DISSENTING VIEWS

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I. Introduction[1]

Impeachment of an American president demands the accuser prioritize legitimacy and thoroughness over expediency. In the impeachment inquiries for Presidents Johnson, Nixon, and Clinton, the facts had been established and agreed upon by the time Articles of Impeachment were considered. Due to years-long investigations into the allegations against Nixon and Clinton, the only question to answer was what Congress would do to confront the findings.

The evidence uncovered in this impeachment, by contrast, shows the case is not only weak but dangerously lowers the bar for future impeachments. The record put forth by the Majority is based on inferences built upon presumptions and hearsay. In short, the Majority has failed to make a credible, factually-based allegation against this president that merits impeachment.[2]

By deciding to pursue impeachment first and build a case second, the Majority has created a challenge for itself. In the face of new information that exculpates or exonerates the President, the Majority must choose: either accept that the impeachment inquiry's findings do not merit impeachment and face the political consequences or, alternatively, ignore those facts. Regrettably, the Majority has chosen the latter.

As detailed in Section III below, since the delivery of the Intelligence Committee's Reports (both Majority and Minority), new developments have emerged that further undermine the case for impeachment. The Majority's response to new exculpatory facts, as it has been since the day the President was elected, is to ignore them and press on.

The Majority has not only ignored exculpatory evidence but proclaims the facts are "uncontested." The facts are contested, and, in many areas, the Majority's claims are directly contradicted by the evidence. That assertion is further contradicted by the Articles of Impeachment themselves. Not one of the criminal accusations leveled at the President over the past year—including bribery, extortion, collusion/conspiracy with foreign enemies, or obstruction of justice—has found a place in the Articles. Some of these accusations are, in fact, holdovers from an earlier disingenuous attempt by the Majority to weaponize the Russia collusion investigations for political gain. The Majority has not made the case for impeachment in part due to its decision to impeach being rooted less in a concern for the nation than the debasement of the President.

History will record the impeachment of President Donald J. Trump as a signal that even the gravest constitutional remedy is not beyond political exploitation. The Articles of Impeachment alone, drafted by the Majority in haste to meet a self-imposed December deadline,

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[1] As an initial matter, the Minority wishes to note for the record its unwavering commitment to security for the people and the nation of Ukraine. Throughout this process, the Minority has been cast variously as against foreign aid, pro-Russia, or unsympathetic to the plight of Ukrainians, who face unimaginable hardship in the face of Russian aggression. To the Ukrainian people, we say we categorically reject these characterizations and apologize that the Ukrainian democracy has been thrust into the spotlight besmirching both of our leaders. We congratulate you on your election of President Zelensky, whose commitment to fighting corruption and the Russian threat are values all decent Americans share with you.

[2] *See* Jonathan Turley, "The Impeachment Inquiry Into President Donald J. Trump: The Constitutional Basis For Presidential Impeachment," House Committee on the Judiciary, Written Statement, Dec. 4, 2019, at 4. ("I am concerned about lowering impeachment standards to fit a paucity of evidence and an abundance of anger. I believe this impeachment not only fails the standard of past impeachments but would create a dangerous precedent for future impeachments.").

underscore the Majority's anemic impeachment case. The Majority's actions are unprecedented, unjustifiable, and will only dilute the significance of the dire recourse that is impeachment. The ramifications for future presidents are not difficult to surmise. If partisan passions are not restrained, the House of Representatives will be thrown into an endless cycle of impeachment, foregoing its duty to legislate and usurping the place of the American people in electing their president.

II. Procedural Background

Apart from those factual and evidentiary shortcomings referenced above, the Majority's dedication to impeaching the President at any cost was well-reflected by their willful disregard of House Rules and congressional precedent. Throughout the first session of the 116th Congress, Chairman Jerrold Nadler repeatedly violated any Rules that inconvenienced the Committee's ardent attempts to impeach the President. The Committee's impeachment-related activities during the first session of the 116th Congress should be viewed as a cautionary tale.

In 1974, Chairman Peter Rodino approached the question of presidential impeachment solemnly and with an eye towards fairness and thoroughness. He worked diligently to ensure that such a country-altering process was conducted with not only bipartisan support, but with the support of the American people. What has occurred in the halls of Congress over the final months of 2019 has been a sharp and unfortunate departure from Chairman Rodino's legacy. The institutional damage done to the House of Representatives by the Majority throughout this impeachment "process" can never be repeated.

A. Impeachment Proceedings Without Authorization

For most of 2019, the House Committee on the Judiciary (the "Committee" or the "Judiciary Committee") conducted various "impeachment" hearings outside the scope of its authority under Rule X of the Rules of the House. The Chairman's refusal to seek authorization by a vote of the full House of Representatives—as was done in 1974 and 1998—denied every Member of the House of Representatives the opportunity to determine whether such proceedings should commence.

Not only did the Majority fail to seek authorization from the House of Representatives, they insisted they did not need it. On multiple occasions, Speaker of the House Nancy Pelosi and the Chairman denied that a vote of the full House of Representatives was necessary prior to conducting an impeachment inquiry, arguing that House committees could conduct oversight pursuant to Rule X of the Rules of the House.[3] This is a manipulative reading of the Rules. Rule X prescribes – in list format – the specific topics over which each House committee may exercise jurisdiction. Impeachment is not listed in Rule X.[4] To add—even temporarily—to a committee's jurisdiction, the full House of Representatives must agree.[5]

B. The Bifurcation of Impeachment Inquiry Proceedings Under H. Res. 660

The adoption of H. Res. 660 diverged substantially, and without justification, from prior

[3] *Nadler: These are 'formal impeachment proceedings'*, CNN (Aug. 8, 2019); Susan Cornwall, *U.S. House Will Hold Off on Vote to Authorize Impeachment Probe: Pelosi*, REUTERS, (Oct. 15, 2019).;Lindsey McPherson, *McCarthy Asks Pelosi to Suspend Impeachment Inquiry Until She Defines Procedures*, ROLLCALL, (Oct. 3, 2019).
[4] Rules of the House of Representative, Rule X.
[5] Deschler-Brown's Precedents, Volume 3, Chapter 10. 94th Cong. 2042 (1994).

authorizations agreed to by the House of Representatives in 1974 and 1998. Most notably, it bifurcated impeachment proceedings, allowing the House Permanent Select Committee on Intelligence (the "Intelligence Committee") to usurp what has traditionally been the Committee's investigative role in presidential impeachment. To be clear, Members of the House of Representatives will soon have to vote on Articles of Impeachment reported by a Judiciary Committee that has barely reviewed the alleged evidence. After the Intelligence Committee "investigation," the Judiciary Committee held only one hearing and one presentation from staff on the impeachment inquiry. Not only was the Judiciary Committee almost completely shut out from the impeachment inquiry, it turned down the opportunity to examine all of the evidence collected by the Intelligence Committee or to hear testimony from even one fact witness.

The Majority allowed the entire investigative portion to take place in a committee that denied Minority-requested witnesses, would not allow the participation of the President's counsel to question fact witnesses, and censored Minority questions.[6] After the Intelligence Committee's one-sided investigation, the Judiciary Committee was unable to conduct a full review, leaving the American people in the dark.

