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# Hamilton Wouldn't Impeach Trump

He didn't say the process of impeachment is entirely political. He said the offense has to be political.

By Alan M. Dershowitz

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What is an impeachable offense? Rep. Maxine Waters, chairman of the House Financial Services Committee, says the definition is purely political: “whatever Congress says it is—there is no law.” She’s wrong.

At the Constitutional Convention of 1787, the Framers debated impeachment of a president. Some argued for the power of Congress to remove the president for “maladministration” or other open-ended terms that appeared in several state constitutions. Others, including James Madison, opposed such vague criteria, fearful that they would turn the republic into a British-style parliamentary system, in which Congress could remove a president over political differences—effectively a vote of no confidence. That, Madison argued, would be the “equivalent to tenure during pleasure of the Senate.”



## Why Won't the House Vote to Authorize an Impeachment Inquiry?



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The Framers wanted an independent president who could be removed only for genuine wrongdoing. So they agreed to the criteria that became part of the Constitution: “treason, bribery, or other high crimes and misdemeanors.”

In Federalist No. 65, Alexander Hamilton elaborated on the meaning of “high” crimes: “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done immediately to the society itself” (emphasis added).

Hamilton didn't say the *process* of impeachment is entirely political. He said the *offense* has to be political. He continued: "The prosecution of [such offenses] will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly, or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side, or on the other; and in such cases, there will always be the greater danger, that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."

If Hamilton's words sound prescient, it is because he foresaw how the process of impeachment and removal could easily be exploited for political advantage, as Democrats are attempting now and Republicans tried to do when they impeached President Clinton in 1998. Hamilton was concerned that the decision to impeach and remove "the accused" be based not on "the comparative strength of parties," but rather on "real demonstrations of innocence or guilt." These words imply a quasi-legal process rather than an exclusively political one.



Alexander Hamilton PHOTO: GETTY IMAGES

There is an inevitable political component to the decision to impeach and remove a president, but it should come into play only if the objective constitutional criteria are met. Even if a president did commit "treason, bribery or other high crimes and misdemeanors," the House could decide on political grounds not to move forward on impeachment. The constitutional criteria are necessary for impeachment, but they do not necessitate it.

The Framers didn't want the impeachment power to become a political weapon. That's why they designed both procedural

and substantive protections against misuse of this important legislative check on the executive. The procedural protection is the requirement of a two-thirds vote for removal, which makes it impossible to remove the president without broad support. The substantive check is the list of offenses justifying impeachment.

The words "other high crimes and misdemeanors" does accord Congress some discretion, but not as much as the rejected term "maladministration" would have. The words would seem to require criminal-like acts of a serious nature, though precisely what would suffice is anything but clear. A sitting president would almost certainly be impeached if he committed murder, despite the historical precedent that Vice President Aaron Burr was not impeached for killing Hamilton in a duel. But if a president paid hush money out of personal funds to prevent his

adultery from being disclosed—as Hamilton did when he was Treasury secretary—he wouldn’t be impeached. Adultery was a felony in Hamilton’s time, but nothing Hamilton did constituted a *public* crime. Perjury to cover up adultery—one of the offenses for which Mr. Clinton was impeached—is a closer call, although I believe it was not impeachable.

As for the allegations against President Trump, obstruction of justice is plainly a high crime, but a president cannot commit it by exercising his constitutional authority to fire or pardon, regardless of his motive. (It would have been an impeachable offense in Mr. Clinton’s case, but the facts were disputed.) Neither is it a crime to conduct foreign policy for partisan or personal advantage—a common political sin with no limiting principle capable of being applied in a neutral manner.

The Framers, by rejecting open-ended criteria such as “maladministration” and substituting more specific and criminal-like criteria, sent a message to future generations: Impeachment should not be a political measure governed by “the comparative strength of parties.” It should be based on “the real demonstration of innocence or guilt” of “the accused.” It is left to Congress to be reasonable and conscientious in interpreting the words “treason, bribery or other high crimes and misdemeanors”—a tall order in our hyperpartisan age.

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