

## Resolved, Impeachment Should Be Normalized

**PRO:** Gene Healy

**CON:** Keith E. Whittington

Elections are the lifeblood of democracy. They are the mechanism by which the hallowed principle of the sovereignty of the people is made manifest. Elections are the way in which democracies legitimize having the many govern the few. They express the unshakable democratic conviction that those who govern derive their powers from the governed.

On its face, impeachment seems an affront to democratic principles. Impeaching an unelected judge or bureaucrat for malfeasance is something a democrat could understand, but why would a democracy allow an elected official to be impeached and removed, especially the president and vice president, the only two people in the United States who are elected by the entire country? What were the framers of the Constitution thinking when they wrote Article 2, Section 4, which empowers Congress to remove the president and vice president as well as “all civil Officers of the United States” (that is, any federal official in the judicial or executive branch) for “Treason, Bribery, or other high Crimes and Misdemeanors”?

The idea of impeachment has deep roots in English history, reaching back to the fourteenth century. Originally, impeachment by the House of Commons was a means to hold accountable those whose “exalted station” put beyond the reach of “the usual course of justice.” His (or Her) Majesty was not impeachable, but their most powerful ministers and advisers were. Between 1625 and 1715, more than fifty British officials were impeached by the House of Commons for “high crimes and misdemeanors,” although only five were convicted in the House of Lords. The Commons, though, usually did not need a conviction to secure its political objectives; indeed, in many instances “the Commons did not even prosecute—the impeachment itself was sufficient warning . . . to the accused.”<sup>1</sup>

All of which makes it even more puzzling that the framers of the U.S. Constitution would provide for impeachment of a president elected every four years. No known republic, ancient or modern, had ever employed impeachment. Why did the framers imagine that impeachment, steeped in the sometimes bloody struggle between the Crown and Parliament, was appropriate in republican America, in which there was no monarch, no Parliament, and no House of Lords? Why would a new nation so resentful

of the omnipotent power of the British Parliament resurrect one of Parliament's most awesome powers?

Part of the answer lies in the American colonial experience with imperial authorities who repeatedly denied that colonial assemblies had the right to impeach. Only Parliament, the British authorities insisted, had the power to impeach; if the colonies had a grievance with a colonial official it had to be handled through an appeal to the royal governor or the crown. Faced with this challenge to self-governance, colonial Americans responded by embracing impeachment as one of the fundamental rights and privileges of Englishmen. Impeachment was the people's tool. Impeachment also made sense to the framers because it accorded with the republican dread of power and corruption. Impeachment served as the ultimate check on the appetites of avaricious government officials. It was the last line of defense against a president run amok. The president was no monarch and so, like all officials in the executive branch and judiciary, should ultimately be answerable to the people through the elected representatives in Congress.

The framers were maddeningly imprecise about what actions warranted impeachment. Treason is clear enough; indeed, Article 3, Section 3 of the Constitution defines treason: "levying war against [the United States], or in adhering to their enemies, giving them aid and comfort." Bribery, too, is a readily understandable offense. But the term "high crimes and misdemeanors" is not defined. Some argue that the framers intended impeachment to cover only criminal actions. Others maintain that since it was offered as an alternative at the Constitutional Convention to the broader terms of "maladministration" and "corruption," it was intended to include the "great and dangerous offenses" against the state, especially those that undermine the Constitution.<sup>2</sup>

If the framers were imprecise about what counts as an impeachable offense, they were unambiguous as to where the impeachment power would be lodged—and therefore who would get to decide what was an impeachable offense and whether one had been committed. The House of Representatives was given the sole power to impeach and the Senate the sole power to try all impeachments, with removal requiring a two-thirds vote in the Senate. Lawyers and scholars can argue all they want about what counts as an impeachable offense but ultimately the Constitution leaves the decision not to the lawyers or the courts but to the politicians in Congress. The framers thereby ensured that Congress would be the ultimate check on presidents who act as if they are above the law.

The debate between Gene Healy and Keith Whittington is not about the original intent of the framers. Instead it is about what role impeachment should have in our twenty-first century democracy. For Healy, the fundamental threat to democracy is an untethered, imperial presidency. Even impeachment without removal can cause presidents to act with greater restraint and be more careful to respect democratic and constitutional

norms. Elections are necessary, but they are no longer sufficient to hold the presidency in check and thereby guarantee the survival of a robust democracy. Whittington, on the other hand, cautions against normalizing impeachment, not only because it does violence to the constitutional text but, more importantly, because playing constitutional hardball on impeachment will likely increase partisan polarization and antagonism, weaken democratic norms of mutual tolerance (accepting political opponents as legitimate rivals) and institutional forbearance (that politicians should exercise restraint in deploying their institutional power),<sup>3</sup> and further undermine effective governance.

