

## Written Statement

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*“The Basis for the Impeachment Inquiry of President Joseph R. Biden”*

**United States House of Representatives  
Committee on Oversight and Accountability**

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### I. INTRODUCTION

Chairman Comer, ranking member Raskin, members of the Committee on Oversight and Accountability, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.<sup>1</sup> It is an honor to appear before you today to discuss arguably the most weighty constitutional function under Article I other than the declaration of war: the impeachment of the President of the United States.

I come to this question as someone who has served both as lead counsel in the last judicial impeachment trial in the United States Senate and testified in two prior presidential impeachments. I have also written extensively on impeachment. I previously represented the United States House of Representatives as an institution as well as individual Republican and Democratic members in constitutional litigation. This background has left me with a highly cautious approach to impeachments. This includes a presumption in favor of the sitting president that could ultimately tip the balance in the current inquiry.

Twenty-five years ago, I appeared before Congress as an expert witness in the impeachment of former president William Jefferson Clinton. I testified that his alleged perjury did constitute a high crime and misdemeanor. Four years ago, I appeared as an expert witness in the only impeachment hearing held in the first impeachment of former president Donald J. Trump.<sup>2</sup> While opposing many of the proposed articles of impeachment, I testified that two possible articles presented viable impeachable conduct, if proven. However, I maintained that the House needed to create a full record to support those articles. (Those two articles were the articles later adopted by the House).

As a law professor, there is no more solemn responsibility than advising this body in an impeachment. It is my sincere hope that my testimony can assist both sides even if

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<sup>1</sup> I appear today in my academic capacity to present views founded in prior academic work on impeachment and the separation of powers. My testimony does not reflect the views or approval of my university or any of the media outlets with which I am associated.

<sup>2</sup> The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment Before H. Comm. on the Judiciary, 116th Cong. (2019) (written testimony of Professor Jonathan Turley).

we disagree on the ultimate merits of an inquiry or an impeachment.<sup>3</sup> I hope that today's testimony will offer a fair account of the historical and best practices used in impeachment inquiries. These suggested practices cut both ways in the Biden matter, but I believe they can reinforce and even restore elements of this process going forward.

It is important to emphasize what this hearing is not. It is not a hearing on articles of impeachment. The House has launched an impeachment inquiry, and I am appearing to discuss the history and purpose of such inquiries. I have previously stated that, while I believe that an impeachment inquiry is warranted, I do not believe that the evidence currently meets the standard of a high crime and misdemeanor needed for an article of impeachment. The purpose of my testimony today is to discuss how past inquiries pursued evidence of potentially impeachable conduct.

My testimony also reflects the fact that I do believe that, after months of investigation, the House has passed the threshold for an inquiry into whether President Joe Biden was directly involved or benefited from the corrupt practices of his son, Hunter, and others. Since my testimony focuses on the historical and legal aspects of this inquiry, I will leave much of the discussion of the evidence to my fellow witnesses and to the Committee members themselves. However, I believe that the record has developed to the point that the House needs to answer troubling questions surrounding the President. As discussed below, polls indicate that most of the country shares those concerns while expressing doubts over the Biden Administration investigating potential criminal conduct.

My knowledge, of course, is confined to what has been made public, but I wanted to note a few of those allegations at the outset that collectively warrant a formal inquiry. The record currently contains witness and written evidence that the President (1) has lied about key facts in these foreign dealings, (2) was the focus of a multimillion-dollar influence peddling scheme, and (3) may have benefitted from this corruption through millions of dollars sent to his family as well as more direct possible benefits. The President may be able to disprove or rebut these points, but they raise legitimate concerns over his role based on the accounts of key figures in the matter. Consider just ten of the disclosures from the prior investigation:

- Hunter Biden and his associates were running a classic influence peddling operation using Joe Biden as what Devon Archer called “the Brand.”<sup>4</sup> While this was described as an “illusion of access,” millions were generated for the Bidens from some of the most corrupt figures in the world, including associates who were later accused of or convicted of public corruption.<sup>5</sup>

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<sup>3</sup> While I opposed the Trump impeachment on that record, Chairman Jerrold Nadler ended the hearing by citing my position that the abuse of power article was constitutionally viable. The House managers also relied on my view that such a non-criminal article of impeachment was permissible under the Constitution. Some of those issues are also relevant today.

<sup>4</sup> Brain Bennett, Hunter Biden Sold “Illusion of Access” to Father, Former Associate Testifies, Time, July 31, 2023.

<sup>5</sup> Mark Moore, Court Upholds Bribery Conviction of Chinese Exec Patrick Ho Linked to Hunter Biden, N.Y. Post, Dec. 30, 2020.

- Some of the Biden clients pushed for changes impacting United States foreign policy and relations, including help in dealing with Ukrainian prosecutor Viktor Shokin investigating corruption.<sup>6</sup>

- President Biden has made false claims about his knowledge of these dealings repeatedly in the past, including insisting that he had no knowledge of Hunter's foreign dealings which Archer has declared "patently false."<sup>7</sup> The Washington Post and other media outlets have also declared the President's insistence that his family did not take money from China is false.<sup>8</sup>

- The President had been aware for years that Hunter Biden and his uncle James were accused of influence peddling, including an audiotape of the President acknowledging a New York Times investigation as a threat to Hunter.<sup>9</sup>

- President Biden was repeatedly called into meetings with these foreign clients and was put on speakerphone.<sup>10</sup> He also met these clients and foreign figures at dinners and meetings.<sup>11</sup>

- E-mails and other communications show Hunter repeatedly invoking his father to secure payments from foreign sources and, in one such message, he threatens a Chinese figure that his father is sitting next to him to coerce a large transfer of money.<sup>12</sup>

- A trusted FBI source recounted a direct claim of a corrupt Ukrainian businessman that he paid a "bribe" to Joe Biden through intermediaries.<sup>13</sup>

- Hunter Biden reportedly claimed that he had to give half of his earnings to his father<sup>14</sup> and other e-mails state that intermingled accounts were used to pay

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<sup>6</sup> Steven Nelson, "My Guy": Hunter Biden Partner Devon Archer Says Joe Biden was on Calls with Foreign Patrons for "the Brand," N.Y. Post, July 31, 2023.

<sup>7</sup> Steven Nelson, Biden's Claim he had no Role in Foreign Business Dealings "Categorically False": Devon Archer, N.Y. Post, August 4, 2023.

<sup>8</sup> Glenn Kessler, Biden said his Son Earned No Money from China. His Son Says Otherwise, Wash. Post, August 1, 2023.

<sup>9</sup> See also Ben Schreckinger, Biden Inc.: Over his Decades in Office, 'Middle Class Joe's' Family Fortunes Have Closely Tracked his Political Career, Politico, August 2, 2019.

<sup>10</sup> John Wagner, Biden was on Speakerphone When Son Hunter was with Business Associates, Former Partner Testifies, Wash. Post, August 1, 2023.

<sup>11</sup> Jessica Chasmar, Joe Biden Met With at Least 14 of Hunter's Business Associates While Vice President, Fox News, July 28, 2022.

<sup>12</sup> Fatma Khaled, Hunter Biden Allegedly Threatened Chinese Official with his Father's Power, Newsweek, June 22, 2023. The WhatsApp message stated:

"I am sitting here with my father and we would like to understand why the commitment made has not been fulfilled. Tell the director that I would like to resolve this now before it gets out of hand, and now means tonight. And, Z, if I get a call or text from anyone involved in this other than you, Zhang, or the chairman, I will make certain that between the man sitting next to me and every person he knows and my ability to forever hold a grudge that you will regret not following my direction. I am sitting here waiting for the call with my father."

<sup>13</sup> Anthony Zurcher, Senator Releases FBI's Source of Biden Bribes from Ukraine, BBC, July 21, 2023.

<sup>14</sup> Jon Levine, Hunter Biden Frequently Covered Expenses, Texts Reveal, N.Y. Post, April 9, 2022.

bills for both men, including a possible credit account that Hunter used to allegedly pay prostitutes.<sup>15</sup>

- At least two transfers of funds to Hunter Biden in 2019 from a Chinese source listed the President’s home in Delaware where Hunter sometimes lived and conducted business.<sup>16</sup>

- Some of the deals negotiated by Hunter involved potential benefits for his father, including office space in Washington.<sup>17</sup> At least nine Biden family members reportedly received money from these foreign transfers, including grandchildren.<sup>18</sup> For Hunter Biden, this included not just significant money transfers but gifts like an expensive diamond and a luxury car.<sup>19</sup>

These are only some of the serious corruption allegations facing the President, but each could raise impeachable conduct if a nexus is established to the President. As I mention below, there are possible defenses and questions over sources that must be resolved before these disclosures could ever support actual articles of impeachment.

In this testimony, I seek to offer a view of the “guardrails” for impeachment inquiries in seeking to establish whether impeachable conduct has been committed by a president. These guardrails are tighter than what past impeachments have allowed but reflect a more constrained view to limit this extraordinary power to the most compelling cases. I have previously expressed concern over the recent departures from the historical practices used in impeachment inquiries. Regardless of the outcome of this inquiry, I am hopeful that the House can restore important procedural and due process protections to these inquiries. It will demand something that is never easy for a majority, namely, voluntarily accepting limits on their own ability to impeach. However, the committees carrying out this inquiry could repair what I view as an erosion of best practices in the investigation of presidents. Most importantly, this process can assure the public that allegations of corruption have been fairly and thoroughly investigated by Congress in relation to the President. These protections give credibility to a process that is always fraught with political passions and accusations. It is the assurance to the public, as described by Alexander Hamilton in Federalist No. 65, that the Congress will fully examine allegations of “the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”<sup>20</sup>

## II. THE HISTORY OF IMPEACHMENT INQUIRIES

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<sup>15</sup> Andrew Kerr & Jerry Dunleavy, Joe Biden Unwittingly Helped Finance Trusts with Russia-Linked Prostitutes, *Washington Examiner*, September 27, 2023.

<sup>16</sup> Annie Grayer, *House Oversight Republicans Say New Bank Subpoena Shows Hunter Biden Father’s Wilmington House in Wires from China*, CNN, September 27, 2023.

<sup>17</sup> Matt Viser, Tom Hamburger, & Craig Timberg, Hunter Biden’s Multimillion-Dollar Deals with a Chinese Energy Company, *Wash. Post*, March 20, 2022.

<sup>18</sup> Steven Nelson, Nine Biden Family Members Who Allegedly Got Foreign Money Identified by House GOP, *N.Y. Post*, May 10, 2023.

<sup>19</sup> Andrew Prokop, How Much Legal Jeopardy is Hunter Biden In?, *Vox*, April 11, 2023.

<sup>20</sup> THE FEDERALIST NO. 26, at 173 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

There is a curious type of common law to impeachments, a history of interpretations and practices that have long informed members on how to structure impeachment inquiries. Obviously, this history is not binding, and each Congress will reach its own conclusions on the interpretation of the standard and proper practices that are followed in an impeachment inquiry. However, the legitimacy of these proceedings is often judged by this historical baseline. To that end, I want to briefly describe the inquiries in the impeachments of presidents Andrew Johnson, Richard Nixon, Bill Clinton, and Donald Trump (2).

### **A. The Johnson Impeachment Inquiry**

The 1868 impeachment inquiry of Andrew Johnson has one striking similarity to the current inquiry: it occurred in an age of rage.<sup>21</sup> Ascending to the presidency in the wake of the Civil War and a presidential assassination, Johnson was intensely disliked and viewed as a Southerner who was hostile to black suffrage and equal rights. The Radical Republicans in particular opposed Johnson and sought his removal from office due to his economic policies as well as his obstruction of certain federal laws and Reconstruction measures.

