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What 2020 Really Needed: A New Standard for Impeachment

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NOTE

WHAT 2020 REALLY NEEDED: A NEW STANDARD FOR IMPEACHMENT

I. INTRODUCTION

In his farewell address, President George Washington warned the American people of the negative impact that opposing political parties could have on a nation.¹ He cautioned that parties would become “potent engines” by which men could undermine the concept of popular sovereignty in the United States.² The Founding Fathers thus safeguarded our government with a system of checks and balances to prevent one person or one party from upsetting the balance of power.³ One tool used to sustain this system is found in the Impeachment Clause of the United States Constitution.⁴

The Framers knew that the ability to hold government officials accountable needed to be balanced with the independent votes of the people.⁵ In most instances, voters hold government officials accountable through elections.⁶ If constituents are unhappy with how the government is being run, they can exercise their right to vote and remove people

1. See generally George Washington, U.S. President, Washington’s Farewell Address (Sept. 19, 1796), in WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, at 11-12 (discussing the threat of forming two political parties).

2. *Id.* at 12 (“However . . . [political parties] may now and then answer popular ends, they are likely . . . to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government . . .”).

3. Keith E. Whittington, *Balancing Independence and Accountability in Impeachable Offenses*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/349#balancing-independence-and-accountability-in-impeachable-offenses-by-keith> (last visited Jan. 15, 2022) (“They thought that if government power collapsed into a single set of officials, civil liberty and political effectiveness would be compromised.”).

4. *Id.*; see U.S. CONST. art. I, § 2, cl. 5; see also U.S. CONST. art. I, § 3, cl. 6.

5. Whittington, *supra* note 3.

6. *Id.*

from positions of power.⁷ Impeachment, therefore, is left for cases in which abusive behavior cannot be tolerated until the next election.⁸

The power to impeach was ultimately given to the legislative branch.⁹ Although this power was vested in a political body, the Framers did not intend for the process to be wholly political.¹⁰ One of the greatest dangers of impeachment is that “the decision will be regulated more by the comparative strength of parties, than by real demonstrations of innocence or guilt.”¹¹ The Framers recognized this, and created constitutional safeguards to check the power of the legislature,¹² such as dividing impeachment power between the two legislative bodies with the House of Representatives acting as accusers and the Senate acting as the judge.¹³ More notably, the Framers rejected the “maladministration” standard for impeachment and substituted “high Crimes and Misdemeanors.”¹⁴ Many argue this implies a higher standard for when Congress can impeach a president, and that mere political grounds are not sufficient.¹⁵

The Framers created a “beautiful system” expected to protect democratic votes and allow a president to be “ousted only if fair-minded members of his own party condemn him.”¹⁶ If politics were a proper ground for impeachment, one would expect this instrument to be used more often.¹⁷ The rarity of presidential impeachments demonstrates how serious it is to initiate this action against a sitting president.¹⁸

7. *Id.*

8. *Id.*

9. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole power to try all Impeachments.”).

10. See Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 555 (2018) (“[T]he *Federalist Papers* . . . appears to support the conclusion that impeachment is a political matter but actually does no such thing.”); see generally THE FEDERALIST NO. 65 (Alexander Hamilton) (discussing the Framers’ intent behind the Impeachment Clause of the Constitution).

11. THE FEDERALIST NO. 65, *supra* note 10 (Alexander Hamilton).

12. *Nixon v. United States*, 506 U.S. 224, 235-36 (1993).

13. *Id.* This was meant to guard against a divisive spirit in either branch. *Id.* at 236. The two-thirds supermajority requirement is another safeguard that provides an added security for innocence. Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 295 (1999).

14. Bobbitt, *supra* note 10, at 554.

15. *Id.* Others argue, however, that the current standard includes maladministration and there is, therefore, a permissible political basis for impeachment. *Id.*

16. Amar, *supra* note 13, at 295.

17. Bobbitt, *supra* note 10, at 555.

18. See Angelo D’Agostini, *Trump’s Impeachment, the Perfect Example of American Polarization*, INST. FOR COMPETITIVENESS (Jan. 17, 2020), <https://www.i-com.it/en/2020/01/17/trump-impeachment-polarization> (“The rarity of such occurrences exemplifies the seriousness to bring charges against a president with the intention to remove him from office.”); Scott Bomboy, *What the Founders Thought About Impeachment and the President*, NAT’L CONST.

Unfortunately, this delicately crafted system is deteriorating with the rise of partisan politics.¹⁹ Polarization is not the same as disagreeing with a family member or neighbor about certain issues.²⁰ It is a phenomenon empowered by “tribalism,” where negotiation and compromise are perceived as betrayal.²¹ It is creating an increasingly antagonistic society where we judge and loathe those who disagree with us.²² This is most obvious when looking at our two-party political system²³ in which Democrats view Republicans as a threat to the nation’s well-being and vice versa.²⁴ As a result, when one party controls the executive branch and another controls Congress, there is legislative stagnation and tension between the two branches.²⁵

This extreme political polarization became quite evident during the first impeachment of President Donald J. Trump,²⁶ when a whistleblower complaint brought attention to a phone call with Ukrainian President Volodymyr Zelensky.²⁷ The complaint alleged that President Trump pressured Zelensky to open an investigation into Hunter Biden²⁸ and, if

CTR. (May 18, 2017), <https://constitutioncenter.org/blog/what-the-founders-thought-about-impeachment-and-the-president> (stating that this rarity is demonstrated by the fact that there have been a mere nineteen impeachments of federal officials and only eight were convicted after a Senate trial).

19. See generally *How to Fix Impeachment*, POLITICO MAG. (Dec. 6, 2019, 5:08 AM), <https://www.politico.com/news/magazine/2019/12/06/impeachment-trump-constitution-expert-analysis-076433> (arguing that political polarization has “broken” Congress and this, in turn, impacts the impeachment process).

20. Zaid Jilani & Jeremy Adam Smith, *What Is the True Cost of Polarization in America?*, GREATER GOOD MAG. (Mar. 4, 2019), https://greatergood.berkeley.edu/article/item/what_is_the_true_cost_of_polarization_in_america.

21. *Id.*

22. *Id.*

23. See *How to Fix Impeachment*, *supra* note 19.

24. *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public> [hereinafter *Political Polarization in the American Public*].

25. See *How to Fix Impeachment*, *supra* note 19 (“[O]ur politics is now so fractured that Congress has become increasingly incapable of performing any of its core functions.”).

26. D’Agostini, *supra* note 18.

27. *President Donald Trump Impeached*, HIST., <https://www.history.com/this-day-in-history/president-trump-impeached-house-of-representatives> (Feb. 17, 2021) (stating that in September 2019, the whistleblower filed a complaint about the President’s July 2019 phone call).

28. See *id.* (explaining that Hunter Biden is the son of then-leading 2020 Democratic presidential candidate, Joe Biden); see also Kevin Breuninger, *Trump Asked Ukraine President in Phone Call ‘If You Can Look Into’ Biden and His Son*, CNBC <https://www.cnbc.com/2019/09/25/trump-asked-ukraine-president-if-you-can-look-into-biden-and-his-son-in-phone-call.html> (Sept. 27, 2021, 3:37 PM). Trump and his personal attorney, Rudy Giuliani, accused Joe Biden of corruption for “pressuring Ukraine to fire a prosecutor who reportedly oversaw a probe into the owner of a Ukrainian gas company, Burisma Holdings.” *Id.* Hunter Biden was a board member of the company. *Id.*

not initiated, Trump would have allegedly declined to release military aid to Ukraine.²⁹ Democrats saw President Trump asking for a “favor” as “quid pro quo” and a way for Trump to investigate a political rival.³⁰ Speaker of the House Nancy Pelosi stated Trump “gave us no choice” but to open the debate on impeachment.³¹ Republicans, on the other hand, supported President Trump and criticized Democrats for initiating impeachment based on weak evidence.³² The political right viewed the inquiries into President Trump’s behavior as unwarranted and nothing more than a personal vendetta against the administration.³³

The actual impeachment proceedings led to further debate and turmoil among political parties.³⁴ Throughout the entire process, the House faced intense backlash from President Trump and fellow Republicans.³⁵ President Trump’s lawyers specifically addressed certain parts of the House proceedings that appeared to be due process violations, such as denial of notice and the inability to both call and cross-examine witnesses.³⁶ On the other side of the aisle, Democrats

29. *President Donald Trump Impeached*, *supra* note 27.

30. Anne Flaherty, *What You Need to Know About the Trump Impeachment Hearings: A Quid Pro Quo and Trump’s Defense*, ABC NEWS (Dec. 4, 2019, 5:16 AM), <https://abcnews.go.com/Politics/trump-impeachment-hearings-quid-pro-quo-trumps-defense/story?id=66944239> (defining “quid pro quo” as a Latin word meaning “something for something”); Liu Jie, *U.S. House Polarized, Public Divided Over Trump Impeachment*, XINHUA (Dec. 19, 2019), http://www.xinhuanet.com/english/2019-12/19/c_138641355.htm (describing an encounter with a demonstrator who said, “Trump is abusing his power as the president for his own personal gain and to gain advantage in the elections”); *see also* H.R. REP. NO. 116-346, at 4 (2019).

31. Jie, *supra* note 30 (“As Speaker of the House, I solemnly and sadly open the debate on the impeachment of the President of the United States.”). After a member of the House of Representatives offers a resolution calling for an impeachment, the Speaker of the House must schedule a time to consider the resolution within two legislative days. ELIZABETH RYBICKI & MICHAEL GREENE, *THE IMPEACHMENT PROCESS IN THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. R45769, at 2 (2019), <https://fas.org/sgp/crs/misc/R45769.pdf>. The Speaker will then “rule as to whether the resolution constitutes a proper question of the privileges of the House.” *Id.* at 12.

32. *Compare* Jie, *supra* note 30 (stating that Republicans believed the impeachment was an “effort aimed to overturn the results of the 2016 presidential election”), *with* Heather Caygle & Sarah Ferris, *‘No Choice’: Pelosi Proceeds with Articles of Impeachment*, POLITICO, <https://www.politico.com/news/2019/12/05/pelosi-reveals-plan-to-proceed-with-articles-of-impeachment-against-trump-076173> (Dec. 5, 2019, 10:22 PM) (illustrating that Speaker of the House Nancy Pelosi and the Democratic Party believed that the facts were uncontested and that the president clearly abused his power).

33. *How to Fix Impeachment*, *supra* note 19 (“[T]he loyal supporters of Mr. Trump are likely to complain that impeachment is broken because all the inquiries into his behavior are nothing more than vengeful efforts by Trump’s opponents to overturn the results of the 2016 election.”).

34. Jie, *supra* note 30 (describing House floor debate as “familiar arguments along party lines”).

35. D’Agostini, *supra* note 18 (stating that Republicans continuously argued that “Trump’s impeachment was a political stunt with no legitimacy”).

36. *See* John Cornyn, *Statement for the Record: Impeachment Trial of Donald John Trump*, 24 TEX. REV. L. & POL. 339, 348 (2019) (discussing the three main issues that the Trump

argued the president cannot be denied due process of law when the Constitution gives the House the “sole power of impeachment.”³⁷ Throughout this process, it seemed as though the American people could only agree on one thing: that the United States was entering dangerous territory.³⁸

This Note will argue that the polarization of our political parties, as seen through the impeachment of President Trump, has created a constitutional crisis.³⁹ It maintains that Congress not only needs to put political affiliations aside, but it must also create a set of fair and just rules surrounding presidential impeachments.⁴⁰ This Note argues that the best way for Congress to accomplish this is by passing legislation allowing for expedited judicial review to resolve congressional-executive disputes.⁴¹ This is a necessary step to prevent presidential impeachments from becoming “a regular feature of America’s weaponized politics.”⁴²

Part II of this Note will discuss the history of impeachment in the United States, starting with the mindset of our Founding Fathers as they drafted the Impeachment Clause⁴³ and what the Supreme Court has interpreted that Clause to mean.⁴⁴ Part II will then review past presidential impeachments, specifically addressing why the House of Representatives chose to initiate impeachment inquiries and detail the procedures adopted in each case.⁴⁵ Part III of this Note will articulate the issue of political polarization and the current state of our political parties.⁴⁶ It will further describe the impeachment of President Donald Trump and how political polarization dominated the process.⁴⁷ Part IV will propose new legislation that will help the House conduct fairer and

administration had with the House impeachment proceedings); see also Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) (explaining due process and how the Constitution guarantees that no person may be deprived of life, liberty, or property without due process of law).

37. Cornyn, *supra* note 36, at 345-46; U.S. CONST. art. I, § 2, cl. 5.

38. Sean Illing, *Are We in a Constitutional Crisis Yet?*, VOX (Oct. 9, 2019, 12:20 PM), <https://www.vox.com/policy-and-politics/2019/10/9/20905503/trump-white-house-letter-democrats-impeachment> (“Nearly everyone agrees about one thing: We’re entering dangerous territory.”).