## PRO: Gene Healy

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For most American jobs, the rule is employment-at-will: barring unlawful discrimination, we can be fired for good reason, bad reason, or no reason at all. At the top of the corporate hierarchy, for-cause termination is the norm; CEO employment contracts allow removal for offenses as vague as “moral turpitude” or “unprofessional conduct.”<sup>4</sup> So it’s not as though Americans are particularly averse to the idea of sacking employees who underperform or misbehave. Indeed, this country pioneered the idea of firing people as *entertainment*—and, in 2016, even elected as president a man who rose to national fame in large part due to a television show on which his signature line was, “You’re fired!”

And yet, judging by how rarely we’ve tried, Americans seem profoundly uncomfortable with the idea of firing a president before his term is up. In our entire constitutional history, the House has impeached only two—Andrew Johnson in 1868 and Bill Clinton in 1998—both of whom escaped removal in the Senate. Of our forty-four presidents only Richard Nixon, who resigned in 1974 before the full House could vote, was effectively removed from office via the impeachment process.

Meanwhile, over the past century, the American presidency has grown vastly more powerful—and more dangerous—than America’s founders could ever have imagined. On the home front, our presidents increasingly rule by executive order and administrative edict; abroad, the president’s war powers have become practically uncheckable: The president can add new names to the Predator-drone kill list—and even launch thermonuclear “fire and fury”—virtually at will. How is it, then, that along the way, we’ve managed to convince ourselves that the *one job* in America where you have to commit a felony to get fired is the one where you actually get nuclear weapons?

Our Constitution’s Framers considered impeachment to be an indispensable remedy for executive misconduct.<sup>5</sup> But in the 230 years since ratification, we’ve all but dispensed with it. As *Vox*’s Ezra Klein has put it, “We have created a political culture in which firing our national executive

is viewed as a crisis rather than as a difficult but occasionally necessary act. And we have done this even though we recognize that the consequences of leaving the wrong president in power can include horrors beyond imagination.”<sup>6</sup> Given the damage an unfit president can do, shouldn’t it be easier to get rid of one?

## Normalizing Impeachment

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What would it mean to normalize impeachment? Had I framed the debate resolution, I might have picked a different term. In recent years, the verb “normalize” has acquired a distinctively negative tenor. As with the recurring Trump-era lament, “This is not normal,” the word “normalize” now describes what one shouldn’t do when faced with aberrant, unacceptable behavior: for example, don’t *normalize* sexism, nativism—or the president himself.<sup>7</sup> “When normalize entered the language,” however, “it originally described a return to a state considered normal.”<sup>8</sup> Normalizing relations with China or Vietnam meant reconciling with those countries, extending diplomatic recognition, and reducing mutual fear and hostility. That connotation better describes what I have in mind here. We’ve come to think of impeachment as a source of constitutional crisis itself, rather than a potential solution to one. Instead, we should recognize the remedy for what it is: a legitimate fail-safe mechanism for removing federal officers who’ve demonstrated their unfitness to wield power.

Normalizing impeachment doesn’t mean making it an ordinary weapon of political combat, triggered for partisan advantage whenever a president’s popularity fades. No sensible person would want to see it used in that manner. It should mean viewing impeachment more like we view other, infrequently deployed constitutional tools, such as veto overrides or the rejection of a presidential nominee for a cabinet post.<sup>9</sup> It’s rare for Congress to resort to either, yet no one thinks these constitutional tools *illegitimate*, much less harbingers of national doom. Impeachment should remain rare, though not as vanishingly rare as it’s become. We shouldn’t fear wielding it somewhat more often—and not just for presidents, but for other “Civil Officers of the United States” as well.

## Impeachment Phobia

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Impeachment talk has become far more common since the 2016 election, but it remains tentative and couched in euphemism, as if there’s something profane and dangerous about even entertaining the idea. “Impeachment is hell,” Kenneth W. Starr, the former independent counsel whose four-year investigation led to President Bill Clinton’s 1998 impeachment, recently

proclaimed.<sup>10</sup> (*Now he tells us.*) In early 2018, after delivering a fiery speech likening President Trump to Soviet dictator Joseph Stalin, then-Senator Jeff Flake (R.-AZ) clarified his position: he wasn't one of those radicals "who run around calling for our president to be impeached."<sup>11</sup> Running for a Senate seat that fall, Mitt Romney found the very notion inconceivable: "I don't think it makes sense to be talking about impeachment, *not for a sitting president*"—a stipulation that would somewhat hamper the remedy's usefulness (emphasis added).<sup>12</sup>

Impeachment phobia is common even among President Trump's left-leaning critics. "If Donald Trump is to leave office, it should be through political means," said *Late Show* host Stephen Colbert, not "extreme constitutional remedies."<sup>13</sup> "If we 'normalize' impeachment as a political tool," frets former Obama campaign guru David Axelrod, "it will be another hammer blow to our democracy."<sup>14</sup>

