The Senate met at 1:05 p.m. and was called to order by the Chief Justice of the United States.

TRIAL OF DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES

The CHIEF JUSTICE. The Senate will convene as a Court of Impeachment.

The Chaplain will lead us in prayer.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Lord, through all the generations, You have been our mighty God. As millions mourn the deaths of Kobe and Gianna Bryant and those who died with them, we think about life’s brevity, uncertainty, and legacy. Remind us that we all have a limited time on Earth to leave the world better than we found it.

As this impeachment process unfolds, give our Senators the desire to make the most of their time on Earth. Teach them how to live, O God, and lead them along the path of honesty. May they hear the words of Jesus of Nazareth reverberating down the corridors of the centuries: “And you shall know the verity, and the truth shall make you free.”

And Lord, thank You for giving our Chief Justice another birthday. Amen.

PLEDGE OF ALLEGIANCE

The Chief Justice led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

THE JOURNAL

The CHIEF JUSTICE. If there is no objection, the Journal of proceedings of the trial is approved to date.

Without objection, it is so ordered.

The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Michael C. Stenger, made the proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Donald John Trump, President of the United States.

The CHIEF JUSTICE. The majority leader is recognized.

Mr. MCCONNELL. Mr. Chief Justice, as the Chaplain has indicated, on behalf of all of us, happy birthday. I am sure this is exactly how you had planned to celebrate the day.

The CHIEF JUSTICE. Thank you very much for those kind wishes, and thank you to all the Senators for not asking for the yeas and nays.

(Laughter.)

ORDER OF PROCEDURE

Mr. MCCONNELL. For the information of all Senators, we should expect to break every 2 or 3 hours and then at 6 o’clock a break for dinner.

And with that, Mr. Chief Justice, I yield the floor.

The CHIEF JUSTICE, pursuant to the provisions of S. Res. 483, the counsel for the President have 22 hours and 5 minutes remaining to make the presentation of their case. The Senate will now hear you.

Mr. MCCONNELL. The Senate will now hear you, Mr. Sekulow.

OPENING STATEMENT—CONTINUED

Mr. Counsel SEKULOW. Mr. Chief Justice, Members of the Senate, managers, what we have done on Saturday is the pattern that we are going to continue today, as far as how we are going to deal with the case. We dealt with transcript evidence. We deal with publicly available information. We do not deal with speculation, allegations that are not based on evidentiary standards at all.

We are going to highlight some of those very facts we talked about very quickly on Saturday. You are going to hear more about that. I want to give you a little bit of an overview of what we plan to do today in our presentation.

You will hear from a number of lawyers. Each one of these lawyers will be addressing a particular aspect of the President’s case. I will introduce the facts that they are going to discuss, and then, that individual will come up and make their presentation. We want to do this on an expeditious but yet thorough basis.

Let me start with, just for a very brief few moments, taking a look at where we were. One of the things that became very clear to us as we looked at the presentation from the House managers was the lack of focus on that July 25 transcript. That is because the transcript actually doesn’t say what they would like it to say. We have heard—and you will hear more—about that in the days ahead. We know about Mr. Schiff’s version of the transcript. You heard it. You saw it.

I want to keep coming back to facts—facts that are undisputed. The President, in his conversation, was clear on a number of points, but so was President Zelensky. I mentioned that at the close of my arguments earlier, that it was President Zelensky who said: No pressure, I didn’t feel any pressure.

And, again, as this kind of reading of minds of what people were saying, I think we need to look at what they actually said and how it is backed up.

It is our position as the President’s counsel that the President was at all time acting under his constitutional authority, under his legal authority, in our national interest, and pursuant to his oath of office. Asking a foreign leader to get to the bottom of issues of corruption is not a violation of an oath.

It was interesting because there was a lot of discussion the other day about Lieutenant Colonel Vindman, and one of the things that we reiterate is that

*This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.*
he himself said that he did not know if there was anything of crime or anything of that nature. He had deep policy
concerns. I think that is what this is really about—deep policy concerns, deep policy differences.

We live in a constitutional Republic where you have deep policy concerns and deep differences. That should not be the basis of an impeachment. If the bar of impeachment has now reached that level, then, for the sake of the Repub
lic, the danger that puts not just this country but our entire constitutional framework in is unimaginable. Every
time there is a policy difference of sig
nificance or an approach difference of
significance about a policy, are we going
to start an impeachment pro-
ceeding?

As I said earlier, I don’t think this was about just a phone call. There was a pattern in practice of attempts over a 3-year period to not only interfere with the President’s capability to gov-
er—by this way, they were completely unsuccessful at; just look at the state of where we are as a coun-
try—but also interfere with the con
stitutional framework.

I am going to say this because I want to be brief. We are going to have se-
ries of lawyers address you. So it will not be one lawyer for hours and hours. We are going to have a series of
lawyers address you on a variety of issues. This is how we envision the President’s defense, and I thought it would be appropriate to start with an overview, if you will, of some of the significant historical issues, constitutional issues, involving impeachment proceedings, since we don’t have a long history of
that. I think that is a good thing for the country that we don’t, and I think that we would all agree. But if this be-
comes the new standard, the future is going to look a lot different.

We are going to hear next from my cocounsel Judge Kenneth Starr. Judge Starr is a former judge for the U.S. Court of Appeals for the District of Co
lumbia. He served as the 39th Solicitor General of the United States, arguing cases before the Supreme Court of the United States on behalf of the United States.

I had the privilege of arguing a case alongside Judge Starr—we were talk-
ing about this earlier—many years ago. He also served as the independent counsel during the Clinton Presidency and authored the Starr report. He tes
tified for almost 12 hours before the Ju
diciary Committee with regard to that report. Judge Starr is very familiar with this process. He is going to ad
dress a series of deficiencies, which are legal issues with regard to articles I and II—constitutional implications, histori
cal implications, and legal implica
tions of where this case now stands.

I would like to yield my time right now to... If it please the Chief Justice, Ken
Starr.
The CHIEF JUSTICE. Mr. Starr.
Mr. Counsel StARR. Thank you.

Mr. Chief Justice, House Managers, and staff. Members of the Senate, the ma
jority leader, and the minority leader,
at the beginning of these pro-
ceedings on January 16, the Chief Jus
tice administered the oath of office to
the Members of this body and then again on January 21. At that point, the
Chief Justice was honoring the words of our Constitution, article I, section 3. We all know the first sentence of that article by heart: “The Senate shall
have the sole Power to try all Impeach-
ments.”.

In the House, resolution after resolution, month after month, has called for the President’s impeach-
ment.

How did we get here, with Presi
dential impeachment invoked fre
quently in its inherently destabilizing, as well as acrimonious way? Briefly
told, the story begins 42 years ago.

On the night of the Watergate nightmare of Watergate, Congress and President Jimmy Carter collabora
tively ushered in a new chapter in America’s constitutional history. To
gether, in full agreement, they enacted the independent counsel provisions of the Ethics in Government Act of 1978. But the new chapter was not simply the age of independent counselors; it be
came, unbeckoningly to the American people, the age of impeachment.

During my service in the Reagan ad
ministration as Counsel and Chief of Staff to Attorney General William French Smith, the Justice Department
took the position that, however well-inten
tioned, the independent counsel provision
of the Ethics in Government Act of 1978 was unconstitutional. Why? In the view of the Department, those provisions intruded into the rightful domain and prerogative of the execu
tive branch of the Presidency.

The Justice Department’s position was eventually rejected by the Su
preme Court, but most importantly, in
helping us understand this new era in our country’s history. Justice Antonin Scalia was in deep dissent. Among his stinging criticisms of that law, Justice Scalia wrote this: “The context of this statute is acrid with the smell of threatened impeachment.”

Impeachment.

Justice Scalia echoed the criticism of the court in which I was serving at the time, the District of Columbia Circuit, which had actually struck down the law as unconstitutional in a very im
pressive opinion by renowned Judge Laurence Silberman.

Why would Justice Scalia refer to impeachment? This was a reform measure. There would be no more Saturday Night Massacres—the firing of Special Prosecutor, as he was called, Archibald Cox by President Nixon. Government would now be better, more honest, accountable, the inde
pendent counsel would be protected. But the word “impeachment” haunts that dissenting opinion, and it is not hard to discover why—because the statute, by its terms, expressly di
rected the independent counsel to be
come, in effect, an agent of the House of Representatives. And to what end?

To report to the House of Representa
tives when a very low threshold of in
formation was received that an im
peachable offense, left undefined, may have been committed.

To paraphrase President Clinton’s very able counsel at the time, Bernie Nussbaum, this statute is a dager
aimed at the heart of the Presidency. President Clinton, nonetheless, signed the reauthorized measure into law, and the Nation then went through the long process known as Whitewater, resulting in the findings by the office which I led, the Independent Counsel, and a written report to the House of Representatives. That referral to Congress was stipulated in the Ethics in Government Act of 1978.

To put it mildly, Democrats were very concerned with what had happened. They then joined Republicans across the aisle who, for their part, had been outraged by an earlier independent counsel investigation, that of a very distinguished former judge, Lawrence Walsh.

During the Reagan administration, Judge Walsh’s investigation into what became known to the country as Iran-Contra spawned enormous criticism on the Republican side, not to mention to the investigation itself but also as to statute.

The acrimony surrounding Iran-Contra and then the impeachment and the trial and President Clinton’s acquittal by the Senate led inexorably to the end of the independent counsel era. Enough was enough. Living through that wildly controversial, 21-year, bold experiment with the independent counsel statute, Congress, in a bipartisan way, had a change of heart. It allowed the law to expire in accordance with its terms in 1999.

That would-be and well-intentioned reform measure died a quiet and uneventful death, and it was promptly replaced by Justice Department internal regulations promulgated by Attorney General Janet Reno during the waning months of the President Clinton administration. One can review those regulations and see no reference to impeachment—none. No longer were the poison pill provisions of Presidential impeachment part of America’s legal landscape. They were gone. The Reno regulation seemed to signal a return to traditional impeachment, yet no longer be embedded in the actual laws of the land but returned to the language of the Constitution.

In the meantime, America’s constitutional DNA and its political culture had changed. Even with the dawn of the new century, the 21st century, “impeachment” remained on the lips of countless Americans and echoed frequently in the people’s House. The impeachment habit proved to be hard to kick.

Ironically, while this was happening here at home, across the Atlantic, the use of impeachment as a weapon disappeared. In the United Kingdom, from which the independent counsel arose, impeachment was first used more than two centuries before those first settlers crossed the Atlantic. But upon thoughtful examination, a number of modern-day parliamentary committees looked and found impeachment to be obsolete.

Among other criticisms, Members of Parliament came to the view that the practice which had last been attempted in Britain in 1868 failed to meet modern procedural standards of fairness—fairness.

As Sir William McKay recently remarked: “Impeachment in Britain is dead.”

Yet, here at home, in the world’s longest standing constitutional Republic, instead of a once-in-a-century phenomenon, which it had been, Presidential impeachment has become a weapon to be wielded against one’s political opponent.

In her thoughtful Wall Street Journal op-ed a week ago, Saturday, Peggy Noonan wrote this:

“Impeachment has now been normalized. It will not be a once-in-a-generation act but an every-administration act. The Democrats will regret it when the Republicans are handing out the pens (for the signing ceremony).

“When we look back down the corridors of time, we see that for almost our first century as a constitutional republic the sword of Presidential impeachment remained sheathed. Had there been controversial Presidents? Oh, yes, indeed. Think of John Adams and the Alien and Sedition Acts. Think of Andrew Jackson and Henry Clay. Were partisan passions occasionally inflamed during that first century? Of course.

And lest there be any doubt, the early Congresses full well knew how to summons to the floor, including against a Member of this body—Senator William Blount, of Tennessee. During the Jefferson administration, the unsuccessful impeachment of Justice Samuel Chase—a surly and partial jurist, who was, nonetheless, acquitted by this Chamber—became an early landmark in maintaining the treasured independence of our Federal judiciary.

It took the national convulsion of the Civil War, the assassination of Mr. Lincoln, and the counter-reconstruction measures aggressively pursued by Mr. Lincoln’s successor, Andrew Johnson, to bring about the Nation’s very first Presidential impeachment. Famously, of course, your predecessors in this High Court of Impeachment acquitted the unpopular and controversial Johnson but only by virtue of Senators from the party of Lincoln breaking ranks.

It was over a century later that the Nation returned to the tumultuous world of Presidential impeachment, necessitated by the rank criminality of the Nixon administration. In light of the rapidly unfolding facts, including uncovered by the Senate select committee, in an overwhelmingly bipartisan vote of 410 to 4, the House of Representatives authorized an impeachment inquiry; and, in 1974, the House Judiciary Committee, after lengthy hearings, voted again in a bipartisan manner to impeach the President of the United States. Importantly, President Nixon’s own party was slowly but inexorably moving toward favoring the removal of their chosen leader from the Nation’s highest office, who had just won reelection by a landslide.

It bears emphasis before this high court that this was the first Presidential impeachment in over 100 years. It also bears emphasis that it was pouvoir. It was just the vote to authorize the impeachment inquiry. Indeed, the House Judiciary chair, Peter Rodino, of New Jersey, was insistent that, to be accepted by the American people, the process had to be bipartisan.

Like war, impeachment is hell or, at least, Presidential impeachment is hell. Those of us who lived through the Clinton impeachment, including Members of this body, full well understand that a Presidential impeachment is tantamount to domestic war. Albeit thankfully protected by our beloved First Amendment, it is a war of words and a war of ideas, but it is filled with acrimony, and it divides the country like nothing else. Those of us who lived through the Clinton impeachment, including Members of this body, full well understand that in a deep and personal way.

Now, in contrast, wisely and judiciously conducted, unlike in the United Kingdom, impeachment remains a vital and appropriate tool in our country to serve as a check with respect to the Federal judiciary. After all, in the Constitution’s brilliant structural design, Federal judges know, as this body full well knows from its daily work, of a pivotally important feature—indeed, independence from politics—exactly what Alexander Hamilton was talking about in Federalist 78: during the Constitution’s term, good behavior; in practical effect, life tenure. Impeachment is, thus, a very important protection for we the people against what could be serious article III wrongdoing within that branch.

And so it is that, when you count, of the 63 impeachment inquiries authorization by the House of Representatives over our history, only 8 have actually been convicted in this high court and removed from office, and each and every one has been a Federal judge.

This history leads me to reflect on the nature of your weighty responsibilities here in this high court as judges in the context of Presidential impeachment—the fourth Presidential impeachment. I am counting the Nixon proceedings in our Nation’s history, but the third over the past half century.

And I respectfully submit that the Senate, in its wisdom, would do well in its deliberations to guide the Nation in this world’s greatest deliberative body to return to our country’s traditions when Presidential impeachment was truly a measure of last resort. Members of this body can help and in this very proceeding restore our constitutional and historical traditions, above all, by returning to the text of the Constitution. It is this example here in these proceedings in weaving the tapestry of what can rightly be called the common law of
Presidential impeachment. That is what courts do. They weave the common law. There are indications within the constitutional text—I will come to our history—so that this fundamental question is appropriate to be asked—you are familiar with the arguments: Was there the commission of an other violation of established law alleged?

So let’s turn to the text. Throughout the Constitution’s description of impeachment, the text speaks almost always—without exception—in terms of crimes. It begins, of course, with treason—the greatest of crimes against the state and against we the people, but so misused as a bludgeon and parliamentary experience, to lead the Founders to actually define the term in the Constitution itself. Bribery—an iniquitous form of moral and legal corruption and the basis of so many of the 63 impeachment proceedings over the course of our history—again, almost all of them against judges—are the murky terms—other high crimes and misdemeanors. Once again, the language is employing the language of crimes. The Constitution is speaking to us in terms of crimes.

Each of those references, when you count them—count seven, count eight—supports the conclusion that impeachments should be evaluated in terms of offenses against established law but especially with respect to the President. The Constitution requires the Chief Justice of the United States and not a political officer—no matter how honest, no matter how impartial—to preside at trial. Guided by history, the Framers made a deliberate and wise choice to cabin, to constrain, to limit the power of impeachment.

And so it was, on the very eve of the impeachment of President Andrew Johnson, that the eminent scholar and dean of Columbia Law School, Theodore Dwight, wrote this: “The weight of authority is that no impeachment will lie except for a true crime—a breach of the law—which would be the subject of indictment.” I am not making that argument. I am noting what he is saying. He didn’t over-argue the case. He said “the weight of authority,” “the weight of authority.”

And so this issue is a weighty one. Has the House of Representatives, with all due respect, in these two Articles of Impeachment charged a crime or violation of established law or not? This is—I don’t want to over-argue—an appropriate and worthy consideration for the Senate but especially as I am trying to emphasize in the case not of a Federal judge but of the President. Courts consider prudential factors, and there is a huge prudential factor that this trial is occurring in an election year, when we the people, in a matter of months, will go to the polls.

In developing the common law of Presidential impeachment, this threshold factor, consistent with the constitutional text, consistent with the Nation’s history and Presidential impeachments, as I will seek to demonstrate, serves as a clarifying and stabilizing element. It increases predictability—to do what?—to reduce the profound danger that a Presidential impeachment will be dominated by partisan considerations—precisely the evil that the Founders warned about.

And so to history.

History bears out the point. The Nation’s most recent experience—the Clinton impeachment—even though serious—were a Menendez criticized charged crimes. These were not crimes proven in the crucible of the House of Representatives’ debate beyond any reasonable observer’s doubt.

So too the Nixon impeachment. The articles charged crimes. What about article II in Nixon, which is sometimes referred to as abuse of power? Was that the abuse of power article—the precursor to article I that is before this court? Not at all. When one returns to article II in Nixon—approved by a bipartisan House of Representatives—article II of Nixon sets forth a deeply troubling story of numerous crimes—not one, not two, numerous crimes—carried out at the direction of the President himself.

And so the appropriate question: Were crimes alleged in the articles of the common law of Presidential impeachment? In Nixon, yes. In Clinton, yes. Here, no—a factor to be considered as the judges of the high court. Come, my friends, you will, individually to your judgment.

Even in the political cauldron of the Andrew Johnson impeachment, article XI charged a violation of the controversial Tenure of Office Act. You are familiar with it. And that act warned expressly the Oval Office; that its violation would institute a high misdemeanor, employing the very language of constitutionally cognizable crimes.

The history represents, and I believe, may it please the court, it embodies the common law of Presidential impeachment. These are facts gleaned from the constitutional text and from the gloss of the Nation’s history. And under this view, the commission of an alleged crime, the violation of established law, can appropriately be considered, again, a weighty and an important consideration and element of a historically supportable Presidential impeachment.

Will law professors agree with this? No, but with all due respect to the academy, this is not an academic gathering. We are in court. We are not just in court. With all due respect to the Chief Justice and the Supreme Court of the United States, we are in democracy’s ultimate court.

And the better constitutional answer to the question is provided by a rigorous and faithful examination of the constitutional text and then looking faithfully and respectfully to our history.

The very divisive Clinton impeachment demonstrates that, while highly relevant, the commission of a crime is by no means sufficient to warrant the removal of our duly elected President. Why?

This body knows. We appoint judges and you confirm them and they are there for life. Not Presidents. And the President is up for election. The Presidency stands alone in our constitutional framework.

Before he became the Chief Justice of the United States, John Marshall, then Chief Justice, wrote: “A President, it is true, is the people’s House, made a speech on the floor of the House, and there he said this: ‘The President is the sole organ of the Nation in its external relations, and its sole representative with foreign nations.’

If that sounds like hyperbole, it has been embraced over decades by the Supreme Court of the United States, by Justices appointed by many different Presidents. The Presidency is unique. There is no other system quite like ours, and it has served us well.

As the Presidency, impeachment and removal not only overturns a national election and perhaps profoundly affects an upcoming election, in the words of Yale’s Akhil Amar, it entails a risk, and these are not empty words. Professor Amar penned those words in connection with the Clinton impeachment. “Grave disruption of the government.” Regardless of what the President has done, “grave disruption of the government.”

We will all agree that the Presidents, under the text of the Constitution and its amendments, are to serve out their term absent a genuine national consensus. The Framers’ debate beyond any reasonable observer’s doubt. And so the appropriate question:

January 27, 2020
resolution to impeach President Ronald Reagan was introduced. It was filed, and the effort to impeach President Reagan was supported by a leading law professor whose name you would well recognize, and you will hear it again this evening from Professor Dershowitz, who has written to identify the learned professor. But the Speaker of the people’s House, emulating Peter Rodino, said no.

So I, respectfully, submit that the Senate should close this chapter, this idiosyncratic chapter, on this increasingly disruptive act, this era, this age mid-century of the 20th century. And in a lawsuit involving a very basic question: Can citizens whose rights have clearly been violated by Federal law enforcement agencies and agents bring a suit for damages when Congress has not so provided—no law that gave the wounded citizen a right to redress through damages?

And Justice Harlan, in a magnificent concurring opinion in Bivens v. Six Unnamed Federal Agents, suggested that courts—here you are—should take into consideration in reaching its judgment—what he called factors counseling restraint.

He was somewhat reluctant to say that the Supreme Court, should grant this right, that we should create it when Congress hasn’t acted and Congress could have acted, but it hadn’t. But he reluctantly came to the conclusion that the Constitution itself empowered the Federal courts to create this right for our injured citizens, to give them redress, not just an injunctive relief but damages, money recovery, for violations of their constitutional rights. Factors counseling restraint. A brief tome addressed this issue, and it came to the view—it was so honest—and said: I came to the case with a different view, but I changed my mind and voted in favor of the Bivens family having redress against the Federal agents who had violated their rights, judging in its most impartial, elegant sense.

I am going to draw from Justice Harlan’s matrix of factors counseling restraint and simply identify these. I think there may be others.

The articles do not charge a crime for violations established. I am suggesting it is a relevant factor. I think it is a weighty factor, when we come to Presidential impeachment, not judicial impeachment.

Second, the articles come to you with no bipartisan support. They come to you as a violation of what I am dubbing the Rodino rule.

And third, as I will now discuss, the pivoting important issue of process, the second Article of Impeachment: Obstruction of Congress.

This court is very familiar with United States v. Nixon. Its unanimity in recognizing the President’s profound interest in confidentiality, regardless of the world view or philosophy of the justice, the Justices were unanimous. This isn’t just a contrivance; it is built into the very nature of our constitutional order. So let me comment, briefly.

This constitutionally based recognition of executive privilege and then companion privileges—the deliberative process privilege, the immunity of close Presidential advisers from being summoned—these are all firmly established in our law.

If there is a dispute between the people’s House and the President of the United States over the availability of documents or witnesses—and there is in each and every administration—then go to court. It really is as simple as that. I don’t need to belabor the point.

But here is the point I would like to emphasize. Frequently, the Justice Department advises the President of the illegal or unconstitutional acts. It is the Presidency calls—whatever the President might want to do as a political matter, as an accommodation in the spirit of comity—to protect privileged conversations and communications.

I have heard it, in my two tours of duty at the Justice Department: Don’t release the documents, Mr. President. If you do, you are injuring the Presidency. Go to court.

We have heard concerns about the length of time that the litigation might take. Those of us who have litigated know that sometimes litigation does take longer than we would like. Justice delayed is justice denied. We gated know that sometimes litigation

But our history—Churchill’s maxim, study history—our history tells us that is not necessarily so. Take by way of example the Pentagon Papers case—orders issued preventing and sanctioning a gross violation of the First Amendment’s guarantee of freedom of the press, an order issued out of the district court June 15, 1971. That order was reversed in an opinion by the Supreme Court of the United States 2 weeks later, June 15.

The House of Representatives could have followed that well-trod path. It could have sought expedition. The E. Barrett Prettyman Courthouse is 6 blocks down. The judges are there. They are hard-working people of integrity. Follow the path. Follow the path of the law. Go to court.

There would have been at least one problem had the House seen fit to go to court and remain in court. The issue is before you.

But among other flaws, the Office of Legal Counsel determined—and I have read the opinion, and I believe it is correct—that with all respect, all House subpoenas issued prior to the adoption of H. R. 660, which for the first time authorized the impeachment inquiry as a House, all subpoenas were invalid. They were void. With all due respect to the Speaker of the House of Representatives, with all her abilities and her vast experience, under our Constitution, she was powerless to do what she purported to do. As has been said now time and again, especially throughout the fall, the Constitution does entrust the sole power of impeachment to the House of Representatives, but that is the House, its 435 Members elected from across the constitutional Republic—not one, no matter how able she may be. In the people’s House, every person gets to vote; you know the concept: one person, one vote.

