

Written Testimony of

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It is an honor to be invited to appear before the House Judiciary Committee to discuss “Constitutional Processes for Addressing Presidential Misconduct.” It is hard to imagine a more important subject for this Committee to consider. As you know, this subject is not new for me. It has been at the core of my academic work. My first law review article, “The Constitutional Limits on Impeachment and its Alternatives,” was published thirty years ago this year. It addressed this subject, as have two books I subsequently wrote on the law of impeachment (and its alternatives), one in its third edition, and several other publications (and testimony in Congress). I have studied the procedures of this great institution as well as the Senate, particularly their respective powers of internal rule-making, investigation, impeachment, censure, and other subjects I expect we are likely to cover in this hearing. I hope I may be able to assist your understanding of these important topics.

A good place to begin is with the Supreme Court’s decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In that case, the Supreme Court, 5-4, ruled that presidents are immune from civil lawsuits seeking damages based on their official conduct. Near the end of its opinion, written by Justice Lewis Powell, the Court emphasized that its decision “will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive.” The Court explained, “There remains the remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force other executive officials.” Among the “informal” checks are a president’s being “subject to constant scrutiny by the press,” as well as his “need to maintain prestige as an element of Presidential influence, and a President’s traditional concern for his historical stature.” The formal checks recognized by the Court were “[v]igilant oversight by Congress,” impeachment, and popular elections. The Court emphasized further “t]hat the existence of alternative remedies and deterrents establishes that absolute immunity will not place the President ‘above the law.’” I will discuss each of the formal checks on presidential misconduct briefly as well as a few other checks, which were not discussed in the Court’s opinion.

First, congressional oversight is a longstanding means for either chamber, or both, to investigate possible presidential (and other official) wrong-doing. The legitimacy of this mechanism is well-settled and beyond question. The Constitution nowhere says, much less requires, either chamber of Congress to approve resolutions, of any kind, before the committees of either or both chambers conduct investigations, issue subpoenas, take

testimony, and gather evidence. All of these are instrumental to each chamber's performing its constitutional duties.

The constitutional foundation for either chamber, or committees in either chamber, to perform these functions can be traced back to both the British and colonial systems, which were often a model for the framers, and to the enumerated powers of the Congress in Article I, section 5, of the Constitution. This section provides that "Each House may determine the Rules of its Proceedings." We should be grateful when the Constitution provides a clear answer to a question, and it plainly does so here. Each chamber may establish its own rules of internal governance, which include, among other things, establishing committees, empowering the chairs of those committees with powers such as issuing subpoenas, and establishing procedures to follow in law-making and other legislative functions.

Besides the text as constitutional authority for all this, we have more than two hundred years of congressional practice and a few judicial decisions that make crystal clear that each chamber's latitude to fashion or re-fashion its rules and procedures is profoundly broad. There is nothing in the Constitution that requires each chamber to establish committees, but each did. There is nothing in the Constitution that prevents each chamber from modifying its rules, and each have done so many times. There were no committees in early, pre-civil war impeachments, because there were no committees. In time, the House and Senate each decided to create committees to improve their efficiency and abilities to handle their growing workloads. Those decisions were perfectly legitimate. In short, there is nothing in the Constitution dictating the procedure each chamber must use, if any, to issue subpoenas and to initiate or to conduct investigations. It is the rules of each chamber, not the Constitution, which dictates the procedures and rules that each chamber adopts or modifies as it sees fit.

Resolutions are sometimes useful for shaping or supporting the House as it chooses how to proceed in exercising its authority, even when considering impeachments, but the Constitution does not require it to do so. At present, the Committee's investigation of misconduct laid out in the Mueller Report is being done pursuant to all of the Congress' Article I authorities, and the Committee is reasonably considering the available constitutional remedies for any presidential misconduct it uncovers, including the remedies discussed in *Nixon v. Fitzgerald* and discussed here today.

Legitimate purposes for congressional hearings and investigations are remarkably broad, as broad as the powers of Congress. They may be exercised, by a Committee and its Chair pursuant to the House rules, singularly or in combinations to authorize subpoenas and conduct investigations in the course of performing its duties. The rules of this House authorize what the chairman or this committee may do in exploring or suggesting appropriate remedies for executive-branch officials, including the President, who refuse to comply with lawful subpoenas.

A corollary to the power invested in the Committees to investigate possible wrongdoing, either on the basis of impeachment, another power, or some combination of powers, is

the power to issue subpoenas and to hold hearings on whether to hold witnesses defying subpoenas should be held in contempt of Congress. By their nature, legislative subpoenas have the force of law. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court unanimously directed President Nixon to comply with a judicial subpoena ordering him to turn over taped conversations in the White House to defendants charged with breaking into the Watergate Hotel. Not long thereafter, the House Judiciary Committee approved an article of impeachment against Nixon based on his refusal to comply with a legislative subpoena. Refusals to comply with duly authorized subpoenas (which are made pursuant to the House's internal rules of governance) show contempt for the rule of law and the legitimate authority of Congress. Attorneys on behalf of the House or this Committee may seek enforcement of these subpoenas in court; if committees were barred by the Constitution to do that, then the President would be "above the law." That is completely antithetical to the Constitution we have, and we would no longer be a nation of laws and not just the people we happen to like.