This is nothing new. Well before Donald J. Trump's election, impeachment had become the constitutional process that dare not speak its own name. The *Oxford English Dictionary* (OED) blog notes the rise of a "curious circumlocution" in the late 1980s: the use of the phrase "I-word" in place of "impeachment." That euphemism, OED's Katherine Connor Martin explains, reflects the fact that "earnest discussion of the possibility of impeachment is still regarded by many politicians and journalists as a bridge too far, putting the speaker in danger of being considered reckless, disloyal, or overly partisan. . . . The momentous impact on the government and the nation of a decision to impeach [is] regarded as extending even to broaching the topic."<sup>15</sup>

On the rare occasions when presidential removal becomes a live possibility—that is, all of three times since 1789—normally sober and judicious scholars resort to violent hyperbole. Given "the deep wounding such a step must inflict on the country," Charles Black observed in his classic 1974 primer *Impeachment: A Handbook*, we should "approach it [only] as one would approach high-risk major surgery."<sup>16</sup> "Truly the political equivalent of capital punishment," Harvard's Laurence Tribe declaimed in 1998: It allows Congress "to decapitate the executive branch in a single stroke."<sup>17</sup> It's worse than that, New York University's (NYU's) Ronald Dworkin insisted: "The power to impeach a president is a *constitutional nuclear weapon*" (emphasis added).<sup>18</sup>

## An Indispensable Remedy

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Is impeachment really as grave as all that? Few, if any, of our Constitution's Framers viewed the prospect of a presidential pink slip with the unbridled horror now common among America's political and intellectual elites. At the Philadelphia Convention in 1787, Massachusetts' Elbridge Gerry insisted,

“A good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them.”<sup>19</sup> North Carolina’s Hugh Williamson thought there was “more danger of too much lenity than of too much rigour towards the President.”<sup>20</sup> Given our paltry record of presidential impeachments, Williamson was more right than he could have known.

To be sure, the attempted removal of a sitting president was serious business, and never to be undertaken lightly. In *Federalist* 65, Hamilton wrote of “the awful discretion, which a court of impeachments must necessarily have, to doom [the accused] to honor or to infamy.”<sup>21</sup> He also believed that discretion to be necessary, periodically, as “an essential check in the hands of [the legislative] body upon the encroachments of the executive.”<sup>22</sup>

Indeed, the constitutional grounds for impeachment are much broader than popularly understood.<sup>23</sup> Hamilton described impeachment’s scope as involving “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.” By its nature, such a proceeding “can never be tied down by such strict rules . . . as in common cases serve to limit the discretion of courts.” A remedy aimed, as James Madison put it, at “defending the Community against the incapacity, negligence, or perfidy of the chief Magistrate,” couldn’t be so narrowly confined.<sup>24</sup>

## False Alarmism

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If the scope of “high Crimes and Misdemeanors” is that broad, why have we had so few impeachments? One obvious answer is that our Constitution, by requiring a two-thirds vote of the Senate to convict, makes it very difficult to remove a president. The Framers may not have fully appreciated how much that provision would narrow the path to impeachment.<sup>25</sup> But the high structural barrier alone can’t explain why presidential impeachments have been so extraordinarily rare. We’ve also erected barriers not found in the Constitution, in the form of “national nightmares” about the remedy that have little basis in our historical experience.

On the rare occasions when impeachment becomes a live issue, America’s “thought leaders” conjure up specters of wounded democracy and constitutional collapse. They describe impeachment as “reversing an election” and “overturning the will of the people.”<sup>26</sup> They tell us we risk unleashing a host of evils, including government paralysis, economic distress, and quite possibly, civil war. At a minimum, Laurence Tribe and Joshua Matz argue in their 2018 book *To End a Presidency*, “There can be little doubt that a successful impeachment campaign would inflict enduring national trauma.”<sup>27</sup>

But I, for one, doubt it. Such fears are radically overblown. Impeachment neither vandalizes democracy nor threatens constitutional crisis—nor

does our (admittedly limited) experience suggest recourse to the remedy is especially destabilizing. Since 2016 President Trump's copartisans have repeatedly charged that a successful impeachment effort would be tantamount to a coup against a duly elected president.<sup>28</sup> In that, they echoed Democratic partisans of two decades ago, who used the same term to decry the Clinton impeachment.<sup>29</sup> But whichever side happens to be crying "coup," it's an abuse of language to liken a peaceful constitutional process, led by the people's elected representatives, to the violent seizure of power by a cabal. Neither can impeachment fairly be said to "reverse the last election." Our constitutional structure all but guarantees that any president who's removed will be replaced by a member of his own party, usually his hand-picked, duly elected running mate.<sup>30</sup> Some "coup."