More generally, the President, as I reviewed the record, has consistently and scrupulously followed the advice and counsel of the Justice Department and, in particular, the Office of Legal Counsel. He has been obedient. As you know, that important office—many of you have had your own experiences professionally with that office—is staffed with lawyers of great ability. It has done such thoughtful work with both Democratic and Republican administrations. The office is now headed by a brilliant lawyer who served as a law clerk to Justice Anthony Kennedy.

The House may rely on the guidance provided to the President by that office; the House frequently does disagree. But for the President to follow the guidance of the Department of Justice with respect to an interbranch legal and constitutional dispute cannot reasonably be viewed as a deviation and, most emphatically, not as an impeachable offense.

History, once again, is a great teacher. In the Clinton impeachment, the House Judiciary Committee rejected a draft article asserting that President Clinton—and here are the words that were drafted: “fraudulently and corruptly asserted executive privilege.” Strong words, “fraudulently and corruptly.” That was the draft article.

In my view, having lived through the facts and with all due respect to the former President, he did. He did it time and again, month after month. We would go to court, and we would win. Many members—not everybody—on the House Judiciary Committee agreed that the President had, indeed, improperly claimed executive privilege, rebuffed time and again by the Judiciary. But at the end of the day, that Committee, the Judiciary Committee of the House, chaired by Henry Hyde, wisely concluded that President Clinton’s doing so should not be considered an impeachable offense.

Here is the idea. It is not an impeachable offense for the President of the United States to defend the asserted legal and constitutional prerogatives of the Presidency.

This is, and I am quoting here from page 55 of the President’s trial brief, “a function of his constitutional and political judgments, it just a political judgment, but a constitutional judgment.” I would guide this court, as it is coming through the deliberation process,
to read the President’s trial brief with respect to process. It was Justice Felix Frankfurter, confidante of FDR, brilliant jurist, who reminded America that the history of liberty is in large measure the history of process, procedure.

In particular, I would guide the high court to the discussion of the long history of the House of Representatives—over two centuries—in providing due process protections in its impeachment investigations. It is a richly historical discussion.

The good news is, you can read the core of it in four pages, pages 62 to 66, of the trial brief. It puts in bold relief, I believe, an irrefutable fact. This House of Representatives, with all respect, sought to turn its back on its own established procedures—procedures that have been followed faithfully decade after decade, regardless of who was in control, regardless of political party. All those procedures were torn and shredded—perhaps, literally, in the big fight for the America’s Constitution. The very first order of our government after “to form a more perfect Union” is to “establish Justice”—to “establish justice.” Even before getting to the words to “provide for the common Defense, to promote the general Welfare, to insure domestic Tranquility,” the Constitution speaks in terms of justice—establishing justice.

Courts would not allow this. They would not allow this because—why? They knew, and they know, that the purpose of our founding instrument is to protect our liberties, to safeguard us, but to safeguard us as individuals against the government. Why? In the benedictory words of the preamble, to “secure the Blessings of Liberty to ourselves and our Posterity.” Liberty under law.

I thank the CHIEF JUSTICE. Mr. Sekulow. Mr. Counsel SEKULOW. Mr. Chief Justice, Members of the Senate, House managers: Judge Starr laid out before you the solemn nature of these proceedings and the solemn nature of these proceedings and what has been laid out before us from both a historical and constitutional perspective.

I want you to think about this, to history, the importance and solemnity of what we are engaged in in this body, with what took place in the House of Representatives upon the signing of Articles of Impeachment—pens distributed to the impeachment managers. A celebratory moment—think about that; think about this—a poignant moment.

We are next going to address a factual analysis. To briefly reflect, my colleague, the Deputy White House Counsel, Mike Purpura, will be joining us in a moment to discuss more of the facts, to continue the discussion that we had on Saturday. But let me just recap very quickly what was laid out on Saturday.

First, the transcript shows that the President did not condition either security assistance or a meeting on anything. The paused security assistance funds aren’t even mentioned on the call. President Zelensky and the top Ukrainian officials did not learn of the pause on the security assistance until more than a month after the July 25 call, and the House managers’ own record—their record that they developed and brought before this Chamber—requests that the President said that the President made clear that there was no linkage between security assistance and investigations.

There is another category of evidence that demonstrated that the pause on security assistance was distinct and unrelated to investigations. The President released the aid without the Ukrainians ever announcing any investigations or undertaking any investigations.

Here is Ambassador Sondland. (Text of Videotape presentation:)

Ms. STEFANIK. And the fact is the aid was given to Ukraine without any announcement of new investigations? Ambassador SONDLAND. That’s correct. Ms. STEFANIK. And President Trump did in fact meet with President Zelensky on September 11, and a Presidential meeting took place on September 25 without the Ukrainian Government—without the Ukrainian Government—announcing any investigations.

Fourth, not a single witness testified that the President himself said that there was any connection between any investigation, security assistance, a Presidential meeting, or anything else.

Fifth, the security assistance flowed on September 11, and a Presidential meeting took place on September 25 without the Ukrainian Government—without the Ukrainian Government—announcing any investigations.
Mr. Counsel PURPURA. So while the security assistance was paused, the administration did precisely what you would expect. It addressed President Trump’s concerns about the two issues that I mentioned on Saturday: burden-sharing and corruption.

A number of law- and policymakers also contacted the President and the White House to provide input on the security assistance issue during this previous period, including Senator Lindsey Graham. The process culminated on September 11, 2019. On that day, the President spoke with Vice President PENCE and Senator Ron PORTMAN. The Vice President, in Senator Portman’s words, was “armed with his conversation with President Zelensky from their meeting just days earlier in Warsaw, Poland, and both the Vice President and Senator Portman related their view of the importance of the assistance to Ukraine and convinced the President that the aid should be immediately stopped.

After the meeting, President Trump terminated the pause, and the support flowed to Ukraine.”

I want to take a step back now and talk for a moment about why the security assistance was briefly paused—again, in the words of the House managers’ own witnesses. Witness after witness testified that confronting Ukrainian corruption should be at the forefront of U.S. foreign policy towards Ukraine. Ambassador Sondlan testified that the President had longstanding and sincere concerns about corruption in Ukraine. The House managers, however, told you that it was laughable to think that the President cared about corruption in Ukraine, but that is not what the witnesses said.

According to Ambassador Volker, President Trump demonstrated that he had a very deeply rooted negative view of Ukraine based on past corruption, and he immediately stopped according to Ambassador Volker. Most people who know anything about Ukraine would think that.

Dr. Hill testified:

I think the President has actually quite publicly, said that he was very skeptical about corruption in Ukraine. And, in fact, he is not alone, because everyone has expressed great concerns about corruption in Ukraine.

The House managers have said the President’s concern with corruption is disingenuous. They said that President Trump didn’t care about corruption in 2017 or 2018 and he certainly didn’t care about it in 2019. Those were their words. Not according to Ambassador Yovanovitch, however, who testified that President Trump shared his concern about corruption directly with President Poroshenko—President Zelensky’s predecessor—in their first meeting in the Oval Office. When was that meeting? In June of 2017—2017. The House managers also have well-known concerns about foreign aid generally. Scrutinizing and in some cases curtailling foreign aid was a central plank of his campaign platform. President Trump is especially wary of sending American taxpayer dollars abroad when other countries refuse to pitch in.

Mr. Morrison and Mr. Hale both testified at length about President Trump’s longstanding concern with burden-sharing aid programs. Here is what they said.

(Text of Videotape presentation:)

Mr. RATCLIFFE. The President was concerned that the United States seemed to bear the exclusive security assistance to Ukraine. He wanted to see the Europeans step up and contribute more security assistance.

Mr. HALE. We’ve often heard at the State Department that the President of the United States wants to make sure that foreign assistance is reviewed scrupulously and make sure that it is truly in the U.S. national interests and that we evaluate it continuously and that it meets certain criteria the President has established.

Mr. RATCLIFFE. And has the President expressed that he expected our allies to give their fair share of foreign aid as evidenced by the point that he raised during the July 25th phone call to President Zelensky to that effect?

Mr. HALE. The principle of fair burden-sharing by allies and other like-minded states is an important element of the foreign assistance review.

Mr. Counsel PURPURA. The President expressed these precise concerns to Senator Ron Johnson, who wrote:

He reminded me how thoroughly corrupt Ukraine is. He shared his frustration that Europe doesn’t do its fair share of providing military aid.

The House managers didn’t tell you about this. Why not? And President Trump was right to be concerned that other countries weren’t paying their fair share. As Laura Cooper testified, U.S. contributions to Ukraine are far more significant than any individual country, and she also said EU funds tend to be on the economic side rather than for security.

Senator Johnson also confirmed that other countries refused to provide the lethal defense weapons that Ukraine needs in its war with Russia.

Please keep in mind also that the pause of the Ukraine security assistance program was far from unusual or out of character for President Trump. The American people know that the President is skeptical of foreign aid and that one of his top campaign promises and priorities in office has been to avoid wasteful spending of American taxpayer dollars abroad.

Meanwhile, the same people who today claimed that President Trump was not genuinely concerned about burden-sharing were upset when, as a candidate, President Trump criticized free-riding by NATO members.

This past summer, the administration paused, reviewed, and in some cases canceled hundreds of millions of dollars in foreign aid to Afghanistan, El Salvador, Honduras, Guatemala, and Lebanon. We also heard some of the reviews of foreign aid undertaken at the very same time that the Ukraine aid was paused.

So what happened during the brief period of time while the Ukraine security assistance was paused? People were gathering information and monitoring the facts on the ground in Ukraine as the new Parliament was sworn in and began introducing anti-corruption legislation.

Notwithstanding what the House managers would have you believe, the reason for the pause was no secret within the White House and the agencies. According to Mr. Morrison, in a meeting with senior officials throughout the executive branch agencies, the reason provided for the pause by a representative of the Office of Management and Budget was that the President was concerned about corruption in Ukraine and he wanted to make sure Ukraine was doing enough to manage that corruption. In fact, as Mr. Morrison testified, by Labor Day, there had been definitive developments to demonstrate that President Zelensky was committed to the issues he campaigned on: anti-corruption reforms.

Mr. Morrison also testified that the administration was working on answering the President’s concerns regarding burden-sharing. Here is Mr. Morrison.

(Text of Videotape presentation:)

Mr. CASTOR. Was there any interagency activity by either the State Department or the Defense Department coordinated by the National Security Council to look into that at all?

MR. MORRISON. We were surveying the data to understand what was contributing what and sort of in what categories.

MR. CASTOR. And so the President evolved concerns. The interagency tried to address them?

MR. MORRISON. Yes.

Mr. Counsel PURPURA. How else do we know that the President was awaiting information on burden-sharing and anti-corruption efforts in Ukraine before releasing the security assistance? Because that is what Vice President Pence told President Zelensky.

On September 1, 2019, Vice President Pence met with President Zelensky. President Trump was scheduled to attend the World War II commemoration in Poland but instead remained in the United States to manage the emergency response to Hurricane Dorian. Remember, this was 3 days—3 days—after President Zelensky learned through the POLITICO article about the review of the security assistance. Just as Vice President Pence and his aides anticipated, Jennifer Williams testified that once the cameras left the room, the very first question that President Zelensky had was about the status of the security assistance. The Vice President responded by asking about two things: burden-sharing and corruption.

Here is how Jennifer Williams described it:

And the VP responded by really expressing our ongoing support for Ukraine, but wanting to hear from President Zelensky, you know, what the status of his efforts were that he could then convey back to the President, and also wanting to hear if there
was more that European countries could do to support Ukraine.

Vice President Pence knows President Trump, and he knew what President Trump wanted to hear from President Zelensky. The Vice President was echoing the Vice President’s focus on corruption and burden-sharing. It is the same, consistent themes every time.

Ambassador Taylor received a similar readout of the meeting between the Vice President and President Zelensky, including the Vice President’s focus on corruption and burden-sharing. Here is Ambassador Taylor.

(Text of videotape presentation:)

Ambassador TAYLOR. On the evening of September 1st, I received a readout of the Pence-Zelensky meeting over the phone from Mr. Morrison during which he told me that President Zelensky had opened the meeting by immediately asking the Vice President about the security cooperation. The Vice President did not respond substantively but said that he would talk to President Trump that night. President Trump did ask President Pence if he was willing to do more to support Ukraine and that he wanted the Ukrainians to do more to fight corruption.

Mr. Counsel PURPURA. On September 11, based on the information collected and presented to President Trump, the President lifted the pause on the security assistance. As Mr. Morrison explained, “our process gave the President the confidence he needed to approve the release of the security-sector assistance.”

The House managers say that the talk about corruption and burden-sharing is a ruse. No one knew why the security assistance was paused, and no one was addressing the President’s concerns with Ukrainian corruption and burden-sharing. The House managers’ own evidence—their own record—tells a different story, however. They didn’t tell you about this, not in 21 hours. Why not?

The President’s concerns were addressed in the ordinary course. The President wasn’t caught, as the House managers allege. The managers are wrong. All of this, together with what we discussed on Saturday, demonstrates that there was no connection between security assistance and investigations.

When the House managers realized their “quid pro quo” theory on security assistance was falling apart, they created a second alternative theory. According to the House managers, President Zelensky desperately wanted a meeting at the White House with President Trump, and President Trump conditioned that meeting on investigations.

What about the managers’ backup accusation? Do they fare any better than their quid pro quo for security assistance? No. No, they don’t.

A Presidential-level meeting happened without any preconditions at the first available opportunity in a widely televised meeting at the United Nations General Assembly in New York.

President Trump invited President Zelensky to an in-person meeting on their initial April 21 call. He said: “When you’re settled in and ready, I’d like to invite you to the White House.”

On May 29, the week after President Zelensky’s inauguration, President Trump sent a congratulatory letter, again, inviting President Zelensky to the White House. He said:

As you prepare to address the many challenges facing Ukraine, please know that the American people are with you and are committed to supporting your vast potential. To help show that commitment, I would like to invite you to meet with me at the White House in Washington, D.C., as soon as we can find a mutually convenient time.

Then, on July 25, President Trump personally invited President Zelensky to participate in a meeting for a third time. He said: Whenever you would like to come to the White House, feel free to call. Give us a date, and we’ll work that out. I look forward to seeing you.

Those are three separate invitations for a meeting, all made without any preconditions.

During this time, and behind the scenes, the White House was working diligently to schedule a meeting between the Presidents at the earliest possible date. Tim Morrison, whose responsibilities included helping to arrange White House or other head-of-state meetings, testified that he understood that arranging the White House visit with President Zelensky was a do-out that came from the President.

The House managers didn’t mention the work that the White House was doing to schedule the meeting between President Trump and President Zelensky; did they? Why not? Scheduling a Presidential meeting takes time. Mr. Morrison testified that his directorate, which was just one of several, had a dozen schedule requests in with the President for meetings with foreign leaders that we were looking to land and Ukraine was but one of those requests.

According to Mr. Morrison, due to both Presidents’ busy schedule, “it became clear that the ‘earliest opportunity for the two Presidents to meet would be in Warsaw’ at the beginning of September.”

The entire notion that a bilateral meeting between President Trump and President Zelensky was somehow conditioned on a statement about investigations is completely defeated by one straightforward fact: A bilateral meeting between President Trump and President Zelensky was planned for September 1 in Warsaw—’the same Warsaw meeting we were just discussing, without the Ukrainians saying a word about investigations.

As it turned out, President Trump was not able to attend the meeting in Warsaw because of Hurricane Dorian. President Trump asked Vice President Pence to attend in his place, but even that scheduling glitch did not put off their meeting for long. President Trump and President Zelensky met at the next available date, September 25, at the sidelines of the United Nations General Assembly.

As President Zelensky, himself, has said, there were “no preconditions” for his meeting with President Trump. Those are his words: “No conditions.”

You are probably wondering how the House managers could claim there was a quid pro quo for a meeting with President Trump when the two Presidents actually did meet without President Zelensky announcing any investigations? Well, the House managers moved the goalpost again. They claim that the meeting couldn’t be just an in-person meeting with President Trump. What it had to be was a meeting at the Oval Office and in the White House. That is nonsense.

Putting to one side the absurdity of the House managers trying to remove a duly-elected President of the United States from office because he met with a foreign leader in another country, this theory has no basis in fact.

As Dr. Hill testified, what mattered was that there was a bilateral Presidential meeting, not the location of the meeting. She said:

[It wasn’t always a White House meeting per se, but definitely a Presidential-level, you know, meeting with Zelensky and the President. I mean, it could’ve taken place in Poland, in Warsaw. It could’ve been, you know, a proper bilateral in some other context. But, in other words, a White House-level Presidential meeting.]

The House managers didn’t tell you about Dr. Hill’s testimony. Why not? In fact, just last week they said that President Zelensky still hasn’t gotten his White House meeting. Why didn’t they tell you about Dr. Hill’s testimony? Why didn’t they tell you about Dr. Hill’s testimony? Why didn’t they tell you about Dr. Hill’s testimony? Why didn’t they tell you about Dr. Hill’s testimony? Why didn’t they tell you about Dr. Hill’s testimony? How else do we know that Dr. Hill was right? Because President Zelensky said so on the July 25 call. Remember, when, on the July 25 call, President Trump invited President Zelensky to Washington on the July 25 call, President Zelensky said he would be “happy to meet with you personally” and offered to host President Trump in Ukraine or, on the other hand, meet with President Trump on September 1 in Poland. That is exactly what the administration planned to do.
If it weren’t for Hurricane Dorian, President Trump would have met with President Zelensky in Poland on September 1st, just as President Zelensky had requested and without any preconditions.

As it happened, President Zelensky met with the Vice President instead and just a few weeks later met with President Trump in New York—all without anyone making any statement about Ukraine investigations. And, once again, not a single witness in the House record that they compiled and developed under their procedures that we have discussed and will continue to discuss, provided any firsthand evidence that President ever linked the Presidential meeting to any investigations.

The House managers have seized upon Ambassador Sondland’s claim that Mr. Giuliani’s requests were a quid pro quo because arranging a White House visit for President Zelensky. But, again, Ambassador Sondland was only guessing based on incomplete information. He testified that the President told him there was any support of a condition for a meeting with President Zelensky. Why, then, did he think there was one?

In his own words, Ambassador Sondland said that he could only repeat what he heard “through Ambassador Volker from Giuliani.” So he didn’t even hear from Mr. Giuliani himself. But Ambassador Volker, who is the supposed link between Mr. Giuliani and Ambassador Sondland, thought no such link existed. Ambassador Volker testified unequivocally that there was no linkage between the meeting with President Zelensky and Ukrainian investigations.

I am going to read the full questions and answers because this passage is key. This is from Ambassador Volker’s deposition testimony.

**Question.** Did President Trump ever withhold a meeting with President Zelensky or delay it happening with President Sondland until the Ukrainians committed to investigate the allegations that you just described concerning the 2016 Presidential election?

**Answer.** The answer to the question is no. If you want a yes-or-no answer. But the reason is no is we did have difficulty scheduling a meeting, but there was no linkage like that.

**Question.** You said that you were not aware of any linkage between delaying the Oval Office meeting between President Trump and President Zelensky and the Ukrainian commitment to investigate the two allegations as you described them, correct?

**Answer.** Correct.

Over the past week, on no fewer than 15 separate occasions, the House managers played a video of Ambassador Volker’s deposition testimony. What the administration of the investigations was a pre-requisite for a meeting or call with the President—15 times. They never once read to you the testimony that I just did. They never once read to you the testimony which Ambassador Volker refuted what Ambassador Sondland claimed he heard from Ambassador Volker.

Here is what we know. President Trump invited President Zelensky to meet three times without preconditions. The White House was working behind the scenes to schedule the meeting. The two Presidents planned to meet at least twice. And ultimately met 3 weeks later without Ukraine announcing any investigations.

No one testified in the House record that the President ever said there was a connection between a meeting and investigations. Plain and simple. So much for a quid pro quo for a meeting with the President.

Before I move on, let me take a brief moment to address a side allegation that was raised in the original whistle-blower complaint and that the House managers are still trying to push.

The managers claim that President Trump ordered Vice President Pence not to attend President Zelensky’s inauguration in favor of a lower ranking delegation corresponding to them—to single a downgrading of the relationship between the United States and Ukraine.

That is not true. As I am sure everyone in this room can greatly appreciate, the Vice President had to align for the VP to attend.

**First, dates of travel were limited.** For national security reasons, the President and Vice President generally avoid being out of the country at the same time. The only time the President has scheduled trips to Europe and Japan during the period when our Embassy in Ukraine anticipated the Ukrainian inauguration would occur, at the end of May or in early June. Jennifer Williams testified that the Office of the Vice President advised the Ukrainians that, if the Vice President were to participate in the inauguration, the ideal dates would be around May 29, May 30, May 31, or June 1, which would be in the United States. She said “if it wasn’t one of those dates, it would be very difficult or impossible” for the Vice President to attend.

**Second, the House managers act as if no other priorities in the world could compete for the administration’s time.** The Vice President’s Office was simultaneously planning a competing trip for May 30 in Ottawa, Canada, to participate in an event supporting passage of the United States-Mexico-Canada Agreement. Ultimately, the Vice President traveled to Ottawa on May 30 to meet with Prime Minister Justin Trudeau and to promote the passage of the USMCA. This decision, as you know, advanced the top administration priority and an issue that President Trump vigorously supported.

What you did not hear from the House managers was that the Ukrainian inauguration dates did not go as planned. On May 16—May 16—the Ukrainians surprised everyone and scheduled the inauguration for just 4 days later, on May 20—Monday, May 20. So think about that: May 16, May 20. Get everybody—security, advance, everyone—to Ukraine. Jennifer Williams testified that it was very short notice, so it would have been difficult for the Vice President to attend, particularly since they hadn’t sent out the advance team.

George Kent testified that the short notice left almost no time for either proper preparations or foreign delegations to visit and that the State Department scrambled on Friday the 17th to try and figure out who was available. Mr. Kent suggested that Secretary of Energy Perry be the anchor for the delegation, as “someone who was a person of stature and whose job had relevance to our agenda.” Secretary Perry led the delegation, which also included Ambassador Sondland, Ambassador Volker, and Senator Johnson. Ambassador Volker testified that it was the largest delegation from any country there, and it was a high-level one. The House managers didn’t tell you that. Why not?

The claim that the President instructed the Vice President not to attend President Zelensky’s inauguration is based on House manager assumptions with no evidence that the President did anything wrong.

Finally, as I am coming to the end, if the evidence doesn’t show a quid pro quo, what does it show? Unfortunately for the House managers, one of the few things that all of the witnesses agreed on was that President Zelensky has strengthened the relationship between the United States and Ukraine and that he has been a more stalwart friend to Ukraine and a more fierce opponent of Russian aggression than President Obama. The House managers repeatedly claimed that President Trump doesn’t care about Ukraine. They are attributing views to President Trump that are contrary to his actions. More importantly, they are contrary to the House managers’ own evidence.

Let’s take it for it. Ambassadors Yovanovitch, Taylor, and Volker all testified to the Trump administration’s positive new policy toward Ukraine based especially on President Trump’s decision to provide lethal aid to Ukraine. Ambassador Taylor testified that President Trump’s policy toward Ukraine was a substantial improvement over President Obama’s policy. Ambassador Volker agreed that America’s policy toward Ukraine has been strengthened under President Trump, whom he credited with approving each of the decisions made along the way.

Ambassador Yovanovitch testified that President Trump’s decision to provide lethal aid to Ukraine meant that our policy actually got stronger over the last 3 years. She called the policy shift that President Trump directed very significant. Let’s hear from Ambassador Taylor, Ambassador Volker, and Ambassador Yovanovitch.

