIFF. Mr. Chief Justice, Senator, as you know, I am quite familiar with the Porteous impeach- ment. Someone asked me the last time I tried a case. The answer is probably 30 years ago except for the impeach- ment of Thomas Porteous, when I last spent some quality time with you.

There is no difference there is nothing in the Constitution. I would say that the need for witnesses in the impeachment trial of a President of the United States is a far more compelling circumstance than the impeachment of a judge. Now, you might say, well, in the impeachment of a judge, how is it possible that the time of the Senate could be occupied by calling witnesses; that, as precious as your time is, we would occupy your time calling dozens of witnesses, but in the impeachment of a President, it is not worth the time; it is too much of an imposition.

Again, I would argue that the imper- ative of calling judges and having a fair trial when we are adjudicating the guilt also a President of the United States is paramount.

Now, we have always argued that the trial should be fair to the President and the American people. And, yes, it is a big deal to impeach a President and remove that President from office. It is a big deal if you leave in place a President when the House has proven that President has committed im- peachable misconduct and is likely to
The CHIEF JUSTICE. Thank you, Mr. Chief Justice. I send a question to the desk for the President's counsel.

The CHIEF JUSTICE. Thank you. The question from Senator COONS to the President's counsel is this: Mr. President's brief states, "Congress has forbidden foreigners' involvement in American elections." However, in June 2019, President Trump said if Russia or China offered information on his opponent, "[t]here's nothing wrong with listening," and he might not alert the FBI because: "Give me a break. Life doesn't work that way." Does President Trump agree with your statement that foreigners' involvement in American elections is illegal?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senator, thank you for the question.

I think Congress has specified specific ways in which foreigners cannot be involved in elections. Foreigners can't vote in elections. There are restrictions on foreign contributions to campaigns—things like that. When the whistleblower originally made a complaint about this July 25 call, and that was reviewed by the inspector general for the intelligence community, he framed that whistleblower's complaint and wrote a cover letter framing it in terms of those laws. And he said that there might be an issue here related to soliciting a foreign contribution to a campaign, a thing of value, foreign campaign interference.

That was specifically reviewed by the Department of Justice. The Department of Justice concluded that there was no such violation here. So that is not something that is involved in this case.

President Trump's interview with ABC that you cited does not involve something that is a foreign campaign contribution, something that is addressed by the law as passed by Congress. He was referring to the possibility that information could come from a source, and I think he pointed out in that interview that he might contact the FBI, he might listen to something.

The Senator from Delaware.

Mr. COONS. Mr. Chief Justice, I send a question to the desk for the President's counsel.

The CHIEF JUSTICE. Thank you.

The question from Senator COONS to the President's counsel is this: Mr. President's brief states, "Congress has forbidden foreigners' involvement in American elections." However, in June 2019, President Trump said if Russia or China offered information on his opponent, "[t]here's nothing wrong with listening," and he might not alert the FBI because: "Give me a break. Life doesn't work that way." Does President Trump agree with your statement that foreigners' involvement in American elections is illegal?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senator, thank you for the question.

I think Congress has specified specific ways in which foreigners cannot be involved in elections. Foreigners can't vote in elections. There are restrictions on foreign contributions to campaigns—things like that. When the whistleblower originally made a complaint about this July 25 call, and that was reviewed by the inspector general for the intelligence community, he framed that whistleblower's complaint and wrote a cover letter framing it in terms of those laws. And he said that there might be an issue here related to soliciting a foreign contribution to a campaign, a thing of value, foreign campaign interference.

That was specifically reviewed by the Department of Justice. The Department of Justice concluded that there was no such violation here. So that is not something that is involved in this case.

President Trump's interview with ABC that you cited does not involve something that is a foreign campaign contribution, something that is addressed by the law as passed by Congress. He was referring to the possibility that information could come from a source, and I think he pointed out in that interview that he might contact the FBI, he might listen to something.
But more information is not something that would violate the campaign finance laws. And if there is credible information, credible information of wrongdoing by someone who is running for a public office—it is not campaign interference for credible information about someone. We want to be honest to go, if it is credible information.