Impeachment is said to be "immensely disruptive to the normal function of governing."<sup>31</sup> But recent history suggests that what disruption we suffer is entirely manageable. During the Clinton impeachment, as Judge Richard A. Posner observed in his 1999 book on the subject, "government ticked along in its usual way through thirteen months of so-called crisis."<sup>32</sup> Granted, some distraction from policy matters is inevitable. But the key question is, compared to what? "One should really speak of *incremental* paralysis," Posner points out (emphasis in original). The alternative to an impeachment inquiry is never going to be federal business as usual. If we've reached that point, the president will already face multiple congressional subpoenas and likely a special prosecutor nipping at his heels. Vigorous oversight—or, if one prefers Donald Trump's all-caps coinage, "PRESIDENTIAL HARASSMENT"—is a given.<sup>33</sup> The question is whether some *additional* disruption is a price worth paying to bring to a head and finally resolve serious questions about presidential malfeasance.

What about economic disruption? President Trump was typically hyperbolic when he warned in 2018 that, were he ever impeached, "the market would crash [and] everybody would be very poor"<sup>34</sup>—but some sober-minded analysts seem to think there's a risk.<sup>35</sup> Here again, there's little evidence from our history to justify alarm. It's true that the Watergate scandal unfolded during a significant stock market decline, but it's unlikely that Nixon's woes were the slump's main cause. The 1973 Arab oil embargo, which started the same month as the Saturday Night Massacre, was a major factor, and, as it happens, the market rallied in the months after Nixon's resignation.<sup>36</sup> In the late 1990s investors "shrugged off" the Clinton impeachment, which coincided with one of the biggest bull markets in U.S. history.<sup>37</sup>

Dark prophecies of recession, gridlock, and democratic decline are common features of impeachment debates, but the Trump era has birthed a new hobgoblin: the alleged threat of civil war. "You will have a spasm of violence in this country, an insurrection like you've never seen," says erstwhile Trump adviser Roger Stone. "Both sides are heavily armed."<sup>38</sup>

Surprisingly, liberal intellectuals seem to take this notion seriously, with the *New Yorker* and *Foreign Policy* magazines grimly mulling over the risks.<sup>39</sup>

Put aside the offensive, antidemocratic notion that a violent minority should enjoy a sort of heckler's veto on a legitimate constitutional process. What historical evidence is there that impeachment even leads to serious social unrest? The 1970s saw a level of domestic strife we'd find stunning today: race riots, violent antiwar protests, and terror bombing campaigns. But even with that backdrop, the Nixon impeachment inquiry proceeded peacefully. As Sanford Levinson points out, the successful effort to drive our thirty-seventh president from office even "led to what was in context a brief era of good feelings, at least until Gerald Ford pardoned Nixon."<sup>40</sup>

## The Costs of Not Impeaching

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What too often gets ignored in these debates is the cost of never, or almost never, invoking the remedy. "A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty," future Supreme Court Justice James Iredell observed during North Carolina's ratification debate in 1788, "but if he knows there is a tribunal for that purpose, although he may be a man of no principle, the very terror of punishment will perhaps deter him."<sup>41</sup> The "terror of punishment" will hardly deter, however, if even proposing impeachment is taboo.

No lesser punishment is likely to do the job. Congressional censure, as proposed by impeachment opponents during the Clinton years, is a toothless expression of disapproval. The few successful censure resolutions against sitting presidents have mostly faded into obscurity.<sup>42</sup> But the ignominious distinction of getting impeached is central to the stories of the Johnson and Clinton presidencies—a permanent black mark on their legacies. Even if it fails to produce a conviction in the Senate, impeachment by the House is censure with teeth.

In our first presidential impeachment, removal wasn't necessary to put an end to Andrew Johnson's aggressive use of executive power to thwart Reconstruction. "Once the impeachment process began in earnest, Johnson retreated," Stephen Griffin explains, and "as a practical matter, this made removal unnecessary and the effort to convict Johnson foundered in the Senate."<sup>43</sup>

Impeachment's history suggests that the mere threat of the ultimate remedy can deter bad behavior by those in high places.<sup>44</sup> In so doing, it can also forge valuable new constitutional norms. One such case was the 1804 impeachment of associate Supreme Court Justice Samuel Chase. Chase, an ardent and active Federalist, stood accused of rank pro-prosecution bias against republican defendants and "intemperate and inflammatory harangues" from the bench. Chase was acquitted on all charges, but the

threat of removal had a pronounced effect on his subsequent behavior. “From that moment until his death,” historian Gordon Wood writes, “he ceased engaging in political controversy.”<sup>45</sup> Other judges took a similar lesson, helping foster a new norm against blatant partisanship from the bench.<sup>46</sup>

At the Constitutional Convention, most of the debate over impeachment focused on the president, but most of our impeachment practice has involved the other “Civil Officers of the United States” referenced in Article II, Section 4. Of the nineteen impeachments approved by the House since ratification, fifteen have targeted federal judges, mainly for corruption or other conduct deemed to undermine confidence in the administration of justice.<sup>47</sup> The impeachment of Justice Chase stands out as the rare case where the charges went to the merits of a judge’s rulings.