39. See generally *id.* (arguing that the White House’s refusal to comply with the impeachment inquiry has created a constitutional crisis).

40. *How to Fix Impeachment*, *supra* note 19.

41. *Id.*

42. Carl Hulse, *In a Polarized Era, Will Impeachment Become a ‘New Normal’?*, N.Y. TIMES, <https://www.nytimes.com/2019/12/12/us/impeachment-democrats-republicans.html> (Dec. 18, 2019).

43. See *infra* Part II.A.

44. See *infra* Part II.B.

45. See *infra* Part II.C.

46. See *infra* Part III.A–B.

47. See *infra* Part III.C.

more transparent impeachment inquiries.⁴⁸ This Note aims to craft a piece of legislation that will help restore impeachment proceedings to the fair and bipartisan process that the Framers envisioned during a time when political polarization makes that seemingly impossible.⁴⁹

II. HISTORY OF IMPEACHMENT IN THE UNITED STATES

Part II of this Note will first outline the Framers' intent behind creating the Impeachment Clause.⁵⁰ It will then examine the Supreme Court's interpretation of the Impeachment Clause, focusing specifically on *Nixon v. United States*.⁵¹ Part II will conclude by detailing the three impeachment proceedings that are currently used as precedent.⁵²

A. *Framer Intent and Impeachment*

The ability to remove a sitting president from office stems from the language of Article II, Section 4 of the United States Constitution.⁵³ A president can "be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."⁵⁴ The power to impeach a president was given to the House of Representatives,⁵⁵ while the Senate has the power to try all impeachments.⁵⁶ Both powers act as a check on the executive branch.⁵⁷

Today, there remains extensive disagreement as to what the Framers intended the impeachment standard to be.⁵⁸ The *Federalist Papers* provide some guidance,⁵⁹ but a precise standard for when a president can be impeached is still up for debate.⁶⁰ There is, however,

48. See *infra* Part IV.

49. See *infra* Part IV.

50. See *infra* Part II.A.

51. 506 U.S. 224 (1993); see *infra* Part II.B.

52. See *infra* Part II.C.

53. U.S. CONST. art. II, § 4.

54. *Id.*

55. U.S. CONST. art. I, § 2, cl. 5.

56. U.S. CONST. art. I, § 3, cl. 6.

57. See Whittington, *supra* note 3 (explaining how the legislative branch was given the tools to "check abuses of power and advance the public welfare"). The Impeachment Clause also acts as a check on the judicial branch. Marc O. DeGirolami, *Congressional Threats of Removal Against Federal Judges*, 10 TEX. J. ON C.L. & C.R. 111, 113-14 (2005).

58. Cornyn, *supra* note 36, at 340.

59. J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment as Politics*, 68 CASE W. RES. L. REV. 275, 287 (2017) (stating that a historical understanding of the impeachment standard can be found in *Federalist* 65 by Alexander Hamilton).

60. Cornyn, *supra* note 36, at 341. Philip Bobbitt notes that a passage from the *Federalist Papers* is often quoted out of context. Bobbitt, *supra* note 10, at 555. He argues the passage appears to support the conclusion that impeachment is a political matter, but that this is in fact a fallacy. *Id.*

clear historical evidence that the judicial branch was meant to be excluded from impeachment proceedings.⁶¹ The Framers wanted to bestow impeachment power with a body that was “sufficiently numerous” and subject to public accountability.⁶² They also worried that the judiciary would be in charge of both the impeachment proceedings and the subsequent criminal trial if necessary.⁶³ The system was designed to prevent judges from punishing an official twice for the same conduct.⁶⁴ Finally, and perhaps most importantly, impeachment is the legislative branch’s only check on the judiciary.⁶⁵ Allowing judicial participation in judicial impeachment proceedings would ultimately eviscerate the Framers’ system of checks and balances.⁶⁶ These factors led the Framers to decide to vest the impeachment power “solely” with the legislative branch.⁶⁷

B. *The Supreme Court and Impeachment*

The Framers’ arguments for vesting the impeachment power in the legislative branch⁶⁸ were recognized by the Supreme Court in its decision to treat impeachment challenges as nonjusticiable.⁶⁹ In *Nixon v. United States*,⁷⁰ Chief Justice Rehnquist noted that nothing in the history of the Constitutional Convention suggested that judicial review had a place in the impeachment process.⁷¹ As a result, questions about

61. See generally *Nixon v. United States*, 506 U.S. 224 (1993) (discussing why the judiciary was not meant to have any role in impeachments); see also Thomas D. Amrine, *Judicial Review of Impeachment Proceedings: Nixon v. United States*, 113 S. Ct. 732 (1993), 16 HARV. J.L. & PUB. POL’Y 809, 812 (1993).

62. See Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 247 (1994); see also THE FEDERALIST NO. 65, *supra* note 10 (Alexander Hamilton) (describing how the impeachment power is best placed in the branch that represents the American citizens).

63. Gerhardt, *supra* note 62, at 247.

64. *Id.*

65. *Nixon v. United States*, 506 U.S. at 235; Gerhardt, *supra* note 62, at 247.

66. *Nixon v. United States*, 506 U.S. at 235. It is important to note that Judge Nixon argued judicial review of impeachment proceedings was a necessary check on the legislative branch. *Id.* The Court rejected this argument and noted that the Framers created constitutional safeguards to prevent the Senate from abusing its power. *Id.* at 235-36; see *supra* notes 12-15 and accompanying text.

67. Gerhardt, *supra* note 62, at 256. An exception to this general rule is that the Chief Justice of the United States Supreme Court presides in the Senate when a President is being tried. *Id.* at 235.

68. See *supra* text accompanying notes 58-67.

69. Gerhardt, *supra* note 62, at 252; Jay M. Zitter, Annotation, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R. 6th 177 (2005) (defining “nonjusticiability” as “a holding that the subject matter is inappropriate for judicial consideration”).

70. 506 U.S. 224 (1993).

71. *Id.* at 233.

impeachment proceedings have traditionally been deemed nonjusticiable political questions by the Supreme Court.⁷²

This political question doctrine dates back to *Marbury v. Madison*⁷³ in 1803, where the Supreme Court made clear that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁷⁴ This duty, however, does leave some power of interpretation to the political branches.⁷⁵ The *Marbury* Court admitted that some questions, which are political in nature, can never be answered by the courts.⁷⁶ This idea was expanded upon in *Baker v. Carr*,⁷⁷ in which the Court identified certain elements to help classify a case as a political question.⁷⁸

The Court of Claims originally examined whether or not impeachment fell under this umbrella of nonjusticiable political questions in *Ritter v. United States*⁷⁹ and its holding reflected an understanding that impeachments were in fact inherently political questions.⁸⁰ The Supreme Court officially adopted this interpretation in 1993⁸¹ when Walter Nixon Jr., a Chief Judge of the United States District Court for the Southern District of Mississippi, was impeached

72. Amrine, *supra* note 61, at 809 (“Impeachment proceedings in the Senate have traditionally been immunized from judicial review on the theory that they are inherently ‘political questions.’”).

73. 5 U.S. 137 (1803).

74. *Id.* at 177.

75. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002).

76. *Marbury*, 5 U.S. at 170 (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

77. 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”). “[T]he mere fact that the suit seeks protection of a political right” does not automatically make the case nonjusticiable under the political question doctrine. *Id.* at 209.

78. *See id.* at 217. The *Baker* court notes the following six factors used to determine if a case presents a nonjusticiable political question: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) “the impossibility of a court’s undertaking independent resolution without expressing the lack of respect due coordinate branches of government;” (5) “an unusual need for unquestioning adherence to a political decision already made;” or (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.*

79. 84 Ct. Cl. 293, 296 (1936).

80. *See id.* (holding that the word “sole” in the Constitution was used with the intent to prevent tribunals from having jurisdiction over any provision dealing with impeachment); *see also* Amrine, *supra* note 61, at 809.

81. *See Nixon v. United States*, 506 U.S. 224, 228, 238 (1993) (affirming the lower court’s decision that the issue dealing with a Senate impeachment trial was nonjusticiable).

by the House of Representatives.⁸² The articles of impeachment were presented to the Senate, which then “voted to invoke its own Impeachment Rule XI.”⁸³ After the full Senate was presented with a complete transcript of the committee hearings and other uncontested facts and evidence, it voted to convict and remove Judge Nixon from office.⁸⁴ He subsequently filed a lawsuit arguing that Senate Rule XI was unconstitutional because it prevented the entire Senate from taking part in the evidentiary hearings of an impeachment trial.⁸⁵

In its decision, the Supreme Court began by examining when a controversy is nonjusticiable and chose to adopt only the first two prongs from *Baker*.⁸⁶ A close examination of the language in Article I, Section 3, Clause 6⁸⁷ was key in determining whether or not these two elements were met.⁸⁸ Through a textualist⁸⁹ approach to constitutional interpretation, the Court used the commonsense meaning of the word “sole” to demonstrate that the Senate should conduct its impeachment

82. *Id.* at 226. Judge Nixon had allegedly accepted a bribe from a businessman in exchange for asking a local district attorney to dismiss the prosecution of the man’s son. *Id.* He was convicted for making false statements before a federal grand jury and sentenced to prison. *Id.* During this time, Nixon refused to resign from his office as a United States District Judge and continued to collect his judicial salary. *Id.* As a result, the House of Representatives adopted three Articles of Impeachment against Nixon: two charged him with giving false testimony and one charged him with bringing disrepute on the Federal Judiciary. *Id.* at 226-27. This “high crimes and misdemeanors” standard for judicial impeachments is the same in presidential impeachments. *Id.*

83. *Id.* at 227. Senate Impeachment Rule XI allows the presiding officer to appoint “a committee of Senators to ‘receive evidence and take testimony.’” *Id.* The committee would then present the information gathered to the full Senate. *Id.*

84. *Id.* at 227-28 (stating that “[t]he Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first two articles”).

85. *Id.* at 228. Nixon’s argument stemmed from the fact that the Constitution grants the Senate the power to “try” all impeachments and that supposedly this language required the entire Senate to be present. *Id.* at 229.

86. *Id.* at 228 (stating that “a controversy is nonjusticiable . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .’”) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

87. U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for the Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

88. See *Nixon v. United States*, 506 U.S. at 228-29. The Court stated that “the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it” and that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.” *Id.*

89. See generally Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (describing the origins of textualism and exactly how textualist judges tend to interpret the Constitution). Textualists “elevat[e] statutory text over statutory purposes and legislative history[.]” *Id.* at 26. It is believed this will “narrow judicial leeway and minimize judicial creativity.” *Id.*

power independently.⁹⁰ In using the word “sole,” the Framers envisioned this power to be reposed in the Senate and the Senate alone.⁹¹ According to the Court, examining the “plain language of the enacted text is the best indicator of intent,”⁹² and the plain language here proves that the Framers purposely excluded the judiciary from having a role in the impeachment process.⁹³

Additionally, the word “try” needed further explanation,⁹⁴ as Nixon argued that this gave courts the power to “review whether or not the Senate ‘tried’ him before convicting him.”⁹⁵ In reality, the limitations of the Senate’s power are carefully detailed in the Impeachment Clause itself, as it lists very specific requirements, for example, that members must be under oath.⁹⁶ This demonstrates that the Framers did not intend to impose further limitations such as the kind Nixon suggested, otherwise, it would have been explicitly stated in the Constitution.⁹⁷

By giving the legislative branch the “sole” power of impeachment, the Framers indicated a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁹⁸ The *Baker* test was officially met after examination of the word “try” and the Court concluded this language was insufficient to provide a judicially

90. *Nixon v. United States*, 506 U.S. at 231 (“[T]he Senate alone shall have authority to determine whether an individual should be acquitted or convicted.”). The Court also takes notice that the word “sole” appears only one other time in the Constitution when describing the House of Representative’s “sole Power of Impeachment.” *Id.* at 230-31.

91. *Id.* at 229. The Court believed “the word ‘sole’ is of considerable significance.” *Id.* at 230. “Sole” means “‘having no companion,’ ‘solitary,’ ‘being the only one,’ and ‘functioning . . . independently and without assistance or interference.’” *Id.* at 231.

92. *Id.* at 232. Justice White, joined by Justice Blackmun, concurred only in the judgment in *Nixon* and would have reached the same decision on the merits of the claim. *Id.* at 239 (White, J., concurring). He argued the Framers’ main concern was vesting too much power in one branch. *Id.* at 244. Through a textual approach similar to the majority opinion, Justice White concluded that the word “sole” meant the House would impeach without interference from the Senate and the Senate would try impeachments without interference from the House. *Id.* at 241-42. The word “sole” merely indicates a division between the House and the Senate when conducting impeachments. *Id.*

93. *Id.* at 238.