So I think that the idea that any information that happens to come from overseas is necessarily campaign interference is a mistake. That is a non-sequitur. Information that is credible, that potentially shows wrongdoing by someone who happens to be running for office, if it is credible information, is relevant information for the voters to know about, for people to be able to decide on who is the best candidate for an office.

Thank you.
The CHIEF JUSTICE. Thank you, counsel.

The majority leader is recognized.

RECESS
Mr. MCCONNELL. Mr. Chief Justice, I recommend we take a break until 10 p.m. and then finish up for the evening.

There being no objection, at 9:34 p.m., the Senate, sitting as a Court of Impeachment, recessed until 10:07 p.m.; whereupon the Senate reassembled when called to order by the CHIEF JUSTICE.

Mr. MCCONNELL. Mr. Chief Justice, my understanding is we will finish up at about 11 p.m.

The CHIEF JUSTICE. Thank you.
The Senator from Georgia.

Mrs. LOEFFLER. I send a letter to the desk on behalf of myself, Senators BLACKBURN, HYDE-SMITH, COTTON, HAWLEY, BARRASSO, PERDUE, FISCHER, and CORNYN.
The CHIEF JUSTICE. Thank you.
The question from Senator LOEFFLER and Senators BLACKBURN, HYDE-SMITH, COTTON, HAWLEY, BARRASSO, PERDUE, FISCHER, and CORNYN is for counsel for the President:

As a fact witness who was coordinating with the whistleblower, did Manager SCHIFF’s handling of the impeachment inquiry and material due process issues for the President have a fair trial?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senators, thank you for that question.

And I believe the short answer is yes. It did create a material due process issue. At 11 p.m., I explained the other day in a portion of my argument, there were three major due process violations: the lack of an authorization, so that the whole proceeding started in an illegitimate and constitutionally invalid manner; second, the lack of basic due process protections related to fundamental rights to present evidence, cross-examine witnesses, present witnesses; and the final one is that Manager SCHIFF’s handling of the impeachment inquiry and material due process issues for the President to have a fair trial?

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It has to proceed by the proper method, the law. It has to turn square corners. The House of Representatives is not above the President—all the House has to do is demand information. If you or I accepted material information from a source—an email, a database, and the like—without paying for it or from a foreign nation, that would be impeachable. If the thought of this—as we go forward in this trial itself, we are creating additional dangers to the Nation by suggesting that things that have long been prohibited are now suddenly going to be OK because they have been asserted in the President’s defense. I yield back.

The CHIEF JUSTICE. Thank you.

The Senator from Wyoming.

Mr. BARRASSO. Mr. Chief Justice, I send a question to the desk on behalf of myself and Senators RISCH, HAWLEY, and MORAN.

The CHIEF JUSTICE. Thank you.

The question is from Senators BARRASSO, RISCH, HAWLEY, and MORAN for counsel.

Can the Senate convict a sitting U.S. President of obstruction of Congress for exercising the President’s constitutional authorities or rights?

Mr. Counsel PHILBIN. Mr. Chief Justice and Senators, thank you for the question. I think the short answer is, constitutionally, no, the Senate may not convict the President for exercising his constitutional authorities.

The theory that the House managers have presented—I think Professor Turley, in testifying before the House, made it very clear—is itself an abuse of power by Congress and is dangerous for the structure of our government because it is the fundamental proposition at the heart of the obstruction of Congress charge that the House managers have brought is that the House can simply demand information.

If the executive branch resists, even if it provides lawful rationales—perhaps ones that the House managers disagree with but that are consistent with longstanding precedents and principles applied by the executive branch—and if the House managers disagree with them, they jump immediately to impeaching the President. That is dangerous for our structure of government. We are talking about principles here—one based on simply the failure of the House to proceed lawfully.

