

**IN THE SENATE OF THE UNITED STATES**  
**Sitting as a Court of Impeachment**

**In re**

**IMPEACHMENT OF  
PRESIDENT DONALD J. TRUMP**

**REPLY MEMORANDUM OF THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP**

United States House of Representatives

Adam B. Schiff  
Jerrold Nadler  
Zoe Lofgren  
Hakeem S. Jeffries  
Val Butler Demings  
Jason Crow  
Sylvia R. Garcia

*U.S. House of Representatives Managers*

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## INTRODUCTION

President Trump's brief confirms that his misconduct is indefensible. To obtain a personal political "favor" designed to weaken a political rival, President Trump corruptly pressured the newly elected Ukrainian President into announcing two sham investigations. As leverage against Ukraine in his corrupt scheme, President Trump illegally withheld hundreds of millions of dollars in security assistance critical to Ukraine's defense against Russian aggression, as well as a vital Oval Office meeting. When he got caught, President Trump sought to cover up his scheme by ordering his Administration to disclose no information to the House of Representatives in its impeachment investigation. President Trump's efforts to hide his misdeeds continue to this day, as do his efforts to solicit foreign interference. President Trump must be removed from office now because he is trying to cheat his way to victory in the 2020 Presidential election, and thereby undermine the very foundation of our democratic system.

President Trump's lengthy brief to the Senate is heavy on rhetoric and procedural grievances, but entirely lacks a legitimate defense of his misconduct. It is clear from his response that President Trump would rather discuss anything other than what he actually did. Indeed, the first 80 pages of his brief do not meaningfully attempt to defend his conduct—because there is no defense for a President who seeks foreign election interference to retain power and then attempts to cover it up by obstructing a Congressional inquiry. The Senate should swiftly reject President Trump's bluster and evasion, which amount to the frightening assertion that he may commit whatever misconduct he wishes, at whatever cost to the Nation, and then hide his actions from the representatives of the American people without repercussion.

*First*, President Trump's argument that abuse of power is not an impeachable offense is wrong—and dangerous. That argument would mean that, even accepting that the House's recitation

of the facts is correct—which it is—the House lacks authority to remove a President who sells out our democracy and national security in exchange for a personal political favor. The Framers of our Constitution took pains to ensure that such egregious abuses of power would be impeachable. They specifically rejected a proposal to limit impeachable offenses to treason and bribery and included the term “other high Crimes and Misdemeanors.”<sup>1</sup>

There can be no reasonable dispute that the Framers would have considered a President’s solicitation of a foreign country’s election interference in exchange for critical American military and diplomatic support to be an impeachable offense. Nor can there be any dispute that the Framers would have recognized that allowing a President to prevent Congress from investigating his misconduct would nullify the House’s “sole Power of Impeachment.”<sup>2</sup> No amount of legal rhetoric can hide the fact that President Trump exemplifies why the Framers included the impeachment mechanism in the Constitution: to save the American people from these kinds of threats to our republic.

*Second*, President Trump’s assertion that impeachable offenses must involve criminal conduct is refuted by two centuries of precedent and, if accepted, would have intolerable consequences. But this argument has not been accepted in previous impeachment proceedings and should not be accepted here. As one member of President Trump’s legal team previously conceded, President Trump’s theory would mean that the President could not be impeached even if he allowed an enemy power to invade and conquer American territory.<sup>3</sup> The absurdity of that argument demonstrates why every serious constitutional scholar to consider it—including the House Republicans’ own legal

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<sup>1</sup> U.S. Const., Art. II, § 4.

<sup>2</sup> U.S. Const., Art. I, § 2, cl. 5.

<sup>3</sup> See Alan Dershowitz, *The Case Against Impeaching Trump* 26-27 (2018).

expert—has rejected it.<sup>4</sup> The Framers intentionally did not tie “high Crimes and Misdemeanors” to the federal criminal code—which did not exist at the time of the Founding—but instead created impeachment to cover severe abuses of the public trust like those of President Trump.

*Third*, President Trump now claims that he had virtuous reasons for withholding from our ally Ukraine sorely needed security assistance and that there was no actual threat or reward as part of his proposed corrupt bargain. But the President’s after-the-fact justifications for his illegal hold on security assistance cannot fool anybody. The reason President Trump jeopardized U.S. national security and the integrity of our elections is even more pernicious: he wanted leverage over Ukraine to obtain a personal, political favor that he hoped would bolster his reelection bid.

If withholding the security assistance to Ukraine had been a legitimate foreign policy act, then there is no reason President Trump’s staff would have gone to such lengths to hide it, and no reason President Trump would have tried so hard to deny the obvious when it came to light. It is common sense that innocent people do not behave like President Trump did here. As his own Acting Chief of Staff Mick Mulvaney bluntly confessed and as numerous other witnesses confirmed, there was indeed a quid pro quo with Ukraine. The Trump Administration’s message to the American people was clear: “We do that all the time with foreign policy.”<sup>5</sup> Instead of embracing what his Acting Chief of Staff honestly disclosed, President Trump has tried to hide what the evidence plainly reveals: the Emperor has no clothes.

*Fourth*, President Trump’s assertion that he has acted with “transparency” during this impeachment is yet another falsehood. In fact, unlike any of his predecessors, President Trump

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<sup>4</sup> See, e.g., Jonathan Turley, Written Statement, *The Impeachment Inquiry into President Donald J. Trump: The “Constitutional Basis” for Presidential Impeachment* 10-11 (Dec. 4, 2019), <https://perma.cc/92PY-MBVY>; Charlie Savage, ‘Constitutional Nonsense’: Trump’s Impeachment Defense Defies Legal Consensus, N.Y. Times (Jan. 20, 2020), <https://perma.cc/76TD-94XI>.

<sup>5</sup> Statement of Material Facts ¶ 121 (Jan. 18, 2020) (Statement of Facts) (filed as an attachment to the House’s Trial Memorandum).

categorically refused to provide the House with *any* information and demanded that the entire Executive Branch coverup his misconduct. President Trump's subordinates fell in line.

Similarly wrong is the argument by President Trump's lawyers that his blanket claim of immunity from investigation should now be understood as a valid assertion of executive privilege—a privilege he never actually invoked. And President Trump's continued attempt to justify his obstruction by citing to constitutional separation of powers misunderstands the nature of an impeachment. His across-the-board refusal to provide Congress with information and his assertion that his own lawyers are the sole judges of Presidential privilege undermines the constitutional authority of the people's representatives and shifts power to an imperial President.

*Fifth*, President Trump's complaints about the House's impeachment procedures are meritless excuses. President Trump was offered an eminently fair process by the House and he will receive additional process during the Senate proceedings, which, unlike the House investigation, constitute an actual trial. As President Trump recognizes, the Senate must “decide for itself all matters of law and fact.”<sup>6</sup>

The House provided President Trump with process that was just as substantial—if not more so—than the process afforded other Presidents who have been subject to an impeachment inquiry, including the right to call witnesses and present evidence. Because he had too much to hide, President Trump did not take advantage of what the House offered him and instead decided to shout from the sidelines—only to claim that the process he obstructed was unfair. President Trump's lengthy trial brief does not explain why, even now, he has not offered any documents or witnesses in his defense or provided any information in response to the House's repeated requests. This is not how an innocent person behaves. President Trump's process arguments are simply part

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<sup>6</sup> Trial Memorandum of President Donald J. Trump at 13 (Jan. 20, 2020) (Opp.).

of his attempt to cover up his wrongdoing and to undermine the House in the exercise of its constitutional duty.