(Text of Videotape presentation:)

Ms. STEFANIK. The Trump administration has indeed provided substantial aid to

January 27, 2020

CONGRESSIONAL RECORD — SENATE

S587
S588

CONGRESSIONAL RECORD — SENATE
January 27, 2020

Ukraine in the form of defensive lethal aid, correct?
Ambassador TAYLOR. That is correct.
Ms. STEFANIK. And that is more so than the Obama administration, correct?
Ambassador TAYLOR. The Trump administration.
Ms. STEFANIK. Defensive lethal aid.
Ambassador TAYLOR. Yes.
Ambassador YOVANOVITCH. And the Trump administration strengthened our policy by allowing the provision to Ukraine of antitank missiles known as Javelins.
They are obviously tank busters. And so, if the war with Russia—all—all of a sudden accelerates in some way and tanks come over the horizon, Javelins are a very serious weapon to deal with that.
Mr. Counsel PURURA. Ukraine is better positioned to fight Russia today than it was before President Trump took office. As a result, the United States is safer too. The House managers did not tell you about this testimony from Ambassadors Taylor, Volker, and Yovanovitch. Why not?
These are the facts, as drawn from the House managers’ own record on which they impeached the President. This is why the House managers’ first Article of Impeachment must fail, for the six reasons I set forth when I began on Saturday.
There was no linkage between investigations and security assistance or a meeting on the July 25 call. The Ukrainians said there was no quid pro quo and they felt no pressure. The top Ukrainians did not even know that security assistance was paused until more than a month after the July 25 call. The House managers’ record reflects that anyone who spoke with the President said that the President made clear that there was no linkage. The security assistance flowed, and the President’s defense will take place, all without any announcement of investigations. And President Trump has enhanced America’s support for Ukraine in his 3 years in office.
These facts all require that the first Article of Impeachment fail. You have already heard and will continue to hear from my colleagues on why the second Article of Impeachment must fail, for the very heavy burden of proof rests with them. They say their case is over-thrown until 6 p.m.
The CHIEF JUSTICE. Thank you, Mr. Chief Justice.
Mr. Chief Justice, Members of the Senate, house managers, there has been a lot of talk in both the briefs and in the discussions over the last week about one of our colleagues, former mayor of New York, Rudy Giuliani. Mayor Giuliani was one of the leaders of the President’s defense team during the Mueller investigation. He is mentioned 531 times—20 in the brief and about 511, give or take, in the arguments, including the motion day.
We had a robust team that worked on the President during the Mueller probe, consisting of Mayor Giuliani, Andrew Economou, Stuart Roth, Jordan Sekulow, Ben Sisney, Mark Goldfeder, Mayor Giuliani, of course, and Marty Raskin, as well as Jane Raskin. She in report, was one of the leading attorneys on the Mueller investigation for the defense of the President.
The issue of Mayor Giuliani has come up here in this Chamber a lot. We thought it would be appropriate now to turn to that issue, the role of the President’s lawyer, his private counsel, in this proceeding. I would like to yield my time, Mr. Chief Justice, to Jane Se- rene Raskin.
Ms. Counsel RASKIN. Mr. Chief Justice, Majority Leader McCONNELL, Members of the Senate.
I expect you have heard American poet Carl Sandburg’s summary of the trial lawyer’s dilemma:
If the facts are against you, argue the law. If the law is against you, argue the facts. If the facts and the law are against you, pound the table and yell like hell.
Well, we have heard the House man-agers do some table-pounding and a little yelling, but, in the main, they have used a different tactic here, a tactic fa-miliar to trial lawyers, though not mentioned by Mr. Sandburg. If both the law and the facts are against you, present a distraction, emphasize a sensa-tional fact or perhaps a colorful or controversial public figure who appears on the scene, then distort certain facts, ignore others, even when they are the most probative, make conclusory statements, and insinuate the shiny object is far more important than the actual facts allow: In short, divert at-tention from the holes in your case.
Rudy Giuliani is the House man-agers’ colorful distraction. He is a household name. He is a legendary Fed-eral prosecutor who took down the Mafia, corrupt public officials, Wall Street racketeers. He is the crime-busting mayor who cleaned up New York and turned it around, a national hero. His America’s mayor. And, after that, an internationally recog-nized expert on fighting corruption. To be sure, Mr. Giuliani has always been somewhat of a controversial figure for his hard-hitting, take-no-prisoners approach. But it is not that that he was respected by friend and foe alike for his intellect, his tenacity, his accomplishments, and his fierce loy-alty to his causes and his country. And then, the unthinkable happened. He publicly supported the candidacy of President Trump—the one who was not supposed to win. And then, in the spring of 2018, he stood up to defend the President—successfully, it turns out—against—who?—against the juggernaut of the real debunked conspiracy theory that the Trump campaign colluded with Russia during the 2016 campaign. The House managers would have you believe that Mr. Giuliani is at the center of this very controversy. He point-ed him the proxy villain of the tale, the leader of a rogue operation. Their presen-tations were filled with ad hominem attacks and name-calling: cold-blooded political operative, political bagman.
But I suggest to you that he is front and center in their narrative for one reason and one reason alone: to dis-tract from the fact that the evidence does not support their claims.
And what is the first tell that Mr. Giuliani’s role in this may not be all that it is cracked up to be? They didn’t subpoena him to testify. In fact, Mr. SCHIFF and his committee never invited him to testify. They took a subpoena back and sent it back in September, and when his law- yer responded with legal defenses to the production, the House walked away. But if Rudy Giuliani is every-thing they say he is, don’t you think they would have subpoenaed and pursued his testimony? Ask yourselves, why didn’t they?
In fact, it appears the House com-mittee wasn’t particularly interested in presenting you with any direct evi-dence of what Mayor Giuliani did or why he did it. Instead, they ask you to rely on hearsay, speculation, and as-sumption—evidence that would be inadmissible in any court.
For example, the house managers suggest that Mr. Giuliani, at the Presi-dent’s direction, demanded that Ukraine announce an investigation of the Bidens and Burisma before agreeing to a White House visit. They base that conclusion on thirdhand information. As he put it, the most he could do...
is repeat what he heard through Ambas-
sador Volker from Giuliani, whom
he presumed spoke to the President on
the issue. And by the way, as Mr. Pur-
pura has explained, the person who was
actually speaking to Mr. Giuliani, Am-
bassador Volker, testified clearly that
there were communications before the
meeting with President Zelensky and
Ukrainian investigations.

The House managers also make much
of a May 23 White House meeting dur-
ing which the President suggested to
his Ukraine working group, including
Ambassadors Volker and Sondland,
that they should talk to Rudy. The
managers told you that President
Trump gave a directive and a demand
that the group needed to work with
Giuliani if they wanted him to agree
with the Ukraine policy they were pro-
posing, but those words, “directive” and
“demand,” are misleading. They
misrepresent what the witnesses actu-
ally said.

Ambassador Volker testified that he
understood, based on the meeting, that
Giuliani was only one of several
sources of information for the Presi-
dent, and the President simply wanted
officials to speak to Mr. Giuliani be-
cause of those things about Ukraine. As
Volker put it, the Presi-
dent’s comment was not an instruction
but just a comment. Ambassador
Sondland agreed. He testified that he
didn’t take it as an order, and he added
that Mr. Giuliani wasn’t even specific
about what he wanted us to talk to
Giuliani about.

So it may come as no surprise to you
that after the May 23 meeting, the one
during which the House managers told
you the President demanded that his
Ukraine team talk to Giuliani, neither
Volker nor Sondland even followed up
with Mr. Giuliani until July, and the
July followup by Mr. Volker happened
only because the Ukrainian Govern-
ment put in touch with him. Volker
testified that President
Zelensky’s senior aide, Andriy Yermak,
approached him to ask to be connected
to Mr. Giuliani.

House Democrats also rely on testi-
mony that Mayor Giuliani told Ambas-
sadors Volker and Sondland that, in
his view, to be credible, a Ukrainian
statement on anti-corruption should
specifically mention investigations into
2016 election interference and Bri-
mance.

But when Ambassador Volker was
asked whether he knew if Giuliani was
“conveying messages that President
Trump wanted conveyed to the Ukrain-
ians,” Volker said that he did not have
that impression. He believed that
Giuliani was doing his own communica-
tion about what he believed he was
interested in.

But even more significant than the
reliance on presumptions, assumptions,
and unsupported conclusions, the House
managers place in any fair context Mr. Giuliani’s actual role in
exploring Ukrainian corruption. To
hear their presentation, you might
think that Mayor Giuliani had parachuted into the President’s orbit
in the spring of 2019 for the express
purpose of carrying out a political hit
job. They would have you believe that
Mayor Giuliani was only there to dig
up dirt against former Vice President
Biden, a supporter of the President
Trump’s rivals in the 2020 election.

Of course, Mr. Giuliani’s intent is no
small matter here. It is a central and
essential premise of the House man-
gers’ case that Mr. Giuliani’s motive
in discussing corruption, interference in the 2016 election was an entirely political one, undertaken
at the President’s direction. But
what evidence have the managers actu-
ally offered you to support that propo-
sition? On close inspection, it turns out
virtually none. They just say it over
and over and over.

And they offer you another false di-
chotomy. Either Mr. Giuliani was act-
ing in an official capacity to further
President Trump’s political objec-
tives or he was acting as the Presi-
dent’s personal attorney, in which
case, they conclude, ipse dixit, his mo-
tive would only be to further the Presi-
dent’s political objectives.

The House managers then point to
various of Mr. Giuliani’s public state-
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he is, indeed, the President’s personal
attorney. There you have it. Giuliani
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he is, in the end, after a 2-year siege on
the Presidency, a rogue, a renegade. The fact
is, in the end, the President was acting
as his client against the false allegations
being investigated by Special Counsel
Mueller, but the House managers didn’t
even allude to that possibility. Instead,
they just repeated their mantra that
Giuliani’s motive was purely political.
That speaks volumes about the bias
with which they have approached their
mission.

The bottom line is, Mr. Giuliani de-
defended President Trump vigorously, re-
peatedly, and publicly throughout the
Mueller investigation and in the non-
stop congressional investigations that
followed, including the attempted
Mueller redo by the House Judiciary
Committee, which the managers would
apparently like to sneak in the back
door here.

The House managers may not like his
style—you may not like his style—but
one might argue that he is everything
Clarence Darrow said a defense lawyer
ought to be: outrageously, inconveni-
ently, blaspheous, a rogue, a renegade.
The fact is, in this trial, in this moment, Mr.
Giuliani is just a minor player—that
shiny object designed to distract you.

Senators, I urge you most respect-
fully: Do not be distracted.

Thank you, Mr. Chief Justice.
I yield back to Mr. Sekulow.
Mr. Counsel SEKULOW. Mr. Chief
Justice, Members of the Senate, and
House managers, we are going to now
move to a section dealing with the law.
There are two issues in particular that
my colleague Pat Philbin, the Deputy
White House Counsel, will be address-
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legal issues specific to dealing with the
second Article of Impeachment: Ob-
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CONGRESSIONAL RECORD — SENATE
S589

The House managers told you
you the President demanded that his
Ukraine working group, including
Ambassadors Volker and Sondland,
the mayors, to speak to Mr. Rudolf
in his defense against the Russia collu-

CNN, which related that Giuliani’s role
in the Mueller investigation was spot-on.

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the due process violations that characterized the proceedings in the House and some of the fundamental mischaracterizations and errors that underpinned the House Democrats’ charge for obstruction. I will complete the presentation today on those points to round out the fundamental unfair procedures that were used in the House and their implications in this proceeding before you now and also address in detail the purported charges of obstruction in the second Article of Impeachment.

On due process, there are three fundamental errors that affected the proceedings in the House. The first is, as I explained on Saturday, the impeachment inquiry was unauthorized and unconstitutional from the beginning.

No committee of the House has the power to launch an inquiry under the House’s impeachment power unless the House itself has taken a vote to give that authority to a committee. I noted that, in cases such as session v. United States and United States v. Watkins, the Supreme Court has set out these principles, general principles derived from the Constitution, which assign authority to each Chamber of the legislative branch—to the House and to the Senate—but not to individual members or to subcommittees. For an authority of the House to be transferred to a committee, the House has to vote on that.

The DC Circuit has distilled the principles from those cases this way: “To issue a valid subpoena, a committee or a subcommittee must conform strictly to the resolution establishing its investigatory powers.” That was the problem here in that there was no such resolution. There was no vote from the House authorizing the issuance of subpoenas under the impeachment power. So this inquiry began with nearly two dozen invalid subpoenas. The Speaker had the House proceed on nothing more than a press conference in which she purported to authorize committees to begin an impeachment power. Under the Constitution, she lacked that authority.

As the chairman of the House Judiciary Committee, Peter Rodino, pointed out during the Nixon impeachment inquiry:

Such a resolution [from the House] has always been passed by the House. . . . It is a necessary step if we are to meet our obligation.

So we began this process with unauthorized subpoenas that imposed no compulsion on the executive branch to respond with documents or witnesses. I will be coming back to that point, that threshold foundational point, when we get to the obstruction charge.

The second fundamental due process error is that the House Democrats denied the President basic due process required by the Constitution and by the fundamental principles of fairness in the procedures that they used for the hearings. I am not going to go back in detail over those. As we heard from Judge Starr, the House Democrats essentially abandoned the principles that have governed impeachment inquiries in the House for over 150 years. I will touch on just a few points and respond to a couple of points that the House managers have made.

The first is denying due process rights, the House proceedings were a huge reversal from the positions the House Democrats themselves had taken in the recent past, particularly in the Clinton impeachment proceeding.

I believe we have Manager NADLER’s description of what was required. Perhaps not. Manager NADLER was explaining that due process requires at a minimum notice of the charges against you, the right to be represented by counsel, the right to cross-examine witnesses against you, and the right to present evidence. All of those rights were denied to the President.

Now, one of the responses that the managers have made to that defect that we pointed out in the secret proceedings, where Manager SCHIFF began these hearings in the basement bunker, is that, well, that was really just best investigative practice; they were operating in good faith and they were fooled by that. Those hearings operated nothing like a grand jury.

A grand jury has secrecy primarily for two reasons: to protect the direction of the investigation so others won’t know who’s being called in and what they are saying—to keep that secret for the prosecutor to be able to keep developing the evidence—and to protect the accused because the accused might not ever be indicted.

In this case, all of that information was made public every day. The House Democrats destroyed any legitimate analogy to a grand jury, because that was all public. They made no secret that the President was the target. They issued vile calumnies about him every day. They didn’t keep the direction of their investigation secret. Their witness lists were published daily, and the direction of the investigation was open. The testimony that took place was selectively leaked to a compliant media to establish a false narrative about the President.

If that sort of conduct had occurred in a real grand jury, that would have been a criminal violation. Prosecutors can’t do that under Article 3, Section 2 of the Federal criminal rules; it is a criminal offense to be leaking what takes place in a grand jury.

Also, the grand jury explanation provides no rationale whatsoever for this second round of hearings. Remember, after the basement bunker—after the secret hearings where the testimony was prescreened—then the same witnesses who had already been deposed were put on in a public hearing where the President was still excluded.

Ask yourself, what was the reason for that? In every prior Presidential impeachment in the modern era there have been public hearings. The President has been represented by counsel and could cross-examine witnesses. Why did there have to be public, televised hearings where the President was excluded? That was nothing more than a show trial.

I also addressed the other day the House managers’ contention that they had offered the President due process; that when things reached the third round of hearings in front of the House Judiciary Committee, Manager NADLER offered the President due process. I explained why that was illusory. There was no genuine offer there because, before any hearings began, other than the law professor’s seminar on November 4, the Speaker had already determined the outcome, had already said there were going to be Articles of Impeachment, and the Judiciary Committee had informed the counsel’s office that they had to provide witness lists or have any factual hearings whatsoever. It was all done. It was locked in. It was baked.

There was something else I was commenting on, that when the House Judiciary Committee purportedly offered to allow the President some due process rights, and that was a special provision in the rules for the House Judiciary Committee proceedings—also unprecedented—that allowed the House Judiciary Committee to deny the President any due process rights at all if he continued to refuse to turn over documents or not allow witnesses to testify, so that if the President didn’t give up his privileges and immunities that he had been asserting over executive branch confidentiality—if he didn’t comply with what the House Democrats wanted—then it was up to Chairman NADLER, potentially, to say: No rights at all. There is a term for that. It is called an unconstitutional condition. You can’t condition someone’s exercise of some rights on his surrendering other constitutional rights. You can’t say: We will let you have due process in this way if you waive your constitutional privilege on another issue.

The last point I will make about due process is this: It is important to remember that due process is enshrined in the Bill of Rights for a reason. It is not that process is just an end in itself. Instead, it is a deep-seated belief in our legal tradition that fair process is essential for accurate decision making.

Cross-examination of witnesses, in particular, is one of the most important procedural protections for any American. The Supreme Court has explained that, for over 250 years, our legal tradition has recognized cross-examination as the greatest legal engine invented for the discovery of truth.

So why do House Democrats jettison every precedent and every principle of due process in the way they devise these hearing procedures? Why did they devise a process that kept the President blocked out of any hearings for 71 of the 78 days of the so-called investigation?
I would submit because their process was never about finding truth. Their process was about achieving a predetermined outcome on a timetable and having it done by Christmas, and that is what they achieved.

Now, the third fundamental due process error is that the whole foundation of these proceedings was also tainted beyond repair because an interested fact witness supervised and limited the course of the factual discovery, the course of the hearings. I explained the other day that Manager SCHIFF had a reason, potentially, because of his office’s contact with the so-called whistleblower and what was discussed and how the complaint was framed, which all remained secret, to limit inquiry into that, which is relevant.

The whistleblower began this whole process. His bias, his motive, why he was doing it, what his sources were—that is relevant to understand what generated this whole process, but there was nothing to that.

So what conclusion does this all lead to—all of these due process errors that have infected the proceeding up to now?

I think it is important to recognize the right conclusion is not that this body, this Chamber, should try to redo everything—to start bringing in new evidence, bring in witnesses because the President wasn’t allowed witnesses below and redo the whole process. And that is what they say.

One is, first, as my colleagues have demonstrated, despite the one-sided, unfair process in the House, the record that the House Democrats collected through that process already shows that the President did nothing wrong. It already exonerates the President.

But the second and more important reason is because of the institutional implications it would have for this Chamber. Whatever precedent is set, whatever this Chamber accepts now as a permissible way to bring an impeachment proceeding and to bring it to this Chamber the becomes the new normal. And if the new normal is going to be that there can be an impeachment proceeding in the House that violates due process, that doesn’t provide the President or another official being impeached due process rights, that fails to conduct a thorough investigation, that doesn’t come here with facts established by this body that would become the investigatory body and start redoing what the House didn’t do and finding new witnesses and doing things over and getting new evidence, then, that is going to be the new normal, and that will be the way that this Chamber has a new function, and there will be a lot more impeachments coming because it is a lot easier to do an impeachment if you don’t have to follow due process and then come here and expect the Senate to do the work that the House did not.

I submit that is not the constitutional function of this Chamber sitting as a Court of Impeachment, and this Chamber should not put its imprimatur on a process in the House that would force this Chamber to take on that role.

Now, I will move on to the charge of obstruction in the second Article of Impeachment.

Accepting that Article of Impeachment would fundamentally damage separation of powers under the Constitution by permanently altering the relationship between the executive and the legislative branches of the Government. And even accepting the second Article, House Democrats are trying to impeach the President for resisting legally defective demands for information by asserting established legal defenses and immunities based on legal advice from the Department of Justice’s Office of Legal Counsel. In essence, the approach here is that House Democrats are saying: When we demand documents, the executive branch must comply immediately, and the assertions of privilege or defenses to our subpoenas are further evidence of obstruction. We don’t have to go through the constitutionally mandated accommodations process to work out an acceptable solution with the executive branch. We don’t have to go to the courts to establish the validity of our subpoenas.

At one point, Manager SCHIFF said that anything that makes the House even contemplate litigation is evidence of obstruction. Instead, the House claimed it can jump straight to impeachment. What this really means, in this case, is that they are saying for the President to defend the prerogatives of his office, to defend the constitutionally grounded principles of executive branch privileges of immunities is an impeachable offense.

If this Chamber accepts that premise, what has been asserted here constitutes an impeachable offense, it will forever damage the separation of powers. It will undermine the independence of the executive and destroy the bounds between the legislative and executive branches that the Framers crafted in the Constitution.

As Professor Turley testified before the House Judiciary Committee, “hanging impeachment on this obstruction theory would itself be an abuse of power . . . by Congress.”

And I would like to go through that and explain so thing. I will start by outlining what the Trump administration actually did in response to subpoenas, because there are three different actions—three different legally based assertions for resisting different subpoenas that the Trump administration made.

I pointed out on Saturday that there has been this constant refrain from the House Democrats that there was just blanket defiance, blanket obstruction, as if it were unexplained obstruction—just, we won’t cooperate with that warrant. And that is not true. There were very specific legal grounds provided, and each one was supported by an opinion from the Department of Justice’s Office of Legal Counsel.

So the first is executive branch officials declined to comply with subpoenas that had not been authorized, and that is the point I made at the beginning. There was no delegation of authority to the House. Without a vote from the House, the subpoenas that were issued were not authorized. And I pointed out that in an October 18 letter from White House Counsel that that ground was explained.

The second was that wasn’t just from the White House counsel. There were other letters. On the screen now is an October 15 letter from OMB, which explains:

Absent a delegation by a House rule or a resolution of the House, none of your committees have been delegated jurisdiction to conduct an investigation pursuant to the impeachment power under article I, section 2 of the Constitution.

That letter went on to explain that legal rationale—not blanket defiance. There were specific exchanges of letters explaining these legal grounds for resisting.

The second ground, the second principle that the Trump administration asserted was that asserted subpoenas purported to require the President’s senior advisers, his close advisers, to testify.

Following at least 50 years of precedent, the Department of Justice’s Office of Legal Counsel has concluded that three senior advisers to the President—the Acting White House Chief of Staff, the Legal Advisor to the National Security Council, and the Deputy National Security Advisor—were absolutely immune from compelled congressional testimony. And based on that advice from the Office of Legal Counsel, the President directed those advisers not to testify.

Administrations of both political parties have asserted immunity since the 1970s. President Obama asserted it as to the Director of the Office of Political Strategy and Outreach, President George W. Bush asserted it as to his former counsel and to his White House Chief of Staff. President Clinton asserted it as to two of his counsel. President Reagan asserted it as to his counsel, Fred Fielding, and President Nixon asserted it. This is not something that was just made up recently. There is a decades-long history of the Department of Justice providing the opinion that senior advisers to the President are immune from compelled congressional testimony, and it is the same principle that was asserted here.

Now, there are important rationales behind immunity. One is that the President’s most senior advisers are essentially his alter egos, and allowing Congress to subpoena them and compel them to come testify would be tantamount to allowing Congress to subpoena the President himself, and we cannot compel him to come testify, but that in separation of powers would not be tolerated. Congress could no more do that with the
President than the President could force Members of Congress to come to the White House and answer to him. There is also a second and important rationale behind this immunity, and that relates to executive privilege. The immunity protects the same interests that underlie executive privilege. The Supreme Court has recognized executive privilege that protects the confidentiality of the communications with the President and deliberations within the executive branch. As the Court put it in United States v. Nixon, “The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.”

So the Supreme Court has recognized the executive needs this privilege to be able to function. It is rooted in the separation of powers.

As Attorney General Janet Reno advised President Clinton, this is not a partisan issue. This is not a Republican or Democrat issue. Administrations of both parties have asserted this principle of immunity for senior advisers.

And why does it matter? It matters because the Supreme Court has explained that the fundamental principle behind executive privilege is that it is necessary to confidentiality in communications and deliberations in order to have good and worthwhile deliberations, in order to have people provide their candid advice to the President. Because if they knew that what they were advising the President could be on the front page of the Washington Post the next day or the next week, they wouldn’t tell the President what they actually thought. If you want to have good decision making, there has to be confidentiality.

This is the way the Supreme Court put it: “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.”

That was also from United States v. Nixon.

So those are exactly the interests that are protected by having senior advisers to the President be immune from compelled congressional testimony. Because once someone is compelled to sit in the witness seat and start answering questions, it is very hard for them to protect that privilege, to make sure that they don’t start revealing something that was discussed.

So for a small circle of those close to the President, for the past 40 to 50 years, administrations of both parties have insisted on this principle.

Now, the other night, House managers, when we were here very late last week, suggested that executive privilege was a distraction, and Manager Nadler called it “nonsense.”

Not at all—it is a principle recognized by the Supreme Court—a constitutional principle grounded in separation of powers.

They also asserted that this immunity has been rejected by every court that has addressed it, as if to make it seem that lots of courts have addressed this. They have all said that this theory just doesn’t fly. That is not accurate. That is not true.

In fact, in most instances, once the President asserts immunity for a senior adviser, the accommodations process between the executive branch and the legislature begins, and there is usually some compromise to allow, perhaps, some testimony, not in open hearing but in a closed hearing or a deposition, perhaps to provide some other information instead of live testimony. There is a compromise.

But in the only two times it has been litigated, district courts, it is true, rejected the immunity. One was in a case involving former counsel to George W. Bush, Harriet Miers. The district court decided that immunity was not present and that the grand jury decision of the District of Columbia stayed that decision. And that decision means—to stay that district court decision—that the appellate court thought there was a likelihood of success on appeal, that the executive immunity analyzed at a minimum, that the issue of immunity presented “questions going to the merits, so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation.” The first decision was stayed.