We have heard a lot about the President is not above the law, but as Professor Dershowitz pointed out, the House of Representatives is not above the law. It has to turn square corners. It has to proceed by the proper methods to issue subpoenas to the executive branch.

So, if the House has an issue about subpoenas and if the House attempts to subpoena a senior adviser to the President and the President asserts the immunity of the senior adviser—a doctrine that has been asserted by virtually every President since President Nixon and goes back earlier than that—then there is a confrontation between the branches. That doesn’t suggest what it shows—is a separation of powers in operation. That friction between the branches is part of the constitutional design.

It was Justice Louis Brandeis who explained that the separation of powers was enshrined in the Constitution not because it was the most efficient way to have government, but because the friction that it caused and the interaction between the branches was part of a way of guaranteeing liberty by ensuring that no one branch could aggrandize power to itself.

What the House managers are suggesting here is directly antithetical to that fundamental principle. What they are suggesting is that they want to pursue impeachment and when they make demands for information to the Executive, the Executive has no defenses. It can have no constitutional authorities or prerogatives to raise in response to the subpoenas. It has to just turn over everything or it is an impeachable offense. What that would lead to, as Professor Turley explained, is transforming our system of government by elevating the House and making it, really, a parliamentary system.

As Professor Dershowitz was explaining, in the parliamentary system, the Prime Minister can simply be removed by a vote of no confidence, but if you make it so easy to impeach the President—all the House has to do is demand some information, goad a response from a President that this is contrary to the principles that all Presidents before me have asserted, and am going to stick by the executive branch, then the President can say: Well, that is it. You will be impeached.

If the votes are there to remove the President, you make the President dependent on the legislature, and that is what Government-Morris warned against specifically during the Constitutional Convention. He warned the Framers, when we make a method for making the President amenable to justice, we should make sure that we do not make him dependent on the legislature.

It was the parliamentary system’s making it easy to remove the Chief Executive that the Framers wanted to reject, and this theory of obstruction of Congress would create exactly that now system of easy removal, effectively a parliamentary system of a vote of no confidence. That is not the structure of the government that the Framers enshrined in the Constitution for us.

The CHIEF JUSTICE. Thank you, counsel.

The President from Connecticut.

Mr. BLUMENTHAL. Thank you, Mr. Chief Justice.

Mr. Chief Justice, I send a question to the desk on behalf of myself and Senators WARNER, HEINRICH, and HARRIS.

The CHIEF JUSTICE. Thank you.

The question from Senator BLUMENTHAL and Senators WARNER, HEINRICH, and HARRIS reads as follows: Before the break, the President’s Counsel stated that accepting “mere information” from a foreign source is not something that would violate campaign finance law, and when asked by counsel, “to accept ‘credible information’ from a foreign source about someone who is running for office. Under this view, acceptance of the kinds of propaganda disseminated by Russia in 2016—on Facebook and other social media platforms, using bots, fake accounts and other techniques to spread disinformation—would be perfectly legal and appropriate. Isn’t it true that accepting such a thing of value is, in fact, a violation of law? And isn’t it true that it is one of the highest priorities of our intelligence agencies and our law enforcement to prevent foreign interference in our election of the type and character that we saw in 2016. When Russia hacked the databases of the Democratic National Committee—the DCCC—when they began a campaign of leaking those documents and when it engaged in a massive and systemic social media campaign, our intel agencies and law enforcement had been devoting themselves to preventing a recurrence of that type of foreign interference. If I am understanding counsel and the President correctly—and I think that I am—they are saying that not only is that OK to willingly accept that but that the very allegation against the President that Bob Mueller spent 2 years investigating didn’t amount to criminal conspiracy. That is the prove the government can’t even reasonably doubt the crime of conspiracy? Again, we are talking about something separate from collusion here, although my colleagues keep confusing the two. Bob Mueller didn’t address the issue of collusion. What he did address was whether he could prove the elements of criminal conspiracy, and he found that he could not.