There’s good reason to tread carefully here: The use of the impeachment power to police judges’ constitutional (mis)interpretations could threaten the core value of judicial independence. But such uses should not be ruled out entirely. In *Federalist* 81, Hamilton suggests that the ultimate check on judicial “encroachments on the legislative authority” can be found in “the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.”<sup>48</sup> Abuses of judicial power, if flagrant enough, can meet the standard of high crimes and misdemeanors, and be impeachable by Congress.<sup>49</sup>

Impeachment arose in England as a means of striking ministers close to the king, but in America the remedy has almost never been deployed against executive branch officials who report to the president. Only one Cabinet officer has ever been impeached: Secretary of War, William Belknap (1876), for bribes and kickbacks. “The issue has almost invariably proven moot,” Frank Bowman explains. Historically, “any appointee whose continued service was so politically toxic as to provoke a serious effort at impeachment has been shuffled off the stage” when the president demands his or her resignation.<sup>50</sup> But one can imagine the rare case in which the president resists public pressure to remove a Cabinet officer—say, the attorney general—because he depends on that officer as a shield from investigation.<sup>51</sup> In such situations, it may take a serious threat of impeachment to restore accountability.

## Conclusion

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In politics, as in economics, incentives matter: Lower the cost of bad behavior and you’ll likely get more of it. As Keith Whittington has written, “If Congress tolerates officers who commit high crimes and misdemeanors, it sends a signal to other officers that those crimes are not beyond the pale.”<sup>52</sup>

Right now, that seems at least as valid a concern as the fear that we'll resort to impeachment too frequently.

Yet American public intellectuals continue to warn that serious consideration of impeachment in any one case opens the door to an explosion of partisan impeachments in the future. "If you ever did go down that road, you're opening a Pandora's box that will never end,"<sup>53</sup> David Axelrod admonishes—a path that will lead to "weaponization of impeachment as a partisan political tactic to be deployed by both parties," echoes Alan Dershowitz.<sup>54</sup>

I find that scenario highly unlikely. Even if America conquers its impeachment phobia, the supermajority requirement for removal, combined with the effort it takes to launch an impeachment inquiry and see it through, will always remain a significant disincentive to using the indispensable remedy too casually.

But what if the alarmists are right? What if legitimizing impeachment along the lines I advocate leads to a radical increase in the number of serious impeachment attempts—say, a tripling of the rate Congress tries it? Since the current rate is roughly one out of every fifteen presidents, that would mean one in every five presidents. In that case, we would see a serious impeachment effort about once every quarter century.

Would that be a national calamity? No doubt some would see it that way. Then again, perhaps once a generation or so, we could stand to be reminded that the president serves at our pleasure. Presidents could stand to be reminded of that too.

## CON: Keith E. Whittington

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One difficulty with normalizing the impeachment power is simply determining what doing so might mean. The text of the U.S. Constitution imposes some important constraints on what can be done with the impeachment power. Substantively, the Constitution tells us that impeachment and removal are justified only when a federal official has committed an act of "Treason, Bribery, or other high Crimes and Misdemeanors." Procedurally, the Constitution empowers the House to impeach with a simple majority vote but empowers the Senate to convict after an impeachment trial, and only with the agreement of two-thirds of the senators.<sup>55</sup> Together, these two features of the Constitution hamper any effort to do a great deal more with the impeachment power than we have traditionally done.

Some have argued that removing a sitting president from office before the expiration of his or her term should be easy. As a practical matter, this means broadening our understanding of when impeachments might be justified and shifting our norms of how we think about making use of the impeachment power. In the wake of Donald Trump's election to the

presidency, liberal political writer Ezra Klein began to ask what to do “if we elect the wrong person to be president,” someone who was “impulsive, conspiratorial, undisciplined” and just generally “unfit.” The traditional answer, of course, is that in four years the voters will have the opportunity to throw the rascal out. Klein argues that the presidency has become too important and too powerful to allow someone unfit for the office to serve for as many as four years. “Being extremely bad at the job of president of the United States should be enough to get you fired”—not in four years, but right now.<sup>56</sup> Klein found support for his case in the work of Gene Healy, a scholar at the libertarian Cato Institute. Healy had long thought that the presidency had become too big and needed to be knocked down a peg or two.<sup>57</sup> What better method for reducing the power and prestige of the presidency than by making the president more easily removable? Beltway insiders tended to talk about the impeachment power in hushed tones, “as if there was something vaguely profane and disreputable about the very idea” of impeaching a president. But given “how many bastards and clowns we’ve been saddled with over the years, shouldn’t we manage the feat [of impeaching a president] more than once a century?”<sup>58</sup>

We should be skeptical about trying to normalize the impeachment power too much, especially if normalizing means encouraging it to be used much more often and more easily than it traditionally has been used. Two kinds of concerns arise out of the procedural constraints on the impeachment power built into the constitutional text, and one arises out of the substantive constraint.