The second district court decision is still being litigated right now. It is the McGahn case that the House has brought, trying to get testimony from former counsel to President Trump, Donald McGahn. That case was just argued in the DC Circuit on January 3. So there is no established law suggesting that this immunity somehow has been rejected by the court. It is still being litigated right now. It is an immunity that is a standard principle asserted by every administration in both parties for the past 40 years. Asserting that principle cannot be treated as obstruction of Congress.

The third action that the President took—the third action that’s related to the fact that House Democrats’ subpoenas tried to shut out executive branch counsel, agency counsel from the depositions of executive branch employees. Now, the Office of Legal Counsel concluded that congressional committees may not bar agency counsel from assisting an executive branch witness without contravening the legitimate prerogatives of the executive branch and that attempting to enforce a subpoena while barring agency counsel would be “unconstitutional.”

The President relied on that legal advice here. As Judge Starr pointed out, the President was consulting with the Department of Justice, receiving advice from the very respected Office of Legal Counsel, and following that advice about the constitutional prerogatives of his office and the constitutional prerogatives of the executive branch. Again, as both political parties have recognized the important role that agency counsel plays.

In the Obama administration, the Office of Legal Counsel stated that the ability of agency counsel and potentially undermine the President’s constitutional authority to consider and assert executive privilege where appropriate.”

So why is agency counsel important? As I tried to explain, the executive privilege of confidentiality for communications with the President for internal deliberative communications of the executive branch—those are important legal rights. They are necessary for the proper functioning of the executive branch, and the agency counsel is essential to protect those legal rights.

When an individual employee goes in to testify, he or she might not know—probably would not know—that legal right for what is covered by executive privilege or deliberative process privilege—not things the employees necessarily know, and their personal counsel, even if they are permitted to have their personal counsel with them—so the personal attorney for employees don’t know the finer points of executive branch confidentiality interests or deliberative process privilege. It is also not their job to protect those interests. They are the personal lawyer for the employee who is testifying, trying to protect that employee from potential legal consequences.

We usually have lawyers to protect legal rights, so it makes sense when there are important legal and constitutionally based right at stake—the executive privilege—that there should be a lawyer there to protect that right for the executive branch, and that is the principle that the Office of Legal Counsel enjoys.

This also doesn’t raise any insurmountable problems for congressional investigations for finding information. In fact, just as recently as April of 2019, the House Committee on Oversight and Government Reform reached an accommodation with the Trump administration after the administration had declined to make someone available for a deposition because of the lack of agency counsel. That issue was worked out and accommodation was made, and there was some testimony provided in other circumstances. So it doesn’t always result in the kind of escalation that was seen here—straight to impeachment. The accommodation process can work things out.

House Democrats have pointed to a House rule that excludes agency counsel, but, of course, that House rule cannot override a constitutional privilege.
So those are the three principles that the Trump administration asserted. Now I would like to turn to the claim that somehow the assertion of these principles created an impeachable offense.

The idea that asserting defenses and immunity—legal defenses and immunity in response to subpoenas, acting on advice of the Department of Justice—is an impeachable offense is absurd and is dangerous for our government. Let me explain why.

House Democrats’ obstruction theory is wrong first and foremost because, in a government of laws, asserting privileges and rights to resist compulsion is not obstruction; it is a fundamental right. In Bordenkircher v. Hayes, the Supreme Court explains that to “punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional.”

This is a principle that in the past, in the Clinton impeachment, was recognized across the board, that it would be improper to suggest that asserting rights is an impeachable offense. Harvard law professor Laurence Tribe said: “The allegation that invoking privileges and otherwise using the judicial system to shield information...is an abuse of power that should lead to impeachment and removal from office is not only frivolous, but also dangerous.”

Manager NADLER said that the use of a legal privilege is not illegal or impeachable itself—a legal privilege, executive privilege. Minority Leader SCHUMER, in the Clinton impeachment, expressed the same view:

(Text of Videotape presentation:)

Mr. SCHUMER. To suggest that any subject of an investigation, much less the President—obligations to the institution of the presidency, is abusing power and interfering with an investigation by making legitimate legal claims, using due process and asserting constitutional rights, is beyond serious consideration.

Mr. Counsel PHILBIN. That was exactly correct then and it is exactly correct now.

More important than simply the principle that asserting rights can’t be considered obstruction, when the rights the President has asserted are based on executive privilege, when they are constitutionally grounded principles that are essential for the separation of powers and for protecting the institution of the presidency, is absolutely blocking. The House has to call that obstruction to turn the Constitution on its head. Defending the separation of powers can’t be deemed an impeachable offense without destroying the Constitution. Accepting that approach would do permanent damage to the separation of powers and would allow the House of Representatives to turn any disagreement with the Executive over informational demands into a supposed basis for removing the President from office. It would effectively create for us the very parliamentary system that the Framers sought to avoid because, by making any demand for information and goading the Executive to a refusal and then accusing it of impeachable defiance, the House would effectively be able to function with a no-confidence vote power. That is not the Framers’ design. The legislative and executive branches frequently clash on questions of investigation, including about congressional demands for information. These conflicts have happened since the founding.

In 1796, George Washington, our first President, resisted demands from Congress for information about the negotiation of the Jay Treaty, and there have been conflicts between the Executive and the Congress in virtually every administration since then about congressional demands for information.

The Founding Fathers expected the branches to have these conflicts. James Madison pointed out that “the legislative, executive, and judicial departments...must, in the exercise of its constitutional powers, intrude upon each other. It constitutes the Constitution according to its own interpretation of it.” It was recognized that there would be friction.

Similarly in Federalist 51, Madison pointed out that “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.” This is checks and balances, this friction, this clashing between the branches. It is not evidence of an impeachable offense. It is the separation of powers in its practical operation. It is part of the constitutional design. Executive must be right. Any resistant stance to their subpoena is obstruction. If you claim that our subpoena is invalid, we don’t have to do anything to address that concern; we will just impeach you because resistance is obstruction.

The House put it this way in their report to the Judiciary Committee. They effectively said that the House is the judge of its own powers, because what they said was “the Constitution gives the House the final word.” That is on page 154 of the House Judiciary Committee report:

What that is essentially saying—they point to the fact that article I, section 2, gives the House “the sole Power of Impeachment,” and they claim because it has the sole power of impeachment, the courts have no role; the House is the final word; it is the judge of its own powers. But that is contrary to constitutional design. There is no power that is unchecked in the Constitution. Madison pointed out that resistance to the House simply means that power is given solely to the House, not anywhere else.

Impeachment under the Constitution is the thermonuclear weapon of interbranch friction, and where there is something like a rifle or a bazooka at the House’s disposal to address some friction with the executive branch, this is the next step. Incrementalism in the Constitution—not jumping straight to impeachment—that is the solution.

If the House could jump straight to impeachment, that would alter the role of the courts between the branches. It would suggest that the House could make itself superior over the Executive to dangle the threat of impeachment over any demand for information made to the Executive.

That is contrary to the Framers’ plan. Madison explained that where the executive and legislative branches come into conflict, in Federalist No. 49, “[neither] of them, it is evident, can pretend to exclusive or superior right of settling the batteries between their respective powers.” But that is exactly what the House managers have asserted in this case. They have said that the House becomes supreme. There is no need for them to go to court. The Executive’s resistance is wrong. Any resistance to their subpoena is obstruction. If you claim that our subpoena is invalid, we don’t have to do anything to address that concern; we will just impeach you because resistance is obstruction of Congress.

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The Constitution does not say that the power of impeachment is the paramount power that makes all other constitutional rights and privileges and prerogatives of the other branches fall away.

The Framers recognized that there could be partisan impeachments and there could be impeachments for the wrong reasons, and they did not strip the executive branch of any of its needs for protecting its own sphere of authority and its own prerogatives under the Constitution. Those principles of executive privilege and those immunities still survive, even in the context of impeachment.

The power of impeachment is not like the House can simply flip a switch and say now we are in impeachment, and they have constitutional kryptonite that makes the powers of the executive eliminated. So when there are these conflicts, even in the context of impeachment inquiry, the executive prerogative to assert these privileges and prerogatives under the Constitution, and, indeed, it must in order to protect the institutional interests of the Office of the Presidency and to preserve the proper balance between the branches of government that we have designed, and it is categorical. Well, it is not a valid reason to not pursue litigation, that it is Congress that is not above the law. It is the House. The House has to follow the law as well. It has to issue valid subpoenas. And if the law isn’t followed, those subpoenas are null and void, and the Executive doesn’t have to comply with them. That is the ground on which they are litigating.

They say that they have no time for the courts. I think what that really means is they have no time for the rule of law in the way that they are pursuing the inquiry. The other day, one of the House managers actually said on the floor of the Senate that they had to get it moving. They couldn’t wait for litigation. They had to impeach the President before the election. That is not a valid reason to not pursue litigation in the courts.

I think it is relevant to bear in mind what sort of delay are we talking about? In the McNair case that are litigating right now, they have asserted that is part of the impeachment inquiry. The Trump administration has explained that it was not validly part of the impeachment inquiry, but that is the ground on which they are litigating under.

That is exactly what this Article of Impeachment would do. It would make the President dependent on the legislation because any demand for information, be it by Congress, could be used as a threat of impeachment to enforce compliance by the executive. The very theory of the House Democrats have asserted is that there can be no assertions of privileges and no constitutionally based prerogatives of the Executive to stand in the way.

If that theory were true, virtually every President could have been impeached. Virtually every President has asserted, at one time or another, these constitutional prerogatives. President Obama famously, in the Fast and Furious investigation, refused to turn over documents that led to his Attorney General being held in contempt of court. And didn’t lead to impeachment. It could be a long list. Professor Turley testified there could be a very long list of Presidents who would have to be distinguished if the principles being asserted now in this case were applied to all past Presidents in history.

Now, House Democrats have given a few different justifications for this approach to be reconciled with the Constitution. They say that if we cannot impeach the President for this obstruction, then the President is above the law. Not so. I think I pointed out that the President is above the law, asserting the plea, law, and relying on the legal advice from the Department of Justice to make his arguments based on long-recognized constitutional principles, and, indeed, is making the fundamental point, with respect to the subpoenas, that it is Congress that is not above the law. It is the House. The House has to follow the law as well. It has to issue valid subpoenas. And if the law isn’t followed, those subpoenas are null and void, and the Executive doesn’t have to comply with them.

The House Democrats say that they shouldn’t go to the courts because the courts have no role in impeachment. I think I pointed out that the House Democrats can’t say that they have the same constitutional position of the sole power of impeachment, that it is a paramount power, and that no other branch plays any role in providing a check on how the power is exercised. And in addition, the House Democrats themselves have acknowledged that.

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these proceedings without voting to authorize the committee to issue the subpoenas. That was the first unprecedented step. That is what had never happened before in history. So, of course, the response to that would be, in some sense, unprecedented. The President simply pointed out that without that vote, there were no valid subpoenas.

There have also been categorical rejections in the past. President Truman, when a House Committee on American Activities, in 1948, issued subpoenas to his administration, issued a directive to the entire executive branch that any subpoena or demand or request for information, reports, or files in the nature described in those subpoenas shall be respectfully declined on the basis of this directive, and he referred also to inquiries of the Office of the President for such response as the President may determine to be in the public interest. The Truman administration responded to none of them.

A last point on the House Democrats’ claim that privileges simply disappear because this is impeachment power of the House. They have referred a number of times to United States v. Nixon, the Supreme Court decision, suggesting that somehow determines that when you are in an impeachment inquiry, executive privilege falls away.

That is not true. In fact, United States v. Nixon actually involved a congressional subpoena. It was a subpoena from the special prosecutor, and even in that context, the Court did not state that executive privilege simply disappears. Instead, the Court said: “It is necessary to resolve these competing interests”—they are the interests of the judicial branch in administering a criminal prosecution in a case where the evidence was needed—“these competing interests in a manner that preserves the essential functions of each branch.”

And it even held out the possibility that in the field of foreign relations and national security, there might be something approaching an absolute executive privilege. That is exactly the field we are in, in this case—foreign relations and national security matters.

Another thing you have heard is that President Clinton voluntarily cooperated with the investigation that led to his addresses to United States v. Nixon, the Supreme Court decision, but that the House Judiciary Committee then explained “during the Lewinsky investigation, President Clinton abused his power through repeated privilege assertions of executive privilege by at least five of his aides.”

Unlike the House in this case, Independent Counsel Starr first negotiated with the White House, got them to vacate those claims and got them resolved. Ultimately, the House managers argued that all of the problems with their obstruction theory should be brushed aside and the President’s assertions of immunities and defenses have to be treated as something nefarious because, as Mr. Nadler said: Only guilty people try to hide the evidence. That is what he said from last Tuesday. And Mr. Schumer, similarly, in discussing the assertion of the executive branch’s constitutional rights, said: “The innocent do not act this way.”

Really? Is that the principle in the United States of America that if you assert legal privileges or rights, that means you are guilty? If the innocent don’t assert their rights, that the President can’t defend the constitutional prerogatives of his office?

That doesn’t make any sense. At bottom, the second Article of Impeachment comes down to a dispute over a legal issue relating to constitutional limits on the ability of the House to compel information from the Executive, and whether the President can try to dress up their charges, a difference of legal opinion does not rise to the level of impeachment.

Until now, the House has repeatedly rejected attempts to impeach the President for assertions over assertions of privilege. As Judge Starr pointed out, in the Clinton proceedings, the House Judiciary Committee concluded that the President had improperly exercised executive privilege—asserted an Article of Impeachment on this basis to impeach him. And at the Article of Impeachment based on Clinton’s assertions of privilege.

And as the House Democrat’s own witness, Professor Gerhardt, has explained, in 1843, President Tyler similarly was impeached on the ground that it did not have the ability to second-guess the rationale behind the President or what was in his mind asserting executive privilege, and it could not treat that as an impeachable offense. It rejected an Article of Impeachment based on Clinton’s assertions of privilege.

Professor Turley, who testified before the House, said we have three branches of government, not two. If you impeach a President, if you make a high crime and misdemeanor out of going to court, it is an abuse of power. It is your abuse of power.

With regard to executive privilege, it was Mr. Nadler who called it “executive privilege and other nonsense.”

When Attorney General Holder refused to comply with subpoenas, President Obama invoked executive privilege, arguing “compelled disclosure would be inconsistent with the separation of powers established in the Constitution”—“executive privilege and other nonsense.”

Manager SCHIFF wrote that the White House assertion of executive privilege was based on a precedent that has been recognized and has recognized the need for the President and his senior advisers to receive candid advice and information from their top aides—executive privilege and other nonsense.

We talked about this the other night. The nonsense is to treat the separation of powers and constitutional privileges as if they are asbestos in the ceiling tiles. You can’t touch them. That is not how the Constitution is designed.

We are going to now turn our attention to a separate topic. It is one that...
has been discussed a lot on the floor here and will be discussed now.

Presenting for the President is the former attorney general for the State of Florida, Pam Bondi. She is also a career prosecutor. She has handled complex financial cases. She is going to discuss an issue that the House managers have put pretty much at the center of their case, and that is the issue of corruption in Ukraine, particularly with regard to a company known as Burisma.

Mr. Chief Justice, Senators, Members of the Senate, when the House managers gave you their presentation, when they submitted their brief, they repeatedly referenced Hunter Biden and Burisma.

They spoke to you for over 21 hours, and they referred Biden or Burisma over 400 times. And when they gave these presentations, they said there was nothing—nothing—to see. It was a sham.

In their trial memorandum, the House managers described this as baseless. Why did they say that? Why did they invoke Biden or Burisma over 400 times? The reason they needed to do that is they are here arguing that the President must be impeached and removed from office for raising a concern, and that is why we have to talk about this today.

They say sham. They say baseless. They say this because if it is OK for someone to say, "hey, you know what, maybe there is something here worth raising," then, their case crumbles. They have to prove beyond a reasonable doubt that there is no basis to raise this concern, but that is not what public records show.

Here are just a few of the public sources that flagged questions surrounding this very same issue. The United Kingdom’s Serious Fraud Office, the former Secretary of State George Kent, Hunter Biden’s former business associate, ABC White House reporter, ABC’s Good Morning America, the Washington Post, the New York Times, Ukrainian law enforcement, and the Obama State Department itself—they all raised this issue.

We would prefer not to be talking about this. We would prefer not to be discussing this. But the House managers have put this squarely at issue. So we must address it.

Let’s look at the facts. In early 2014, Joe Biden, our Vice President of the United States, led the U.S. foreign policy in Ukraine with the goal of rooting out corruption. According to an annual study published by Transparency International, during this time, Ukraine was one of the most corrupt countries in the entire world.

There is a natural gas company in Ukraine called Burisma. Burisma has been owned by an oligarch named Mykola Zlochevsky. Here is what happened very shortly after Vice President Biden was made U.S. point man for Ukraine. His son Hunter Biden ends up on the board of Burisma, working for and paid by the oligarch Zlochevsky.

In February 2014, in the wake of anti-corruption uprising by the people of Ukraine, Zlochevsky flees the country, flees Ukraine. Zlochevsky, the oligarch, is well-known.

George Kent, the very first witness that the Democrats called during their public hearings, testified that Zlochevsky stood out for his self-dealings, even among other oligarchs. House managers didn’t tell you that.

Burisma was so corrupt that George Kent said he intervened to prevent USAID from cosponsoring an event with Burisma. Do you know what this event was? It was a child’s contest, and the prize was a camera. They were so bad—Burisma—that our country wouldn’t even cosponsor a children’s event with Burisma.

In March 2014, the United Kingdom’s Serious Fraud Office opened a money laundering investigation into the oligarch, Zlochevsky, and the company Burisma. The very next month, April 2014, according to a public report, Hunter Biden quietly joins the board of Burisma.

Remember, early 2014 was when Vice President Biden began leading Ukraine policy.

Here is how Hunter Biden came to join Burisma’s board in 2014. He was brought on the board by Devon Archer, his business partner. Devon Archer was college roommates with Chris Heinz, the stepson of Secretary of State John Kerry. All three men—Hunter Biden, Devon Archer, and Chris Heinz—all started an investment firm together.

Public records show that on April 16, 2014, Devon Archer meets with Vice President Biden at the White House. Just 2 days later, on April 18, 2014, Hunter Biden quietly joins Burisma. That is according to public reporting.

Remember, this is just 1 month after the United Kingdom’s Serious Fraud Office opened a money laundering case into Burisma, and Hunter Biden joins their board.

And not only 10 days after Hunter Biden joins the board, British authorities seized $23 million in British bank accounts connected to the oligarch Zlochevsky, the owner of Burisma. Did Hunter Biden leave the board then? No.

The British authorities also announced that they had started a criminal investigation into potential money laundering. Did Hunter Biden leave the board? No.

What happened was, then—and only then—did the company choose to announce that Hunter Biden had joined the board after the assets of Burisma and its oligarch owner, Zlochevsky, were frozen, a criminal investigation had begun. Hunter Biden’s decision to join Burisma raised flags almost immediately.

One article from May 2014 stated that, “the appointment of Joe Biden’s son to the board of the Ukrainian gas firm Burisma has raised eyebrows the world over.”

Even an outlet with bias for Democrats pointed out Hunter Biden’s activities created a conflict of interest for Joe Biden. The article stated: “The move raises questions about a potential conflict of interest for Joe Biden.”

Even Chris Heinz, Hunter Biden’s own business partner, had grave concerns. He thought that working with Burisma was unacceptable. This is Chris Heinz. He was worried about the corruption, the geopolitical risk, and how bad it would look. So he wisely stayed away from the Vice President’s son and Burisma.

He didn’t simply call his stepfather, the Secretary of State, and say: I have a problem with this. He didn’t tell his family. He, a guy on the board, I want nothing to do with this.

He went so far as to send an email to senior State Department officials about this issue. This is Chris Heinz. He wrote:

Apparently, Devon and Hunter have joined the board of Burisma, and a press release went out today. I can’t speak [to] why they decided to, but there is no investment by our firm in their company.

What did Hunter Biden do? He stayed on the board. What did Chris Heinz do? He subsequently stopped doing business with his college roommate Devon Archer and his friend Hunter Biden. Chris Heinz’ spokesperson said the lack of judgment in this matter was a major catalyst for Mr. Heinz ending his business relationship with Mr. Archer and Mr. Biden.

Now, the media also noticed. The same day, an ABC News reporter asked Obama White House Press Secretary Jay Carney about it. Here is what happened.

(Text of Videotape presentation:) Joe KARP. Hunter Biden is now taken a position with the largest oil and gas company—holding company in Ukraine. Is there any concern about at least the appearance of a conflict there—the Vice President’s son—the Secretary of State, and say: I have a problem with this. He didn’t tell his family. He, a guy on the board, I want nothing to do with this.

(Text of Videotape presentation:) Vice President BIDEN. You have to fight the cancer of corruption.
When speaking with ABC News about his qualifications to be on Burisma’s board, Hunter Biden didn’t point to any of the usual qualifications of a board member. Hunter Biden had no experience in natural gas, no experience in the energy sector, and no experience with Ukraine’s energy affairs. As far as we know, he doesn’t speak Ukrainian. So naturally the media has asked questions about his board membership. Why was Hunter Biden on this board? (Text of Videotape presentation:)

Ms. Counsel BONDI. Let’s go back and talk about his time on the board. Remember, he joined Burisma’s board in April 2014, while the United Kingdom was in the money laundering case against Burisma and its owner, the oligarch Zlochevsky. On August 20, 2014, 4 months later, the Ukrainian prosecutor general’s office initiates a money laundering investigation into the owner, the oligarch, Zlochevsky. This is one of 15 investigations into Burisma and Zlochevsky, according to a recent public statement made by the current prosecutor general.

On January 16, 2015, prosecutors put Zlochevsky, the owner of Burisma, on whose board Hunter Biden sat, on the country’s wanted list for fraud—while Hunter Biden is on the board.

Then British court orders that Zlochevsky’s $23 million in assets be unfrozen. Why was the money unfrozen? Deputy Assistant Secretary Kent testified to it. (Text of Videotape presentation:)

KENT. Somebody in the General Prosecutor’s Office of Ukraine shut the case, issued a letter to his lawyer, and that money went unfrozen.

KENT. So essentially paid a bribe to make the case go away.

KENT. That is our strong assumption, yes.

Ms. Counsel BONDI. He also testified that the Ukrainian prosecutor general’s office actions led to the unfreezing of the assets. After George Kent’s confirmation, that prosecutor was out. Viktor Shokin became prosecutor general. This is the prosecutor you will hear about later, the one Vice President Biden has publicly said he wanted out of office.

In addition to flagging questions about previous prosecutors’ actions, George Kent also specifically voiced other concerns—this time to the Vice President’s Office—about Hunter Biden. In February 2015, he raised concerns about Hunter Biden to Vice President Biden.

(Text of Videotape presentation:)

KENT. In a briefing call with the National Security staff in the Office of the Vice President in February 2015, I raised my concern about Hunter Biden, do you think you would’ve been asked to be on the board of Burisma? Mr. Hunter BIDEN. I don’t know. Probably not.

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Ms. Counsel BONDI. But House managers didn’t tell you that. This is all while Hunter Biden sat on Burisma’s board. Did Hunter Biden stop working for Burisma? No. Did Vice President Biden stop leading the Obama administration’s foreign policy efforts in Ukraine? No. In the meantime, Vice President Biden is still at the forefront of the U.S.-Ukraine policy. He pledges a billion-dollar loan guarantee to Ukraine contingent on its progress in rooting out corruption.

Around the same time as the $1 billion announcement, other people raised the issue of a conflict. As the Obama administration special envoy for energy policy told the New Yorker, he raised Hunter Biden’s participation on the board of Burisma directly with the Vice President himself. This is a special envoy to President Obama.

The media had questions too. On December 3, 2015, the Washington Post publishes an article that Prosecutor General Shokin was investigating Burisma and its owner, Zlochevsky. Here is their quote: “The credibility of the vice president’s anticorruption message may have been weakened by the association of his son, Hunter Biden,” with Burisma and its owner, Zlochevsky.

And it wasn’t just one reporter who asked questions about the relationship between Burisma and the Obama administration. As we learned recently through reporting on FOX News, on January 19, 2016, there was a meeting between Obama administration officials and Ukrainian prosecutors.

Ken Vogel, journalist for the New York Times, asked the State Department about this meeting. He wanted more information about the meeting “where U.S. support for prosecutions of Burisma Holdings in New York and the United Kingdom and Ukraine were discussed.” But the story never ran.

Around the time of the reported story—January 2016—a meeting between the Obama administration and Ukrainian officials was reported in a Ukrainian press report, as translated, says: The U.S. Department of State made it clear to the Ukrainian authorities that it was linking the $1 billion in loan guarantees to the dismissal of Prosecutor General Viktor Shokin.