It is important not to confuse the demands of the Constitution with actions undertaken by either chamber pursuant to the delegations set forth in the Constitution. While the Supreme Court has said that committees must have "a legitimate purpose" when seeking evidence, doing investigations, or issuing subpoenas, it is absurd to think that the Court's, or the Constitution's, directives limit the discretion in each chamber on the needs to investigate, issue subpoenas, or hold witnesses in contempt of Congress for failing to comply with their subpoenas. For example, the House did not approve resolutions to authorize impeachment inquiries in any of the first few impeachments considered by the House. Much later, after each chamber had created committees, the Senate appointed a special committee, chaired by Sam Ervin of North Carolina, to look into the circumstances relating to the break-in at the Democratic headquarters in the Watergate Hotel. The same was done in the House. Neither chamber approved resolutions to authorize those initial hearings; the initial investigations were authorized within the rules of internal governance the Constitution had given to each chamber of Congress to fashion on their own. There has been no tradition, rising to the level of a constitutional command, that requires impeachment resolutions to be approved by the House to authorize this Committee to initiate an impeachment inquiry – or to proceed in any particular way. As long as the Committee functions pursuant to the House rules (and its inherent authority), it is functioning properly. Nor was there a House resolution authorizing this Committee to consider whether or not Justice William O. Douglas had committed any impeachable offenses. The matter died in committee but only after some initial, brief deliberation and investigation were done.

Nor was there a House resolution authorizing three separate hearings held by this Committee in 2016, on whether John Koskinen, then the head of the Internal Revenue Service, had committed any impeachable offenses. Nor was there one, in the late 1980s, authorizing this Committee to explore whether to impeach three federal district judges. All three judges were eventually impeached, convicted, and removed from office. The lawsuit filed challenging the procedures held in the Senate was dismissed because, the Court found, it raised non-justiciable questions left to the final discretion of the Senate. See *Walter Nixon v. United States*, 506 U.S. 224 (1993).

A second mechanism for addressing possible presidential misconduct – impeachment -- was deliberately designed to deviate from the British practice of impeachment. A people, who had overthrown a king, were not going to turn around, just after securing their independence from monarchical tyranny, and create an office that, like the King, was above the law. In England, the King could not be impeached, a factor which enraged the framers' generation to such an extent that the Declaration of Independence is a list of impeachment articles leveled against the tyrannical King they were rebelling against. Our president, unlike the King, is not the embodiment of law and certainly not immune from the ways in which the Constitution allows him to be held accountable or to be investigated for misconduct. In England, anyone (except the King) could be impeached for anything and could be subject to any penalties Parliament chose, while the framers wisely limited the scope of impeachable offenses and the remedies available to Congress to two sanctions -- removal from office and disqualification to occupy any other federal office.

The distinctions between the British and the American systems on the law and practice of impeachment are essential to keep in mind when we consider the scope of impeachable offenses. Besides telling us that "The House of Representatives shall . . . have the sole power of Impeachment" (Article I, section 2, clause 5), the Constitution says that, "The President and all civil Officers of the United States, shall be removed from office on Impeachment and Conviction of Treason, Bribery, or other high crimes and misdemeanors" (Article II, section 4). The Constitution defines treason (Article III, section 3), and federal criminal statutes define bribery. First, the framers and ratifiers called impeachable offenses "political crimes," which included "great" offenses against the United States, "attempts to subvert the Constitution," when the President "deviates from his duty" or "dare[s] to abuse the power invested in him by the people," breaches of the public trust, and serious injuries to the Republic. In his influential essay in *The Federalist Papers*, Alexander Hamilton declared that impeachable offenses are "those offences which proceed from the misconduct of public men, or, in other words, the abuse or violation of some public trust" and "relate chiefly to injuries done immediately to the society itself." In his influential lectures on the Constitution, given shortly after ratification, Justices James Wilson said impeachable offenses were "political crimes and misdemeanors." In his equally influential *Commentaries on the Constitution*, Justice Joseph Story explained that that impeachable "offenses" are "offenses, which are committed by public men in violation of their public trust and duties" and "partakes of a political character, as it respects injuries to the society in its political character." The theme that clearly emerges from early discussions of the scope of impeachable offenses are that they are not neatly delineated but depend on context and gravity. As to which or what kinds of misconduct fit into this terminology, we know that, in the constitutional convention, George Mason worried that if the President "has the power of granting pardons before indictment or conviction, may he not stop inquiry and prevent detection?" James Madison responded that, "There is one security in this case to which gentlemen may not have averted: If the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President. Should he be suspected also, he may likewise be suspended and be impeached and removed." Madison added, "This is