What counsel for the President is now saying is that, even if he could have, that is OK. It is now OK to criminally conspire with another country to get help in a presidential election, as long as the President believes it would help his campaign, and, therefore, it is not an impeachable offense. Did he ever tell you that? It is OK to ask for that help. It is OK to work with that power to get that help. That is now OK. It has been a remarkable evolution of the Presidential defense. It began with “nothing to see here.” It migrated to “OK, they did seek investigation of the President’s political
rival, and then it became, OK, those in-
vestigations were not sought by official channels to official policy. They were sought by the President’s lawyer in his personal capacity. Then it migrated to, OK, we acknowledge that, while the President’s lawyer was conducting this personal probe, the President withheld the money, but we think that is OK.

We have witnessed over the course of the last few days and the long day today a remarkable lowering of the bar to the point now where everything is OK as long as the President believes it is in his reelection interest. You could conspire with another country to get its help in your election either by its intervening on your behalf to help you or by its intervening to hurt your oppo-

Now, we are told that that is not only OK, but it is beyond the reach of the Constitution. Why? Because abuse of power is not impeachable. If you abuse your impeachable, well, then, you are impeaching Presidents for mere policy. Well, that is nonsense. They are not the same thing.

They are not the same thing as Pro-

fessor Dershowitz argued 21 years ago, and they are not the same thing today. They are just not. You can’t solicit for-

fereign interference, and the fact that you are unsuccessful in getting it doesn’t exonerate you. The failed scheme doesn’t make you innocent.

A failed scheme doesn’t make you in-

nocent. If you take a hostage and you demand a ransom and the police are after you and you release the hostage before you get the money, it doesn’t make you innocent. It just makes you unsuccessful—an unsuccessful crook—but it doesn’t mitigate the harmful conduct.

And this body should not accept nor should the American people accept the idea put out by the President’s lawyers today that it is perfectly fine—unimpeachable—for the President of the United States to say “Hey, Russia” or “Hey, Ukraine” or “Hey, China, I want your help in my election” because that is the policy of the President. We are calling that policy now. It is the policy of the President to demand foreign inter-

ference and withhold money from an ally at war unless they get it. That is what they call policy, impeachable, well. I am sorry, that is what I call corruption, and they can dress it up in fine legalese, but corruption is still corrupt-

The CHIEF JUSTICE. Thank you, Mr. Manager.

The Senator from Maine.

Ms. COLLINS. Mr. Chief Justice, I send a question to the desk.

The CHIEF JUSTICE. Thank you.

The question from Senator COLLINS is for the Chief Justice.

The House Judiciary Committee report accompanying the Articles of Impeachment as-

serted the President committed criminal

brbriety as defined in 18 U.S.C., section 201, and Honest Services Fraud as defined in 18 U.S.C., section 1346, but these offenses are not cited in the Articles of Impeachment. And the President’s actions as alleged in the

Articles of Impeachment constitute viola-
tions of these Federal criminal laws, and if so, why were they not included in the Arti-

cles?

Mr. Manager JEFFRIES. Thank you, Chief Justice, and thank you, Senator, for your question.

Our article I alleges corrupt abuse of power—corrupt abuse of power—connected to the President’s effort to try to cheat in the 2020 election by pres-

uring Ukraine to target an American citizen, Joe Biden, solely for personal and political gain and then to solicit presidentially important assistance in 2020 elec-

tion. And the scheme was executed in a variety of ways.

Now, Professor Dershowitz has indi-
cated, based on his theory of what is impeachable, that it has to either be a technical, well, though perhaps the weight of constitutional authority says the contrary, but he said that it should be something that is either a criminal violation or something akin to a criminal violation—akin to a criminal violation.

And what we allege in article I falls into that category because what happened here is that President Trump so-
licted a thing of value in exchange for an official act: the White House meeting call.

But, indeed, what we have are none of those facts, none of those docu-

ments, and in an almost 2-month pe-

period, none of the individuals who would normally be involved in that process are aware of the reason for the hold.