*Finally*, President Trump’s impeachment trial is an effort to *safeguard* our elections, not override them. His unsupported contentions to the contrary have it exactly backwards. President Trump has shown that he will use the immense powers of his office to manipulate the upcoming election to his own advantage. Respect for the integrity of this Nation’s democratic process requires that President Trump be removed before he can corrupt the very election that would hold him accountable to the American people.

In addition, President Trump is wrong to suggest that the impeachment trial is an attempt to overturn the prior election. If the Senate convicts and removes President Trump from office, then the Vice President elected by the American people in 2016 will become the President.<sup>7</sup> The logic of President Trump’s argument is that because he was elected once and stands for reelection again, he cannot be impeached no matter how egregiously he betrays his oath of office. This type of argument would not have fooled the Framers of our Constitution, who included impeachment as a check on Presidents who would abuse their office for personal gain, like President Trump.

\* \* \*

The Framers anticipated that a President might one day seek to place his own personal and political interests above those of our Nation, and they understood that foreign interference in our elections was one of the gravest threats to our democracy. The Framers also knew that periodic democratic elections cannot serve as an effective check on a President who seeks to manipulate the

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<sup>7</sup> As the then-House Managers explained in President Clinton’s impeachment trial, “[t]he 25th Amendment to the Constitution ensures that impeachment and removal of a President would not overturn an election because it is the elected Vice President who would replace the President not the losing presidential candidate.” Reply of the U.S. House of Representatives to the Trial Mem. of President Clinton, *in Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton, Volume II: Floor Trial Proceedings*, S. Doc. No. 106-4, at 1001 (1999).

those elections. The ultimate check on Presidential misconduct was provided by the Framers through the power to impeach and remove a President—a power that the Framers vested in the representatives of the American people.

Indeed, on the eve of his impeachment trial, President Trump continues to insist that he has done nothing wrong. President Trump’s view that he cannot be held accountable, except in an election he seeks to fix in his favor, underscores the need for the Senate to exercise its solemn constitutional duty to remove President Trump from office. If the Senate does not convict and remove President Trump, he will have succeeded in placing himself above the law. Each Senator should set aside partisanship and politics and hold President Trump accountable to protect our national security and democracy.

## **ARGUMENT**

### **I. PRESIDENT TRUMP MUST BE REMOVED FOR ABUSING HIS POWER**

#### **A. President Trump’s Abuse of Power Is a Quintessential Impeachable Offense**

President Trump contends that he can abuse his power with impunity—in his words, “do whatever I want as President”<sup>8</sup>—provided he does not technically violate a statute in the process. That argument is both wrong and remarkable. History, precedent, and the words of the Framers conclusively establish that serious abuses of power—offenses, like President Trump’s, that threaten our democratic system—are impeachable.

President Trump’s own misconduct illustrates the implications of his position. In President Trump’s view, as long as he does not violate a specific statute, then the only check on his corrupt abuse of his office for his personal gain is the need to face reelection—even if the very goal of his abusive behavior is to cheat in that election. If President Trump were to succeed in his scheme and

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<sup>8</sup> Statement of Facts ¶ 164.



win a second and final term, he would face no check on his conduct. The Senate should reject that dangerous position.

1. *The Framers Intended Impeachment as a Remedy for Abuse of High Office.* President Trump appears to reluctantly concede that the fear that Presidents would abuse their power was among the key reasons that the Framers adopted an impeachment remedy.<sup>9</sup> But he contends that abuse of power was never intended to be an impeachable offense in its own right.<sup>10</sup>

President Trump’s focus on the label to be applied to his conduct distracts from the fundamental point: His conduct is impeachable whether it is called an “abuse of power” or something else. The Senate is not engaged in an abstract debate about how to categorize the particular acts at issue; the question instead is whether President Trump’s conduct is impeachable because it is a serious threat to our republic. For the reasons set forth in the House Manager’s opening brief, the answer is plainly yes.

In any event, President Trump is wrong that abuses of power are not impeachable. The Framers focused on the toxic combination of corruption and foreign interference—what George Washington in his Farewell Address called “one of the most baneful foes of republican government.”<sup>11</sup> James Madison put it simply: The President “might betray his trust to foreign powers.”<sup>12</sup>

To the Framers, such an abuse of power was the quintessential impeachable conduct. They therefore rejected a proposal to limit impeachable offenses to only treason and bribery. They recognized the peril of setting a rigid standard for impeachment, and adopted terminology that

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<sup>9</sup> Opp. at 57 n.383.

<sup>10</sup> Opp. at 1-2.

<sup>11</sup> George Washington, Farewell Address (Sept. 19, 1796), *George Washington Papers, Series 2, Letterbooks 1754-1799: Letterbook 24, April 3, 1793 – March 3, 1797*, Library of Congress.

<sup>12</sup> 2 *The Records of the Federal Convention of 1787*, at 66 (Max Farrand ed., 1911).

would encompass what George Mason termed the many “great and dangerous offenses” that might “subvert the Constitution.”<sup>13</sup> The Framers considered and rejected as too narrow the word “corruption,” deciding instead on the term “high Crimes and Misdemeanors” because it would encompass the type of “abuse or violation of some public trust”—the abuse of power—that President Trump committed here.<sup>14</sup>

2. *Impeachable Conduct Need Not Violate Established Law.* President Trump argues that a President’s conduct is impeachable only if it violates a “known offense defined in existing law.”<sup>15</sup> That contention conflicts with constitutional text, Congressional precedents, and the overwhelming consensus of constitutional scholars.

The Framers borrowed the term “high Crimes and Misdemeanors” from British practice and state constitutions. As that term was applied in England, officials had long been impeached for non-statutory offenses, such as the failure to spend money allocated by Parliament, disobeying an order of Parliament, and appointing unfit subordinates.<sup>16</sup> The British understood impeachable offenses to be “so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.”<sup>17</sup>

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<sup>13</sup> *Id.* at 550.

<sup>14</sup> *The Federalist No. 65* (Alexander Hamilton); see *The Federalist Nos. 68* (Alexander Hamilton); *The Federalist No. 69* (Alexander Hamilton).

<sup>15</sup> Opp. at 14-16.

<sup>16</sup> Raoul Berger, *Impeachment: The Constitutional Problems* 67-69 (1973).

<sup>17</sup> 2 Joseph Story, *Commentaries on the Constitution of the United States* § 762 (1833). The President’s brief selectively quotes Blackstone’s *Commentaries* for the proposition that impeachment in Britain required a violation of “known and established law.” Opp. at 15. But that reflected the well-known and established nature of the parliamentary impeachment process, not some requirement that the underlying conduct violate a then-existing law. See also 4 William Blackstone, *Commentaries on the Law of England* \*5 n.7 (1836) (“The word *crime* has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the words *high crimes and misdemeanors* are used in prosecutions by impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge.”).