94. *Id.* at 229. Nixon argued that “try” imposed an additional requirement that the Senate proceedings must be similar to a judicial trial. *Id.* He continued by saying that this language precludes the Senate from appointing a small committee to hear witnesses’ testimony. *Id.*

95. *Id.*

96. *Id.* at 230 (stating that there are three very specific requirements imposed by the Senate in impeachment trials: “The members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried”).

97. *See id.*

98. *Id.* at 228 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 984 (2017) (“[T]he Constitution ‘committed’ the role of trying impeachments to the Senate alone.”).

manageable standard of review.⁹⁹ These two words together were enough for the Court to determine that impeachment is a nonjusticiable political question.¹⁰⁰ As a result of *Nixon*, the courts are powerless to dictate how the House and Senate conduct impeachment proceedings.¹⁰¹ Any changes in how the legislative branch performs this enumerated power would therefore have to be accomplished through a new judicial interpretation, a constitutional amendment, or new congressional rules.¹⁰²

C. History of Presidential Impeachments

For the first two centuries of our nation's history, only one president was impeached and subjected to a Senate impeachment trial.¹⁰³ The United States did not witness another impeachment proceeding until the 1970s with President Richard Nixon.¹⁰⁴ Although President Nixon resigned from office before he could officially be impeached,¹⁰⁵ the proceedings are still looked to as precedent.¹⁰⁶ Some scholars believe the more recent presidential impeachment of President William ("Bill") Clinton is responsible for setting a very low impeachment standard.¹⁰⁷

1. Andrew Johnson: The First President to Be Impeached

President Andrew Johnson, Abraham Lincoln's successor, was the first United States President to be impeached by the House of

99. *Nixon v. United States*, 506 U.S. at 230 ("[T]he use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions . . .").

100. *Id.* at 226 (holding that this issue was not one that could be resolved by the courts).

101. See Lisa A. Kainec, Comment, *Judicial Review of Senate Impeachment Proceedings: Is a Hands Off Approach Appropriate?*, 43 CASE W. RES. L. REV. 1499, 1526 (1993) ("[B]y refusing to subject this area to judicial review, the Senate is afforded unreviewable and unchecked discretion to exercise its impeachment powers.").

102. See *id.* at 1511 (arguing that the Supreme Court should alter its approach taken in *Nixon* and "proceed with deference to congressional determinations and caution in any such proceeding, but review should nevertheless take place in order to 'uphold the Constitution and protect the separation of federal powers'"); see generally *How to Fix Impeachment*, *supra* note 19 (discussing how a constitutional amendment and new congressional rules could be used to "fix" impeachment).

103. Hulse, *supra* note 42 (stating that President Andrew Johnson became the first United States President to be impeached in 1868).

104. Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 540 (2019).

105. *Id.* at 542.

106. *Id.* at 535 (discussing how Nixon's almost-impeachment "influenced the meaning in contemporary impeachment jurisprudence of what constitutes 'high Crimes and Misdemeanors'").

107. *Id.* at 544.

Representatives.¹⁰⁸ His impeachment took place during the post-Civil War Reconstruction period¹⁰⁹ and revolved around the overarching question of how to deal with the Southern states that seceded from the Union.¹¹⁰ While President Johnson took a more lenient position towards the former Confederate states,¹¹¹ radical Republicans staunchly disagreed and this created a “superheated environment.”¹¹² As a result, President Johnson regularly exercised the presidential veto power to prevent Republican Reconstruction legislation from becoming law.¹¹³

In 1867, Congress overrode one of President Johnson’s many vetoes and passed the Tenure of Office Act.¹¹⁴ The Act prevented the president from removing certain officials without the advice and consent of the Senate.¹¹⁵ Congress’ intention was to prohibit the president’s unilateral removal of the Secretary of War, Edwin McMasters Stanton.¹¹⁶ On February 21, 1868, President Johnson disregarded the

108. *Id.* at 536; *Andrew Johnson Papers, Timeline*, LIBR. OF CONG., <https://www.loc.gov/collections/andrew-johnson-papers/articles-and-essays/timeline> (last visited Jan. 15, 2022) [hereinafter *Andrew Johnson Papers*] (noting that Johnson became the 17th President of the United States after President Lincoln’s assassination).

109. Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 426 (2000).

110. *Id.* at 427; see generally History.com Editors, *Confederate States of America*, HIST. https://www.history.com/topics/american-civil-war/confederate-states-of-america#section_3 (Aug. 21, 2018) (stating that eleven Southern states seceded from the United States and created the Confederate States of America).

111. *The Impeachment of President Andrew Johnson*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1851-1900/The-impeachment-of-President-Andrew-Johnson> (last visited Jan. 15, 2022) [hereinafter *Impeachment of President Johnson*]. It cannot go unnoticed that Andrew Johnson was himself a southerner. See *Andrew Johnson Papers*, *supra* note 108. Before becoming President, he worked in the Tennessee state legislature, was the Governor of Tennessee, and was elected to the United States House of Representatives and United States Senate for the State of Tennessee. *Id.* While he did remain loyal to the United States after Tennessee seceded from the Union in 1861, his southern roots likely played a role in his leniency towards the Confederate States. *Id.*

112. Whittington, *supra* note 109, at 427 (describing the tension between President Johnson and Republicans as a “superheated environment”); *Impeachment of President Johnson*, *supra* note 111 (stating that radical Republicans advocated for southern states to receive immediate citizenship and enfranchisement, as well as social and economic aid for freed slaves).

113. *Impeachment of President Johnson*, *supra* note 111. Andrew Johnson vetoed twenty-one bills as President, compared to the thirty-six vetoes exercised by all of his predecessors combined. Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 218 (2007). Congress overrode fifteen of President Johnson’s vetoes, more than any other president in history. *Id.*

114. *Andrew Johnson Papers*, *supra* note 108.

115. See Tenure of Office Act, ch. 153, 1867 Stat. 430, 430 (1867) (stating that any person holding civil office to which he was appointed by the advice and consent of the Senate is “subject to removal by and with the advice and consent of the Senate”); see also *Impeachment of President Johnson*, *supra* note 111 (stating that the Act barred the President from removing Cabinet officials without the Senate’s consent).

116. *Andrew Johnson Papers*, *supra* note 108.

Tenure of Office Act and issued an order removing Stanton from office.¹¹⁷

A few days later, the House of Representatives passed a resolution to impeach President Johnson¹¹⁸ and appointed a committee to develop articles of impeachment.¹¹⁹ Eleven articles were adopted, most of which alleged the violation of the Tenure of Office Act.¹²⁰ After debate, the articles were approved by the House and subsequently delivered to the United States Senate,¹²¹ where both the prosecution and defense were able to present their arguments at the Senate trial.¹²² The Senate then deliberated in closed session on the articles of impeachment¹²³ and ultimately failed to reach the two-thirds necessary to convict and remove President Johnson by only one vote.¹²⁴ Although President Johnson remained in office, Congress used the first presidential impeachment to emphasize the Framers' vision of congressional supremacy and demonstrate that the president is no king.¹²⁵ It is known for establishing the appropriate relationship between the Chief Executive and Congress.¹²⁶

117. *Andrew Johnson, Impeachment Time Line*, NAT'L PARK SERV. <https://www.nps.gov/anjo/learn/historyculture/impeachmenttimeline.htm> (June 10, 2020) (explaining how President Johnson breached the rules set forth in the Tenure of Office Act by removing an officer without the consent of Congress). It appears that President Johnson purposefully disobeyed the Tenure of Office Act because he thought the law was unconstitutional and he wanted to "inflamm" Congress. Neumann, *supra* note 113, at 222. President Johnson's impeachment seemed legitimate under the "high crimes and Misdemeanors" standard because the Tenure of Office Act contained a provision making its violation a "high misdemeanor." Whittington, *supra* note 109, at 443.

118. *Andrew Johnson, Impeachment Time Line*, *supra* note 117. The resolution was passed by a strict party vote, 126 to 47. Trautman, *supra* note 104, at 537.

119. *Andrew Johnson, Impeachment Time Line*, *supra* note 117.

120. Neumann, *supra* note 113, at 223. Other articles of impeachment were based on disparaging public comments Johnson made about members of Congress and the body of Congress in general. Trautman, *supra* note 104, at 537; see *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7 (last visited Jan. 15, 2022) [hereinafter *Impeachment of Andrew Johnson*] (quoting each of the eleven articles of impeachment issued against President Johnson).

121. *Andrew Johnson, Impeachment Time Line*, *supra* note 117; *Impeachment of Andrew Johnson*, *supra* note 120 (stating that the Senate was presented the articles of impeachment in March 1968).

122. *Impeachment of Andrew Johnson*, *supra* note 120.

123. *Id.*

124. *Andrew Johnson Papers*, *supra* note 108; U.S. CONST. art. I, § 3, cl. 6. (stating that "no Person shall be convicted without the Concurrence of two thirds of the Members present").

125. Whittington, *supra* note 109, at 442 ("Presidential power was the target of the Johnson impeachment.").

126. *Id.* at 444.

2. Richard Nixon and the Threat of Impeachment

Although President Nixon resigned from office before he could officially be impeached, these proceedings were the next serious attempt to impeach a president in the modern era.¹²⁷ Many of President Nixon's most acclaimed achievements occurred during his first term as president.¹²⁸ However, despite his popularity and a brilliantly orchestrated reelection campaign, Nixon had an underlying fear that his illegal actions would be leaked to the public and either sink his reelection or lead to his impeachment.¹²⁹ The White House therefore established a covert unit known as the "Plumbers" to "plug leaks" and protect President Nixon.¹³⁰ On June 17, 1972, this team, consisting of five men in business suits and surgical gloves, was arrested at the offices of the Democratic National Committee ("DNC").¹³¹ After the burglars were convicted, the trial judge received a letter from one of the defendants stating that he was paid "hush money" to keep quiet about the White House's role in the crime.¹³² Notwithstanding the fact that Nixon "enjoyed a landslide victory" in 1972, his second term would prove to be much more problematic than the first.¹³³

The public suspected that Nixon's Justice Department would not reliably investigate the alleged crimes committed by the administration and as a result, Attorney General Elliot Richardson appointed Archibald Cox as a special prosecutor.¹³⁴ A Senate committee shortly began investigating the Watergate burglary and suspected cover-up by

127. Trautman, *supra* note 104, at 540 ("The 1972 case of Richard Nixon . . . becomes the next serious attempt to impeach a president."); *Id.* at 542.

128. Richard M. Nixon, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/richard-m-nixon> (last visited Jan. 15, 2022) ("His accomplishments while in office included revenue sharing, the end of the draft, new anticrime laws, and a broad environmental program."). President Nixon had also delivered on his promise to appoint conservative Justices to the Supreme Court and oversaw American astronauts landing on the moon for the first time. *Id.*

129. Trautman, *supra* note 104, at 540. These illegal acts included the covert bombing war in Cambodia and wiretapping of various reporters and officials. *Id.*

130. ALLAN J. LICHTMAN, THE CASE FOR IMPEACHMENT 23 (1st ed. 2017).

131. Neumann, *supra* note 113, at 252-53; John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 609 (2000). This group not only burglarized the Democratic National Committee but also the office of psychiatrist Daniel Ellsberg. *Id.* at 618. Daniel Ellsberg was the man who had leaked a detailed and lengthy study of the origins of the Vietnam War known as the Pentagon Papers. *Id.* at 617.

132. Neumann, *supra* note 113, at 253.

133. Trautman, *supra* note 104, at 540; Richard M. Nixon, *supra* note 128 ("In his 1972 bid for office, Nixon defeated Democratic candidate George McGovern by one of the widest margins on record.").

134. Neumann, *supra* note 113, at 253.

President Nixon.¹³⁵ During the Senate investigation, Nixon's former appointments secretary, Alexander Butterfield, accidentally shared "that Nixon had ordered a voice-activation audiotaping system to be installed in the Oval Office and that the system recorded every conversation there since 1971."¹³⁶ Nixon continuously refused to turn over any of these recordings, even after special prosecutor Cox subpoenaed certain tapes.¹³⁷

Both Congress and the public were outraged with the Nixon administration¹³⁸ and as a result, multiple resolutions calling for both the impeachment of President Nixon and investigations relating to the Watergate scandal were introduced to the House Judiciary Committee.¹³⁹ The House subsequently passed a resolution authorizing the Judiciary Committee to investigate fully and completely whether sufficient grounds existed for the House of Representatives to impeach President Richard Nixon.¹⁴⁰ It set general standards for the Committee, and authorized it to require, by subpoena, interrogatory, or otherwise, the furnishing of information deemed necessary for the investigation.¹⁴¹ The House also approved a resolution which permitted further investigation and provided for additional expenses of the committee.¹⁴²

135. *Id.* This cover-up was ultimately a conversation in the Oval Office between President Nixon and his principal aide to strategize about how to hide White House involvement in the scandal. *Id.*

136. *Id.*

137. *Id.* This led to "the Saturday night massacre," in which President Nixon ordered Attorney General Richardson to fire special prosecutor Archibald Cox. *Id.* "Richardson refused to obey what he believed to be an illegal order and resigned" instead. LICHTMAN, *supra* note 130, at 29. Nixon then turned to Deputy Attorney General William French Smith who also refused and resigned. *Id.* Acting Attorney General Robert Bork ultimately complied with Nixon's order. *Id.* Bork "fired Cox, abolished the office of special prosecutor, and had the FBI lock up the office and its records." Neumann, *supra* note 113, at 253.

