



# The Politics of Removal: The Impeachment of a President

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This contribution takes the current debate about an impeachment of President Donald J. Trump as an inducement to delve deeper into the question under which circumstances and conditions Congress decides to impeach a president—and when it prefers to evade or repudiate the legal and political demands to remove him from office. This tricky problem, an issue of constitutional (legal) principle *and* political expediency, will be dealt with in a longitudinal historical approach, comparing the philosophical debate at the Constitutional Convention in Philadelphia with the most intriguing cases of impeachment debates in the 23 decades thereafter. Why did the House of Representatives impeach Andrew Johnson and Bill Clinton, and was willing to impeach Richard Nixon, whereas it tabled attempts to prosecute—among others—Andrew Jackson, John Tyler, Harry Truman, Ronald Reagan, George W. Bush and Barack Obama? And why was the Senate willing to convict Nixon but acquitted Johnson and

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M. T. Oswald (ed.), *Mobilization, Representation,  
and Responsiveness in the American Democracy*,

[https://doi.org/10.1007/978-3-030-24792-8\\_4](https://doi.org/10.1007/978-3-030-24792-8_4)

Clinton? Finally: What can we learn from these precedents with respect to a potential impeachment of the current 45th President of the United States: Could he be impeached—and should he be?<sup>1</sup>

## IMPEACHMENT IN THE US CONSTITUTIONAL SYSTEM OF GOVERNMENT

Impeachment is at the center of the American Revolution and the American republic. According to Benjamin Franklin, “We, the people” take over the responsibility to keep the republic (Sunstein 2017a, p. 1). As the Declaration of Independence reminds the people of the nascent United States of America (and the world) in powerful words, “governments are instituted among men” to secure political equality and liberty, and “whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government”. The American revolutionaries justified their secession from the British motherland with a long list of power usurpations and abuses that they found the British King to be guilty of. They were so fearful of a tyrannical chief executive that they initially, in the *Articles of Confederation*, disbanded with an executive altogether.

Since the Confederation proved to be deficient in meeting the political, economic and military challenges of the new nation, the Founding Fathers came together in Philadelphia in May 1787 ‘to form a more perfect union’. After extensive discussions, the delegates agreed on a single, unitary and ‘energetic’ executive, following the advice of James Wilson and Alexander Hamilton. Nonetheless, many delegates still feared the scope of his power. Edmund Randolph saw in a unitary executive “the foetus of monarchy” (Farrand 1911, vol. 1, p. 66), Hugh Williamson was afraid that “a single Magistrate ... will be an elective king” (Farrand 1911, vol. 2, p. 101). Hamilton, in Federalist No. 69, tried to dissipate the concerns of the delegates:

That magistrate is to be elected for *four* years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch... The president of the

<sup>1</sup>The manuscript was finished on May 30, 2019 amidst heated impeachment debate in the House of Representatives and especially in the Democratic caucus.

United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. (Rossiter 1961, p. 416)

So, to sum up somewhat perfunctorily the debate about the presidency during the Philadelphia convention: There is a single, strong and energetic executive; there are elections every four years as the usual means to hold the president accountable; and there is as a measure of last resort: Impeachment—if something goes seriously wrong during those four years when it is otherwise impossible to get rid of a president who abuses his power. If removed from office, the president would be liable for criminal prosecution in the federal court system.

It was not until after World War II that further precautions were taken to prevent the president from becoming all too powerful or otherwise inflicting harm upon the American people. In 1951, after Franklin Delano Roosevelt had broken with the custom to serve only two terms during World War II, the 22nd Amendment restricted the maximum amount of time in office to eight years or, in case of a vice-presidential ascendancy to the office, just under ten years. And after the assassination of John F. Kennedy in November 1963, Congress finally took to finding a solution for the presidential and vice-presidential succession problems in case of death, removal, resignation, or physical and mental incapacity of the president. In 1967, the 25th Amendment was ratified by three-fourths of the states. Section “[Calls for Impeachment Died Away: The Many Cases from Washington to Obama](#)” provides for a situation when a president is not able or willing to declare his own incapacity. In this case, the vice president and a majority of the cabinet can discharge the president from his official duties and install the vice president as acting president. If the president contradicts his cabinet, Congress has to resolve the conflict with two-thirds majorities in each chamber within specified deadlines.

According to the famous dictum of Richard Neustadt the Constitutional Convention did not create a government of separate powers, but of “separate institutions, sharing powers.” (1990, p. 29) With its impeachment power Congress, the legislative branch, is performing a judicial function. The House of Representatives has the “sole power of impeachment” (Art. 1 Sec. 2 No. 5 US const.), whereas the “sole power to try all impeachments” (Art. 1 Sec. 3 No. 6) lies with the Senate. The Supreme Court participates in the impeachment of a president insofar as the chief justice

has to preside over the trial in the Senate. A president can only be convicted with a two-thirds majority of the senators present. In case of conviction, he will then automatically be removed from office. The Senate can hold a second vote to disqualify the president from holding any other public office in the future—for which a simple majority suffices. It can issue no other punishments (Art. 1 Sec. 3 No. 7).

Most constitutional scholars believe that the decision of the Senate cannot be appealed in the regular court system because it is deemed a nonjusticiable political question (*Nixon v. United States*, 506 U.S. 224 (1993); Bazan 2010, pp. 11–13). There are some like Alan Dershowitz (2018, pp. 18–23) who caution against such a premature conclusion. *Nixon v. United States* decided the removal of a judge, not of the president of the United States. Since there is no precedent for the Supreme Court reviewing a presidential impeachment and removal from office, Dershowitz argues, it could very well be that the Supreme Court accepts a role as final arbiter between a warring Congress and president. But since the office of president of the United States is far more important than the office of a federal judge and indeed unique, this argument stands on rather shaky ground. Ultimately, the decision to remove a president elected by the American people is so important and existential for the survival of the constitutional order that it rests with Congress and what Franklin coined as ‘We, the people’.

### THE CAUSES OF IMPEACHMENT: ‘HIGH CRIMES AND MISDEMEANORS’

Since Congress is wielding a judicial power in regard to impeaching a president, there needs to be an offense or a pattern of offenses based on which the House and the Senate render their judgment. Art. II. Sec. 4 of the constitution mentions “treason, bribery, or other high crimes and misdemeanors”. Treason and bribery are rather clearly defined in the US constitution and the US code. So, the interesting questions arise with the idea of ‘high crimes and misdemeanors’. There are conflicting opinions about the meaning of the term until today. The discussion regularly starts with the Founding Fathers and their understanding of a ‘high crime’. Initially, they just copied the English language and spoke of “malpractice or neglect of duty” (Berger 1973, p. 74). The Committee of Detail changed the term to “treason, bribery or corruption”. When the impeachment clause

was taken up on the floor of the Convention, the draft provision had been reduced to ‘treason and bribery’ by the Committee of 11 (Berger 1973, p. 74). George Mason objected that “treason as defined in the constitution will not reach many great and dangerous offenses” (Farrand 1911, vol. 2, p. 550). His proposal to add ‘maladministration’ was opposed by Madison who argued that “so vague a term will be equivalent to a tenure during pleasure of the Senate”. Mason then withdrew his proposition and substituted ‘other high crimes and misdemeanors’ (Farrand 1911, vol. 2, p. 550).

For starters, the impeachment clause’s short journey at the Convention indicates that the framers followed a narrower view of impeachable offenses than was customary in English law at the time. Impeachment certainly was not supposed to be an equivalent to a no-confidence vote by parliament. Therefore, the often-quoted sentence of House Minority Leader Gerald Ford (R-MI) in 1970 that an impeachable offense is “whatever a majority of the House of Representatives considers it to be at a given moment in history” (Tribe and Matz 2018, pp. 25–26) is clearly wrong. Madison expressly rejected this idea (Farrand 1911, vol. 2, p. 550), and the convention followed his lead. Nevertheless, a wide scope of interpretation remained. Apparently, ‘high’ crimes excluded a series of lower crimes. But where to draw the line? And was it necessary for a ‘high crime’ to be a crime at all or could it consist of actions which were not considered to be criminal in the first place?

A look into the Federalist Papers can be of some help. In No. 65, Alexander Hamilton elaborates that impeachable offenses are those:

which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. (Rossiter 1961, p. 396)

It is safe to conclude from Hamilton’s words and the English practice that the ‘high’ crime refers to the high public office from which the misconduct emanates. High crimes are political crimes, exercised by ‘public men’ and directed against the state or ‘the society itself’. Besides treason and bribery, these high crimes mostly comprise acts of public corruption, of misusing the ‘high’ authority of a public office for private gains, for penalizing the political opponent or for subverting the structure of government. They are so detestable because they clearly constitute power

abuses. Since these misdeeds are exerted out of the highest political offices, they not only abuse trust, but are often no crimes or cannot be prosecuted as such (Hirsch 2018, Chapter 1).

There still is some controversy among constitutional scholars whether high crimes need to be indictable crimes. The prevalent opinion is that they need not (Cole and Garvey 2015, p. 8; Doyle 1998, pp. 28–32; Gerhardt 1999). The minority view that only “indictable crimes clearly set forth in the Constitution” (Doyle 1998, p. 27) are impeachable was taken by the attorneys of Richard Nixon and indeed every sitting president accused of wrongdoing. Today, lawyer Alan Dershowitz (2018) is the strongest voice of this position. It is the narrowest view possible and the opposite pole of Gerald Ford’s position taken in 1970, which cedes a maximum freedom of choice to the majority party. But it has to be kept in mind that Ford back then advocated the impeachment of liberal Supreme Court Justice William O. Douglas. That this was in fact an opportunistic position became clear when Ford ascended to the presidency four years later and did not hesitate to pardon President Nixon for the criminal offenses he had committed in office. The right answer probably has to be found somewhere in between the two extremes marked by Ford (maximum freedom of choice) and Dershowitz (only indictable crimes are impeachable). The experiences made with 44 US presidents using and abusing their power should shed some light on where to locate the impeachable offenses.

