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January 22, 2020

The Honorable Members of the United States Senate  
c/o The Honorable Julie E. Adams  
Secretary of Senate  
United States Capitol  
Washington, D.C. 20510

Dear Members,

As Attorneys General of 21 States whose citizens and Electoral College delegates voted in the 2016 presidential election, we have a special duty to defend the integrity of the votes cast by those citizens and electors during that election. However, our interests go well beyond that particular election. This impeachment proceeding threatens *all* future elections and establishes a dangerous historical precedent. That new precedent will erode the separation of powers shared by the executive and legislative branches by subjugating future Presidents to the whims of the majority opposition party in the House of Representatives. Thus, our duty to current and future generations commands us to urge the Senate to not only reject the two articles of impeachment contained in H. Res. 755—“abuse of power” and “obstruction of Congress”—as lacking in any plausible or reasonable evidentiary basis, but also as being *fundamentally flawed as a matter of constitutional law*.

If not expressly repudiated by the Senate, the theories animating both Articles will set a precedent that is entirely contrary to the Framers’ design and ruinous to the most important governmental structure protections contained in our Constitution: the separation of powers. As the House Judiciary Committee Democrats put it during the 1998 impeachment of President Clinton, “Impeachment is like a wall around the fort of the separation of powers. The crack we put in the wall today becomes the fissure tomorrow, which ultimately destroys the wall entirely.”<sup>1</sup> We agree.

Impeachment should never be a partisan response to one party losing a presidential election. If successful, an impeachment proceeding nullifies the votes of millions of citizens. The Democrat-controlled House passing of these constitutionally-deficient articles of impeachment amounts, at bottom, to a partisan political effort that undermines the democratic process itself. Even an unsuccessful effort to impeach the President undermines the integrity of the 2020 presidential election because it weaponizes a process that should only be initiated in exceedingly rare circumstances and should never be used for partisan purposes. Impeachment may cast a pall over the office of the presidency, undermines the President’s constitutional authority, and taints his – and America’s – standing with foreign leaders and ultimately irreparably damages the

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<sup>1</sup> Minority Views, House Judiciary Comm., Impeachment of William Jefferson Clinton, President of the United States, H. R. Rep. No. 105-830, at 200 (1999)

United States' interests. This body should never permit impeachment proceedings to proceed where they are permeated with the clearly partisan objective of energizing a political party's base to, ultimately, influence a presidential election. Such a raw political and unconstitutional use of the impeachment power should not be countenanced by the Senate.

Because the legal theories underlying both Articles I and II are legally flawed and factually insufficient, as well as inherently destructive of separation of powers, the Senate should explicitly reject them to protect both the institution of the Presidency and the Constitution. A close examination of the legal theories and stipulations of fact accompanying Articles I and II reveal their fatal flaws.<sup>2</sup> It is important to note that the focus of this legal analysis will be on the stipulations of fact relied upon by the House at the time of the impeachment vote because this is the precedent upon which all future impeachment proceedings will rely.

### **Article I—“abuse of power”**

Article I is based upon a constitutionally-flawed theory that the President can be impeached for exercising *concededly lawful constitutional authority* “motivated” by *thoughts* a House majority unilaterally deems “corrupt.” This “corrupt motive” theory is infinitely expansive and subjective. It will erode separation of powers, making the President impeachable for what his political adversaries *perceive his thoughts to be*. Moreover, the conclusory factual allegations purporting to support Article I’s “abuse of power” charge fall far below the evidentiary standard that should be demanded by the Senate before taking the extraordinary step of even entertaining charges to remove a sitting President from office. As the Supreme Court has stated in the context of civil litigation, a pleading that offers only conclusory allegations devoid of factual support is not entitled to any presumption of truth and must be dismissed for failure to state a claim.<sup>3</sup> Article I suffers from the same fatal factual deficit, relying on speculative, conclusory allegations that are contradicted by, and indeed conveniently ignore, known material facts.

Article I does not identify *any* high crimes or misdemeanors committed by President Trump. Instead, it relies upon the nebulous phrase, “abuse of power.” While an indictable crime is not indispensable to establish a “high crime and misdemeanor,” the *absence* of such a crime—particularly under the facts of this particular impeachment—counsels great skepticism that the constitutional standard has been met.

Even more disturbing than its insufficient factual predicate is the *theory* underlying the abuse of power charge. The House Judiciary Committee’s report offered a definition of “abuse of power” as “the use of official powers in a way that on its face grossly exceeds the President’s constitutional authority or violates legal limits on that authority.” Unfortunately, immediately after doing so, the Committee unveiled an unprecedented expansion: declaring that “a President can be impeached for exercising power with a “*corrupt purpose*.” Article I embraces this legally-

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<sup>2</sup> The facts, as discussed below, come directly from the facts the House voted upon and memorialized in Articles I and II.