## Impeachment by the Opposite Party

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What would a greater willingness to use the impeachment power look like in practice? One likely answer is that the House of Representatives would more often vote to impeach and the Senate would more often brush those impeachment charges aside. It is relatively easy to put together a simple majority in the House to take action against an unpopular president—or simply a president of the other party. As Republican House minority leader Gerald Ford once noted as conservatives were calling for the impeachment of liberal Supreme Court justice William O. Douglas (who was, in 1970, mired in an ethics scandal), the “only honest answer” to what counted as an impeachable offense is “whatever a majority of the House of Representatives considers it to be at a given moment in history.”<sup>59</sup> In our highly partisan age, it is relatively easy to imagine a majority of the members of the House of Representatives voting to impeach a president of the opposite party just to score political points with their own voters back home. Certainly, there have been House members on the fringes of each political party who have advocated the impeachment of

every president who has served during the past four decades. Would we be better off if House speakers joined those calls for action?

The current talk of normalizing presidential impeachments has been fueled by dislike of President Donald Trump. We might be tempted to imagine that Trump is a special case, and so lowering the bar to impeach him would not have many implications for other presidents. But while Trump might be on the extreme end of the scale in the intensity with which members of the opposite party hold him in contempt, he is not exactly in a class by himself. President Trump's average presidential approval rating among Democrats has been abysmal, hovering in the high single digits over the course of his first two years in office. But President Barack Obama's approval rating among Republican voters was not much better, barely breaking into the double digits after a brief honeymoon period at the very beginning of his presidency. Similarly, President George W. Bush's approval ratings among Democrats throughout his second term of office was not much different from that of Donald Trump's. (Bush's first term approval rating among Democrats was better but was in a steady and steep slide from a brief high point that came after the 9/11 attacks.) Presidents of the late twentieth century seem like models of bipartisanship by contrast, since they could generally count on at least a third of the voters of the opposite party approving of their job performance.

The fact that voters who identify with the opposite party hate the sitting president and would be happy to see him or her impeached is, for the time being, our normal state of affairs and not an exceptional feature of the Trump presidency. If we are comfortable with the idea of normalizing the impeachment of President Donald Trump by a Democratic House of Representatives, we should probably reconcile ourselves to the House being equally willing to impeach President Obama or Bush or any other president in the foreseeable future.

The flip side of the intense partisan dislike of the other party's president, however, has been the intense partisan support for its own president. Donald Trump might be reviled by Democratic voters, but he gets high marks from Republican voters, and the same was true of Presidents Obama and Bush.

There are at least two implications of this deep divide in partisan assessments of the sitting president. One is that the president's fellow partisans are likely to always view any impeachment effort by the opposite party as illegitimate. There is little common ground to be found across the two parties, and impeachments that are launched on a highly partisan basis are likely to be seen as little more than partisan politics by other means. Threatening presidential impeachments will do more to deepen the partisan divide than to build bridges across it.

The second implication of this partisan division is that impeachment votes in the House will generally be futile. If the opposition party controls

a majority in the House of Representatives, it might easily put together the votes to impeach the president. If the opposition wants to remove the president from office, however, it must convict the president after a trial in the Senate, and doing so requires the support of two-thirds of the senators. Across American history, a single political party has almost never held two-thirds of the seats in the Senate. It might be possible to impeach a president on a partisan basis, but actually removing a president requires some degree of bipartisanship.

As a practical matter, if the opposition party wants to *remove* a sitting president through the use of the impeachment power, it needs to be able to persuade at least a few senators from the president's own party to vote to convict him. If we were to normalize impeachments in the House, it is hard to imagine that we would be able to make it any easier to reach across the aisle in the Senate and persuade senators to vote against the president who remains popular among his own partisans. Bill Clinton survived his impeachment trial in the Senate in the winter of 1999 in no small part because his approval rating among Democrats at the time was north of 90 percent. Democratic senators could reasonably fear paying a high political price if they were to defect from the president, regardless of what they thought of the merits of impeachment charges levelled against him. Impeachments by the opposition party will only result in the actual removal of a president if there is a broad consensus that the president has committed impeachable offenses and must be removed. That is necessarily a high bar, no matter how easy we want the impeachment power to be.