Now, let’s look at some prior holds in the cases of Obama’s—President Obama’s—temporary holds. Congress was notified of the reasons for those holds, and it was always done in the national interest, whether it be corrup-

tion, national security, in support of our alliances—never the President’s own personal interests.

But let’s look at even President Trump’s other holds in Afghanistan because of concerns about al Qaeda or in Central America because of immigra-

tion concerns. They were done for rea-

sons related to official U.S. policy. They weren’t concealed. They were public—widely publicized—and had en-

gaged not only Congress but the De-

partment of Defense, Department of State, and the entire apparatus that is involved in conducting those holds—

again, none of which happened here.

So all of this goes to show—the evi-

dence shows that there is no legitimate policy reason. Why violate the Im-

poundment Control Act? Why keep all of the people involved in these holds in the dark?

The President’s agencies and advisers confirmed repeatedly that the aid was in the best interests of our country’s national security, including Secretary Esper, Secretary Pompeo, Vice President Pence, Ambassador Bolton. Over and over again, everybody was implor-

ing the President to release the hold—
to no avail.

The evidence also shows that even the process was unusual, as I talked about earlier, and you have heard, over
the last week, a career OMB official, Mr. Sandy, explain that Mr. Duffey, the President’s handpicked political appointee who has refused to testify at the President’s direction, took over responsibility to authorize the aid.

Mr. Sandy explained that, in his entire career at OMB, he had never seen or experienced career officials having their apportionment authority removed by a political appointee. Senators, this is what we are talking about. There has been a lot of discussion.

You haven’t heard from me in a little while. I suspect there is a reason for that. I suspect it is because we don’t want to talk about the big issue. We don’t want to talk about what happened here.

The President abused his authority, put the interests of himself over the interests of the country, over the interests of our national security, over the interests of our free and fair elections. That is what I want to talk about. That is what happened. That is what the evidence shows.

There is no evidence that shows a legitimate engagement of U.S. policy processes to forward legitimate ends.

The CHIEF JUSTICE. Thank you.

Mr. Blunt. Mr. Chief Justice, I send a question to the desk on behalf of myself and other Senators for the counsel of the President.

The Senator from Missouri.

Mr. BLUNT. Mr. Chief Justice, I send a question to the desk on behalf of myself, Senators McCaskill—McCaskill—McSally, rather—Lankford, who it was a terrifying moment on behalf of myself, Senator McSally, Senator Lankford, Senator Gardner, Senator Capito, and Senator Wicker. This is a question for the President’s counsel.

The CHIEF JUSTICE. Thank you.

The question from Senator Blunt and other Senators is for the counsel of the President:

What does the supermajority threshold for conviction in the Senate, created by the Framers, mean about the type of case that should be brought by the House and the standard of proof that should be considered in the Senate?

Mr. Counsel DERSHOWITZ. Mr. Chief Justice, Senators, there were several debates among the Framers, of course: Should you have impeachment at all? We talked about that—what the criteria for impeachment should be. But then there was another debate: Who should have the ultimate responsibility for deciding whether the President should be removed?

James Madison suggested the Supreme Court of the United States as a completely nonpartisan institution.

Alexander Hamilton was concerned about that issue, as well. He said he thought the Supreme Court would be inappropriate because the judicial branch should not become involved directly as a branch—OK to preside over the trial—but ultimately an impeached President can be put on trial for crimes he committed crimes.

And Hamilton said that if he were to be put on trial, he would then be put on trial in front of the same institution—the judiciary—that had already impeached him, and they might have a predisposition.

So in the course of the debate, it was finally resolved that the Senate, which was a very different institution back at the time, eventually, votes not directly elected; they were appointed by the legislature. They were supposed to serve as an institution that checked on the House of Representatives—more mature, more sober, elected for longer periods of time. There is not so much concern about pleasing the popular masses.