<sup>3</sup> See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

flawed theory, repeatedly stating that President Trump’s actions constitute an abuse of power because they were undertaken “for corrupt purposes,” specifically, the “corrupt” purpose of “personal political benefit.”<sup>4</sup>

On the surface, the words “corrupt motives” sound ominous and perhaps suggest a legitimate basis for accusing someone of “abuse of power.” But a close examination of the facts upon which the House vote was predicated and as outlined in Article I reveals the serious threat this concept poses to the separation of powers. Article I does not accuse President Trump of “corruption”— a concept the Framers expressly *rejected* as a basis for impeachment. Nor does Article I accuse President Trump of committing a corruption-related “high crime or misdemeanor,” as required for removal by Article II, § 4 of the Constitution. Instead, it alleges the President should be removed because a partisan-majority of the House thinks he exercised *lawful constitutional authority* for a “*corrupt*” purpose, which it defines as a “personal political benefit.” The President, in other words, is being impeached for *political thought crime*.

The threat such a limitless concept poses to the most fundamental principles of our system of government are plain. It cannot be a legitimate basis to impeach a President for acting in a legal manner that may also be politically advantageous. Such a standard would be cause for the impeachment of virtually every President, past, present, and future. Nor can it be a legitimate basis to impeach a President whose constitutional responsibilities command him to investigate crimes, cooperate with other nations’ criminal investigations in accord with mutual legal assistance treaties, and grant him broad discretion to conduct diplomatic and foreign affairs. The President’s duty to “faithfully execute” the law and his diplomatic power also require that neither he nor his Administration turn a blind eye to potential criminal acts of Americans, even if doing so is politically advantageous.

Moreover, impeachment based upon the President’s exercise of his foreign relations power is inherently dangerous, precisely because he has broad constitutional discretion, the exercise of which often generates intense political and policy disagreements. The Supreme Court has recognized the broad scope of discretion afforded to the President in this area. For example, in *United States v. Curtiss-Wright Export Corporation* (1936), the Court stated flatly that the President is “the sole organ of the federal government in the field of international relations.”

The Framers were right to cabin impeachment authority and to worry about its use as a political weapon. Consider the damage already done to presidential foreign affairs authority—and the Nation as a whole—because of House Democrats’ decision to impeach based upon a high-level diplomatic phone call. To defend his reputation, the President was forced to release the transcript of an otherwise highly-sensitive conversation with another foreign leader. Witnesses who testified about the President’s purported motives have all been subordinate diplomatic personnel, mostly career bureaucrats, none of whom have first-hand knowledge but many of whom have strong suspicions, beliefs, and negative opinions about the President’s actions.

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<sup>4</sup> H. Res. 755, p. 3, lines 4-5. See also *id.* at 3, line 15 (“corruptly” solicited); *id.* at 3, line 24 (“With the same corrupt motives . . . .”); *id.* at 4, line 19-21 (“openly and corruptly” soliciting investigations “for personal political benefit.”); *id.* at 5, line 3-4 (“to obtain an improper personal political benefit”).

The Trump-Zelensky call, which forms the basis of Article I, was initially claimed to violate campaign finance law on the specious theory that asking to investigate a political rival or his family members is soliciting a “thing of value” constituting a “contribution” by a foreign national.<sup>5</sup> Then came the equally suspect claim that the call established the crime of bribery or extortion.<sup>6</sup> At the end of the House’s investigation, however, it failed to allege *any* of these crimes, relying instead on the murky and manipulable claim of “abuse of power,” with its own impossibly broad definition capturing the House Democrats’ perception of the President’s thoughts.

Specifically, Article I of H. Res. 755 asserts President Trump committed an abuse of power by “soliciting the Government of Ukraine to publicly announce investigations” into two matters: (1) “a political opponent, former Vice President Joseph R. Biden, Jr.”; and (2) “a discredited theory promoted by Russia alleging that Ukraine—rather than Russia—interfered in the 2016 United States Presidential election.”<sup>7</sup> Article I further asserts that President Trump “conditioned two official acts” on Ukraine’s public announcement of these two investigations: (1) the release of \$391 million appropriated for Ukrainian military and security assistance; and (2) a meeting at the White House with Ukrainian President Zelensky.<sup>8</sup>

Regarding allegedly withholding appropriated funds, Article I concedes<sup>9</sup> President Trump released the appropriated funds for Ukraine on September 11, well before the expiration of the fiscal year on September 30<sup>10</sup> and does not allege a violation of the Impoundment Control Act. Regarding the alleged withholding of a meeting at the White House, the call transcript reveals that President Trump invited Zelensky to the White House prior to the call and stated several times that he looked forward to having Zelensky visit.<sup>11</sup> The two men subsequently met in New York September 25, 2019. While the bilateral meeting took place in New York rather than