C. Committee Proceedings Under H. Res. 660

1. Failure to Schedule a Minority Hearing Day

The Minority has a right to a minority day of hearings under clause 2(j)(1) of Rule XI of the Rules of the House.[7] The Rules set forth that a minority day of hearings must occur on the "measure or matter" under consideration at the time of the demand. On December 4, 2019, the Committee held a hearing titled "The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment."[8] It was during that hearing that a demand for a minority day of hearings was made. In fact, a demand for a minority day of hearings was made less than two minutes after the start of the hearing, which was the *first* Committee hearing designated pursuant to H. Res. 660.[9] Given the issue under consideration at the December 4 hearing, the Rules would require that the Chairman schedule a minority day of hearings on the impeachment inquiry into President Donald J. Trump, the matter under consideration at the time of the demand. Once the articles of impeachment were considered and adopted, the impeachment inquiry ended, and the necessity of the minority hearing day dissipated.

After the Chairman failed to acknowledge his obligation to schedule such a hearing during the December 4 hearing, Ranking Member Doug Collins sent a letter the following day reminding the Chairman that the requested minority hearing day must be scheduled before Committee consideration of any articles of impeachment.

The issue was again raised at the staff presentation hearing on December 9, 2019.[10] Each time the issue was raised directly to the Chairman, he said that he was still considering the

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[6] Valerie Richardson, *Adam Schiff Rejects Hunter Biden, 'Whistleblower' as Impeachment Witnesses*, WASHINGTON TIMES (Nov. 10, 2019); Bob Fredericks & Aaron Feis, *Adam Schiff Blocks Republicans' Attempts to Question Impeachment Witnesses*, NEW YORK POST (Nov. 19, 2019).
[7] Rules of the House of Representative, Clause (2)(j)(1), Rule XI.
[8] The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment, Hearing Before the H. Comm. On the Judiciary, 116th Cong. (2019).
[9] *Id*. at 4.
[10] The Impeachment Inquiry into President Donald J. Trump: Presentations from the House Permanent Select Committee on Intelligence and House Judiciary Committee, Hearing Before the H. Comm. on the Judiciary, 116th Cong. 12 (2019).

request.[11] At the markup of articles of impeachment, a point of order was made against consideration of the articles for the Chairman's failure to schedule a minority hearing day. Instead of acknowledging his violation of the Rules, the Chairman ruled against the point of order, depriving Minority Members of their right to a minority day of hearings.

Such a blatant, intentional, and impactful violation of the Rules during consideration of a matter as course-altering as articles of impeachment has never occurred in the history of the House of Representatives.

2. Staff Presentation

The staff "presentation" hearing held on Monday, December 9, 2019, could only be described as a bizarre, made-for-TV divergence from the precedent set during the impeachments of Presidents Nixon and Clinton. Staff presentations in 1974 and 1998 occurred as a means to assist Members of the Committee in sorting through dense volumes of evidence. The December 9 hearing was set up by the Majority as a means to functionally replace the participation of Members of Congress with paid, outside consultants, not to advise them.

To begin, an outside consultant to the Majority, Barry Berke, was permitted to make a presentation to the Committee without being sworn in or questioned by Members of the Committee.[12] He was later permitted forty-five minutes to cross-examine the Minority staff member (after said staffer had been sworn in) that had earlier presented the counter argument to his "presentation," which was in fact just thirty minutes of opinion.

This aspect of the hearing comported with the procedures of H. Res. 660, but we question any application of the Rules that would permit a private consultant to use Committee proceedings to cross examine a career staff member for forty-five minutes but only allow the majority of Members on the Committee five minutes to ask questions.

Future staff presentations of evidence during impeachment inquiries should be just that – presentations of evidence compiled and reviewed by the Committee. Instead, this Majority chose to prioritize TV ratings over meaningful Member participation and a greater understanding of the facts.

3. Rejection of All Republican Witness Requests

H. Res. 660 provided that the Ranking Member could request that the Chairman subpoena witnesses. While H. Res. 660 provides no time constraints on such a request, the Chairman sent a letter requiring that the Ranking Member submit any such requests by December 6, 2019.[13] Despite the unjustifiably short time constraint, the Ranking Member sent a list of witnesses to the Chairman by the deadline. On Monday December 9, the Chairman rejected all of the Ranking Member's requests without justification beyond the Chairman's

[11] The Impeachment Inquiry into President Donald J. Trump: Presentations from the House Permanent Select Committee on Intelligence and House Judiciary Committee, Hearing Before the H. Comm. on the Judiciary, 116th Cong. 13 (2019).
[12] *Id*. at 74-5.
[13] Letter from the Honorable Jerrold Nadler, Chairman, H. Comm. on the Judiciary, to the Honorable Doug Collins, Ranking Member, H. Comm. on the Judiciary (Nov. 29, 2019).

unilateral determination that the witnesses were not relevant.[14] Considering that Articles of Impeachment were announced the very next morning, it is clear that the Chairman had no intention to provide the Minority Members with an opportunity to examine additional evidence or call additional witnesses.

III. Factual Background

From a substantive perspective, despite the Minority's efforts,[15] this Committee invited no fact witnesses to testify during this impeachment inquiry. Instead, it held one hearing with a panel of four academics, and one presentation with a panel of Congressional staffers.

Rather than conduct its own investigation, this Committee relied on the investigation conducted by the Intelligence Committee. The Intelligence Committee Majority produced a report. However, the Intelligence Committee's Minority Staff Report is the more complete document, describing in significant detail the evidentiary record.[16] The Intelligence Committee Minority Staff Report is incorporated into these Minority Views and attached as Appendix A. As that Minority Report shows, the Majority does not have evidence to support the allegations in the Articles of Impeachment.[17]

Since the conclusion of the Intelligence Committee's investigation and the provision of its reports, significant new facts have come to light that further contradict the Majority's primary allegation that the President conditioned U.S. security assistance on the initiation of Ukrainian investigations into a political rival. The Majority has ignored those facts. First, on December 2, President Zelensky repeated his earlier statements[18] that he was not pressured by President Trump. In fact, he said he was not aware of a *quid pro quo* involving U.S. security assistance.[19] Second, on December 10, a close aide to President Zelensky, Andriy Yermak, denied discussing a *quid pro quo* with Gordon Sondland, which, as discussed below, is the linchpin of the Majority's factual case.[20] It is difficult to conceive that a months-long pressure campaign existed when the alleged victims are not aware of it and deny being pressured. These exculpatory facts not only undercut the Majority's primary factual claims, they emphasize the problems with the rushed nature of the process.