Remember, the Framers were very concerned about democracy. Nobody ever called the United States a democracy—"a Republic, if you can keep it." Not a democracy—very great concern about that.

And then, when it came time to assign it to the Senate, there was discussion about what the criteria and what the standard should be. The selection of a two-thirds supermajority was plainly designed—plainly designed to avoid partisan impeachments, plainly designed to effectuate the very wise philosophy espoused by the Constitution Senator for during the Clinton campaign; that is, during the Clinton impeachment.

Never ever have an impeachment or removal that is partisan. Always demand that it be a widespread consensus, a bipartisan agreement, and bipartisan support. What better way of assuring bipartisan support than requiring a two-thirds vote because almost in every instance, in order to get a two-thirds vote, you need Members of both parties.

The Johnson case was a perfect example. In order to get that vote, you needed not only the party that was behind the impeachment, but you needed people from the other side as well, and that is what is not happening here. The President has committed obstruction of Congress.

Mr. Chief Justice, Members of the Senate, we had this question. We will say it very clearly. We are not willing to do that, and we are not willing to do that because of the constitutional framework upon which an impeachment is based and the constitutional privileges that are at stake, with no disrespect to the Chief Justice.

That is not the constitutional design. It is the same thing they are doing again. Surrender the constitutional prerogatives you have, and then we will proceed in this way. Give us documents, give us witnesses, and if you don’t, we are going to charge you with obstruction of Congress.

In that case, it is “We are willing to live,” according to the managers, “by whatever the Chief Justice decides.” But that is not the way the constitutional framework is set up, and it is putting us in exactly the same spot again: Give up your right to challenge a subpoena in court; rely only on the person who is here—by the way, again, with no disrespect to the Chief Justice. The Chief Justice is here as the Presiding Officer of this proceeding.

So the President is not willing to forgo those rights and privileges that he possesses under the Constitution, under article II, for expediency. They tried that below in the House. We trust that will not be the decision here in the Senate.

Thank you, Mr. Chief Justice.

The CHIEF JUSTICE. Thank you, counsel.
The Senator from Mississippi.

Mr. WICKER. Mr. Chief Justice, I send a question to the desk for Professor Dershowitz on behalf of myself and Senators MCSALLY and MORAN.

The CHIEF JUSTICE. The question for counsel DERSHOWITZ, by Senators WICKER, MCSALLY, and MORAN, is this:

Professor Dershowitz: You stated during your presentation that the House grounds for impeachment amount to the ‘most dangerous accusation.’ This represents, first, that this impeachment pose to our republic? To its citizens?

Mr. Counsel DERSHOWITZ. Thank you, Mr. Chief Justice. Thank you, Senators.

I came of age during the period of McCarthyism. I then became a young professor during the divisive time of the Vietnam war. I, as you, lived through the division during the Iraq war and 9/11 and following 9/11. I have never lived at a more divisive time in the United States of America than today. Families have broken up. Friends don’t speak to each other. Dialogue has disappeared on university campuses. We live in extraordinarily dangerous times. I am not suggesting that the impeachment decision by the House has brought that on us. Perhaps it is merely a symptom of a terrific problem that we have facing us and likely to face us in the future.

I think it is the responsibility of this mature Senate, whose job it is to look forward, whose job it is to ensure our future, to make sure the divisions don’t grow even greater.

Were the President of the United States to be removed today, it would pose existential dangers to our ability to live together as a people. The decision would not be accepted by many Americans. Nixon’s decision was accepted—easily accepted. I think that decisions that would have been made in other periods were not accepted. The one would not be easily accepted because it is such a divided country, such a divided time.

If the precedent is established that a President can be removed on the basis of such vague and recurring and open-ended and targeted terms as ‘abuse of power’—40 Presidents have been accused of abuse of power. I bet you all of them have. We just don’t know some of the charges against some of them, but we have never lived at a time when so many. If that would be the case that would be true, this would just be the beginning of a recurring weaponization of impeachment whenever one House is controlled by one party and the Presidency is controlled by another party.