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<sup>5</sup> Ian Millhiser, *The 4 Possible Crimes in the Trump-Ukraine Whistleblower Scandal, Explained*, VOX, Sept. 27, 2019, available at <https://www.vox.com/policy-and-politics/2019/9/27/20885557/criminal-laws-trump-barr-giuliani-ukraine>. The notion that the sharing of non-public information is a “thing of value” under campaign finance law as has never been accepted by any court or the Federal Election Commission. *See, e.g.*, 1 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 187 (“[N]o judicial decision has treated the voluntary provision of uncompensated opposition research or similar information as a thing of value that could amount to a contribution under campaign-finance law.”); Lee E. Goodman, *The Mueller Report: Is Information a Contribution?* Wiley Newsletter, May 2019, available at <https://www.wiley.law/newsletter-The-Mueller-Report-Is-Information-a-Contribution>.

<sup>6</sup> Richard Blumenthal, *Yes, Trump Is Guilty of Bribery*, WASHINGTON POST, Dec. 3, 2019, available at [https://www.washingtonpost.com/opinions/yes-trump-is-guilty-of-bribery/2019/12/03/8468424e-15f9-11ea-a659-7d69641c6ff7\\_story.html](https://www.washingtonpost.com/opinions/yes-trump-is-guilty-of-bribery/2019/12/03/8468424e-15f9-11ea-a659-7d69641c6ff7_story.html); Jeffrey Toobin, *In His Dealings With Ukraine, Did Donald Trump Commit a Crime?*, THE NEW YORKER, Nov. 1, 2019, available at <https://www.newyorker.com/news/daily-comment/in-his-dealings-with-ukraine-did-donald-trump-commit-a-crime>.

<sup>7</sup> H. Res. 755, at p. 3, lines 18-23.

<sup>8</sup> *Id.* at p. 4, lines 2-15.

<sup>9</sup> H. Res. 755, at p. 4, lines 17-19.

<sup>10</sup> The Impoundment Control Act permits the President to defer appropriated monies by notification to Congress, but not beyond the fiscal year. 2 U.S.C. § 684. It is unclear whether the OMB’s use of apportionment for the Ukrainian funds constitutes a deferral under the ICA.

<sup>11</sup> President Zelensky told President Trump, “I also wanted to thank you for your invitation to visit the United States, specifically Washington D.C.” President Trump replied, “Whenever you would like to come to the White House, feel free to call. Give us a date and we’ll work that out. I look forward to seeing you.” Memorandum of Telephone Conversation With President Zelensky of Ukraine, July 25, 2019, available at <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf>.

Washington, D.C., impeaching a President for holding a meeting with a foreign leader at a venue other than the White House is a patent abuse of the impeachment power, confirming the petty nature of this aspect of Article I.

Regarding Article I's charge that President Trump abused his power by "soliciting" investigations into the Bidens and Ukrainian interference in the 2016 presidential election, the factual predicate upon which the charge is made is entirely conclusory and omits material facts. Specifically, Article I fails to even mention that then-Vice President Biden's son, the principal focus of President Trump's comments to President Zelensky,<sup>12</sup> was appointed to an unusually lucrative, multi-million dollar position on the Board of Directors of Ukrainian energy giant Burisma. This was done despite his having no prior experience in the energy sector, and only *one month* after his father, then-Vice President Joe Biden, was named the Obama Administration's "point person" on Ukraine.<sup>13</sup> The Trump-Zelensky call occurred July 25, 2019, shortly after U.S. media widely reported Hunter Biden's Ukrainian activities and his father's threat to fire the Ukrainian prosecutor investigating Burisma.<sup>14</sup> These reports about the Bidens' dealings in Ukraine raise serious and legitimate questions about possible violations of both U.S. and Ukrainian law.

Moreover, Article I conclusively declares that the possibility of Ukrainian interference in the 2016 presidential election has been "discredited" and is being "promoted by Russia." Yet there has been no completed investigation of the matter. Senators Grassley and Johnson—chairs, respectively, of the Committees on Finance and Homeland Security and Governmental Affairs—have urged the Department of Justice ("DOJ") to investigate possible interference in the 2016 presidential election.<sup>15</sup> Indeed, the DOJ recently confirmed that such an investigation is ongoing, within the assigned jurisdiction of U.S. Attorney John Durham.<sup>16</sup>

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<sup>12</sup> The transcript of the Trump-Zelensky call reveals that President Trump's Biden-related comments, *in toto*, were as follows:

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

Memorandum of Telephone Conversation With President Zelensky of Ukraine, July 25, 2019, *available at* <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf>.