American precedent confirms that the Impeachment Clause is not confined to a statutory code. The articles of impeachment against President Nixon turned on his abuse of power, rather than on his commission of a statutory offense. Many of the specific allegations set forth in those three articles did not involve any crimes. Instead, the House Judiciary Committee emphasized that President Nixon’s conduct was “undertaken for his own personal political advantage and not in furtherance of any valid national policy objective”<sup>18</sup>—and *expressly* stated that his abuses of power warranted removal regardless whether they violated a specific statute.<sup>19</sup>

Previous impeachments were in accord. In 1912, for example, Judge Archibald was impeached and convicted for using his position to generate business deals with potential litigants in his court, even though this behavior had not been shown to violate any then-existing statute or laws regulating judges. The House Manager in the Archibald impeachment asserted that “[t]he decisions of the Senate of the United States, of the various State tribunals which have jurisdiction over impeachment cases, and of the Parliament of England all agree that an offense, in order to be impeachable, need not be indictable either at common law or under any statute.”<sup>20</sup> As early as 1803, Judge Pickering was impeached and then removed from office by the Senate for refusing to allow an appeal, declining to hear witnesses, and appearing on the bench while intoxicated and thereby “degrading . . . the honor and dignity of the United States.”<sup>21</sup>

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<sup>18</sup> *Impeachment of Richard M. Nixon, President of the United States: Report of the Comm. on the Judiciary, H. of Representatives*, H. Rep. No. 93-1305, at 139 (1974).

<sup>19</sup> *See id.* at 136.

<sup>20</sup> *Proceedings of the U.S. Senate and the House of Representatives in the Trial of Impeachment of Robert W. Archibald*, Vol. II, S. Doc. No. 62-1140, at 1399 (1913).

<sup>21</sup> *Extracts from the Journal of the U.S. Senate in All Cases of Impeachment Presented by the House of Representatives, 1798-1904*, S. Doc. No. 62-876, at 20-22 (1912).

President Trump’s argument conflicts with a long history of scholarly consensus, including among “some of the most distinguished members of the [Constitutional] convention.”<sup>22</sup> As a leading early treatise on the Constitution explained, impeachable offenses “are not necessarily offences against the general laws ... [for] [i]t is often found that offences of a very serious nature by high officers are not offences against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty.”<sup>23</sup> In his influential 1833 treatise, Supreme Court Justice Joseph Story similarly explained that impeachment encompasses “misdeeds ... as peculiarly injure the commonwealth by the abuse of high offices of trust,” whether or not those misdeeds violate existing statutes intended for other circumstances.<sup>24</sup> Story observed that the focus was not “crimes of a strictly legal character,” but instead “what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office.”<sup>25</sup>

The fact that impeachment is not limited to violations of “established law” reflects its basic function as a remedy reserved for office-holders who occupy special positions of trust and power. Statutes of general applicability do not address the ways in which those to whom impeachment applies may abuse their unique positions. Limiting impeachment only to those statutes would defeat its basic purpose.

Modern constitutional scholars overwhelmingly agree. That includes one of President Trump’s own attorneys, who argued during President Clinton’s impeachment: “It certainly doesn’t have to be a crime, if you have somebody who completely corrupts the office of president, and who

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<sup>22</sup> S. Doc. No. 62-1140, at 1401 (1913) (citing 15 *The American and English Encyclopedia of Law* 1066 (John Houston Merrill ed., 1891)).

<sup>23</sup> See Thomas M. Cooley, *The General Principles of Constitutional Law* 159 (1880).

<sup>24</sup> 2 Story § 788.

<sup>25</sup> *Id.* § 762.

abuses trust and who poses great danger to our liberty.”<sup>26</sup> More recently, that attorney changed positions and now maintains that a President cannot be impeached even for allowing a foreign sovereign to conquer an American State.<sup>27</sup> The absurdity of that argument helps explain why it has been so uniformly rejected.

Even if President Trump were correct that the Impeachment Clause covers only conduct that violates established law, his argument would fail. President Trump concedes that “high crimes and misdemeanors” encompasses conduct that is akin to the terms that precede it in the Constitution—treason and bribery.<sup>28</sup> And there can be no reasonable dispute that his misconduct is closely akin to bribery. “The corrupt exercise of power in exchange for a personal benefit defines impeachable bribery.”<sup>29</sup> Here, President Trump conditioned his performance of a required duty (disbursement of Congressionally appropriated aid funds to Ukraine) on the receipt of a personal benefit (the announcement of investigations designed to skew the upcoming election in his favor). This conduct carries all the essential qualities of bribery under common law and early American precedents familiar to the Framers.<sup>30</sup> It would be all the more wrong in their view because it involves a solicitation to a foreign government to manipulate our democratic process. And

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<sup>26</sup> James Walker, *Alan Dershowitz Said a “Technical Crime” Wasn’t Needed for Impeachment in Resurfaced 1998 Interview*, Newsweek (Jan. 20, 2020), <https://perma.cc/6JCG-2GDW> (*Dershowitz 1998 Interview*).

<sup>27</sup> Dershowitz at 26-27.

<sup>28</sup> Opp. at 14.

<sup>29</sup> *Impeachment of Donald J. Trump, President of the United States: Report of the Comm. on the Judiciary of the H. of Representatives, together with Dissenting Views, to Accompany H. Res. 755*, H. Rep. No. 116-346, at 42 n. 207 (2019) (quotation marks omitted); see 2 Story § 794. Notably, President Trump’s counsel, Professor Dershowitz, indicated in a recent television appearance that he and Professor Tribe agree on this point. See *Dershowitz 1998 Interview*, <https://perma.cc/6JCG-2GDW>.

<sup>30</sup> See, e.g., *Gilmore v. Lewis*, 12 Ohio 281, 286 (1843) (For “public officers, . . . [i]t is an indictable offence, in them, to exact and receive any thing, but what the law allows, for the performance of their legal duties,” because “at common law, being against sound policy, and, *quasi*, extortion.”); accord *Kick v. Merry*, 23 Mo. 72, 75 (1856); *United States v. Matthews*, 173 U.S. 381, 384-85 (1899) (collecting cases).

President Trump did actually violate an “established law”: the Impoundment Control Act.<sup>31</sup> Thus, even under his own standard, President Trump’s conduct is impeachable.

3. *Corrupt Intent May Render Conduct an Impeachable Abuse of Power.* President Trump next contends that the Impeachment Clause does not encompass any abuse of power that turns on the President’s reasons for acting. Thus, according to President Trump, if he could perform an act for legitimate reasons, then he necessarily could perform the same act for corrupt reasons.<sup>32</sup> That argument is obviously wrong.

The Impeachment Clause itself forecloses President Trump’s argument. The specific offenses enumerated in that Clause—bribery and treason—both turn on the subjective intent of the actor. Treason requires a “disloyal mind” and bribery requires corrupt intent.<sup>33</sup> Thus, a President may form a military alliance with a foreign nation because he believes that doing so is in the Nation’s strategic interests, but if the President forms that same alliance for the purpose of taking up arms and overthrowing the Congress, his conduct is treasonous. Bribery turns on similar considerations of corrupt intent. And, contrary to President Trump’s assertion, past impeachments have concerned “permissible conduct that had been simply done with the wrong subjective motives.”<sup>34</sup> The first and second articles of impeachment against President Nixon, for example, charged him with using the powers of his office with the impermissible goals of obstructing justice and targeting his political opponents—in other words, for exercising Presidential power based on impermissible reasons.<sup>35</sup>

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<sup>31</sup> *Matter of Office of Mgmt. & Budget—Withholding of Ukraine Sec. Assistance*, B-331564 (Comp. Gen. Jan. 16, 2020), <https://perma.cc/5CDX-XLX6>.

<sup>32</sup> Opp. at 28.

<sup>33</sup> *Cramer v. United States*, 325 U.S. 1, 30-31 (1945) (Treason); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) (Bribery).

<sup>34</sup> Opp. at 30.

<sup>35</sup> See H. Rep. No. 93-1305 (1974).