Many of us have been highly critical of the Johnson impeachment, which lacked the deliberative process shown in judicial impeachments. There were a variety of impeachable offenses raised against Johnson. However, his firing of Secretary of War Edwin Stanton triggered a swift and relatively narrow impeachment. Thus, on the surface, the period of impeachment lasted only a few days. Secretary Stanton was dismissed on February 21, 1868, and a resolution of impeachment was introduced that day. On February 24, 1868, the resolution passed, and articles of impeachment were prepared. On March 2 and March 3, 1868, eleven articles were adopted.

The firing of Stanton was a redline for many members and had long been anticipated. Indeed, Stanton was relieved of his duties in August of 1867, as the House worked on the expected impeachment. When Johnson crossed that line, the impeachment moved quickly. However, there had been months of consideration of the issue by the House. Moreover, this was the third attempted impeachment. Congress passed legislation on March 2, 1867—one year before the first nine articles were adopted. In December of 1867, the House failed to adopt an impeachment resolution based on many of the same grievances because members did not feel that an actual crime had been committed. There were three prior impeachments with similar elements before the final impeachment effort.

Johnson is, therefore, only marginally useful in terms of the historical treatment of impeachment inquiries. It occurred before the modern committee structure and division of congressional functions were established. Ultimately, the actual impeachment was narrowly based on the violation of the Tenure of Office Act. The Act was written to facilitate what I have described as a trapdoor impeachment. It prohibited a President from

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<sup>21</sup> As I discuss in my forthcoming book, our country has gone through regular periods of rage that have resulted in the erosion of not just free speech rights but other protections for due process and fair trials. Jonathan Turley, *THE INDISPENSABLE RIGHT: FREE SPEECH IN AN AGE OF RAGE* (forthcoming 2024); see also Jonathan Turley, *Rage Rhetoric and the Revival of American Sedition*, 65 *William & Mary Law Review* (forthcoming 2024); Jonathan Turley, *The Right to Rage in American Political Discourse*, *GEO. J.L. & PUB. POL'Y* (forthcoming 2023).

removing a cabinet officer without the appointment of a successor by the Senate. To lay the ground for an impeachment, the drafters included a provision stating that any violation of the Act would constitute a “high misdemeanor.” Violations were criminal and punishable “upon trial and conviction . . . by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both.”<sup>22</sup> The act was repealed in 1887, and the Supreme Court later declared that its provisions were presumptively constitutionally invalid.

Johnson was impeached on eleven articles of impeachment tied to the Tenure in Office Act. These included many allegations that should not be treated as impeachable, such as accusing Johnson of trying to bring Congress “into disgrace, ridicule, hatred, contempt, and reproach” and making “with a loud voice certain intemperate, inflammatory, and scandalous harangues ...”. Unfortunately, this practice has been repeated by Congress where valid impeachable offenses are coupled with allegations that clearly do not fit the constitutional standard. The Johnson impeachment was deeply flawed, but the constitutional standard prevailed due to defecting Republican members who courageously voted to acquit the deeply unpopular president.

## **B. The Nixon Impeachment Inquiry**

The Nixon inquiry is the most referenced impeachment in terms of the process and standards, even though it did not result in an actual impeachment due to Richard Nixon’s resignation. The inquiry began with a foundation of criminal acts by third parties and allegations that Nixon knew and approved of the unlawful conduct.

After the Watergate break-in on June 17, 1972, the Nixon Administration put pressure on the FBI to shut down the subsequent investigation. As in the present case, the allegations of White House involvement (as well as corruption connected to the Nixon campaign) arose before the presidential election. On October 30, 1973, just after President Nixon fired Archibald Cox, the House Judiciary Committee voted along party lines to start the impeachment inquiry with the issuance of subpoenas. The vote in the judiciary committee was along party lines. The House Judiciary Committee, under Democratic Rep. Peter Rodino, did not define what it would view as an impeachable offense in starting the inquiry.

On February 6, 1973, the United States House of Representatives approved a resolution to formally begin the impeachment process. The next day, the United States Senate voted to establish a select committee to investigate Watergate. On July 27, 1974, the Committee approved the first article of impeachment.

The Nixon inquiry allowed various witnesses to testify and gave the White House ample opportunity to respond to allegations. The inquiry not only was handled by a large staff but pursued various potential lines of evidence through subpoenas and hearings to establish linkages to Nixon. At the same time, efforts by President Nixon to block evidence in the investigation of Archibald Cox failed in spectacular fashion with the decision in *United States v. Nixon*, wherein the court voted 8-0 to compel the disclosure

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<sup>22</sup> Tenure in Office Act, Ch. 154, 14 Stat. 430, 431 (1867).

of the famous Nixon tapes and other material.<sup>23</sup> Before the House as a whole could adopt the three articles of impeachment, Nixon resigned.

### **C. The Clinton Impeachment Inquiry**

The third relevant inquiry preceded the Clinton impeachment. The House inquiry began as Independent Counsel Kenneth Starr was investigating President Bill Clinton regarding his relationship with White House intern Monica Lewinsky. On September 9, 1998, the House formally received Starr's Report and 18 boxes of supporting documents. With this ready-made foundation for impeachment over Clinton's perjury, the House began an investigation and the Judiciary Committee announced that a formal resolution for the inquiry would be submitted to that Committee. That investigation was headed by chief investigator David Schippers who found 15 potential impeachable offenses committed by Clinton, from perjury to obstruction to witness tampering.

The formal inquiry began on October 5, 1998, with a vote of the Judiciary Committee. As with Nixon, it was a straight 20-16 party-line vote. Two alternative Democratic resolutions limiting any inquiry failed. As Chairman Rodino and the Democrats did in the Nixon impeachment, Chairman Henry Hyde and the Republicans failed to define what constituted an impeachable offense in starting the formal impeachment inquiry. Chairman Hyde stated that the committee foresaw a three-month House inquiry.

On October 8, 1998, the House of Representatives authorized a broad impeachment inquiry by a vote of 258-176. The measure was passed with 31 Democrats supporting the resolution. On November 9, 1998, the House Judiciary Committee called a hearing of 19 experts to help define what constitutes an impeachable offense. I was one of those witnesses and testified that the perjury committed by President Clinton would clearly constitute an impeachable offense.

On December 6, 1998, the Judiciary Committee granted President Clinton's counsel a full day to present their defense to the allegations of impeachable conduct. On December 11, 1998, the House Judiciary Committee approved three articles of impeachment focusing on perjury and obstruction of justice.

The Clinton impeachment was, in my view, a good model on a procedural level. Even with considerable evidence (including testimony of witnesses) already compiled in the Starr investigation, it allowed the House to deliberate the evidence while affording the President ample opportunity to defend himself, including the option of testifying on his own behalf. The hearing was passionate but substantive and civil. We had significantly different views on the intent of the Framers, but the tenor of the hearing was a departure from the trash talking and personal attacks raging in the controversy.

### **D. The First Trump Inquiry**

The first Trump impeachment was the most significant departure from the past practices of the House in impeachment inquiries. This was an investigation into a 30-minute phone call by President Donald Trump to Ukrainian President Volodymyr Zelenskyy on July 25, 2019. The House Intelligence Committee was notified of a

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<sup>23</sup> United States v. Nixon, 418 U.S. 683 (1974).

whistleblower complaint filed over the call on September 9, 2019. Public reports of the complaint were published roughly one week later. On September 24, 2019, Speaker Nancy Pelosi announced that the House was starting an impeachment inquiry.

The House Intelligence Committee held hearings on the controversy. However, the House Judiciary Committee was confined to a single hearing with experts on December 4, 2019. I was called again to testify at that hearing. While I felt that an inquiry was justified on two grounds (which became the two articles of impeachment), I strongly encouraged the Committee not to impeach on what I viewed as a demonstrably incomplete and thin record. I noted that prior impeachments allowed for hearings to develop the record, including ample opportunity for the sitting president to contest evidence and present a full defense. This opportunity is most significant after the Committee has honed down both the evidence and likely articles.

On December 13, 2019, the House Judiciary Committee approved two articles of impeachment on abuse of power and obstruction. On December 18, 2019, the full House impeached President Trump on both articles.

### **E. The Second Trump Impeachment**

After the January 6, 2021, riot on Capitol Hill, Speaker Nancy Pelosi announced that the House would forego any impeachment inquiry or even an impeachment hearing. In the greatest departure from presidential and judicial impeachments in history, the House elected to hold what I called a “snap impeachment” by going directly to the floor with a single article of impeachment.<sup>24</sup> The House Judiciary Committee did not hold a hearing of experts. That article, based on an allegation of incitement by President Donald Trump, was approved on January 13, 2021.

### **F. Summary**

The five impeachments offer starkly different approaches to the process used by the House in fulfilling this constitutional function. I have previously expressed my opposition to the use of a “snap impeachment” as a dangerous precedent that should not be repeated by this body. The Nixon and Clinton impeachments offer more faithful procedural models. Of the two, my preference remains the Nixon impeachment, with its extensive evidentiary hearings and procedural protections for the sitting President. In the current impeachment inquiry, the House has proceeded correctly, in my view, by taking this step only after months of preliminary investigations into the alleged corruption scandal involving the President and his family.

## **III. THE BASIS FOR THE BIDEN IMPEACHMENT INQUIRY**

The initiation of the impeachment inquiry into President Joe Biden was announced by Speaker Kevin McCarthy on September 12, 2023. As with the announcement of former Speaker Nancy Pelosi four years earlier, it was initiated under

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<sup>24</sup> Jonathan Turley, *How a Snap Impeachment Could Shatter Our Constitutional Balance*, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Jan. 11, 2021, <https://jonathanturley.org/2021/01/11/how-a-snap-impeachment-can-shatter-our-constitutional-balance/>.

the inherent authority of the speakership. In the past, there has been a separate vote of either the House Judiciary or the House as a whole, or both. I strongly favor a vote of the House to start an impeachment inquiry, as I did in 2020.

In light of the possibility of such a formal vote, I want to briefly explain why I view an inquiry as warranted in this circumstance. I realize that people of good faith can disagree, but I believe that the House has an obligation to investigate the allegations raised against the President. Once again, I do not believe that the current evidence supports an actual article of impeachment, but that is commonly the case in presidential impeachments.

Any inquiry ideally should start with the credible suspicion, not the presumption, of impeachable conduct. That suspicion should be based on more than purely partisan or sensational claims. Specifically, if underlying facts are established, there should be a credible linkage demonstrating that it would constitute a high crime and misdemeanor. In recent years, there has been a steady drumbeat of impeachment calls. One resolution called for the impeachment of Trump for stating that professional athletes kneeling during the national anthem should be fired,<sup>25</sup> while others focused on his controversial statement regarding the Charlottesville protests.<sup>26</sup> Legal experts called for impeachment based on the pardoning of former Arizona sheriff Joe Arpaio,<sup>27</sup> and for his participation in fundraisers for senators.<sup>28</sup> Legal analysts insisted that impeachment could be based on a tweet criticizing federal charges brought against two Republican congressmen.<sup>29</sup> Likewise, there have been numerous impeachment calls for President Biden and his cabinet members that I have criticized as unfounded. These earlier calls for an

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<sup>25</sup> Nicole Cobler, *Texas lawmaker calls for impeachment vote over Trump's NFL Remarks*, DALLAS MORNING NEWS (Sept. 26, 2017, 12:08 PM), <https://www.dallasnews.com/news/politics/2017/09/26/texas-lawmaker-calls-for-impeachment-vote-over-trump-s-nfl-remarks/>.

<sup>26</sup> Jessica Estepa, *Democratic lawmaker to file articles of impeachment over Trump's Charlottesville response*, USA TODAY (Aug. 17, 2017, 11:58 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/08/17/democratic-lawmaker-to-file-articles-of-impeachment-over-trump-charlottesville-response/575892001/>; see also Michael Collins & Daniel Connolly, *Rep. Cohen to file articles of impeachments against Trump*, THE TENNESSEAN (Aug. 17, 2017, 9:21 AM), <https://www.tennessean.com/story/news/2017/08/17/steve-cohen-impeach-president-trump-charlottesville/575764001/> (quoting Rep. Steven Cohen as saying “if the president can’t recognize the difference between these domestic terrorists and the people who oppose their anti-American attitudes, then he cannot defend us.”).

