

THE LEGAL CASE FOR A CONGRESSIONAL INVESTIGATION ON WHETHER TO IMPEACH PRESIDENT DONALD J. TRUMP

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This paper summarizes the legal grounds for Congress to pass a resolution calling on the House Committee on the Judiciary to investigate whether sufficient grounds exist for the impeachment of Donald John Trump, President of the United States. President Trump's abuse of power and corruption of the presidency are far worse than the Watergate scandal and the abuses that gave rise to the proposed articles of impeachment against President Richard Nixon that were reported out of the Judiciary Committee of the House of Representatives shortly before Nixon resigned. Abuse of power, corruption, and the threat to our republic are manifest today. They require a thorough and deliberate investigation in the House of Representatives.

The factual summaries of the grounds for impeachment are based on publicly reported facts, including statements made by President Trump himself, and testimony to Congress. The legal analysis is based on the text, structure, and history of the Constitution and federal law, and legal and political precedent. This analysis was developed with the insight and input of a wide range of experts over the past ten months. We are particularly grateful to Professor Catherine J. Ross of George Washington University Law School and Professor Jennifer Taub of Vermont Law School for their extensive comments and for joining us in presenting this paper.

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Free Speech For People is a non-partisan, non-profit organization, founded in 2010, dedicated to reclaiming democracy and the Constitution.

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Executive Summary

The U.S. Constitution provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Based on publicly reported information, as of today there are at least eight grounds for the House of Representatives to authorize the Judiciary Committee to begin hearings on whether to impeach President Donald J. Trump.

Some of the grounds for investigation are based on violations of specific enumerated constitutional or statutory provisions, but in keeping with the intent of the Founders and the two-hundred-year history of impeachments, other grounds are based on abuses of power that do not fall easily within a specific proscription. The grounds for investigation are:

Obstructing justice

Beginning soon after the inauguration, the president engaged in a course of conduct that sought to obstruct justice in the Federal Bureau of Investigation’s investigations of Lieutenant General Michael Flynn and of his own campaign’s potential involvement with Russian activity in the 2016 election. In short course, the president first improperly demanded loyalty from then-Director James Comey; asked him to abandon his investigation; pressured him to make public statements regarding the investigation; attempted to misuse intelligence officials to interfere with the investigation; and attempted to enforce a supposed personal “loyalty” commitment. When these failed, President Trump fired Comey in the hope of interfering with the investigation, and then attempted to intimidate him from speaking publicly. Additionally, the president attempted to interfere with congressional investigations.

Violating the Foreign Emoluments Clause and Domestic Emoluments Clause of the United States Constitution

Through his businesses in the United States and abroad, the president receives payments, regulatory approval, and other forms of direct and indirect financial benefits from foreign governments. These include increased foreign bookings at the Trump International Hotel in Washington, D.C.; foreign government payments at other Trump properties in the United States; extensions of credit from foreign-owned banks; foreign trademarks; foreign government permits and approvals for projects abroad. These violate the Constitution’s Foreign Emoluments Clause, which prohibits federal officials, including the president, from receiving a “present” or “emolument” from any foreign government or official.

The president’s businesses also act as a conduit for enrichment from federal and state government coffers. This includes the president profiting personally from official government travel, executive branch action to benefit Trump businesses, and various other subsidies and tax breaks. These violate the Domestic Emoluments Clause,

which prohibits the president from receiving, beyond his official salary, any emolument from the United States or any state.

The president was advised between the election and the inauguration that, unless he took credible action to separate himself from his business interests, he would be in violation of these provisions from the moment he entered office. Instead, he chose a weak set of superficial measures that removed him from day-to-day *management* of his businesses, but retained his *ownership* interests, so that he continues to profit personally from foreign and domestic emoluments.

Conspiring with others to commit crimes against the United States involving the solicitation and intended receipt by his presidential campaign of things of value from a foreign government and other foreign nationals, and to conceal those violations

In the 2016 election, the senior-most officials of Trump's presidential campaign (including his campaign chairman, his son, and his son-in-law) met with Russian nationals after an invitation to receive compromising information about his campaign opponent, Hillary Clinton, that they were told would be of great value to the campaign. Federal campaign finance law prohibits a candidate or campaign from soliciting a foreign national (including a foreign government) for a thing of value. In 2017, after this meeting was revealed, President Trump personally dictated a misleading public statement on behalf of his son as to the intended purpose of the meeting.

Advocating illegal violence, giving aid and comfort to white supremacists and neo-Nazis, and undermining constitutional protections of equal protection under the law

Over the course of 2017, the president has made a series of public statements that, together, constitute a pattern. For example, he has openly encouraged police officers to physically mistreat arrested persons; encouraged the military to execute Muslim prisoners of war; equated the violent white supremacists and neo-Nazis in Charlottesville, Virginia with the protesters against them; and shared inflammatory anti-Muslim videos on Twitter from the account of a far-right white supremacist. Taken as a whole, this pattern of conduct violates his constitutional obligation to "take care that the laws be faithfully executed," protect the citizenry against "domestic Violence," and ensure "the equal protection of the laws."

Abusing the pardon power

On August 25, 2017, President Trump pardoned former Arizona sheriff Joseph Arpaio, who had been convicted of criminal contempt of court for willfully violating a court order to stop violating the constitutional rights of Latino drivers. This unprecedented pardon, and the president's public statements explaining the rationale, expressed contempt for equal protection of the laws and the ability of the courts to protect constitutional rights. The president's very first pardon sent a dangerous message that

similarly-inclined unscrupulous law enforcement officials could not only violate individual rights, but could also violate court orders requiring them to stop violating those rights with impunity because the president would support them.

Recklessly threatening nuclear war against foreign nations, undermining and subverting the essential diplomatic functions and authority of federal agencies, including the United States Department of State, and engaging in other conduct that grossly and wantonly endangers the peace and security of the United States, its people and people of other nations, by heightening the risk of hostilities involving weapons of mass destruction, with reckless disregard for the risk of death and grievous bodily harm

Through a series of public statements (including on Twitter), and beginning particularly in the late summer of 2017, President has made increasingly reckless public threats against North Korea. It is not clear whether President Trump understands the ramifications of his actions. Reported statements indicate that the Secretary of State and the National Security Advisor, and perhaps other senior leaders, believe that the president does not understand (and is incapable of understanding) the facts necessary to make an informed decision regarding nuclear weapons or matters involving North Korea. The existing tension between, and lack of accurate understanding of intentions of the leadership of, the United States and North Korea means that threats of invasion or bombing could easily lead to a misunderstanding or miscalculation resulting in the use of nuclear weapons by either or both sides. While the president is the “Commander in Chief of the Army and Navy of the United States,” reckless or wanton conduct with the potential for millions of deaths constitutes an abuse of power.