IV. Article I Fails to Establish an Impeachable Offense

Impeachment is only warranted for conduct that constitutes "Treason, Bribery, or other high Crimes and Misdemeanors."[21] For months, the Majority claimed the President was guilty of

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[14] Letter from the Honorable Jerrold Nadler, Chairman, H. Comm. on the Judiciary, to the Honorable Doug Collins, Ranking Member, H. Comm. on the Judiciary (Dec. 9, 2019).
[15] *See, e.g.*, Letter from the Honorable Doug Collins, Ranking Member, H. Comm. on the Judiciary, to the Honorable Jerrold Nadler, Chairman, H. Comm. on the Judiciary (December 6, 2019).
[16] *See* Appendix A, Report of Evidence in the Democrats' Impeachment Inquiry in the House of Representatives ("Intel. Comm. Minority Report") (Dec. 2, 2019).
[17] *Id.*
[18] Tara Law, *'Nobody Pushed Me.' Ukrainian President Denies Trump Pressured Him to Investigate Biden's Son*, TIME (Sep. 25, 2019).
[19] Simon Shuster, *'I Don't Trust Anyone at All,' Ukrainian President Volodymyr Zelensky Speaks Out on Trump, Putin and a Divided Europe*, TIME (Dec. 2, 2019).
[20] Simon Shuster, *Top Ukraine Official Andriy Yermak Casts Doubt on Key Impeachment Testimony*, TIME (Dec. 10, 2019).
[21] U.S. CONST. Art. II, § 4.

bribery, extortion, and a host of other common law and penal code crimes,[22] but the Articles of Impeachment do not include any of those specific offenses. In fact, the first Article in the resolution sponsored by Chairman Nadler alleges an amorphous charge of "abuse of power."[23]

Simply put, the Majority has included the vague "abuse of power" charge because they lack the evidence to prove bribery, extortion, or any other crimes. For example, during the Committee's markup of the articles of impeachment, Members from the Minority explained in detail why the Majority's claims that the President was guilty of bribery were erroneous.[24]

It is not the Minority's contention that an abuse of power can never form the basis for an impeachment. But an accusation of abuse of power must be based on a higher and more concrete standard than conduct that "ignored and injured the interests of the Nation."[25] The people, through elections, decide what constitutes the "interests of the nation." For an abuse of power charge, although "criminality is not required…clarity is necessary."[26]

Unfortunately, such clarity is utterly lacking in the Majority's articles. This is the first presidential impeachment in American history without the allegation of a crime, let alone a high crime or high misdemeanor. The absence of even an allegation of criminality, after months of claiming multiple crimes had been committed, reveals the Majority's inability to substantiate their claims.[27] The abuse of power charge in the first Article is vague, unprovable, and confined only by the impulses of the majority party in the House of Representatives. The Majority has failed to distinguish its definition of "abuse of power" from simple dislike or disagreement with the President's actions because this impeachment is inextricably tied to the Majority's dislike and disagreement with the President. That is not what the Founders intended.

The crux of the factual allegations in the first Article is that the President directed a months-long pressure campaign to force President Zelensky to announce particular investigations in exchange for U.S. security assistance or a White House meeting, in an effort to influence the 2020 election. The Intelligence Committee Minority Report demonstrates that these claims were not only unproven but, in fact, are undermined or contradicted by the primary actors in the alleged scheme.[28] Significantly, the alleged victims of the supposed pressure campaign were not even aware of any so-called pressure campaign.[29] Indeed, if the Majority had proof of bribery, they would have said so in the Articles.

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[22] *See e.g.,* Mike DeBonis & Toluse Olorunnipa, *Democrats sharpen impeachment case, decrying 'bribery' as another potential witness emerges linking Trump to Ukraine scandal*, WASHINGTON POST (Nov. 14, 2019).
[23] H. Res. 775, 116th Cong. (2019).
[24] *See* Markup of H. Res 755, Articles of Impeachment Against President Donald J. Trump, Before the H. Comm. on the Judiciary, 116th Cong. 77-78, 167-68 (statements of Reps. Buck and Reschenthaler; specifically, that Democrats lacked the evidence to prove at least three elements of the crime of bribery).
[25] *Id.* at 110 (Article I, charging that the President abused his power because he "ignored and injured the interests of the nation.").
[26] Turley, *supra* note 2, at 11.
[27] *See* Appendix A (Intel. Comm. Minority Report), outlining the evidentiary deficiencies in the Majority's case.
[28] *Id.* at 32-64.
[29] Georgi Kantchev, *Ukrainian President Denies Trump Pressured Him During July Call*, WALL STREET JOURNAL (Oct. 10, 2019) (President Zelensky said, "There was no blackmail."); Matthias Williams, *U.S. envoy Sondland did not link Biden probe to aid: Ukraine minister*, REUTERS (Nov. 14, 2019) (Ukraine's Foreign Minister Vadym Prystaiko said Ambassador Sondland "did not tell us . . . about a connection between the assistance and the investigations."); Mark Moore, *Ukraine's Zelensky again denies quid pro quo during Trump phone call*, NY POST (Dec. 2, 2019) (President Zelensky again denies there was a *quid pro quo*); Simon Shuster, *Top Ukraine Official Andriy Yermak Casts Doubt on Key Impeachment Testimony*, TIME (Dec. 10, 2019) (Andriy Yermak denies discussing military assistance with Ambassador Sondland).

Because they do not have direct evidence of a pressure campaign against the Ukrainians, the Majority's allegations are based on presumptions, assumptions, hearsay, and inferences.[30] And its most critical assumptions and inferences have been contradicted by direct evidence from the primary actors in the alleged scheme.[31] It is no surprise the allegations shifted from *quid pro quo*, bribery, and extortion to settle on an undefined "abuse of power." The facts uncovered by the Intelligence Committee fail to approach the constitutional and historical standard for impeaching a president.[32] As Professor Jonathan Turley testified before this Committee, this is the "thinnest evidentiary record" in the history of presidential impeachments.[33] The reason the Majority has failed to seek information to substantiate that record, as Professor Turley and the Minority agree, is "an arbitrary deadline at the end of December."[34]

A. Impeachment in the House of Representatives Requires Clear and Convincing Evidence of Specific Impeachable Conduct. The Majority Has Not Met Its Burden.

Some in the Majority have argued that the House of Representatives is like a grand jury that should vote to impeach based on probable cause. This framing contradicts historical precedent. In the Clinton Impeachment Minority Views, House Democrats stated that the burden of proof, just as it was in the Nixon inquiry, should be "clear and convincing evidence."[35] Chairman Nadler elaborated on that standard when he said:

> At a bare minimum, [] the president's accusers must go beyond hearsay and innuendo and beyond demands that the president prove his innocence of vague and changing charges. They must provide clear and convincing evidence of specific impeachable conduct.[36]

The Majority should reflect upon Chairman Nadler's words.