<sup>27</sup> Laurence H. Tribe & Ron Fein, *‘Sheriff Joe’ is back in court. The impeachment inquiry should pay attention*, BOS. GLOBE (Oct. 23, 2019, 3:30 PM), <https://www.bostonglobe.com/opinion/2019/10/22/sheriff-joe-back-court-the-impeachment-inquiry-should-pay-attention/1Yv9YZmzwL93wP9gYIFj7J/story.html>.

<sup>28</sup> Jason Lemon, *Trump Is Committing ‘Felony Bribery’ By Giving Cash To GOP Senators Ahead Of Impeachment Trial: Ex-Bush Ethics Lawyer*, NEWSWEEK (Oct. 31, 2019, 10:28 AM), <https://www.newsweek.com/trump-committing-felony-bribery-giving-fundraising-cash-gop-senators-ahead-impeachment-trial-1468946> (quoting Richard Painter, chief White House ethics lawyer for George W. Bush and a professor at the University of Minnesota Law School as saying “This is a bribe. Any other American who offered cash to the jury before a trial would go to prison for felony bribery. But he can get away with it?”).

<sup>29</sup> Veronica Stracqualursi, *Toobin: 'Trump's Attack against Sessions "an impeachable offense"*, CNN (Sept. 4, 2018, 11:09 AM), <https://www.cnn.com/2018/09/04/politics/jeffrey-toobin-trump-sessions-tweet-cnntv/index.html>.

impeachment inquiry were based on policy disagreements or the alleged negligent performance of official duties.<sup>30</sup> None of these claims would warrant an impeachment inquiry since, even if the underlying facts were established, there would be no cognizable impeachable conduct.

The current allegations concern an alleged effort to sell influence or access, as well as other wrongdoing. Corruption allegations involving a president are particularly damaging for our political system, effectively dissolving the public trust in the government. Self-dealing, influence peddling, and obstruction all undermine the faith that federal laws are being enforced equally. The public is often skeptical of the ability or inclination of federal agencies to investigate allegations raised in relation to a sitting president. Current polling illuminates that deep distrust by the public. Roughly half of the public does not have faith that the Justice Department's investigation into the Biden corruption scandal is fair and nonpartisan.<sup>31</sup> Roughly half of Americans also believe that President Biden broke the law in relation to his son's business activities.<sup>32</sup> Congress offers a critical check on abuses of office, while also offering assurance to the public that allegations will be fully investigated. This effort is admittedly often opposed by a president's party of a given house. Indeed, in each of the four impeachments, it was the opposing party that pushed for an inquiry, over the opposition of the president's party. Yet, it is precisely that adversarial relationship that creates the needed motivation to pursue such allegations over the obvious political costs to a president's party. However, as discussed above, some members have shown great courage in standing with their constitutional obligations over their political interests.

Since this is simply the start of an inquiry into possible impeachable offenses, I will not discuss the full range of evidence produced by committees in this matter. Instead, I would like to lay out the most salient facts that alone, in my view, justify an inquiry. Those facts can be reduced to three basic points. First, influence peddling is a form of corruption. Second, influence peddling is often accompanied by criminal or impeachable acts of concealment. Third, the alleged corrupt conduct of President Biden could amount to impeachable offenses and the House has an obligation to establish if such conduct occurred.

#### A. Influence Peddling is a Form of Corruption

My first point is, hopefully, uncontested. Influence peddling is arguably Washington's favorite form of corruption. While there are also allegations of possible bribes and other crimes, there should not be any serious debate that influence peddling is

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<sup>30</sup> See, e.g., Jonathan Turley, No, President Biden Should Not Be Impeached for Lax Border Security, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Jan. 26, 2023, <https://jonathanturley.org/2022/01/26/no-president-biden-should-be-impeached-for-lax-border-security/>; Jonathan Turley, No, Secretary of State Blinken's Failure in Afghanistan is Not an Impeachable Offense, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Aug. 28, 2021, <https://jonathanturley.org/2021/08/28/no-secretary-of-state-blinkens-failure-in-afghanistan-is-not-an-impeachable-offense/>.

<sup>31</sup> ABC-Ipsos Poll, Aug. 17, 2023, <https://abcnews.go.com/Politics/majority-americans-trumps-charges-ga-election-interference-case/story?id=102328543>.

<sup>32</sup> Jacob Knutson, Nearly Half of Voters Believe Biden Broke the Law in regards to Son Hunter: Poll, Axios, Sept. 21, 2023, <https://www.axios.com/2023/09/21/joe-biden-illegal-hunter-business>.

corrupt and inimical to good government. Most citizens would agree that “political corruption means that a public official has perverted the office entrusted to his care, that he has broken a public trust for private gain.”<sup>33</sup> Influence peddling has long existed on the very edge of bribery. It is widely accepted as corrupt but may not be treated as a crime in each circumstance. Professor Daniel Hays Lowenstein aptly described this relationship:

“The crime of bribery is the black core of a series of concentric circles representing the degrees of impropriety in official behavior. In this conception, a series of gray circles surround the bribery core, growing progressively lighter as they become more distant from the center, until they blend into the surrounding white area that represents perfectly proper and innocent conduct.”<sup>34</sup>

Canada expressly criminalizes influence peddling under section 121(1)(d) of the *Criminal Code*. It is defined as:

“having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with [government functions].”<sup>35</sup>

The United States has supported efforts internationally to oppose influence peddling as it is expressly barred under various international codes. For example, in 1996, the Organization of American States (OAS) adopted the Inter-American Convention Against Corruption (IACAC), “to prevent, detect, punish and eradicate corruption . . .”<sup>36</sup> The United States ratified the IACAC on September 15, 2000. Additionally, in 1997, the Organization for Economic Co-operation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention) to combat corruption. The IACAC encompasses influence peddling in its broad definition of corruption as “any act or omission in the discharge of his duties by a government official . . . for the purpose of illicitly obtaining benefits for himself or for a third person.” The definition focuses on the intent rather than any exchange in such self-dealing.

Article XI, entitled “Progressive Development,” also details forms of corruption that include:

“b. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of property

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<sup>33</sup> Abraham S. Eisenstadt, Political Corruption in American History, in *POLITICAL CORRUPTION: A HANDBOOK*, at 537-38 (Arnold J. Heidenheimer, Michael Johnston, Victor T. Le Vine eds., 1999).

<sup>34</sup> Daniel Hays Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 *UCLA L. REV.* 784, 786 (1985). This and other definitions are discussed in Peter J. Henning, Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law, 18 *Ariz. J. Int'l & Comp. Law* 793 (2001).

<sup>35</sup> See *R. v. Carson*, 2018 SCC 12, [2018] 423 D.L.R. 389 (Can.).

<sup>36</sup> Inter-American Convention Against Corruption, March 29, 1996, 35 *I.L.M.* 724, 728, art. II, § 1.

belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person who performs public functions has access because of, or in the performance of, his functions;

c. Any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain; whether or not such act or omission harms State property; and

d. The diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third party, of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody or for other reasons.”<sup>37</sup>

Notably, the United States declared that it accepted this broad definition because “the kinds of official corruption which are intended under the Convention to be criminalized would in fact be criminal offenses under U.S. law.”<sup>38</sup> Likewise, the United States supports the definition used by the U.N. Development Program that combats corruption as “the misuse of public power, office or authority for private benefit - through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement.”<sup>39</sup>

Once again, while defenders of the Bidens may legitimately argue that there was no effort to sell influence or access, I assume that members agree that any such “illusion” sold to foreign buyers is still corruption in and of itself. If President Biden was engaged in selling access or influence, it is clearly a corrupt scheme that could qualify as impeachable conduct. An inquiry into such allegations of corruption would clearly have been viewed by the Framers as a matter of the highest priority for congressional investigation.

## B. Influence Peddling is Commonly Facilitated or Followed by Criminal Acts

While some have stressed that the alleged Biden influence peddling may not be criminal, it is most certainly corrupt. The public has no delusions about the selling of influence and access. For that reason, influence peddlers are often keen on avoiding public scrutiny. As a result, crimes are often committed in the concealment of the corrupt practices. Many of those crimes have been alleged in the Biden matter. The failure to pay taxes, the use of questionable financial transfers, the failure to register as a foreign agent, and other crimes can be used to avoid the exposure of corrupt associations or the sources

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<sup>37</sup> IACAC, art. XI.

<sup>38</sup> 146 CONG. REC. S7809 (2000), discussed in Henning, *Public Corruption*, *supra*, at 828. However, it added the caveat that it was not agreeing to criminalize a simple attempt at corruption. In signing, the State Department noted that “Article VI(1)(c) . . . by its literal terms would embrace a single preparatory act done with the requisite ‘purpose’ of profiting illicitly at some future time, even though the course of conduct is neither pursued, nor in any sense consummated. The United States will not criminalize such conduct per se . . . .” 146 CONG. REC. S7809 (2000), *see also* Henning, *Public Corruption*, *supra*, at 810.

<sup>39</sup> U.N. Dev. Program, Mgmt. Dev. & Governance Div., *Fighting Corruption to Improve Governance*, at 6 (Nov. 13, 1998).

of money. It is telling that many now recognize that Hunter Biden and his associates were selling influence and access. As Biden associate Devon Archer told Congress, they were selling the “Brand” and Joe Biden was that brand. That is a pitch that may appeal to clients, but it does not appeal to the public. The transactions and communications uncovered by the House tended to shield these efforts from public view.

At this stage, these remain mere allegations. There is a danger of creating a certain confirmation bias early in an investigation in highlighting certain crimes. In the Clinton hearing, there was a clear indication on the specific articles of impeachment given the relatively advanced stage of the investigation.<sup>40</sup> However, the legitimacy of an inquiry is often judged based on whether, if alleged connections are made to a sitting president, impeachable conduct can be established. It is useful, therefore, to quickly address a few obvious offenses that *could* be established in the course of this inquiry. Any one of these violations would justify an inquiry. It seems folly to suggest that none of these possible violations could be established without considering still undisclosed evidence, including financial records of the Bidens. To do so, one must assume away even the possibility that these violations could be connected to the President, precisely the type of assumption that breeds public distrust in our system. That distrust is evident in the fact that only 16 percent of the public trusts our government to “do the right thing.”<sup>41</sup> One way of restoring that trust is to allow for greater transparency in controversies like the Biden matter. Trust can be restored by showing that impeachable offenses are not simply ignored or dismissed, which is why I supported the impeachment inquiry into former president Donald Trump. Indeed, I rejected the argument that the House should not impeach even if it was clear that the Senate would not convict.<sup>42</sup> While I opposed the premature issuance of articles of impeachment without fact hearings and testimony, I believed that the House had every right to pursue answers on the conduct of President Trump in relation to Ukraine.<sup>43</sup> I take the same position with President Biden in the current controversy.

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<sup>40</sup> Testimony of Jonathan Turley, Trump Impeachment, *supra*, at 24.

<sup>41</sup> Pew Research Center, Poll Results, Sept. 19, 2023, <https://www.pewresearch.org/politics/2023/09/19/views-of-the-u-s-political-system-the-federal-government-and-federal-state-relationships/#:~:text=those%20under%2050,-,Trust%20in%20the%20federal%20government,than%2070%20years%20of%20polling>.

<sup>42</sup> Jonathan Turley, The House Has a Duty To Impeach Trump if They Find High Crimes and Misdemeanors, *Res Ipsa* ([www.jonathanturley.org](http://www.jonathanturley.org)), Jan. 19, 2020, <https://jonathanturley.org/2019/01/20/the-house-has-a-duty-to-impeach-if-they-find-high-crimes-and-misdemeanors-by-trump/>.