Directing or endeavoring to direct law enforcement, including the Department of Justice and the Federal Bureau of Investigation, to investigate and prosecute political adversaries and others, for improper purposes not justified by any lawful function of his office, thereby eroding the rule of law, undermining the independence of law enforcement from politics, and compromising the constitutional right to due process of law

Over the course of 2017, President Trump repeatedly pressured the Department of Justice and the Federal Bureau of Investigation to investigate and prosecute political adversaries, including former campaign opponent Hillary Clinton and the Democratic Party. The president’s attempts to employ the criminal investigative powers of the federal government against political opponents for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office are grounds for impeachment, regardless of whether they have yet succeeded in influencing law enforcement.

Undermining the freedom of the press

President Trump has repeatedly attacked major U.S. news organizations as “fake news” and “the enemy of the American people.” His administration has also taken retaliatory measures against the independent press. President Trump’s rhetoric has encouraged authoritarian foreign governments to attack the very U.S. media that he criticizes. To be sure, President Trump is certainly free to criticize particular news stories that he believes are inaccurate, and no one tweet in isolation constitutes an impeachable offense. But his consistent pattern of denigrating journalistic institutions as “fake news” based on little more than dislike of their coverage, threatening (even if empty) to somehow change libel laws to reduce First Amendment protection for press, and suggesting revocation of licenses for television networks with critical coverage, undermines a critical foundation of a free society.

*

Some of the conduct described above overlaps with the criminal investigation of Special Counsel Robert S. Mueller III; some overlaps with pending federal litigation regarding emoluments, or the pardon of Mr. Arpaio. (Other conduct does not overlap with any parallel proceeding.) However, an *impeachment* investigation is entirely separate from a criminal or other judicial proceeding. These two types of proceedings address different questions, using different procedural and evidentiary rules, and criminal or civil litigation may be subject to judicial limits that have no relevance to an impeachment proceeding.

Ultimately, the purpose of impeachment is not to punish for past crimes, but to remove from office a dangerous official who threatens the rule of law and the republic itself. Congress must not use the Mueller investigation or other litigation as an excuse to shirk its duty to conduct its own independent impeachment hearings. The abuse of power, the corruption, and the threat to our republic are here now.

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I. INTRODUCTION TO IMPEACHMENT

A. The impeachment process

The U.S. Constitution provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”¹

The “sole Power of Impeachment”—that is, to launch impeachment charges—lies with the House of Representatives.² Typically, a resolution calling for an investigation is referred to the House Committee on Rules, which may in turn refer it to the House Judiciary Committee for investigation.³ The Judiciary Committee has the power to subpoena witnesses and documents in the course of its investigation. The Judiciary Committee may then report articles of impeachment for a full House vote. The House can approve these articles by simple majority. If the House votes to approve the articles of impeachment, the official is deemed to have been impeached.

If the House votes to impeach, then the full Senate conducts a trial. When the president is tried, the Chief Justice of the Supreme Court presides.⁴

The Constitution requires at least a two-thirds majority of the Senate to convict in an impeachment trial.⁵ A judgment of conviction “shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”⁶

¹ U.S. Const. art. II, § 4.

² U.S. Const. art. I, § 2, cl. 5.

³ Lewis Deschler, *Precedents of the U.S. House of Representatives*, ch. 14 § 5.11; T.J. Halstead, Congressional Research Serv., *An Overview of the Impeachment Process* 2-3 (Apr. 20, 2005).

⁴ U.S. Const. art. I, § 3, cl. 6-7.

⁵ *Id.*

⁶ U.S. Const. art. I, § 3, cl. 7.

B. Legal standard for impeachment

As noted above, impeachable offenses are “Treason, Bribery, or other high Crimes and Misdemeanors.”⁷ The phrase “high Crimes and Misdemeanors” is a term of art that the Framers understood from English history.⁸ “High crimes” refer to offenses committed against the state by public officials.⁹ And the use of “other” implies that high crimes and misdemeanors bear some similarity to the enumerated violations of “treason” and “bribery.”¹⁰ Like treason, high crimes and misdemeanors may threaten our constitutional order; like bribery, they may abuse the trust of a public position by using such power for corrupt ends.¹¹

Furthermore, “high crimes and misdemeanors” includes conduct that is not criminal.¹² As Congress has repeatedly explained:

The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined “other high Crimes and Misdemeanors”

⁷ U.S. Const. art. II, § 4. The Founders settled on this language after first considering and rejecting various alternatives, including a narrower alternative that would have only allowed impeachment for treason and bribery, and a broader alternative that would have allowed impeachment for “maladministration.” See James Madison, *Debates in the Federal Convention of 1787*, http://avalon.law.yale.edu/18th_century/debates_908.asp (Sept. 8, 1787); Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 Geo. Wash. L. Rev. 712, 718-19 (1999).

⁸ Charles Doyle, Congressional Research Serv., *Impeachment Grounds: A Collection of Selected Materials* 1, 26 (Oct. 29, 1998); Gary L. McDowell, “High Crimes and Misdemeanors”: *Recovering the Intentions of the Founders*, 67 Geo. Wash. L. Rev. 626, 638 (1999).

⁹ McDowell, *supra* note 8, 67 Geo. Wash. L. Rev. at 638.

¹⁰ Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 Geo. Wash. L. Rev. 712, 717 (1999).

¹¹ See *id.* at 718.