The staff report on Constitutional Grounds for Impeachment filed during the Nixon impeachment further explains the high bar required for impeachment:

> Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.[37]

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[30] *See* The Impeachment Inquiry into President Donald J. Trump: Testimony of Ambassador Gordon Sondland, Hearing Before the H. Perm. Sel. Comm. on Intelligence, 116th Cong. 148-51 (2019) (Ambassador Sondland testifying that his testimony about military was a "presumption" and that nobody told him the aid was linked to investigations); *see also* Appendix A (Intel. Comm. Minority Views) at 32-64.
[31] *See supra* note 29; Intel. Comm. Minority Views, at 43-44 (testimony of Ambassador Kurt Volker, the Special Envoy to Ukraine); Letter from Sen. Ron Johnson to the Honorable Jim Jordan, Ranking Member, H. Comm. on Oversight & Reform, and the Honorable Devin Nunes, Ranking Member, H. Perm. Sel. Comm. on Intelligence (Nov. 18, 2019).
[32] *See supra* note 10 (Opening Statement of Stephen R. Castor).
[33] Turley, *supra* note 2, at 4.
[34] *Id.* at 48.
[35] *See id.* at 211.
[36] Impeachment Inquiry: William Jefferson Clinton, President of the United States, 105th Cong., Consideration of Articles of Impeachment 78 (Comm. Print 1998) (statement of Rep. Jerrold Nadler).
[37] Staff of H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 4, at 27 (Comm. Print 1974) ("Nixon Constitutional Grounds for Presidential Impeachment").

As described below, the Majority's case fails to meet the burden of proof required.[38]

B. Abuse of Power Allegations Are Overbroad and Fail to Allege Specific Impeachable Conduct

Instead of alleging specific impeachable conduct, such as bribery or other high crimes, the Majority has alleged the vague and malleable charge of "abuse of power." While a consensus of scholars agree it is possible to impeach a president for non-criminal acts, the House of Representatives has never done so based "solely or even largely on the basis of a non-criminal abuse of power allegation."[39] That is because "[c]riminal allegations not only represent the most serious forms of conduct under our laws, but they also offer an objective source for measuring and proving such conduct."[40] No such objective measure has been articulated by the Majority.

The Majority claims its abuse of power standard is satisfied when a president injures "the interests of the nation" for a personal political benefit.[41] What constitutes an injury to the national interest has been left undefined. It can mean anything a majority in Congress wants it to mean. The opposition party almost unfailingly disagrees with a president on many issues and can always argue his or her actions injure the national interest. Here, for example, Majority Members have already begun to argue the abuse of power allegations in the first Article encompass conduct totally unrelated to the Ukraine allegations.[42] Moreover, nearly any action taken by a politician can result in a personal political benefit. When a certain standard can always be met by virtually all presidents, depending on partisan viewpoints, that standard has no limiting neutral principle and must be rejected. Simply stated, the Majority is advancing an impeachment based on policy differences with the President—a dangerous and slippery slope that our Founders cautioned against during discussions crafting the impeachment clause.

The Founders warned against such a vague and open-ended charge because it can be applied in a partisan fashion by a majority of the House of Representatives against an opposition president. Alexander Hamilton called partisan impeachment "regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt" the "greatest danger."[43] Additionally, the Founders explicitly excluded the term "maladministration" from the impeachment clause because they did not want to subject presidents to the whims of Congress.[44] James Madison said, "So vague a term will be equivalent to a tenure during pleasure of the Senate."[45] As applied here, the Majority's abuse of power standard does precisely what the Founders rejected.

Thus, when the House of Representatives impeaches a president for non-criminal abuses of power, it must state with clarity how the harm to "national interests" is so egregious that it

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[38] *See also* Appendix A (Intel Comm. Minority Report).
[39] Turley, *supra* note 2, at 47.
[40] *Id.* at 23.
[41] *See* H. Res. 755, 116th Cong. (2019) (Article I).
[42] *See, e.g.*, Rep. Rashida Tlaib, TWITTER, Dec. 10, 2019, 11:14am (stating that "abuse of power" standard includes the allegation that the "President targeted people solely based on their ethic [sic] background, their faith, disability, sexual orientation and even source of income.").
[43] THE FEDERALIST NO. 65 (Alexander Hamilton).
[44] 2 The Records of the Federal Convention of 1787, 550 (Max Farrand ed., 1937).
[45] *Id.*

merits usurping the will of the electorate.[46] The Majority has attempted to do that by equating a telephone conversation with election tampering. That argument is resoundingly unconvincing.

To prove an abuse of power, the accusation and the evidence against a president must "be sufficiently clear to assure the public that an impeachment is not simply an exercise of partisan creativity in rationalizing a removal of a president."[47] Here, specific impeachable conduct was not clearly identified because the Majority failed to prove its initial allegations of a *quid pro quo*, bribery, extortion, and other statutory crimes.

1. Claims About the 2020 Election are Hyperbolic and Misleading

The injury to the national interest alleged against the President is harm to the integrity of the 2020 election. The Majority claims the President has engaged in a pattern of inviting foreign governments to intervene in American elections, and removal is the only option to preserve American democracy. Chairman Adam Schiff said not impeaching is equivalent to saying, "Why not let him cheat in one more election?"[48] That claim is hyperbolic and untrue.

First, the basis for the Majority's claimed pattern of conduct is a statement made in 2016 by then-candidate Trump during a public press conference, when he jokingly and mockingly asked Russia to find former Secretary of State Hillary Clinton's infamous 30,000 missing emails.[49] That statement has now been used as a basis to impeach the President because, the Majority argues, he invited a foreign power to intervene in the 2016 election and will do it again. This claim is specious for at least three reasons. First, the President was speaking publicly to fellow Americans. The remark was not, for example, caught on a hot microphone during a private conversation with the Russian president.[50] Second, the remark was made in jest in response to a question at a public press conference, following the news that 30,000 of Clinton's emails—potentially incriminating evidence—had mysteriously disappeared. Millions of Americans, including then-candidate Trump, were wondering what had happened. Finally, there is no evidence that the President actively sought to conspire with Russia to interfere in the election. The Majority simply does not like the comment.

The last point is particularly relevant. The Majority actively ignores the fact that the FBI and a special counsel spent nearly three years investigating the allegation that the President or his campaign colluded or conspired with the Russian government. Both concluded that the Trump-Russia collusion narrative was baseless.[51] The special counsel found no conspiracy and no collusion.[52] Indeed, on December 9, 2019—the same day the Committee received testimony from Chairman Schiff's staff, rather than Schiff himself—the Inspector General released a report outlining a myriad of egregious errors committed by the FBI during its Russia collusion

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[46] Turley, *supra* note 2, at 11.
[47] *Id.* at 25.
[48] Allan Smith & Rebecca Shabad, *House leaders unveil two articles of impeachment, accusing Trump of 'high crimes and misdemeanors*', NBC NEWS (Dec. 10, 2019) ("Remarks by Chairman Adam Schiff").
[49] *See* Ian Schwartz, Trump to Russia: I Hope You're Able to Find Clinton's 30,000 Missing Email, REAL CLEAR POLITICS (July 27, 2016).
[50] J. David Goodman, *Microphone Catches a Candid Obama*, NY TIMES (March 26, 2012).
[51] *See* Robert S. Mueller III, Report On The Investigation Into Russian Interference In The 2016 Presidential Election (March 2019) ("Mueller Report"); Michael Horowitz, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election (June 2018) ("Horowitz Report").
[52] *See* Mueller Report at 1.