Now the House managers say there are dangers of not impeaching, but those dangers can be eliminated in 8 months. If you really feel there is a strong case, then campaign against the President. But the danger of impeachment—not just my lifetime, your lifetime, and the lifetime of our children.

So I urge you respectfully, you are the guardians of our future. Follow the constraints of the Constitution. Do not allow impeachment to become a normalized weapon, in the words of one of the Framers. Make sure that it is reserved only for the most extraordinary of cases, like that of Richard Nixon. This case does not meet those criteria.

The CHIEF JUSTICE. Thank you, counsel.

The Senator from Arizona.

Ms. SINEMA. Mr. Chief Justice, I submit a question to the President’s counsel.

The CHIEF JUSTICE. Thank you.

The question from Senator SINEMA to President’s counsel is this:

The administration notified Congress of the hold of the Northern Triangle countries’ funds in 2019, announced its decision to withhold aid to Afghanistan in September 2019, and worked with Congress for months in 2018 regarding funds being withheld due to Pakistan’s lack of progress meeting its counterterrorism responsibilities. In these instances, the receiving countries knew the funds were being withheld to change behavior and further U.S. policy. Why, when the administration withheld the Ukraine security assistance, did it not notify Congress, or make Ukraine or other partner countries aware of the hold and the steps needed to resolve the hold?

Mr. Counsel PHILBIN. Mr. Chief Justice, Senator, thank you for the question.

I think that, in all of those instances that were listed in the question, it was clear what the hold was meant to send a signal. It was done publicly, and it was meant to send a signal to the country. I think that in the testimony before the House here, Ambassador Volker made clear that he and others hoped that the hold would not become public because they did not want there to be any signal to the Ukrainians or to others.

People have talked here—the House managers talked about how, well, even if the aid didn’t lead to anything not being purchased over the summer, it was still dangerous because it sent a signal to the Russians. The whole point was, it wasn’t public. The Ukrainians didn’t know. The Russians didn’t know. It wasn’t being done to send a signal; it was to address concerns.

The President had raised concerns, and he wanted time to have those concerns addressed. He wanted to understand better burden-sharing—the issue that is reflected in the June 25 email that I referred to earlier; it is referred to in the July 25 call transcripts—and he wanted to understand corruption issues. He raised corruption issues.

Over the course of the summer, the testimony showed the President in particular below explained that there were developments on corruption. President Zelensky had just been elected in April. At that time, multiple witnesses testified that it was unclear. He had run on a reform agenda, but it was unclear what he would accomplish because it was unclear whether or not he would secure a majority in the Ukrainian Parliament. Those elections didn’t occur until July. That is when the July 25 call occurred.

He won the majority in Parliament, but the Parliament was not actually going to be seated until later in August. Mr. Morrison testified that when he had the Ambassador Bolton were in Kyiv in August, around August 27, that the Parliament had just been seated, and Zelensky and his Ministers were tired because they had been up all night. They kept the Parliament up late in session to pass the agenda right then, including things like eliminating immunity for members of the Parliament from corruption, prosecutions, and the legislature just set up the newly formed corruption court.

So these developments were positive developments, but then Mr. Morrison testified that President Zelensky, when he spoke to Vice President PENCE in Warsaw, discussed these things, and President Zelensky went through what he was doing, and then that information was relayed back to the President. So the hold had been in place so that the President could, within the U.S. Government, privately consider this information and not to send a signal to the outside world.

This plays into some of the ideas that the House manager presented that somehow this was terrible; it sent a signal to the Russians. Part of the whole point, Ambassador Volker explained, was that there was concern that it not become public because it would not then send a signal. That is what happened until the POLITICO article came out. We think that is the best way to understand the difference and approach there.

The CHIEF JUSTICE. Thank you, counsel.

Mr. YOUNG. Mr. Chief Justice. The CHIEF JUSTICE. The Senator from Indiana.