¹² See Jared P. Cole & Todd Garvey, Congressional Research Serv., *Impeachment and Removal* 1, 7–9 (Oct. 29, 2015), <https://fas.org/sgp/crs/misc/R44260.pdf>; see also The Federalist No. 65 (Alexander Hamilton), http://avalon.law.yale.edu/18th_century/fed65.asp (impeachable offenses are “of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself”).

to be serious violation of the public trust, not necessarily indictable offenses under criminal laws.¹³

Indeed, “[m]any of the impeachments approved by the House of Representatives have included conduct that did not involve criminal activity. Less than a third have specifically invoked a criminal statute or used the term ‘crime.’”¹⁴ The renowned early nineteenth century commentator and U.S. Supreme Court Justice Joseph Story summarized impeachable offenses as offenses “committed by public men in violation of their public trust and duties.”¹⁵ Importantly, the purpose of impeachment is not to *punish*, but to *protect* the body politic by removing a lawless president to prevent him from further harming the country.¹⁶ As Justice Story explained, “It is not so much designed to punish an offender, as to *secure the state* against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity.”¹⁷

This distinction between violations of the criminal code that can lead to criminal indictments, prosecution and conviction, and the high crimes and misdemeanors that can lead to impeachment and removal from office, is especially important when, as now, a special counsel has been appointed to conduct a criminal investigation. The special counsel may uncover evidence pertinent to an impeachment inquiry, but much of the evidence is available to the House Committee on the Judiciary. And under the Constitution, the Committee may report out, and the House may approve, articles of impeachment even in the absence of indictable offenses. The impeachment inquiry and the special counsel’s investigation are bound by different rules, and should proceed on separate tracks.¹⁸

¹³ H.R. Rep. No. 111-159, at 5 (2009), <https://www.congress.gov/111/crpt/hrpt159/CRPT-111hrpt159.pdf> (quoting H.R. Rep. No. 101-36, at 5 (1989)); *see also id.* at 6 (“[T]he phrase ‘high Crimes and Misdemeanors’ ‘refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct.’”) (quoting H.R. Rep. No. 100-810, at 6 (1988)).

¹⁴ Cole, *Impeachment and Removal*, *supra* note 12, at 9.

¹⁵ Joseph Story, *Commentaries on the Constitution* § 746, at 547 (5th ed. 1891), http://press-pubs.uchicago.edu/founders/documents/a1_2_5s18.html.

¹⁶ *See* Greg Weiner, *Impeachment’s Political Heart*, N.Y. Times, May 18, 2017, <https://nyti.ms/2rwnH5j>.

¹⁷ Story, *supra* note 15, § 801 (emphasis added).

¹⁸ *See* Part IV *infra* for further discussion.

II. GROUNDS FOR AN IMPEACHMENT INVESTIGATION OF PRESIDENT TRUMP

The grounds for an impeachment investigation of the current president are set forth here as distinct grounds, even though, in contrast to a criminal indictment, for purposes of impeachment there is no requirement that “an official’s course of conduct must be divided into offenses, and then each offense must be judged separately as to whether it is impeachable.”¹⁹ Rather:

Although the House has returned multi-count impeachments in the past, it has been well understood that the official’s course of conduct as a whole should be the subject of judgment. . . . Moreover, other things being equal, a pattern of misconduct may be more probative of unfitness than an isolated criminal act. Thus, the nature of both the consequences and the proof in impeachment proceedings suggests that offenses should be considered collectively in determining whether an official should be removed from office.²⁰

With that background, as set forth in more detail below, the grounds for opening an impeachment investigation as of this date include:

1. Obstructing justice
2. Violating the Foreign Emoluments Clause and Domestic Emoluments Clause of the United States Constitution
3. Conspiring with others to commit crimes involving his presidential campaign’s solicitation and receipt of things of value from a foreign government and other foreign nationals, and to conceal those violations
4. Advocating illegal violence, giving aid and comfort to white supremacists and neo-Nazis, and undermining constitutional protections of equal protection under the law
5. Abusing the pardon power
6. Recklessly threatening nuclear war against foreign nations, undermining and subverting the essential diplomatic functions and authority of federal agencies, including the United States Department of State, and engaging in other conduct that grossly and wantonly endangers the peace and security of the United States, its people and people of other nations, by heightening the risk

¹⁹ John O. McGinnis, *Impeachment: The Structural Understanding*, 67 Geo. Wash. L. Rev. 650, 659 (1999).

²⁰ *Id.*

of hostilities involving weapons of mass destruction, with reckless disregard for the risk of death and grievous bodily harm

7. Directing or endeavoring to direct law enforcement, including the Department of Justice and the Federal Bureau of Investigation, to investigate and prosecute political adversaries and others, for improper purposes not justified by any lawful function of his office, thereby eroding the rule of law, undermining the independence of law enforcement from politics, and compromising the constitutional right to due process of law
8. Undermining the freedom of the press

III. DISCUSSION OF EACH GROUND

A. Obstructing justice

1. Facts

Obstruction of justice can be established from facts that are already known about the president's course of conduct. Even if any one item standing alone is not conclusive, together they form a clear pattern. Much of the evidence comes from President Trump's own mouth on camera or his Twitter feed. The House Judiciary Committee can investigate the rest through documents and examination of witnesses (including, potentially, President Trump himself). Furthermore, the House's impeachment investigation will not require advanced investigative techniques, such as forensic science or signals intelligence, or evidence from Special Counsel Robert Mueller's criminal investigation.²¹ Nor does congressional investigation need to be held up until Mueller's report is completed.

The principal facts are publicly available from President Trump's own statements (on camera and on Twitter), from testimony given in Congress,²² and from news reports in reliable mainstream outlets. The key points are summarized here; for a more

²¹ See Part IV *infra* for further discussion on this point.

²² Former Acting Attorney General Sally Yates testified to a Senate Judiciary Committee subcommittee hearing on May 8, 2017. Director of National Intelligence Dan Coats and National Security Agency Director Admiral Michael Rogers testified to the Senate Intelligence Committee on June 7, 2017. Former Federal Bureau of Investigation Director James Comey testified to that committee on June 8, 2017. Comey's testimony included a prepared written statement submitted on June 7. James B. Comey, *Statement for the Record*, June 8, 2017, <https://www.intelligence.senate.gov/sites/default/files/documents/os-jcomey-060817.pdf>.

detailed recitation, see an October 2017 report issued by the Brookings Institution.²³ If accurate, they indicate the following course of conduct:²⁴

a. Improper demand for loyalty

On January 26, 2017, President Trump learned that the FBI was investigating Lieutenant General (and then National Security Advisor) Michael Flynn. That day, then-Acting Attorney General Sally Yates warned White House Counsel Donald McGahn about dishonest statements made by General Flynn that she believed made Flynn a risk to national security.²⁵ As the White House later stated, “[i]mmmediately after the Department of Justice notified the White House Counsel of the situation, the White House Counsel briefed the president and a small group of senior advisors.”²⁶

The very next day, January 27, President Trump invited FBI Director Comey to a private one-on-one dinner at the White House. At that dinner, according to Comey’s written Statement for the Record to the Senate Intelligence Committee dated June 8, 2017:

The President began by asking me whether I wanted to stay on as FBI Director, which I found strange because he had already told me twice in earlier conversations that he hoped I would stay, and I had assured him that I intended to. He said that lots of people wanted my job and, given the abuse I had taken during the previous year, he would understand if I wanted to walk away. *My instincts told me that the one-on-one setting, and the pretense that this was our first discussion about my position, meant the dinner was, at least in part, an effort to have me ask for my job and create some sort of patronage relationship.* That concerned me

²³ See generally Barry H. Berke, Noah Bookbinder, and Norman L. Eisen, Brookings Governance Studies, *Presidential Obstruction of Justice: The Case of Donald J. Trump* (Oct. 10, 2017), <http://brook.gs/2jadWLb>.