There are many acts that a President has “objective” authority to perform that would constitute grave abuses of power if done for corrupt reasons. A President may issue a pardon because the applicant demonstrates remorse and meets the standards for clemency, but if a President issued a pardon in order to prevent a witness from testifying against him, or in exchange for campaign donations, or for other corrupt motives, his conduct would be impeachable—as our Supreme Court unanimously recognized nearly a century ago.<sup>36</sup> The same principle applies here.

**B. The House Has Proven that President Trump Corruptly Pressured Ukraine to Interfere in the Presidential Election for His Personal Benefit**

President Trump withheld hundreds of millions of dollars in military aid and an important Oval Office meeting from Ukraine, a vulnerable American ally, in a scheme to extort the Ukrainian government into announcing investigations that would help President Trump and smear a potential rival in the upcoming U.S. Presidential election. He has not come close to justifying that misconduct.

1. President Trump principally maintains that he did not in fact condition the military aid and Oval Office meeting on Ukraine’s announcement of the investigations—repeatedly asserting that there was “no quid pro quo.”<sup>37</sup> The overwhelming weight of the evidence refutes that assertion. And President Trump has effectively muzzled witnesses who could shed additional light on the facts.

Although President Trump argues that he “did not make any connection between the assistance and any investigation,”<sup>38</sup> his own Acting Chief of Staff, Mick Mulvaney, admitted the opposite during a press conference—conceding that the investigation into Ukrainian election

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<sup>36</sup> *Ex Parte Grossman*, 267 U.S. 87, 122 (1925) (the President could be impeached for using his pardon power in a manner that destroys the Judiciary’s power to enforce its orders).

<sup>37</sup> Statement of Facts ¶ 114.

<sup>38</sup> Opp. at 81.

interference was part of “why we held up the money.”<sup>39</sup> After a reporter inquired about this concession of a quid pro quo, Mr. Mulvaney replied, “[W]e do that all the time with foreign policy,” added, “get over it,” and then refused to explain these statements by testifying in response to a House subpoena.<sup>40</sup> The President’s brief does not even address Mr. Mulvaney’s admission. Ambassador Taylor also acknowledged the quid pro quo, stating, “I think it’s crazy to withhold security assistance for help with a political campaign.”<sup>41</sup> And Ambassador Sondland testified that the existence of a quid pro quo regarding the security assistance was as clear as “two plus two equals four.”<sup>42</sup> President Trump’s lawyers also avoid responding to these statements.

The same is true of the long-sought Oval Office meeting. As Ambassador Sondland testified: “I know that members of this committee frequently frame these complicated issues in the form of a simple question: Was there a quid pro quo?” He answered that, “with regard to the requested White House call and the White House meeting, the answer is yes.”<sup>43</sup> Ambassador Taylor reaffirmed the existence of a quid pro quo regarding the Oval Office meeting, testifying that “the meeting President Zelensky wanted was conditioned on the investigations of Burisma and alleged Ukrainian interference in the 2016 U.S. elections.”<sup>44</sup> Other witnesses testified similarly.<sup>45</sup>

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<sup>39</sup> Statement of Facts ¶ 121.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 118.

<sup>42</sup> *Id.* ¶ 101.

<sup>43</sup> *Id.* ¶ 52.

<sup>44</sup> Transcript, *Impeachment Inquiry: Ambassador William B. Taylor and George Kent: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 35 (Nov. 13, 2019) (statement of Ambassador Taylor).

<sup>45</sup> Transcript, *Impeachment Inquiry: Fiona Hill and David Holmes: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 18-19 (Nov. 21, 2019) (statement of Mr. Holmes) (“[I]t was made clear that some action on Burisma/Biden investigation was a precondition for an Oval Office visit.”).



President Trump’s principal answer to this evidence is to point to two conversations in which he declared to Ambassador Sondland and Senator Ron Johnson that there was “no quid pro quo.”<sup>46</sup> Both conversations occurred after the President had been informed of the whistleblower complaint against him, at which point he obviously had a strong motive to come up with seemingly innocent cover stories for his misconduct.

In addition, President Trump’s brief omits the second half of what he told Ambassador Sondland during their call. Immediately after declaring that there was “no quid pro quo,” the President insisted that “President Zelensky must announce the opening of the investigations and he should want to do it.”<sup>47</sup> President Trump thus conveyed that President Zelensky “must” announce the sham investigations in exchange for American support—the very definition of a quid pro quo, notwithstanding President Trump’s self-serving, false statement to the contrary. Indeed that statement shows his consciousness of guilt.

President Trump also asserts that there cannot have been a quid pro quo because President Zelensky and other Ukrainian officials have denied that President Trump acted improperly.<sup>48</sup> But the evidence shows that Ukrainian officials understood that they were being used “as a pawn in a U.S. reelection campaign.”<sup>49</sup> It is hardly surprising that President Zelensky has publicly denied the existence of a quid pro quo given that Ukraine remains critically dependent on continued U.S. military and diplomatic support, and given that President Zelensky accordingly has a powerful incentive to avoid angering an already troubled President Trump.

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<sup>46</sup> *See* Opp. at 87-88.

<sup>47</sup> Statement of Facts ¶ 114.

<sup>48</sup> Opp. at 84-85.

<sup>49</sup> Statement of Facts ¶ 68.

President Trump’s assertion that the evidence of a quid pro quo cannot be trusted because it is “hearsay” is incorrect.<sup>50</sup> The White House’s readout of the July 25 phone call itself establishes that President Trump linked military assistance on President Zelensky’s willingness to do him a “favor”—which President Trump made clear was to investigate former Vice President Biden and alleged Ukrainian election interference.<sup>51</sup> One of the people who spoke directly to President Trump—and whose testimony therefore was not hearsay—was Ambassador Sondland, who confirmed the existence of a quid pro quo and provided some of the most damning testimony against President Trump.<sup>52</sup> Other witnesses provided compelling corroborating evidence of the President’s scheme.<sup>53</sup>

President Trump’s denials of the quid pro quo are, therefore, plainly false. There is a term for this type of self-serving denial in criminal cases—a “false exculpatory”—which is strong evidence of guilt.<sup>54</sup> When a defendant “intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false,” such a false statement tends to show the defendant’s consciousness of guilt.<sup>55</sup> President Trump’s denial of the quid pro quo underscores that he knows his scheme to procure the sham investigations was improper, and that he is now lying to cover it up.

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<sup>50</sup> Opp. at 87.

<sup>51</sup> Statement of Facts ¶¶ 75-80.

<sup>52</sup> See, e.g., *id.* ¶ 52.

<sup>53</sup> See, e.g., *id.* ¶¶ 49-67.

<sup>54</sup> See, e.g., *United States v. Kahan*, 415 U.S. 239, 240-41 (1974) (per curiam).

<sup>55</sup> *United States v. Penn*, 974 F.2d 1026, 1029 (8th Cir. 1992).