138. Neumann, *supra* note 113, at 254.

139. See ELIZABETH RYBICKI & MICHAEL GREENE, THE IMPEACHMENT PROCESS IN THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. R45769, at 5 (2019), <https://fas.org/sfp/crs/misc/R45769.pdf>; see 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES ch. 14, § 15.1, at 2167-69 (1994) [hereinafter DESCHLER'S PRECEDENTS] (quoting the different resolutions referred by multiple House members). In most impeachments, "proceedings in the House have been initiated either by introducing a resolution of impeachment through the hopper or by offering a resolution of impeachment on the floor as a question of the privileges of the House." CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 614 (2017), <https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-115/pdf/GPO-HPRACTICE-115.pdf>.

140. Bobbitt, *supra* note 10, at 519-20.

141. See H.R. Res. 803, 93rd Cong. (1974); see also DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 15.2, at 2169-70 (describing the authority of the chairman, the ranking minority member, and the committee as a whole).

142. See DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 15.2, at 2169-70 (explaining the issues regarding funding of the impeachment inquiry). In order to perform these investigative

Once the resolution was introduced and referred to the Judiciary Committee, the impeachment investigations were governed by portions of House Rule XI.¹⁴³ These requirements may be waived or supplemented in particular cases,¹⁴⁴ and the Judiciary Committee, during Nixon's impeachment, initially set certain parameters regarding confidentiality, grounds for impeachment, and also reported on the status of the investigation.¹⁴⁵ Two sets of confidentiality procedures were adopted¹⁴⁶: one provided procedures for handling impeachment inquiry material,¹⁴⁷ while the other provided protection for materials and work product of the inquiry staff.¹⁴⁸ Another important role of the Committee was to answer the question of whether impeachable offenses were required to be criminal or indictable offenses.¹⁴⁹ A staff report "summarized the historical origins and constitutional bases for impeachment," and determined that a criminal or indictable offense is sufficient for impeachment, but not necessary.¹⁵⁰ At this point, the inquiry staff reported specific allegations of Nixon's wrongdoing that needed to be investigated.¹⁵¹

The Nixon investigation played out slowly and was largely open to the public.¹⁵² The Committee on the Judiciary unanimously adopted

functions, the House of Representatives could "subpoena persons or written records, conduct hearings, and incur expenses . . . in connection with investigations" under House Rule XI. RYBICKI & GREENE, *supra* note 139, at 6.

143. JOHNSON ET AL., *supra* note 139, at 615 ("Committee impeachment investigations are governed by those portions of rule XI relating to committee investigative and hearing procedures, and by any rules and special procedures adopted by the House and by the committee for the inquiry.").

144. *Id.* at 615-16.

145. DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, §§ 15.3-15.5, at 2173-74.

146. *Id.* at ch. 14, § 15.3, at 2173.

147. *Id.* The first set of procedures ensuring the confidentiality of materials in the Nixon impeachment inquiry was entitled, "Procedures for Handling Impeachment Inquiry Material." *Id.* Access to such materials were limited to "the chairman, ranking minority member, special counsel, and special counsel to the minority of the committee." *Id.* Preserving confidentiality was a top priority. *Id.*

148. *Id.* The second set of procedures were entitled "Rules for the Impeachment Inquiry Staff." *Id.*

149. *Id.* at ch. 14, § 15.4, at 2173-74. This question was necessary to answer because of the language of the Constitution which states that a person can be impeached for "high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

150. DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 15.4, at 2173-74. This precedent will prove to be important when examining President Trump's impeachment in which no crime was committed, but an impeachment inquiry was still initiated. See *infra* Part III.C.

151. DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 15.5, at 2174 (listing specified allegations of which President Richard Nixon was accused).

152. *Comparing the Trump Impeachment Probe to Nixon's*, CBS NEWS (Nov. 11, 2019, 9:11 AM), <https://www.cbsnews.com/news/donald-trump-impeachment-inquiry-comparing-richard-nixon-watergate-investigation>.

special procedures for presenting evidence¹⁵³ and permitted a statement of information with annotated evidentiary materials to be presented to both Committee Members and the President's counsel.¹⁵⁴ Not only did the evidence include "six hundred fifty 'statements of information' and more than 7,200 pages of supporting evidentiary material,"¹⁵⁵ but also recordings of different presidential conversations which left no room for individual inferences or conclusions.¹⁵⁶ Other procedures were adopted for holding hearings to examine witnesses, and these hearings were largely available to President Nixon and his counsel.¹⁵⁷ In July 1974, testimony was heard from nine witnesses, including witnesses proposed by the President's counsel, and witnesses were interrogated by the counsel for the Committee, Special Counsel to the President, and by members of the Committee.¹⁵⁸ Importantly, throughout these procedures, the Judiciary Committee allowed President Nixon's attorneys to mount a defense, even though that defense eventually wilted against the available evidence.¹⁵⁹

On July 23, 1974, the Judiciary Committee voted to consider "a motion to report a resolution and articles of impeachment to the House" and it seemed more likely than not that Nixon would eventually be impeached.¹⁶⁰ However, the President's true downfall occurred once Leon Jaworski was appointed as the new special prosecutor¹⁶¹ and relentlessly commanded Nixon to surrender recordings of discussions in the Oval Office.¹⁶² On July 24, the Supreme Court in *United States v. Nixon*¹⁶³ concluded that President Nixon must surrender the tapes sought by Jaworski and earlier by Cox.¹⁶⁴ The transcripts were released and

153. See generally DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 6.5, at 2045-47 (detailing the evidentiary hearing procedures used in the Nixon impeachment inquiry).

154. *Id.* at ch. 14, § 15.6, at 2175.

155. *Id.*

156. *Id.*

157. *Id.* The President's counsel was able to attend these hearings and they were permitted to examine witnesses. *Id.*

158. *Id.* at 2176.

159. *Comparing the Trump Impeachment Probe to Nixon's*, *supra* note 152.

160. DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 15.7, at 2176-77 (quoting the resolution to consider articles of impeachment against President Nixon); see *id.* at 2177-78 (stating that at least ten members of the Judiciary Committee had voted against this resolution and that Nixon still had some support in Congress).

161. Neumann, *supra* note 113, at 254.

162. *Id.* Subpoenas were issued for the production of "certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others." *United States v. Nixon*, 418 U.S. 683, 688 (1974).

163. 418 U.S. 683 (1974).

164. Neumann, *supra* note 113, at 254; *United States v. Nixon*, 418 U.S. at 700 ("We . . . conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment."). The Supreme Court

proved that President Nixon planned the Watergate burglary, directed a cover-up, and ordered the Federal Bureau of Investigation not to investigate the burglary.¹⁶⁵

These recordings provided overwhelming evidence that not only sent President Nixon's top advisors to prison, but also utterly destroyed public faith in the Nixon Administration.¹⁶⁶ The House Judiciary Committee officially voted to accept three proposed articles of impeachment¹⁶⁷: obstruction of justice,¹⁶⁸ abuse of power,¹⁶⁹ and contempt of Congress.¹⁷⁰ The Committee had concluded its investigation, hearings, and accepted the articles, which meant the full House of Representatives now had to consider the articles of impeachment.¹⁷¹ At this point, the President had lost nearly all Republican support in Congress and Republican leaders made it clear that Nixon would certainly be impeached in the House of Representatives, and likely convicted and removed from office by the Senate as well.¹⁷² When President Nixon submitted his written resignation on August 9, 1974, further impeachment proceedings were discontinued in the House, and Nixon was never officially impeached.¹⁷³

recognized "the importance of the general privilege of confidentiality of Presidential communications" in order to fulfill presidential responsibilities, but also stated that "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id.* at 711-12.

165. Neumann, *supra* note 113, at 254. These tapes were considered "the smoking gun." *Id.*

166. See Trautman, *supra* note 104, at 542; see also Neumann, *supra* note 113, at 254.

167. DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 15.7, at 2177-78 (quoting the three articles of impeachment approved by the Judiciary Committee).

168. Neumann, *supra* note 113, at 255. Regarding obstruction of justice, "[t]he committee vote in favor of this article was twenty-seven to eleven." *Id.* All of the committee Democrats voted in favor of the article "and Republicans voted against it, six to eleven." *Id.*

169. *Id.* Here, the committee vote was twenty-eight to ten with all ten negative votes coming from Republicans. *Id.*

170. *Id.* at 255-56. In this final article of impeachment, "Democrats voted for it nineteen to two, and Republicans voted against it, two to fifteen." *Id.* at 256.

171. ELIZABETH RYBICKI & MICHAEL GREENE, THE IMPEACHMENT PROCESS IN THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. R45769, at 2 (2019), <https://fas.org/sgp/crs/misc/R45769.pdf>.

172. Neumann, *supra* note 113, at 256 ("After the smoking gun tape transcripts were released, all but one of the remaining Republicans deserted Nixon, and Republican leaders . . . went to the White House, advised Nixon that he would be impeached by an overwhelming vote in the House, and asked him to resign, which he did.").

173. DESCHLER'S PRECEDENTS, *supra* note 139, at ch. 14, § 2.1, at 1952. One month later, "Gerald Ford, who had succeeded to the presidency on Nixon's resignation, granted a pardon for 'all offenses against the United States' committed by Nixon while he was president." Neumann, *supra* note 113, at 255.

3. The Controversial Impeachment of President Bill Clinton

This narrative begins with Bill Clinton serving as Arkansas's Attorney General and the Whitewater scandal that ensued during his tenure.¹⁷⁴ The Clintons began scouting opportunities for investment and ultimately formed the Whitewater Development Corporation to buy riverfront land and develop vacation homes on the property.¹⁷⁵ The project was a failure and rumors speculated that the Clintons conspired with their partners to defraud businesses.¹⁷⁶ Investigations into Whitewater began,¹⁷⁷ and the scandal erupted further when the *New York Times* published a story on the suicide of a deputy White House counsel and former partner of the First Lady.¹⁷⁸

Robert Fiske was appointed as independent counsel to investigate the scandal and after a six-month investigation, Fiske issued a final report stating that there was no foul play in the death of the deputy counsel.¹⁷⁹ The report further cleared President Clinton from any involvement in the Whitewater charges.¹⁸⁰ However, Congress decided to reauthorize the independent counsel statute and a three-judge panel appointed Kenneth Starr to continue investigations for the next three years.¹⁸¹ Like the previous counsel, Starr "was unable to find any prosecutable wrongdoing by either the president or Mrs. Clinton."¹⁸² However, Starr's final report, instead of focusing on the Whitewater scandal, offered results of a lengthy investigation into charges of

174. Dylan Matthews, *Whitewater, Explained for People Who Don't Remember the Clinton Presidency*, VOX (Apr. 13, 2015, 10:30 AM), <https://www.vox.com/2015/4/13/8397309/hillary-clinton-whitewater>.

175. *Id.* (stating that the Clintons formed this corporation with James and Susan McDougal).

176. *Id.* Jim McDougal "bought a small savings and loan association, renamed it Madison Guaranty, and defrauded both it and the small-business investment firm Capital Management Services to the tune of \$3 million; the bank's failure wound up costing the federal government around \$73 million." *Id.*

177. *Id.* These investigations uncovered real wrongdoing with fifteen people being convicted of various charges. *Id.*; see generally *Whitewater Time Line*, WASH. POST, <https://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm> (last visited Jan. 15, 2022) (providing a detailed timeline of the Whitewater scandal).

178. Bobbitt, *supra* note 10, at 529. Members of Congress then pushed to investigate Whitewater and its relationship to this death. *Id.* at 529-30.

179. *Id.* at 528, 530; 140 CONG. REC. S8018 (daily ed. June 30, 1994) (statement of Sen. Pryor) ("[T]he special counsel found no evidence that issues involving Whitewater, Madison, Capital Management Services, or other personal legal matters of the President or Mrs. Clinton were a factor in Mr. Foster's suicide.").

180. Bobbitt, *supra* note 10, at 530.

181. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, § 2, 108 Stat. 732, 732; Bobbitt, *supra* note 10, at 530; see also Amar, *supra* note 13, at 296-99 (describing the process of how Starr was chosen as independent counsel).