²⁴ See also Part III.C *infra*.

²⁵ Matt Apuzzo & Emmarie Huetteman, *Sally Yates Tells Senators She Warned Trump About Michael Flynn*, May 8, 2017, <http://nyti.ms/2s0CoB7>. On December 1, 2017, Flynn pleaded guilty to making false statements to the FBI regarding interactions with the Russian government, in violation of 18 U.S.C. § 1001. See Dan Mangan, *Read: Michael Flynn’s plea agreement and how he lied to FBI*, CNBC, Dec. 1, 2017, <http://cnb.cx/2AKZd0E>; United States v. Flynn, No. 17-CR-00232-RC (filed D.D.C. Nov. 30, 2017).

²⁶ Office of the Press Secretary, The White House, *Press Briefing by Press Secretary Sean Spicer*, <https://www.whitehouse.gov/the-press-office/2017/02/14/press-briefing-press-secretary-sean-spicer-2142017-12> (Feb. 14, 2017).

greatly, given the FBI's traditionally independent status in the executive branch.

...

A few moments later, the President said, "I need loyalty, I expect loyalty."

...

Near the end of our dinner, the President returned to the subject of my job, saying he was very glad I wanted to stay, adding that he had heard great things about me from Jim Mattis, Jeff Sessions, and many others. *He then said, "I need loyalty."*²⁷

The president's statements appear to be an attempt to gain influence over and/or intimidate the official in charge of a pending investigation. They can also be viewed as a form of bribery: offering to allow Director Comey to keep his job, on the condition that he would be "loyal" to the president.

b. Improper request to abandon investigation

After disclosure of some of the facts regarding General Flynn's false statements, Flynn was forced to resign on February 13, 2017. The next day, on February 14, 2017, President Trump met in the Oval Office with Director Comey and other top officials: Vice President Michael Pence, Attorney General Jefferson Sessions, the Deputy Director of the CIA, the Director of the National Counter-Terrorism Center, the Secretary of Homeland Security, and Jared Kushner. At the end of the meeting, the president asked everyone but Director Comey to leave the room.

As Comey later testified, he observed that Attorney General Sessions hesitated before leaving. Comey testified: "My sense was the attorney general knew he shouldn't be leaving, which is why he was lingering."²⁸

Once the president was alone with FBI Director Comey, the president asked Comey to abandon the investigation into General Flynn. According to Comey's testimony:

When the door by the grandfather clock closed, and we were alone, the President began by saying, "I want to talk about Mike Flynn." . . . [After discussing other topics, the] President then returned to the topic of Mike Flynn, saying, "He is a good guy and has been through a lot." He repeated that Flynn hadn't done anything wrong on his calls with the Russians, but had misled the Vice President. He then said, "*I hope you*

²⁷ Comey, *Statement for the Record*, *supra* note 22 (emphases added).

²⁸ Comey, *Statement for the Record*, *supra* note 22.

can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.” . . .

I immediately prepared an unclassified memo of the conversation about Flynn and discussed the matter with FBI senior leadership. *I had understood the President to be requesting that we drop any investigation of Flynn in connection with false statements about his conversations with the Russian ambassador in December.* I did not understand the President to be talking about the broader investigation into Russia or possible links to his campaign. I could be wrong, but I took him to be focusing on what had just happened with Flynn’s departure and the controversy around his account of his phone calls. Regardless, *it was very concerning, given the FBI’s role as an independent investigative agency. The FBI leadership team agreed with me that it was important not to infect the investigative team with the President’s request, which we did not intend to abide.*²⁹

In his testimony to the Senate Intelligence Committee on June 8, Director Comey testified that, when the president expressed a “hope” that Comey would “let this go,” he took it as more than a suggestion: “I took it as a direction. He’s the president of the United States, with me alone, saying, ‘I hope this.’ I took it as this is what he wants me to do.”

President Trump’s direction to “let this go” was an impermissible attempt to interfere with the ongoing FBI investigation into General Flynn.³⁰

c. Improper pressure to make public statements regarding investigation

On March 30, 2017, President Trump called Director Comey and asked him when federal authorities were going to state publicly that Mr. Trump was not personally under investigation.³¹ This was not a new request; on February 15, White House Chief of Staff Reince Priebus reportedly called Director Comey and asked Comey’s

²⁹ Comey, *Statement for the Record*, *supra* note 22 (emphases added).

³⁰ The president’s insistence that Flynn was a “good guy” also contributes to this point. “Providing a positive assessment of the subject of an investigation to a key decision-maker can also support a finding of obstruction.” Berke et al., *supra* note 23, at 42; see *United States v. Torquato*, 316 F. Supp. 846, 848 (W.D. Pa. 1970) (defendants obstructed justice under 18 U.S.C. § 1503 by asking intermediaries to tell a juror that an ally was a “good man who needed help”).

³¹ Comey, *Statement for the Record*, *supra* note 22.

help in countering news reports that Mr. Trump's associates had been in contact with Russian intelligence officials during the campaign.³²

Comey did not agree to the president's request, in part because such a statement would be potentially misleading, depending on what the ongoing investigation might reveal. As he testified:

I did not tell the President that the FBI and the Department of Justice had been reluctant to make public statements that we did not have an open case on President Trump for a number of reasons, *most importantly because it would create a duty to correct, should that change.*³³

The President's request was an attempt to prevent, or interfere with, an FBI investigation into Mr. Trump and his associates. So too was the call made by the president's chief of staff which, according to precedent from the Nixon impeachment investigation, is attributable to the president himself because the chief of staff was acting as the president's agent.³⁴

d. Attempt to misuse intelligence officials to interfere with investigation

In March 2017, President Trump reportedly asked two top intelligence officials to publicly deny the existence of any evidence against Trump in the matter under FBI investigation.³⁵ According to news reports, the following sequence unfolded:

On March 22, shortly after Director Comey's March 20 testimony to the House Intelligence Committee that the FBI was investigating "the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts," Director of National Intelligence Daniel Coats and CIA Director Michael Pompeo reportedly attended a briefing at the White House along with other government officials. At the end of the briefing, President Trump reportedly asked everyone to clear the room except for Director of National Intelligence Coats and CIA Director Pompeo. He then complained to them about the FBI's Russia investigation.³⁶

³² Michael S. Schmidt, *Comey, Unsettled by Trump, Is Said to Have Wanted Him Kept at a Distance*, N.Y. Times, May 18, 2017, <http://nyti.ms/2s0oZZS>.