Now, we all know the Obama administration, from the words of Vice President Biden himself—he advocated for the prosecutor general’s dismissal.

There was ongoing news about Zlochevsky and his business partners, including Hunter Biden. Days after the last call, on February 24, 2016, a DC consultant reached out to
the State Department to request a meeting to discuss Burisma. We know what she said because the email was released under the Freedom of Information Act. The consultant explicitly invoked Hunter Biden's name as a board member.

In an email summarizing the call, the State Department official says that the consultant noted that two high-profile citizens are affiliated with the company, including Hunter Biden as a board member. She added that the consultant told her to talk with Under Secretary of State Novelli about getting a better understanding of how the United States came to the determination that the country is corrupt.

To be clear, this email documents that the U.S. Government had determined Burisma to be corrupt, and the consultant was seeking a meeting with an extremely senior State Department official to discuss the U.S. Government’s position. Her pitch for the meeting included using Hunter Biden’s name, and according to the email, the meeting was set for a few days later.

Later that month, on March 29, 2016, the Ukrainian Parliament finally votes to fire the prosecutor general. This is the prosecutor general investigating the oligarch, owner of Burisma, on whose board Hunter Biden sat.

Two days after the prosecutor general is voted out, Vice President Biden announces that the United States will provide $35 million in security assistance to Ukraine. He soon announces that the United States will provide $1 billion in loan guarantees to Ukraine.

Let’s talk about one of the Democrats’ central witnesses: Ambassador Yovanovitch. In May 2016, Ambassador Yovanovitch was nominated to be Ambassador to Ukraine. She was highly qualified and was confirmed July 2016 as the Obama administration’s choice to lead the mission.

In mid-January 2017, Burisma announces that all legal proceedings against it and Zlochevsky have been closed. Both of these things happened while Hunter Biden sat on the board of Burisma. Around this time, Vice President Biden publicly sought to fire the prosecutor general.

Years later now, former Vice President Biden publicly details what we know happened: his threat to withhold more than $1 billion in loan guarantees unless Shokin was fired.

Here is the Vice President. (Text of Videotape presentation:)

Vice President BIDEN. I said I’m not—we are not going to give you the billion dollars. They said: You have no authority. You’re not the President. The President said—I said: Call him. I said: I’m telling you, you are not getting the billion dollars. I said: You are not getting the billion. I’m going to be leaving here in, I think it was about 6 hours. I looked at them and said: I’m leaving in six hours. If the prosecutor is not fired, you’re not getting the money. Well, son of a bitch. (Laughter.) He got fired. And they put in place someone who was solid at the time.

Ms. Counsel BONDI. What he didn’t say on the video—according to the New York Times, this was the prosecutor investigating Burisma, Shokin.

What he also didn’t say on the video was that his son was being paid significant amounts by the oligarch, owner of Burisma to sit on that board.

Only then does Hunter Biden leave the board. He stays on the board until April 2019. In November 2019, Hunter Biden signs an affidavit saying he ‘has been unemployed and has no other “monthly income since May 2019.”’

This was in November of 2019, so we know, from after April 2019 to May 2019 through November 2019, he was unemployed, by his own statement—April 2019 to May 2019.

Despite his resignation from the board, the media continued to raise the issue relating to a potential conflict of interest.

On July 22, 2019, the Washington Post wrote that Attorney General Shokin ‘believes hunters were because of his interest in the company’—referring to Burisma. The Post further wrote that ‘had he remained in his post, he would have questioned Hunter Biden.’

On July 25, 2019, 3 days later, President Trump speaks with President Zelensky. He said:

The other thing, there’s a lot of talk about Biden’s son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it . . . It looks horrible, horrible, horrible.

The House managers talked about the Bidens and Burisma 400 times, but they never gave you the full picture. But here are those who did: The United Kingdom’s Serious Fraud Unit; Deputy Assistant Secretary of State George Kent; Ukraine correspondent for the ABC White House reporter; ABC “Good Morning America”; the Washington Post; the New York Times; Ukrainian law enforcement; and the Obama State Department itself. They all thought there was cause to raise the issue about the Bidens and Burisma.

The House managers might say, without evidence, that everything we have heard has been debunked, that the evidence presented was unequivocally in the other direction. That is a distraction.

You have heard from the House managers. They do not believe that there was any concern to raise here, that all of this was based. And what they are saying is that there was a basis to talk about this, to raise this issue, and that is enough.

I yield my time.

The CHIEF JUSTICE. Mr. Sekulow, Mr. Counsel SEKULOW. Mr. Chief Justice. Majority Leader MCCONNELL, Democratic Leader SCHUMER. House managers, Members of the Senate, this will be our last presentation before dinner.

The next lawyer representing the President is Eric Herschmann. He is a partner in the Kasowitz firm, the law firm which has been representing the President for over two decades. He is a former prosecutor and trial lawyer, and he ran a natural gas company in the United States.

He is going to discuss additional evidence the House managers ignored or misstated and how other Presidents might have measured up under this new impeachment standard.

Mr. Counsel HERSCHEMANN. Mr. Chief Justice, Members of the Senate, I am Eric Herschmann. I have the honor and privilege of representing the President of the United States in these proceedings. I have been carefully listening to and reviewing the House managers’ case. That case pretty much boils down to one straightforward contention—that the President abused his power to promote his own personal interests and not our country’s interests.

The House managers say that the President did not take the steps that they allege for the benefit of our country but only for his own personal benefit. If that is wrong, if what the President had wanted would have benefited our country, then the managers have not met their burden, and these Articles of Impeachment must be rejected. As we will see, the House managers do not come close to meeting the burden. As a matter of fact, last week, Manager Schiff said that the investigations President Trump supposedly asked President Zelensky about on the July 25 call could not have been in the country’s interest because he said they were ‘“discredited entirely.”’ The House managers say that the investigations had been debunked; they were sham investigations. Now we have the question: Were they real?

The House managers in the over 21 hours of the repetitive presentation have never found the time to support those conclusory statements. Was it, in fact, true that any investigation had been debunked? The House managers do not
identify for you who supposedly conducted any investigations, who supposedly did the debunking, who discredited it. Where and when were any such investigations conducted? When were the results published? And much more left unaddressed.

Attorney General Bondi went through for you some of what we know about Burisma in its millions of dollars in payments to Vice President Biden’s son and his son’s business partner.

There is no question that any rational person will understand what happened. I am going to go through some additional evidence, which was easily available to the House managers but which they never sought or considered.

Based on what Attorney General Bondi told you in this additional evidence, you can judge for yourself whether the conduct was suspect. As you know, one of the issues concerned Hunter Biden’s involvement with the Ukrainian natural gas company, which paid Hunter Biden millions of dollars to serve on its board of directors. He did not have any relevant expertise or experience. He had no expertise or experience in the natural gas industry. He had no known expertise in corporate governance nor any expertise in Ukrainian law. He doesn’t, so far as we know, speak Ukrainian. So why—why—did Burisma want Hunter Biden on its board? Why did they want to pay him millions of dollars? Well, he did have one qualification. He was the son of the Vice President of the United States. He was the son of the man in charge of the Ukrainian portfolio for the prior administration. And we are to believe there is nothing to see here, that for anyone to investigate or inquire about this would be a sham—nothing to see here.

But tellingly, Hunter Biden’s attorney, on October 13, 2019, issued a statement on his behalf. He indicated that in April 2014, Hunter was asked to join the board of Burisma, then states Hunter stepped off Burisma’s board in April 2019.

Now listen to the commitment that Hunter Biden is supposedly willing to make to all of us. Hunter makes the following commitment: Under a Biden administration, Hunter will readily comply with any and all guidelines or standards a President Biden may issue to address purported conflicts of interest or the appearance of such conflicts, including any restrictions related to overseas business interests.

That statement almost tells us all we need to know; that is the rule that should have been in place in 2014 because there already was an Obama-Biden administration. What changed? What changed?

Remember a couple of minutes ago when I quoted an expert on Ukraine, the one who said that Ukraine must clean up its energy sector, the one who said that Ukraine’s senior elected officials have to remove all conflicts between their business interests and their government responsibilities.

As Attorney General Bondi said, here are the facts we do know about Hunter Biden’s involvement with Ukraine. Burisma, a Ukrainian natural gas company, paid Hunter Biden millions of dollars to serve on its board of directors. He did not have any relevant expertise or experience. He had no expertise or experience in the natural gas industry. He had no known expertise in corporate governance nor any expertise in Ukrainian law. He doesn’t, so far as we know, speak Ukrainian. So why—why—did Burisma want Hunter Biden on its board? Why did they want to pay him millions of dollars? Well, he did have one qualification. He was the son of the Vice President of the United States. He was the son of the man in charge of the Ukrainian portfolio for the prior administration. And we are to believe there is nothing to see here, that for anyone to investigate or inquire about this would be a sham—nothing to see here.

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Remember a couple of minutes ago when I quoted an expert on Ukraine, the one who said that Ukraine must clean up its energy sector, the one who said that Ukraine’s senior elected officials have to remove all conflicts between their business interests and their government responsibilities. You know who said that about Ukraine? Vice President Joe Biden in December of 2015.

Vice President Biden went to Ukraine approximately 12 to 13 times. He spoke with legislators, business people, and officials. He was purportedly fighting corruption in Ukraine. He was urging Ukraine to investigate and uproot corruption.

One thing he apparently did not do, however, was to tell his son not to trade on his family connections. He did not tell his son to especially stay away from the energy sector in the very corruption-ridden country Vice President Biden was responsible for.

And Manager Schiff says: Move along; there is nothing to see here. What are the House managers afraid of finding out? In an interview with ABC in October of last year, Hunter said he was on the board of Burisma to focus on principles of corporate governance and transparency.

(Text of Videotape presentation:)

Mr. HUNTER BIDEN. Bottom line is that I knew I was completely qualified to be on the board, to head up the corporate governance and transparency committee on the board. And that’s all that I focused on.

Mr. Counsel HERSHEYMAN. But when asked how much money Burisma was paying him, he responded he doesn’t want to “open his kimono” and disclose how much. He does refer to public reports about how much he was being paid, but as we now know, he was being paid far more than was considered.

(Text of Videotape presentation:)

Ms. ROBACH. You were paid $50,000 a month for your position?

Mr. HUNTER BIDEN. Look, I’m a private citizen. One thing that I do is sit here and open my kimono as it relates to how much money I make or made or didn’t. But it’s all been reported.

Mr. Counsel HERSHEYMAN. So what was the real reason that Hunter Biden, the Vice President’s son, was being paid by Burisma? Was it based on his knowledge and understanding of the natural gas industry in Ukraine? Was he going to discuss how our government regulates the industry here? Was he going to discuss how we set gas rates? Was he going to discuss pipeline development construction or environmental impact statements? Did he know anything about the natural gas industry at all? Of course not.

So what was the reason? I think you do not need to look any further than the explanation that Hunter Biden gave during the ABC interview when he was asked why.

Here is what he had to say.

(Text of Videotape presentation:)

Ms. ROBACH. If your last name wasn’t Biden, do you think you would have been asked to be on the board of Burisma?

Mr. HUNTER BIDEN. I don’t know. Probably no. I don’t think there are a lot of things that would have happened in my life if my last name wasn’t Biden.

Mr. Counsel HERSHEYMAN. And as if to confirm how absurd this product was that it should be a concern to our country, Hunter Biden and his lawyer could not even keep their story straight. Compare the press release that was issued by Burisma on May 12, 2014, with Hunter Biden’s lawyer’s statement on October 13 of 2019. The May 2014 press release begins: “R. [Robert] Hunter Biden will be in charge of holding’s legal unit.” He was going to be in charge of a Ukrainian gas company owned by an oligarch’s legal unit. However, in his lawyer’s statement in October of 2019, after his involvement with Burisma came under renewed public scrutiny, he now claims: “At no
time was Hunter in charge of the company’s legal affairs.”

Which is it? What was Hunter Biden doing at Burisma in exchange for millions of dollars? Who knows? What were they looking to hide so much for his corporate governance and transparency?

But let’s take a step back and realize what actually transpired, because the House managers would have us believe this had nothing at all to do with our government, nothing at all to do with our country’s interests, nothing at all to do with our Vice President, nothing at all to do with the State Department. It was simply private citizen Hunter Biden doing his own private business. It was purely coincidental that it was in his father’s portfolio in Ukraine, in the exact sector—the energy sector—that his father said was corrupt.

But we have a document here—again, something that House managers did not show you or even put before the House managers on these baseless Articles of Impeachment. If you look at that email, it is an email from Chris Heinz. And as Attorney Bondi already told you, he is the stepson of the then-Secretary of State John Kerry, and he was a previous business partner with Hunter Biden and Devon Archer. Our Secretary of State’s stepson and our Vice President’s son are in business together.

It was sent on May 13, 2014, to the official government email addresses of two senior people at the State Department. These two people are the Chief of Staff to the Secretary of State and the Special Adviser to the Secretary of State. The subject line in the email is not “corporate transparency.” It is not “corporate governance.” It is not “here’s a heads-up.” The subject line is “Ukraine.”

Chris Heinz certainly understood the sensitivity to our U.S. foreign policy. What does Secretary of State’s stepson say about Hunter Biden and Devon Archer? He says this:

Apparently Devon and Hunter both joined the board of Burisma and a press release went out today. I can’t speak to why they decided to, but there was no investment by our firm in their company.

What is the most telling thing about this? It is clear that the Chief of Staff and the Special Assistant to the Secretary already knew who Devon was because Mr. Heinz did not include his last name. It is just “Devon.” They obviously knew who Hunter was because, again, it is Hunter Biden. This is Chris Heinz saying: “I can’t speak to why they decided to join the board of Burisma. He is the business partner—not that there were good corporate reasons that they are going there for corporate governance, not that they are there to enhance corporate transparency, not that they are there to further our policy, not that they are there to help fight corruption in Ukraine, not that they are there to ensure boards of directors’ compensation and benefits are publicly dis-

closed—nothing like that. He cannot say those things because he knows Devon and Hunter well and he knows they have no particular qualifications, whatsoever, to do those things, especially for a Ukrainian gas company.

Instead, Mr. Heinz is planning to go on the record to say Hunter and Devon were doing through official channels to take pains to dissociate himself from what they were doing. And what did the State Department do with this information that the Secretary already knew that they needed to know? Apparently, nothing. They did not tell Mr. Heinz to stay away. They did not tell Mr. Heinz there is no problem—nothing. But all this, the House managers want us to believe, does not even merit any inquiry. Any one asking for one, anyone discussing one is now corrupt.

Does it matter in an inquiry why a corrupt company in a corrupt country would be paying our Vice President’s son? Well, yes, it does. It appears, some additional expenses, and paying his business partner an additional million dollars per year? Secretary of State Kerry’s stepson thought it was important enough to report. Why wasn’t the House managers concerned?

And I ask you, why would it not merit an investigation? You know something else about Vice President Biden? Well, back in January of 2018, as you heard, former Vice President Biden bragged that he had pressured the Ukrainians—threatened them, indeed, coerced them—into firing the state prosecutor who reportedly was investigating the very company that paid millions of dollars to his son. He bragged that he gave them 6 hours to fire the prosecutor or he would cut off $1 billion in U.S. loan guarantees.

(Video Taped presentation:)

Vice President BIDEN: I said: We’re not going to give you the billion dollars. They said: You’re the administrator. You’re not the President. The President said—

I said: Call him. I said: I’m telling you, you’re not getting billions. I said: You’re not getting the billion. I’m going to be leaving here in—I think it was, what—6 hours. I looked at him and said: I’m leaving in 6 hours. If the prosecutor is not fired, you’re not getting the billion.

Well, son of a bitch, he got fired, and they put in place someone who was solid at the time.

Mr. Counsel HERSCHMANN, are we really to believe it was the policy of our government to withhold $1 billion of guarantees to Ukraine unless they fired a prosecutor on the spot? Was that really our policy? We have all heard continuously from the managers and many agree about the risks to the Ukrainians posed by the Russians. We have heard the managers say that a slight delay in providing funding to Ukraine endangers our national security and jeopardizes our interests and, thereby, our President, and must be immediately removed from office. Yet, they also argue that it was the official policy of our country to withhold $1 billion unless one individual was fired within a certain matter of hours. Was that really or could it ever be our United States policy?

According to the House managers’ theory, we were willing to jeopardize our national security and jeopardize our interests and our government to withhold $1 billion unless one individual was fired within a certain matter of hours. Was that really or could it ever be our United States policy?

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But during this whole time, what else was happening? His son and his son’s business partner were raking in over $1 million a year from what was regarded as one of the most corrupt Ukrainian companies in the energy sector, owned and controlled by one of the most corrupt oligarchs. Were Vice President Biden’s words and advice to Ukraine just hollow? According to the House managers, the answer apparently is yes, they were empty words, at least when it came to anyone questioning him, his own sweetheart deal, his own son’s deal with Ukraine’s corruption and oligarchy.

Again, to raise Manager SCHIFF’s own question: What kind of message did this send to future U.S. Government officials? Your family can accept money from foreign corrupt companies? No problem. You can pay family members of our highest government officials, and no one is allowed to even ask questions.

What was going on? We have to just accept now the House managers’ conclusory statements, like “sham,” “discrediting,” even though no one has
ever investigated why. And can you imagine what House Manager Schiff and his fellow Democratic Representatives would say if it were President Trump’s children on an oligarch’s payroll?

And when it finally appeared that a true Ukrainian corruption fighter had assumed the country’s Presidency, President Trump was not supposed to— he was not permitted to— follow up on Vice President Biden’s own words about fighting corruption and try to make the new words something other than empty?

According to the House managers, Ukrainian corruption is now only a private interest. It no longer is a serious important concern for our country.

Now I want to take a moment to cover a few additional points about the July 25 telephone call in which the House managers believe that the President of the United States, in their words, was shaking down and pressuring the President of Ukraine to do his personal bidding.

First of all, this was not the first telephone call that the President of the United States had with other foreign leaders. Think about this for a moment, routed through the Situation Room. It was a scheduled call. There were other people on the call. There were other people taking notes. Obviously, the President was aware of that fact.

The House managers talked about the fact that the President did not follow the approved talking points as if the President—any President—is obligated to follow approved talking points. The last time I checked—and I think this is clear to the American people—President Trump knows how to speak his mind.

Do you remember the fake transcript that Manager Schiff read when he was before the Intelligence Committee—his mob, fake reading of the call? Well, I prosecuted organized crime for years. The type of description of what goes on—what House Manager Schiff tried to create for the American people—is completely detached from reality. It is as if we were supposed to believe that mobsters would invite people they do not know into an organized crime meeting to sit around and take notes to establish their corrupt intent.

Manager Schiff, our jobs as prosecutors—and I know you were one—would have been a lot easier if that were how it worked.

Think about what he is saying. Think about the managers’ position: that our President decided with corrupt intent to shake down, in their words, another foreign leader, and he decided to do it in front of everyone, in a documented conversation, in the presence of people he did not even know, just so he could get this personal benefit that was not in our country’s interest. That is flawed: this is completely illogical—because that is not what happened, and that is why Manager Schiff ran away from the actual transcript. That is why he created his own, fake conversation.

I would like to just address another point, for the transcript, of the July 25 phone call.

The House managers alleged that an Oval Office meeting with the President was critical to the newly elected Ukrainian President because it would signal to Russia, which had invaded Ukraine in 2014 and still occupied Ukrainian territory, that Ukraine could count on American support. They are essentially saying that it was a quid pro quo, that the President withheld this critical Oval Office meeting that would deter the Russians and save the Ukrainians because he wanted something personal.

Now, if that were, in fact, critical to President Zelensky for the safety of his own citizens, he would have immediately jumped at the opportunity to come to the Oval Office, especially when President Trump offered him that July 25 call.

Let’s see what President Zelensky actually said when he was invited to Washington on that call.

He does not say: Oh, this is what I would like to do. It is critical for my people. We will arrange it in a meeting. His response is:

I would be very happy to come and would be happy to meet you personally and get to know you better. On the other hand, I believe that it was a quid pro quo, that the President withheld this critical Oval Office meeting that would deter the Russians and save the Ukrainians because he wanted something personal.

If an Oval Office meeting were critical to President Zelensky, that was the time to say so, not to suggest another venue.

When we look at the evidence that is before us, it is clear that the only people who talked about having an Oval Office meeting were lower level government employees who thought it was a good idea. But for the principals involved, those who actually make the decisions—President Zelensky, President Trump—to them, it was not critical, it was not material, and it was definitely never a quid pro quo.

What was important to President Zelensky was an Oval Office meeting but the lethal weapons that President Trump supplied to Ukraine and the sanctions that President Trump enforced against the Russians. That is what the transcript of the July 25 call demonstrates.

Let us now consider what President Zelensky knew about the support that President Trump had provided to Ukraine compared to the support—or more accurately, the lack thereof—that the prior administration had provided to Ukraine.

In February 2004, Russia began its military campaign against Ukraine. Against the advice and urgings of Congress and of many in his own administration, President Obama refused then and throughout the remainder of his Presidency to provide lethal assistance to Ukraine.

In the House, Manager Schiff joined many of his colleagues in a letter-writing campaign to President Obama, urging “the U.S. must supply Ukraine with the means to defend itself” against Russian aggression, urging President Obama to quickly approve additional efforts to support Ukraine’s efforts to defend its sovereign territory, including the transfer of lethal defense weapons to the Ukraine military.

On March 23, the House of Representatives overwhelmingly passed a resolution urging President Obama to immediately exercise his authority by Congress to provide Ukraine with a lethal defensive weapons system.

The very next day, this Senate passed a unanimous resolution urging the President to prioritize and expedite the provision of defensive lethal and nonlethal military assistance to Ukraine, consistent with U.S. national interests and policies.

As one Senator here stated in March 2015, “Providing nonlethal equipment—night vision goggles is all well and good, but giving the Ukrainians the ability to see the Russians coming but not the ability to stop them is not the answer.”

Yet President Obama refused. He refused, even in the face of support by senior career professionals recommending he provide lethal weapons to the Ukrainians.

By contrast, what did President Zelensky and the Russians know? They knew that President Trump did—provide that support. That, clearly, was the most material thing to him, much more important than a meeting in the Oval Office.

The House managers also made much of the contention that President Trump supposedly wanted President Zelensky only to announce an investigation, not conduct it, but that contention makes no sense. President Trump’s call with President Zelensky was on July 25, 2019—almost a year and a half before our next election. Would only a bare announcement so far in advance, with no follow-up, really have had any effect on the election, as the managers claim? Would anyone have remembered the announcement a year or more later?

Ironically, it is the House managers who have put Burisma and its connection to the Bidens front and center in this proceeding, and now the voters will know about it and probably will remember it. Be careful what you wish for.

Manager Schiff—well, there he goes again. He is putting words in the President’s mouth that were never there. Again, look at the transcript of the July call. President Trump never asked about any announcement of any type of investigation, and President Zelensky told President Trump:

I guarantee, as the President of Ukraine, that all the investigations will be done open—literally, I guarantee you. That can assure you.

What happened next?

The House managers say President Zelensky did not want to get mixed up
largely in U.S. politics, but it is precisely the Democrats who politicized the issue.

Last August, they began circling the wagons in trying to protect Vice President Biden, and they are still doing it in these proceedings. They contend that there would be no investigation, no million of dollars of payments by a corrupt Ukraine company—owned by a corrupt Ukraine oligarch—to the son of the second highest officeholder in our land, who was supposed to be in charge of fighting corruption in Ukraine, to be a sham, debunked. But there has never been an investigation, so how could it be a sham—simply because the House managers say so?

What bugs me is that another one of the House managers’ baseless contentions—that President Trump raised the matter with President Zelensky because Vice President Biden had just announced his candidacy for President. But, of course, it was far from a secret that Vice President Biden was planning to run.

What had, in fact, changed?

First, President Zelensky had been elected in April, in an anti-corruption platform, his party took control of the Ukrainian Parliament. That made it the opportune time to raise the issue because finally there was a receptive government in Ukraine that was committed to fighting precisely the kind of highly questionable conduct displayed by Burisma in its payments to Hunter Biden and his partner, just as Joe Biden had raised years before.

There are two other things.

In late June, ABC News ran a story entitled “Hunter Biden’s foreign deals. Did Joe Biden’s son profit off of his father’s position as Vice President?”

Then, just a couple of weeks before President Trump’s telephone call with President Zelensky, the New Yorker magazine—not exactly a supporter of President Trump’s—ran an expose—“Will Hunter Biden Jeffersonize His Father?”—and went through some of the facts that we do know about Hunter Biden’s involvement with Burisma and his involvement with the Chinese company.