2. President Trump next argues that he withheld urgently needed support for Ukraine for reasons unrelated to his political interest.<sup>56</sup> But President Trump’s asserted reasons for withholding the military aid and Oval Office meeting are implausible on their face.<sup>57</sup>

President Trump never attempted to justify the decision to withhold the military aid and Oval Office meeting on foreign policy grounds when it was underway. To the contrary, President Trump’s lawyer Rudy Giuliani acknowledged about his Ukraine work that “this isn’t foreign policy.”<sup>58</sup> President Trump sought to hide the scheme from the public and refused to give any explanation for it even within the U.S. government. He persisted in the scheme after his own Defense Department warned—correctly—that withholding military aid appropriated by Congress would violate federal law, and after his National Security Advisor likened the arrangement to a “drug deal.”<sup>59</sup> And he released the military aid shortly after Congress announced an investigation<sup>60</sup>—in other words, after he got caught. The various explanations that President Trump now presses are after-the-fact pretexts that cannot be reconciled with his actual conduct.<sup>61</sup>

*The Anti-Corruption Pretext.* The evidence shows that President Trump was actually indifferent to corruption in Ukraine before Vice President Biden became a candidate for President.

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<sup>56</sup> Opp. at 89.

<sup>57</sup> As the Supreme Court reiterated in rejecting a different pretextual Trump Administration scheme, when reviewing the Executive’s conduct, it is not appropriate “to exhibit a naiveté from which ordinary citizens are free.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

<sup>58</sup> Statement of Facts ¶ 18. President Trump’s brief never addresses the role of Mr. Giuliani, who served as President Trump’s principal agent in seeking an announcement of the investigations.

<sup>59</sup> *Id.* ¶ 59.

<sup>60</sup> *Id.* ¶ 131.

<sup>61</sup> After Congress began investigating President Trump’s conduct, the White House Counsel’s Office reportedly conducted an internal review of “hundreds of documents,” which “reveal[ed] extensive efforts to generate an after-the-fact justification” for the hold ordered by President Trump. Josh Dawsey et al., *White House Review Turns Up Emails Showing Extensive Effort to Justify Trump’s Decision to Block Ukraine Military Aid*, Wash. Post (Nov. 24, 2019), <https://perma.cc/99TX-5KFE>. These documents would be highly relevant in this Senate trial.

After Biden’s candidacy was announced, President Trump remained uninterested in anti-corruption measures in Ukraine beyond announcements of two sham investigations that would help him personally.<sup>62</sup> In fact, he praised a corrupt prosecutor and recalled a U.S. Ambassador known for her anti-corruption efforts. President Trump did not seek *investigations* into alleged corruption—as one would expect if anti-corruption were his goal—but instead sought only *announcements* of investigations—because those announcements are what would help him politically.

As Ambassador Sondland testified, President Trump “did not give a [expletive] about Ukraine,” and instead cared only about “big stuff” that benefitted him personally like “the Biden investigation.”<sup>63</sup> While President Trump asserts that he released the aid in response to Ukraine’s actual progress on corruption,<sup>64</sup> in fact he released the aid two days after Congress announced an investigation into his misconduct. And President Trump’s claim that the removal of the former Ukrainian prosecutor general encouraged him to release the aid is astonishing.<sup>65</sup> On the July 25 call with President Zelensky, President Trump praised that very same prosecutor—and Mr. Giuliani continues to meet with that prosecutor to try to dig up dirt on Vice President Biden to this day.<sup>66</sup>

*The Burden-Sharing Pretext.* Until his scheme was exposed, President Trump never attempted to attribute his hold on military aid to a concern about other countries not sharing the burden of supporting Ukraine.<sup>67</sup> One reason he never attempted to justify the hold on these grounds is that it is not grounded in reality. Other countries in fact contribute substantially to Ukraine. Since 2014, the European Union and European financial institutions have committed over \$16 billion to Ukraine.<sup>68</sup>

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<sup>62</sup> See Statement of Facts ¶ 88.

<sup>63</sup> *Id.* ¶ 88.

<sup>64</sup> Opp. at 94-95.

<sup>65</sup> Opp. at 94.

<sup>66</sup> Statement of Facts ¶¶ 81, 144-45.

<sup>67</sup> See *id.* ¶¶ 41-48.

<sup>68</sup> See *id.* ¶¶ 30-32.

In addition, President Trump *never even asked* European countries to increase their contributions to Ukraine as a condition for releasing the assistance. He released the assistance even though European countries did not change their contributions. President Trump’s asserted concern about burden-sharing is impossible to credit given that he kept his own Administration in the dark about the issue for months, never made any contemporaneous public statements about it, never asked Europe to increase its contribution,<sup>69</sup> and released the aid without any change in Europe’s contribution only two days after an investigation into his scheme commenced.<sup>70</sup>

*The Burisma Pretext.* The conspiracy theory regarding Vice President Biden and Burisma is baseless. There is no credible evidence to support the allegation that Vice President Biden encouraged Ukraine to remove one of its prosecutors in an improper effort to protect his son. To the contrary, Biden was carrying out official U.S. policy—with bipartisan support—when he sought that prosecutor’s ouster because the prosecutor was known to be corrupt.<sup>71</sup> In any event, the prosecutor’s removal made it *more likely* that Ukraine would investigate Burisma, not less likely—a fact that President Trump does not attempt to dispute. The allegations against Biden are based on events that occurred in late 2015 and early 2016—yet President Trump only began to push Ukraine to investigate these allegations in 2019, when it appeared likely that Vice President Biden would enter the 2020 Presidential race to challenge President Trump’s reelection.

*The Ukrainian-Election-Interference Pretext.* The Intelligence Community, Senate Select Committee on Intelligence, and Special Counsel Mueller all unanimously found that Russia—not Ukraine—interfered in the 2016 election. President Trump’s own FBI Director confirmed that American law enforcement has “no information that indicates that Ukraine interfered with the 2016

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<sup>69</sup> *See id.*

<sup>70</sup> *See id.* ¶ 131.

<sup>71</sup> *Id.*

presidential election.”<sup>72</sup> In fact, the theory of Ukrainian interference is Russian propaganda—“a fictional narrative that is being perpetrated and propagated by the Russian security services themselves” to drive a wedge between the United States and Ukraine.<sup>73</sup>

Thanks to President Trump, this Russian propaganda effort is spreading. In November, President Vladimir Putin said, “Thank God no one is accusing us of interfering in the U.S. elections anymore; now they’re accusing Ukraine.”<sup>74</sup> President Trump is correct in asserting “that the United States has a ‘compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government”<sup>75</sup>—and that is exactly why his misconduct is so harmful, and warrants removal from Office.

## **II. PRESIDENT TRUMP MUST BE REMOVED FOR OBSTRUCTING CONGRESS**

President Trump has answered the House’s constitutional mandate to enforce its “sole power of Impeachment”<sup>76</sup> with open defiance: obstructing this constitutional process wholesale by withholding documents, directing witnesses not to appear, threatening those who did, and declaring both the courts and Congress powerless to compel his compliance. As President Trump flatly stated, “I have an Article II, where I have the right to do whatever I want as president.”<sup>77</sup> President Trump now seeks to excuse his obstruction by falsely claiming that he has been transparent and by hiding behind hypothetical executive privilege claims that he has never invoked and that do not apply.

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<sup>72</sup> *Id.* ¶ 13.

<sup>73</sup> *Id.* ¶ 14.

<sup>74</sup> “*Thank God! Putin thrilled U.S. ‘political battles’ over Ukraine taking focus off Russia*, Associated Press (Nov. 20, 2019), <https://perma.cc/7ZHY-44CY>.

<sup>75</sup> *Opp.* at 100.

<sup>76</sup> U.S. Const., Art. I, § 2, cl. 5.

<sup>77</sup> Statement of Facts ¶ 164.