³³ *Statement for the Record*, *supra* note 22.

³⁴ *See infra* notes 58-59.

³⁵ Adam Entous & Ellen Nakashima, *Trump asked intelligence chiefs to push back against FBI collusion probe after Comey revealed its existence*, Wash. Post, May 22, 2017, <http://wapo.st/2ruKr9n>.

³⁶ Adam Entous, *Top intelligence official told associates Trump asked him if he could intervene with Comey on FBI Russia probe*, Wash. Post, June 6, 2017, <http://wapo.st/2se4JnX>.

Then on March 22 or 23, Trump personally called Director of National Intelligence Coats and asked him to publicly deny any evidence of collusion between the Trump campaign and Russian officials.³⁷ Director Coats reportedly deemed the request inappropriate, and refused to comply. Shortly afterwards, President Trump made a similar request to Admiral Michael Rogers, the NSA director, who similarly refused. (Trump’s conversation with Admiral Rogers was documented in a contemporaneous internal memo written by a senior NSA official.)

At about the same time, “senior White House officials sounded out top intelligence officials about the possibility of intervening directly with Comey to encourage the FBI to drop its probe of Michael Flynn.” The line of questioning was reportedly paraphrased by one official as “Can we ask him to shut down the investigation? Are you able to assist in this matter?”³⁸

If these news reports are accurate,³⁹ this was an attempt to misuse federal officials to interfere with another agency’s investigation. It is even more direct than President Nixon’s “smoking gun” tape, in which (among other things) he asked his chief of staff to ask the Central Intelligence Agency to help derail an FBI investigation.⁴⁰ Here, President Trump called the intelligence officials himself.

e. Improper attempt to enforce “loyalty” commitment

On April 11, according to Comey’s testimony, the president called Comey and asked him what he had done to convey publicly that the president was not personally under investigation. Comey recommended that the president convey his request to Department of Justice leadership. According to Comey:

[Trump] said he would do that and added, “*Because I have been very loyal to you, very loyal; we had that thing you know.*” I did not reply or ask him what he meant by “that thing.”⁴¹

³⁷ *Id.*

³⁸ Entous & Nakashima, *supra* note 35.

³⁹ In testimony to the Senate Intelligence Committee, Director Coats and Admiral Rogers gave carefully worded answers that they had never been “pressured” or “directed” to do anything illegal or inappropriate, but refused to answer direct questions about whether they had been “asked” to do such things. *See* Hearing before the Senate Select Comm. on Intelligence, *Foreign Intelligence Surveillance Act*, June 7, 2017, C-SPAN, <http://c-spanvideo.org/xaa6d/>; Nolan D. McCaskill, *Key moments from intel chiefs’ testimony on Trump and Russia*, Politico, June 7, 2017, <http://politi.co/2rLQMen>.

⁴⁰ *The Smoking Gun Tape*, Watergate.info, <http://watergate.info/1972/06/23/the-smoking-gun-tape.html>.

⁴¹ Comey, *Statement for the Record*, *supra* note 22.

In trying to box Director Comey into making a public statement with references to being “loyal to you” because of “that thing,” President Trump was trying to enforce the improper loyalty commitment that he demanded (and may have thought he received) from Comey on January 27, apparently in exchange for his continued employment.

At the same time, President Trump sought loyalty from Flynn. On April 25, the president reportedly told Flynn to “stay strong.”⁴²

f. Misuse of federal officials to provide false pretext

By his own later admission, on or before May 8, 2017, President Trump decided to fire Director Comey because of the investigation in question.⁴³ However, he first enlisted Deputy Attorney General Rod Rosenstein and Attorney General Jeff Sessions to create pretextual memos offering an unrelated basis to fire FBI Director Comey—that Comey had improperly disclosed information about a separate investigation involving Hillary Clinton before the 2016 election and before the president’s decision to retain Comey as the FBI Director. Deputy Attorney General Rosenstein later told Congress in a prepared statement:

On May 8, I learned that President Trump intended to remove Director Comey and sought my advice and input. . . . I wrote a brief memorandum to the Attorney General summarizing my longstanding concerns about Director Comey’s public statements concerning the Secretary Clinton email investigation. I chose the issues to include in my memorandum.⁴⁴

The timing and order of those events are extremely significant. President Trump *first* decided to fire Comey, *then*, at the president’s direction, Deputy Attorney General Rosenstein prepared a memorandum describing a rationale for the firing based on grounds *that Rosenstein himself identified*. The grounds set forth in Rosenstein’s memo therefore could not have formed the basis for President Trump’s earlier

⁴² Michael Isikoff, *As investigators circled Flynn, he got a message from Trump: Stay strong*, Yahoo News, May 18, 2017, <https://yhoo.it/2iJNiZQ>; cf. *United States v. Strode*, 552 F.3d 630, 634-35 (7th Cir. 2009) (affirming sentencing enhancement for obstruction of justice where defendant asked co-defendants to “stay strong”).

⁴³ See *infra* Part III.A.1.g.

⁴⁴ Kevin Johnson, *Here’s what Deputy AG Rod Rosenstein told Congress about James Comey’s firing*, USA Today, May 19, 2017, <https://usat.ly/2rzPXns>.

decision to fire Director Comey and, to the extent that the president pointed to the Rosenstein memo, the grounds contained in that memo were pretextual.⁴⁵

President Trump's use of federal employees to create a false pretext is independent evidence of obstruction of justice. The president intended to mislead any future investigation and thereby impede or obstruct the administration of justice.

g. Termination of FBI director to interfere with an ongoing investigation

On May 9, 2017, President Trump fired Director Comey. While the president initially claimed this was for reasons cited in the pretextual memos, just two days later (May 11) Trump explained the real reason to NBC interviewer Lester Holt:⁴⁶

I—I was going to fire Comey. Uh I—there's no good time to do it by the way. . . . [Deputy Attorney General Rosenstein] made a recommendation but regardless of recommendation I was going to fire Comey knowing, there was no good time to do it. And in fact when I decided to just do it, I said to myself, I said you know, this Russia thing with Trump and Russia is a made up story, it's an excuse by the Democrats for having lost an election that they should have won.