The New Yorker reporter—again, this was in July, just a couple of weeks before the phone call—said that some of Vice President Biden’s advisers were worried that Hunter would expose the Vice President to criticism.

A White House aide told the New Yorker reporter that Hunter’s behavior invited questions about whether he was leveraging access for his benefit.” The reporter wrote: “When I asked members of Biden’s staff whether they did raise their concern with the Vice President, several of them said they had been too intimidated to do so.”

“Everyone who works for him has been screamed at,” a former adviser told the reporter. “I don’t know whether anyone was even intimidated by Vice President Biden or has been screamed at by him about Burisma or his son’s involvement.”

Do we want the type of government where questions about facially suspect conduct are suppressed or dismissed as illegitimate because someone is intimidating or screaming or is just too important? No. That is precisely when an investigation is most important.

Last Thursday night, Manager Jeffries provided us with the Democrats’ standard for abuse of power. He said: “Abuse of power occurs when the President exercises his official power to benefit while ignoring or injuring the national interest.”

Mr. Jeffries and the House managers contend that, under this standard, President Trump has committed an impeachable offense and must be immediately removed from office. But if Manager Jeffries’ standard applies, then where were these same Democrats’ calls for impeachment when uncontroversial, smoking-gun evidence emerged that President Obama had violated their standard?

The American people understand this basic notion as equal justice under the law. It is as American as apple pie. Yet, the basic notion as equal justice under the law. It is as American as apple pie. Yet, their own version of selective justice emerged that President Obama had violated their standard?

How important was the issue of missile defense to the strategic relationship between the United States and Russia?

As President Obama’s Defense Secretary Robert Gates said in June 2010, upgraded missile interceptors in development “would give us the ability to protect our troops, our bases, our families and our allies in Europe.”

There is no meeting of the minds on missile defense. The Russians hate it. They have hated it since the late 1960s. They will always hate it, mostly because we will build it, and they won’t.

During the Nuclear Security Summit, President Obama had a private exchange with Russian President Medvedev that was picked up on a hot microphone.

(Text of Videotape presentation:)

President OBAMA. This is my last election. After my election, I will have more flexibility.

President MEDVEDEV. I understand, I will transmit this information to Vladimir, and I stand with you.

President Obama said:“On all these issues, but particularly missile defense, this can be solved, but it’s important that we go through the facts.”

President Medvedev responded:“Yeah, I understand. I understand your message about space. Space for you.”
ROMNEY said Russia was the greatest geopolitical threat to the U.S. ator ROMNEY for saying. In fact, they when it is politically convenient, the Cold War’s been over for 20 years. their foreign policy back because, you know, the 1980s are now calling to ask for biggest geopolitical threat facing America, decided to scrap the U.S. plans to install Ukraine.

President Obama’s abuse of power to benefit his own political interests was there and is here now for everyone to hear. It was a direct, unquestionable quid pro quo. No mind reading was needed there. Where were the House managers then?

And that points out the absurdity of the House managers case against President Trump. It was President Obama, not President Trump, who was weak on Russia and weak on support to Ukraine.

President Obama caved to Russia and Putin on defense when he decided to scrap the U.S. plans to install missile bases in Poland. Yet he critici- zed Senator ROMNEY during the 2012 Presidential campaign when Senator ROMNEY said Russia was the greatest geopolitical threat to the U.S. (Text of Videotape presentation:)

President Obama. I’m glad that you rec- ognize that al-Qaeda’s a threat because a few months ago when you were asked what’s the biggest threat facing America, you said Russia. Not al-Qaeda, you said Rus- sia, and the 1980s are now calling to ask for their foreign policy back because, you know, the Cold War’s been over for 20 years.

Mr. Counsel HERSCHMANN. Now, when it is politically convenient, the Democrats are saying the same thing that President Obama criticized Sena- tor ROMNEY for saying. In fact, they are basing their entire politicized im- peachment on a version of reality, this claim that President Trump is not supporting Ukraine far more than the prior administration.

President Obama caved on missile de- fense in late 2009. His hot mic moment occurred in March 2012. His re-election was 8 months later. Two years later, in March 2014, Russia invaded Ukraine and annexed Crimea. President Obama refused to provide lethal aid to Ukraine to enable it to defend itself. Where were the House managers then?

The House managers would have the American people believe that there is a threat—an imminent threat—to the national security of our country for which the President must be removed immediately from the highest office in the land because of what? Because he had a phone call with a foreign leader and discussed corruption? Because he paused for a short period of time giving away our tax dollars to a foreign country? That is not how it is supposed to work. It is absurd on its face. Not one American life was in jeopardy or lost by this short delay, and they know it. And how do we know that they know it? Because they went on vacation after they adopted the Articles of Impeachment. They did not cancel their recess. They did not rush back to de- liver the Articles of Impeachment to the Senate. They did not have their supposed terrible imminent threat to our na- tional security. What did they do? (Text of Videotape presentation:)

Speaker PELOSI. Urgency. Mr. SCHIFF. Timing is really driven by the urgency. Mr. SWALWELL. The urgency. Mr. NADLER. Nothing could be more ur- gent. Mr. RICHMOND. The urgency. Speaker PELOSI. And urgent. And urgent. Mr. SWALWELL. There is an urgency, you know, to this.

Mr. NADLER. Then we must move swiftly. Mr. SWALWELL. We don’t have time to screw around.

Speaker PELOSI. It’s about urgency. Mr. TAPPER. House Speaker NANCY PELOSI is still holding on to the Articles of Impeachment.

Mr. Counsel HERSCHMANN. Ur- gency? Urgency, for which you want to immediately remove the President of the United States? You sat on the arti- cles for a month—the longest delay in the history of our country.

They adopted them on Friday, De- cember 13, 2019—Friday the 13th—went on vacation, and finally decided after one of their Democratic Presidential debates had finished and after the BCS football championship game, that it was time to deliver the charges.

What happened to their national se- curity interest argument? Wasn’t that the reason that they said they had to rush to vote? It is urgent, they told us. No due process for this President. It is a crisis of monumental proportion. Our national security is at risk every addi- tional day that he is in office, they tell us.

The House managers also used the same excuse for not issuing subpoenas as an excuse for not providing.Football championship game, that it is equally true today. Divisiveness and bitterness, the House did not fol- low his admonition. They did not heed his advice, and that is one of the rea- sons we are sitting here today with Ar- ticles of Impeachment that are not found in our Constitution or the evi- dence and are brought simply for par- tisan politics.

This is a sad time for all of us. This is not a time to give out souvenirs, the pens used to sign two Articles of Impeachment, trying to improperly im- peach our country’s representative to the world.

President Obama’s abuse of power to benefit his own political interests was there and is here now for everyone to hear. It was a direct, unquestionable quid pro quo. No mind reading was needed there. Where were the House managers then?

And that points out the absurdity of the House managers case against President Trump. It was President Obama, not President Trump, who was weak on Russia and weak on support to Ukraine.

President Obama caved to Russia and Putin on defense when he decided to scrap the U.S. plans to install missile bases in Poland. Yet he critici- zed Senator ROMNEY during the 2012 Presidential campaign when Senator ROMNEY said Russia was the greatest geopolitical threat to the U.S. (Text of Videotape presentation:)

President Obama. I’m glad that you rec- ognize that al-Qaeda’s a threat because a few months ago when you were asked what’s the biggest threat facing America, you said Russia. Not al-Qaeda, you said Rus- sia, and the 1980s are now calling to ask for their foreign policy back because, you know, the Cold War’s been over for 20 years.

Mr. Counsel HERSCHMANN. Now, when it is politically convenient, the Democrats are saying the same thing that President Obama criticized Sena- tor ROMNEY for saying. In fact, they are basing their entire politicized im- peachment on a version of reality, this claim that President Trump is not supporting Ukraine far more than the prior administration.

President Obama caved on missile de- fense in late 2009. His hot mic moment occurred in March 2012. His re-election was 8 months later. Two years later, in March 2014, Russia invaded Ukraine and annexed Crimea. President Obama refused to provide lethal aid to Ukraine to enable it to defend itself. Where were the House managers then?

The House managers would have the American people believe that there is a threat—an imminent threat—to the national security of our country for which the President must be removed immediately from the highest office in the land because of what? Because he had a phone call with a foreign leader and discussed corruption? Because he paused for a short period of time giving away our tax dollars to a foreign country? That is not how it is supposed to work. It is absurd on its face. Not one American life was in jeopardy or lost by this short delay, and they know it. And how do we know that they know it? Because they went on vacation after they adopted the Articles of Impeachment. They did not cancel their recess. They did not rush back to de- liver the Articles of Impeachment to the Senate. They did not have their supposed terrible imminent threat to our na- tional security. What did they do? (Text of Videotape presentation:)

Speaker PELOSI. Urgency. Mr. SCHIFF. Timing is really driven by the urgency. Mr. SWALWELL. The urgency. Mr. NADLER. Nothing could be more ur- gent. Mr. RICHMOND. The urgency. Speaker PELOSI. And urgent. And urgent. Mr. SWALWELL. There is an urgency, you know, to this.

Mr. NADLER. Then we must move swiftly. Mr. SWALWELL. We don’t have time to screw around.

Speaker PELOSI. It’s about urgency. Mr. TAPPER. House Speaker NANCY PELOSI is still holding on to the Articles of Impeachment.

Mr. Counsel HERSCHMANN. Ur- gency? Urgency, for which you want to immediately remove the President of the United States? You sat on the arti- cles for a month—the longest delay in the history of our country.

They adopted them on Friday, De- cember 13, 2019—Friday the 13th—went on vacation, and finally decided after one of their Democratic Presidential debates had finished and after the BCS football championship game, that it was time to deliver the charges.

What happened to their national se- curity interest argument? Wasn’t that the reason that they said they had to rush to vote? It is urgent, they told us. No due process for this President. It is a crisis of monumental proportion. Our national security is at risk every addi- tional day that he is in office, they tell us.

The House managers also used the same excuse for not issuing subpoenas as an excuse for not providing. Football championship game, that it is equally true today. Divisiveness and bitterness, the House did not fol- low his admonition. They did not heed his advice, and that is one of the rea- sons we are sitting here today with Ar- ticles of Impeachment that are not found in our Constitution or the evi- dence and are brought simply for par- tisan politics.

This is a sad time for all of us. This is not a time to give out souvenirs, the pens used to sign two Articles of Impeachment, trying to improperly im- peach our country’s representative to the world.

This is not the time to try to get digs in that the President will always be impeached because we had the major- ity and we could do it to you and we did it to you. It is wrong. It is not what the American people deserve or want. Sadly, the House managers do not trust their fellow Americans to choose their own President. They do not think
that they can legitimately win an election against President Trump, so they need to rush to impeach him immediately. That is what they have continually told the American people, and that—that is a shame.

We vote in the other hand, trust our fellow Americans to choose their President. Choose your candidate. Let the Senators who are here who are trying to become the Democratic nominee try to win that election, and let the American people choose.

May—maybe they are concerned that the American people like historically low unemployment. Maybe the American people like that their 401(k) accounts have done extremely well. Maybe the American people like prison reform and giving people a second chance.

Tellingly, some of these House managers worked constructively with this administration to give Americans a second chance. That was the public interest. That is what the country demands. That is what society deserves.

Maybe the American people like an administration that is fighting the opioid epidemic. Maybe the American people like secure borders. Maybe the American people like better trade agreements with our biggest trading partners. Maybe the American people like other countries sharing in the burden when it comes to foreign aid. Maybe the American people actually like the American people like their current President—a President who has kept his promises and delivered on them.

If you think Americans want to abandon our prosperity and our unprecedented successes under this President, then convince the electorate in November at the ballot box. Do not try to improperly interfere with an election that is only months away, based on these Articles of Impeachment.

In your trial memorandum that you submitted here before the Senate, you speak about the Framers of the Constitution believing that President Trump’s alleged conduct is their “worst nightmare” and that they would be horrified.

In fact, sadly, sadly, it is the House managers’ conduct in bringing these baseless Articles of Impeachment that would clearly be their and our worst nightmare. That was the public interest. That is what society deserves.

The CHIEF JUSTICE. The majority leader is recognized.

RECESS

Mr. MCCONNELL. Mr. Chief Justice, I think we are looking at a 45-minute break for dinner.

I ask unanimous consent that the Senate stand in recess.

There being no objection, at 6:01 p.m., the Senate, sitting as a Court of Impeachment, recessed until 6:48 p.m., and thereupon reassembled when called to order by the Chief Justice.

The CHIEF JUSTICE. The Senate will come to order. Ready to proceed?

Mr. Counsel SEKULOW. Yes, sir.

Mr. Chief Justice, Members of the Senate, House managers, we are going to do two things this evening. We are going to first hear from former independent counsel Robert Ray. He is going to discuss issues of how he was involved in the investigation, the legal issues, the merits of how that works, and then we will conclude this evening with a presentation from Professor Dershowitz.

With that, I yield my time, Mr. Chief Justice, to Robert Ray.

Mr. Counsel RAY. Mr. Chief Justice, Members of the Senate, distinguished House managers, and may it please this Court of Impeachment, I stand before you today in defense of my fellow Americans, who in November 2016 elected Donald Trump to serve the people as their President. Their reasons for that vote were as varied as any important decisions are, but their collective judgment, accepted as legitimate under our Constitution, is deserving of my respect.

For only the third time in our Nation’s history, the Senate is convened to try the President of the United States on Articles of Impeachment. Those articles do not allege crimes. The Constitution makes it clear that, and historical practice all dictate that well-founded Articles of Impeachment allege both that a high crime has been committed, and that, as such, removal from office is warranted only when such an offense also constitutes an abuse of the public trust; that is, in the case of the President, a violation of his oath of office. Both are required and neither one, by clear and unmistakable evidence, is shown here by these Articles of Impeachment.

I am here this evening in this Chamber distinctly privileged to represent and defend the President of the United States on the facts, on the law, and on the constitutional principles that must be preserved. I am one of the six Republicans in the Senate, in deciding the great question of whether these articles warrant, with or without witnesses, the removal of the President from office.

Because there is and can be no basis in these articles on which the Senate can or should convict a President on what is alleged, the President must not be removed from office. That judgment is reserved to the people in the ordinary course of elections, the next of which is months away. Now, 40 years ago, in 1980, I first came to Capitol Hill as a legal intern for a Congressman who only 6 years earlier had played an important and critical role in the impeachment proceedings against President Richard Nixon. The Congressman of whom I speak, whom I came to respect immensely, served then, in 1974, in the House Judiciary Committee. He was tasked in the summer of 1974, together with his colleagues, in evaluating and determining: What House managers here have, Articles of Impeachment. Those articles included the crime of obstruction of justice, abuse of power, and obstruction of Congress. But unlike how House managers—and, indeed, the entire House—45 years later in December 2019 proceeded here, bipartisan consensus in 1974, among both House Democrats and House Republicans, was the President’s removal from office. Indeed, it became apparent then, that narrow partisan views aside, the House Judiciary Committee would step into the breach only insofar as evidence of criminal Presidential conduct warranted.

The tapes of Oval Office conversations involving the President provided that evidence. The Supreme Court, in effect, overruled the claim of executive privilege and ordered the release of the tapes to the House Judiciary Committee.

As a result, 3 days later, the high crime of obstruction of justice, including suborning perjury tethered to a second Article of Impeachment, alleging abuse of power, was approved by the House Judiciary Committee by a vote of 27 to 11 and 28 to 10, respectively.

The second Article of Impeachment alleged, among other things, unlawful use of the CIA and its resources, including covert activity in the United States and interference with the law enforcement actions of the FBI to advance the coverup; that is, the criminal conspiracy to obstruct justice charge in the first Article of Impeachment.

The crimes alleged were serious, involving unlawful surveillance of an opposing political party, paying hush money out of a White House safe to burglars and other co-conspirators to silence cooperation with law enforcement, and attempts to alter testimony under oath.

Six Republican House committee members joined as Republican witnesses in supporting those two articles. My Congressman was among those six Republican House Members. Another one of the six was then a young Congressman from Maine, who later became a Member of this body, sitting in the Senate as a Senator and later as President Bill Clinton’s Secretary of Defense. That young Congressman was Bill Cohen. A third of the six was Representative Caldwell Butler, a Republican from Virginia, whose papers are housed at Washington and Lee University in Lexington, VA, in the State where I grew up and where I later went to law school.

Together, these six Republicans made history. They did so with no sense of triumph—in today’s parlance, no fist bumps—but in the words of my Congressman, only “with deep reluctance” and only because the evidence was so clear and unmistakable. Already the activity of the President in a criminal coverup that was—in the concluding language of the first Article of Impeachment—“contrary to his trust as President.”

As to the third article in the Nixon impeachment, that article charging obstruction of Congress did not enjoy bipartisan support but instead was voted
on by the House Judiciary Committee along party lines by a vote of 21 to 17. Republicans objected then to the third article in the face of the President’s good-faith prior claim to executive privilege by withholding certain evidence until such time as the matter was definitively resolved by the Supreme Court.

My point in mentioning these three votes by the House Judiciary Committee is simply this: Count votes, and do the math. I understand that you all have been obsessed by your phones and, thus, a calculator app, so I will do it for you.

A 27-to-11 vote was not only bipartisan, as I have indicated, but overwhelmingly so—indeed, over 70 percent; that is to say, greater than a two-thirds supermajority.

That vote sent a powerful signal to the full House and indeed the Senate that impeachment was overwhelmingly bipartisan and, therefore, politically and legally legitimate.

President Nixon’s fate was sealed, and the result was inevitable. Thus, less than 2 weeks after that initial committee vote on impeachment, the President resigned.

During the course of those proceedings, my Congressman commented simply and plainly that it was, in his words, “a great American tragedy.” But the greater point was—and is—that impeachment was never designed or intended to be used as a calculator tool and was to be undertaken only as a last resort.

This then brings me to what was intended by the Framers of the Constitution relative to impeachment. That subject was addressed at some length by my colleague Professor Dershowitz, but, for now, let me just say that much has been said by House managers in reliance on Alexander Hamilton’s oft-quoted statement in Federalist No. 65. That is the one repeatedly taken out of context and cited in favor of an expansive scope of jurisdiction by Congress over alleged offenses.

In Hamilton’s words, “which proceed from misconduct of [a] public [official constituting] the abuse or violation of some public trust.” The irony that Hamilton—the greatest proponent in this country of executive and Presidential authority that perhaps ever lived—should be front and center in this partisan impeachment effort to remove a duly elected President from office is apparently lost on House impeachment managers. I dare say that Hamilton would roll over in his grave at the end of Wall Street in New York City to know that, contrary to what he explicitly acknowledged in Federalist No. 69, a President can only be removed from office “upon conviction of treason, bribery, or other high crimes and misdemeanors. We should just read the word ‘crime’ right out of the impeachment clause of the Constitution and proceed merrily along the way toward an impeachment trial, with witnesses, no less, of a President duly elected by the people. And for what? Articles of Impeachment that do not even allege crimes.

President Trump is right. That course, if sustained, cheapens the impeachment process and, thus, is an American travesty. Indeed, during the impeachment trial 21 years ago in January 1999, none other than President Clinton’s highly respected White House Counsel Charles Ruff stood and quipped, as the managers do, that the phrase ‘other high crimes and misdemeanors’ was really meant to encompass a wide range of offenses . . . simply flies in the face of the clear intent of the framers, who carefully chose their language, knew exactly what those words meant and knew exactly what risk they intended to promote against.” Counsel Ruff went on to explain: One of those concerns and risks was that “impeachment be limited and well defined.”

For our purposes here, what is required is both that crimes be alleged and that those crimes be of the type that, in particular, are so serious that they—again, in Mr. Ruff’s words—“subvert our system of government and would justify overturning a popular election.” Otherwise, what you have—in Tocqueville’s words—is legislative tyranny.

I respectfully submit, Members of the Senate, taken in its proper context, that is what Alexander Hamilton well understood and meant, and so did my Congressman. That Congressman was, of course, Mr. Howard “Chuck” Ruff. Actually, he was not really a junior but Hamilton Fish IV. His great-grandfather was also Hamilton Fish, who was born in 1808, later served as Governor of New York, a U.S. Senator immediately before the Civil War, and, notably, as President Ulysses Grant’s Secretary of State. But at the time back in 1980, what I didn’t realize—even though now, perhaps, it is so obvious—the original Hamilton Fish was named after his parents’ best friend, none other than Alexander Hamilton himself.

What Congressman Hamilton Fish, from the Watergate era, courageously understood is the same historical lesson that Jeffrey A. Engel, founding director of the Center for Presidential History at Southern Methodist University, has written about in a coauthored 2018 book on impeachment:

The charge must be treason, bribery or other high crimes and misdemeanors. It must be one for which clear and unmistakable proof can be produced. Only if the evidence actually produced against the President is indeed irrefutable such that his own conscience—by an overwhelming 63 million people, like me, who voted for President Trump—accept his guilt of the offense charged in order to overwhelmingly persuade a supermajority of Americans, and, thus, their Senators, of malfeasance, warranting his removal from office.

And, finally, because it is the President of the United States, after all, that we are talking about here, the repository of and entrusted under the Constitution with all of the executive power of the United States—in other words, an entire branch of government—removal from office cannot be based upon an impeachable offense or offenses which are not only huge but encompassing more than—paraphrasing President Gerald Ford now—whatever a partisan majority of the House of Representatives considers them to be.

To supplement that cited statement 56 years ago, in 1970, from then-Congressman Jerry Ford in connection with the prospect of potentially impeaching a Supreme Court Justice, Ford pointedly clarified that executive branch impeachments are different because voters can remove the President, the Vice President, and all persons holding office at their pleasure at least every 4 years. To remove a President in midterm—it has been tried before and never done—would indeed, he said, require crimes of the magnitude of treason and bribery.

Professor Akhil Amar of Yale Law School made largely the same point during the Clinton impeachment about the danger presented through Presidential impeachment of transforming an entire branch of government:

When they remove a duly elected President, they undo the votes of millions of ordinary Americans on Election Day. This is not something that Senators should do lightly, lest we slide toward a kind of parliamentary government that our entire structure of government was designed to repudiate.

In hammering home the constitutional uniqueness of Presidential impeachment—following the Republicans’ success in the Senate, taken in its proper context, as a matter of principle rather than policy—the history of the 1974 impeachment of President Nixon is instructive.

Indeed, during the impeachment trial of President Nixon, the articles unanimously adopted by the House of Representatives considered and abandoned.

At least in the case of President Clinton’s impeachment, the articles actually charged crimes. The Senate thereafter determined, by its vote in that case, in effect, that while those crimes—perjury and obstruction of justice—may have been committed, those crimes were not high enough crimes damaging to the body politic to warrant the President’s removal from office.

That judgment was, of course, within this body’s discretion to render, and it has been accepted as such by the country—whether you agreed with it or...
The lesson for me was a simple one that I am sure every American citizen, whatever their own experience or political perspective, can understand: Be humble and act with humility. Never be too sure that you are right.

Thus, during the past 4 months alone, we have witnessed the endless procession of legal theories used to sustain this partisan impeachment—from treason to quid pro quo, to bribery, to extortion, to obstruction of justice, to soliciting an illegal foreign campaign contribution, to the Impeachment of Justice’s Principles of Federal Impoundment Control Act—to who knows what all is next.

What you are left with, then, are constitutionally deficient articles abandoning any pretense of the need to allege specific acts of bribery, extortion, or weapon, if you will, in order to damage the President politically in an election year.

It is, I submit, decidedly not in the country’s best interest to have the prosecution of the grave issue of impeachment and the drastic prospect of removal from office become just politics by other means, any more than it would be appropriate for the huge power of prosecution of offenses under the Federal Criminal Code to be exercised not on the merits, without fear or favor, but instead as a raw, naked, and pernicious exercise of partisan power and advantage.

I have spent the better part of my professional life, for over 30 years—as a Federal prosecutor for 13 years through two independent counsel investigations and now as a defense lawyer for over 17 years—trying my level best always to ensure that politics and prosecution do not mix. It must not happen here. A standardless and partisan impeachment is illegitimate and should be rejected as such overwhelmingly by this body, I hope and submit, or alternatively and, if need be, by only a partial summary resolution in favor of acquittal or dismissal.

Turning now to what the House managers have alleged, regarding the first article, the House Judiciary Committee report on impeachment contains a rather extraordinary statement. It says as follows: “Although President Trump’s actions need not rise to the level of a criminal violation to justify impeachment, his conduct here was criminal.” So, in short, we needn’t bother in an impeachment Article III subtitle of the Constitution with a crime, implicitly recognizing that there is insufficient evidence to prove that such a crime was committed, but we are going to say that the President’s conduct was criminal nonetheless. Aside from being exceedingly unfair to call something criminal and not stand behind the allegation and actually charge it, it just ain’t so.