If we still think it would be a good idea for the opposition party to routinely impeach presidents, that belief would have to depend not on our view that presidents should often be removed from power but rather on our view that impeachments are a good idea even if they will not result in the removal of the president. Such impeachments might better be understood as a particularly strong form of a resolution of censure. They would express the sense of the House that the president has behaved very badly. There might well be reasons for sending such a message. Impeachments can be a useful vehicle for forcing a debate on how we expect government officials to conduct themselves in office and for changing our constitutional norms and practices. An impeachment can accomplish that result even if the impeached official is not removed. The early impeachment of Justice Samuel Chase for allowing his conduct in office to be affected by his political partisanship had real consequences for how judges behaved in the subsequent years and decades, even though Chase himself was not convicted after his Senate trial and remained on the bench.<sup>60</sup> But such debates are themselves hard to pull off, and if we normalize impeachments we might well wind up reducing the significance of any particular impeachment. If we want to send a strong message about President Trump's violation of norms and indicate that no future president should behave similarly, that

message has a chance of coming across only if we understand impeachments to be rare rather than common. If we normalize impeachments, we might well lose their capacity to affect constitutional norms as well as their capacity to remove misbehaving officers.

## Impeachment by the President's Own Party

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Another option is the possibility that we normalize impeachments by a House of Representatives controlled by the president's own political party. It is, of course, counterintuitive to imagine that the president's own party would often want to impeach him or her, but if we were truly to normalize impeachments then that might well change. We might want to begin thinking about the impeachment process as more like a vote of no confidence in a parliamentary system, as a vehicle for the president's own party to dismiss an unpopular leader and install a replacement who might be more capable of leading the party into the future.

Under what circumstances might a political party want to impeach its own president? One reason is if the sitting president has become personally unpopular due to scandal or some other individual failing. Looking at the opinion polls, a Republican House might imagine that the GOP would be better off under the leadership of a president Pence than a president Trump. A Democratic House might have decided Bill Clinton was damaged goods, and an incumbent president Al Gore would allow them to move on from a presidency wracked by scandal. Even a friendly House might well have made similar calculations about President Ronald Reagan in the midst of the Iran-Contra scandal, President Jimmy Carter during the Iran hostage crisis, President Gerald Ford in the run-up to the 1976 election, President Richard Nixon after the revelations of the Watergate scandal, or President Lyndon Johnson when the Vietnam War became unpopular.

Indeed, nearly every presidency has its low moments, and a normalized impeachment process could turn those low moments into critical moments for the longevity of the president's administration. Here partisan public opinion might serve as a restraint on the House. Even an unpopular president tends to retain a great deal of support among the party faithful, and thus representatives might be reluctant to risk the wrath of their own voters by tossing a president under the bus even if those representatives think the party would be healthier in the long term if it could separate itself from the sitting president. Populism has too strong of a hold on the American political culture to give elected politicians the free rein they would need to make such hard-headed political calculations as removing by congressional vote a sitting president who had been installed in office through a popular

election. The people are likely to think that they should have the final say on whether a sitting president should be retained or removed from office, and would not appreciate having that decision taken out of their hands by a partisan majority in Congress.

But imagine that normalizing the impeachment process also has the effect of altering the political culture and the public becomes more accepting of the idea that a partisan majority in Congress should be able to throw out their own presidents when they become a political burden. What then? Fixed terms of office have benefits as well as costs. The costs are obvious in this context: A lengthy fixed term of office means that unpopular, unwise, or misbehaving officials can stick around for longer than the people might prefer. The benefits are perhaps less obvious but were very much on the minds of the framers when they designed the Constitution. They preferred to give elected federal officials relatively long terms. Most states at the time of the founding favored annual elections and made governors easily removable by state legislatures. The founders wanted to create more insulation and independence in office. They wanted elected officers to be able to filter public sentiment, to be able to resist misplaced popular passions, to have the space to deliberate on difficult political issues even when the people themselves were demanding that they take the quick and easy route. In our modern era, we already find that elected representatives spend much of their time running for reelection, even though we might prefer that they spent more of their time governing. If presidents could be more easily removed from office by their own copartisans, they would have to adjust their political calculations and spend more energy pandering to congressional interests and looking for short-term political gains. Presidents would find it more difficult to make the hard choices that might be politically unpopular but that promised greater long-term benefits to the country. Every major policy decision would be made in the shadow of the impeachment threat and with the presidency itself hanging in the balance. There are already forces at work in modern American politics that have encouraged the development of a so-called plebiscitary presidency, and perhaps we would prefer a president who was less independent of the will of Congress, but it is not obvious that the country would be better governed as a result.<sup>61</sup>

There are also some reasons to doubt whether the impeachment power could ever render the American constitutional system into something more closely resembling a parliamentary system. Even if the president's own party controlled both the House and the Senate, and the president's own party favored removing the president because he was an albatross around the neck of the party, the problem of persuading a supermajority in the Senate to convict and remove the president would still be significant. The advocates of impeachment and removal would still need to reach across the political aisle and pull in a few votes from senators of the other party. In this case, it is not obvious why the senators of the opposition party should want to assist the president's

party in removing an unpopular leader from office before the election. If the president's own party wants to remove a sitting president early because he is an electoral burden, then the opposition party will be inclined to want to force the president's party to carry that burden into the election. If Jimmy Carter or George H. W. Bush or Donald Trump is unpopular on the eve of a presidential reelection, then the opposition party has every incentive to keep the current incumbent in power and to take the case to the people in November.