On its face, the president's on-camera statement constitutes an admission that he fired FBI Director Comey because the president wished to impede the course of a specific investigation ("this Russia thing with Trump and Russia"). Congress could reasonably conclude that president fired Comey to inhibit or end that investigation.

On May 10 (the day after the Comey firing but one day before President Trump explained the real reason to Lester Holt), the president revealed his motive for the firing to the Russian ambassador and foreign minister in the Oval Office, in the presence of several American officials. According to meeting notes that the White House does not dispute, the president stated: "I just fired the head of the F.B.I. He

⁴⁵ Reportedly, President Trump and political aide Stephen Miller first drafted a letter that more closely represented the president's actual thinking. White House Counsel McGahn apparently prevailed on the president not to issue that letter, but Rosenstein received a copy before drafting his own letter. See Michael S. Schmidt & Maggie Haberman, *Mueller Has Early Draft of Trump Letter Giving Reasons for Firing Comey*, N.Y. Times, Sept. 1, 2017, <https://nyti.ms/2wYeSYw>.

⁴⁶ *Watch Lester Holt's Extended Interview With President Trump*, NBC News, May 11, 2017, <http://nbcnews.to/2s0iLJq>; *Partial transcript: NBC News interview with Donald Trump*, CNN, May 11, 2017, <http://cnn.it/2pDDa2S>.

was crazy, a real nut job. I faced great pressure because of Russia. That's taken off. I'm not under investigation."⁴⁷ This unsolicited statement confirms that his reason for firing Director Comey was because the president personally "faced great pressure" from the FBI's investigation. With Comey gone, he believed, "[t]hat's taken off."

As Comey testified to the Senate Intelligence Committee on June 8, 2017: "I was fired in some way to change, or the endeavor was to change, the way the Russia investigation was being conducted. And that is a very big deal."

President Trump's decision to fire Director Comey because of his claim that "this Russia thing with Trump and Russia is a made up story" and that firing Comey would "take[] off" the "great pressure" he faced "because of Russia" constituted interfering or endeavoring to interfere with the conduct of an investigation by the Federal Bureau of Investigation by firing its director.

h. Attempt to intimidate a witness by insinuating that he had recorded conversations

On May 12, 2017, after widespread negative reaction to the Comey firing among the public, media, and members of Congress, President Trump tweeted:⁴⁸

James Comey better hope that there are no "tapes" of our conversations before he starts leaking to the press!

This tweet was almost certainly intended to deter Comey (now no longer a law enforcement officer, but a witness in a potential obstruction case) from speaking out. It was designed (even if it did not succeed) to threaten and intimidate Comey to discourage him from sharing unfavorable information about the president.

In short, President Trump engaged in a sustained course of attempts to interfere with ongoing FBI investigations. He first asked FBI Director Comey to abandon his investigations; when Comey would not, he tried to enlist other government officials to get Comey to abandon the investigations; when that did not work either, Trump enlisted federal officials to develop a pretextual rationale and fired him. And even after the firing, Trump attempted to intimidate Comey over Twitter. The evidence is compelling, does not require sophisticated investigative techniques, and in several instances, comes from the president's own mouth on video, on Twitter, or in the presence of reputable witnesses.

⁴⁷ Matt Apuzzo *et al.*, *Trump Told Russians That Firing 'Nut Job' Comey Eased Pressure From Investigation*, N.Y. Times, May 19, 2017, <http://nyti.ms/2sY5b6n>.

⁴⁸ <https://twitter.com/realDonaldTrump/status/863007411132649473>

i. Attempt to interfere with congressional investigations

Over the summer of 2017, President Trump repeatedly urged leaders in Congress, to end their investigations. According to Senator Richard Burr of North Carolina, the chairman of the Senate Intelligence Committee, Trump in essence told him: “I hope you can conclude this as quickly as possible.”⁴⁹ Trump also reportedly told Senate Majority Leader Mitch McConnell of Kentucky, and Senator Roy Blunt of Missouri, a member of the intelligence committee, to end the investigation swiftly.⁵⁰ Apparently, he “complained frequently to Mr. McConnell about not doing enough to bring the investigation to an end.”⁵¹ And, while on a flight with Senator Blunt on Air Force One in August 2017, the president urged Senator Blunt “to wrap up this investigation.”⁵² President Trump also asked other Republican senators to lobby Senator Burr to close the Russia investigation.⁵³

2. Legal analysis

Obstruction of justice is undoubtedly an impeachable offense. William Blackstone’s influential *Commentaries on the Laws of England* lists, as the third example of those “crimes and misdemeanors, that more especially affect the common-wealth”: “*obstructing* the execution of lawful *process*,” which he described as “at all times an offence of a very high and presumptuous nature.”⁵⁴

Obstruction of justice has played a central role in earlier impeachment proceedings against U.S. presidents. It grounded the first article of impeachment against President Nixon approved by the House Judiciary Committee in 1974.⁵⁵ That article cited President Nixon for, among other things, “interfering or endeavouring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special

⁴⁹ Jonathan Martin et al., *Trump Pressed Top Republicans to End Senate Russia Inquiry*, N.Y. Times, Nov. 30, 2017, <https://nyti.ms/2BBmbo4>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 4 William Blackstone, *Commentaries on the Laws of England* *129 (emphases in original); see also Gary L. McDowell, “*High Crimes and Misdemeanors*”: *Recovering the Intentions of the Founders*, 67 Geo. Wash. L. Rev. 626, 640-41 (1999).

⁵⁵ H.R. Rep. No. 93-1305, 120 Cong. Rec. 29,220 (1974). The full articles of impeachment approved by the House Judiciary Committee against President Nixon, including the specification of charges (bill of particulars), as well as two articles rejected by the Committee, have been made available online at *Articles of Impeachment against Richard M. Nixon*, <https://www.colorado.edu/AmStudies/lewis/1025/articlesNixon.pdf>.

Prosecution Force and Congressional Committees.”⁵⁶ Similarly, in 1998 the House of Representatives approved an article of impeachment against President Clinton for obstruction of justice.⁵⁷

Some of the reported conduct occurred through the president’s subordinates. While “no president can or should be held responsible for the wrongs of all persons working under him,” actions by subordinates may be attributed to the president in impeachment proceedings based on “the extent of the president’s knowledge and moral culpability.”⁵⁸ In the second article of impeachment against President Nixon, Congress set a precedent by including a pattern of activity by subordinates.⁵⁹

The *high crime or misdemeanor* of obstruction of justice is separate from, and broader than, the *federal criminal offense* of obstructing justice. Indeed, as noted earlier, scholars and Congress broadly agree that impeachable offenses need not even be crimes.⁶⁰ And leading constitutional scholar Professor Laurence Tribe has noted that Congress could take a broader view of the *intent* necessary for obstruction for impeachment purposes than would be appropriate in a criminal proceeding in that, while the federal obstruction statutes typically require that the defendant intended to interfere with a specific proceeding, Congress could properly take a broader view of obstruction for impeachment purposes.⁶¹ Nonetheless, it is also possible that some of President Trump’s conduct may also violate federal criminal statutes such as 18 U.S.C. §§ 1503, 1505, and 1512.⁶²

⁵⁶ *Id.*

⁵⁷ *Approved articles of impeachment*, Wash. Post, Dec. 20, 1998, <http://wapo.st/2s0muqe>.