<sup>43</sup> Turley Testimony, Trump Impeachment, *supra*, (“The problem is not that abuse of power can never be an impeachable offense. You just have to prove it, and you haven’t. It’s not enough to say, I infer this was the purpose.”); *see also* Jonathan Turley, “Let Them Impeach And Be Damned”: History Repeats Itself With A Vengeance As The House Impeaches Donald Trump, *Res Ipsa*, Dec. 19, 2019.

(“I have strongly encouraged the House to abandon the arbitrary deadline of impeaching Trump before Christmas and to take a couple more months to build a more complete record and to allow judicial review of the underlying objections of the Trump administration.”). The disagreement among the experts was not as much on the standard as the threshold for an impeachment article:

“I think that one of the disagreements that we have and I have with my esteemed colleagues, is what makes a legitimate impeachment, not what technically satisfies an impeachment, there’s very few technical

### C. The Alleged Corrupt Conduct Could Amount to Impeachable Offenses

Before addressing the range of possible impeachable offenses, I would like to make one threshold observation. In both the Clinton and Trump impeachment hearings, I repeatedly stated that an impeachable offense does not have to be an actual crime. In the Clinton impeachment, I opposed the narrower interpretations of other witnesses.<sup>44</sup> In my Trump impeachment testimony, I also emphasized that “criminality is not required” and that the strongest claim is for a non-criminal abuse of power if a quid pro quo can be established on the record. Despite later false claims to the contrary,<sup>45</sup> I repeatedly stated that “it is clear that ‘high crimes and misdemeanors’ can encompass non-criminal conduct.”<sup>46</sup> That remains my position in the Biden impeachment inquiry. Yet, the most compelling impeachments have been those which raise conduct that would also be the basis for criminal charges. The reason is simple and obvious. Criminal-based articles of impeachment can incorporate judicial decisions on the interpretation of the underlying conduct. There is also a heightened concern over a president committing acts for which their own and prior administrations have incarcerated citizens. With that in mind, here are some of the impeachable offenses relevant to this impeachment inquiry if evidence links the President to underlying acts.<sup>47</sup>

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requirements of an impeachment. The question is, what is expected of you? And my objection is that there is a constant preference for inference over information, for presumptions over proof. That’s because this record hasn’t been developed. And if you’re going to remove a president ...if you’re going to remove a sitting president, then you have an obligation not to rely on inference when there’s still information you could gather. And that’s what I’m saying. It’s not that you can’t do this, you just can’t do it this way.”

*Id.* (Testimony of Professor Jonathan Turley)

<sup>44</sup> See, e.g., Jonathan Turley, Impeachment in the Age of Trump, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), Jan. 29, 2021, <https://jonathanturley.org/2021/01/29/tribe-in-the-age-of-trump-the-evolving-views-of-impeachable-conduct/>. The criminal/noncriminal issue was not central to the impeachment since even Democratic supporters accepted that Clinton committed perjury (as did a later federal judge) and the question was whether the subject of the perjury is determinative on the question of whether the alleged crime is impeachable.

<sup>45</sup> Jonathan Turley, The GW Commencement Controversy: A Response of Rep. Susan Wild, Res Ipsa ([www.jonathanturley.org](http://www.jonathanturley.org)), May 16, 2022, <https://jonathanturley.org/2022/05/16/the-gw-commencement-controversy-a-response-to-rep-susan-wild/>.

<sup>46</sup> That position was also emphasized in my oral testimony: “It’s not that you can’t impeach on a non-crime, you can. In fact, non-crimes have been part of past impeachments.” Turley Testimony, Trump Impeachment, *supra*. Indeed, that position in my testimony was relied upon by Chairman Jerry Nadler and the House managers.

<sup>47</sup> There have been allegations raised under the Foreign Corrupt Practices Act in the Biden matter, which criminalizes the paying of bribes to foreign officials to assist in obtaining or retaining business. The allegations center around Hunter Biden’s relationship with various officials who have histories of corrupt practices, including Patrick Ho, who was sentenced in 2019 for bribing foreign officials in connection with CEFC China Energy Company Limited (“CEFC China”). Department of Justice, Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offense, Mar. 25, 2019, <https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-sentenced-3>. There are also questions of the failure of Hunter Biden to register as a foreign agent under the Foreign Agents Registration Act (FARA). However, there is no current evidence that would suggest a credible link from President

## 1. Bribery

The most obvious offense is the second textual crime referenced in the impeachment provision: bribery. This allegation appears in an FD-1023 form recounting a tip from a trusted FBI source who had been previously paid considerable money by the agency for his information. The source recounted information from multiple conversations with the head of Burisma Mykola Zlochevsky. The source relayed how Zlochevsky had contempt for Hunter Biden's intellect and abilities, but said that he was used as a conduit to his father. In raising legal problems facing Burisma, the source allegedly stated, "Don't worry, Hunter will take care of all of those issues through his dad." He also allegedly said that he paid \$5 million to Hunter Biden and \$5 million to Joe Biden as 'poluchili,' the Russian slang term for extortion. The source also stated that Zlochevsky was told not to send money directly to Joe Biden, whom he referred to as "the Big Guy," the term also used as a code by Biden associates in referring to Joe Biden in relation to foreign dealings.

The allegations in the FD-1023 are obviously troubling, but it is important to emphasize what we do not know. The source remains a mystery and this is a secondhand account. The most that can be said about the account is that it warrants investigation. It is not clear how aggressively the FBI pursued this lead. However, given the millions tracked by the House going to Hunter Biden and his associates from these foreign dealings, it is obviously a matter worthy of an inquiry to determine if President Biden was aware of these corrupt practices or benefited from them.

Many have insisted that the House has not shown that the President personally accepted money from these sources to be considered a benefit for the purposes of bribery or other impeachable offenses. Putting aside the fact that an inquiry is designed to uncover such evidence, there is a suggestion that, absent a direct payment or gift, the benefits accrued by Hunter Biden and his associates would not implicate Joe Biden. If President Biden was aware of money going to his family in exchange for influence or access, it would constitute an impeachable offense. Putting aside references in e-mails to Hunter paying bills for his father, transfers to his close family members are also a benefit. Indeed, most people of an advanced age are concerned about leaving a financial legacy for their children and grandchildren via the transfer of funds. To say that millions of dollars going to his family would not be considered a benefit to Joe Biden is legally and logically absurd.

Under 18 U.S. Code § 201, it is bribery when

being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:  
(A) being influenced in the performance of any official act;

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Biden to such violations, even if they did involve his son. Absent new evidence, the focus should be on the offenses discussed below.

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person.

Thus, it covers seeking anything of value for himself “or for any other person.”

Past criminal cases involving bribery and related honest services fraud have included payments to family members as benefits. For example, in *Ryan v. United States*, the United States Court of Appeals for the Seventh Circuit upheld the conviction based on the receipt of benefits by George Ryan, formerly Secretary of State and then Governor of Illinois, for himself and his family.<sup>48</sup> This included paying for a band at his daughter’s wedding and other “undisclosed financial benefits to him and his family and to his friends.” Notably, considering the narrowing interpretations of the Supreme Court in prior cases, the Seventh Circuit noted that the prosecutors did not rely on an overly broad jury instruction but instead emphasized that these “benefits” constituted effective bribes. In an argument that could prove relevant to the inquiry on the Shokin question, the Court noted that the defense claimed that “these benefits were tokens of friendship, and that he did nothing in return for them. If some of his acts assisted Warner, or Warner’s associates, that happened only because Ryan concluded in the exercise of independent judgment that the public interest required the actions favorable to Warner.”<sup>49</sup> This argument was rejected by the jury and the conviction was upheld. Judge Frank Easterbrook also noted that the prosecutors had made a proper argument in rejecting the need to show a particular decision was the result of these ill-gotten benefits:

“A dispute developed at trial about whether the prosecution had to show that a particular payment from Warner to Ryan matched a particular decision that Ryan made to confer benefits on Warner. The prosecutor denied that matching was necessary and contended that taking money in exchange for a promise (explicit or reasonably implied) to deliver benefits in return is bribery; it isn’t necessary to show that Warner’s paying for the band at the wedding could be matched against a particular decision Ryan made in exchange. The district judge told the jury that the prosecutor was right about this. Thus when the prosecutor denied that it was necessary to show a quid pro quo, he was not arguing that it was unnecessary to show bribery; he was arguing that Ryan’s lawyers had defined bribery too narrowly. This aspect of the prosecutor’s argument did not invite a conviction based on nondisclosure, rather than the receipt of bribes.”<sup>50</sup>

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<sup>48</sup> *Ryan v. United States*, 688 F.3d 845 (7<sup>th</sup> Cir. 2012).

<sup>49</sup> *Ryan*, 688 F.3d at 850.

<sup>50</sup> *Id.*

It is widely accepted that benefits given to family members can constitute bribes.<sup>51</sup> Even clothing for a spouse<sup>52</sup> or a rigged victory for a son in a golfing contest<sup>53</sup> have been treated as sufficient for bribery charges. The direct benefit claim also contradicts the past position of the House on impeachable offenses. I served as lead counsel in the last judicial impeachment tried before the Senate. My client, Judge G. Thomas Porteous, was impeached by the House for, among other things, benefits received by his children, including gifts related to a wedding.<sup>54</sup>

Once again, the Supreme Court has narrowed the scope of bribery in public corruption cases. It is useful to compare impeachable claims to such judicial interpretations even if the House is not locked into that scope by the constitutional definition of a high crime and misdemeanor.

The Supreme Court has stressed a narrow scope of bribery in cases like *McDonnell v. United States*,<sup>55</sup> where the Court overturned the conviction of former Virginia governor Robert McDonnell. McDonnell and his wife were prosecuted for bribery under the Hobbs Act, applying the same elements as found in Section 201(a)(3). They were accused of accepting an array of loans, gifts, and other benefits from a businessman in return for McDonnell facilitating key meetings, hosting events, and contacting government officials on behalf of the businessman who ran a company called Star Scientific. The benefits exceeded \$175,000 and the alleged official acts were completed. In unanimously overturning the conviction, Chief Justice Roberts stressed that “a more limited interpretation of the term ‘official act’ leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.”<sup>56</sup> The opinion dismisses benefits like meetings as insufficient. The Court rejected “boundless interpretations” as inimical to constitutional rights because they deny citizens the notice of what acts are presumptively criminal: “[U]nder the Government’s interpretation, the term ‘official act’ is not defined ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited,’ or ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’”<sup>57</sup>

*McDonnell* resulted in the reversal of a number of convictions or dismissal of criminal counts against former public officials. One such case was *United States v. Silver* involving the prosecution of the former Speaker of the New York Assembly. Silver was accused of an array of bribes and kickbacks in the form of referral fees from law firms. It was overturned because of the same vagueness that undermined the conviction in

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<sup>51</sup> *United States v. Kemp*, 500 F.3d 257, 285 (3d Cir. 2007) (“providing a loan to a public official (or his friends or family) that would have otherwise been unavailable . . . may constitute a bribe”); *Hope for Families & Cmty. Serv. V. Warren*, 2009 U.S. Dist. LEXIS 5253 (M.D. Ala. 2009) n. 18 (“The parties do not dispute the general proposition that bribes involving benefits to family members or friends can provide the predicate for a criminal bribery conviction.”).

<sup>52</sup> *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998).

<sup>53</sup> *Buchanan County v. Blankenship*, 496 F. Supp. 2d 715, 722 (W.D. Va. 2007).

<sup>54</sup> *The Impeachment of G. Thomas Porteous*, House Report, March 4, 2010, <https://www.govinfo.gov/content/pkg/CRPT-111/hrpt427/html/CRPT-111/hrpt427.htm>.

<sup>55</sup> *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

<sup>56</sup> *Id.* at 2375.

<sup>57</sup> *Id.* at 2373.