<sup>13</sup> Mark Hemingway, *Hunter Biden's Burisma Post Had a Troubling Conflict, Watchdog Says*, REALCLEARINVESTIGATIONS, Nov. 19, 2019, *available at* [https://www.realclearinvestigations.com/articles/2019/11/19/hunter\\_bidens\\_burisma\\_post\\_had\\_a\\_troubling\\_conflict\\_watchdog\\_says\\_121260.html](https://www.realclearinvestigations.com/articles/2019/11/19/hunter_bidens_burisma_post_had_a_troubling_conflict_watchdog_says_121260.html).

<sup>14</sup> See, e.g., Tom Llamas et al., *Biden Sidesteps Questions About His Son's Foreign Business Dealings But Promises Ethics Pledge*, ABCNEWS.COM, June 20, 2019, *available at* <https://abcnews.go.com/Politics/biden-sidesteps-questions-sons-foreign-business-dealings-promises/story?id=63820806>; Michael Kranish & David L. Stern, *As Vice President, Joe Biden Said Ukraine Should Increase Gas Production. Then His Son Got a Job With a Ukrainian Gas Company*, WASHINGTON POST, July 22, 2019, *available at* [https://www.washingtonpost.com/politics/as-vice-president-biden-said-ukraine-should-increase-gas-production-then-his-son-got-a-job-with-a-ukrainian-gas-company/2019/07/21/f599f42c-86dd-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/politics/as-vice-president-biden-said-ukraine-should-increase-gas-production-then-his-son-got-a-job-with-a-ukrainian-gas-company/2019/07/21/f599f42c-86dd-11e9-98c1-e945ae5db8fb_story.html).

<sup>15</sup> Letter to U.S. Attorney General William Barr from Senator Chuck E. Grassley and Ron Johnson, Sept. 27, 2019, *available at* <https://www.grassley.senate.gov/sites/default/files/2019-09-27%20CEG%20RHJ%20to%20DOJ%20%28Ukraine%20DNC%29.pdf>.

<sup>16</sup> Jerry Dunleavy, *U.S. Attorney John Durham Looking Into Ukrainian Involvement in 2016 Election*, WASHINGTON EXAMINER, Sept. 25, 2019.

In sum, the Article I claims are both legally flawed and factually insufficient. This body should consider the broader implications of accepting the House's corrupt motives theory. Politicians regularly act in an official capacity in ways that are or may have political benefit.<sup>17</sup> This is especially true of Presidents in their role as the nation's chief diplomat. In a 1987 speech in Berlin, for example, President Reagan beseeched, "Mr. Gorbachev, tear down this wall!" In 2008, President Bush made multiple personal appeals to then-Saudi King Abdullah to increase oil production in an effort to bring down U.S. gas prices. In January 2015, President Obama asked then-Mexican President Peña Nieto to halt the flow of illegal immigrants entering the U.S. Indeed, Presidents routinely ask other countries to cooperate on a wide variety of matters such as trade, denuclearization, and handling of energy and other natural resources.

Under House Democrats' corrupt motives theory, however, a President who negotiates a nuclear deal with Iran or a trade deal with China can be impeached for abuse of power if the House majority believes the deal was "motivated" by a desire to enhance the President's reelection prospects rather than to benefit the country. But how would members of Congress ever know what *really* motivated the President? Motives are often in the eye of the beholder because they are exceedingly difficult to discern and generally mixed.

The House's corrupt motives theory is dangerous to democracy because it encourages impeachment whenever the President exercises his constitutional authority in a way that offends the opposing political party, which is *predisposed* to view his motives with skepticism and motivated by its *own* motives to re-gain that very office. The potential for impeachment based upon raw political or policy disagreements will increase exponentially, transforming it from a rare, objective, bipartisan event to a subjective, common, partisan weapon.

Significantly, impeachment for policy disagreements was something the Framers vehemently opposed. Professor Michael Gerhardt, whom House Democrats called as a witness to support President Trump's impeachment, testified in 1999 during the Clinton impeachment that "one of the most often repeated pronouncements of the Framers" was "that impeachment is not designed to address policy differences of opinion."

If "high crimes and misdemeanors" is to retain the properly narrow meaning understood by the Framers, it cannot encompass the exercise of lawful presidential authority that the House majority *deems* was performed with "bad" or "corrupt" motives. Such an expansion of the meaning of "high crimes and misdemeanors" would render the President nothing more than a ward of Congress. As Harvard Law professor Laurence Tribe described it in the context of the Clinton impeachment, when "a laid-back jurisprudence of an amorphous Constitution is applied

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<sup>17</sup> Indeed, the political nature of the President and members of Congress—the "political" branches—makes impeachment for corrupt motives particularly destructive of separation of powers. By contrast, federal judges, who are members of the non-political judicial branch and accordingly receive lifetime appointments, arguably may be impeached for "abuse of power" if their official actions are motivated by partisan influences. As Harvard Law professor Laurence Tribe put it, "what constitutes an abuse of official power and what conduct cripples the officeholders' ability to discharge the duties and responsibilities of his or her office necessarily depends on what the office is. Letting partisan considerations affect one's decisions, for example, is always an impeachable abuse of power in a judge. Almost never would it be in a president." Laurence H. Tribe, Comm. on the Judiciary, Subcomm. on the Constitution, *Hearing on the Impeachment of President William Jefferson Clinton*, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess., H. R. Rep. No. 106-3, at 220 (1999).



to the basic architecture of our government, it is a siren song for playing Russian roulette that protects us all from the perils of an enfeebled presidency.”<sup>18</sup>

For this reason, abuse of power may be a valid basis for impeachment, but only for obvious and *objectively* egregious acts that either clearly exceed the President’s constitutional authority or alternatively, violate his constitutional or statutory duties.