⁵⁸ Jane Chong, *To Impeach a President: Applying the Authoritative Guide from Charles Black*, Lawfare (July 20, 2017), <https://www.lawfareblog.com/impeach-president-applying-authoritative-guide-charles-black>; Charles L. Black, Jr., *Impeachment: A Handbook* (1974), <https://lawfareblog.com/impeachable-offense>.

⁵⁹ *See Articles of Impeachment against Richard M. Nixon*, *supra* note 55.

⁶⁰ *See, e.g.*, Jared P. Cole & Todd Garvey, Congressional Research Serv., *Impeachment and Removal* 8-9 (Oct. 29, 2015), <https://fas.org/sgp/crs/misc/R44260.pdf>; House Judiciary Comm., *Constitutional Grounds for Presidential Impeachment* 21-25 (93d Cong., Feb. 1974), <http://bit.ly/1974StaffReport>; Gene Healy, *The Overcriminalization of Impeachment*, Cato at Liberty, Aug. 7, 2017, <https://www.cato.org/blog/overcriminalization-impeachment>.

⁶¹ Laurence H. Tribe, *Why Impeachment Must Remain A Priority*, Take Care Blog, May 23, 2017, <http://takecareblog.com/blog/why-impeachment-must-remain-a-priority>.

⁶² *See* Berke et al., *supra* note 23.

B. Violating the Foreign Emoluments Clause and Domestic Emoluments Clause of the United States Constitution

President Trump continues to own and profit from a broad range of personal and business holdings in the United States and abroad. His income from these business holdings, most or all of which are collected under the umbrella of the Trump Organization, implicates two different prohibitions of the U.S. Constitution: the Foreign Emoluments Clause and the Domestic Emoluments Clause.

On January 11, 2017, the Trump Organization’s tax law firm announced a plan to transfer *management* control of the Trump Organization to Mr. Trump’s sons and a senior executive, without removing Mr. Trump’s *ownership* stake.⁶³ Instead, Mr. Trump has apparently transferred his ownership stakes in various Trump business entities to “The Donald J. Trump Revocable Trust.” This trust, of which Mr. Trump’s son and the Trump Organization’s chief financial officer are trustees, has as its purpose “to hold assets for the ‘exclusive benefit’ of the president,” and uses Mr. Trump’s Social Security number as its taxpayer identification number.⁶⁴ Mr. Trump knows which businesses his trust owns, and how his actions as President may affect their income and value. The trust is run not by an independent trustee, but by his own son and longtime chief financial officer. And he can revoke the trust at any time.⁶⁵ This arrangement does not diminish Mr. Trump’s ability to enrich himself during his presidency with funds from constitutionally prohibited sources, and even to shape U.S. policy to preserve and promote his business assets—an outcome the founders expressly intended to prevent (as discussed in the legal analysis that follows).

1. Emoluments from foreign governments

The U.S. Constitution’s Foreign Emoluments Clause provides: “[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever,

⁶³ See *Donald Trump’s News Conference: Full Transcript and Video*, N.Y. Times, Jan. 11, 2017, <http://nyti.ms/2kHSolf>.

⁶⁴ Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. Times, Feb. 3, 2017, <https://nyti.ms/2kytJIP>. Similarly, on February 3, 2017, the Trump Organization filed paperwork to transfer *management* of the LLCs and corporations that operate the Trump International Hotel to Mr. Trump’s sons, without removing Mr. Trump’s *ownership* stake. See Patrick Madden, *It’s Official: Trump’s Son Takes Over Pennsylvania Avenue Hotel*, WAMU, Feb. 6, 2017, <http://bit.ly/2lkv9S5>.

⁶⁵ See Craig & Lipton, *supra* note 64, <https://nyti.ms/2kytJIP>.

from any King, Prince, or foreign State.”⁶⁶ The purpose of this provision is to prevent foreign influence or corruption, and the conflicts of interest and improper dependence that arise when a president’s policy considerations and actions are intermingled with his interest in personal financial benefits from foreign governments. “Emoluments” from foreign governments include “any conferral of a benefit or advantage, whether through money, objects, titles, offices, or economically valuable waivers or relaxations of otherwise applicable requirements,” even including “ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder.”⁶⁷

A Washington Post analysis of Mr. Trump’s financial filings found that at least 111 Trump companies do or have done business in 18 countries and territories around the world.⁶⁸ Many of the Trump Organization’s extensive business dealings include receipt of payments or other benefits from foreign governments, businesses owned by foreign governments, and other foreign leaders. That creates the appearance that foreign governments can gain favorable treatment from the United States by doing business with the Trump Organization. Some of the most egregious examples include the following.⁶⁹

Foreign payments at the Trump International Hotel in Washington, D.C.

Shortly after the election, “[a]bout 100 foreign diplomats, from Brazil to Turkey, gathered at the Trump International Hotel [in Washington, D.C.] to sip Trump-

⁶⁶ U.S. Const., art. I, § 9, cl. 8. This ban is located within a clause addressing both titles of nobility and foreign payments, and is variously called the Titles of Nobility Clause, the Foreign Corruption Clause, or the Foreign Emoluments Clause.

⁶⁷ Norman L. Eisen, Richard Painter, & Laurence H. Tribe, Brookings Governance Studies, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, <http://brook.gs/2i1i3Ht> (Dec. 16, 2016), at 2. For a thorough historical exposition of the meaning of the word “emolument” at the time of the Founding, see John S. Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523-1806*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693 (last updated July 13, 2017).

⁶⁸ Drew Harwell & Anu Narayanswamy, *A scramble to assess the dangers of President-elect Donald Trump’s global business empire*, Wash. Post, Nov. 20, 2016, <http://wpo.st/KCmP2>.