*McDonnell*. The Second Circuit ruled the “overbroad” theory of prosecution “encompassed any action taken or to be taken under color of official authority.”<sup>58</sup> Likewise, the Third Circuit reversed conviction on a variety of corruption counts in *Fattah v. United States*.<sup>59</sup> Former Rep. Chaka Fattah (D-Penn.) was convicted on all twenty-two counts of corruption based on an honest services prosecution. The case also involved a variety of alleged “official acts” including the arranging of meetings with a U.S. Trade Representative. The Third Circuit ruled out the use of acts as an “official act.” As for the remanded remainder, the court noted it might be possible to use other acts, such as lobbying for an appointment of an ambassador, to make out the charge but stated that “[d]etermining, for example, just how forceful a strongly worded letter of recommendation must be before it becomes impermissible ‘pressure or advice’ is a fact-intensive inquiry that falls within the domain of a properly instructed jury.”<sup>60</sup> There was also a successful appeal in the case of former Rep. William Jefferson where the court dismissed seven of the ten counts that led to his conviction.<sup>61</sup> The first bribery trial of Sen. Robert Menendez (D- N.J.) also led to a narrowing of charges despite an array of valuable gifts received from a wealthy businessman donor.<sup>62</sup> Under the more restrictive post-*McDonnell* definition, the jury deadlocked and the Justice Department dismissed the case—a decision attributed by experts to the view that *McDonnell* “significantly raised the bar for prosecutors who try to pursue corruption cases against elected officials.”<sup>63</sup> These cases will need to be considered as the House not only investigates the benefits from these dealings but also the acts that were taken in light of those benefits.

However, as shown in cases like *Ryan*, the government has established bribery-based fraud theories based on what it called a “stream of benefits” running to either the politician, his family or friends. In an impeachment article based on bribery, a quid pro quo should remain the focus of the investigation. It establishes a key nexus between corruption practices and public office. Yet, these cases offer a more nuanced standard. Indeed, the Seventh Circuit quoted the closing argument of the Justice Department with approval in describing how:

“this is not a case in which a public official had a specific price for each official act that he did, like a menu in a restaurant where you pick an item and it has a particular price. The type of corruption here—that type of corruption where you give me this, I will give you that, is often referred to as a *quid pro quo*. The

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<sup>58</sup> *United States v. Silver*, 864 F.3d 102, 113 (2d Cir. 2017).

<sup>59</sup> *United States v. Fattah*, 902 F.3d 197, 240 (3d Cir. 2018) (“in accordance with *McDonnell*, that Fattah’s arranging a meeting between Vederman and the U.S. Trade Representative was not itself an official act. Because the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt.”).

<sup>60</sup> *Id.* at 241.

<sup>61</sup> Rachel Weiner, *Judge lets former Louisiana congressman William Jefferson out of prison*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d\\_story.html](https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d_story.html).

<sup>62</sup> *United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015).

<sup>63</sup> Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html>.

corruption here was more like a meal plan in which you don't pay for each item on the menu. Rather, there is a cost that you pay, an ongoing cost, and you get your meals.”<sup>64</sup>

Obviously, the direct bribe described by the FBI source would meet any definition of bribery in return for official acts. The Court noted that an “official act”:

“is a decision or action on a ‘question, matter, cause, suit, proceeding or controversy.’ The ‘question, matter, cause, suit, proceeding or controversy’ must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is ‘pending’ or ‘may by law be brought’ before a public official.”

There are obviously official acts that are alleged in the Biden matter. There are allegations that Burisma wanted Joe Biden’s help to deal with the pressure from anti-corruption investigations. Where Trump threatened the withholding of military aid, Biden threatened to withhold needed loans from Ukraine. Devon Archer testified that, at a meeting in December of 2015, Zlochevsky and fellow Burisma executive Pozharski "placed constant pressure on Hunter Biden to get help from D.C." to counter Ukrainian prosecutor Viktor Shokin in his corruption investigation. Archer testified that Zlochevsky and Pozharski stepped away with Hunter and “called D.C.” A few days later, Biden gave the Ukrainian an ultimatum to fire Shokin or he would not give the Ukrainians a billion dollars in approved loans. Shokin was promptly fired.

Once again, the current record does not establish any crime, let alone an impeachable offense. Various figures in both parties were critical of Shokin and looking for a change in Ukraine. Moreover, Archer did not hear who was called or what was discussed. President Biden can argue that he was motivated by U.S. policy in taking this extraordinary action. The question remains not just the details on this call, but whether there was a plan to give the ultimatum before the call or other efforts by Hunter Biden. That is precisely the purpose of an impeachment inquiry. Recognizing that there remains a critical nexus to be established does not mean that you do determine if such a nexus exists. If the House concludes that Joe Biden took this action, or other official actions, as a result of money and gifts given to his son, it will clearly constitute bribery.

## 2. Obstruction

Another common focus of impeachment inquiries has been obstruction of justice or obstruction of Congress.<sup>65</sup> Obstruction of justice is a more broadly defined crime than

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<sup>64</sup> *Ryan*, 688 F.3d at 852.

<sup>65</sup> It is important to distinguish between claims of “obstruction of justice,” “obstruction of Congress,” and “contempt of Congress” – terms often loosely used in these controversies. Obstruction of Congress falls under the same provisions as obstruction of justice, specifically, 18 U.S.C. §1505 (prohibiting the “obstruction of proceedings before ... committees”). However, the Congress has also used its contempt powers to bring both civil and criminal actions. The provision on contempt states:

“Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, ... or

bribery and often overlaps with other crimes like witness tampering, subornation, or other specific acts designed to obstruct a given proceeding. There are many federal provisions raising forms of obstruction that reference parallel crimes. Thus, influencing a witness is a standalone crime and a form of obstruction under 18 U.S.C. 1504.

The various obstruction provisions generally share common elements. 18 U.S.C. § 1503, for example, broadly defines the crime as “corruptly” endeavoring “to influence, obstruct or impede the due administration of justice.” This “omnibus” provision, however, is most properly used for judicial proceedings such as grand jury investigations, and the Supreme Court has narrowly construed its reach. There is also 18 U.S.C. § 1512(c), which contains a “residual clause” in subsection (c)(2), which reads:

(c) Whoever corruptly-- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added]

The classic obstruction of justice article was the first article of impeachment against Nixon:

“Committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.”

As shown in the White House tapes, the President was directly implicated in efforts to not only commit the underlying offenses, but also to conceal the evidence from the courts and Congress.<sup>66</sup> Chairman Rodino maintained that the House would dictate

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any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$ 100,000] nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.”

2 U.S.C. §§ 192, 194. Thus, when the Obama Administration refused to turn over critical information in the Fast and Furious investigation, the Congress brought a contempt not an impeachment action against Attorney General Eric Holder. In this case, the House would skip any contempt action as well as securing any order to compel testimony or documents. Instead, it would go directly to impeachment for the failure to turn over material or make available witnesses – a conflict that has arisen in virtually every modern Administration.

<sup>66</sup> In a prior interview with former Rep. Liz Holtzman, I raised the utter lack of due process and fairness in such a position. Holtzman, one of the House Judiciary Committee members during the Nixon impeachment, insisted that a president has no right to seek judicial review and that he must turn over everything and anything demanded by Congress. Holtzman insisted that the position of her Chairman, Peter Rodino, was that the House alone dictates what must be produced. Public Impeachment Hearing Analysis From Nixon, Clinton Figures, WBUR (Nov. 14, 2019), <https://www.wbur.org/onpoint/2019/11/14/first-impeachment-hearing-congress-trump-taylor-kent>.

what had to be turned over in an inquiry and that any refusal constituted obstruction. That view is captured in the third article of impeachment against Nixon concerning the failure to comply with congressional subpoenas. That article stated:

“In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives... [i]n all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.”<sup>67</sup>

I have long been critical of this article, which treated Nixon’s challenges in court as impeachable conduct. While Nixon ultimately lost in his effort to withhold the evidence, he had every right to do so. On July 25, 1974, the Court ruled in *United States v. Nixon*<sup>68</sup> that the President had to turn over the evidence. On August 8, 1974, Nixon announced his intention to resign. Notably, in that decision, the Court recognized the existence of executive privilege—a protection that requires a balancing of the interests of the legislative and executive branches by the judicial branch. The Court ruled that “[n]either 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 under all circumstances.”<sup>69</sup> Nixon did engage in obstruction, but not through his challenging of subpoenas. There were unresolved questions of executive privilege that were addressed in that litigation.

The second approved article against President Clinton (originally Article III) was an obstruction allegation based on his actions regarding the case brought against him by Paula Jones. The article alleged that Clinton “prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding.”

The Clinton obstruction article is likely the most relevant to allegations of interference with the Hunter Biden investigation, though there is still no direct evidence of such action by the President or his associates. Again, it may also encompass efforts by President Biden to maintain false accounts of his lack of knowledge or involvement in the alleged influence peddling efforts by his son and his associates.<sup>70</sup> Yet, obstruction

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<sup>67</sup> WATERGATE.INFO, <https://watergate.info/impeachment/articles-of-impeachment>.

<sup>68</sup> *United States v. Nixon*, 418 U.S. 683, 706 (1974).

<sup>69</sup> *Id.*

<sup>70</sup> This can itself be a difficult line to draw. While the “exculpatory no” defense has been rejected, there has to be some leeway for presidents in denying allegations of corruption. The issue is whether a president fostered a false narrative in the knowingly denial of key facts, particularly in relation to Congress, investigators or sworn proceedings.

allegations tend to be late developers in impeachment inquiries since the response to the inquiry itself can be grounds for such an article. Indeed, the Nixon articles included Article III on the defiance of subpoenas that can also be subsumed within an obstruction article. In this matter, any obstruction allegations are most likely to focus on the efforts to withhold evidence in an effort to delay or to conceal wrongdoing.

### 3. Conspiracy

The Biden matter raises questions over the President's knowledge and involvement in an influence peddling operation that netted millions of dollars from foreign sources. That operation involved a variety of alleged criminal conduct ranging from tax evasion to extortion to bribery. The President's involvement and effort to conceal these dealings could support cognizable claims of conspiracy.

The Justice Department continues to charge defendants with a variety of conspiracy counts potentially relevant to the Biden matter. The recent corruption indictment of Senator Menendez contains another possible conspiracy claim. Count Two charges Menendez with conspiracy to commit honest services fraud under 18 U.S.C. 1343 and 1346. The first provision, Section 1343, deals with fraud by wire, radio and television and includes anyone:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.”

Section 1346 further states that “[f]or the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.”

Once again, honest services prosecutions have had a series of narrowing interpretations in the courts in cases like *McDonnell*, *United States v. Silver*<sup>71</sup> and *Fattah v. United States*.<sup>72</sup> In *Skilling v. United States*, the Supreme Court rejected an argument that “undisclosed self-dealing by a public official or private employee--*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.”<sup>73</sup> However, the Justice Department under President Biden maintains that the alleged acceptance of gifts and money by Senator Menendez still constitutes a chargeable crime. Moreover, the use of wire and telephone means to carrying out these efforts can amount to separate criminal acts. Finally, as emphasized in the first Trump impeachment, the House is not

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<sup>71</sup> *United States v. Silver*, 864 F.3d 102, 113 (2d Cir. 2017).

<sup>72</sup> *United States v. Fattah*, 902 F.3d 197, 240 (3d Cir. 2018) (“in accordance with *McDonnell*, that Fattah's arranging a meeting between Vederman and the U.S. Trade Representative was not itself an official act. Because the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt.”).

<sup>73</sup> *Skilling v. United States*, 561 U.S. 358, 410-11(2010).

bound by the criminal code or its interpretation for the purposes of an impeachment. Courts have struggled with this line of when honest services charges constitute crimes, and have honed closer to classic bribery or kickback schemes. The House may view self-dealing as a quintessential impeachment concern.<sup>74</sup> Under this approach, self-dealing may be more constrained in justifying a criminal conviction than it is in removing a person from office.