In conclusion, I hope and submit Hakeem Jeffries argue before this body that he and his team have overwhelming evidence of an explicit—his word, not mine—quid pro quo by the President; that is, an explicit, purported, and proposed exchange by President Trump of something of personal benefit to himself in return for an official act by the U.S. Government.

As I have explained as far back as November of last year in a TIME magazine cover story, the problem with this legal theory is that an unlawful quid pro quo is limited to those arrangements that are corrupt; that is to say, only those that are clearly and unmistakably improper are therefore illegal. And, in the eyes of the law, the spe- cific arrangements that are measurable cannot be imputed, consistent with the Department of Justice’s Principles of Federal Impoundment Control Act—to who knows what all is next.

The price paid by President Clinton was indeed high, and it stemmed, in the end, from the need to vindicate the principle, first raised most prominently during Watergate, that no person, including the President, is above the law.

Despite President Clinton’s subsequent protestation in his memoirs that I was just another Federal prosecutor out to extract, in his words, a pound of flesh from the President to this day with agreeing to do what was necessary in order to exercise my discretion not to prosecute; namely, that for the good of the country and recognizing the unique place that the President—in deed, any President—occupies in our constitutional government, accountability and discretion go hand in hand and permitted—indeed, demanded—such an appropriate resolution. It enabled the country to move on, and it was a more, a far more, a far more of Bill Clinton than to any credit I received or deserved that we were able to reach agreement and avoid any further partisan recriminations or interference with the will of the American people in electing and reelecting President Clinton in the first place—and his successor, President George W. Bush.

In short, I was absolutely mindful and exceedingly concerned throughout my tenure as independent counsel that, although crimes had been committed, Bill Clinton was the elected, official placed in office by voters throughout the Nation and head of the executive branch, and I was not.
upon his military experience, and hav-
ing listened in on the call, by a supe-
rior officer—in this case, the Com-
mander in Chief—as the same thing as an
order in the chain of command.
While all of this may be true in the
military, it goes without saying that
President Zelensky, as the leader and
head of a sovereign nation, was not and
is not in our military chain of com-
mand.
I say that to you. Members of the
Senate, as the son of a U.S. Army col-
nel and Vietnam war veteran buried in
Arlington National Cemetery and as
the father of a U.S. Army major cur-
rently serving with President Trump's
Space Force Command in Aurora, CO,
near Denver.
With all due respect, Lieutenant
Colonel Vindman’s testimony in this
regard is at best, I submit to you, dis-
torted and unpersuasive.
Next, there was an implicit link be-
tween foreign aid and the investiga-
tions, or the announcement of them, is
weak. The most that Ambassador Gor-
don Sondland was able to give was his
presumption that such a link likely ex-
isted. This presumption was flatly con-
traded by the President's express
denial of the existence of a quid pro
quo to Ambassador Sondland as well as
to Senator Ron Johnson.
The President was emphatic to Am-
bassador Sondland. The President said:
I want nothing. I want no quid pro quo. I
just want Zelensky to do the right thing, to
do what he ran on.
And to Senator Johnson, the same
thing. Senator Johnson asked: "No way.
" Recognizing this flaw in the testi-
mony, House managers have focused
instead on an alternate quid pro quo
rationale, that the exchange was condi-
tioned on a foreign head-of-state meet-
ing at the White House in return for
Ukraine publicly announcing an inves-
tigation of the Bidens.
In the House Judiciary report, it
states as follows: "It is beyond ques-
tion that without the White House’s
constitute a ‘formal exercise of govern-
mental power’ within the meaning of
McDonnell."
Not so fast. Actually, the Supreme
Court in McDonnell helpfully boiled it
down to only those acts that constitute
the formal exercise of government power
and that are more specific and
focused than a broad policy objective.
An exchange resulting in meetings,
events, phone calls, as those terms are
typically understood as being routine,
according to the Supreme Court’s defi-
nition of an official act, do not count.
The fact that the meeting involved
was a formal one, with all of the
trappings of a state visit by the Presi-
dent and the White House hosting
President of the United States, makes
no difference. The Supreme Court is
talking about an official act as a for-
amal exercise of decision-making power,
not the formality of the visit. Even if
the allegation were true, this could not
constitute a quid pro quo.
I should know. I argued, in effect, the
contrary proposition in United States
v. Sun-Diamond before the Supreme
Court over 20 years ago in 1999. That
proposition lost—unanimously. The
vote was 9 to 0.

In any event, the coveted meeting—
and it was, after all, just a meeting,
those kind of meetings the White
House hosts, that was not permanently
withheld. It later happened between the
President of the United States with the
President at the United Nations in New
York City at the first available opportu-
nity in September 2019.

Finally, the argument by Chairman
Jerry Nadler that this call by Presi-
dent Trump with President Zelensky
represented an “extortionate demand”
is patently ridiculous. The essential
element of the crime of extortion is
pressure. No pressure was exercised or
exerted during the call. Ukrainian offi-
cials, including President Zelensky
himself, have since repeatedly denied
that any such pressure existed. Indeed,
to the contrary, the evidence strongly
suggests Ukraine was perfectly capable
of resisting any efforts to entangle
itself in United States domestic party
politics and partisanship.

What, then, remains of the first Arti-
cle of Impeachment? No crimes were
committed. Indeed, no crimes were
mentioned on a foreign head-of-state meet-
ing what in the formal exercise of govern-
ment that official White House visits
ment may temporarily withhold funds
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violation of the Tenure of Office Act,
more compelling basis for Johnson’s re-
moval from office from the one that the
House of Representatives actually
voted on and the Senate considered at his
impeachment trial.

There has been an awful lot of that
going on in this impeachment trial—sub-
textual and subtextual interpretations for the ones that the principles actu-
ally and explicitly insist on.

At any rate, a President’s so-called
illegitimate motives in wielding power
can no more frame and legitimize the
Johnson impeachment than recasting the
Nixon impeachment as really about his motives in defying Congress over
the country’s foreign policy in Viet-
nam. Again, all of that may be true, but it has nothing to do with impeach-
ment. Not only that, it is also bad his-
tory.

As recognized 65 years ago by then-
Senator John F. Kennedy in his book
“Profiles in Courage,” President John-
son was saved from removal from office by one courageous Senator who recognized the legislative
overreach that the Tenure of Office Act
represented.

Quoting now from Senator Edmund G. Ross in “Profiles in Courage,” who explained his vote as follows:

The independence of the executive office as a coordinate branch of the government was on trial. . . . If . . . the President must step down . . . upon insufficient proofs and from partisan considerations the office of Presi-
dent would be degraded.

So, too, here. Contrary, apparently
to the fashion now, Senator Ross’s ac-
tion eventually was praised and accept-
ed several decades after his service and again many years later by President
Kennedy as a courageous stand against
legislative mob rule. Professor Der-
showitz will have more to say about one
other courageous Senator from that
impeachment. More on that later.

For now, the point is that our history
demonstrates that Presidents should not be subject to impeachment based upon bad or ill motives, and any
thought to the contrary should strike
you, I submit, as exceedingly dan-
gerous to our constitutional structure of
government.

If that were the standard, what Presi-
dent would ever be safe by way of im-
peachment from what Hamilton de-
cried as the “persecution of an inter-
perate or designing majority in the House of Representa-
tives”? The central import of the abuse of
power Article of Impeachment—indeed,
when added together with the obstruc-
tion of justice article—is a result not far off from what one citizen tweet I
saw back in December described as ar-
ticle I, Democrats don’t like President
Trump; article II, Democrats can’t beat
President Trump.

President Trump is not removable from office just because a designing
majority in the House, as represented by the White House counsel, also believes that the
President abused the power of his office
during the July 25 call with President
Zelensky. The Constitution requires
more. To ignore the requirement of
proving that a crime was committed is to sidestep the constitutional design as well as the lessons of history.

I know that many of you may come
to conclude, or may have already con-
cluded, that impeachment cannot be
perfect. I have said on any number of oc-
casions previously—and publicly—that it would have been better, in attempt-
ing to spur action by a foreign govern-
ment in coordinating law enforcement
efforts with our government, to have
cooperated through proper channels. While
the President certainly enjoys the power to do otherwise, there is con-
sequence to that action, as we have now witnessed. After all, that is why
we are all here.

But it is another thing altogether to claim that such conduct is clearly and
unmistakably impeachable as an abuse of power. There can be no serious ques-
tion that this President, or any Presi-
dent, acts lawfully in requesting for-
dig or law enforcement investigations into possible corruption, even when it
might potentially involve another politi-
cian.

To argue otherwise would be to en-
gage in the specious contention that a
President can no more frame and legit-
imate his motives in defying Congress over
the country’s foreign policy in Viet-
nam than recasting the Nixon impeach-
ment from what Hamilton de-
clared as an abuse of power article—is a result not
added together with the obstruc-
tion of justice article—is a result not

White House Counsel Don McGahn’s testimony, grand jury material, and other documents has been drawn out since April of last year, I can only say in response: Boo-hoo.

Did I think at the time that many of those assertions were frivolous and an abuse of the judicial process? Of course. And, indeed, that was the determination of the House Judiciary Committee during the Clinton impeachment. What did they do about it? Nothing. The committee properly concluded that those assertions of privilege, even if ill-founded, did not constitute an impeachable offense. Did I believe that the Clinton administration’s actions in this regard have adversely impacted our investigation? You bet I did. And I said so in the final report. But never did I seriously consider that those efforts by the White House, although endlessly frustrating and damaging to the independent counsel’s investigation, would constitute the obstruction of justice or any related impeachable offense for obstruction of Congress. Instead, I and my colleagues did the best that we could in reaching an accommodation with the White House where possible or through litigation, when necessary, in order to complete the task at hand, to the best of our ability to do so.

Any contention that what has transpired here involving this administration’s assertion of valid and well-recognized privileges and immunities is somehow contrary to law and impeachable is ludicrous. In short, to add to the parade of criminal offenses not sustained on this impeachment, there was no obstruction of justice or of Congress, period.

The President cannot be impeached and removed from office for asserting, subject to judicial review, what he has every right to assert. That is true now, as it has been true of every President all the way back to President George Washington.

In short, as to both Articles of Impeachment, all the President is asking for here is basic fairness and to be held to the very same standard that both his predecessors and those Presidents who may be charged with corruption, criminal procedure, constitutional litigation, legal ethics, and even courses on impeachment. He will address the constitutional issues for a bit and then I will begin, as all constitutional analysis begins, with the text of the Constitution governing impeachment. I

Democrats is not, I submit, in the best interest of this country because in the final analysis, we will all be judged in the eyes of history on whether, in this moment, we act with the country’s overriding welfare firmly in mind rather than in advancing the cause of partisan political advantage.

I have always believed as an article of faith that in good times and in hard times and even in bad times, with matters of importance at stake, that this country gets the big things right. I have never believed and for my own experience, even in Washington, DC.

Well, Members of the Senate, this, what lies before you now, is just such a big thing. The next election awaits.

As Senator Dale Bumpers eloquently concluded in arguing against President Clinton’s removal from office:

"That is the day when we reach across this aisle and hold hands, Democrats and Republicans, and say, so long, the political warfare, the judicial warfare, the legal warfare, the criminal warfare, the criminal procedure, constitutional litigation, legal ethics, and even courses on impeachment. He will address the constitutional issues raised by these articles.

Mr. Counsel DERSHOWITZ. Mr. Chief Justice, distinguished Members of the Senate, our friends, lawyers, fellow lawyers, it is a great honor for me to stand before you today to present a constitutional argument against the impeachment and removal not only of this President but of all and any future Presidents who may be charged with the unconstitutional ground of abuse or obstruction of Congress. I

January 27, 2020

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...in some form, is all that is left. Otherwise, as Abraham Lincoln warned us during his first inaugural address:

"If the minority will not acquiesce . . . the government must cease. So that rejecting the majority principle, anarchy . . . in form, is all that is left.

This impeachment and the refusal to accept the results of the last election in 2016 cannot be left to stand. For the reasons stated, the Articles of Impeachment, therefore, should be rejected, and the President must be acquitted.

Members of the Senate, thank you very much.

With that, Mr. Chief Justice, I yield back to Mr. Sekulow.

Thank you.

Mr. Counsel SEKULOW. Mr. Chief Justice, we are going to now delve into the constitutional issues for a bit and our presenter is Professor Alan Dershowitz. He is the Felix Frankfurter Professor Emeritus of Harvard Law School. After serving as a law clerk for Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia, he served as a law clerk for Justice Arthur Goldberg at the U.S. Supreme Court. At the age of 28, Professor Dershowitz became the youngest tenured professor at Harvard Law School. Mr. Dershowitz spent 50 years as an active faculty member at Harvard, teaching generations of law students, including several Members of this Chamber, in classes ranging from criminal law to constitutional law, criminal procedure, constitutional litigation, legal ethics, and even courses on impeachment. He will address the constitutional issues raised by these articles.

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Mr. Counsel DERSHOWITZ. Mr. Chief Justice, distinguished Members of the Senate, our friends, lawyers, fellow lawyers, it is a great honor for me to
will then examine why the Framers selected the words they did as the sole criteria authorizing impeachment. In making my presentation, I will transport you back to a hot summer in Philadelphia and a cold winter in Washington. I will introduce you to the patriots and ideas that helped shape our great Nation.

To prepare for this journey, I have immersed myself in a lot of dusty old volumes, volumes 18th and 19th century. I ask your indulgence as I quote from the wisdom of our Founders. This return to the days of yesteryear is necessary because the issue today is not what the criteria of impeachment should be, not what a legislative body or a constitutional body might today decide are the proper criteria for impeachment of a President but what the Framers of our Constitution actually chose and what they expressly and implicitly included.

I will ask whether the Framers would have accepted such vague and open-ended terms as “abuse of power” and “obstruction of Congress” as governing criteria. By close review of the history that they did not and would not accept such criteria for fear that these criteria would turn our new Republic into a British-style parliamentary democracy in which the Chief Executive’s tenure would be, in the words of James Madison, father of our Constitution, “at the pleasure” of the legislature.

The conclusion I will offer for your consideration is similar, though not identical, to what was advocated by a highly respected Justice Benjamin Curtis, who, as you know, dissented from the Supreme Court’s notorious decision in Dred Scott, and who, after resigning in protest from the High Court, served as counsel to President Andrew Johnson in the Senate impeachment trial. He argued that “there can be no crime, there can be no misdemeanor without a law, written or unwritten, express or implied.”

In so arguing, he was echoing the conclusion reached by Dean Theodore Dwight of the Columbia Law School, who wrote in 1867, just before the impeachment, that “unless the crime is specifically named in the Constitution”—treason and bribery—“impeachments, like indictments, can only be instituted for crimes committed against the statutory law of the United States.” As Judge Starr said earlier today, that is as the only position taken by the highest court of authority being on the side of that proposition at a time much closer to the framing than we are today.

The main thrust of my argument, however, and the one most relevant to these proceedings is that even if that position is not accepted, even if criminal conduct were not required, the Framers of our Constitution implicitly rejected—and, if it had been presented to them, would have explicitly rejected—such vague terms as “abuse of power” and “obstruction of Congress” as among the enumerated and defined criteria for impeaching a President.

You will recall in the many Articles of Impeachment against President Johnson were accusations of non-criminal but outrageous misbehavior, including ones akin to abuse of power and obstruction of Congress. For example, article X charged Johnson “did attempt to bring into disgrace, ridicle, hatred, contempt and reproach, the Congress of the United States.” Article XI charged Johnson with denying that Congress was [a]uthorized by the Constitution to exercise the legislative power and denying that “[t]he legislation of said Congress was obligatory upon him.” Those are pretty serious charges.

Here is how Justice Curtis responded to these noncriminal charges:

My first position is, that when the Constitution speaks of treason, bribery, and other crimes and misdemeanors, it refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.

I will briefly review those other provisions of the Constitution with you. Judge Curtis’s interpretation is supported by a long view compelled by the constitutional text. Treason, bribery, and other high crimes and misdemeanors are high crimes. Other high crimes and misdemeanors must be akin to treason and bribery. Curtis cited the Latin phrase “Nec scribitur a sedis”—a rule for the inference for my pronunciation—referring to a classic rule of interpretation that when the meaning of a word that is part of a group of words is uncertain, you should look to the other words in that group that provide interpretive context.

The late Justice Antonin Scalia gave the following current example. If one speaks of Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors, the last noun does not “refer to an interpretation of high crimes and misdemeanors that changes according to the law of each Senator’s judgment, enacted in his own bosom after the alleged commission of the offense.” Though he desperately wanted to see President Johnson, whom he despised, out of office, he believed that an impeachment removal without the violation of law would be “construed into approval of impeachments as part of future political machinery.”

According to Professor Bowie, Justice Curtis’s constitutional arguments may well have contributed to the decision by at least some of the seven Republican dissidents to defy their party and vote for acquittal, which was secured by a single vote.

Today, Professor Bowie has an article in the New York Times in which he repeats his view of “impeachment requires a crime,” but he now argues that the Articles of Impeachment do charge crimes. He is simply wrong. He is wrong, he knows it is wrong because, in the United States v. Hudson—a case decided almost more than 200 years ago now—the U.S. Supreme Court ruled that Federal courts have no jurisdiction to create common law crimes. Crimes are only what are in the statute book.

So Professor Bowie is right that the Constitution requires a crime for impeachment but wrong when he says that common law crimes can be used as a basis for impeaching even though they don’t appear in the statute books.

Now, I am not here arguing that the current distinguished Members of the Senate are in any way bound—legally.
bound—by Justice Curtis’s arguments or those of Dean Dwight, but I am arguing that you should give them serious consideration—the consideration to which they are entitled by the essence of their author and the role they may have played in the outcome of the closest precedent to the current case.

I want to be clear. There is a nuanced difference between the arguments made by Curtis and Dwight and the argument that I am presenting here today based on my reading of history. Curtis argued that there must be a specific violation of preexisting law. He recognized that, at the time of the Constitution, there were no Federal criminal statutes. Of course not. The Constitution established a national government, so we couldn’t have statutes prior to the establishment of our Constitution and our Nation.

This argument is offered today by proponents of this impeachment on the claim that the Framers could not have intended the criteria for impeachment to criminal-like behavior. Justice Curtis addressed that issue and that argument head-on.

He pointed out that crimes such as bribery would be outside criminal law by the laws of the United States, which the Framers of the Constitution knew would be passed. In other words, he anticipated that Congress would soon enact statutes punishing and defining crimes such as burglary, extortion, perjury, and others. He anticipated that, and he based his argument, in part, on that.

The Constitution already included treason as a crime, and that was defined in the Constitution itself, and then it included other crimes; but what Justice Curtis said is that you could include laws, “written or unwritten, express or implied”—by which he meant common law, which, at the time of the Constitution, there were many common crimes—and they were enforceable, even federally, until the Supreme Court, many years later, decided that common law crimes were no longer part of federal jurisdiction.

So the position that I have derived from history would include—and this is a word that will upset some people—criminal-like conduct akin to treason and bribery. There need not be, in my view, conclusive evidence of a technical crime that would necessarily result in a criminal conviction. Let me explain.

For example, if a President were to receive or give a bribe outside of the United States and outside of the statute of limitations, he could not technically be prosecuted in the United States for such a crime, but I believe he could be impeached for such a crime because he committed the crime of bribery even though he couldn’t technically be accused of it in the United States. That is the distinction that I think was made by President Ford in his case, and it was different.

I want to start by saying that this is precisely the kind of view expressed rejected by the Framers, who feared having a President serve at the “pleasure” of the legislature, and it is precisely the view rejected by Senator James Grimes when he refused to accept impeachment offenses because these crimes, though not specified in the Constitution, are akin to treason and bribery. This would be true even if some of the technical elements—time and place—were absent.

What Curtis and Dwight and I agree upon—and this is the key point in this impeachment case; please understand what I am arguing—is that purely noncriminal conduct, including abuse of power and corruption of Congress, are outside the range of impeachable offenses. That is the key argument I am presenting today.

This view was supported by text writers and judges close in time to the founding of our nation. William Russell, whose 1819 treatise on criminal law was a Bible among criminal law scholars and others, defined “high crimes and misdemeanors” as “such immoral and unlawful acts as are nearly allied, and in equal degree, to the execution of a felony; and yet, owing to the absence of some technical circumstances”—technical circumstances—“do not fall within the definition of a felony.” Similar views were expressed by some State courts.

Curtis’s considered views and those of Dwight, Russell, and others, based on careful study of the text and history, are not “bonkers,” “absurdist,” “legal claptrap,” or other demeaning epithets thrown around by partisan supporters of this impeachment. As Judge Starr pointed out, they have the weight of authority. They were accepted by the generation of the Founders and the generation that followed. If they are not accepted by academicians today, that shows a weakness among the academics, not among the Founders. Those who disagree with Curtis’s textual analysis are obliged, I believe, to respond with better interpretations, not name-calling.

If Justice Curtis’s arguments and those of Dean Dwight are rejected, I think then proponents of impeachment must offer alternative principles and alternative standards for impeachment and removal.

We just heard that, in 1970, Congressman Gerald Ford, whom I greatly admired, said the following in the context of an impeachment of justice: “[A]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” et cetera. You all know the quote.

Congresswoman MAXINE WATERS recently put it more succinctly in the context of a Presidential impeachment. Here is what she said:

Impeachment is whatever Congress says it is. There is no law.

But this lawless view would place Congress above the law. It would place Congress above the Constitution. For Congress to ignore the specific words of the Constitution itself and substitute its own judgments would be for Congress to disregard that it is accusing the President of doing—and no one is above the law, not the President and not Congress.

This is precisely the kind of view expressed rejected by the Framers, who feared having a President serve at the “pleasure” of the legislature, and it is precisely the view rejected by Senator James Grimes when he refused to accept impeachment offenses that would change “according to the law of each Senator’s judgment, enacted in his own bosom.”

The Constitution requires, in the words of Gouverneur Morris, that the “case” for impeachment be “enumerated and defined.” Those who advocate impeachment today are obligated to demonstrate how the criteria accepted by the House in this case are enumerated and defined in the Constitution.

The compelling textual analysis provided by Justice Curtis is confirmed by the debate in the Constitutional Convention, by the Federalist Papers, by the writings of William Blackstone, and, I believe, by the writings of Alexander Hamilton, which were heavily relied on by lawyers at the time of the Constitution’s adoption.

There were at the time of the Constitution’s adoption two great debates that went on, and it is very important to understand the distinction between these two great debates. It is hard to imagine today, but the first was, Should there be any power to impeach a President at all? There were several members of the founding generation and of the Framers of the Constitution who said no—who said, no, a President shouldn’t be allowed to be impeached. The second—and the second is very, very important in our consideration today—is, If a President is to be subject to impeachment, what should the criteria be? These are very different issues, and they are often erroneously conflated.

Let’s start with the first debate.

During the broad debate about whether a President should be subject to impeachment, proponents of impeachment used terms such as “abuse,” “misconduct,” “misbehavior,” “negligence,” “malpractice,” “perfidy,” “treachery,” “incapacity,” “peculation,” and “maladministration.” They worried that a President might “pervert his administration into a scheme of speculation and oppression”; that he might be “corrupted by foreign influence”; and—yes, this is important—that he might have “great opportunities of abusing his power.”

Those were the concerns that led the Framers to decide that a President must be subject to impeachment, but not a single one of the Framers suggested that they believed that the need for an impeachment and removal mechanism should automatically be accepted as a specific criterion for impeachment. Far from it.

In 1802 Gouverneur Morris aptly put it: “[C]orruption and some other offenses . . . ought to be impeachable, but . . . the cases ought to be enumerated and defined.”
The great fallacy of many contemporary scholars and pundits, and, with due respect, Members of the House of Representatives is that they fail to understand the critical distinction between the broad reasons for needing an impeachment mechanism and the carefully enumerated and defined criteria that should authorize the deployment of this powerful weapon.

Let me give you a hypothetical example that might have faced Congress or, certainly, will face Congress. Let us assume that there is a debate over regulating the content of social media—whether we should have regulations or criminal, civil regulations over Twitter or Facebook, et cetera. In the debate over regulating the social media, proponents of regulation might well cite broad dangers, such as false information, inappropriate content, hate speech, and so forth. Those are good reasons for having regulation; but when it came to enumerating and defining what should be prohibited, such broad dangers would have to be balanced against other important policies, and the resulting legislation would be much narrower and more carefully defined than the broad dangers that necessitated some regulation.