### A. President Trump’s Claim of Transparency Ignores the Facts

President Trump does not appear to dispute that obstructing Congress during an impeachment investigation is itself an impeachable offense. He instead falsely insists that he “has been extraordinarily transparent about his interactions with President Zelensky[.]”<sup>78</sup>

President Trump’s transparency claim bears no resemblance to the facts. In no uncertain terms, President Trump has stated that “we’re fighting all the subpoenas [from Congress].”<sup>79</sup> Later, through his White House Counsel, President Trump directed the entire Executive Branch to defy the House’s subpoenas for documents in the impeachment—and as a result not a single document from the Executive Branch was produced to the House.<sup>80</sup> He also demanded that his current and former aides refuse to testify—and as a result nine Administration officials under subpoena refused to appear.<sup>81</sup> That is a cover-up, and there is nothing transparent about it.

President Trump emphasizes that he publicly released the memorandum of the July 25 call with President Zelensky. But President Trump did so only after the public had already learned that he had put a hold on military aid to Ukraine and after the existence of the Intelligence Community whistleblower complaint became public.<sup>82</sup> The fact that President Trump selectively released limited information under public pressure, only to obstruct the House’s investigation into his corrupt scheme, does not support his assertion of transparency.

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<sup>78</sup> Opp. at 35.

<sup>79</sup> Statement of Facts ¶ 164.

<sup>80</sup> *Id.* ¶¶ 179-83.

<sup>81</sup> *Id.* ¶¶ 186-87.

<sup>82</sup> See Michael D. Shear & Maggie Haberman, *Do Us a Favor”: Call Shows Trump’s Interest in Using U.S. Power for His Gain*, N.Y. Times (Sept. 25, 2019), <https://perma.cc/B7P9-BPK2>; Karoun Demirjian et al., *Trump Ordered Hold on Military Aid Days Before Calling Ukrainian President, Officials Say*, Wash. Post (Sept. 23, 2019), <https://perma.cc/N7PQ-K9WB>; Letter from Michael K. Atkinson, Inspector Gen. of the Intelligence Community, to Chairman Adam Schiff, House Permanent Select Comm. on Intelligence, and Ranking Member Devin Nunes, House Permanent Select Comm. on Intelligence (Sept. 9, 2019), <https://perma.cc/K78N-SMRR>.

## **B. President Trump Categorically Refused to Comply with the House’s Impeachment Inquiry**

In an impeachment investigation, the House has a constitutional entitlement to information concerning the President’s misconduct. President Trump’s categorical obstruction would, if accepted, seriously impair the impeachment process the Framers carefully crafted to guard against Presidential misconduct.<sup>83</sup>

President Trump asserts that individualized disputes regarding responses to Congressional subpoenas do not rise to the level of an impeachable offense.<sup>84</sup> But this argument distorts the categorical nature of his refusal to comply with the House’s impeachment investigation. President Trump has refused *any and all* cooperation and ordered his Administration to do the same. No President in our history has so flagrantly undermined the impeachment process.

President Nixon ordered “[a]ll members of the White House Staff [to] appear voluntarily when requested by the committee,” to “testify under oath,” and to “answer fully all proper questions.”<sup>85</sup> Even so, the Judiciary Committee voted to impeach him for not *fully* complying with House subpoenas when he withheld complete responses to certain subpoenas on executive privilege grounds. The Committee emphasized that “the doctrine of separation of powers cannot justify the withholding of information from an impeachment inquiry” because “the very purpose of such an inquiry is to permit the [House], acting on behalf of the people, to curb the excesses of another branch, in this instance the Executive.”<sup>86</sup> If President Nixon’s obstruction of Congress raised a

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<sup>83</sup> See *The Federalist No. 69* (Alexander Hamilton).

<sup>84</sup> Opp. at 48-54.

<sup>85</sup> Remarks by President Nixon (Apr. 17, 1973), reprinted in *Statement of Information: Hearings Before the Comm. on the Judiciary, H. of Representatives: Book IV—Part 2, Events Following the Watergate Break-in* (1974).

<sup>86</sup> H. Rep. No. 93-1305, at 208 (1974).



“slippery slope” concern, then President Trump’s complete defiance takes us to the “bottom of the slope, surveying the damage to our Constitution.”<sup>87</sup>

President Trump’s attempt to fault *the House* for not using “other tools at its disposal” to secure the withheld information—such as seeking judicial enforcement of its subpoenas<sup>88</sup>—is astonishingly disingenuous. President Trump cannot tell the House that it must litigate the validity of its subpoenas while simultaneously telling the courts that they are powerless to enforce them.<sup>89</sup>

### **C. President Trump’s Assertion of Invented Immunities Does Not Excuse His Categorical Obstruction**

Having used the power of his office to stonewall the House’s impeachment inquiry, President Trump has now enlisted his lawyers in the White House Counsel’s Office—and coopted his Department of Justice’s Office of Legal Counsel—to justify the cover-up.<sup>90</sup> But his lawyers’ attempts to excuse his obstruction do not work.

One fact is essential to recognize: President Trump *has never actually invoked executive privilege*. That is because, under longstanding law, invoking executive privilege would require President Trump to identify with particularity the documents or communications containing sensitive material

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<sup>87</sup> H. Rep. No. 116-346, at 161. President Trump’s new lawyer, Kenneth Starr similarly argued that President Clinton’s assertion of executive privilege in grand jury proceedings, which “thereby delayed any potential congressional proceedings,” constituted conduct “inconsistent with the President’s Constitutional duty to faithfully execute the laws. *Communication from Kenneth W. Starr, Independent Counsel, Transmitting a Referral to the United States House of Representatives Filed in Conformity with the Requirements of Title 28, United States Code, Section 595(c)*, H. Doc. No. 105-310, at 129, 204 (1998).

<sup>88</sup> Opp. at 48-49 & n.336.

<sup>89</sup> See Statement of Facts ¶ 192; Def.’s Mot. to Dismiss, or in the Alternative, for Summ. J. at 20, *Kupperman v. U.S. House of Representatives*, No. 19-3224 (D.D.C. Nov. 14, 2019), ECF No. 40; Defs.’ and Def.-Intervenors’ Mot. to Dismiss at 46-47, *Comm. on Ways & Means v. U.S. Dep’t of the Treasury*, No. 19-1974 (D.D.C. Sept. 6, 2019), ECF No. 44; see also Brief for Def.-Appellant at 2, 32-33, *Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Dec. 9, 2019).

<sup>90</sup> Opp. app’x C (*House Committees’ Authority to Investigate for Impeachment*, 44 Op. O.L.C. (2020)) at 1-2, 37 (opining that the House’s impeachment investigation was not authorized under the House’s “sole Power of Impeachment,” U.S. Const., Art. I, § 2, cl. 5).

that he seeks to protect. Executive privilege generally cannot be used to shield misconduct, and it does not apply here because President Trump and his associates have repeatedly and publicly discussed the same matters he claims must be kept secret.

President Trump instead maintains that his advisors should be “absolutely immune” from compelled Congressional testimony.<sup>91</sup> But this claim of absolute immunity—which turns on the theory that certain high-level Presidential advisors are “alter egos” of the President—cannot possibly justify the decision to withhold the testimony of the lower-level agency officials whom President Trump ordered not to testify. Regardless, the so-called absolute immunity theory is an invention of the Executive Branch, and every court to consider this argument has rejected it—including the Supreme Court in an important ruling requiring President Nixon to disclose the Watergate Tapes.<sup>92</sup> In other words, President Trump’s defenses depend on arguments that disgraced former President Nixon litigated and lost.