182. Bobbitt, *supra* note 10, at 530.

President Clinton's sexual misconduct and potential impeachable offenses.¹⁸³

The narrative then shifted to *Clinton v. Jones*,¹⁸⁴ in which Ms. Paula Jones alleged that while she was an Arkansas state employee and President Clinton was Governor of Arkansas, Clinton invited Ms. Jones to a hotel room and made crude sexual advances toward her.¹⁸⁵ Jones's attorneys faxed the President a list of potential witnesses and the list included the name of Ms. Monica Lewinsky, a twenty-one-year-old White House intern.¹⁸⁶ It is now known that President Clinton and this young intern partook in secret liaisons where they engaged in many acts of inappropriate sexual conduct.¹⁸⁷ However, at this point in the *Jones* case, the two attempted to keep their relationship a secret and filed a false affidavit to avoid having Ms. Lewinsky called to testify.¹⁸⁸ This proved difficult, as evidence was accumulating through records and eyewitness accounts of President Clinton and Ms. Lewinsky spending significant amounts of time together.¹⁸⁹ Ms. Lewinsky ultimately received a subpoena on December 19, 1997 to testify in a deposition and produce gifts that President Clinton had given her.¹⁹⁰

Throughout this case, President Clinton testified in an ambiguous manner, saying it was "possible" he invited Ms. Lewinsky to the White House, that he "probably" gave Ms. Lewinsky gifts, and that he could not recall other events.¹⁹¹ He continued making false and misleading statements to the federal court, the federal grand jury, and Congress, which would ultimately lead to his impeachment.¹⁹² A famous example is President Clinton's response to a question about paragraph eight of Ms. Lewinsky's affidavit, in which he stated he had never had a sexual

183. H.R. DOC. NO. 105-310, at 1 (1998) (providing "substantial and credible information that President William Jefferson Clinton committed acts that may constitute grounds for impeachment").

184. 520 U.S. 681 (1997).

185. See *id.* at 684-86 (providing more detail on the background of the case, Paula Jones, and President Clinton); see also H.R. REP. NO. 105-830, at 7 (1998).

186. H.R. REP. NO. 105-830, at 7-8.

187. *Id.* (describing significant sexual events that took place over the term of Ms. Lewinsky and President Clinton's relationship).

188. *Id.* at 11-13 (describing how President Clinton informed Ms. Lewinsky that she was on the witness list and how he planned to prevent her from testifying); see also Neumann, *supra* note 113, at 283 (stating that President Clinton was also attempting to get Ms. Lewinsky a private industry job in exchange for her silence).

189. H.R. REP. NO. 105-830, at 12.

190. *Id.* at 14. Ms. Lewinsky immediately informed President Clinton that she was subpoenaed, as they had previously agreed. *Id.* President Clinton later lied to the grand jury and denied that he was told Ms. Lewinsky was subpoenaed. *Id.*

191. *Id.* at 15. President Clinton also provided different answers to the same questions when asked at a later date. *Id.*

192. *Id.*

relationship with Ms. Lewinsky.¹⁹³ The President also engaged in witness tampering by encouraging potential witnesses to view his relationship with Ms. Lewinsky in a platonic way.¹⁹⁴ By August 1998, President Clinton testified before a grand jury and lied despite swearing to tell the truth.¹⁹⁵ This narrative was thoroughly described by independent counsel Kenneth Starr,¹⁹⁶ who urgently pressed the House to impeach President Clinton by submitting “substantial and credible information that President Clinton obstructed justice . . . by lying under oath and concealing evidence of his relationship with . . . Monica Lewinsky.”¹⁹⁷

In September 1998, the House of Representatives passed Resolution 525, authorizing the release of Starr’s referral, setting parameters for release of other materials, and directing the Judiciary Committee to review Starr’s report and the accompanying materials.¹⁹⁸ The Committee would then be able to make an informed recommendation to the full House on whether impeachment was proper.¹⁹⁹ Starr’s eleven possible grounds for impeachment²⁰⁰ were thoroughly considered by the House Judiciary Committee, which later

193. *Id.* at 19. Paragraph eight states: “I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship.” *Id.* When President Clinton was asked if that was “a true and accurate statement” he replied that it was “absolutely true.” *Id.* at 21.

194. *See generally id.* at 21-28 (describing the aftermath of Clinton’s deposition and other ways he acted improperly).

195. *Id.* at 28 (“He equivocated and engaged in legalistic fencing, but he also lied. Actually, the entire testimony was calculated to mislead and deceive the grand jury and eventually the American people.”); *see generally id.* at 28-32 (describing Clinton’s grand jury testimony and lies told in further detail).

196. *See generally* H.R. DOC. NO. 105-310, at 11-130 (1998) (detailing Starr’s investigation and recommendation that Clinton be impeached); *see also* H.R. REP. NO. 105-830, at 7-32 (providing a similar summary of these events). It is also important to note that a Pentagon employee secretly tape-recorded her conversations with Ms. Lewinsky about her and President Clinton and those conversations were handed over to Starr’s Office of the Independent Counsel. Neumann, *supra* note 113, at 283.

197. H.R. REP. NO. 105-795, at 5 (1998); Bobbitt, *supra* note 10, at 533. In comparison to the independent counsels in the Nixon impeachment, both Cox and Jaworski turned over their evidence collected to the House without making any recommendations. Neumann, *supra* note 113, at 286.

198. H.R. REP. NO. 105-795, at 24, 32.

199. *Id.* at 24. The Rules Committee Chairman added that “this resolution does not authorize or direct an impeachment inquiry.” *Id.* at 25. “It is not the beginning of an impeachment process” but merely provides the appropriate parameters to the Committee. *Id.* After reviewing Mr. Starr’s evidence, the Committee would either find no substantial evidence of an impeachable offense or it would recommend a formal impeachment inquiry. *Id.*

200. H.R. DOC. NO. 105-310, at 129-210.

reported its recommendation to initiate an official impeachment inquiry.²⁰¹

The House then passed another resolution authorizing the Judiciary Committee to officially investigate whether sufficient grounds existed to impeach President Clinton.²⁰² Such a resolution is always passed in the House of Representatives because “the issue of impeachment is of such overwhelming importance” that authorization from the full House is needed before proceeding.²⁰³ This was a bipartisan vote with support from every Republican and thirty-one Democrats.²⁰⁴ Importantly, this “Resolved [C]ause,” which authorized and directed the Committee to investigate, is identical to Resolution 803 in the Nixon impeachment.²⁰⁵ Additionally, the House raised concerns about “procedural fairness” and encouraged the Committee to adopt procedural protections for President Clinton.²⁰⁶ Among these protections were that “[t]he President and his counsel shall be invited to attend all executive session and open committee hearings,” that “[t]he President’s counsel may cross examine witnesses,” and may “suggest that the Committee receive additional evidence.”²⁰⁷

Overall, the Judiciary Committee relied mostly on the independent counsel’s report as a basis for impeachment and conducted few hearings of its own.²⁰⁸ To begin, Committee Chairman Henry Hyde asked President Clinton to “admit or deny” the major facts outlined in the Starr Report and a subcommittee heard from legal experts on whether the facts surrounding President Clinton’s extramarital affair rose to the level of an impeachable offense.²⁰⁹ Much of the Committee’s actions were to support the already conducted investigation of Independent Counsel Kenneth Starr and on November 19, 1998, Starr outlined his case before the House Judiciary Committee.²¹⁰ In December of that year, President

201. Charles Tiefer, *The Controversial Transition Process from Investigating the President to Impeaching Him*, 14 ST. JOHN’S J. LEGAL COMM. 111, 124 (1999).

202. H.R. Res. 581, 105th Cong. (1998).

203. H.R. REP. NO. 105-795, at 24.

204. Tiefer, *supra* note 201, at 126.

205. H.R. REP. NO. 105-795, at 33. Section Two of the Resolution, which empowers the Committee to require the attendance and testimony of witnesses and describes the Committee’s investigative authority is also the same, word-for-word, as section two of H.R. Res. 803. *Id.*

206. *Id.* at 25. This was similar to Nixon’s procedural protections. *See supra* notes 157-59 and accompanying text.

207. H.R. REP. NO. 105-795, at 25.

208. Bobbitt, *supra* note 10, at 533.

209. *The Clinton Impeachment, a Basic Chronology*, BROOKLYN CUNY, <http://academic.brooklyn.cuny.edu/history/johnson/clintontimeline.htm> (last visited Jan. 15, 2022) [hereinafter *The Clinton Impeachment*].

210. Bobbitt, *supra* note 10, at 533; *The Clinton Impeachment*, *supra* note 209. Starr repeatedly stated that Clinton purposefully “chose deception” throughout this process. *Id.*

Clinton's lawyers asked the Committee for three to four days to present their defense, and were granted thirty hours over two days in order to do so.²¹¹

The Committee felt comfortable concluding its investigation and recommended four articles of impeachment to the full House of Representatives in December 1998.²¹² These articles were ultimately based on the fact that the President: "(1) abused his office by using staff to facilitate sexual liaisons with other personnel, (2) used his office to buy silence by offering jobs or threatening to embarrass others, and (3) lied under oath and [gave] false statements to the public."²¹³ Two of the articles, "Perjury in the Grand Jury" and "Obstruction of Justice," were passed with the help of a few Democrats in the House.²¹⁴ The articles were immediately sent to the Senate, where, like Andrew Johnson, President Clinton was acquitted on all charges and remained in office.²¹⁵

Those who supported President Clinton argued that his impeachment process "represented a grievous display of partisanship."²¹⁶ The President's accusers argued the House followed a fair and proper process modeling the content of Nixon's impeachment proceeding in the 1970s.²¹⁷ It favored precedent over manipulative redrafting and offered free debate.²¹⁸ The discussion over whether Clinton's impeachment was proper remains a debate today.²¹⁹

211. *The Clinton Impeachment*, *supra* note 209 ("In a daylong session, President Clinton's lawyers and three panels of witnesses testif[ied] on the president's behalf, saying Clinton's behavior [did] not warrant impeachment.").

212. *See generally* H.R. REP. NO. 105-830, at 2-5 (1998) (detailing the four proposed articles of impeachment); Neumann, *supra* note 113, at 291.

213. Bobbitt, *supra* note 10, at 533-34.

214. *Id.* at 534; Andrew Glass, *House Votes to Impeach Clinton*, *Oct. 8, 1998*, POLITICO (Oct. 8, 2017, 6:53 AM) <https://www.politico.com/story/2017/10/08/house-votes-to-impeach-clinton-oct-8-1998-243550>. Five Democrats voted in favor of three of the articles of impeachment. *Id.* Twenty-eight Republicans voted against the "Perjury in the Civil Case" charge and eighty-one against the "Abuse of Power" charge, sending them both to defeat. *Id.*

215. Bobbitt, *supra* note 10, at 534. "No Democratic senator voted guilty on either charge" and the sixty-seven votes needed to convict and remove President Clinton were not reached. *Id.*

216. Tiefer, *supra* note 201, at 127.

217. *Id.* at 125.

218. *Id.* at 126.

219. *See generally* Bobbitt, *supra* note 10, at 537 ("[T]he Clinton debacle, from which no one walked away unscathed, will shape the development of the impeachment clauses more than any other events to date.").

III. THE INCREASINGLY POLARIZED CLIMATE OF PRESIDENTIAL IMPEACHMENTS

Part III of this Note will define political polarization and examine this issue in today's modern political climate.²²⁰ It will also carefully detail the impeachment of President Trump, analyzing why he was impeached and the procedures adopted by the House of Representatives.²²¹ More specifically, Part III will describe how political polarization played a role in the process and why this extreme political division is harmful to impeachment procedures.²²²

A. What Is Political Polarization?

Simply put, political polarization is defined as “the political distance separating partisans.”²²³ On its face, this seems like an easy concept to understand,²²⁴ but political scientists have heavily researched this concept²²⁵ and have determined that “tribalism”²²⁶ seems to be the driving force of polarization.²²⁷ The separation is not limited to political views,²²⁸ but it is easy to view in a political light because the divide along ideological lines is so visibly deep and extensive.²²⁹ In this sense, political polarization is when the ideological overlap of parties diminishes.²³⁰ The “tails” or poles of the ideological distribution grow.²³¹

220. See *infra* Part III.A–B.

221. See *infra* Part III.C.1–2.

222. See *infra* Part III.C.3.

223. Robert B. Talisse, *Political Polarization Is About Feelings, Not Facts*, CONVERSATION (July 31, 2019, 7:43 AM), <https://theconversation.com/political-polarization-is-about-feelings-not-facts-120397>.

224. *Id.* (calling polarization an “intuitive idea”).

225. *Id.* (explaining that political scientists have developed at least three ways of measuring the ideological distance between political parties).

226. Jilani & Smith, *supra* note 20 (defining “tribalism” as “clustering ourselves into groups that compete against each other in a zero-sum game where negotiation and compromise are perceived as betrayal . . .”).