The Framers understood and acted on this difference, but I am afraid that many scholars and others and Members of Congress fail to see this distinction, and they cite some of the fears that led to the need for an impeachment mechanism. They cite them as the criteria themselves. That is a deep fallacy, and it is crucially important that the distinction be sharply drawn between arguments made in favor of impeaching and the criteria then decided upon to justify the impeachment specifically of the President.

The Framers understood this, and so they got down to the difficult business of enumerating and defining precisely which offenses, among the many that they feared could [not] be balanced against other important policies, and the resulting legislation would be much narrower and more carefully defined than the broad dangers that necessitated some regulation.

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Some Framers, such as Roger Sherman, wanted the President to be removable by “the National legislature” at its “pleasure,” much like the Prime Minister can be removed by a simple vote of no confidence by Parliament. That view was rejected.

Benjamin Franklin opposed decidedly the making of the Executive “the mere creature of the legislature.”

Gouverneur Morris was against “a dependence of the Executive on the Legislature, considering the Legislature”—you will pardon me for quoting this—“a great danger to be apprehended.”

I don’t agree with that.

James Madison expressed concern about the President being improperly dependent on the legislature. Others worried about a feebly executive.

Heard are the other arguments against turning the New Republic into a parliamentary democracy, in which the legislature had the power to remove the President, the Framers set out to strike the appropriate balance between the broad concerns that led them to vote for a provision authorizing the impeachment of the President and the need for specific criteria not subject to legislative abuse or overreach.

Among the criteria proposed were: malpractice, neglect of duty, malconduct, neglect in the execution of office, and—and this word we will come back to talk about—maladministration.

It was in response to that last term, a term used in Britain, as a criteria for impeachment that Madison responded: “So vague a term will be equivalent to a tenure during the pleasure of the Senate.”

Upon hearing Madison’s objections Colonel Mason withdrew “maladministration” and substituted “other high crimes and misdemeanors.”

Had a delegate proposed inclusion of “abuse of power” or “obstruction of Congress” as enumerated and defined criteria for impeachment, history strongly suggests that Madison would have similarly opposed it, and it would have been rejected.

I will come back to that argument a little later on when I talk specifically about abuse of power.

Indeed, Madison worried that a partisan legislature could even misuse the word “misdemeanor” to include a broad array of noncrimes, so he proposed moving the trial to the nonpartisan Supreme Court. The proposal was rejected.

Now, this does not mean, as some have suggested, that Madison suddenly changed his mind and favored such misuse to expand the meaning of “misdemeanor” to include broad terms like “misbehavior.” No, it only meant that he feared—he feared that the word “misdemeanor” could be abused. His fear has been proved prescient by the misuse of that term, “high crimes and misdemeanors,” by the House, in this case.

Now, the best evidence that the broad concerns cited by the Framers to justify impeachment were not automatically accepted as criteria justifying impeachment is the manner by which the word “incapacity”—focus on that word, please—incapacity was treated.

Madison and others focused heavily on the problem of what happens if a President becomes incapacitated. Certainly, a President who is incapacitated should not be allowed to continue to preside over this great country. And everyone seemed to agree that the possibility of Presidential incapacity is a good and powerful reason for having impeachment.

But when it came time to establishing criteria for actually removing a President, “incapacity” was not included. Why not? Presumably because it was too vague and subjective a term.

And when the Woodrow Wilson second term, he was not impeached and removed.

A constitutional amendment with carefully drawn procedural safeguards against abuse was required to remedy the daunting problem of a President who was deemed incapacitated.

Now, another reason why incapacitation was not included in impeachable offenses is because it is not criminal. It is not a crime to be incapacitated. It is not akin to treason. It is not akin to bribery, and it is not a high crime and misdemeanor.

The Framers believed that impeachable offenses must be criminal in nature and akin to the most serious crimes. Incapacity simply did not fit into this category. Nothing criminal about it.

So the Constitution had to be amended to include a different category of noncriminal behavior that warranted removal.

I urge you to consider seriously that important part of the history of the adoption of our Constitution.

I think that Blackstone and Hamilton also support this view.

There is no disagreement over the conclusion that the words “treason, bribery, or other high crimes”—those words require criminal behavior. The debate is only over the words “and misdemeanors.” The Framers of the Constitution were fully cognizant of the fact that the word “misdemeanor” was a species of crime.

The book that was most often deemed authoritative was written by William Blackstone of Great Britain, and, from what he says about this in the version that was available to the Framers:

A crime, or misdemeanor, is an act committed or omitted, in violation of the (public) law, either forbidding or commanding it. The general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonomous terms.

Mere synonomous terms. He went on to say:

[Though, in common usage, the word “crimes” is made to denote such offenses are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of “misdemeanors” only.

Interestingly, though, he pointed out that misdemeanors were not always so gentle.

There was a category called “capital misdemeanors,” where if you stole somebody’s pig or other fowl, you could be sentenced to death, but it was only for a misdemeanor. Don’t worry. It is not for a felony. But there were misdemeanors that were capital in nature.

Moreover, Blackstone wrote that parliamentary impeachment “is a prosecution”—a prosecution—of already known and established law (presented) to the lowest high and Supreme Court of criminal jurisdiction—-analogous to this great court.

He observed that “[a] commoner [can be impeached] but only for high misdemeanors: a peer may be impeached for any crime”—any crime.

This certainly suggests that Blackstone deemed high misdemeanors to be a species of crime.
Hamilton is a little less clear on this issue, and not surprisingly because he was writing—in Federalist No. 65, he was writing not to define what the criteria for impeachment were, he was writing primarily in defense of the Constitution as written and less to define the criteria. He certainly cannot be cited as in favor of criteria such as abuse of power or obstruction of Congress, nor of impeachment voted along party lines.

He warned that the "greatest danger"—he wrote his words—"the greatest danger [is] that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

In addition to using the criminal terms "innocence" or "guilt," Hamilton also referred to "prosecution" and "sentence." He cited the constitutional provisions that states that "the party convicted shall nevertheless be liable to an indictment for, and may be punished for, the crime or misdemeanor, by virtue of a conviction.."

But advocates of a broad, open-ended, noncriminal interpretation of "high crimes and misdemeanors" insist that Hamilton is on their side, and they cite the following words regarding the court of impeachment. And I think I heard the President quoted more than any other words in support of a broad view of impeachment, and they are misunderstood. Here is what he said when describing the court of impeachment. He said:

"The subjects of its jurisdiction—

Those are important words, the subjects of its jurisdiction, by which he meant treason, bribery, and other high crimes and misdemeanors.

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public power; in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to society itself."

Those are Hamilton’s words. They are often misunderstood as suggesting that the criteria authorizing impeachment include “the misconduct of public men” or “the abuse or violation of some public trust.”

That is a misreading. These words were used to characterize the constitutional criteria that are “the subject of” the jurisdiction of the court of impeachment: namely, “treason, bribery, or other high crimes and misdemeanors.”

Those specified crimes are political in nature. They are the crimes that involve “misconduct of public men” and “the abuse or violation of some public trust."

Hamilton was not expanding the specified criteria to include—as independent grounds for impeachment—misconduct, abuse, or violation. If anything, he was contracting them to require, in addition to proof of the specified crimes, also proof that the crime must be of a political nature.

This would exclude President Clinton’s procurement of nonpolitical crimes. In other words, from one reading, Hamilton’s view was cited by Clinton’s advocates as contracting, not expanding, the meaning of “high crimes.”

Today, some of these same advocates, you look at the same words and cite them as expanding its meaning.

Clinton was accused of a crime—perjury—and so the issue in his case was not whether the Constitution required a crime for impeachment. Instead, the issue was whether Clinton’s alleged crime could be classified as a “high crime” in light of the personal nature.

During the Clinton impeachment, I stated in an interview that I did not think that a technical crime was required but that I did think that abusing trust could be considered. I said that:

"At that time, I had not done the extensive research on that issue because it was irrelevant to the Clinton case, and I was not fully aware of the controlling case. So I simply accepted the academic consensus on an issue that was not on the front burner at the time.

But because this impeachment directly raises the issue of whether criminal behavior is required, I have gone back and read all the relevant historical material, as nonpartisan academics should always do, and have now concluded that the Framers did intend to limit the criteria for impeachment to criminal-type acts akin to treason, bribery, and they certainly did not intend to extend it to vague and open-ended and noncriminal accusations such as abuse of power and obstruction of Congress.

I publish this academic conclusion well before I was asked to present the argument to the Senate in this case. My switch in attitude, purely academic, purely nonpartisan.

Nor am I the only participant in this proceeding who has changed his mind. Several Members of Congress, several Senators expressed different views regarding the criteria for impeachment when the subject was President Clinton than they do now. When President was Clinton, my colleague and friend Professor Laurence Tribe, who is advising Speaker PELOSI now, wrote that a sitting President could not be charged with a crime. Now he has changed his mind. That is what academics do and should do, based on new information.

If there are reasonable doubts about the intended meaning of “high crimes and misdemeanors,” Senators might consider resolving these doubts by reference to the legal concept known as lenity.

Lenity goes back to hundreds of years before the founding of our country and was a concept in Great Britain, relied upon by many of our own Justices and judges over the years. It was well known to the legal members of the founding generations.

It required that in construing a criminal statute that is capable of more than one reasonable interpretation, the interpretation that favors the defendant should be selected unless it conflicts with the intent of the statute.

It has been applied by Chief Justice Marshall, Justice Oliver Wendell Holmes, Felix Frankfurter, Justice Antonin Scalia and others.

Now, applying that rule to the interpretation of “high crimes and misdemeanors” would require that these words be construed narrowly to require criminal-like conduct akin to treason and bribery rather than broadly to encompass abuse of power and obstruction of Congress.

In other words, if Senators are in doubt about the meaning of “high crimes and misdemeanors” the rule of lenity should incline them toward accepting a narrower rather than a broad interpretation, a view that rejects abuse of power and obstruction of Congress as within the constitutional criteria.

Now, even if the rule of lenity is not technically applicable to impeachment—that is a question—certainly, the policies underlying that rule are worthy and deserving of consideration as guides to constitutional interpretation.

Now, here I am making, I think, a very important point. Even if the Senate were to conclude that a technical crime is not required for impeachment, the critical question remains—and it is the question I now want to address myself to—do abuse of power and objection of Congress constitute impeachable offenses?

The relevant history answers that question clearly in the negative. Each of these charges suffers from the vice of being “so vague a term that they will be equivalent of tenure at the pleasure of the Senate.” to quote again the Father our Constitution.

Abuse of power is an accusation easily leveled by political opponents against controversial presidents. In our long history, many Presidents have been accused of abusing their power. I will now give you a list of Presidents who in our history have been accused of abusing their power. They would be subject to impeachment under the House managers’ view of abuse: George Washington, for refusal to turn over documents relating to the Jay Treaty; John Adams for signing and enforcing the Alien and Sedition laws; and Thomas Jefferson, for purchasing Louisiana without congressional authorization.

I will go on—John Quincy Adams; Martin Van Buren; John Tyler, “arbitrary, despotic and corrupt use of the veto power” James Polk; and here I quote Abraham Lincoln. Abraham Lincoln accused Polk of abusing the power of his office, “contemptuously disregarding the Constitution, usurping
the role of Congress, and assuming the role of dictator.” He didn’t seek to impeach him, just sought to defeat him. Abraham Lincoln was accused of abusing his power for suspending the writ of habeas corpus during the Civil War; President Franklin Roosevelt—by which Congress could impeach, and so they created a law. They created a law that did not want to turn our new Republic into a parliamentary-style democracy. When the Framers rejected maladministration, they also rejected abuse of power as a criteria for impeachment. It is precisely the kind of vague, open-ended term as “abuse of power” to be used, as campaign rhetoric. It should entail an impeachable abuse of power.”—George H.W. Bush. “The following was released today by the Clinton-Gore campaign: In the past weeks, Americans have begun to learn the extent to which George Bush and his administration have abused their governmental power for political purposes.”

That is how abuse of power should be used, in rhetoric. It should be issued as statements of one political party against the other. That is the nature of the term. Abuse of power is a political weapon, and it should be levied against political opponents. Let the public decide if that is true.

Barack Obama, the House Committee on the Judiciary held an entire hearing entitled “Obama Administration’s Abuse of Power.”

By the standards applied to earlier Presidents, one could argue that any controversial act by a Chief Executive could be denominated as abuse of power. For example, past Presidents have been accused of using their foreign policy, even their war powers, to enhance their electoral prospects. Presidents often have mixed motives that include partisan personal benefits, along with the national interest.

Professor Josh Blackman, constitutional law professor, provided the following interesting example:

In the height of the Civil War, President Lincoln encouraged General William Sherman to allow soldiers in the field to return to Indiana to vote.

What was Lincoln’s primary motivation, the professor asks.

He wanted to make sure that the government of Indiana remained in the hands of Republican loyalists who would continue the war until victory. Lincoln’s request risked undercutting the military effort by depleting the ranks. Moreover, during this time, soldiers in the remaining States faced greater risks than did the returning Hoosiers.

The professor continues:

Lincoln had personal motives. Privately, he sought victory for his party; but the President, as a President and as a party leader and Commander in Chief made a decision with life-or-death consequences.

Professor Blackman used the following relevant conclusion from this and other historical events. He said:

Politicians routinely promote the understanding of the general welfare while at the back of their minds considering how these actions will affect their popularity. Often the two concepts overlap. What is good for the country is good for the official’s reelection. All politicians understand that dynamic.

Like all human beings, Presidents and other politicians, persuade themselves that their actions seen by their opponents as self-serving are primarily in the nation interest. They conclude that such mixed-motive actions constitute an abuse of power, opponents must psychoanalyze the President and attribute to him a singular, self-serving motive. Such a subjective probing of motives cannot be the legal basis for abuse of power that could result in the removal of an elected President.

Yet this is precisely what the managers are claiming. Here is what they said: “Whether the President’s real mind, the one actually in his mind, are at the time legitimate.”

What a standard, what was in the President’s mind—actually in his mind? What was the real reason? Would you want your actions to be probed for that ‘true real reason’ why you acted? Even if a President were—and it clearly shows in my mind that the Framers could not have intended this psychoanalytical approach to Presidential motives to determine the distinction between what is impeachable and what is not.

Here, I come to a relevant and contemporaneous issue: Even if a President—any President—were to demand a quid pro quo as a condition to sending aid to a foreign country—obviously a temporaneous issue: Even if a President—any President—were to demand a quid pro quo as a condition to sending foreign aid to a foreign country, it would not, by itself, constitute an abuse of power.

Consider the following hypothetical case that is in the news today as the Israeli Prime Minister comes to the United States for meetings. Let’s assume a Democratic President tells Israel that foreign aid authorized by Congress will be sent or an Oval Office meeting will not be scheduled unless the Israeli government settles—quid pro quo. I might disapprove of such a quid pro quo demand on policy grounds, but it would not constitute an abuse of power.

Quid pro quo alone is not a basis for abuse of power. It is part of the way foreign policy has been operated by Presidents since the beginning of time. The claim that foreign policy decisions can be deemed abuses of power based on subjective opinions about mixed or sole motives is obviously a highly disputed matter in this case—that would not, by itself, constitute an abuse of power.

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Now, it follows from this that, if a President—any President—were to have done what “The Times” reported about the content of the Bolton manuscript, that would not constitute an impeachable offense. Let me repeat it. Nothing in the Bolton revelations, even if true, would rise to the level of an abuse of power or an impeachable offense. That is clear from the history.

That is clear from the language of the Constitution. You cannot turn conduct that is not impeachable into impeachable conduct simply by using words like “quid pro quo” and “personal benefit.”

It is inconceivable that the Framers would have intended so politically loaded and promiscuously deployed a term as “abuse of power” to be weaponized as a tool of impeachment. It is precisely the kind of vague, open-ended, and subjective term that the Framers feared and rejected.

Consider the term “maladministration.” I want to get back to that term because it was a term explicitly rejected by the Framers. Recall that it was raised, Madison objected to it, and it was then withdrawn, and it was not a part of the criteria. We all agree that maladministration is not a ground for impeachment. If the House were to insist on maladministration, it would be placing itself above the law. There is no doubt about that because the Framers explicitly rejected maladministration.

Now what is maladministration? It is comparable in many ways to abuse of power. Maladministration has been defined as “abuse, corruption, misrule, dishonesty, misuse of office, and misbehavior.” Professor Bowie in his article in today’s “New York Times” equates abuse of power with “misconduct in office”—misconduct in office—thus supporting the view that, when the Framers rejected maladministration, they also rejected abuse of power as a criteria for impeachment.

Blackstone denominated maladministration as a “high misdemeanour” that is punishable “by the method of parliamentary impeachment, wherein such penalties, short of death, are inflicted. In other words, you can go to prison for maladministration. Despite this British history, Madison insisted it be rejected as a constitutional criteria for impeachment because so vague a term would place itself above the law. There is no doubt about that because the Framers feared and rejected it.

This important episode in our constitutional history supports the conclusion that the Framers did not accept, whole hog, the British approach to impeachment as some have mistakenly argued. Specifically, they rejected vague and open-ended criteria, even those that carried threat of imprisonment in Britain because they did not want to turn our new Republic into a parliamentary-style democracy in which the Chief Executive could be removed from office simply by a vote of no confidence. That is what they didn’t want.

Sure, nobody was above the law, but they created a law. They created a law by which Congress could impeach, and they did not want to expand that law to include all the criteria that permitted impeachment in Great Britain. The Framers would never have included and did not include abuse of
power as an enumerated and defined criterion for impeachment. By expressly rejecting maladministration, they implicitly rejected abuse.

Nor would the Framers have included obstruction of Congress as among the enumerated defined criteria. It, too, is vague and undefined, especially in the constitutional system in which, according to Hamilton in Federalist No. 78, ‘‘the legislative body’’ is not themselves ‘‘the constitutional judge of their powers’’ and the ‘‘law they put on them’’ is not ‘‘conclusive upon other departments.’’ Instead, he said, ‘‘the courts were designed as an intermediate body between the people [as declared in the Constitution] and the legislature’’ in order ‘‘to keep the latter within the limits assigned to their authority.’’

Under our system of separation of powers and checks and balances, it cannot be an ‘‘obstruction of Congress’’ for a President to demand judicial review of legal documents, but only when they are complied with. The legislature is not the ‘‘Constitutional judge of their own powers,’’ including the power to issue subpoenas. The courts are designated to resolve disputes between the executive and legislative branches, and it cannot be obstruction of Congress to invoke the constitutional power of the courts to do so.

By their very nature, words like ‘‘abuse of power’’ and ‘‘obstruction of Congress’’ are criminal. It is impossible to put standards into words like that. Both are subjective matters of degree and amenable to varying powers of interpretations. It is impossible to know in advance whether a given action will subsequently be deemed to be on one side or the other of the line. Indeed, the same action with the same state of mind can be deemed abusive or obstructive when done by one person but not when done by another. That is the core of the rule of law, that not, when you have a criteria that can be applied to one person in one way and another person in another way and they both fit within the terms ‘‘abuse of power.’’

A few examples will illustrate the dangers of standardless impeachment criteria. My friend and colleague Professor Noah Feldman argued that a tweet containing what he believed false information could ‘‘get the current President impeached if it is part of a broader abuse of conduct’’—a tweet containing what he regarded as ‘‘a crime against humanity.’’ I have to tell you, I disagree with our President’s climate change policy, as do many of his other policies, but that is not a criteria for impeachment. That is a criteria for deciding who you are going to vote for. If you don’t like the President’s policies on climate change, you don’t have to vote for the other candidate. Find a candidate who has better policies on climate change. If you don’t like the President’s tweets, find somebody who doesn’t.

In any event, it is the actual articles that charge abuse of power and obstruction of justice—neither of which are in the Constitution. It is the actual articles on which you must all vote, not on the more specific list of means included in the text of the articles. The only way the impeachment process might be helpful is if a defendant were accused of dishonesty, committing the crime of dishonesty, it wouldn’t matter that the indictment listed as well the means toward dishonesty, a variety of far more specific offenses. Dishonesty is simply not a crime. It is too broad a concept. It is not in the statute. It is not a crime. The indictment would be dismissed because dishonesty is a sin and not a crime, even if the indictment included a long list of more specific acts of dishonesty.

Nor can impeachment be based on a bunching together of nonimpeachable sins, none of which, standing alone, meet the constitutional criteria. Only if you met one constitutionally authorized offense can you remove a President. But you have no jurisdiction to remove unless there is at least one impeachable offense within the meaning of high crimes and misdemeanors.

In the 3 days of argument, the House managers tossed around words even vaguer and more open-ended than ‘‘abuse’’ and ‘‘obstruction’’ to justify their case for removal. These words include ‘‘trust,’’ ‘‘truth,’’ ‘‘honesty,’’ and finally ‘‘right.’’ These aspirational standards of virtue are defined with all the precision of a constitutional provision. But they demonstrate the failure of the managers to distinguish alleged political sins from constitutionally impeachable offenses.

We all want our Presidents and other public officials to live up to the highest standards set by Washington and Lincoln, although both of them were accused of abuse of power by their political opponents. The Framers could have demanded that a President must meet Congress’ standards of being honest, trustworthy, virtuous, and right in order to complete their terms, but they didn’t because they understand human fallibility. As Madison put it, ‘‘If men were angels, no government would be necessary.’’

The Framers understood that if they set the criteria for impeachment too low, few Presidents would serve their terms. Instead, their tenure would be
at the pleasure of the legislature, as it was and still is in Britain. So they set the standards and the criteria high, requiring not sinful behavior—not dishonesty, distrust, or dishonor—but treason, bribery, or other high crimes and misdemeanors.

I end this presentation today with a nonpartisan plea for fair consideration of my arguments and those made by counsel and managers on both sides. I willingly acknowledge that the academic consensus is that criminal conduct, not judicial disregard for impeachment and the abuse of power and obstruction of Congress are sufficient. I have read and respectfully considered the academic work of my many colleagues who disagree with my view and the few who accept it. I do my own research, and I do my own thinking, and I have never bowed to the majority on intellectual or scholarly matters.

What concerns me is that during this impeachment proceeding, there have been few attempts to respond to my arguments and other people’s arguments opposed to the impeachment of this President. Instead of answering my arguments and those of Justice Curtis and Professor Bowie and others on their positions and possible demerits, they have simply been rejected with negative epithets. I urge the Senators to ignore these epithets and to consider the arguments and counterarguments on their merits, especially those directed against the impeachment proceeding, there have been few attempts to respond to my arguments and those of Justice Curtis and Professor Bowie and others on their positions and possible demerits, they have simply been rejected with negative epithets.

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But then you would be happy because you would have an easy answer and you can be done with your law school exam, and it would be—you immediately reject the Articles of Impeachment.

Bonus question: Should your answer depend on your political party?
Answer: No.

My second observation is, I actually think it is very instructive to watch the old videos from the last time this happened, when many of you were making so eloquently—more eloquently than we are—the points that we are making about the law and precedent. But that is not playing a game of "gotcha"; that is paying you a compliment.

You were right about those principles. You were right about those principles. And if you will not listen to me, I urge you to listen to yourselves. You were right.

The third observation I had sitting here today is, Judge Starr talked about that we are in the age of impeachment, in the age of constant investigations. Imagine—if all of that energy were being used to solve the problems of the American people. Imagine if the age of impeachment were over in the United States. Imagine that.

I was listening to Professor Dershowitz talking about the shoe-on-the-other-foot rule, and it makes a lot of sense. I would maybe put it differently. I would maybe call it the golden rule of impeachment. For the Democrats, the golden rule could be, do unto Republicans as you would have them do unto Democrats. And hopefully we will never be in another position in this country where we have another impeachment but vice versa for that rule.

Those are my three observations. I hope that is helpful. Those were the thoughts I had listening to the presentations.

At the end of the day, the most important thought is this: This choice belongs to the American people. They will get to make it months from now. The Constitution and common sense and all of our history prevent you from removing the President from the ballot. There is no basis for it in the facts. There is simply no basis for it in the law. I urge you to quickly come to that conclusion so we can go have an election.

Thank you very much for your attention.
Thank you, Mr. Chief Justice.
The CHIEF JUSTICE. The majority leader is recognized.

ADJOURNMENT UNTIL 1 P.M. TOMORROW

Mr. MCCONNELL. Mr. Chief Justice, I ask unanimous consent that the trial adjourn until 1 p.m., Tuesday, January 28, and that this order also constitute the adjournment of the Senate.

There being no objection, at 9:02 p.m. the Senate, sitting as a Court of Impeachment, adjourned until Tuesday, January 28, 2020, at 1 p.m.