a great security.” We know, from the debates on the scope of impeachable offenses in the founding era and subsequent congressional practice (or “liquidations,” Madison said), not all crimes are impeachable (for example, jaywalking) and not all impeachable offenses are crimes (such as abuses of the pardon power or President Nixon’s ordering the heads of the CIA and IRS to harass his political enemies). As happened with former Judge Alcee Hastings (now a member of the House of Representatives), the President or any other impeachable official does not have to be found to have committed a felony in order to be impeached. Whether any impeachable official has broken a law, in the judgment of Congress, may be relevant, but it is not required. See generally Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 105-113 (3rd edition, University of Chicago Press 2019).

A third option that the Committee should consider as a possible process to address presidential misconduct is censure. Censure usually takes the form of a resolution approved by a majority, in either chamber of Congress. There are two arguments commonly made against the constitutionality of censure. The first, initially made by President Andrew Jackson, was that the explicit authorization of impeachment in the Constitution necessarily excludes or bars Congress from deploying any other mechanism for sanctioning the President for misconduct. The second is that censure is an unconstitutional bill of attainder, barred in Article I, section 9, which entails either chamber’s finding someone guilty and imposing a punishment on the person in the absence of a judicial trial.

After many years and opportunities to consider the constitutionality of censure, I concluded that the arguments in favor of its constitutionality are stronger than the ones against it. (See Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. Richmond L. Rev. 333 (1997).) First, the idea behind the censure is not that it is a replacement for impeachment but instead an option to consider when a president’s misconduct has fallen short of an impeachable offense. It makes no sense to say impeachment is the only remedy for presidential misconduct, since it does not, based on the plain language of the Constitution, only is available for impeachable misconduct not unimpeachable misconduct.

Second, the text of Article I, section 7, of the Constitution raises a reasonable inference that censure may be a permissible means for addressing or calling attention to official misconduct. That section says, “Judgments in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold any Office of honor, Trust or Profit under the United States.” The inference is that there may some judgments falling short of impeachment, conviction, and removal, such as censure. Even if impeachment were the only or exclusive means for formal action by the Congress to sanction the President for misconduct, it does not follow that it would preclude other options for dealing with other kinds of misconduct.

Third, it is reasonable to assume that the First Amendment, along with the Speech or Debate clause, protects members individually in denouncing what they consider to be official misconduct (even demanding resignations from the perpetrators). But, if the Constitution protects members individually in expressing their opinions, it does not make sense to preclude them from doing so collectively. There is no doubt that members of Congress may circulate a

statement denouncing an official for misconduct and then submit that petition in the congressional record. Censure is the same thing.

Fourth, a censure is not a bill of attainder because it imposes no tangible punishment on the person being censured. It exacts no fines, imprisonment, or any other material, physical, or substantial punishment on the official being censured. The person censured may not like or may he or she may disapprove of the condemnation expressed by the House or the Senate, but they have their own platforms for expressing their disagreement or disapproval.

Moreover, the House has approved resolutions, which have censured the President. Indeed, when Abraham Lincoln was in the House of Representatives, he proposed a resolution to condemn President Polk for initiating an illegal war, the Mexican War (1846-1848). The House rejected his proposed resolution but instead approved 82-81, with Lincoln casting his vote with the majority, a resolution declaring that the Mexican War had been “unconstitutionally and unnecessarily begun.” If President Lincoln believed that such censure was constitutional, that has always been good enough for me – and, I respectfully suggest, for this institution, too. Later as president, he did not object on constitutional grounds that there was a joint committee assigned to review his handling of the war.

The next remedy to consider as a remedy, or check, on presidential misconduct is popular election. Obviously, there are no formal limits on what the public may take, or not take, into consideration in the electoral process. Yet, one significant limitation on this check, often overlooked, is the fact that the Constitution limits presidents to two terms in office. Both Presidents Nixon and Clinton faced serious threats of impeachment in their second terms, a time when neither was subject to any further elections to check what they did in office.

Yet another way to hold a president accountable for misconduct is by civil suits seeking damages but for unofficial or pre-presidential misconduct. Unanimously, the Supreme Court settled the constitutionality of this option in *Clinton v. Jones*, 520 U.S. 681 (1997) when it found such proceedings to be constitutional.