investigation.[53] That the Majority included references to the Russia collusion narrative in these Articles of Impeachment illuminates the Majority's disregard for history, trivializes impeachment, and demonstrates an inability by the Majority to accept the inconvenient conclusions of those investigations—which, of course, the Majority previously lauded. It should be noted that the misconduct uncovered by the Department of Justice Inspector General largely occurred during President Obama's administration. As such, there is no basis to suspect President Trump's administration would allow the same election year abuses seen in 2016—which included the wiretapping of then-candidate Trump's campaign worker.[54]

Second, there was no invitation by President Trump for Ukraine to "intervene" in the 2020 election. By the Majority's standard, any action taken by any president that may affect an election is itself "intervention" in that election. Assuredly, every elected official eligible for reelection gives thought to how their actions will improve or harm their future campaign. Asking the president of Ukraine to "look into" potential corruption involving Hunter Biden's employment at a notoriously corrupt company in Ukraine is not "corrupting democratic elections."[55] Any request, however remote, that might benefit a politician politically is not an invitation to corrupt an election. To portray the President's request as corrupting the 2020 election is disingenuous, at best. As explained further below, the President did not ask for false information, and the fact that a key player in a corrupt Ukrainian company is the son of a politician does not transform a legitimate question into election interference.

Finally, the Majority argues that it must act now to prevent an ongoing "crime spree".[56] This is a spurious charge since the Articles of Impeachment do not allege *any* crimes, past or present. The Majority's argument that it must impeach the President to prevent future crimes, on the basis of past crimes not alleged in the Articles, is difficult to comprehend. Though impeachment is conceived of as prophylactic, the Majority would wield it on prognostication alone. The Majority must point to a high crime or other impeachable offense before claiming it is acting to protect future generations. It has completely failed to do so, instead relying on politically-motivated innuendo.

2. Prior Presidential Impeachments Were All Based on Criminality

The Majority's Articles of Impeachment are unprecedented in American history because they are not based on criminality, as were all prior presidential impeachments. President Johnson was impeached by the House of Representatives in 1868 for violating the Tenure of Office Act.[57] The House Judiciary Committee approved Articles of Impeachment against President Nixon based on extensive and proven criminal conduct. As Professor Turley explained:

> The allegations began with a felony crime of burglary and swept to encompass an array of other crimes involving political slush funds, payments of hush money, maintenance of an enemies list, directing tax audits of critics, witness intimidation, multiple instances of perjury, and even an alleged kidnapping. Ultimately, there were nearly 70 officials charged and four dozen of them found guilty. Nixon was also named as an unindicted

[53] *See* Horowitz Report at *i*.
[54] *Id.*
[55] H. Res. 755, 116th Cong. (2019) (Article I).
[56] *See supra* note 24, at 62.
[57] Turley, *supra* note 2, at 14-17.

> conspirator by a grand jury. . . . The claim that the Ukrainian controversy eclipses Watergate is unhinged from history.[58]

The House of Representatives impeached President Clinton for the federal crime of lying under oath to deny justice to a fellow American.[59] While individual Articles of Impeachment have been passed against prior presidents that do not allege criminality, no president has been impeached solely on non-criminal accusations. This impeachment not only fails to satisfy the standard of past impeachments but would create a dangerous precedent because the alleged conduct is unproven.

3. This is the First Presidential Impeachment Where the Primary Allegations Have Not Been Proven.

The Majority has said repeatedly that the facts in this impeachment inquiry are not in dispute. That is false. Not only are the facts in dispute, the Majority's primary allegations are based on presumptions that are contradicted by direct evidence. Indeed, this is the first presidential impeachment where the primary allegations have not been proven.[60] In the Nixon impeachment, the Judiciary Committee had tapes and a host of proven crimes.[61] In the Clinton impeachment, there was physical evidence and a well-founded perjury claim that even President Clinton's supporters acknowledged was a felony, leaving them to argue that some felonies are not impeachable.[62] Here, all the Majority has presented connecting the hold on foreign security assistance to a request for investigations is a presumption by Ambassador Gordon Sondland.[63] But that presumption is contradicted by more credible direct evidence. Specifically, Ambassador Kurt Volker testified that there was no "linkage" between a White House meeting and Ukrainian actions to investigate President Trump's political rival.[64] During his public testimony, in an exchange with Rep. Mike Turner, Ambassador Volker reiterated that there was no linkage between foreign security assistance and investigations.[65]

There are four facts that will never change, making it impossible for the Majority to make any convincing case for the impeachment of the President on these facts. First, the President has publicly released the transcript of the July 25 call, which shows no conditionality for any official act.[66] Second, President Zelensky and his advisors did not know the aid was on hold until it was reported publicly at the end of August.[67] Third, both President Trump and President Zelensky have said repeatedly there was no pressure, no *quid pro quo*, and no linkage between the aid and investigations.[68] Fourth, the foreign security assistance funds were released without Ukraine

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[58] *Id.* at 17-20.
[59] *See* H. Rept. 105-830, 105th Cong. (1998).
[60] Turley, *supra* note 2, at 22.
[61] *Id.*
[62] *See* Staff of H. Comm. on the Judiciary, 105th Cong., Constitutional Grounds for Presidential Impeachment: Modern Precedents, Minority Views, at 15 (1998) ("Clinton Impeachment Report").
[63] *See supra* note 30, at 148-151 (Testimony of Gordon Sondland stating that his testimony about security assistance was a "presumption" and that nobody told him the aid was linked to investigations).
[64] Transcribed Interview of Ambassador Kurt Volker (Oct. 3, 2019) at 35-36; 40.
[65] The Impeachment Inquiry into President Donald J. Trump: Testimony of Ambassador Kurt Volker and Mr. Timothy Morrison, Hearing Before the H. Perm. Sel. Comm. on Intelligence, 116th Cong. 106-108; 166 (2019).
[66] The White House, Memorandum of Telephone Conversation 1 (July 25, 2019).
[67] *See* Appendix A (Intel Comm. Minority Report), at 50 (citing testimony of Ambassadors Volker and Taylor).
[68] *See, e.g.*, Georgi Kantchev, *Ukrainian President Denies Trump Pressured Him During July Call*, WALL STREET JOURNAL (Oct. 10, 2019) (President Zelensky said "There was no blackmail."); Matthias Williams, *U.S. envoy Sondland did not link Biden probe to aid: Ukraine minister*, REUTERS (Nov. 14, 2019) (Ukraine's Foreign Minister Vadym Prystaiko said Ambassador Sondland "did not tell us . . . about a connection between the assistance and the

announcing or undertaking any investigations.

Additionally, Andriy Yermak, the only Ukrainian who allegedly was told about Ambassador Sondland's presumption, described in great detail his brief encounter with Ambassador Sondland that occurred when they were walking towards an escalator and said Ambassador Sondland never told him that U.S. security assistance was tied to investigations.[69] It defies logic to believe the President carefully orchestrated a months-long pressure campaign involving security assistance when the alleged victims of the supposed pressure campaign did not even know about it or about conditionality on any official act. Equally unconvincing is the assertion that everyone who disagrees with Ambassador Sondland's presumption is just lying.