If we normalize the impeachment process, the opposition party has no reason to cooperate with the president's own party to remove an unpopular sitting president. Only if the president has engaged in the sort of misbehavior that has traditionally been recognized as an impeachable offense is there much of a chance of building the kind of bipartisan support that would be necessary to remove a reckless, abusive, and dangerous incumbent from the White House before that president's constitutional term of office is up.

## Lowering the Bar for Impeachments

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Before we get to the problem of persuading senators to cross the aisle to join a bipartisan vote to remove a sitting president in an impeachment trial, we must first get around the problem of lowering the bar to impeaching a president in the House of Representatives. If normalizing the impeachment process just means overcoming our reluctance to act when confronted with egregious abuses of the presidential office, then there is no reason to object. Members of Congress should take their constitutional responsibilities seriously and vote to impeach and remove a president who has engaged in the kind of behavior that has traditionally been recognized as impeachable.

The more challenging claim is that normalizing the impeachment process would mean lowering the constitutional bar to impeachment. In other words, the more radical challenge is the suggestion that we should make impeachments easier by changing our understanding of what counts as an impeachable offense and extending it to include something more like general unfitness or gross incompetence than serious abuse of office.

There are a couple of paths by which we could get to that conclusion. One is to reexamine our traditional understanding of the meaning of the constitutional phrase "high crimes and misdemeanors." Perhaps there is a good argument to be made that this phrase is best understood to include something like "maladministration," the language that George Mason proposed to include in the constitutional text when empowering Congress to impeach federal officers. Mason's language was rejected by the delegates at the Philadelphia Convention because, as James Madison pointed out, it would tend to have the effect of giving the president "a tenure during pleasure of the Senate."<sup>62</sup> The framers had witnessed the problems associated with the weak governors created by the first state constitutions after the American

Revolution and they wanted a federal chief executive who was more independent of the legislature than that. Most scholars who have examined the question have not been persuaded that a good faith interpretation of our existing constitutional text can read it to mean something broad enough to cover general unfitness or incompetence. Perhaps most scholars have been wrong, but those who would want us to adopt a radically different interpretation of this constitutional language have a heavy burden of proof to bear.<sup>63</sup>

A second path would cut through all the interpretive red tape. Gerald Ford told us that impeachable offenses are whatever the majority of the members of the House of Representatives wants them to be, and we could just embrace that approach. That might be an honest and realistic answer, but it is also an extremely cynical one. We would be rightly appalled if a Supreme Court justice were to announce that the Constitution simply means whatever a majority of the members of the Court want it to mean. We would be rightly appalled—and indeed might even think it impeachable—if the president were to announce that her constitutional duty to take care that the laws be faithfully executed just means whatever she wants it to mean. We expect our constitutional officers to make a good faith effort at interpreting the terms of the Constitution and not simply to do whatever they happen to find convenient in the moment. We should expect the same of members of Congress when it comes to the impeachment power. The Constitution gives Congress the power to impeach and convict, but the Constitution also imposes a substantive constraint on how that power is to be used. We should demand that the members of Congress exercise the power in a constitutionally responsible manner and not treat it as a matter of mere discretionary authority that can be wielded arbitrarily to suit the momentary whims of the legislative majority. If we accept the idea that government officials should treat the constitutional text cynically here, we should expect them to treat it cynically everywhere else also. We are likely to regret going down that path. It would be better to be able to criticize government officials for getting the Constitution wrong than to abandon the belief that it is even possible to get the Constitution wrong.

There is a reasonable case to be made that members of Congress are too reluctant to shoulder their own constitutional responsibilities. Among their constitutional responsibilities is the duty to hold government officials accountable when they have committed high crimes and misdemeanors. Members of Congress should not sweep such high crimes under the rug, even if confronting them squarely will be unpleasant, burdensome, and perhaps politically costly. In that sense, we should want members of Congress to treat the impeachment power as a normal part of the constitutional architecture.

We should be much more reluctant to encourage members of Congress to act as if impeaching the president is easy. Normalizing the impeachment power might do violence to the constitutional text and might well lead us down the path of routine impeachment votes that heighten partisan strife

and animosity and get in the way of productive lawmaking but that do little to enhance the quality of American government or to preserve valuable constitutional norms. If impeachments become routine, they will also become meaningless symbolism. They will become part of the background noise of rancorous partisan debate rather than a momentous instrument for defending the constitutional order from abusive officers.

## ENDNOTES

### PRO

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## CON

55. The Constitution also limits what punishments the Senate can impose after a conviction in an impeachment trial, restricting the Senate only to removing an individual from office and barring that individual from holding future office. It would surely be more difficult to contemplate

normalizing impeachments if the Senate's power to punish was more expansive and included the ability to imprison or execute those convicted of high crimes and misdemeanors.

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