A final mechanism for addressing presidential misconduct is criminal trials. There is no question that a president may face criminal proceedings for misconduct after he has left office. The more troubling question, for many, is whether a sitting president may be indicted while in office. The Department of Justice has taken the position that it is unconstitutional to indict, prosecute, and/or imprison a president for any possible criminal misconduct he committed in office or in procuring office. (The late Ron Rotunda, a distinguished legal scholar, advised Kenneth Starr, when Starr was the independent counsel assigned to investigate possible misconduct in the real estate transaction known as Whitewater, that the President may be investigated and indicted while in office. Rotunda was unsure whether the President could be imprisoned while he was still president.). The principal objection to subjecting the President to criminal process while he is in office is that, as the executive branch is the only branch overseen by a single individual, criminal proceedings would profoundly impede its functioning because

the president would be so distracted by having to defend himself from possibly going to prison or worse that the entire executive branch would become paralyzed.

My longstanding position on this question is no secret. I have long been skeptical of the arguments vesting the President with absolute immunity from any criminal proceedings while he is in office. First, the Constitution says no such thing. Just the opposite. It vests members of Congress with immunity when engaged in speech or debate. This clause raises the natural inference the President has no corresponding immunity from the Constitution's vesting members of Congress with immunity for doing their jobs and its silence on president's having any similar kind of immunity.

Second, just as the Court reasoned in *Clinton v. Jones*, it makes little to no sense to allow a president to use his office to shield himself from criminal liability (which, by definition, would be based on his unofficial conduct, but not to do so for civil infractions based on pre-presidential or unofficial misconduct. If, for example, a president murdered someone to silence them from revealing embarrassing information during his successful campaign for the presidency, it makes no sense to insist he may never stand trial for that crime for at least four years, perhaps as many as eight. What if, to modify the example a little further, he murdered someone on camera to show that he can do whatever he likes as president? The temptation to say that is what impeachment is for is too simplistic, because what happens if the President's party controls this chamber or the other, or maybe both, and prefer not to remove the President who has done so many favors for them. The failure to impeach in that circumstance leaves the American people with a criminal in the White House.

It has long been said that the Constitution is not a suicide pact. When, for example, James Buchanan was in the White House, he believed the Constitution did not allow him to protect federal forts under siege in South Carolina and Florida. Obviously, President Lincoln disagreed. The point is not that our leaders may bend or manipulate the Constitution to do what they believe is necessary under the circumstances. They may not. The Constitution provides constraints on presidents and vests this body with the monumental power of impeachment to deal with the serious misconduct of the President. The House may excuse or ratify what a president has done, or it may exercise its discretion not to impeach the President, whom they believe may have acted in good faith. The Constitution allows for that. If the House does not agree with the President or his actions, it may act on that basis. The Constitution allows for that. What the Constitution does not allow is our leaders breaking the Constitution, or the law, to serve their political needs. We do not teach that in constitutional law classes, and you have all taken an oath, as have the President and all the people who work for him, to defend and support the Constitution as it is, not as you or this President, would like it to be.

Ultimately, you must decide what kind of precedent you wish to establish. It is for this committee and the House to determine how, and even whether, in what ways they wish to exercise its powers in response to charges of misconduct by the most powerful person in the government. It is not for the President to say or to obstruct congressional deliberations and investigations or other legitimate functions.

Thirty-five years ago, Raoul Berger, a conservative constitutional scholar who was widely renowned as one of the twentieth century's great experts on impeachment, wrote an opinion in the New York Times responding to President Nixon's defiance of a legislative subpoena. Mr. Berger said, "By refusing to comply with the subpoenas of the House Judiciary Committee, President Nixon is setting himself above the Constitution. He would nullify the constitutional provision for Presidential accountability that was designed to prevent dictatorial usurpations." Berger, Mr. Nixon's Refusal of Subpoenas: 'A Confrontation with the Nation,' N.Y. Times, July 8, 1974. As Mr. Berger explained, "The House's need for all the facts surrounding suspected Presidential offences cannot of course be circumscribed by an executive determination of what is relevant." The same can be said about the need for this committee, or any other committee, to investigate official misconduct when they have reason to suspect its occurrence. Mr. Berger went further to emphasize that such defiance (done by the President or ordered by him) was plainly a matter the House had a legitimate reason to investigate. Indeed, he deemed the defiance an impeachable offense. He noted that, Justice James Wilson in 1791, had observed presciently that, "the most powerful magistrates should be amenable to the law. . . No one should be secure while he violates the Constitution and the laws." In closing, Mr. Berger reminded the nation that President Nixon was a man and nothing but a man, who "is subject to the law in all its manifestations, including, if need be, arrest. [I] would recall to the nation the words of a great statesman, Edward Livingston, in the early days of the Republic: 'No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin . . . because the means of publicity had not been secured.'" A year earlier, Mr. Berger had wisely counseled the nation and the members of this institution that, "Congress already has enough power to force the White House to yield documents and supply witnesses. The question is whether Congress has the nerve to use it."

Thank you, again, for the privilege to appear before you on this important subject. If you have any questions, please do not hesitate to let me know.