Finally, the President was asked about Ambassador Sondland's presumption on two separate occasions, and both times President Trump said Sondland was wrong. After Ambassador Sondland told Senator Ron Johnson on August 30 about his presumption that U.S. security assistance was linked to investigations, Senator Johnson called the President on August 31 and asked if Ambassador Sondland's presumption was accurate.[70] The President said, "No way. I would never do that."[71] Senator Johnson and Senator Murphy subsequently met with President Zelensky. They discussed Ukraine's recent anti-corruption efforts and U.S. security assistance, but, not surprisingly, the question of investigations was not raised.[72] Likewise, when Ambassador Sondland asked President Trump what he wants from Ukraine, the President said, "I want nothing."[73] In fact, the President said he wanted President Zelensky to do what he ran on: root out corruption in Ukraine.[74]

Ultimately, Ukraine received the U.S. security assistance and a meeting with the President without announcing any investigations. There is no evidence that the President engaged in a pressure campaign or other scheme to condition security assistance on investigations. The Majority's case is built on a presumption that is contradicted by the evidence. The Intelligence Committee Minority Report provides further details about the flaws in the Majority's factual case. If the Majority proceeds with impeachment, it will be based on one presumption from one witness who amended his story multiple times.

C. The Majority Fails to Explain Why Asking About Hunter Biden's Role on Burisma Board of Directors is a High Crime or Misdemeanor

After failing to substantiate the allegations related to the U.S. security assistance, the Majority's remaining allegation is that the President committed the "high crime" of asking President Zelensky to look into potential corruption involving Hunter Biden's role on Burisma's board of directors.[75] This allegation is not a high crime or misdemeanor.

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investigations."); Simon Shuster, *'I Don't Trust Anyone at All,' Ukrainian President Volodymyr Zelensky Speaks Out on Trump, Putin and a Divided Europe*," TIME (Dec. 2, 2019) (President Zelensky again denies there was a *quid pro quo*).

[69] Simon Shuster, *Top Ukraine Official Andriy Yermak Casts Doubt on Key Impeachment Testimony*, TIME (Dec. 10, 2019).

[70] Letter from Sen. Ron Johnson to the Honorable Jim Jordan, Ranking Member, H. Comm. on Oversight & Reform, and the Honorable Devin Nunes, Ranking Member, H. Perm. Sel. Comm. on Intelligence, at 5 (Nov. 18, 2019).

[71] *Id.* at 6.

[72] *Id.* at 6-7.

[73] *See supra* note 30, at 148-151 (Testimony of Ambassador Gordon Sondland stating the President said "I want nothing.").

[74] *Id.*

[75] *See supra* note 69.

That question was the same question the American media had been asking for years. For example, on June 20, 2019, *ABC News* scrutinized Hunter Biden's involvement on the Burisma board of directors on a nationally televised news report.[76] The reporter asked whether "Hunter Biden profit[ed] off his Dad's work as vice-president, and did Joe Biden allow it?"[77] Numerous other publications have asked the same questions, including the Wall Street Journal as far back as 2015.[78] Former Vice President Biden himself, in a widely circulated video, explained his role in leveraging foreign aid to get a Ukrainian prosecutor who had investigated Burisma fired during a speech at the Council on Foreign Relations.[79] As the New York Times reported earlier this year, "Among those who had a stake in the outcome was Hunter Biden, Mr. Biden's younger son, who at the time was on the board of an energy company owned by a Ukrainian oligarch who had been in the sights of the fired prosecutor general."[80] Certainly, the questions surrounding the Bidens' role in Ukraine have been topics of interest for the media for a long time.

There is nothing untoward about a president asking a foreign government to investigate the same questions about potential corruption the American media was asking publicly. In fact, the United States has been party to a Mutual Legal Assistance Treaty (MLAT) with Ukraine since 2001.[81] The purpose of that MLAT includes "mutual assistance…in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters."[82]

Furthermore, being a political campaign participant does not immunize anyone from scrutiny. The President did not ask for the creation of any false information. When Lt. Col. Vindman was asked "Would it ever be U.S. policy, in your experience, to ask a foreign leader to open a political investigation?" he replied, "…Certainly the President is well within his right to do that."[83]

V. Article II Fails to Establish an Impeachable Offense

The second Article of Impeachment, "Obstruction of Congress," appears to be a simple invective by the Majority against the constitutional reality of separation of powers.[84] The

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[76] *Biden sidesteps questions about son's foreign work*, ABC NEWS (June 20, 2019).
[77] *Id.*
[78] Paul Sonne & Laura Mills, *Ukrainians See Conflict in Biden's Anticorruption Message*, WALL STREET JOURNAL (Dec. 7, 2015) (Quoting Ukrainian corruption expert stating: "If an investigator sees the son of the vice president of the United States is part of the management of a company … that investigator will be uncomfortable pushing the case forward."); *see also* James Risen, *Joe Biden, His Son and the Case Against a Ukrainian Oligarch*, NY TIMES (Dec. 8, 2015); Kenneth Vogel & Iuliia Mendel, *Biden Faces Conflict of Interest Questions that are being Promoted by Trump and Allies*, NY TIMES (May 1, 2019).
[79] Council on Foreign Relations, *Foreign Affairs Issue Launch with Former Vice President Joe Biden* (Jan. 23, 2018).
[80] Kenneth Vogel & Iuliia Mendel, *Biden Faces Conflict of Interest Questions that are being promoted by Trump and Allies*, NY TIMES (May 1, 2019).
[81] See Department of State, "Ukraine (12978) – Treaty on Mutual Legal Assistance in Criminal Matters".
[82] *Id.* at art. I cl. 1.
[83] The Impeachment Inquiry into President Donald J. Trump: Testimony of Ms. Jennifer Williams & Lt. Col. Alexander Vindman, Hearing Before the H. Perm. Sel. Comm. on Intelligence, 116th Cong. 120 (2019).
[84] *See* Montesquieu, Charles de Secondat, baron de, 1689-1755. *The Spirit of the Laws*. The Colonial Press, 1899 (New York). ("But should the legislative power usurp a share of the executive, the latter would be equally undone…Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.").

Majority's refusal to engage the Executive Branch in the traditional accommodations process,[85] or seek redress from the Judicial Branch, has rendered this Article as baseless as the first. The system of checks and balances is neither theoretical nor dispassionate; the Founders fully intended to put the three branches in conflict, and expected they would argue self-interestedly for their respective powers.[86] The inclusion of the second Article may be due to the Majority's reticence to propose only a single unsupported Article.

No president has been impeached for obstruction of Congress. The Majority seeks to impeach the President *not* for violating the Constitution but, instead, for asserting privileges that are part of its very structure. Though Legislative frustration with Executive resistance has previously inspired calls for impeachment and even the drafting of Articles of Impeachment, in this instance, the Majority is rushing to impeachment without attempting to engage available alternative avenues to obtain information. They have failed to do so because the Majority has set an arbitrary, politically-motivated deadline, by which it believes it must finish impeachment. Quite simply, further negotiations or the courts would take too long for the Majority's liking. This situation is truly unprecedented.