## Article II—“obstruction of Congress”

Article II of the Articles of Impeachment is as equally flawed as Article I. Under the House’s “unilateral control” theory of obstruction, the President could be impeached anytime he vigorously invokes and seeks to protect executive privilege in response to the House’s demand for Executive Branch information. But this is precisely what executive privilege is *for*—to protect the independence of the Executive Branch from Legislative overreach and thereby safeguard the separation of powers. If the House can *impeach* a President for invoking executive privilege, the privilege is meaningless because it is under unilateral control of the House.

Thus, as with Article I’s charge, the *theory* underlying the obstruction of Congress charge is even more disturbing than its lack of factual predicate. Specifically, the theory animating the Article II charge is that a President may be impeached because he dared to invoke executive privilege. This theory, if allowed to stand unchallenged, will be massively destructive of presidential independence from Congress.

If the House believed President Trump’s invocation of executive privilege was unjustified, it should have done what every other congressional committee has done: go to court to enforce the subpoena and challenge the assertion of privilege. When former deputy national security adviser Charles Kupperman challenged the House Intelligence Committee’s subpoena, however, Chairman Adam Schiff voluntarily withdrew the Kupperman subpoena<sup>19</sup> and failed entirely to pursue judicial enforcement of others.<sup>20</sup>

Article II states that the House committees involved in the impeachment inquiry against President Trump “served subpoenas seeking documents and testimony deemed vital to the inquiry from various Executive Branch agencies and offices, and current and former officials.”<sup>21</sup> It then asserts that “without lawful cause or excuse,” the President “directed Executive Branch agencies, offices and officials not to comply with those subpoenas.”<sup>22</sup> It further lists nine

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<sup>18</sup> Laurence H. Tribe, Comm. on the Judiciary, Subcomm. on the Constitution, *Hearing on the Impeachment of President William Jefferson Clinton*, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess., H. R. Rep. No. 106-3, at 219 (1999).

<sup>19</sup> Andrew O’Reilly, *House Withdraws Subpoena for Former Nat’l Security Council Deputy Charles Kupperman*, FOXNEWS.COM, Nov. 6, 2019, available at <https://www.foxnews.com/politics/house-withdraws-subpoena-for-former-national-security-council-deputy-charles-kupperman>.

<sup>20</sup> The House Judiciary Committee subpoenaed former White House Counsel Don McGahn to testify regarding a separate issue—namely, whether President Trump may have obstructed justice with regard to the investigation of Special Counsel Robert Mueller. McGahn invoked executive privilege and the federal district judge in D.C., Judge Jackson, ruled that while McGahn must appear before the committee, he is free to invoke executive privilege when he appears. Comm. on the *Judiciary v. McGahn*, Civ. No. 19-cv-2379 (KBJ) 2019 WL 631201 (D.D.C. Nov. 25, 2019).

<sup>21</sup> H. Res. 755, at p. 6, lines 12-15.

<sup>22</sup> *Id.* at lines 16-18.

individuals who defied House subpoenas, all high-ranking political appointees and advisors to the President at the White House, OMB, and the Departments of Energy and State.<sup>23</sup> Notably absent from the list of nine “vital” witnesses who defied subpoenas are former National Security Advisor John Bolton and his deputy, Charles Kupperman. Also notably absent in Article II is any mention that the subpoenas were defied on the basis of the President’s invocation of executive privilege.

Executive privilege *exists* to protect the President’s constitutional prerogatives, much like the Speech and Debate Clause protects the prerogatives of Congress and judicial immunity protects the prerogatives of judges. Once executive privilege is asserted, coequal branches of the Government are set on a collision course.<sup>24</sup> The Supreme Court has made clear, however, that the executive privilege “is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”<sup>25</sup> And the Supreme Court has also stated in *Barenblatt v. United States*, that Congress “cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.”<sup>26</sup> The conduct of foreign diplomacy is one such “exclusive province” of the President, who is “the sole organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Export Corp.* (1936). More recently, in *Zivotovsky v. Kerry*, the Court reiterated that Congress “has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation”; that power belongs exclusively to the President.<sup>27</sup>