### IMPEACHED, BUT NOT CONVICTED: ANDREW JOHNSON AND BILL CLINTON

The two presidential impeachments in American history that eventually led to a trial and removal vote in the Senate, those of Andrew Johnson in 1868 and Bill Clinton in 1998, both ended with an acquittal. Both proceedings illustrate that impeachment is not only a judicial power exerted by Congress to judge grave misdeeds of high public officials. It is also a political device of the majority party in Congress to fight the political moves of the president, to hold him accountable and to achieve maximum gains for one’s own political aims. In this respect impeachment is—like judicial review—legal *and* political, but when the political passions get out of hand and the legal principles neglected, the prosecution of a president is doomed to fail. It is no accident that both the Johnson and the Clinton

impeachment occurred—and failed—during an era of heightened partisan conflict and divided government. In both cases (and in Nixon’s as well), the opposition party controlled both houses of Congress (Table 4.1). Both impeachments followed on an abrupt change of party control in one branch of government—in 1865 the presidency fell suddenly to the Democrats who opposed Reconstruction, in 1994 Republicans won a majority in both houses of Congress for the first time after more than four decades (Perkins 2003).

Although both cases today are usually regarded as failures caused by an excessively partisan instrumentalization of the impeachment process, the Johnson impeachment, undoubtedly, was much more justified than Clinton’s (Benedict 1998; Stewart 2009; Whittington 2000). Johnson’s character traits were very similar to those of the current 45th President. He has been positively described as courageous and fearless, but he also was said to be stubborn, intolerant and unwilling to compromise. Johnson was considered an isolated, lonely man who had few friends and rejected

**Table 4.1** Party divisions in the US House and Senate at the start of (possible) impeachments

<i>President</i>	<i>Congress</i>	<i>House</i>			<i>Senate</i>		
		<i>D</i>	<i>W/R</i>	<i>Other</i> <sup>1</sup>	<i>D</i>	<i>W/R</i>	<i>Other</i> <sup>1</sup>
Jackson (D)	23rd (1833–35)	<b>143</b>	63	34	20	<b>26</b>	2
Tyler <sup>2</sup> (W)	27th (1841–43)	98	<b>142</b>	2	22	<b>29</b>	1
Johnson (D)	40th (1867–69) <sup>3</sup>	45	<b>142</b>	56	8	<b>45</b>	21
Wilson (D)	66th (1919–21)	192	<b>240</b>	3	47	<b>49</b>	–
Truman (D)	81st (1951–53)	<b>235</b>	199	1	<b>54</b>	42	–
Nixon (R)	93rd (1973–75)	<b>243</b>	192	–	<b>57</b>	43	–
Reagan (R)	100th (1987–89)	<b>258</b>	177	–	<b>55</b>	45	–
Clinton (D)	105th (1997–99)	207	<b>226</b>	2	45	<b>55</b>	–
W. Bush (R)	110th (2007–09)	<b>233</b>	202	–	<b>51</b>	49	–
Obama (D)	114th (2015–17)	188	<b>247</b>	–	46	<b>54</b>	–
Trump (R)	116th (2019–21)	<b>235</b>	199	1	47	<b>53</b>	–

D = Democrats, W = Whigs, R = Republicans. **Bold: Majority Party.** Party divisions at the beginning of each Congress

<sup>1</sup>Including vacancies

<sup>2</sup>President Tyler was expelled from the Whig Party on September 13, 1841

<sup>3</sup>The party balance during the 40th Congress changed constantly because of the ongoing seating of members of Congress due to the readmission of former Confederate states into the Union. Nonetheless, the Republican Party held a veto-proof majority in both chambers over the whole time

Source: Own compilation from the websites of the US House and Senate

all counsel (Foner 2014, Chapter 5). He was a die-hard racist with little empathy for other human beings, least of all black people. His vision of Reconstruction was that of a white supremacist and states-right Democrat (Foner 2014, Chapter 5; Meacham 2018, pp. 49–50; Tribe and Matz 2018, p. 54). It may not have been so far away from the lenient approach toward the former Confederate states taken by the moderate Lincoln, but it differed considerably from the position of Radical Republicans who took control of the 39th (1865–67) and especially the 40th Congress (1867–69). Johnson's *weltanschauung* was clearly out of step with the requirements of the historical moment.

In the first eight months in office, Johnson could unilaterally shape Reconstruction policy because Congress was in a long recess. It quickly became clear that Johnson's Unionist positions were rather sketchy. He was perfectly satisfied when the provisional governors he appointed to the defeated states called constitutional conventions that abolished slavery and disclaimed their asserted right to secede. He generously pardoned former Confederate rebels, thus supporting the existing power structure in the Southern states. Almost all of these states enacted—unhindered by Johnson—so-called black codes which held the former slaves in a state of slave-like dependency. When Congress resumed work in December 1865, it hurried to prevent the worst. Republicans blocked the newly elected Southern representatives from being seated in Congress. In 1866, they extended the life of the Freedmen's Bureau, enacted a landmark Civil Rights Act giving citizenship to all persons born on American soil, and passed the 14th Amendment to the US Constitution. This amendment, which was ratified two years later, not only gave 'equal protection of the laws' to blacks but also reduced the overrepresentation of white Southerners in Congress by revoking the infamous three-fifth clause of Art. 1 Sec. 2 No. 3 of the Constitution. All these landmark measures had to be enacted over the opposition or veto of the president (Foner 2012, pp. 454–461; Varon 2019).

In the midterm elections of 1866, Radical Republicans substantially increased their seat shares in Congress. Equipped with veto-proof majorities in both chambers, Republicans embarked on a more rigorous Reconstruction policy. In March 1867 they adopted, again over the president's veto, a Reconstruction Act that imposed martial law on the Southern states and set strict standards for their re-entry into the Union. States had to ratify the 14th Amendment and allow black males the right to vote. In the same month, Congress reigned in the president with the



Command of the Army Act and the Tenure of Office Act. Both bills were votes of no confidence against President Johnson who was forced to secure the approval of the Senate when he wanted to dismiss high-ranking federal officials. The latter bill was of dubious constitutionality and a hardly concealed impeachment bait by stipulating that violations of the act were a ‘high misdemeanor’. After Congress passed several additional Reconstruction Acts over Johnson’s veto—he still holds the record with 15 overridden vetoes (Kosar 2014)—the president was successfully lured into the trap when he, on August 12, 1867 suspended Secretary of War Edwin Stanton, an ally of the Radicals. Upon the Senate’s reinstatement of Stanton, Johnson dismissed Stanton a second time in February 1868, now probably in violation of the Tenure of Office Act (Hirsch 2018, Chapter 2).

Impeachment of Johnson had been discussed by Republicans throughout 1866 and 1867. All three attempts came to naught because moderate Republicans were not satisfied with the argument that Johnson had abused his veto and pardon power. Although this power abuse and his obnoxious behavior toward Congress were in fact the true reasons for Johnson’s impeachment (Hirsch 2018; Meacham 2018; Stewart 2009; Tribe and Matz 2018), Republicans thought they needed an impeachable crime. This they believed to finally have found in Johnson’s violation of the Tenure of Office Act. Only three days after Stanton’s firing, the full House voted to impeach Johnson on a straight party-line vote (Table 4.2). A select committee then quickly drafted nine articles of impeachment, all dealing with the violation of the Tenure of Office Act. The full House added two articles that charged Johnson with denying Congress’s authority and bringing it “into disgrace, ridicule, hatred, contempt and reproach” by making “certain intemperate, inflammatory and scandalous harangues” (Stewart 2009, Appendix 3).

The case that the House brought to the Senate was weak. In this respect, nearly all constitutional scholars and historians concur. In focusing their argument on presidential violation of a highly technical and arcane provision of a single act, Republicans failed to make the larger constitutional case to the American public. According to Tribe and Matz, Republicans should have relied on the true reasons for Johnson’s impeachment—“his reactionary and neo-Confederate vision of the post-Civil War presidency” (2018, p. 55) which posed “a mortal threat to the nation” (2018, p. 55). Johnson clearly exhibited a pattern of abusing the powers of the presidency—not so much in lawfully opposing and vetoing landmark

**Table 4.2** Votes on the articles of impeachment in the Johnson, Nixon and Clinton cases

<i>House floor vote to start impeachment</i>	<i>House committee votes—articles of impeachment</i>	<i>House floor votes to impeach</i>	<i>Senate floor votes</i>
Andrew Johnson 1868 No vote	No votes XI. Denying Congress's authority II. Violation of the Tenure of Office Act III. Violation of the Tenure of Office Act	24.02.1868 (Articles were drafted afterward): 126–47 (126–0 R, 0–47 D)	16.– 26.05.1868 XI. 35–19 (35–7 R, 0–12 D) II. 35–19 (35–7 R, 0–12 D) III. 35–19 (35–7 R, 0–12 D) D)
Richard Nixon 06.02.1974 410–4 (232–0 D, 177–4 R)	27.–30.07.1974 I Obstruction of Justice 27–11 (21–0 D, 6–11 R) II. Abuse of power 28–10 (21–0 D, 7–10 R) III. Contempt of Congress 21–17 (19–2 D, 2–15 R)		
Bill Clinton 08.10.1998 258–176 (227–0 R, 31–176 D)	11.–12.12.1998 I. Perjury before grand jury 21–16 (21–0 R, 0–16 D) II. Perjury in deposition 20–17 (20–1 R, 0–16 D) III. Obstruction of justice 21–16 (21–0 R, 0–16 D) IV. Abuse of power 21–16 (21–0 R, 0–16 D)	19.12.1998 I. 228–206 (223–5 R, 5–201 D) II. 205–229 (200–28 R, 5–201 D) III. 221–212 (216–12 R, 5–200 D) IV. 148–285 (147–81 R, 1–204 D)	12.02.1999 I. 45–55 (45–10 R, 0–45 D) III. 50–50 (50–5 R, 0–45 D) D)

Source: Own compilation

civil rights legislation, but in refusing to enforce federal laws, interpreting them in bad faith or thwarting them by misusing his pardon power. Johnson's 'high crime' was in fact that he opposed equal rights for blacks—the very reason the Civil War was fought and 360,000 Union soldiers and President Lincoln gave their lives for. Although he was an accidental presi-

dent, he acted like an elected one and “threatened the legacy of the man the American people had put in the White House” (Hirsch 2018, Chapter 2).