President Trump additionally attempts to justify his obstruction on the ground that Executive Branch counsel were barred from attending House depositions.<sup>93</sup> Of course, the absence of counsel at depositions does not excuse the President’s refusal to disclose documents in response to the House’s subpoenas. And the decades-old rule excluding agency counsel from House depositions—first adopted by a Republican House of Representatives majority—exists for good reasons. It prevents agency officials implicated in Congressional investigations from misleadingly shaping the testimony of agency employees. It also protects the rights of witnesses to speak freely

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<sup>91</sup> See Opp. at 43-44.

<sup>92</sup> See *United States v. Nixon*, 418 U.S. 683, 706 (1974) (“neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process”).

<sup>93</sup> Opp. at 46-47.

and without fear of reprisal<sup>94</sup>—a protection indisputably necessary here given that President Trump has repeatedly sought to intimidate and silence witnesses against him.<sup>95</sup>

President Trump finally maintains that complying with the impeachment inquiry would somehow violate the constitutional separation of powers doctrine.<sup>96</sup> This argument is exactly backwards. The President cannot reserve the right to be the arbiter of his own privilege—particularly in an impeachment inquiry designed by the Framers of the Constitution to uncover Presidential misconduct. The fact that President Trump has found lawyers willing to concoct theories on which documents or testimony might be withheld is no basis for his refusal to comply with an impeachment inquiry. The check of impeachment would be little check at all if the law were otherwise.

### **III. THE HOUSE CONDUCTED A CONSTITUTIONALLY VALID IMPEACHMENT PROCESS**

As explained in the House Managers’ opening brief, the House conducted a full and fair impeachment proceeding with robust procedural protections for President Trump, which he tellingly chose to ignore. The Committees took 100 hours of deposition testimony from 17 witnesses with personal knowledge of key events, and all Members of the Committees as well as Republican and Democratic staff were permitted to attend and given equal opportunity to ask questions. The Committees heard an additional 30 hours of public testimony from 12 of those witnesses, including three requested by the Republicans.<sup>97</sup> President Trump’s lawyers were invited to participate at the public hearings before the Judiciary Committee.<sup>98</sup> Rather than do so, he urged the House: “if you are going to impeach me, do it now, fast, so we can have a fair trial in the Senate.”<sup>99</sup>

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<sup>94</sup> See H. Rep. No. 116-346, at 544.

<sup>95</sup> See, e.g., Statement of Facts ¶ 190.

<sup>96</sup> Opp. at 36; see *id.* at 48-54.

<sup>97</sup> See Statement of Facts ¶¶ 188-89; H. Rep. No. 116-346, at 130.

<sup>98</sup> Statement of Facts ¶ 176.

<sup>99</sup> H. Rep. No. 116-346, at 12 (quoting Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Dec. 6, 2019)).

But faced with his Senate trial, President Trump now cites a host of procedural hurdles that he claims the House failed to satisfy. Nobody should be fooled by this obvious gamesmanship.

**A. The Constitution Does Not Authorize President Trump to Second Guess the House’s Exercise of Its “Sole Power of Impeachment”**

President Trump’s attack on the House’s conduct of its impeachment proceedings disregards the text of the Constitution, which gives the House the “sole Power of Impeachment,”<sup>100</sup> and empowers it to “determine the Rules of its Proceedings.”<sup>101</sup> As the Supreme Court has observed, “the word ‘sole’”—which appears only twice in the Constitution—“is of considerable significance.”<sup>102</sup> In the context of the Senate’s “sole” power over impeachment trials, the Court stressed that this term means that authority is “reposed in the Senate and nowhere else”<sup>103</sup> and that the Senate “alone shall have authority to determine whether an individual should be acquitted or convicted.”<sup>104</sup> The House’s “sole Power of Impeachment” likewise vests it with the independent authority to structure its impeachment proceedings in the manner it deems appropriate. The Constitution leaves no room for President Trump to object to how the House, in the exercise of its “sole” power to determine impeachment, conducted its proceedings here.

President Trump has no basis to assert that the impeachment inquiry was “flawed from the start” because it began before a formal House vote was taken.<sup>105</sup> Neither the Constitution nor the House rules requires such a vote.<sup>106</sup> And notwithstanding President Trump’s refrain that the

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<sup>100</sup> U.S. Const., Art. I, § 2, cl. 5.

<sup>101</sup> U.S. Const., Art. I, § 5, cl. 2.

<sup>102</sup> *Nixon v. United States*, 506 U.S. 224, 230 (1993).

<sup>103</sup> *Id.* at 229.

<sup>104</sup> *Id.* at 231.

<sup>105</sup> *Opp.* at 4.

<sup>106</sup> One district court presented with this same argument recently concluded that “[i]n cases of presidential impeachment, a House resolution has never, in fact, been required to begin an impeachment inquiry,” explaining that the argument “has no textual support in the U.S. Constitution [or] the governing rules of the House.” *In re Application of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-48 (BAH), 2019

House’s inquiry “violated every precedent and every principle of fairness followed in impeachment inquiries for more than 150 years,”<sup>107</sup> House precedent makes clear that an impeachment inquiry does not require a House vote. As even President Trump is forced to acknowledge, several impeachment inquiries conducted in the House “did not begin with a House resolution authorizing an inquiry.”<sup>108</sup> In fact, the House has *impeached* several federal judges without ever passing such a resolution<sup>109</sup>—and the Senate then convicted and removed them from office.<sup>110</sup> Here, by contrast, the House adopted a resolution confirming the investigating Committees’ authority to conduct their inquiry into “whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America.”<sup>111</sup>

President Trump is similarly mistaken that a formal “delegation of authority” to the Committees was needed at the outset.<sup>112</sup> The House adopted its Rules<sup>113</sup>—“a power that the Rulemaking Clause [of the Constitution] reserves to each House alone”<sup>114</sup>—but did not specify rules that would govern impeachment inquiries. It is thus difficult to understand how the House’s

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WL 5485221, at \*27 (D.D.C. Oct. 25, 2019). Although both President Trump and the Office of Legal Counsel of the Department of Justice go to great lengths to criticize the district court’s analysis, *see, e.g.*, Opp. app’x C at 38 n.261, the Department of Justice tellingly has declined to advance these arguments in litigation on the appeal of this decision.

<sup>107</sup> Opp. at 1.

<sup>108</sup> Opp. at 41.

<sup>109</sup> *See In re Application of Comm. on Judiciary*, 2019 WL 5485221, at \*26 (citing proceedings relating to Judges Walter Nixon, Alcee Hastings, and Harry Claiborne).

<sup>110</sup> *See Proceedings in the United States Senate in the Impeachment Trial of Walter Nixon, Jr., a Judge of the United States District Court for the Southern District of Mississippi*, S. Doc. No. 101-22, at 439 (1989); *Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings, a Judge of the United States District Court for the Southern District of Florida*, S. Doc. No. 101-18, at 705 (1989); *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, a Judge of the United States District Court for the District of Nevada*, S. Doc. No. 99-48, at 298 (1986).

<sup>111</sup> H. Res. 660, 116th Cong. (2019); Statement of Facts ¶ 162.

<sup>112</sup> *See* Opp. at 37-38.

<sup>113</sup> *See* H. Res. 6, 116th Cong. (2019).