A. Obstruction of Congress Does Not Constitute a High Crime or High Misdemeanor While Further Recourse is Available

The obstruction of Congress allegations in this second Article do not meet the impeachable standard demanded by the Constitution. The Founders intended to create interbranch conflict. The fact that conflict exists here does not mean the President has committed either a high crime or a high misdemeanor. Most significantly, Congress has not pursued any of its many remedies to resolve interbranch disputes.

Congress has legislated remedies for itself to enforce its investigation requests, but it has not pursued those remedies.[87] Congress may also turn to the Judicial Branch to resolve interbranch disputes over subpoenas, as it has done many times in the past.[88] The Majority has neglected to do so. The Majority's claim that the current administration's "total" declination to participate in the effort to unseat him—either by the President himself or other Executive Branch officers—is somehow unprecedented is, simply, incorrect.[89] The Majority has engaged in a

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[85] *Cf. U.S. v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its power by any branch is due great respect from the others.").

[86] THE FEDERALIST NO. 51 (James Madison) ("This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights…As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.").

[87] *See, e.g.,* 2 U.S.C. § 192.

[88] *See, e.g., H. Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d (D.D.C. 2008).

[89] Many presidents have instructed Executive Branch officials not to comply with congressional demands. *See* Theodore Olson, History of Refusals By Executive Branch Officials to Provide Information Demanded by Congress, Part I, December 14, 1982, 6 Op. Off. Legal Counsel 751. The Olson OLC Opinion describes, for example, President Jackson stating, "It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive." President Theodore Roosevelt stated, "[I have] instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction." And President Eisenhower, in a May 17, 1954, letter to the Secretary of Defense said: "[Y]ou will

fundamentally unfair process and created a scenario in which the President's assertion of valid constitutional privileges is being used as a weapon against him.

The Intelligence Committee Majority served numerous subpoenas for documents and testimony. However, in at least one case, when the witness sought judicial review of the subpoena, the Majority withdrew it. Former Deputy National Security Advisor and Assistant to the President Charles Kupperman was one of the few people to listen in on the call between President Trump and President Zelensky on July 25 and received a subpoena to testify. When the White House instructed him to not testify, he asked the court to resolve "irreconcilable commands" from the Legislative and Executive Branches.[90] Inexplicably, the Majority promptly withdrew the subpoena and moved to dismiss the lawsuit.

Additionally, at least three subpoenas authorized and signed by Intelligence Committee Chairman Schiff were served prior to the passage of House Resolution 660 ("H. Res. 660").[91] Since H. Res. 660 gave Chairman Schiff jurisdiction to pursue this impeachment inquiry, an authorization he did not previously wield, it is likely these subpoenas would be defective and unenforceable since they were issued prior to its passage. Notably, the House of Representatives has chosen not to ask the federal judiciary to opine on such questions, instead rushing straight to impeachment without engaging the courts to resolve this interbranch dispute.

The federal judiciary's recent ruling that White House Counsel Don McGahn must appear before the Judiciary Committee demonstrates that assertions of privileges by the White House do not foreclose the House of Representatives' ability to hear testimony from relevant witnesses.[92] For the price of legitimacy, the Majority is only required to pay a small amount of patience and deference to the courts.

The Majority's claim that the courts are too slow or deliberative only demonstrates the Majority's pessimism about the merits of this case.[93] The Majority's actions show the American people disdain for working within the constitutional framework. Any case filed pursuant to an impeachment inquiry can be expedited in the courts. In the Nixon litigation, courts moved relevant cases quickly to and through the Supreme Court.[94] The decision to adopt an abbreviated schedule for the investigation and not to seek to compel testimony is a strategic choice by the Majority. It is not an appropriate justification for impeachment.

The feebleness of the Obstruction of Congress charge is rooted not only in the Majority's refusal to petition a court for enforcement of its subpoenas, but also the Majority's disregard for the typical process of accommodation that necessarily requires more time than the Majority has allowed. The "gold standard" of impeachment inquiries was with President Nixon.[95] But in that case the "Obstruction of Congress" Article of Impeachment authorized by the Judiciary

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instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications, or to produce any such documents or reproductions."

[90] Brief of Plaintiff, Charles M. Kupperman, *Kupperman v. House of Representatives*, Case No: 1:19-cv-03224 at 2 (D.D.C. Oct. 25, 2019).

[91] Subpoena of Secretary of State Mike Pompeo (Sept. 27), Subpoena of Vice President Mike Pence (Oct. 4), and Subpoena of Acting White House Chief of Staff Mick Mulvaney (Oct. 4).

[92] *H. Comm. on the Judiciary v. McGahn*, Opinion of the Court, Case No: 1:19-cv-02379 (D.D.C. Nov. 25, 2019).

[93] *See supra* note 49.

[94] Two months elapsed between the ruling of Judge Sirica of the U.S. District Court for the District of Columbia and the Supreme Court's final decision.

[95] Turley, *supra* note 2, at 17.

Committee (but not voted on by the full House) was built upon a months-long negotiation with the White House, preceded by a years-long investigation by both houses of Congress.[96]

B. An Impeachment Inquiry Does Not Elevate the House of Representatives Above Fundamental Privileges

The Majority cites the "sole Power of Impeachment" five times in the two Articles of Impeachment. The recitation of Article I, Section 2, Clause 5 of the Constitution is correct, but it is utterly circular to assert the President deserves to be impeached because he defended himself from impeachment. The Constitution's grant of the impeachment power to the House of Representatives does not temporarily suspend the rights and powers of the other branches established by the Constitution. The initiation of impeachment proceedings does not entitle the House of Representatives automatic license to intrude into all corners of the federal government. For additional information regarding the unfair—and in fact, antagonistic—posture the Majority took during its investigation, refer to Section III of the Minority Views of the Intelligence Committee, attached as Appendix A.

The Majority's Articles also illustrate the risk of appropriating language from previous Articles of Impeachment never brought to a vote before the House of Representatives. Specifically, the Majority appears to have lifted from the Articles of Impeachment of President Nixon the language accusing the President of asserting privileges "without lawful cause or excuse."[97] But that is, of course, the heart of the argument in opposition to this Article. It is not for the Legislative Branch to determine unilaterally what is a "lawful cause or excuse." In fact, "[i]t is emphatically the duty of the Judicial Department to say what the law is."[98] The initiation of an impeachment inquiry does not change this calculus. The advantage an impeachment inquiry bestows to fact gatherers is the greater legitimacy of the Legislative Branch over the Executive Branch *before a Judicial Branch judge or magistrate*, which the Majority avoided altogether. The House of Representatives has no power to make laws by itself, and it has no mandate to determine to what privileges the Executive Branch is entitled. Though it may draft and pass Articles of Impeachment cloaking itself in the parlance of the judiciary, the House of Representatives is no substitute for the Judicial Branch. The adoption of such terminology further undermines the seriousness of this Article. In fact, it suggests the Majority is either unaware of the Nixon precedent, or seeks to deceive the American public about it.