The petty-minded argumentation of the House managers made it easy for Johnson’s defense to win over the public. His attorneys argued technically: Stanton was not covered by the Tenure of Office Act, he had acted in good faith and the law was unconstitutional in denying the president his constitutional right to choose his cabinet members. At least the latter argument was correct: Congress repealed the law in 1887, and the Supreme Court invalidated a similar law in 1926. But above all Johnson’s lawyers were very adept in making the larger case that Radical Republicans were engaging in a partisan witch-hunt and were indeed fabricating a ‘high misdemeanor’ in order to oust the unloved president. The closing argument was made by defense counsel William Evarts who spoke over four days. His most powerful line of argument shall be quoted here:

[The People] wish to know whether the President has betrayed our liberties or our possessions to a foreign state. They wish to know whether he has delivered up a fortress or surrendered a fleet. They wish to know whether he has made merchandise of the public trust and turned authority to private gain. And when informed that none of these things are charged, imputed, or even declaimed about, they yet seek further information and are told that he has removed a member of his cabinet. (Hirsch 2018, Chapter 2)

The trial in the Senate lasted for ten weeks. On May 16, the senators had to first vote on Article XI. The vote was 35–19, one vote short of the two-thirds majority needed for conviction. None of the 12 Democrats voted to convict, and also 7 out of 42 Republicans voted to acquit. Ten days later, the Senate voted with the same tally on two further articles (Table 4.2). Johnson was acquitted. The ‘Seven Tall Men’ who saved Johnson the presidency and for some even preserved “constitutional government in the United States” (Kennedy 1956, p. 132) may not have been as heroic as they have been described or portrayed themselves to the posterity (Ross 1868). Certainly, their decision to acquit Johnson was not exclusively determined by the merits of the case or their conscience. Subsequent research has found evidence that was not so noble and more mundane motives also played a role in their decision-making. Ross may have been bribed. The motives of others may have been to prevent the ascendancy of the Radical Benjamin Wade to the presidency. And yet

others may have seen the acquittal of the president as the best way to secure the nomination of General Ulysses S. Grant as the 1870 presidential candidate for the Republican Party (Trefousse 1999, pp. 165–179).

There were many lessons to learn from the failed impeachment of Andrew Johnson. The simplest one certainly was: Do not let the prosecution of a president appear as a partisan witch-hunt. This lesson seems to have been lost to a very different group of radical Republicans who impeached President Bill Clinton 130 years later in the first instance, not because he had committed a serious political crime but because they loathed or maybe—as the hypocrites as who they were usually depicted—quietly envied his loose moral conduct. During the 1992 presidential campaign already, Republicans tried to derail Clinton’s candidacy by scandalizing his well-known infidelity and extramarital affairs. It was up to Hillary Clinton to rescue the campaign of her husband. Confronted by rumors of a 12-year affair with model and cabaret singer Gennifer Flowers, she declared that she stood by her husband whom she loves and respects in front of television cameras.

Clinton went on to win the presidency, but the public image of ‘Slick Willie’ stuck until the end of his presidency and beyond. From the beginning, Clinton and his administration were investigated for wrongdoing in multiple scandals: Travelgate, ‘Filegate’, the suicide of Deputy White House Counsel Vince Foster and the Whitewater scandal (Washington Post 2000). Because Congress had not reauthorized the independent counsel law in December 1992, it fell to Attorney General Janet Reno to appoint the special prosecutor who was tasked with investigating Bill and Hillary Clinton’s involvement in the fraudulent Whitewater real estate deal (Maskell 2013, p. 3). Reno chose Republican Robert B. Fiske who was a fair, tough and incorruptible prosecutor—yet not aggressive enough in the eyes of the Republicans in Congress. When independent counsel law was reauthorized in June 1994—ironically with Clinton’s support (Gormley 2016, p. 575)—the once again responsible three-judge panel of the District of Columbia Circuit Court replaced Fiske with Kenneth W. Starr.

While Starr’s Whitewater investigation languished and failed to produce impeachable offenses by Clinton, a sexual harassment lawsuit filed by former Arkansas state employee Paula Jones made its progress through the federal court system. Luckily for Starr, the Supreme Court decided unanimously in *Clinton v. Jones* (520 U.S. 81 (1997)) that the president was not immune from civil lawsuits during his tenure. During their inquiries into Clinton’s sex life, Jones’s lawyers found out about his sexual relationship

with the young White House intern Monica Lewinsky. Independent Counsel Starr also learned about the affair from Linda Tripp, a colleague and friend of Lewinsky. Tripp was disappointed by or, according to some accounts, hated the president and tape-recorded her conversations with Lewinsky. On January 7, 1998, Lewinsky signed an affidavit in the Jones case asserting that she had no sexual relationship with the president. Clinton also denied any sexual relation with Lewinsky in a deposition ten days later and publicly in a televised speech to the nation. The day before Clinton's deposition, Starr—knowing from Tripp that Clinton would lie under oath and that Clinton adviser Vernon Jordan had helped Lewinsky to find a new job—obtained the permission from the D.C. Circuit Court to expand his investigation into possible acts of obstruction of justice in relation with the Paula Jones case (Posner 1999, pp. 16–31; Starr 1998, pp. 11–128).

Although the Paula Jones case was subsequently dismissed in first instance (upon appeal, Clinton settled the suit in November 1998 for \$850,000), Clinton was mousetrapped when Lewinsky accepted an offer of immunity and agreed to cooperate with Independent Counsel Starr on July 28, 1998. Lewinsky not only told the truth about her sexual encounters with the president between November 1995 and March 1997, she also delivered a 'smoking gun' in the form of a semen-stained dress, which she had kept as a souvenir. The ensuing DNA probe made clear that the semen on the dress was Clinton's—the chance that it was not was "one in 7.87 trillion" (Starr 1998, p. 138). The president had no choice but to confess before the grand jury in August 1998—and afterward in a televised address to the nation—that he had an 'inappropriate intimate' relationship with Lewinsky. Nevertheless, he insisted upon not lying under oath in his former deposition because he had not had sexual intercourse with Lewinsky—and therefore in his understanding had not a 'sexual affair', 'sexual relationship' or 'sexual relations' with her (Starr 1998, p. 146). This legal hairsplitting may have been helpful to build a line of defense against the legitimate perjury claim, but for many, including Starr, it constituted another perjury. It also has been convincingly proved that Clinton lied many more times in his Jones deposition and in testifying before the grand jury (Starr 1998; Posner 1999; Gormley 2010).

On September 9, the Independent Counsel submitted his report to Congress and laid out his case for impeachment. A month later, the House voted 251 to 178, with 31 Democrats joining the Republicans, to start an impeachment inquiry. In November, Democrats gained five seats in the

midterm elections, due to a stunning popularity of their president who reached an approval rate of 66%. Republican House Speaker Newt Gingrich resigned. On December 11 and 12, the House Judiciary Committee approved on straight party-line votes four articles on impeachment: Two charges of perjury (committed before the grand jury and in the Paula Jones deposition), an obstruction-of-justice allegation and a more general accusation that President Clinton ‘misuse(d) and abuse(d)’ his office in not answering, and falsely answering, to Congress. One week later—not before President Clinton had ordered an air strike on Iraq and the designated Republican Speaker Bob Livingston fell prey to an extramarital affair—the full House voted 228 to 206 to approve the perjury charge before the grand jury, and 221 to 212 in favor of obstruction of justice. The Republicans lost 5 votes on the perjury charge and 12 votes on obstruction of justice, whereas only five Democrats parted ways with their party on each charge. When the Senate acquitted the president two months later on both charges, every Democratic senator stood by Clinton, whereas ten Republicans deviated from the party line regarding perjury and five dissented on the obstruction charge (Table 4.2).

The conventional wisdom with respect to the Clinton impeachment until recently was that it represented a partisan enterprise, even “a vast conspiracy” (Toobin 1999) by Clinton foes that did not justify impeachment of the president. In this regard, it resembled the Johnson impeachment from 130 years earlier. Even worse than back then, the underlying conflict causing Clinton’s perjury was not a political, but just a private one. In the words of Judiciary Committee member John Conyers (D-MI), who had already investigated Nixon’s political crimes (and would resign in December 2017 after 53 years in Congress over sexual harassment allegations): “This is not Watergate. It is an extramarital affair” (Hirsch 2018, Chapter 4). As such it belonged, according to the prevailing view at the time, in the realm of private morality and did not constitute a constitutional crisis justifying impeachment. Even some Republicans like Lindsay Graham had second thoughts whether Clinton’s “lying about sex” (Democratic counsel Abbe Lowell, 1998, Impeachment Debate in the House), although undoubtedly a perjury, really constituted “an ongoing series of deliberate and direct assaults by Mr. Clinton on the justice system of the United States”, as Republican counsel David Schippers argued (Hirsch 2018, Chapter 4). Removal from office was considered an unproportionally heavy sanction for such a minor wrongdoing. Censuring the president, it was argued, would have been a more appropriate, albeit con-

stitutionally controversial sanction. Four censure resolutions were introduced in Congress in December 1998 and February 1999 as alternatives to impeachment but did not find majorities (Hudiburg and Davis 2018, pp. 9–10).