It is also notable that the third count in the Menendez indictment is for conspiracy to commit extortion under color of official right under 18 U.S.C. 1951. The Hobbs Act allows for a charge of extortion without a threat of violence but rather the use of official authority. Under this section, it is a crime if it “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion,” which is defined as seeking to obtain “property from another, with his consent, . . . under color of official right.” Once again, the question for the inquiry is whether the President (through surrogates, including his son) sought to extort money from figures in countries like Ukraine in order to receive the assistance of his office.

Courts have held that conspiracy charges do not require that the defendant is involved in every (or even most) aspect of the planning for a bribe or denial of honest services. Thus, a conspirator does not have to participate “in every overt act or know all the details to be charged as a member of the conspiracy.”<sup>75</sup> Indeed, the conspiratorial agreement “need not be express so long as its existence can plausibly be inferred from the defendants’ words and actions and the interdependence of activities and persons involved.”<sup>76</sup>

It is also possible that the House could find a conspiracy to commit wire fraud in transfers of funds and the use of wire and telephonic means to perpetuate this scheme. Returning to the *Ryan* case is illustrative. In that case, the jurors were given rivaling explanations for the defendant’s actions: “the only motivations Ryan had to interfere with this contract were for legitimate law-enforcement reasons, as the defense suggested, or to compensate Warner for the stream of benefits he provided, as the Government urged. The jury rejected the good faith motive.”<sup>77</sup> The Court found that the actions were made to compensate the third parties for their benefits and that the wire transfers and communications were made in furtherance of that scheme.

#### 4. Abuse of Power

Abuse of power is a catch-all article that has been used to encompass a wide range of self-dealing, obstruction, and misuse of federal authority maneuvers’. It can

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<sup>74</sup> This issue has come up in the debate over self-pardons where many argue that a sitting president cannot pardon himself. I have long disagreed with that proposition given the unrestricted language of Article II, Section 2, Clause 1 (stating that the President “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”). Yet, others have argued that there is a clear constitutional rejection of self-dealing that runs throughout its articles and amendments. See, e.g., Brain Kalt, Note, Pardon Me? The Constitutional Case Against Self-Pardons, 106 Yale L.J. 779 (1996).

<sup>75</sup> *United States v. Soto-Beniquez*, 356 F.3d 1, 19 (1st Cir. 2003).

<sup>76</sup> *United States v. Boylan*, 898 F.2d 230, 241-242 (1st Cir.), cert. denied 498 U.S. 849, 111 S. Ct. 139, 112 L. Ed. 2d 106 (1990).

<sup>77</sup> *Ryan*, 688 F.3d at 851.

include the use of federal staff to obstruct or frustrate efforts to investigate corruption or abuse. It is arguably the closest to the description of Alexander Hamilton in *The Federalist*, No. 65 when he described impeachment as "a method of national inquest into the conduct of public men" accused of violating the "public trust." It is also an article that is usually based on non-criminal conduct. The Trump impeachment reaffirmed the use of non-criminal acts as satisfying the impeachment standard.

Abuse of power was Article II in the Nixon impeachment alleging:

“Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States, and to the best of his ability preserve, protect and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice in the conduct of lawful inquiries, of contravening the law of governing agencies of the executive branch and the purposes of these agencies.”

Abuse of power was also one of the articles to be voted out of the Judiciary Committee in the Clinton impeachment. While rejected on the floor, the Judiciary Committee approved Article IV based on the allegation that Clinton “refused and failed to respond to certain written requests for admission and willfully made perjurious, false and misleading sworn statements in response to certain written requests for admission propounded to him as part of the impeachment inquiry authorized by the House of Representatives of the Congress of the United States.”

It was also Article I in the first Trump impeachment, which tracked the Nixon language and added in part:

“Donald J. Trump has abused the powers of the Presidency, in that: Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election. He did so through a scheme or course of conduct that included soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection, harm the election prospects of a political opponent, and influence the 2020 United States Presidential election to his advantage. President Trump also sought to pressure the Government of Ukraine to take these steps by conditioning official United States Government acts of significant value to Ukraine on its public announcement of the investigations. President Trump engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit. In so doing, President Trump used the powers of the Presidency in a manner that compromised the national security of the United States and undermined the integrity of the United States democratic process. He thus ignored and injured the interests of the Nation.”

The thrust of the Trump abuse of power article was the use of his office for personal benefit, including political advantage. It is another example of a non-criminal article of impeachment.

In the Biden matter, the President stands accused of a scheme of withholding aid to Ukraine for personal advantage, though it was allegedly for pecuniary rather than political advantage. There are also allegations that the Biden Administration and the White House have obstructed efforts to investigate these allegations. The President is also accused of lying to the public for years in denying knowledge of his son's business dealings. Recently, Devon Archer called that claim "patently false" and another witness, Hunter's business associate Tony Bobulinski, swore that he sat down with Joe Biden to discuss the business opportunities. To the extent that the President has used White House staff to maintain false claims or resist disclosures, it can fit into the type of Nixonian abuse of power model.

Again, there has been little discovery or disclosures from the White House or agencies on areas that would shed light on abuses of power. However, the underlying allegations of self-dealing naturally raise abuse of power concerns.

#### D. Illusions and Impeachable Offenses

I would like to close this review of possible impeachable offenses by returning to the oft-quoted "illusion" defense to influence peddling allegations. Some politicians and pundits have acknowledged that Hunter Biden was involved in influence peddling, but insist that it was merely "an illusion." Thus, associates like Devon Archer admitted that they were using the access to Joe Biden as a selling point. The suggestion is that these corrupt foreign figures did not actually receive the influence or access that they paid for. In other words, anyone who paid for influence was fleeced as chumps. Of course, the selling of such influence and access was still corrupt, but the question is whether President Biden was entirely unaware of this massive and lucrative enrichment scheme. If the final line of defense is that the influence peddling was merely an "illusion" sold to foreign marks, the question is: How do we know? Congress has a duty to confirm whether this effort was done with the President's knowledge and whether he was facilitating the illusion or the reality of self-dealing in office.

Just as influence peddling is a form of corruption that the United States has sought to combat on a global scale, it is still corrupt if you have no plans to fulfill the deal. You are still turning an office into a commodity for corruption. As noted, even for criminal cases, a quid pro quo is not always required in conspiracy and other prosecutions for public corruption. It is up to Congress on whether, in a broad influence peddling scandal, such a showing is essential for an impeachment. For my part, I continue to view the quid pro quo evidence as a touchstone for a bribery-based article of impeachment.

The Supreme Court has imposed such a quid pro quo showing in cases involving campaign contributions. In *McCormick v. United States*, the Justice Department brought a Hobbs Act charge against a state official for extorting money under "the color of official right." Since the money took the form of campaign contributions, the defendant insisted that the case did not meet the standard for acting "under the color of official right." The Supreme Court voted 6-3 to reverse the conviction, but tied its ruling to the difficulty in distinguishing motives underlying campaign contributions. Accordingly, the majority

ruled that a quid pro quo is necessary for conviction under the Hobbs Act when an official receives a campaign contribution.<sup>78</sup>

A year after handing down *McCormick*, the Court issued a decision in *Evans v. United States* that rejected that standard in a non-contribution case.<sup>79</sup> The Court considered the conviction of Georgia county commissioner John Evans for extortion in violation of the Hobbs Act. He insisted that cash and a check were campaign contributions and that, accordingly, a quid pro quo must be established for conviction. The Court rejected the claim and said that there was no need to show an affirmative act of inducement for a conviction under the Hobbs Act. Thus, a politician does not have to initiate a bribe and a quid pro quo is not an element of the crime under the Hobbs Act: “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” Lower courts have put it more bluntly that “[a]n official may be convicted without evidence equivalent to a statement such as: ‘Thank you for the \$10,000 campaign contribution. In return for it, I promise to introduce your bill tomorrow.’”<sup>80</sup>

It is certainly fair to point out that *Evans* involved actual money passed by an undercover agent. Moreover, as noted earlier, bribery-based impeachment articles should establish the close nexus shown in a quid pro quo arrangement. This may prove a standard higher than demanded in some actual criminal cases where the courts have not required a showing of a quid pro quo and, as discussed earlier, payments to family members can be benefits that amount to bribery under federal law. Thus, even in an actual corruption prosecution, it is not a defense that the benefits went to family members, and it is not a requirement that such payments are shown to be part of a quid pro quo. Once again, such self-dealing goes to the heart of the impeachment standard. Just as abuse of office encompasses non-criminal conduct, an article of impeachment based on influence peddling or bribery can fairly extend beyond the criminal interpretation. However, even these criminal cases do not necessarily require the quid pro quo element.

Under the illusion rationale, defenders of the President suggest that it would not be impeachable if the Bidens effectively shook down corrupt foreign figures but did not actually intend to do anything for the money. It is a curious double corruption theory: the Bidens would be fleecing corrupt figures who sought to fleece the public of honest services. Clearly, these corrupt figures are certainly not likely to file fraud actions for the money back. Yet, the base act is still peddling a public office and a form of public corruption. Quite frankly, the greatest illusion is that millions of dollars could go to President Biden’s children and grandchildren and not be a benefit to him or an inducement for the denial of his honest services as our Chief Executive.

Once again, these preliminary observations are raised merely to show that, if proven, these allegations could lead to impeachable offenses. The question at this stage is

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<sup>78</sup> *McCormick v. United States*, 500 U.S. 257, 273 (1991). The Court held: “The receipt of [campaign] contributions is ... vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or understanding.”

<sup>79</sup> *Evans v. United States*, 504 U.S. 255 (1992).

<sup>80</sup> *United States v. Inzunza*, 638 F.3d 1006, 1014 (9th Cir. 2011).

only whether there is a credible array of potential articles of impeachment, and the record is clearly sufficient in meeting that threshold standard.

#### IV. THE BEST PRACTICES FOR THE BIDEN IMPEACHMENT INQUIRY

One of the best practices that I have long advocated is a vote of the House on the initiation of an impeachment inquiry. I recognize that there is precedent for an inquiry to be initiated by the Speaker, as Speaker Nancy Pelosi did in the Trump impeachment.<sup>81</sup> There is no constitutional precondition of a formal vote to launch such an inquiry. The Constitution simply vests the “sole Power of Impeachment” in the House of Representatives pursuant to Art. I, § 2, cl. 5. Courts have been highly deferential to the House in how it conducts these inquiries and there is not a judicial opinion that binds the House to the necessity of a resolution to vest the authority for an inquiry in a given committee or committees. The Justice Department’s Office of Legal Counsel has cited past practices and House rules to argue that such a vote is needed to vest the authority.<sup>82</sup> Given the leeway afforded to Congress in this process, a challenge to subpoenas on that basis is highly uncertain. That deference was evident in the limited litigation over subpoenas during the Trump Administration when the House argued that such a resolution was not required. Then Judiciary Committee Chair Jerry Nadler insisted that “formal impeachment proceedings” had begun without any resolution. The courts supported this inherent authority argument in *In re Application of the Comm. on the Judiciary*, where the court ruled that no such resolution is required and in fact has not been used in many past impeachments.<sup>83</sup> The court found that “[e]ven in cases of presidential impeachment, a House resolution has never, in fact, been required to begin an impeachment inquiry.”<sup>84</sup> The district court was later upheld by the D.C. Circuit, which stressed “impeachment is a separate process that occurs in the House and the Senate, without the interference or involvement of the courts.”<sup>85</sup> However, as a best practice, even an inquiry should be considered by the House to reflect the gravity of this process.<sup>86</sup>

The function of the House in an impeachment inquiry is often analogized to a grand jury that ultimately submits a case to the Senate for trial. It is not a perfect analogy given the differences in rules and the unique constitutional standard of “high crimes and misdemeanors.” Moreover, the House is the investigatory body and, when impeachment articles are adopted, members serve as the prosecutors (or “House managers”) in the

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<sup>81</sup> Nancy Pelosi, Speaker of the House, Press Release: Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), [www.speaker.gov/newsroom/92419-0](http://www.speaker.gov/newsroom/92419-0).

<sup>82</sup> House Committees' Authority to Investigate for Impeachment, 44 Op. O.L.C.slip op. at 1-2 (2020).