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[96] After requests were made to the White House on February 25, 1974, discussions were entered into to attempt to elicit further cooperation with the White House. Only after these negotiations failed was the first subpoena issued on April 11, 1974, authorized on a bipartisan basis by a vote of 33 to 3. President Nixon proceeded to release to the Committee and the public edited transcripts of 31 of the 42 subpoenaed recorded conversations. Finding the production insufficient and incompliant with the subpoena, the Committee authorized two additional subpoenas on May 15: the first, approved 37 to 1, demanded production of additional recorded telephone conversations which included President Nixon; the second, approved by separate but overwhelmingly bipartisan vote, demanded the "daily diaries" of President Nixon's calls for four specified periods. In a letter to Chairman Rodino on May 22, the President declined to produce the subject material of the May 15 subpoenas. On May 30, the Committee authorized a fourth subpoena, by a vote of 37 to 1, which demanded additional tape recordings and all papers relating to Watergate. By a vote of 28 to 10, the Committee also responded to President Nixon's failure to produce subpoenaed material, which was in turn was replied to by President Nixon on June 9. On June 24, the Committee authorized additional subpoenas into the ITT antitrust litigation and Kleindienst confirmation, domestic surveillance, governmental decisions affecting the dairy industry and campaign contributions, and alleged misuse of the IRS.

[97] *Cf.* Third Article Impeaching Richard M. Nixon, President of the United States. Approved by H. Comm. on the Judiciary (July 30, 1974).

[98] *Marbury v. Madison*, 5 U.S. 137 (1803).

C. The Majority's Failure to Conduct an Impeachment Inquiry in Accordance with Precedent has Led to Ex Post Facto Characterizations of that Inquiry

As detailed in Section II above, many of the Majority's obstruction allegations are due to the Majority's failure to conduct its inquiry in accordance with precedent. Fundamentally, the Majority has offered conflicting accounts of when the inquiry even began.

On September 24, Speaker of the House Nancy Pelosi announced the House of Representatives was "moving forward with an official impeachment inquiry."[99] The media generally reported that this was the commencement of impeachment proceedings, and the Majority purported to act pursuant to the Speaker's pronouncement.[100]

Nonetheless, over a month later, on October 31, the House of Representatives voted to authorize the impeachment inquiry that preceded these Articles, with the passage of H. Res. 660. This resolution directed the Committees on Financial Services, Foreign Affairs, the Judiciary, Oversight and Reform, and Ways and Means "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."[101]

Prior to the formal vote on October 31, serious and legitimate questions were raised as to whether the Executive Branch was being asked to comply with an impeachment inquiry, standard legislative oversight, or a novel hybrid of the two. The White House raised those concerns with the Majority on October 8, but no steps were taken to accommodate reasonable concerns about due process and fundamental fairness.[102]

The unnecessary confusion caused by the Majority about the status of its investigation calls into question the legitimacy of any subpoena issued prior to October 31 claiming to be part of an impeachment inquiry, because subpoenas issued before that date were not issued pursuant to a formal impeachment inquiry, congressional oversight, or any cognizable legislative purpose. A case addressing the validity of actions taken pursuant to Speaker Pelosi's edict is pending before the D.C. Circuit court.[103]

D. Assertions of Privilege by Previous Administrations Never Merited Impeachment

The Executive Branch has resisted congressional requests since the administration of President George Washington.[104] Resisting and asserting privileges in response to congressional demands has never formed the basis of impeachment.

For example, President Obama cited executive privilege and barred essential testimony

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[99] *See supra* note 49 (Remarks by Speaker of the House Nancy Pelosi).
[100] *See, e.g.*, Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, NY TIMES (Sep. 24, 2019).
[101] H. Res. 660, 116th Cong. (2019).
[102] Letter from Pat Cipollone, White House Counsel, to the Honorable Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019).
[103] *See In re: Application of the H. Comm. on the Judiciary*, Department of Justice's Notice of Appeal, Case No: 1:19-gj-00048 BAH (D.C.C. Oct. 28, 2019).
[104] Washington famously declined to deliver to the House of Representatives documents recording the negotiations with Great Britain in what would be memorialized in the Jay Treaty of 1795.

and documents during the investigation of "Fast and Furious," a gunwalking operation in which the government arranged for the illegal sale of weapons to drug cartels in order to track their movement. The Obama administration argued that the courts had no authority over its denial of such witnesses and evidence to Congress. In *Committee on Oversight & Government Reform v. Holder*, Judge Amy Berman Jackson, ruled that "endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers."[105] The position of the Obama Administration was extreme. It was also widely viewed as an effort to run the clock out on the investigation. Nevertheless, President Obama had every right to seek judicial review in the matter.

The subpoena campaign against the Trump Executive Branch began in earnest in September of this year, over a month before the impeachment inquiry had been authorized by the House of Representatives. In a letter to Secretary of State Michael Pompeo, the Committee on Foreign Affairs compelled the production of certain documents from the Department of State.[106] The subpoena issued by the Committee on Oversight and Reform to the White House on October 4, 2019, "compel[led] [the White House] to produce documents set forth in the accompanying schedule by October 18, 2019."[107] Any response less than immediate and total acquiescence, the letter stated, "shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against you and the President."[108] This refrain—a threat by any definition—has accompanied every subpoena issued to the Executive Branch and has needlessly created further tension between the Executive and Legislative Branches. From the commencement of this inquiry—whenever that may be definitively ascertained—the Majority has not been reluctant to voice its goal of impeaching the President.

VI. Conclusion

Before the House of Representatives are two Articles of Impeachment against the President of the United States, Donald John Trump. To these Articles, the Minority dissents. The President has neither abused the power granted to him by the American people nor obstructed Congress. The Majority has failed to prove a case for impeachment. In fact, the paltry record on which the Majority relies is an affront to the constitutional process of impeachment and will have grave consequences for future presidents. The Majority's tactics and behavior—procedurally and substantively—emulate the charade impeachment of President Andrew Johnson, a president impeached because the House of Representatives did not agree with his policies.[109]

If President Nixon's impeachment proceedings are the "gold standard" for presidential impeachment inquiries, these proceedings, in stark contrast, will go down in history as the quintessential example of how such proceedings should *not* be conducted. The Majority Report and attendant documents will be viewed only as maps to the lowest depths of partisanship that no future Congress should follow. The quicker the Majority Report and the Majority's actions are

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[105] *H. Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).
[106] This subpoena followed requests for documents from the Department of State made on September 9 and September 23 (prior to any vote authorizing an impeachment inquiry).
[107] Letter from the Honorable Elijah Cummings, Chairman, H. Comm. on Oversight & Reform, et al. to Pat Cipollone, White House Counsel (Oct. 4, 2019).
[108] *Id.*
[109] *See generally* Association of the Bar of New York, the Committee on Federal Legislation, *The Law of Presidential Impeachment* (1974).

forgotten, the better. As House Judiciary Republicans have repeatedly stated,[110] this institution should move on to working for the American people and forego this exercise of overturning 63 million of the votes cast on November 8, 2016.

[110] *See, e.g.*, Letter from H. Comm. on the Judiciary Republican Members to the Honorable Jerrold Nadler, Chairman, H. Comm. on the Judiciary (December 3, 2019).