As in the Johnson case, the defenders and supporters of the president won the fight for public opinion. In 1999, a majority of the American people was against removing the president from office. But, as in the Johnson case, the view on the legitimacy of the impeachment and some of its most important ramifications would change over time. To name just two points: One, 20 years and a #MeToo movement later, Clinton's predatory sexual behavior certainly would be evaluated differently—and is, for example by Democratic Senator Kirsten Gillibrand of New York who says now that Clinton should have resigned (Baker 2018, p. 203). A reappraisal may even apply to the Lewinsky affair which was back then consensual in the understanding of both partners, but is viewed today by Lewinsky as an exploitive relationship. With even more justification it would hold true for the accusations of Paula Jones (sexual harassment), Kathleen Willey (sexual assault) and Juanita Broaddrick (rape) which were all more or less dismissed at the time. First of all, these charges—even if not substantiated beyond reasonable doubt—would get much more attention these days and would generate an intense pressure for a president to resign. Furthermore, if proven, such crimes today would certainly justify impeachment and removal. Although they may be depicted as crimes of a personal and not a political nature, they (at least sexual assault and rape) belong to a category of serious non-political crimes that must be impeachable (Sunstein 2017a, p. 134).

Two, one of the main lessons drawn from Clinton's impeachment at the time was that Congress had too many resources at its disposal to politicize its investigations. Advocates of a strong executive argued that Supreme Court decisions like *United States v. Nixon* (418 U.S. 683 (1974)), holding that a president has no absolute executive privilege, *Morrison v. Olson* (487 U.S. 654 (1988)), upholding the independent counsel law, or *Clinton v. Jones* (520 U.S. 681 (1997)) allowing civil suits against sitting presidents, impaired the checks and balances of the Constitution. In transferring far-reaching prosecutorial authorities from the executive branch to an independent counsel which somewhat worked by order of the majority party in Congress, and in perforating the protective shield of presidents, the presidency had been unduly weakened (Posner 1999, pp. 217–230; Gerhardt 2001, pp. 62–66; Gormley 2012). Not just a few presidential

scholars feared that the United States had to face a continuous period of partisan trench warfare and cheapened political discourse that would seriously impair the president's ability to govern (Pious 2012; Bloch 2012). These concerns certainly were more than justified and still are. Nevertheless, in times of Trump and an unprecedented stonewalling of Congress by the president, the thesis of a weakened presidency may be in need of a reassessment as well. Against the background of the Mueller (2019) investigation, one can also discuss anew whether it really was a good idea to let the independent counsel law expire in 1999. Granted, to constitutional purists this law may appear quite eccentric in a system of separate powers (Amar 1999, pp. 296–300), but can Congress really effectively investigate an obstinate president when the Special Counsel has to report to the Attorney General?

#### CALLS FOR IMPEACHMENT DIED AWAY: THE MANY CASES FROM WASHINGTON TO OBAMA

That there have been so far only two thorough impeachment proceedings in the history of the United States could suggest that calls for impeaching a president are a rare phenomenon. This is not the case. Even revered founders of the Republic like George Washington and Thomas Jefferson were confronted with isolated voices who wanted to remove them from office. Washington faced some critical editorials and demands of removal in 1795 after he had secretly negotiated a treaty with Britain. And Jefferson was accused of committing a 'high misdemeanor' by Federalist Representative Josiah Quincy in January 1809 because of an alleged misuse of his appointment power. Both proposals went nowhere because they considered as misuse of power what was essentially a normal use of power and indeed a core executive function (Tribe and Matz 2018, pp. 151–155).

In the first half of the nineteenth century, Congress's impeachment power was considered a dead letter of the Constitution. Even the two arguably most headstrong presidents before the Civil War—Andrew Jackson and John Tyler—were able to escape impeachment proceedings. This was not due to a shortage of political conflicts. Jackson was the first president to use the veto power in a significant way.<sup>2</sup> Especially controver-

<sup>2</sup> It is hard to understand from today's perspective that a presidential use of the veto power could amount to some sort of constitutional crisis. But in the contemporary Whig conception of legislative supremacy, presidential vetoes should be restricted to unequivocally uncon-



sial was his veto to recharter the Second Bank of the United States in 1832. When Congress launched an investigation into Jackson's activities one year later, the president withheld a requested document. In response, Whig Henry Clay, his powerful political foe in the Senate, introduced a resolution of censure which the Senate approved in March 1834 (Hudiburg and Davis 2018, p. 5).

President Tyler who like Jackson angered Congress by vetoing a number of bills, came even closer to impeachment. Tyler was the first vice president to rise to the presidency upon William Henry Harrison's death. His problem was that he was not a true Whig. In fact, he had left the Democratic Party in 1836, after he voted to censure President Jackson and refused to follow the instruction of his state party that he vote to cancel Jackson's censure. Like Jackson, he repudiated the Whig conception of legislative supremacy and endorsed a strong presidency. He also opposed federal interference into states' rights. Tyler soon clashed with Clay over a bill establishing the Third National Bank. Upon vetoing the bill in September 1841, he was expelled from the Whig Party. Every member of his cabinet except one resigned in protest. "A man without party" (Clay 1841), Tyler went on to veto two tariff bills in 1842. In response, John Quincy Adams convinced the House to install a select committee tasked with examining Tyler's impeachment. Ultimately, though, Congress saw reason and realized that Tyler's use of the veto power was no illegitimate abuse of his constitutional responsibilities. Congress had all the powers it needed to check the president without impeaching him (Gerhardt 2013, pp. 33–59; Tribe and Matz 2018, pp. 19–21).

Impeachment fever peaked after the Civil War during the ultimately failed prosecution and trial of Andrew Johnson over political conflicts concerning Reconstruction policy. Afterward, Congress's impeachment power again lay dormant for a long period of time—essentially until Watergate more than a century later. There have been two major eruptions of impeachment chatter during these hundred years—both in the wake of, or during a major war. The first outburst came when President Woodrow Wilson tried to bring the United States into the League of Nations after World War I. Wilson's political campaign encountered heavy

stitutional bills and not be used to obstruct Congressional policies. Furthermore, pocket vetos were regarded as plainly unconstitutional because they constituted, in the words of Whig Congressman Daniel Webster, a "silent veto" and "a great practical augmentation" of presidential power (Gerhardt 2013, p. 37, note 20).

political opposition in the Senate and all over the country. The anti-treaty movement flavored its political resistance against Wilson's internationalism with calls to impeach him. The president responded with politically motivated persecutions of the impeachment petitioners charging them as Communists who worked for the political enemy (Tribe and Matz 2018, pp. 158–160).

Impeachment calls broke out again shortly after World War II during the first hot war of the Cold War, the Korean War. The immediate cause of the widespread desire to oust President Harry S. Truman was his decision to relieve General Douglas MacArthur from his command of the American Forces in the Far East on April 10, 1951. The popular MacArthur, a five-star general and an American hero of both World Wars, had publicly criticized Truman's defensive war strategy which he blamed for his defeat against Chinese troops. When the president wanted to negotiate with the Chinese, MacArthur further undermined him by demanding enemy surrender and declaring: "There is no substitute for victory" (Neustadt 1990, p. 13). In view of MacArthur's subordination, the president had no choice but to fire him. Nonetheless, it was a very difficult "case of command" (Neustadt 1990, pp. 10–28) for Truman, who was extremely unpopular at the time with approval ratings hovering around 25%. A storm of public outrage flooded the country, the newspaper editorials and Congress. But it would not last for long because the constitutional case was clear: In the American Republic the military is controlled by civilians, not by the generals (Tribe and Matz 2018, pp. 161–165).

There was a second controversial executive action by Truman in his last year in office that engendered impeachment calls: His seizure of the nation's steel mills on April 8, 1952. Given the impending shutdown of the mills due to announced labor strikes, the president argued that as Commander-in-chief he had the inherent authority to preserve the war effort and "to keep the country from going to hell" (Tribe and Matz 2018, p. 165). This time, constitutionality was certainly not on Truman's side. Republicans introducing impeachment resolutions in Congress could rightly argue that Truman's claim of inherent presidential authority was baseless and that he acted without statutory power. The steel companies brought their case to the court, and in the end the president was rebuffed by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579 (1952)). Truman immediately complied and returned the mills. Republicans no longer felt any need to call for the removal of the president whose party controlled both houses of Congress (Table 4.2) and who

would soon leave office anyway (Tribe and Matz 2018, pp. 165–169; Neustadt 1990, pp. 13–16).

The next 20 years saw no substantial impeachment calls until Watergate, although the ‘imperial presidency’ arguably already emerged with Lyndon B. Johnson, before Nixon pushed the trend toward executive centralization and aggrandizement to its perfection (Schlesinger 2004). Nixon’s case will be treated in the next section. Here it shall suffice to hint at the fact that with Nixon’s imperial presidency impeachment talk has become a regular and perennial feature of American politics. Some are therefore speaking of an “age of impeachment” that originated in the 1960s (Kyvig 2008). Directly following on Nixon, Gerald Ford skated on thin ice when he preemptively pardoned his predecessor four weeks into his presidency. He refuted claims that the pardon represented a corrupt bargain with Nixon and successfully deflected impeachment animus (Tribe and Matz 2018, p. 170). Even Jimmy Carter, a president with hands-down integrity, was investigated by Special Counsel Paul J. Curran on a suspected campaign finance violation. Curran found “no evidence whatsoever” (Pound 1979).