Mr. YOUNG. I send a question to the desk on behalf of myself and Senator BRAUN.

The CHIEF JUSTICE. Thank you. The Senator from Indiana and Senator BRAUN ask both parties the following question:

‘We were promised by House managers that the evidence supporting each article of impeachment would be “overwhelming” and “uncontested.” Virtually every day, House managers have insisted that the Senate cannot have a trial without witnesses. Do both parties agree that the Senate has included in evidence in this trial the testimony of every single witness from whom we heard before they voted, except for the intelligence community IG report that Chairman SCHIFF kept secret? We begin with the House managers.\n
Mr. Manager SCHIFF. Let me take this opportunity, if I can, to answer a few questions. First, is the fact that the testimony of the witnesses before the House sufficient to relieve the Senate of an obligation to have a trial? And the answer is no. There is no—indeed, in the Senate trial—impeachment trial in history—has involved witnesses who did not testify before the House. This will be the
first departure. It shouldn’t be if it is to be a fair trial.

I want to quickly respond to a couple of other points. The question was asked: Why didn’t we charge bribery? And the answer is we could have charged bribery. In fact, we outlined the facts that constitute bribery in the article, but “abuse of power” is the highest crime. The Framers have it in mind as the highest crime. The facts we allege within that do constitute bribery, but had we charged bribery within the “abuse of power” article, I can assure you that counsel here would be arguing: You have charged two offenses within the same article. That makes that invalid. We wouldn’t have had Alan Dershowitz making that argument because he says abuse of power is not impeachable. They would have had Jonathan Turley here making that argument. If we split them into two separate articles—one for abuse of power and one for bribery—they would have argued you have taken one crime and made it into two.

The important constitutional point here is not that the acts within abuse of power constitute bribery—although they do. The important point is we charged a constitutional crime—the most serious crime. The Founders gave the President enormous powers, and their most important consideration was that the President not abuse that power, and they provided a remedy, and that remedy is impeachment.

One final point. Mr. Sekulow said that is not how the Constitution works. The Constitution doesn’t allow the Chief Justice to make those decisions, but, you know, he doesn’t say the Constitution prohibits. The Constitution permits it if they will agree, but they won’t. And he said it is the same as in the House, and it is the same as in the House. And it is the same in this way: If they were operating in good faith, if they really wanted a fair resolution, if they weren’t just shooting for delay, they would allow the Chief Justice to make these decisions.

But what they do not want is they do not want you to hear John Bolton. And why? Because when you hear, graphically, a man saying the President of the United States told me to withhold aid from our ally, to coerce foreign assistance in his election, when the American people hear that firsthand—not filtered through our statements—they will recognize impeachable conduct when they see it.

The CHIEF JUSTICE. Thank you, Mr. Manager.

Mr. Sekulow, you have 2½ minutes.

Mr. Counsel SEKULOW. Thank you, Mr. Chief Justice.

With regard to the last statement, I am just going to say: Asked and answered. I have answered the question about the issue of moving forward if there were witnesses and our view on that. I don’t have to say anything else. Now, with regard to the question that was actually presented, 29 times—the House managers have used the phrase “overwhelming, uncontested, sufficient.” “Proved” they said 31 times. Now, that is just what the record says.

It is true that the record from the House was accepted provisionally subject to evidentiary objections, but they are the ones who have said “overwhelmingly” and “proved.” Now, we, of course, disagree with their conclusions as a matter of fact and as a matter of law. But for them to come up here and to argue “proved” and “overwhelmingly” a total of, I guess, 64 times in a couple of days, tells me a lot about what they want.

What we are asking for is this proceeding to continue, and with that, we are done.

Thank you, Mr. Chief Justice

The CHIEF JUSTICE. Thank you, counsel.

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., Thursday, January 30, and this order also constitute the adjournment of the Senate.

There being no objection, at 11:05 p.m., the Senate, sitting as a Court of Impeachment, adjourned until Thursday, January 30, 2020, at 1 p.m.