As the Supreme Court stated in *United States v. Nixon*, the “President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.”<sup>28</sup> Notably, the *Nixon* Court stated that communications involving “military, diplomatic or sensitive national security secrets” may be entitled to even higher deference than normally accorded domestic policy communications. The nine individuals mentioned in Article II of H. Res. 775 who invoked executive privilege were *all* subpoenaed because the House impeachment committees wanted to ask them about communications relating to President Trump’s call with

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<sup>23</sup> The nine individuals are Mick Mulvaney, Robert Blair, John Eisenberg, Michael Ellis, Wells Griffith, Russell Vought, Michael Duffey, Brian McCormack, and Ulrich Brechbuhl. These are of course not the only individuals who received subpoenas as part of the Trump impeachment proceedings. CNN lists 42 individuals as receiving subpoenas, including high-ranking individuals such as Vice President Pence, Secretary of State Mike Pompeo, Energy Secretary Rick Perry, Defense Secretary Mark Esper and Trump personal attorney Rudy Giuliani. See Marshall Cohen & Will Houp, *Trump Impeachment Tracker*, CNN.COM, Jan. 15, 2020, available at <https://www.cnn.com/interactive/2019/politics/trump-impeachment-inquiry-tracker/#/category/subpoena>. Numerous other subpoenaed individuals have, of course, testified.

<sup>24</sup> When such clashes reach the judiciary, the Supreme Court has stated, “[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive’s claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These ‘occasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.”; *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389–90, (2004), citing *United States v. Nixon*, , 418 U.S. 683, 692 (1974).

<sup>25</sup> *Nixon*, 418 U.S. at 708.

<sup>26</sup> 360 U.S. 109, 112 (1959).

<sup>27</sup> 135 S. Ct. 2076, 2086 (2015).

<sup>28</sup> 418 U.S. at 708.



the Ukrainian president and the administration's decision to apportion Ukrainian military aid funds. Yet all of these matters are military and diplomatic in nature, suggesting that the President's invocation of executive privilege was not only justified, but even more so than in the typical congressional subpoena to the Executive Branch seeking information on an ordinary domestic policy matter.

President Trump has thus been charged with a "high crime or misdemeanor" for doing what *all* Presidents and top advisers routinely do - invoking executive privilege when Congress seeks to unconstitutionally interfere with the president's high-level executive communications. This implies that the President is a mere ward of Congress, who must answer when Congress commands it or face *impeachment*, even though no court has ruled upon the subpoena's validity or the privilege's applicability.

Under the House's "unilateral control" theory of obstruction, the House has *unilateral* authority *to decide whether executive privilege applies*. In a dispute between the political branches, in other words, the holder of the executive privilege is the House of Representatives, not the President. If the Senate does not decisively reject this theory of impeachment, the executive privilege will be rendered meaningless, along with separation of powers.

### **The Historical Meaning of "High Crimes and Misdemeanors"**

The Framers hesitated to give Congress impeachment power over the President, fearing this precise problem—that it would be abused for political gain. Charles Pinckney worried that impeachment would become "a rod over the Executive and by that means effectually destroy his independence."<sup>29</sup> Rufus King opined that it "would be destructive to his independence" and was unnecessary because the President is "periodically tried for his behavior by his electors" every four years.<sup>30</sup> Gouverneur Morris agreed that, because the President is *politically* accountable via election—unlike appointed judges and Executive Branch officers—his impeachment "ought to be enumerated and defined" carefully to prevent the President from being "dependent on the Legislature."<sup>31</sup> Edmund Randolph likewise supported "excluding as much as possible the influence of the Legislature from the business [of the Executive]."<sup>32</sup>

Ultimately, the constitutional convention agreed upon a Constitution that gave the House the "sole Power of Impeachment" and the Senate the "sole Power to try all Impeachments," with conviction by two-thirds of Senators present. Under Article I, § 3, the sentence imposed "shall not extend further" than removal from office and disqualification to hold future office. If the Senate opts to remove, Article II, § 4, requires that action be predicated on "Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Therefore, two key principles cabin the impeachment power: (1) requiring two-thirds of the Senate to vote for conviction; and (2) limiting the most drastic, anti-democratic remedy—removal—to conviction for treason, bribery or "other high crimes and misdemeanors."

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<sup>29</sup> Statement of Charles Pinckney, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 66 (Max Farrand ed. 1911) (July 20, 1787) (hereinafter *Farrand*).

<sup>30</sup> Statement of Rufus King, in 2 *Farrand* 67.

<sup>31</sup> Statement of Gouverneur Morris, in 2 *Farrand* 65, 69.

<sup>32</sup> Statement of Edmund Randolph, in 2 *Farrand* 67.