Ronald Reagan was confronted with removal calls twice during his presidency: When he invaded Grenada without Congressional authorization in 1983 and in connection with the Iran-Contra Affair during his second term. Whereas the impeachment call in 1983 was the single voice of Manhattan Democrat Ted Weiss and trailed off unheard, the Iran-Contra Affair posed a more serious threat to Reagan. The scandal involved a clearly illegal scheme during October 1984 and October 1986 through which it was attempted to achieve two Reagan policy aims *expressis verbis* negated by Congress: Military assistance to the Nicaraguan contra rebels and arms sales to Iran. The two secret operations merged into one when the money from the Iran weapons sales was diverted to support the Contras in Nicaragua (Walsh 1993).

On November 25, 1986, President Reagan confirmed the illegal activities. He dismissed National Security Advisor John Poindexter and National Security Council staff member Oliver North. With ensuing investigations by a presidential commission, Congress and an independent counsel tried to determine the role President Reagan played in these illegal activities. Since Reagan had become highly popular in his sixth year in office and was on the brink of making peace with Soviet leader Mikhail Gorbachev, the public was more than willing to buy into the narrative that Reagan was only passively involved in the decision-making and the real culprits were

his subordinates Robert McFarlane, Poindexter and North. Congress demonstrated no interest in impeaching Reagan who, what is more, helped his case by cooperating with Congressional investigators. Refuting the official narrative, the six-year investigation by Independent Counsel Lawrence Walsh and further research has shown that Reagan—and Vice President George H. W. Bush—were actively guiding the incriminating policies. Both and members of the Reagan cabinet were also directly involved in the cover-up of these activities by withholding important evidence. Upon the closing of the independent counsel investigation, President Bush pardoned Defense Secretary Caspar Weinberger, National Security Advisor McFarlane and four other persons involved in the scandal (Walsh 1993; Byrne 2014).

Like President Reagan in the wake of his Grenada intervention, Presidents Bush 41, Clinton, Bush 43 and Obama all have been criticized for their usurpation of Congressional war powers (Weed 2019). The cases were all different. Not every impeachment call was justified, and not in any case, even not in any justified case, was an impeachment demanded. George H. W. Bush's Panama invasion in December 1989 for example did not lead to protest—it was over, like Reagan's Grenada invasion, before the 60-days period of the War Powers Resolution, according to which Congressional approval for the use of military force is required, expired. What is more, the invasion was successful in freeing the Panamanian people from its criminal dictator Manuel Noriega. Bush's decision to militarily confront Iraq's dictator Saddam Hussein after he had invaded Kuwait in 1990, on the other hand, led to an impeachment resolution by Democratic Representative Henry Gonzalez. Since Bush eventually secured the support of the UN Security Council and of Congress for the military intervention, this resolution was quietly buried by the Judiciary Committee (Tribe and Matz 2018, pp. 172–173).

Discussions about the adequate use of war powers by presidents are too frequent and too common to treat them here comprehensively. President Clinton's use of force in Haiti (1994/95) and in former Yugoslavia, George W. Bush's wars in Afghanistan and Iraq or Barack Obama's intervention in Libya to oust dictator Gaddafi and in Syria to fight ISIS were all tainted by complaints that they violated international or national law—or represented an otherwise illegitimate use of US military power abroad (Weed 2019). Controversial as these military interventions were, they point to a general constitutional problem that individual presidents cannot credibly be charged with. Congress and the judiciary failed as well in set-

ting limits for presidential war waging (Black and Bobbitt 2018; Fisher 2017). Calls for impeaching presidents because of their questionable use of US troops abroad have therefore all been unsuccessful. Lamentable as it is, presidents in general enjoy wide, nearly unlimited leeway in executing their commander-in-chief responsibilities (Schlesinger 2004).

The two most recent enclosed presidencies in US history are both cases in point that even the most questionable activities within the scope of presidential war powers are usually no impeachable offenses. Representative Dennis Kucinich, a leftist Democrat from Cleveland (Ohio), wanted to impeach George W. Bush late in his presidency for manipulating the case for the Iraq war, for the invasion itself, for the treatment of detainees during the war, for the CIA's extraordinary rendition program, for torturing 'enemy combatants' and for illegally spying on American citizens among other things—all to no avail. If anything, the secret illegal domestic eavesdropping came closest to an impeachable offense, because it was directed against American citizens and not a foreign enemy. But House Democratic leader Nancy Pelosi had already decided early in 2006 that impeachment would only energize the Republican base. Immediately after Democrats won the midterm election, she made clear that impeachment was "off the table" (Ferrechio 2006) during the remaining two years of the Bush presidency.

With the exception of torture and eavesdropping on Americans, Obama could have been impeached for many of the same offenses as his predecessor. Kucinich argued in March 2011 that Obama should be impeached for bombing Libya without Congressional authorization. Obama's stepping up of the drone war which led to increased targeted killings and unintended deaths of innocent civilians suggested itself as an impeachment ground. Obviously, Republicans deemed nothing deplorable in this military strategy. They found other reasons to call for Obama's impeachment: His allegedly fake birth certificate, Obamacare, Internal Revenue Service (IRS) discrimination against conservative groups, a far-fetched White House cover-up of the Benghazi attack and even Obama's 'arrogance'. This often lopsided reasoning demonstrated that the right-wing "lunatic fringe" (Dean 2014) had arrived in the mainstream of the Republican Party by then.

The impeachment debate of the recent past clearly indicates a "normalization of impeachment" (Tribe and Matz 2018, p. 182) in American politics. To many politicians and partisans, especially those at the extreme fringes of each political party, impeachment is no longer a weapon of last resort but one of many instruments in political combat. It is no accident

that calls for impeachment became louder at the end of Bush's and Obama's presidential terms when the next election approached. The impeachment debate was also somewhat welcomed by the more radical elements of the attacked presidential party who used it to energize their base or to mobilize donors. The problem with impeachment campaigns as a normal means of political competition is that they cheapen the political discourse and manipulate the political system—a result already observable in the impeachment of Clinton. The politicization of impeachment further poisons the political climate and increases political cynicism (Dean 2014).

### NOT YET IMPEACHED, BUT ON THE WAY TO CONVICTION: THE RESIGNATION OF NIXON

To this day, the paradigmatic cases for impeachment are the events that led to the Watergate affair and the resignation of Richard Nixon in August 1974. Although Nixon was not yet officially impeached by the House of Representatives and therefore never met his just verdict before his special court, it was all but certain that the Senate would have convicted and removed him from office. Nixon persevered in the White House as long as he knew that his partisan base in Congress backed him. When a delegation led by Republican Senator Barry Goldwater of Arizona clarified on August 6 that no more than a dozen Republican senators still supported him, Nixon gave up (Ambrose 1991, p. 420). Two days later in his resignation speech, he would not confess any guilt or apologize for his political crimes. He simply argued that he no longer had “a strong enough political base to justify” (Kutler 2010, p. 201) holding out in office.

This amoral, purely power-oriented view on matters of public interest was typical of Nixon. The 37th President has often been described as “a strange combination of huge ambition and great personal insecurity” (Genovese and Morgan 2012, p. 4). His lust for power, his determination to win at any cost, his willingness to lie and break the law in order to win was seemingly the psychological driving force behind all his abhorrent power abuses (Summers 2000). Significantly, it all started with Nixon's presidential reelection campaign. Initially unsure about his reelection prospects, he built the Committee to Re-elect the President (CREEP) early in 1971. Tasked with securing the election victory at any cost, CREEP raised a record \$60 million in campaign funds, most of them ille-

gally. Contributors were advised by the committee how to bypass the newly enacted Federal Election Campaign Act which would enter into force in April 1972. Furthermore, CREEP sold ambassadorships to donors, took money from dubious foreign governments (e.g. the Shah of Persia and Philippine President Marcos), engaged in money laundering, and funded a dirty tricks campaign directed at political opponents that made use of federal law enforcement agencies. One target of CREEP's espionage operation was the Democratic National Committee (DNC) in Washington's Watergate complex (Genovese and Morgan 2012, pp. 10–13).

In the early hours of June 17, 1972 five burglars carrying walkie-talkies and bugs were arrested in the DNC offices at Watergate. Two additional accomplices outside the building were coordinating the break-in. The two were retired CIA officer E. Howard Hunt and former FBI agent G. Gordon Liddy, who had already worked for Nixon as his so-called 'Plumbers'. Their mission as plumbers was to plug unauthorized government leaks by Nixon critics. In order to dig up dirt on Daniel Ellsberg who had leaked the Pentagon Papers to the *New York Times*, they broke into the Los Angeles office of Ellsberg's psychiatrist—to no avail. After the Plumbers unit in the White House was dissolved in late 1971, Hunt and Liddy went on to become members of CREEP. Together with former CIA officer James McCord, the security chief of CREEP, three Cubans with CIA connections and a further accomplice, they tried to bring DNC documents into their possession and to bug the phones of DNC chairman Larry O'Brien. When arrested, the burglars had two dozen recently printed \$100 banknotes with consecutive serial numbers with them. This led the investigators to CREEP and its slush fund (Schulman 2004, pp. 639–640; Genovese and Morgan 2012, pp. 8–10, p. 13).

The Watergate break-in and the indictment of the seven burglars in September 1972 had little or no influence on the presidential election. Nixon won in a landslide with 97% of the electoral vote, and over 60% of the popular vote. But Democrats held on to their majority in the House and even expanded it in the Senate toward a 57–43 lead (Table 4.1). The new Congress with large Democratic majorities in both houses went about determining the role that the White House and Nixon himself had played in the Watergate affair. The question that Senator Howard Baker, Jr. (R-TN) asked former White House Counsel John Dean in June 1973 at the Senate's Watergate hearings: "What did the President know and when did he know it?" (Kutler 1990, Chapter XIV) should become the most

significant question in the roughly one and a half years between the start of the investigations and Nixon's resignation. Did Watergate really constitute a 'third-rate burglary' perpetrated by 'overzealous aides', as the White House cover-up wanted to suggest? Or was the president actively involved in the commission of this crime (and others as well), and was he a conspirator in its cover-up? (Kutler 2010).