<sup>83</sup> *In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d 129, 168 (D.D.C. 2019).

<sup>84</sup> *Id.*

<sup>85</sup> *U.S. House of Representative v. United States DOJ (In re Committee on the Judiciary)*, 951 F.3d 589, 624 (D.C. Cir. 2020). The matter was later vacated at the request of the House due to the presidential election. *Dep't of Justice v. House Comm. On the Judiciary*, 2021 U.S. LEXIS 3577 (U.S., July 2, 2021).

<sup>86</sup> The need for such a vote was echoed by the Judiciary Committee in the Nixon impeachment. 120 Cong. Rec. 2350–51 (1974) (statement of Rep. Rodino). The Clinton impeachment followed the same course. H.R. Rep. No. 105-795, at 24 (1998); see also H.R. Rep. No. 105-795, at 24 (1998) (“Because impeachment is delegated solely to the House of Representatives by the Constitution, the full House of Representatives should be involved in critical decision making regarding various stages of impeachment.”)

Senate trial. An impeachment inquiry is an active investigatory process where the House members themselves seek to establish key facts to determine if impeachable conduct has occurred. To carry forward on the grand jury analogy, it is more akin to a special grand jury (or “special purpose grand jury”) that is assembled to investigate a specific controversy, where the “grand jurors” actively seek and question witnesses. Such special grand jurors often then produce a report of their findings and their recommendations.

As in the past, it is important to start with one best practice that I have long advocated: ignoring the ill-considered advice of Gerald Ford on the standard for impeachment. When he was still in the House of Representatives, Ford famously remarked that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a moment in history.”<sup>87</sup> In fairness to Ford, he was reflecting upon the fact that impeachments are treated as largely a political judgment left for Congress with little possible judicial review.<sup>88</sup> It has been used as a license to ignore constitutional considerations or limitations. Saying that you can do most anything without fear of repercussions does not mean that you should do so. The Framers debated and crafted this standard and process to avoid an “anything goes” mentality. That was the reason our Framers opposed the “maladministration” standards as too malleable and indeterminate. While we continue to have passionate and good-faith debates over the meaning of the high crimes and misdemeanors standard, it is not intended to give the House carte blanche for any impulsive impeachment theory. As a body, the House has never embraced the Ford statement as an actual standard. Indeed, past impeachments, except the last impeachment, have held hearings to explore the scope and application of the standard to a given allegation of presidential misconduct.

Putting aside obvious distinctions in past impeachments, there are fair points of comparison that should inform the members on the best practices in carrying out this constitutional function. The object of the House should be to create a full record upon which a verdict can be fairly and efficiently adjudged by the Senate. Obviously, the Senate can expand that record with its own witnesses and discovery. Yet, the House should strive to achieve an open and deliberative process where the president has the opportunity to not just contest allegations but appear on his own behalf. It should be based on a presumption of innocence that demands more than pure speculation as to a President’s conduct or knowledge. As with a grand jury, it is not meant to conclusively establish guilt, but rather, to guarantee that a threshold of evidence is met to justify a trial. What follows are a few additional points on recommended “guardrails” for an impeachment inquiry.

#### A. Retroactive Versus Continuing Impeachable Conduct

While this testimony often refers to “President Joe Biden” out of respect for his current office, some of this conduct occurred when he was Vice President. That leads to a threshold question of the relevant period and the relevant office for impeachment. In the

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<sup>87</sup> 116 Cong. Rec. 11913, 11913 (daily ed. Apr. 15, 1970).

<sup>88</sup> It is analogous to Oliver Wendell Holmes’ unfortunate line about crying fire in a crowded theater. Jonathan Turley, *Rage Rhetoric and the Revival of American Sedition*, 65 *William & Mary Law Review* (forthcoming 2023),

second Trump impeachment, the Democrats created precedent for impeaching a former president in a retroactive action. Under the same rationale, the House could impeach Joe Biden from his prior office as Vice President over these allegations, if proven. I opposed the use of a retroactive impeachment with former president Donald Trump, and I oppose such an impeachment with President Joe Biden. While the prior impeachment gives the majority support to replicate this practice, I believe that it is inimical to our constitutional system and contrary to the constitutional standard.

The issue of retroactive impeachment has long been controversial, even though it is a rarity in American history. Roughly 25 years ago, I wrote about the history of impeachments from early English to modern American cases.<sup>89</sup> I briefly addressed the one case of a retroactive impeachment, the case of William Belknap, the former senator of Tennessee who resigned in 1876. After exploring English cases like the trial of Warren Hastings, Britain’s governor-general in India, I observed that “[t]he Senate majority, however, was correct in its view that impeachments *historically* extended to former officials, such as Warren Hastings.” I noted that such retroactive trials can offer a dialogic value for a political system in condemning past wrongdoing: “Even if the only penalty is disqualification from future office, the open presentation of the evidence and witnesses represents the very element that was missing in colonial impeachments.” As I also briefly discussed in a 1999 work, the issue of retroactive impeachments remained controversial.<sup>90</sup> This issue has not been a focus of my past writings – or the writings of most of us who have written on impeachment in prior years. I viewed it as an open question for many, but saw the value in such trials.

In the ensuing quarter of a century, my views on impeachment have remained largely unchanged - with the exception of retroactive impeachments. My constitutional views have admittedly become more textualist over time,<sup>91</sup> but the Trump impeachment magnified my concerns over this seldom used practice. Article I states that the power of impeachment and trial are shared by the two houses, but limits the power of Congress by expressly stating that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.” Article II contains the key impeachment provision and standard, stating “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

I view the text as limiting these actions to the removal of “the President [and] Vice President” and other officials in office. I understand that many do not adhere to a strong textualist approach to the Constitution. However, the primary stated purpose of the trial is to determine whether an officeholder “shall be removed.” Obviously, the historical uses of retroactive impeachments (like Hastings) that I discussed in my earlier work did

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<sup>89</sup> Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 Duke Law Journal 1-146 (1999).

<sup>90</sup> Jonathan Turley, The “Executive Function” Theory, the Hamilton Affair and Other Constitutional Mythologies, 77 North Carolina Law Review 1791-1866 (1999)

<sup>91</sup> See, e.g., Jonathan Turley, Madisonian Tectonics: How Function Follows Form in Constitutional and Architectural Interpretation, 83 George Washington University Law Review 305 (2015); Jonathan Turley, A Fox In The Hedges: Vermeule’s Optimizing Constitutionalism For A Suboptimal World, 82 University of Chicago Law Review 517 (2015).

not occur under that language. In the sole case that did (Belknap), I believe the House was wrong. While I still believe that retroactive impeachments have dialogic value, they also invite continual retroactive forms of retribution as majorities shift in Congress. I encourage the new majority to reject this practice and the underlying interpretation.

That does not mean, however, that President Biden's prior conduct cannot be part of the impeachment inquiry or part of an article of impeachment to remove him from his current office. The relevant office should remain the presidency, not the vice presidency, of Joe Biden. Yet, there are various reasons that such past conduct can be part of a presidential impeachment, including precedent for such inclusion. Indeed, at the 1787 Constitutional Convention, George Mason asked, "Shall the man who has practiced corruption and by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?"<sup>92</sup>

First, prior corrupt practices can form a *modus operandi* for a president. The Biden family has been accused of influence peddling for decades, including efforts by the President's brother, James, who has been accused of actively soliciting those wanting access to his brother.<sup>93</sup> President Biden has also said that he knew nothing of his brother's business dealings.<sup>94</sup> The extensive business arrangements of both Hunter and James Biden are coupled with allegations of the House Committees that money transferred from foreign sources may have been distributed to a variety of Biden family members. Once again, President Biden has denied any knowledge or interaction in these business deals. However, the continuum of conduct can be addressed in a possible impeachment.

Second, a president can "bootstrap" prior conduct into his presidency through statements and actions. As shown in both the Nixon and Clinton impeachments, the response to a scandal can involve impeachable conduct in the form of false statements and abuse of office. White House staff is now actively engaged in denying allegations raised by the House Committees and a "war room" has reportedly been established within the White House. Such measures can lead to the very same allegations raised against prior presidents in efforts to obstruct investigations or mislead the public and Congress.

Third, and finally, there is precedent for the inclusion of past conduct for a judge or official who continues to hold office. In the impeachment of Judge Porteous, the House included conduct and dealings from his time as a state judge.<sup>95</sup> Similarly, the

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<sup>92</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1911).

<sup>93</sup> See, e.g., Ben Schreckinger, James Biden's Health Care Ventures Face Growing Legal Morass, Politico, Mar. 9, 2020 ("reports have trickled out about James, a sometimes business partner of Hunter's, who has received financial support from people with an interest in influencing Joe and been repeatedly accused of trading on Joe's clout to advance his business ventures"), <https://www.politico.com/news/2020/03/09/james-biden-health-care-ventures-123159>.

<sup>94</sup> *Id.*

<sup>95</sup> For example, Article II in the Porteous Impeachment stated the following:

"G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980's while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail bondsman Louis M. Marcotte, III, and his sister Lori Marcotte. As part of this corrupt relationship, Judge Porteous solicited and accepted numerous things of value,

impeachment of Judge Robert Archbald included acts in a prior federal judicial office in 1912. In what may prove relevant to the instant inquiry, the House emphasized in Archbald that, while the acts included an earlier office, they were both federal offices. The earlier pre-office conduct was viewed as a pattern of misconduct in both Porteous and Archbald. Indeed, Article II of the Porteous impeachment alleged that the underlying associations and conduct continued after he assumed the federal bench.

The use of pre-office conduct remains controversial and should be approached with great circumspection and abundant caution. Absent continuing misconduct in office, even criminal acts that occur in private life should not be the subject of an inquiry. If that were the case, the House could launch investigations for any crime committed by an individual as a private citizen before taking office. It would convert impeachment into a rationalization for subjecting officials to limitless inquiries. That is not the case if a president has taken actions or made false statements to conceal an earlier crime, in my view. However, the House should approach pre-office conduct as a type of rebuttable presumption as failing outside of the scope of impeachment process.

Even for a private citizen, pre-office conduct can raise difficult questions. One past example has been raised regarding the Chennault Affair, where Richard Nixon was accused of telling an associate to encourage the Vietnamese to resist peace negotiations to end the Vietnam conflict in order to advance his presidential campaign.<sup>96</sup> Such

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including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. These official actions by Judge Porteous included, while on the State bench, setting, reducing, and splitting bonds as requested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed by the Senate but before being sworn in as a Federal judge). In addition, both while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench. Accordingly, Judge G. Thomas Porteous, Jr., has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office.”

I obviously argued against the inclusion of such pre-office allegations in as counsel in the Porteous case. I still believe that the articles were overbroad and that such inclusion is highly problematic. However, it is precedent that the House can obviously consider, particularly where there are allegations of continuing conduct or misconduct linked to the presidency.

<sup>96</sup> While I disagree with aspects of his analysis, Professor Philip Bobbitt explored this example in looking a pre-office conduct by private actors. Philip C. Bobbitt, *Impeachment: A Handbook*, 128 Yale L.F. 515, 545 (2018). Bobbitt makes a good effort to articulate an exception for such conduct in an otherwise bar on pre-office conduct:

“The constitutionally significant elements in the conspiracy are not confined to Nixon's subsequent acts in public office but clearly include the effects on a public event of great constitutional significance--a presidential election...The sensible rule ought to be that when a substantial attempt is made by a candidate to procure the presidency by corrupt means, we may presume that he at least thought this would make a difference in the outcome, and thus we should resolve any doubts as to the effects of his efforts against him. Yet we must confine the operation of such a rule to truly substantial constitutional crimes, lest we ensnare every successful campaign in an unending postmortem in search of nonconstitutional misdeeds.”

misconduct linked to a presidential campaign presents a gray area that some have suggested can be grounds for impeachment. It is also possible that this conduct – and its concealment – continues after taking office with actions and statements by the president. As noted above, the House has also included misconduct in a prior office as a legitimate basis for impeachment in prior cases. In the instant matter, President Biden has been accused of participating in a corrupt scheme to sell access or influence as Vice President and that elements of this conduct continued into his presidency. That pattern and timeline is precisely the subject of this inquiry.