227. *Id.*

228. See *id.* (stating that polarization can be the division of people based on politics, race, religion, gender, or age).

229. See *Political Polarization in the American Public*, *supra* note 24 (“Republicans and Democrats are more divided along ideological lines . . . than at any point in the last two decades.”).

230. *Id.* (“[T]his shift represents both Democrats moving to the left and Republicans moving to the right, with less and less overlap between the parties.”).

231. *Id.*

B. *The Current State of Our Political Parties*

America's two parties are more "ideologically pure" and distant than ever before.²³² According to the Pew Research Center, the tail ends of the ideological distribution have more than doubled in the past twenty years.²³³ In 1994, 64% of Republicans were to the right of the median Democrat and 70% of Democrats were to the left of the median Republican.²³⁴ By 2014, these percentages grew to 92% and 94%, respectively.²³⁵

Not only has the public become more polarized, but members of the legislative branch have, as well.²³⁶ This has made compromise more difficult to achieve and contributes "to the current Congress' inability to get much of consequence done."²³⁷ Studies have been conducted over the past several decades to determine exactly how much ideological overlap there is between Democrats and Republicans in Congress.²³⁸ There was substantial overlap in the 1970s with 240 House members scoring in between the most conservative Democrat and the most liberal Republican.²³⁹ In the Senate, twenty-nine senators scored within that range.²⁴⁰ This overlap began to diminish and by 1993–1994, those numbers had fallen to nine House members and three senators.²⁴¹ By 2011–2012, there was no intersection at all in either chamber of Congress.²⁴² Moderate-to-liberal Republicans and conservative Democrats are disappearing and there is a clearer divide between the liberal Northeast and conservative South.²⁴³ These studies on political polarization help explain why legislative stagnation is so prominent in

232. Michael Cotton, *Partisanship as Vice and Patriotism as Virtue*, 23 TEX. REV. L. & POL. 647, 648 (2019).

233. *Political Polarization in the American Public*, *supra* note 24 (discussing that in the past twenty years, the tails of the ideological spectrum have doubled from ten percent to twenty-one percent).

234. *Id.*

235. *Id.*

236. Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since> ("Congress is now more polarized than at any time since the end of Reconstruction.").

237. *Id.*

238. *Id.* Researchers took each senator and representative in Congress and ordered them from most liberal to most conservative. *Id.* They then sorted each person to see if there was any overlap between the two parties. *Id.* One dimension of the study represented traditional differences between liberals and conservatives, while another focused on regional issue differences. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

our federal system and why impeachment proceedings are becoming increasingly antagonistic.²⁴⁴

C. *President Trump's Impeachment—The First One*

This Subpart will thoroughly outline the first impeachment of President Trump,²⁴⁵ starting with the President's phone call to Ukrainian President Volodymyr Zelensky.²⁴⁶ It will then describe the procedures that the House of Representatives used to investigate during the impeachment inquiry, while making comparisons to past presidential impeachments.²⁴⁷ Finally, it will examine how political polarization had a negative effect on the process and describe why that is problematic for our society.²⁴⁸

1. Why Impeach President Trump?

What ultimately became the basis for the impeachment proceedings was a July 2019 phone call between President Trump and Ukrainian President Volodymyr Zelensky.²⁴⁹ The call raised flags among some intelligence officials and led to a secret whistleblower complaint in August.²⁵⁰ There was then pressure to release the transcript of the phone

244. *Id.*

245. Molly Blackall, *First Thing: Trump Becomes First President to Be Impeached Twice*, GUARDIAN (Jan. 14, 2021, 5:38 AM), <https://www.theguardian.com/us-news/2021/jan/14/first-thing-trump-becomes-first-president-to-be-impeached-twice> (stating that “[t]he House of Representatives voted . . . to impeach Donald Trump for inciting the violent insurrection at the Capitol . . . making him the first president in [United States] history to be impeached twice”). This Note will focus only on President Trump's first impeachment proceedings. *See infra* Part III.C.1–2.

246. *See infra* Part III.C.1.

247. *See infra* Part III.C.2.

248. *See infra* Part III.C.3.

249. *President Donald Trump Impeached*, *supra* note 27. This was after an exhaustive effort by Democrats to find evidence that President Trump had ties to Russian hackers who targeted Hillary Clinton, his opponent in the general election. *Id.* After investigation, there was “no evidence that the Trump campaign actively conspired with Russia's efforts to interfere in the 2016 presidential election.” Brian Naylor, *Impeachment Timeline: From Early Calls to a Full House Vote*, NPR (Dec. 17, 2019, 5:00 AM), <https://www.npr.org/2019/12/17/788397365/impeachment-timeline-from-early-calls-to-a-full-house-vote>.

250. Letter from Anonymous Whistleblower to Hon. Richard Burr, Chairman, Senate Select Comm. on Intel. and Hon. Adam Schiff, Chairman, House Permanent Select Comm. on Intel. (Aug. 12, 2019) [hereinafter Aug. 12 Whistleblower Letter] (providing the full whistleblower complaint addressed to Richard Burr of the Senate Committee on Intelligence and Adam Schiff of the House Committee on Intelligence). The complaint alleged that the President was “using the power of his office to solicit interference from a foreign country in the 2020 U.S. election.” *Id.* It also stated that the President “had issued instructions to suspend all U.S. security assistance to Ukraine.” *Id.*; *see also* Devlin Barrett et al., *Trump Offered Ukrainian President Justice Department Help in an Investigation of Biden, Memo Shows*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian->

call to the public.²⁵¹ The call began with President Trump congratulating President Zelensky on a “great victory” and telling him he did “a terrific job” with his campaign.²⁵² The two leaders continued by talking about how much the United States has helped Ukraine compared to other countries and eventually President Trump stated, “I would like you to do us a favor though because our country has been through a lot and Ukraine knows a lot about it.”²⁵³ He continued by asking President Zelensky to investigate a prosecutor who was “shut down” and how Joe Biden stopped a prosecution from happening.²⁵⁴ The issue was that then-presidential candidate Joe Biden was accused of “pressuring Ukraine to fire a prosecutor who reportedly oversaw a probe into the owner of a Ukrainian gas company, Burisma Holdings.”²⁵⁵ Biden’s son, Hunter, was a board member of the company.²⁵⁶ On the phone call, President Zelensky replied by saying that he would work to restore honesty and investigate the situation.²⁵⁷ The two concluded the conversation by admiring one another’s countries and how they looked forward to working together.²⁵⁸

President Trump insisted (and still does) that the phone call was perfect and that he did nothing wrong.²⁵⁹ When President Zelensky was asked about the call, he described it as a “good phone call”—one that was “normal” and where he felt no pressure from President Trump to do

president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0_story.html.

251. See generally Politico Staff, *Read the Trump-Ukraine Phone Call Readout*, POLITICO (Sept. 25, 2019, 10:15 AM), <https://www.politico.com/story/2019/09/25/trump-ukraine-phone-call-transcript-text-pdf-1510770> (providing the official memorandum of the telephone conversation between President Trump and President Zelensky of Ukraine).

252. *Id.*

253. *Id.*

254. *Id.* President Trump began by saying, “I would like you to find out what happened with this whole situation with Ukraine.” *Id.* He continued and said, “I heard you had a prosecutor who was very good and he was shut down and that’s really unfair.” *Id.* President Trump explained further by adding, “[t]here’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.” *Id.*

255. Breuninger, *supra* note 28.

256. *Id.* President Trump believed that as Vice President, Joe Biden improperly took actions intending to help his son and the company. *Id.*

257. Politico Staff, *supra* note 251.

258. *Id.*

259. Cf. @realDonaldTrump, TWITTER (Jan. 16, 2020, 3:39 PM), <https://twitter.com/realDonaldTrump/status/1217909231946477575> (“I JUST GOT IMPEACHED FOR MAKING A PERFECT PHONE CALL!”).

anything.²⁶⁰ Prosecutors reviewed the transcript and declined to investigate further, but others on Capitol Hill “accused Trump of violating his oath of office by soliciting political payback from a foreign leader.”²⁶¹ Speaker of the House Nancy Pelosi said the phone call was evidence of President Trump breaching his constitutional responsibilities,²⁶² and on September 24, 2019, Pelosi announced the start of a formal impeachment inquiry.²⁶³

2. Procedures in the Trump Impeachment

Speaker Pelosi announced an official impeachment inquiry, where “the Investigating Committees, the Judiciary Committee, and the Committees on Financial Services and Ways and Means would continue their investigations of Presidential misconduct.”²⁶⁴ The Investigating Committees subsequently issued subpoenas for witness interviews, depositions, and documents possessed by the executive branch.²⁶⁵ In response, White House Counsel sent a letter refusing to produce such subpoenaed documents, as it viewed the impeachment inquiry as partisan and unconstitutional.²⁶⁶ As an example, the White House noted that “the House of Representatives has never attempted to launch an impeachment inquiry . . . without a majority of the House taking political accountability for that decision” through a vote.²⁶⁷ Here, Speaker Pelosi announced an official impeachment inquiry at a press

260. The Associated Press, ‘*Nobody Pushed Me, Ukraine’s President Says of Trump Phone Call*,’ N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/video/us/politics/100000006736087/trump-ukraine-zelensky.html>.

261. Barrett et al., *supra* note 250.

262. Naylor, *supra* note 249.

263. *Id.* In initiating the impeachment inquiry, Nancy Pelosi stated that “[n]o one is above the law” and “[t]he president must be held accountable.” *Id.*

264. H.R. REP. NO. 116-346, at 8 (2019). The Judiciary Committee was already “investigating potential abuses of office by President Trump, including obstruction of law enforcement investigations relating to Russia’s interference in the 2016 United States Presidential election.” *Id.* at 7.

265. *Id.* at 8. The Committees stated that the information collected was “part of the House’s impeachment inquiry and shared among the Committees, as well as with the Committee on the Judiciary as appropriate.” *Id.*

266. *See generally* Letter from Pat A. Cipollone, Counsel to the President, to Hon. Nancy Pelosi, Speaker of the House, Hon. Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel., Hon. Elliot L. Engel, Chairman, House Comm. on Foreign Aff., and Hon. Elijah E. Cummings, Chairman, House Comm. on Oversight and Reform (Oct. 8, 2019) [hereinafter Oct. 8 Cipollone Letter] (“In order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry under these circumstances.”).

267. *Id.*

conference.²⁶⁸ Nevertheless, other officials complied with the orders and interviews were conducted.²⁶⁹ Republicans further challenged these procedures, arguing that interviewing witnesses in private “allows committees to gather information confidentially and in more depth than is possible under the five-minute rule²⁷⁰ governing committee hearings.”²⁷¹

Despite Republican pushback, the House voted to approve Resolution 660, which directed various congressional committees to continue their ongoing investigations as part of their inquiry into whether sufficient grounds existed to impeach President Trump.²⁷² Resolution 660 was similar to the resolutions passed in the Nixon and Clinton impeachments by providing a framework for the inquiry process.²⁷³ However, this investigation would be much different from the past inquiries because the House was conducting and would continue to conduct its investigation through its committees instead of an independent counsel investigating the President’s conduct.²⁷⁴

Ultimately, Resolution 660 set forth procedures for the two stages of the “public-facing” phase of the impeachment inquiry: the first before the House Permanent Select Committee on Intelligence (“HPSCI”) and the second before the House Judiciary Committee.²⁷⁵ The HPSCI held five days of public hearings, where current or former Trump Administration officials testified.²⁷⁶ Three of the witnesses who testified

268. Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES, <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html> (Jan. 8, 2021) (providing a video of Nancy Pelosi’s press conference, where she announced that the House of Representatives was moving forward with an official impeachment inquiry).

269. H.R. REP. NO. 116-346, at 9.

270. RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONG. Rule XI, cl. 2(j)(2) (2019), <https://naturalresources.house.gov/imo/media/doc/116-House-Rules-Clerk.pdf> (explaining that, as a general rule, each committee member is technically entitled to five minutes of questioning for each witness).

271. H.R. REP. NO. 116-346, at 9.

272. H.R. Res. 660, 116th Cong. (2019) (“That the Permanent Select Committee on Intelligence and the Committees on Financial Services, Foreign Affairs, the Judiciary, Oversight and Reform, and Ways and Means, are directed to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America.”).

273. H.R. REP. NO. 116-346, at 10.

274. *Id.*

275. *See id.* at 10; *see also* H.R. Res. 660 (describing procedures for the House Permanent Select Committee on Intelligence (“HPSCI”) and the Judiciary Committee).