These limitations were carefully and thoughtfully designed to prevent impeachment from becoming a political weapon used to undermine separation of powers and democracy itself. As Alexander Hamilton put it in *Federalist No. 68*, an “important desideratum was, that the Executive should be independent for his continuance in office on all but the people themselves.” As such, the President is subject to frequent election to allow regular public input into whether he should be retained in office. Limiting Congress’s ability to remove a President in these particular ways was designed to protect the integrity of presidential elections and de-politicize all attempts to remove the president via impeachment, limiting such a drastic measure to the most egregious, clear cut instances of misbehavior.

The “high crimes and misdemeanors” limitation is best understood in the context of the history of its adoption by the constitutional convention. While the “high crimes and misdemeanors” language may seem broad or vague to modern ears, in 1787 it was intended to raise the bar of impeachment, making it more difficult, as evidenced by the convention’s rejection of a more permissive impeachment language.

For example, on August 6, 1787, the Committee of Detail, consisting of five delegates from various States,<sup>33</sup> reported a draft constitution for consideration by the full convention. This draft stated that the President “shall be removed from his office by impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery or corruption.”<sup>34</sup> Several weeks later, on August 20, 1787, the convention directed the Committee of Detail to draft a provision making the President and other officers (including the Chief Justice of the Supreme Court) removable “for neglect of duty, malversation, or corruption.”<sup>35</sup> On August 31, 1787, the convention referred the issue of impeachment—and all other residual issues on which agreement had not yet been reached—to a Committee of Eleven, consisting of one convention delegate from every State. On September 4, 1787, the Committee of Eleven reported out a draft, stating that the President could be removed upon conviction in the Senate only for “for treason, or bribery.”<sup>36</sup>

Four days later, on September 8, 1787, George Mason objected, arguing that limiting impeachment to treason and bribery was too narrow. He thus moved to add “or maladministration” after the word “bribery.”<sup>37</sup> His motion did not get far.

James Madison opposed Mason’s motion as giving Congress too much power over the President, asserting “So vague a term will be equivalent to a tenure during pleasure of the Senate” rather than the people themselves.<sup>38</sup> Gouverneur Morris likewise agreed that the presidential election process, rather than impeachment, would provide the appropriate remedy for an incompetent or blundering President, stating, “an election of every four years will prevent maladministration.” Sensing the opposition to his broad proposal, Mason withdrew it and offered

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<sup>33</sup> The Committee of Detail consisted of Rutledge (South Carolina), Randolph (Virginia), Gorham (Massachusetts), Ellsworth (Connecticut) and Wilson (Pennsylvania).

<sup>34</sup> 2 *Farrand* 186.

<sup>35</sup> *Id.* at 337.

<sup>36</sup> *Id.* at 499.

<sup>37</sup> *Id.* at 550.

<sup>38</sup> *Id.*

the narrower language of “other high crimes and misdemeanors,” which then passed the Committee, 8-3.

The history of how the “high crimes and misdemeanors” language came to be adopted thus clearly demonstrates that, in the Framers’ view, it had narrower scope than “maladministration” or other more similarly broad terms that had been rejected at various stages, including “neglect of duty,” “malversation,” and “corruption.” While these words had been considered at some point, none survived as a basis for impeachment because their subjectivity and breadth raised the specter of the Framers’ biggest fear—that impeachment would become a tool for unseating a duly-elected President based on mere policy or political disagreements with Congress.

Allowing Congress to impeach based on charges of neglect, corrupt motive or maladministration would be far too tempting, increasing its incidence and destroying the Presidency as an independent, co-equal branch of government. While the constitutional convention ultimately agreed to give Congress the power to impeach and remove a President, it was only upon conviction by two-thirds of the Senate for “treason, bribery, or other high crimes or misdemeanors,” not “maladministration” or generalized allegations of “corruption.”

### **The Senate Must Expressly Reject the Unconstitutional “Corrupt Motives” and “Unilateral Control” Theories Underlying Articles I and II of H. Res. 775**

The Senate is often referred to as a “cooling saucer,” meant to temper House’s popular passions. The need for the Senate’s check on the lower chamber has never been greater. Never before has the House impeached a President on such a nakedly political basis. While House Speaker Nancy Pelosi finally transmitted the articles of impeachment against President Trump to the Senate, her month-long delay reinforces the conclusion that politics, not national security concerns, animates the House’s conduct.

In prosecuting this impeachment of President Trump, House Democrats have often repeated the maxim that “no one is above the law.” This is undoubtedly true, but it only emphasizes the House’s failure to identify *any law*—much less one rising to the level of a “high crime or misdemeanor”—warranting the President’s *removal from office*. The abuse of power and obstruction of Congress charges levied against President Trump amplify the maxim’s inapplicability, as the Trump-Zelensky phone call (upon which the abuse of power article is based) and the invocation of executive privilege (upon which the obstruction of congress article is based) were both *indisputably well within the President’s constitutional authority*.