At the end, the latter proved to be true—but not after lengthy rear-guard battles fought by the administration and some heavy cannonry advanced by the judicial and Congressional investigators. Initially, the cover-up of the Nixon administration which would later lead to the obstruction-of-justice charge by the House Judiciary Committee seemed to be successful: The burglars prevented a trial by pleading guilty, and they did not implicate Nixon's aides or the president himself in the crime. In return, Nixon made sure that Liddy, Hunt and their accomplices obtained generous hush money. The president and his aides worked internally to let the Watergate break-in appear as a covert CIA operation and pressured the FBI to take a hands-off approach. They withheld information, gave false and misleading statements to the FBI and tried to stonewall its investigative work. Nixon and his team brazenly lied to the public. However, thanks to two unabashed young reporters of the *Washington Post*, Carl Bernstein and Bob Woodward (1974), and one incorruptible conservative judge, DC District Court Judge John J. Sirica, the revelations did not stop.

What got the ball rolling was when Judge Sirica read a letter from CREEP security chief McCord in open court on March 23, 1973 which incriminated the administration. Two important presidential aides, White House Counsel John Dean and CREEP deputy director Jeb Magruder, decided to cooperate with the prosecutors in order to evade long imprisonment. On April 30, chief of staff H. R. Haldeman, domestic policy advisor John Ehrlichman and Attorney General Richard Kleindienst resigned under complaints that the Department of Justice was slowing down the investigation. The Senate Judiciary Committee required the new Attorney General Elliot Richardson to nominate as special prosecutor Archibald Cox, Kennedy's and Johnson's Solicitor General and a Harvard law professor, who pledged to "pursue the trail wherever it led, even to the Presidency" (Cox 1987, p. 3). At the same time, the Senate Select Committee on Presidential Campaign Activities (Senate Watergate Committee) under the leadership of Senator Sam Ervin (D-NC) started with its public hearings (Ervin 1974). The star witness John Dean would testify a month later on June 27. Ehrlichman and Haldeman would follow



in July. A sensation with serious consequences broke, when on July 16 Alexander Butterfield revealed the existence of a White House taping system (Kutler 2010).

The rest of the story was the fight over the ‘Nixon tapes’—the recordings from Oval Office conversations. Both Special Prosecutor Cox and Senate Watergate Committee Chairman Ervin subpoenaed President Nixon to produce the tapes. Nixon fought back claiming executive privilege and arguing the tapes included ‘highly sensitive’ national security material that could not be made public. When Judge Sirica ordered an examination in camera, Nixon appealed the decision. Without success: The Appeals Court upheld Sirica’s opinion. Since Cox persisted to get the tapes, Nixon ordered Attorney General Richardson to dismiss him. This led to the so-called ‘Saturday Night Massacre’ on October 20, when Richardson and his deputy William Ruckelshaus refused to fire Cox and subsequently resigned. It was up to Solicitor General Robert Bork (2013) to discharge Cox. The decision to oust Cox was a big mistake by Nixon and probably an impeachable offense in its own right (Kassop 1992). It is no hyperbole when some let the story of Nixon’s impeachment begin with this “reckless and very public abuse of executive power” (Naftali 2018, p. 84). Nixon even ordered Bork to let the FBI seal the offices of Cox, Richardson and Ruckelshaus.

As a side note: Ten days before the Saturday Night Massacre, Vice President Spiro Agnew resigned after he came under investigation for taking bribes and evading income taxes. These misdeeds were unconnected to Watergate. But Agnew was the first vice president to be forced out of office by an impending criminal conviction. Some cynics at the time—ahead of all Nixon and Ehrlichman who reportedly joked about Agnew as “the assassin’s dilemma” (Farrell 2017, p. 519)—argued that with Agnew gone, Nixon’s life insurance against an impeachment had lapsed, too. To Republicans and Democrats alike, the well-respected House Minority Leader Gerald Ford who succeeded Agnew was very well conceivable as president (Farrell 2017, p. 519).

The public was so enraged by the ‘Saturday Night Massacre’ that the president had to accept the appointment of a new special prosecutor, Leon Jaworski. The Democratic House leadership also reconsidered its strategy. Speaker Carl Albert (D-OK) and Majority Leader Tip O’Neill (D-MA) who had long hesitated to start impeachment proceedings now believed the time had come. Nonetheless, they proceeded very carefully and in a bipartisan way. House Judiciary Committee chair Peter Rodino (D-NJ)

hired Republican John Doar as committee counsel who undertook a thorough historical study of the constitutional grounds for impeachment. Not before February 6, 1974 did the full House vote 410–4 to authorize the Judiciary Committee to start impeachment investigations against the president. The committee then joined Special Prosecutor Leon Jaworski in subpoenaing the recorded tapes. The White House released edited and incomplete transcripts of the Nixon tapes on April 30, but Jaworski and Rodino insisted on the unredacted tapes.

In May and June 1974, the committee sifted through the evidence in executive session, including some of the tapes. Not until this process was concluded at the end of June did the committee vote to make the evidence public and held public hearings of witnesses in July. The same day the committee started its debate about the concrete impeachment articles against Nixon, the Supreme Court delivered in *U.S. v. Nixon* (418 U.S. 683 (1974)) the decisive blow to the president in repudiating his claim of absolute executive privilege. Conceding a qualified privilege to the president, the Court nevertheless held that in this case the general interest in the “fair administration of criminal justice” (418 U.S. 683 (1974)) outweighed the president’s interest in confidentiality of his communications. The president had to turn over all the tapes, including the ‘smoking gun tape’ of June 23, 1972 on which Nixon and Haldeman are heard how they collude to impede the FBI investigation by making use of the CIA (Rodino 1974, pp. 6–12; Kutler 2010).

The tapes were delivered on August 5 and sealed Nixon’s fate. The next day, the Goldwater delegation would tell him that he had to resign—which he did two days later. But even without having heard the ‘smoking gun’ tape, the House Judiciary Committee drafted articles on impeachment that were voted on between July 27 and July 30. Article I stated that the president “has prevented, obstructed, and impeded the administration of justice” (Rodino 1974, p. 2) in covering up Watergate. It was passed on July 27 by a 27–11 vote with the support of six Republicans. Article II charged Nixon’s power abuses, his “conduct violating the constitutional rights of citizens” and “his interference with agencies of the executive branch” in “disregard of the rule of law” (Rodino 1974, pp. 3–4). This article got even one more Republican vote and passed 28–10 two days later. On July 30, a third article of impeachment passed the committee, again with a 27–11 vote (Table 4.2). It held that Nixon “has acted in a manner contrary to his trust as President and subversive of constitutional government” (Rodino 1974, p. 4) by disobeying Congressional subpoenas.

On the same day, two proposed articles failed by a vote of 26–12 each: One charging Nixon with violating Congress’s war powers and its power of the purse by misleading Congress about US bombing operations in Cambodia, the other accusing Nixon of tax evasion and corruption by diverting government funds into private properties (Rodino 1974, pp. 1–11).

The lessons of the Nixon impeachment were several: First of all, this was a very strong case of ‘high crimes’, the strongest in US history up until the election of Donald Trump. Nixon’s actions represented a continuous, subversive attack on the US constitutional order. He used the power of his office to harass political opponents, to corrupt executive branch agencies and to deny Congress its legitimate co-equal—in fact, first among equals—place in the constitutional system. He had no qualms to commit crimes while holding the highest political office and to deceive the public, thereby undermining public trust in the government.

Secondly, from the Watergate break-in to the resignation of Richard Nixon two years passed. The political crimes that brought Nixon down had begun even earlier in 1971 when the ‘Plumbers’ went after whistleblower Daniel Ellsberg and CREEP was established. Nonetheless, impeachment proceedings in the House did not begin until February 1974. The press, the federal courts and the Senate Watergate Committee did indispensable groundwork before the House Judiciary Committee sprang into action. The House proceeded in a bipartisan way but only after a lengthy hesitation of its Democratic leadership: It started impeachment proceedings with only four dissenting votes, and more than a third of House Judiciary Committee’s Republican members supported the first two impeachment articles.

Thirdly, the long forerun was necessary to convince the public of the necessity to remove the president from office. Nixon rode a public approval wave of 68% at the beginning of his second term. Within a year, the Senate Watergate hearings, the Saturday Night Massacre and Nixon’s stonewalling of the investigations brought his approval ratings down to 25%. This was the moment for the House to start the impeachment process. But even at this point in time, in February 1974, not more than 38% of Americans supported Nixon’s removal. The delivery of the ‘smoking gun’ was required to convince a majority of Americans that President Nixon should be removed from office (Kohut 2014).

Finally, the removal (or resignation) of a president depends first and foremost on his behavior after a wrongdoing is exposed. Until today, it has

not been proven that Nixon ordered or knew in advance about the Watergate burglary, the ‘original sin’ that set off the avalanche. But Nixon hesitated not a second to engage in the cover-up of this crime because he feared that the investigation would reveal the many other political misdeeds he and his staff had committed. Nixon perpetrated most and the most serious impeachable offenses during the cover-up of the Watergate break-in: Lying to investigators, instigating his aides to lie, misusing the CIA, paying hush money to the burglars (thereby violating campaign finance laws) or stonewalling Congress. Had Nixon cooperated more readily with the courts and Congressional investigators as did Andrew Johnson (and even Bill Clinton) in the end, Congress may have allowed him to stay in office.