276. H.R. REP. NO. 116-346, at 10. These twelve officials spoke about President Trump pressuring Ukraine to investigate political rival Joe Biden and about policy interests regarding Ukraine. *Id.* at 10-11.

did so at the request of Republicans.²⁷⁷ These public hearings concluded on November 21, 2019 and the HPSCI subsequently voted to adopt a report detailing their findings.²⁷⁸ At this point in the process, Chairman Adam Schiff²⁷⁹ “noted that although the investigation would continue, ‘[t]he evidence of the President’s misconduct is overwhelming,’” and he felt prepared to submit an impeachment referral.²⁸⁰

In the second stage of this inquiry, the Rules Committee established impeachment procedures for the Committee on the Judiciary and included certain procedural privileges for the president.²⁸¹ Jerrold Nadler, Chairman of the Judiciary Committee, wrote a letter to President Trump informing him of these procedures, explaining the purpose of the hearing, and asking whether President Trump and his counsel wished to participate.²⁸² The President responded in a December 1 letter stating, “under the current circumstances, we do not intend to participate in your Wednesday hearing.”²⁸³ The President’s counsel, Mr. Pat Cipollone, described the inquiry as “baseless and highly partisan” and provided examples of how the inquiry violated “all past historical precedent, basic due process rights, and fundamental fairness.”²⁸⁴ Mr. Cipollone began the letter by stating that the hearing was scheduled for a day that the Committee knew the President would be out of the country.²⁸⁵ The December 1 letter further claimed that Chairman Nadler provided the President with no information regarding plans for the hearing and set arbitrary deadlines to create a false appearance of providing the President with a fair process.²⁸⁶ He compared these proceedings to the

277. *Id.* at 11. The Minority had requested that Ambassador Kurt D. Vokler, Undersecretary of State David M. Hale, and former National Security Council official Timothy A. Morrison testify. *Id.*

278. *Id.*; see generally H.R. REP. NO. 116-335 (2019) (providing the evidence gathered thus far by the HPSCI).

279. H.R. REP. NO. 116-335, at XIV (showing that Adam Schiff is the Chairman of the HPSCI).

280. H.R. REP. NO. 116-346, at 11.

281. *Id.* at 11-12. These protections included opportunities to present evidence, attend hearings, and raise objections. *Id.* at 12.

282. *Id.*; see Letter from Jerrold Nadler, Chairman, House Comm. on the Judiciary, to Donald J. Trump, President of the United States (Nov. 26, 2019) [hereinafter Nov. 26 Nadler Letter]. Another letter was sent three days later to determine if the President’s counsel would participate. See Letter from Jerrold Nadler, Chairman, House Comm. on the Judiciary, to Donald J. Trump, President of the United States (Nov. 29, 2019) [hereinafter Nov. 29 Nadler Letter] (“In anticipation of our consideration of these matters, I am writing to determine if your counsel will seek to exercise the specific privileges set forth in the Judiciary Committee’s Impeachment Procedures adopted pursuant to H. Res. 660 and participate in the upcoming impeachment proceedings.”).

283. Letter from Pat A. Cipollone, Counsel to the President, to Hon. Jerrold Nadler, Chairman, House Comm. on the Judiciary (Dec. 1, 2019) [hereinafter Dec. 1 Cipollone Letter].

284. *Id.*

285. *Id.*

286. *Id.*

Clinton impeachment, where President Clinton's team had weeks to prepare and suggested the hearing date themselves.²⁸⁷ Here, by contrast, President Trump was given no meaningful information and was afforded too little time to prepare.²⁸⁸

The President's counsel continued by noting that in the proceedings before the HPSCI, Chairman Schiff vetted witnesses "during closed-door depositions hidden from both the President and the American public."²⁸⁹ There, President Trump was not allowed to present evidence, call witnesses, cross-examine witnesses, nor view transcripts until weeks after.²⁹⁰ The letter continued comparing and contrasting the current impeachment inquiry to that of Presidents Nixon and Clinton and concluded that "we cannot fairly be expected to participate in a hearing while the witnesses are yet to be named and while it remains unclear whether the Judiciary Committee will afford the President a fair process through additional hearings."²⁹¹ Cipollone suggested scheduling a meeting to discuss the Committee's plans going forward in order to provide further procedural protections for the President, and ultimately sent another letter on December 6 stating that the House should end the inquiry immediately and not waste its time with more hearings.²⁹²

The Judiciary Committee continued with its December 4 public hearings and heard testimony from four constitutional experts, one being called by the Minority.²⁹³ Similar to President Clinton's impeachment inquiry, these experts testified to the kinds of conduct that amount to "high Crimes and Misdemeanors" and whether President Trump's conduct met that constitutional standard.²⁹⁴ The Judiciary Committee also conducted another public hearing to examine the evidence gathered by the HPSCI.²⁹⁵ The House Majority continuously disagreed with the President and insisted that the impeachment was a thorough and fair inquiry consistent with historical practice.²⁹⁶ "On December 10, 2019, Chairman Nadler introduced a resolution containing two articles of impeachment against President Trump" and after debate, the Judiciary

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *See id.*; *see also* Letter from Pat A. Cipollone, Counsel to the President, to Hon. Jerrold Nadler, Chairman, House Comm. on the Judiciary (Dec. 6, 2019) [hereinafter Dec. 6 Cipollone Letter].

293. H.R. REP. NO. 116-346, at 12-13 (2019).

294. *Id.* at 13.

295. *Id.*

296. *See generally id.* at 13-28 (describing why the House's inquiry was fully authorized by House rules and precedent and why the president was afforded full and adequate procedural rights).

Committee voted on strict party-lines to report both articles to the full House.²⁹⁷

The House was determined to impeach President Trump before Christmas and a bitter debate quickly took place in front of the full House of Representatives.²⁹⁸ Republicans argued that the impeachment proceedings were a “sham” and merely an attempt to overturn the results of the 2016 election.²⁹⁹ Democrats, on the other hand, charged the President with using his office for personal, political gain, and urged the House to approve both articles of impeachment for abuse of power and obstruction of Congress.³⁰⁰ The debate “reflected the deep polarization gripping American politics in the Trump era” and votes fell largely along party lines.³⁰¹ Article I charged the President with abuse of power³⁰² and passed 230 to 197.³⁰³ The second article of impeachment for obstruction of Congress³⁰⁴ was approved 229 to 198, with an additional third Democrat joining Republicans in opposition.³⁰⁵ House Democrats cheered as Speaker Nancy Pelosi gavelled the vote to a close and Donald J. Trump became “the third president in history to be charged with committing high crimes and misdemeanors and face removal by the Senate.”³⁰⁶

3. Polarization and the Trump Impeachment

The impeachment of President Trump is reflective of the growing ideological separation and hatred among Republicans and Democrats.³⁰⁷ In its report, the House of Representatives discussed how the impeachment inquiry was fully authorized by House Rules and

297. *Id.* at 13; Naylor, *supra* note 249 (stating that after an “emotional debate deliberating the two articles of impeachment,” the Committee “approved each article on a party-line 23-17 vote”).

298. Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES, <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html> (Feb. 10, 2021); Cornyn, *supra* note 36, at 353 (stating that there was a desire to meet the deadline before Christmas).

299. Gretchen Frazee, *House Votes to Impeach Trump After Hours of Debate*, PBS (Dec. 18, 2019, 8:00 AM) <https://www.pbs.org/newshour/politics/watch-live-house-votes-on-the-articles-of-impeachment-against-trump>.

300. *Id.*

301. Fandos & Shear, *supra* note 298.

302. H.R. REP. NO. 116-346, at 75-132 (detailing the first article of impeachment against President Trump: Abuse of Power).

303. Fandos & Shear, *supra* note 298. Only two Democrats opposed the abuse of power article. *Id.*

304. H.R. REP. NO. 116-346, at 132-62 (detailing the second article of impeachment against President Trump: Obstruction of Congress).

305. Fandos & Shear, *supra* note 298.

306. *Id.*

307. D’Agostini, *supra* note 18.

precedent because of the language of the Constitution.³⁰⁸ Article I vests the House with the “sole Power of Impeachment” and states that the House is empowered to determine the rules of its proceedings.³⁰⁹ It is true the language of the Constitution and past judicial decisions provide the House with the “sole discretion to determine the manner in which it will investigate, deliberate, and vote upon grounds of impeachment.”³¹⁰ However, in a world where political polarization has become so overpowering and extreme, this unfettered discretion in impeachment proceedings may prove dangerous to future presidents.³¹¹

The two articles impeaching President Trump both received more votes than the articles of the Johnson and Clinton impeachments, but it was certainly more partisan.³¹² A national poll showed that 44% of the public supported impeachment and 41% did not.³¹³ A different poll showed that about 84% of Democrats supported impeachment, compared to only 12% of Republicans.³¹⁴ These partisan patterns were apparent in the recorded congressional votes, where zero Republicans in the House broke rank.³¹⁵ In comparison, House Republicans were the ones who pushed Nixon to resign from office before the full House could vote to impeach him.³¹⁶ For Clinton, thirty-one Democrats voted to initiate a formal impeachment inquiry and no Republicans did so in the Trump impeachment.³¹⁷ Republicans also helped defeat two out of the four articles of impeachment against Clinton and “a handful of Democrats crossed the aisle to vote for Clinton’s impeachment.”³¹⁸ Statistically, these numbers make the impeachment of President Trump different from both the Clinton and Nixon impeachments.³¹⁹

These differences demonstrate how fundamentally broken Congress is and how political party identification can separate and divide

308. H.R. REP. NO. 116-346, at 13.

309. U.S. CONST. art. I, § 2, cl. 5; H.R. REP. NO. 116-346, at 14.

310. H.R. REP. NO. 116-346, at 14.

311. Cornyn, *supra* note 36, at 348-49.

312. Domenico Montanaro, *Tracing the Roots of a Partisan Impeachment*, NPR (Dec. 19, 2019), <https://www.npr.org/2019/12/19/789033023/tracing-the-roots-of-a-partisan-impeachment>.

313. D’Agostini, *supra* note 18.

314. Aaron Bycoffe et al., *Did Americans Support Removing Trump from Office?*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/trump-impeachment-removal-polls/> (Jan. 20, 2021, 10:24 AM).

315. Montanaro, *supra* note 312. Democrats also consistently voted to impeach President Trump, with only two Democrats voting against the abuse of power article and three against the obstruction of Congress article. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* (“Eighty-one Republicans voted against the abuse of power article, and [twenty-eight] voted against a civil perjury charge.”).

319. *See id.*

Americans to an extent that proves harmful to the welfare of society.³²⁰ Republicans unwaveringly supported President Trump throughout the impeachment process, while Democrats were determined to impeach a third president in United States history.³²¹ The process itself was visibly polarizing, as Republicans and Democrats could not agree on basic facts in the impeachment hearings.³²²

However, it is also problematic that Trump's legacy was so quickly and easily tarnished by impeachment without presidential cooperation.³²³ President Trump and his supporters consistently viewed the impeachment inquiry as baseless and a complete waste of time.³²⁴ This led to the President's decision not to participate in the House impeachment inquiry.³²⁵ House Democrats observed that "'it is not a right but a privilege or a courtesy' for the President to participate through counsel in House impeachment proceedings" and allowed the President to be excluded from the process.³²⁶ President Trump then publicly advocated for the House to impeach, knowing the Republican-controlled Senate would not vote to convict and remove him from office.³²⁷ On the one hand, it is obviously problematic when the President of the United States and almost half of the country view an impeachment inquiry as "the most unjust, highly partisan, and unconstitutional attempt at impeachment in our Nation's history."³²⁸ Is this the type of proceeding that we want to repeat and have in our history books?³²⁹

On the other hand, another problem arises because President Trump has essentially rendered Congress and impeachment ineffective.³³⁰ President Trump knew that he could defy congressional orders, be

320. John Haltiwanger, *The Impeachment Drama Has Shown How Broken Congress Is, and Trump Is Taking Full Advantage*, BUS. INSIDER (Dec. 18, 2019, 5:08 PM), <https://www.businessinsider.com/impeachment-has-shown-congress-is-broken-trump-taking-full-advantage-2019-12>; D'Agostini, *supra* note 18 ("Regardless of the legality of Donald Trump's actions, such political games that have surrounded the impeachment process are dangerous to the welfare of American society.").

321. Haltiwanger, *supra* note 320.

322. See Dec. 1 Cipollone Letter, *supra* note 283; Montanaro, *supra* note 312.

323. Haltiwanger, *supra* note 320.

324. Dec. 6 Cipollone Letter, *supra* note 292.

325. Dec. 1 Cipollone Letter, *supra* note 283.

326. H.R. REP. NO. 116-346, at 16-17 (2019).

327. Dec. 6 Cipollone Letter, *supra* note 292 ("[A]s the President has recently stated: 'if you are going to impeach me, do it now, fast, so we can have a fair trial in the Senate, and so that our Country can get back to business.'").