If exercising presidential authority to conduct foreign affairs, investigating potential violations of U.S. law, and asserting executive privilege are “high crimes and misdemeanors” justifying impeachment, Presidents are but congressional puppets, impeachable whenever exercising their constitutional authority angers the political opposition in Congress. Contrary to what Speaker Pelosi recently claimed, our Founders would clearly *not* support the current impeachment effort.

**House Delays in the Impeachment Trial Have Caused Irreparable Harm to the Nation.**

A delayed impeachment trial also harms the nation because it cripples the officeholder's ability to govern effectively and attempts to cast a pall over his legitimacy, a pall which is lifted only by conviction or acquittal. When the officeholder is the President of the United States, a delayed impeachment is particularly harmful, because undermining a President's constitutional authority, even temporarily, creates serious risks to national security and the separation of powers.

In *Federalist No. 65*, Alexander Hamilton told the ratifying public that a delayed impeachment trial would be detrimental to the nation because it would cause "prolonged inaction" by those impeached, which may be viewed as a desirable tool of "persecution" by an "intemperate or designing majority in the House of Representatives." Speaker Pelosi's month-long delay in delivering the articles of impeachment is a stark illustration of the concerns expressed in *Federalist No. 65*. The Articles, hanging like a Sword of Damocles over President Trump's head, weaken the United States internally and externally. This political gamesmanship has been far more damaging to national security than apportioning aid to Ukraine.

In *Federalist No. 66*, Hamilton told the American public that they could "count upon [Senators'] in pride, if not upon their virtue" in exercising the power to try impeachments. The Framers presupposed that Senators' institutional pride would not allow them to tolerate an impeachment that wastes the Senate's or the nation's time. We beseech the Senate to resist the House's attempt to lower the bar of impeachment by espousing theories that inherently undermine separation of powers with its consequent weakening of our entire republican democracy.

### **Conclusion**

Because the legal theories underlying both Articles I and II are both legally flawed and factually insufficient, are inherently destructive of separation of powers, and are contrary to the Framers' vision of the impeachment power, the Senate should explicitly reject them. Even more importantly, it should reject them to protect the institution of the Presidency and the Constitution from such a dangerous precedent for future generations. The Senate should not adopt the specious and legally vacuous theories of "corrupt motives" and "unilateral control." Both theories present the same destructive seed of thought: that a President may be removed from office for exercising his lawful constitutional privilege and authority.

This partisan political effort undermines the democratic process, both now and in the future. The House unilaterally re-writes the constitution, without the people's consent to amend it. It weaponizes a process that should only be initiated in exceedingly rare circumstances and never for partisan purposes. This purely partisan attack on President Trump will damage democracy in America in the worst possible way: it will *forever* weaken the separation of powers—the very edifice upon which our democracy stands.

If the Senate does not reject the politically-motivated, manufactured theories upon which the impeachment articles are based, the House will be emboldened to base *future* impeachment efforts upon the same vague, boundless, and destructive theories. Indeed, because congressional precedents establishing the contours of impeachable conduct are wholly insulated from judicial

January 22, 2020

review, it is imperative that the Senate's basis for rejecting the articles against President Trump be clear for future generations. We, therefore, urge the Senate to reject the Articles of Impeachment.

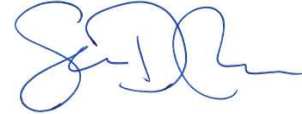
Sincerely,



Alan Wilson  
Attorney General of South Carolina



Jeff Landry  
Attorney General of Louisiana



Sean Reyes  
Attorney General of Utah



Steve Marshall  
Attorney General of Alabama



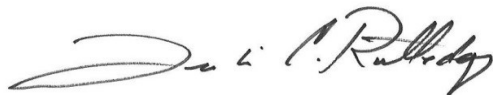
Curtis Hill  
Attorney General of Indiana



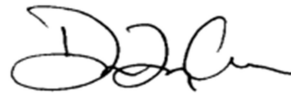
Kevin Clarkson  
Attorney General of Alaska



Derek Schmidt  
Attorney General of Kansas



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Daniel Cameron  
Attorney General of Kentucky



Ashley Moody  
Attorney General of Florida



Douglas Peterson  
Attorney General of Nebraska



Christopher M. Carr  
Attorney General of Georgia



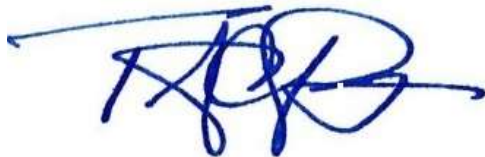
Lynn Fitch  
Attorney General of Mississippi



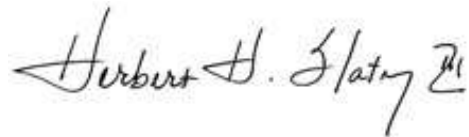
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