### DONALD TRUMP: THE CASE FOR—AND AGAINST— IMPEACHING TRUMP

Donald Trump probably enjoys the distinction to be the first and only president whose impeachment has been discussed and predicted before he entered office. In November 2016, presidential historian Allan Lichtman, who was one in a few to forecast Trump’s victory over Hillary Clinton, predicted that Trump would be impeached—but conceded that this impeachment prognostication other than his election forecast (Lichtman 2016) was based on a ‘gut feeling’, not a scientific method. As early as April 2017, he followed up with *the case for impeachment* (Lichtman 2017). In his preface, he succinctly summarized why Trump was vulnerable to impeachment like no other president since Nixon:

Trump has broken all the usual rules of politics and governing. Early in his term, he has stretched presidential authority nearly to the breaking point, appointed cabinet officials dedicated to destroying the institutions they are assigned to run, and pushed America toward legal and constitutional crises. No previous president has entered the Oval Office without a shred of public service or with as egregious a record of enriching himself at the expense of others. Trump’s penchant for lying, disregard for the law, and conflicts of interests are lifelong habits that will permeate his entire presidency. He has a history of mistreating women and covering up his misdeeds. ... His dubious connections to Russia could open him to a charge of treason. His disdain for constitutional restraints could lead to abuses of power that forfeit the trust of even a Republican Congress. (Lichtman 2017, p. xiii)

A far-fetched “crime against humanity”, that Lichtman (2017, pp. 123–139) saw in Trump’s irresponsible denial of climate change, and his optimistic assessment of Republican judgment were evidence to the fact that his analysis was partly guided by wishful thinking. Nonetheless, Lichtman was not alone in foreboding that impeachment would become a hot-button issue during a Trump presidency. Republican law professor Steven Calabresi, a co-founder of the conservative Federalist Society and member of the Reagan and George H. W. Bush administrations, argued days before Trump’s inauguration that the president would be in danger of impeachment because of his racism, sexism and out-of-control temperament (Egelko 2017). Calabresi referred to Trump’s claim that US District Judge Gonzalo Curiel, who presided over a fraud suit against Trump University, was biased because of his Mexican heritage. This was racist—and it demonstrated a dangerous understanding of judicial independence by Trump. Like Lichtman, Calabresi hoped that Republicans would consider impeaching Trump because his potential replacement Mike Pence was much more appealing to the party’s establishment (Egelko 2017)—a somewhat apolitical, scholarly perspective.

Another issue hotly discussed before Trump’s inauguration were his vast conflicts of interest as a result of his worldwide business activities. In December 2016, two ‘ethics czars’ under Bush and Obama, Richard Painter and Norm Eisen, published a study together with Harvard law professor Laurence Tribe in which they argued that Trump would violate the Foreign Emoluments Clause of the Constitution (Art. I. Sec. 9 No. 8) from day one in office. They were crystal clear in their conclusion that the president could not be allowed to receive “a steady stream of monetary and other benefits from foreign powers and their agents” (Eisen et al. 2016, p. 2). Trump had to divest from his assets that would pose a conflict of interest and put them in a ‘truly blind trust’. If Trump chose instead to further violate the Foreign Emoluments Clause—which he did by transferring control of the Trump Organization to his children—he would be subject to impeachment and removal from office (Eisen et al. 2016, p. 22). On January 9, 2017, Senator Elizabeth Warren and 23 Democratic co-sponsors introduced the Presidential Conflicts of Interest Act (S. 65) into the 115th Congress—a bill that would require the president to establish a qualified blind trust and would make it a ‘high crime and misdemeanor’ to violate the divestiture requirements of the bill. The bill was buried in the committee.

Ever since the DNC announced in June 2016 that Russian officials had hacked its computer system, the question whether the Trump campaign had conspired or ‘colluded’ with the Russians to interfere in the presidential election hung like a sword of Damocles over Trump’s head. The FBI opened an investigation into this question in late July 2016, after stolen emails were released by two Russian fake websites, ‘DCLeaks’ and ‘Guccifer 2.0’, and also by WikiLeaks. At that time, candidate Trump publicly voiced his hope that Russia would find “the 30,000 missing emails” (Parker and Sanger 2016) from Clinton’s time as Secretary of State. Then came October 7, with two ‘October surprises’ in short order: First, the release of the Access Hollywood tape; then, only one hour later, WikiLeaks’ release of the Podesta emails that were stolen by Russian intelligence. This, in effect, may have given the election to Trump because the leaked emails damaged Clinton irreparably and at the same time eclipsed Trump’s scandalous wrongdoing. Two weeks before Trump’s inauguration, the US intelligence community briefed Trump on their finding that Russia had intervened in the election to help him—something the president-elect did not like to hear. Three Congressional committees, the House and Senate Intelligence Committee and the Senate Judiciary Committee began investigations into Russian election interference (Mueller 2019, vol. 1, pp. 1–8).

From January 2017 up until today, Donald Trump’s reaction to the FBI and the Special Counsel investigations into Russian election interference were at the center of the impeachment debate: Did Trump’s conduct amount to obstruction of justice, the first article of impeachment against Richard Nixon and the third one against Bill Clinton? As specified in the second volume of the Mueller Report, there were at least ten cases that begged the question whether President Trump committed an impeachable offense (Mueller 2019, vol. 2, pp. 24–158). Not all obstructive acts by Trump were performed in public, but many of them were. The most egregious power abuse that the public became aware of was the firing of FBI Director James Comey on May 9, 2017. After Comey refused to publicly testify in his hearing before the Senate Judiciary Committee that the president was not under investigation—which Trump had pressured him to do—Trump decided to fire Comey. He later publicly acknowledged that the reason for the dismissal was that he “faced great pressure because of Russia. That’s taken off” (Mueller 2019, vol. 2, p. 62).

At the time, the firing of Comey appeared to many like a ‘Saturday Night Massacre’ moment. To Laurence Tribe (2017) the Comey disposal represented a ‘vastly more serious’ obstruction effort than Nixon’s cover-

up of the Watergate break-in. Although Comey's dismissal did not end the investigation and even induced the appointment of the Special Counsel by Deputy Attorney General Rod Rosenstein, it attempted to obstruct the investigation of a foreign cyberattack on critical US infrastructure. Trump misled the public about his motives by ordering Attorney General Jeff Sessions and his deputy Rosenstein to prepare false justifications for Comey's dismissal. Trump also tried several times to corrupt Comey, before he finally fired him after he had gotten the impression that he could not control him. And he threatened Comey not to inform the public about their private conversations. To Tribe—who could not know at the time of the many corrupt activities that the Special Counsel investigation would yet unearth—these and the enduring violation of the Foreign Emoluments Clause were, as early as May 2017, sufficient grounds to demand the impeachment of Trump. One year later, in his book on the issue he was more restrained and explored “whether the impeachment power can still protect American democracy in an age of broken politics” (Tribe and Matz 2018, p. 197).

It was no surprise that after the firing of Comey impeachment chatter in Congress ballooned. Senators Richard Blumenthal (D-CT) and Angus King (I-ME) vented the possibility of impeachment as did Representatives Maxine Waters (D-CA), Pramila Jayapal (D-WA), Al Green (D-TX) or Senator John McCain (R-AZ). The latter argued that Trump's scandals had reached “Watergate size and scale” (Seipel 2017). Two Republican members of Congress, Justin Amash (R-MI) and Carlos Curbelo (R-FL) also called for Trump's impeachment due to proven obstruction of justice. On June 8, Comey revealed in hearings before the Senate Intelligence Committee that Trump, after firing National Security Advisor Michael Flynn for lying to the FBI, had pressured the FBI Director in private to not prosecute Flynn. The president said according to Comey: “I hope you can see your way to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go” (Mueller 2019, vol. 2, p. 40)—a clear case of interference with a pending criminal proceeding a.k.a. obstruction of justice. The same day, Congressmen Green and Brad Sherman (D-CA) announced that they would introduce an article of impeachment charging the president with obstruction of justice. They did so one month later (H. Res. 438). Nonetheless, this and other impeachment resolutions introduced in the 115th House (H. Res. 621, 646) never garnered more than a minority of votes among Democrats. Out of strategic reasons, the Democratic leadership team around Nancy Pelosi opposed too early

calls for impeachment that above all had no chance to be successful in a Republican-controlled Congress.

Still in 2017, constitutional scholar Cass Sunstein (2017a) published *a citizen's guide to impeachment* in which he primarily made the case that impeachment was not a political, but a legal act. The grounds for impeachment were to be found in the US Constitution; the House of Representatives was not allowed to impeach a president whenever it saw fit. Sunstein further argued that impeachable offenses constituted power abuses, including neglect of duty, that need not (but can) violate the law. In his book, he did not take an explicit position whether Trump should be impeached, but in his public interventions he argued that “if you have a systematic liar who is lying all the time, then we’re in the ballpark of *misdemeanor*, meaning bad action” (Graham 2017). After Trump’s campaign aide and foreign policy advisor George Papadopoulos pleaded guilty for lying to the FBI in October 2017, Sunstein argued that seeking ‘dirt’ on a political opponent from foreign powers was traitorous conduct and would be an impeachable offense if coordinated with the president (Sunstein 2017b).

Since Democrats won back the House in the midterm elections (Horst 2019b), the impeachment debate has risen to a new energy level. Tom Steyer, the influential San Francisco billionaire and liberal activist who in 2017 was among the first to call for impeaching Trump, intensified his pressure on the Democratic leadership in the House and on liberal members of Congress. The new progressive, (social) media affine members of Congress—Alexandra Ocasio-Cortez (D-NY), Ilhan Omar (D-MN) or Rashida Tlaib (D-MI)—also wanted to impeach Trump the earlier the better. So far, the younger, more impatient and more progressive members of the Democratic caucus are successfully contained by Speaker Nancy Pelosi. She—together with the older, more experienced and not necessarily less liberal committee chairpersons and party leaders—is opposed to impeachment for now. The Democratic House leadership is well aware of the fact that impeachment is a very difficult issue for the 30–50 more moderate members of its caucus, those sitting in districts Trump had won in 2016 or members of the Blue Dog Coalition (Bacon 2019). But the pressure is rising on the leadership, and there are signs that the committee chairmen, given the stonewalling by the president, are changing their mind. Although they understandably hesitate to publicly speak out in favor of impeachment, this is also true of many moderate Democrats. It seems to no longer be a question of principle, but of timing when an impeachment inquiry will be started by the House Judiciary Committee (Bade and DeBonis 2019).