328. *Id.*

329. See generally Cornyn, *supra* note 36 (discussing implications for future impeachments).

330. See generally Haltiwanger, *supra* note 320 (describing how the Trump impeachment has essentially made Congress irrelevant).

impeached, and still remain in office.³³¹ Impeachment would be a blackmark on Trump's presidency, but even before the two articles were passed in the House, Senate Republicans publicly declared there was "zero chance" that President Trump would be removed from office in the upcoming trial.³³² The Senate chose not to hear any new witness testimony or review any new evidence and President Trump was easily acquitted.³³³

On yet another hand, there was a very real possibility of President Trump being reelected in the 2020 presidential election.³³⁴ Trump used impeachment to unite his base and even held a rally in Michigan on the night the House voted on his impeachment.³³⁵ During this time, his approval rating was around forty-five percent.³³⁶ Although President Trump ultimately lost his campaign for reelection, there was a very real possibility that he would be a two-term president.³³⁷ Ultimately, the Trump impeachment process and "what the country is witnessing is 'exactly the kind of breakdown of the competition of powers that the Founders [would have] thought would be a signal of the decline of the Republic.'"³³⁸ How can impeachment continue to be an effective check on executive power when half of the country believes the impeachment to be a hoax, and the other half views the system as broken when a president can act in such an egregious manner and still remain in office for four more years?³³⁹

IV. HOW TO RESTORE OUR BEAUTIFUL SYSTEM

The Framers entrusted Congress with the power to develop impeachment protocols, making development of a solution to this

331. *Id.*

332. *Id.*

333. Olivia B. Waxman, *Where Trump's Acquittal Fits into the History of Impeachment, According to Historians*, TIME MAG. (Feb. 6, 2020, 11:08 AM), <https://time.com/5777058/historians-trump-impeachment> ("For the first time in its history, the Senate held an impeachment trial without hearing any new witness testimony or reviewing any new evidence.").

334. Haltiwanger, *supra* note 320 ("[T]he [United States] is entering the 'unchartered territory' of potentially having a president reelected after impeachment.").

335. *Id.*

336. *Id.* That number is significant because "Trump won the 2016 election with [forty-six percent] of the popular vote." *Id.*

337. Ted Johnson, *Joe Biden Wins Again as Electoral College Confirms His Victory Over Donald Trump*, DEADLINE (Dec. 14, 2020, 2:30 PM), <https://deadline.com/2020/12/electoral-college-joe-biden-donald-trump-1234655898> (confirming Joe Biden's presidential victory over Donald Trump after he passed the 270-vote threshold in the Electoral College).

338. Haltiwanger, *supra* note 320.

339. *Id.*

problem rather complicated.³⁴⁰ It seems counterintuitive to change a system that Congress has the “sole” power to create.³⁴¹ However, the United States is experiencing a much broader problem with political polarization and this great division is trickling down into the impeachment process.³⁴² Some scholars believe that the problems exposed in President Trump’s impeachment will not truly be resolved until the much broader problems of political polarization and division are fixed.³⁴³ Nonetheless, this Part will discuss potential amendments to the impeachment process that can, at the very least, bolster the legitimacy of presidential impeachments until that day comes.³⁴⁴

A. *Why Amending the Constitution Is Not Necessary*

The problems experienced in the Trump impeachment are symptomatic of our deeply polarized society.³⁴⁵ If Congress is broken and its members cannot be expected to agree, then one cannot expect impeachment to work as designed.³⁴⁶ Following that logic, it makes sense that if impeachment is not the institution that is broken, then there is no need to “fix” the process through constitutional amendment.³⁴⁷ In addition, impeachment inquiries are extremely rare, especially against a United States President.³⁴⁸ Only nineteen federal officeholders have been impeached since the nation’s founding.³⁴⁹ Of the nineteen, only three of these have been presidential impeachments.³⁵⁰ It seems unnecessary to take the extraordinary step of amending the Constitution to address a situation that so rarely arises, therefore, Congress passing legislation, as opposed to constitutional amendment, may be the greatest hope in returning to what the Framers envisioned impeachments to look like.³⁵¹

340. *See supra* Part II.A–B.

341. *See supra* Part II.A–B.

342. *See supra* Part III.

343. *How to Fix Impeachment*, *supra* note 19.

344. *See infra* Part IV.A–B.

345. *How to Fix Impeachment*, *supra* note 19 (“The problems we are experiencing in contemporary presidential impeachment aren’t merely a result of the impeachment process itself. They are symptomatic of much deeper problems with our democratic republic . . .”).

346. *Id.* (“One cannot expect impeachment to work as designed if Congress does not work at all.”).

347. *Id.*

348. *Id.*

349. *Id.* (“There have been only [nineteen] impeachments of federal officeholders in the nation’s history.”).

350. *See supra* Part II.C (detailing the impeachment of Presidents Johnson, Nixon, and Clinton).

351. *How to Fix Impeachment*, *supra* note 19.

B. A Win-Win Solution

In order to avoid the kind of disagreement and lack of cooperation seen in the Trump impeachment, Congress needs to strengthen its hand.³⁵² The Framers created a “beautiful system” of checks and balances and this doctrine needs to continue to be respected no matter which party is in control.³⁵³ One way to do this would be to assist the House of Representatives when faced with executive defiance.³⁵⁴ New Jersey Senator Bob Menendez has discussed post-Trump impeachment reform in the shape of the Marie Yovanovitch Act.³⁵⁵

This statute would provide for fast-track court hearings and expedited appeals when witnesses refuse to cooperate with requests for documents or testimony in impeachment proceedings.³⁵⁶ With the help of the judicial branch, Senator Menendez calls for financial penalties if agency heads do not provide written justification to Congress for failing to respond to congressional orders.³⁵⁷ This could be taken a step further by holding such witnesses in contempt until they produce the proper documents or agree to testify.³⁵⁸

On the one hand, this helps the House because Congress cannot adequately oversee an executive branch that only responds when it is in its interest.³⁵⁹ There is always tension between the executive and legislative branches, but a complete disregard for congressional orders means we are entering dangerous territory.³⁶⁰ It is clear that President Trump and his supporters viewed the impeachment inquiry as a “hoax” and chose not to participate, but that is no excuse for the role of

352. Senator Bob Menendez, Member, Senate Foreign Rels. Comm., Keynote Address at Brookings Institution: Transparency and Governance in U.S. Foreign Policy (Feb. 13, 2020), <https://www.foreign.senate.gov/press/ranking/release/in-keynote-address-menendez-unveils-post-impeachment-reform-agenda-for-congress>.

353. Whittington, *supra* note 3; Amar, *supra* note 13, at 295.

354. *How to Fix Impeachment*, *supra* note 19. Professor Philip Bobbitt describes this as a “‘shot clock’ remedy that can augment the House investigatory process in light of presidential obstruction.” *Id.*

355. See Menendez, *supra* note 352 (describing the eight key pillars of Senator Menendez’s post-impeachment agenda); see also Vanessa Romo, *Former Ambassador Marie Yovanovitch, Key Figure in Impeachment Trial, Retires*, NPR (Jan. 31, 2020, 7:10 PM), <https://www.npr.org/2020/01/31/801697400/ukraine-ambassador-marie-yovanovitch-key-figure-in-impeachment-trial-retires> (stating that Maria Yovanovitch is the former United States ambassador to the Ukraine and detailing her role in the Trump impeachment).

356. Menendez, *supra* note 352.

357. *Id.*

358. *How to Fix Impeachment*, *supra* note 19.

359. Menendez, *supra* note 352 (“[W]e cannot conduct adequate oversight over an executive branch that only responds to our inquiries when they have to, or when it is in their interest.”).

360. *Id.*

Congress to be reduced.³⁶¹ Importantly, this law would help restore Congress as a co-equal branch of government and prevent the impeachment process from being rendered irrelevant.³⁶² Another significant effect of this law is that it would help provide Congress with all of the necessary information needed to impeach a president—one of the most serious and solemn things that can be done in politics.³⁶³ As Senator Menendez points out, he cannot make important decisions unless he has all of the relevant information to understand what is before Congress.³⁶⁴ This law would help Congress obtain all relevant documents and testimony that are imperative to making such an important decision.³⁶⁵

This Note proposes that Menendez's proposed law should be altered to also benefit the chief executive facing impeachment.³⁶⁶ In addition to reviewing congressional subpoenas, the judicial branch should also review challenges to the impeachment process itself.³⁶⁷ This would help make the impeachment process more transparent and legitimate.³⁶⁸ Procedures could be reviewed by a more impartial branch, and if another president, like President Trump, were to view the process as unfair and a violation of certain rights, this law would provide the president with answers, and nobody would be able to call the impeachment a hoax.³⁶⁹ This would be a tool that could help Democrats and Republicans alike, and it would prevent a future Republican-led Congress from conducting a similar polarizing impeachment against a more liberal president.³⁷⁰

A major concern with this legislation is that there is no constitutional or historical basis for a federal court to claim jurisdiction over a president's impeachment trial.³⁷¹ It is true that the Framers vested the impeachment power solely with the legislative branch in order to

361. See generally *id.* (summarizing how President Trump acted during the impeachment inquiry).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. See *id.*

367. See *id.*

368. See generally *id.* (describing how transparency and legitimacy are two things lacking in the modern impeachment process).

369. See generally Dec. 1 Cipollone Letter, *supra* note 283 (describing the problems that the President's counsel had with the House's impeachment procedures); *How to Fix Impeachment*, *supra* note 19.

370. Menendez, *supra* note 352. This tool would never only serve one party over the other. *Id.* Instead, it would help restore our system of checks and balances, benefitting all. *Id.*

371. Gerhardt, *supra* note 62, at 271.

protect checks and balances.³⁷² It is also well established that the Supreme Court has refused to answer questions about impeachment under the political question doctrine.³⁷³ Others argue that there is an unrealistic need for judicial review of the impeachment process³⁷⁴ and that even when attendance and preparation are poor, Congress has taken impeachment seriously and fully understands the consequences of its actions.³⁷⁵

The underlying issue, however, is that our country is not the same as it once was.³⁷⁶ We no longer live in a time where the president warns of the negative impact of political parties³⁷⁷ or when race, culture, and religion were a person's strongest self-identifying characteristic.³⁷⁸ Instead, we live in a time where a person's strongest attachment is to a political party.³⁷⁹ It is impossible to comport with Framers intent when Congress uses impeachment as a political weapon and the president completely disregards checks and balances.³⁸⁰ Polarization has ruined the transparency and legitimacy of impeachments, and for now, Congress should recognize that "[i]mpeachment needs the legitimacy that the courts can provide."³⁸¹

V. CONCLUSION

America's Founding Fathers were confident that the legislative branch alone could act as an appropriate check on the executive and this led to their decision to vest impeachment power solely with Congress.³⁸² Impeachment of a democratically elected president is inherently divisive, but this has been exacerbated by the current state of our political parties.³⁸³ Our society has become so polarized politically that

372. See *supra* Part II.A.; Gerhardt, *supra* note 62, at 256.

373. See *supra* Part II.B.

374. Gerhardt, *supra* note 62, at 274.

375. *Id.*

376. See *supra* Part III.B.

377. See generally President George Washington, Farewell Address, *supra* note 1, at 11-12 (discussing the threat of forming two political parties).

378. Milenko Martinovich, *Americans' Partisan Identities Are Stronger than Race and Ethnicity*, *Stanford Scholar Finds*, STAN. NEWS (Aug. 31, 2017), <https://news.stanford.edu/2017/08/31/political-party-identities-stronger-race-religion>.

379. *Id.*

380. Hulse, *supra* note 42.

381. *How to Fix Impeachment*, *supra* note 19.

382. See *supra* Part II.A.

383. See *supra* Part III.

impeachment standards no longer comport with the beautiful system our Framers envisioned.³⁸⁴

Half of the country views Trump's impeachment inquiry as a vengeful effort by Democrats to overturn the results of the 2016 election.³⁸⁵ The other half views the impeachment process as broken because, despite their view that Trump is a genuine danger to republican government, the system allowed him to remain in power.³⁸⁶ The process cannot be bipartisan, fair, and transparent when our political parties each view the other as a threat to the nation's well-being.³⁸⁷ It is true that the Framers envisioned an impeachment process without judicial interference,³⁸⁸ but our political parties are not what they used to be.³⁸⁹ Expedited judicial review to resolve congressional-executive disputes will ensure that Congress is not obstructed, that the president is being treated fairly, and, most importantly, that all of the evidence needed to make an informed decision is available to the American people.³⁹⁰

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384. Edward Lempinen, *What's the Point of Impeachment in Hyper-polarized America?*, BERKELEY NEWS (Dec. 12, 2019), <https://news.berkeley.edu/2019/12/12/whats-the-point-of-impeachment-in-hyper-polarized-america>.

385. *How to Fix Impeachment*, *supra* note 19.

386. *Id.*

387. *Political Polarization in the American Public*, *supra* note 24.

388. *See supra* Part II.A.

389. *See supra* Part III.A–B.

390. *See supra* Part IV.

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