<sup>114</sup> *Barker v. Conroy*, 921 F.3d 1118, 1130 (D.C. Cir. 2019) (quotation marks omitted).

impeachment inquiry could violate its rules or delegation authority. Not only did Speaker Pelosi instruct the Committees to proceed with an “impeachment inquiry,”<sup>115</sup> but in passing H. Res. 660, the full House “directed” the Committees to “continue their ongoing investigations as part of the existing House of Representatives inquiry” into impeachment.<sup>116</sup>

President Trump is wrong that the subpoenas were “unauthorized and invalid” because they were not approved in advance by the House.<sup>117</sup> There is no requirement in either the Constitution or the House Rules that the House vote on subpoenas. Indeed, such a requirement would be inconsistent with the operations of the House, which in modern times largely functions through its Committees.<sup>118</sup> The absence of specific procedures prescribing how the House and its Committees must conduct impeachment inquiries allows those extraordinary inquiries to be conducted in the manner the House deems most fair, efficient, and appropriate. But even assuming a House vote on the subpoenas was necessary, there was such a vote here. When it adopted H. Res. 660, the House understood that numerous subpoenas had already been issued as part of the impeachment inquiry. As the Report accompanying the Resolution explained, these “duly authorized subpoenas” issued to the Executive Branch “remain in full force.”<sup>119</sup>

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<sup>115</sup> Statement of Facts ¶ 161.

<sup>116</sup> *Id.* ¶ 162; *see* H. Res. 660.

<sup>117</sup> Opp. at 37; *see* Opp. at 41.

<sup>118</sup> *See, e.g.*, House Rule XI.1(b)(1) (authorizing standing committees of the House to “conduct at any time such investigations and studies as [they] consider[] necessary or appropriate”); *see also id.* XI.2(m)(1)(B) (authorizing committees to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as [they] consider[] necessary”).

<sup>119</sup> *Directing Certain Committees to Continue Their Ongoing Investigations as Part of the Existing House of Representatives Inquiry into Whether Sufficient Grounds Exist for the House of Representatives to Exercise its Constitutional Power to Impeach Donald John Trump, President of the United States of America, and for Other Purposes*, H. Rep. No. 116-266, at 3 (2019).

## **B. President Trump Received Fair Process**

As his lawyers well know, the various criminal trial rights that President Trump demands have no place in the House’s impeachment process.<sup>120</sup> It is not a trial, much less a criminal trial to which Fifth or Sixth Amendment guarantees would attach. The rights President Trump has demanded have never been recognized in any prior Presidential impeachment investigation, just as they have never been recognized for a person under investigation by a grand jury—a more apt analogy to the House’s proceedings here.

Although President Trump faults the House for not allowing him to participate in depositions and witness interviews, no President has ever been permitted to participate during this initial fact-finding process. For example, the Judiciary Committee during the Nixon impeachment found “[n]o record ... of any impeachment inquiry in which the official under investigation participated in the investigation stage preceding commencement of Committee hearings.”<sup>121</sup> In both the President Nixon and President Clinton impeachment inquiries, the President’s counsel was not permitted to participate in or even attend depositions and interviews of witnesses.<sup>122</sup> And in both cases, the House relied substantially on investigative findings by special prosecutors and grand juries, neither of which allowed the participation of the target of the investigation.<sup>123</sup> Indeed, the reasons grand jury proceedings are kept confidential—“to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury” and “encourage free and untrammelled disclosures

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<sup>120</sup> Opp. at 57.

<sup>121</sup> H. Rep. No. 116-346, at 19 (quoting Impeachment Inquiry Staff, H. Comm. on the Judiciary, *Memorandum: Presentation Procedures for the Impeachment Inquiry* 11, 93d Cong. (1974)).

<sup>122</sup> *Id.* at 19, 21.

<sup>123</sup> *See id.* at 17-22.

by persons who have information,”<sup>124</sup>—apply with special force here, given President Trump’s chilling pattern of witness intimidation.<sup>125</sup>

In his litany of process complaints, President Trump notably omits the fact that his counsel could have participated in the proceedings before the Judiciary Committee in multiple ways. The President, through his counsel, could have objected during witness examinations, cross-examined witnesses, and submitted evidence of his own.<sup>126</sup> President Trump simply chose not to have his counsel do so. Having deliberately chosen not to avail himself of these procedural protections, President Trump cannot now pretend they did not exist.

Nor is the President entitled to have the charges against him proven beyond a reasonable doubt.<sup>127</sup> That burden of proof is applicable in criminal trials, where lives and liberties are at stake, not in impeachments. For this reason, the Senate has rejected the proof-beyond-a-reasonable-doubt standard in prior impeachments<sup>128</sup> and instead has “left the choice of the applicable standard of proof to each individual Senator.”<sup>129</sup> Once again, President Trump’s lawyers well know this fact.

President Trump’s contention that the Articles of Impeachment must fail on grounds of “duplicity” is wrong. President Trump alleges that the Articles are “structurally deficient” because they “charge[] multiple different acts as possible grounds for sustaining a conviction.”<sup>130</sup> But this simply repeats the argument from the impeachment trial of President Clinton, which differed from President Trump’s impeachment in this critical respect. Where the articles charged President

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<sup>124</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958).

<sup>125</sup> Statement of Facts ¶¶ 177, 190.

<sup>126</sup> Statement of Facts ¶ 163; 165 Cong. Rec. E1357 (2019) (Impeachment Inquiry Procedures in the Committee on the Judiciary Pursuant to H. Res. 660); *see id.* at (A)(3), (B)(2)–(3), (C)(1)–(2), (4).

<sup>127</sup> Opp. at 20–21.

<sup>128</sup> *See, e.g.*, 132 Cong. Rec. S29124–94 (daily ed. October 7, 1986).

<sup>129</sup> Cong. Research Serv., 98–990 A, *Standard of Proof in Senate Impeachment Proceedings* 6 (1999), <https://perma.cc/9YKG-TJLH>.

<sup>130</sup> Opp. at 107–09.



Clinton with engaging in “one or more” of several acts,<sup>131</sup> the Articles of Impeachment against President Trump do not. This difference distinguishes President Trump’s case from President Clinton’s—where, in any event, the Senate rejected the effort to have the articles of impeachment dismissed as duplicitous. The bottom line is that the House knew precisely what it was doing when it drafted and adopted the Articles of Impeachment against President Trump, and deliberately avoided the possible problem raised in the impeachment proceedings against President Clinton.

\* \* \*

There was no procedural flaw in the House’s impeachment inquiry. But even assuming there were, that would be irrelevant to the *Senate’s* separate exercise of its “sole Power to try all Impeachments.”<sup>132</sup> Any imagined defect in the House’s previous proceedings could be cured when the evidence is presented to the Senate at trial. President Trump, after all, touted his desire to “have a fair trial in the Senate.”<sup>133</sup> And as President Trump admits, it is the Senate’s “constitutional duty to decide for itself all matters of law and fact bearing upon this trial.”<sup>134</sup> Acquitting President Trump on baseless objections to the House’s process would be an abdication by the Senate of this duty.

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<sup>131</sup> H. Res. 611, 105th Cong. (1998).

<sup>132</sup> U.S. Const., Art. I, § 3, cl. 6. *See also Nixon v. United States*, 506 U.S. 224, 229-31 (1993).

<sup>133</sup> H. Rep. No. 116-346, at 12 (quoting Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Dec. 6, 2019)).

<sup>134</sup> *Opp.* at 13.

Respectfully submitted,

United States House of Representatives

Adam B. Schiff  
Jerrold Nadler  
Zoe Lofgren  
Hakeem S. Jeffries  
Val Butler Demings  
Jason Crow  
Sylvia R. Garcia

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*U.S. House of Representatives Managers\**

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