This remains one of the most concerning lines in the inquiry and warrants reexamination after the full extent of these alleged acts are established. In both the Nixon and Clinton impeachments, some alleged misconduct was excluded as occurring before the presidents took office and did not clearly extend into their respective administrations. During the Trump impeachment, there were also calls for articles, including allegations tied to pre-office conduct. This included the Trump Tower meeting with a Russian figure promising evidence of possible criminal conduct by Hillary Clinton.<sup>97</sup>

The questions over pre-office conduct may be moot if the underlying corruption does not directly implicate President Biden. Conversely, if the conduct is viewed as a continuing pattern or bootstrapped into a presidency, the inclusion of such conduct is not unprecedented. What is clear in my view is that the focus should be on the currently held office and not the impeachment from a prior office.

## B. Criminal Conduct Versus Non-Criminal Conduct

As I stated above in both the Clinton and Trump impeachments, Congress is not confined to criminal conduct in drafting articles of impeachment. Indeed, every presidential impeachment has been based in whole or in part on non-criminal acts. However, I continue to recommend the best practice of focusing at the outset on acts that could be criminally charged.

The House should initially focus on allegations that could be charged for ordinary citizens as federal crimes. Once again, there are various reasons for this emphasis in framing impeachment inquiries. First, criminal provisions have been reviewed for their clarity and meaning by courts. The elements are the subject of court decisions that address their application in a variety of different circumstances. This gives the Congress a deep foundation to judging the culpability of presidential conduct while also incorporating judicial protections for defendants in such cases. The criminal code also serves to put presidents, like other citizens, on notice of the bar on certain conducts or

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For some, like Professor Bobbitt, the ability to impeach in such cases “avoids the absurd conundrum” of a president continuing to serve in office because “a sitting president cannot be prosecuted.” *Id.* For some of us who maintain that a sitting president is not immune from prosecution, the conundrum is less evident.

<sup>97</sup> Some argued that the meeting was the solicitation of an illegal campaign contribution before the election. Common Cause, *The Case for an Impeachment Inquiry of President Trump*, Jun 18, 2019, at 25 (“Common Cause recommends Congress begin an “inquiry of impeachment” to further investigate whether the president committed serious campaign finance violations on his way to winning the 2016 presidential election.”), <https://www.commoncause.org/wp-content/uploads/2019/07/ImpeachmentInquiry1.pdf>. Others used a type of bootstrap argument on later efforts to deny or conceal facts from the meeting. *See, e.g.*, James Carroll, *How House Democrats Can Save Democracy and the Rule of Law: Impeach Donald Trump ASAP*, USA Today, Dec. 17, 2018.

actions. That clarity reinforces the view that a president had knowledge and intent in the commission of the underlying misconduct.

Second, articles of impeachment involving possible criminal conduct (as with Nixon and Clinton) reaffirm the principle that a president is subject to the same standards that apply to citizens. Most citizens believe that a president should not be able to commit acts which his administration has used to prosecute or jail others. Indeed, a majority of the public reportedly favor this impeachment inquiry on that very ground. According to a poll from ABC News and the *Washington Post* this week, 58 percent believe that President Biden is being “held accountable under the law like any other president” in this inquiry.<sup>98</sup> Polls are not the measure of the legitimacy of impeachment inquiries. The question is not whether an inquiry is popular but constitutional. However, these polls reflect the continuing public view echoing Hamilton’s defense of impeachment as a needed assurance that the “public trust” in government is well-founded and well-defended. An impeachment is not punishment for crimes. Impeachment focuses on the office while prosecution focuses on the individual. The most damaging impeachable conduct is conduct for which other citizens can be jailed. A president cannot be the chief executive faithfully overseeing the enforcement of federal law when he himself is a perceived lawbreaker.

Third, and finally, potentially criminal conduct creates the strongest foundation for other articles on collateral impeachable conduct like obstruction, false statements, and witness tampering. The criminal code not only puts presidents on notice of the gravity of their actions, but also executive staff. The active involvement of White House staff in promulgating false or misleading accounts can become a matter for an impeachment inquiry.

The front-loading of potential criminal conduct allows the House to then consider common non-criminal impeachable claims of abuse of power. That article is stronger when actions are taken to facilitate conduct that is arguably criminal, though it is not limited to such conduct in prior impeachments. This framing also serves to create a focus for investigatory staff. There is also a danger of drift in impeachment inquiries into areas of political disagreement. Starting this process by tethering to the criminal code helps reduce that danger.

### C. Authority Versus Time

With the impeachment inquiry, the power of Congress is now at its apex. That, however, may not be enough if the House cannot efficiently investigate these allegations and take appropriate action. The common denominator of past impeachments has been the effort of presidents to delay efforts to acquire access to key evidence or witnesses. Presidents know that the cycle of elections can reduce the runway for impeachments to

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<sup>98</sup> Dan Balz, Scott Clement & Emily Guskin, *Post-ABC Poll: Biden Faces Criticism on Economy, Immigration, and Age*, Wash. Post, Sept. 24, 2023, <https://www.washingtonpost.com/politics/2023/09/24/biden-trump-poll-2024-election/>. Another poll shows roughly half of the public supporting the inquiry. Lauren Irwin, *48 Percent Support Impeachment Inquiry: Survey*, The Hill, Sept. 19, 2023, <https://thehill.com/homenews/administration/4212380-48-percent-support-biden-impeachment-inquiry/#:~:text=The%20Morning%20Consult%20poll%20found,42%20percent%20oppose%20the%20investigation.>

take off. During the Trump impeachment, I previously cautioned against “snap impeachments” and premature impeachments. I encouraged the House to go to the courts where I believed it would prevail on many of the challenges over access to witnesses and documents needed for a complete investigation. The same is true in this impeachment inquiry.

It is important to emphasize, again, that the best practices in impeachment inquiries include affording a president the ability to present evidence in a hearing and to appear, if he so desires. The recommendation not to delay in seeking access to evidence and witnesses is not a recommendation for abbreviated hearings before the House, particularly in offering President Biden a full opportunity to present his defense.

One of the early decisions for the House committees is when to seek judicial review in seeking needed evidence. As someone who has represented the United States House of Representatives in court, I have always counseled caution in choosing what controversies to litigate to avoid creating limiting precedent for this institution. However, few courts would question the need for Congress to fully investigate corruption, particularly as part of its constitutionally mandated impeachment process. In this sense, the Constitution is on your side in good-faith disputes with the White House. The calendar is not. The House committees need to establish if the White House and Biden Administration will refuse needed evidence and proceed to the courts to seek expedited review of these matters. Such expedited review has occurred in past impeachments. In the Trump impeachment inquiry, I criticized the House for waiting months to force the testimony of key witnesses like former White House Counsel Don McGahn.<sup>99</sup> Consider the more aggressive moves by the Committee in the Nixon impeachment inquiry. The Nixon White House moved to quash a subpoena for the Watergate tapes on May 1. Judge John Sirica denied that motion 19 days later. On May 24, an appeal was taken to the D.C. Circuit, but the case was taken directly to the Supreme Court. Oral arguments were heard on July 8, and a ruling issued only three weeks later. That was just three months from trial court to the Supreme Court.

There should be a mutual interest in both the House and the White House to resolve these questions. The President can bring this inquiry to a rapid close by voluntarily releasing financial and other records to allow full transparency. However, that would be a departure from past practices. Compelling the disclosure of this evidence will allow the House, and the public, to answer these serious questions, and either bring the inquiry to an end, or to move forward with actual articles of impeachment. There will remain passionate disagreements among advocates on both sides. Defenders of the President are also correct in demanding a presumption of innocence for the President and stressing that there is currently no clear evidence of impeachable conduct. Yet, those arguments lose credibility when there is opposition to securing key records related to these allegations. The worst option is to allow these questions to continue to fester without resolution. It is unfair to the President and inimical to our constitutional process.

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<sup>99</sup> Jonathan Turley, A Brief History of Time: A Response to Chairman Schiff on the Need to Impeach by Christmas, *Res Ipsa* (www.jonathanturley.org), Dec. 13, 2019, <https://jonathanturley.org/2019/12/13/a-brief-history-of-time-response-to-chairman-schiff-on-the-need-to-impeach-by-christmas/>.

## V. CONCLUSION

In conclusion, I want to add one final observation and one request. There are constitutional moments that demand the best from each of us in transcending the passions and politics of time. These are moments when people of good faith can bring a solemnity and clarity to a national debate. We are living an age of rage where ad hominem attacks have replaced civil discourse. This toxic environment starts here with how members treat different views of our constitutional history and standards. As Justice Louis Brandeis stated “Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by example.”<sup>100</sup> While Brandeis was speaking of criminal conduct, it is equally true of our public discourse. The license that some feel to engage in hateful rhetoric and personal attacks are the result of how members treat this moment. We can discuss these issues as Americans who may disagree but remain bound by a common faith in our constitutional system. We can disagree, but we need not hate each other. If we want to combat the deterioration of political discourse in our society, it begins here and now as we discuss these issues. Members can choose to be either potent teachers for civil discourse or political rage. I hope that this testimony will assist the Committee in offering the public an array of different viewpoints on how an impeachment inquiry should ideally progress under Article I.

Impeachment inquiries are often a stress test for our constitutional system. It is difficult for members to transcend the political advantage in blindly seeking the removal of a president or being willfully blind to the evidence supporting an inquiry. Yet, at critical moments in our history, courageous members have transcended the opportunism and anger of their times to do the right thing. Seven Republican senators who risked their careers to do the right thing in the Johnson impeachment, even for a president they despised. They became known as the “Republican Recusants.” It was an interesting characterization since recusancy was a term associated with Catholics who refused to attend the services of the Church of England during the Reformation, despite the risk of being executed. The term is fitting in times of rage. Our history has been marked by such periods of rage where we have turned against core values that define us, including free speech.<sup>101</sup> These moments represent a crisis in faith. There is a compulsion that takes hold of members on both sides to ignore constitutional considerations as well as the value of civility. For those “recusants” who remain, the choice is clear. They can either yield despite their doubts or they can stand alone, if necessary, in keeping faith with their constitutional principles.

The fact that some of us believe that the threshold has been passed to warrant an impeachment inquiry does not mean that we would support an actual impeachment. This is a moment where members and citizens can stand together on the need to seek answers without pre-judging what that evidence may show. None of the offenses discussed above have been established and I hope that the evidence will fall considerably short of that

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<sup>100</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

<sup>101</sup> Jonathan Turley, *THE INDISPENSABLE RIGHT: FREE SPEECH IN THE AGE OF RAGE* (forthcoming 2024); *see also* Jonathan Turley, *Rage Rhetoric and the Revival of American Sedition*, 65 *William & Mary Law Review* (forthcoming 2023); Jonathan Turley, *The Right to Rage in American Political Discourse*, *GEO. J.L. & PUB. POL’Y* (forthcoming 2023).

mark. The impeachment of a president should never be a close question on the merits. The instant question is whether members will support the full review of the underlying allegations. The driving purpose of an inquiry should not be impeachment but the determination if such a radical measure is warranted. In adopting best practices in impeachment, members can restore this process to protect the “public trust” not only invested in a President but in Congress by our constitution.

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.<sup>102</sup>

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<sup>102</sup> I have been asked to include some of my relevant scholarship that may be relevant to aspects of my testimony: Jonathan Turley, *THE INDISPENSABLE RIGHT: FREE SPEECH IN THE AGE OF RAGE* (forthcoming 2024); Jonathan Turley, *A Fox In The Hedges: Vermeule’s Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, *“From Pillar to Post”: The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation*, 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The “Executive Function” Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 145 (1992).