Special Counsel Robert Mueller (2019) delivered his 448-page *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* on March 22, 2019 to Attorney General William Barr. The blackened report was released by Barr to the public on April 18. The four-week delay during which the public was left with Barr's interpretation of Mueller's findings has put House Democrats in a complicated situation. The public perception now is that the Special Counsel did not find a 'collusion' between the Russians and the Trump campaign. This may have been so—in spite of Russian election interference that clearly aided Trump, the Russians' and Trump's expectation that they each would benefit from the interference, frequent meetings between Russian officials and Trump campaign aides, illegal cover-up activities by members of the Trump campaign and Trump's public calls to hack Clinton's emails. According to Mueller, the evidence was not sufficient to establish that members of the Trump campaign violated US conspiracy law (Mueller 2019, vol. 1, p. 2). But even with this finding, there is plenty of material in the first volume of the report that encourages and even demands further investigations by Congress—especially with respect to the June 9, 2016 meeting at Trump Tower and the role of both Donald Trump junior and senior in it (Mueller 2019, vol. 1, pp. 110–123).

With respect to the second volume and the obstruction-of-justice charges, the public understanding now is quite similar to the collusion charge: The Special Counsel did not find sufficient evidence “to establish that the President committed an obstruction-of-justice offense” (New York Times 2019, p. 3), as Attorney General William Barr declared in his March 24, 2019 letter to the House and Senate Judiciary Committee chairmen. But this determination by Barr and his deputy Rosenstein clearly misrepresented Mueller's findings. From the outset, the Special Counsel made clear that he would not make a traditional prosecutorial judgment since Department of Justice guidelines render a criminal proceeding against a sitting president impossible. Mueller (2019, vol. 2, p. 1) explicitly restricted the investigation to a fact-finding mission in order to preserve the evidence for other potential prosecutions or for criminal proceedings against the president after he leaves office. His overall conclusion was the opposite of an exoneration:

[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable

to reach that judgment. The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him. (Mueller 2019, vol. 2, p. 2)

This ambiguous finding clearly is far from a 'total exoneration', as President Trump time and again asserts. Certainly, it also is not a 'case closed', as Senate Majority Leader Mitch McConnell proclaimed (CR, 7.5.2019, S2658). Quite the opposite: It is an invitation to Congress to further investigate. That is exactly what Congress is doing at the time of writing this article—or at least what it is trying to do. The House alone has started ten investigations into Trump's business dealings and conduct as president in which six committees are involved (Table 4.3). The Senate Intelligence Committee still runs its investigation into Russian interference in the 2016 election. Moreover, there are ten federal and eight state or local criminal investigations that relate to Trump (Buchanan and Yourish 2019). The problem with the Congressional investigations is that Trump has decided to stonewall them and by now has succeeded to keep his team in line. Attorney General William Barr, former White House Counsel Don McGahn, former National Security Advisor Michael Flynn, Donald Trump Jr. and Treasury Secretary Steven Mnuchin have all

**Table 4.3** House investigations into Trump, May 2019

<i>Subject</i>	<i>Committee</i>
1. Potential foreign influence over Trump and possible obstruction of justice	Intelligence Oversight and reform
2. Possible role of Trump and others in concealing hush payments	Judiciary Oversight and reform
3. Possible obstruction of justice and abuse of power by Trump and his administration	Oversight and reform Oversight and reform
4. Possible abuses of the White House security clearance process	Ways and means
5. Whether Trump misrepresented his net worth	Intelligence, foreign
6. Alleged use of private messaging by White House officials	affairs, oversight
7. Trump's tax returns	Financial services
8. Trump's communications with Putin	Oversight and reform
9. Possible money laundering	
10. Proposed US nuclear venture in Saudi Arabia	

Source: Buchanan and Yourish (2019)

rejected Congressional subpoenas to testify before the committee or to deliver requested documents. The result is that investigators in Congress are running out of options and have to take the fight to the courts. The first judges have already decided in favor of Congress, and many more will follow since the argumentation of the administration is unsustainable. But this takes time and it inevitably leads to delays.

### CONCLUSION: TRUMP'S IMPEACHMENT IS INDISPENSABLE, HIS REMOVAL FROM OFFICE IS UNCERTAIN

Trump's unjustified stonewalling of Congressional investigations represents a power abuse and an attack on the constitutional order in itself (Horst 2019a, pp. 23–36; Horst et al. 2018). It adds more impeachable offenses to his already very long list. One may sort them, following the Nixon precedent, under the headings 'abuse of power' and 'contempt of Congress' (Table 4.2). From the substantive point of view, the impeachment of the 45th President is indispensable. According to Speaker Nancy Pelosi and former US Senator John McCain, the United States is in a "constitutional crisis" (Sonmez 2019), comparable in "size and scale" to Watergate (Seipel 2017). Given the continuous humiliations by Trump, his contempt for and obstruction of democratic institutions, his systematic lying and the disinformation campaigns out of the White House, impeachment has become almost a question of self-esteem for Democrats by now—Democrats in the partisan sense, but also democrats in the general sense. Pelosi's slip of tongue that Trump is "becoming self-impeachable" (Lillis 2019), although somewhat opaque, hits the mark. Even if one takes into account that Trump's stonewalling of Congress could be a strategy driving Democrats to impeachment (Baker et al. 2019), Trump's conduct leads to an ever-growing erosion of democracy. It leaves House Democrats with no other choice but to investigate and finally prosecute him. This was also the conclusion of 720 former federal prosecutors aligned with both parties after they read the Mueller report (Zapotosky 2019).

For all intents and purposes, impeachment inquiries are already under way. The only question by now is: Should one also formally call them an impeachment proceeding? The answer of Speaker Pelosi is: No. Her argument is a strategic one. She abhors rushing to judgment. She wants to run every single investigation down, before she formally introduces an impeachment investigation by the House Judiciary Committee (which would foreclose the other investigations). She argues that it "is not about

politics, it's about what's best for the American people... It's about patriotism. It's about the strength we need to have to see things through" (Caygle et al. 2019). The Speaker is right to grant the investigations more time in the hope of getting at least some House Republicans on board, knowing that she needs 20 Republican senators to successfully try the president in the upper chamber.

To get to 67 votes in the Senate is very difficult—and it may even be impossible. But the only chance to make the impossible possible is to investigate very carefully and comprehensively. In real political life, as is demonstrated by the Nixon and Clinton precedents, there is a more severe standard for impeachment and especially conviction in the Senate than the majority of constitutional scholars believes. Apparently, the chance to convince the other party and the president's defenders of the necessity to impeach and remove him from office is close to zero if Congressional investigators cannot prove an indictable crime. And this crime has to be proven in a way that ordinary people are able to grasp—that is, a 'smoking gun' similar to the Nixon tapes and Lewinsky's semen-stained dress is necessary. Once this smoking gun is found by investigators, it must be exposed in public in order to convince the adherents of the president—after all, the man elected by the American people. Then Congress, as the much more suitable institution than the presidency to truly represent the American people in all its diversity (Davidson et al. 2016), has at least a chance to remove a lawless president from office, although even then it may fail.

PS: Democrats fear that if they fail in removing Trump from office, they would also lose the 2020 election. I don't think so. Republicans won the presidential election in 2000, although they were not successful with Clinton's impeachment. But Trump is a very different case anyway. His case is much more convincing than Clinton's because Trump's wrongdoing has much more serious and lasting consequences for the liberal constitutional order. Clinton's impeachment was never supported by a majority of Americans and his approval ratings jumped by ten points to 73% after the House voted to impeach him in December 1998 ([Gallup Poll](#)). By comparison, Trump's approval ratings stood at 42% in May 2019 ([Gallup Poll](#)). In the same month, a plurality of Americans (45%) supported Trump's impeachment (Kahn 2019)—a level that during the Watergate crisis was not reached until April 1974. An impeachment proceeding will almost certainly help Democrats in their presidential election campaign because it puts them in a position to attack the president. It would be difficult for Trump to argue that the Mueller investigation has 'totally exon-

erated' him. A decision not to impeach, on the other hand, could very well have negative consequences for the Democratic presidential candidate's prospects of success because it would demobilize the Democratic base. What is more, it would be the wrong answer to history and would permanently corrupt US democracy (Drew 2019).

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## CHAPTER 5

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# The Transformation of the Congressional Primary

*Mike Cowburn*

### INTRODUCTION

Throughout the twentieth century, congressional primaries were largely candidate-centered affairs between competing individuals claiming they could better represent the interests of the electorate and more effectively ‘deliver’ for the state or district, with the party apparatus largely playing the role of a neutral arbiter. This led to personality focused contests that were local affairs, rarely involving policy differences, though if they did these were focused on local issues within the district. In the past decade, congressional primaries have transformed into competitions between nationally organized factions that are distinguishable to voters through competing policy preferences and ideological rhetoric. These factions are now highly organized with differentiated ideologies, sources of funding, and affiliated interest groups.

The nomination process is now a site of struggle for power between these groups to control the party, with ideological implications for party

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M. T. Oswald (ed.), *Mobilization, Representation,  
and Responsiveness in the American Democracy*,  
[https://doi.org/10.1007/978-3-030-24792-8\\_5](https://doi.org/10.1007/978-3-030-24792-8_5)