⁶⁹ The list continues to expand. For regularly updated lists, see Global Anticorruption Blog, *Tracking Corruption and Conflicts in the Trump Administration*, <https://globalanticorruptionblog.com/profitting-from-the-presidency-tracking-corruption-and-conflicts-in-the-trump-administration/>; Citizens for Responsibility and Ethics in Washington, *Trump Inc.: A Chronicle of Presidential Conflicts*, <https://www.citizensforethics.org/trump-timeline/>; Michael Keller *et al.*, *Tracking Trump’s Web of Conflicts*, Bloomberg, <https://bloom.bg/2Ae4GfQ>.

branded champagne, dine on sliders and hear a sales pitch about the U.S. president-elect's newest hotel.”⁷⁰ The motivation was not hard to discern:

In interviews with a dozen diplomats, many of whom declined to be named because they were not authorized to speak about anything related to the next U.S. president, some said spending money at Trump's hotel is an easy, friendly gesture to the new president.

“Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!' Isn't it rude to come to his city and say, 'I am staying at your competitor?'” said one Asian diplomat.⁷¹

Indeed, according to one report, at least one foreign embassy was actively pressured to change an existing reservation by the Trump Organization:

The Embassy of Kuwait allegedly cancelled a contract with a Washington, D.C. hotel days after the presidential election, citing political pressure to hold its National Day celebration at the Trump International Hotel instead. . . . [The embassy] abruptly canceled its reservation after members of the Trump Organization pressured the ambassador to hold the event at the hotel owned by the president-elect.⁷²

Shortly before the inauguration, in January 2017, President Trump's tax law firm announced a plan to “voluntarily donate all profits from foreign government payments made to his hotel to the United States Treasury.”⁷³ As later emerged, the Trump Organization soon retreated from this pledge, claiming that compliance would

⁷⁰ Jonathan O'Connell & Mary Jordan, *For foreign diplomats, Trump hotel is place to be*, Wash. Post, Nov. 18, 2016, <http://wpo.st/VemN2>.

⁷¹ *Id.*

⁷² Judd Legum & Kira Lerner, *Under political pressure, Kuwait cancels major event at Four Seasons, switches to Trump's D.C. hotel*, Think Progress, Dec. 19, 2016, <http://thkpr.gs/1f204315d513>. The Kuwaiti ambassador later gave a different reason for moving the event. According to the ambassador, “[n]obody pressured” him; rather, “There is a new hotel in town, and we thought we would give it a try.” Jonathan O'Connell, *Kuwaiti Embassy is latest to book Trump D.C. hotel, but ambassador says he felt “no pressure”*, Wash. Post, Dec. 20, 2016, <http://wapo.st/2kGKh8D>.

⁷³ *Donald Trump's News Conference: Full Transcript and Video*, *supra* note 63, <http://nyti.ms/2kHSolf>.

be “impractical.”⁷⁴

In May 2017, the Turkey-U.S. Business Council, reportedly an arm of the Turkish government’s Foreign Economic Relations Board, co-sponsored a conference at the hotel that prominently advertised the attendance of Turkish government ministers and members of Parliament. Similar events in the past had cost approximately \$400,000.⁷⁵

In September 2017, Malaysia’s prime minister and an entourage of dozens stayed at the hotel and were seen using meeting rooms (including “a white-tablecloth breakfast in the hotel’s Lincoln Library meeting room”) and a lounge area for hotel guests. According to the Washington Post, bookings of this nature “would probably mean hundreds of thousands of dollars in revenue for the Trump Organization.”⁷⁶

In late October 2017, Mexico’s former ambassador to the United States reported that he had learned from a former U.S. diplomat that the U.S. State Department’s official protocol now emphasizes to world leaders that they should use Trump’s D.C. hotel for official visits.⁷⁷

Foreign payments at other Trump properties in the United States

Foreign governments also spend money at Trump’s other U.S. properties. At least two entities controlled by foreign governments pay rent or fees at Trump buildings. First, at Trump Tower, Trump’s flagship skyscraper at 725 Fifth Avenue in Manhattan, one of the the largest tenants is the Industrial and Commercial Bank of China. This bank—controlled by the Chinese government—leases the entire 20th

⁷⁴ Darren Samuelsohn, *Trump Org says singling out profits from foreign guests is ‘impractical’*, Politico, May 24, 2017, <http://politi.co/2k8ZaEO>. But even if the Trump Organization later decides to comply with that pledge, the Foreign Emoluments Clause does not provide an exception for receiving foreign emoluments, deducting operating costs, and then donating the “profits” to the treasury. And even if that it did, the plan does not remedy the serious constitutional and ethical violations that go beyond the “profits” at one particular hotel. See Richard W. Painter et al., *Emoluments: Trump’s Coming Ethics Trouble*, The Atlantic, Jan. 18, 2017, <http://theatlantic.com/2jwtnr>.

⁷⁵ Hui-yong Yu, *Trump’s Washington Hotel Seen Facing New Set of Legal Challenges*, Bloomberg, Apr. 12, 2017, <https://bloom.bg/2kaK9T8>; *36th Annual Conference on U.S.-Turkey Relations*, <http://bit.ly/2kcpX3k>.

⁷⁶ Jonathan O’Connell, *From Trump hotel lobby to White House, Malaysian prime minister gets VIP treatment*, Wash. Post, Sept. 12, 2017, <http://wapo.st/2wXTBM4>.

⁷⁷ See Ian Millhiser, *Former Mexican ambassador says State Department is telling world leaders to stay at Trump hotels*, Think Progress, Nov. 1, 2017, <https://thinkprogress.org/former-mexican-ambassador-trump-hotels-6fc52c7ce8f5/>; https://twitter.com/Arturo_Sarukhan/status/925429733692727296.

floor, and its lease will not expire until October 2019, after which it could be renewed.⁷⁸

The Kingdom of Saudi Arabia owns the 45th floor of Trump World Tower (845 United Nations Plaza)—another Trump building in Manhattan. The Saudi mission to the United Nations is housed there. The Kingdom pays annual building amenity charges that exceeded \$85,000 per year in 2001 (the last publicly available figure),⁷⁹ and may be considerably higher now.

On September 18, 2017, the Trump National Golf Club in northern Virginia hosted the “Turkish Airlines World Golf Cup,” sponsored by the state-owned Turkish Airlines.⁸⁰

Extensions of credit

Other forms of foreign emoluments include extensions of credit from banks owned or controlled by foreign governments. For example, the state-owned Bank of China—not to be confused with the Industrial and Commercial Bank of China, the major tenant in Trump Tower—holds part of a \$950 million loan on 1290 Sixth Avenue in Manhattan, in which the Trump Organization holds a 30 percent ownership stake.⁸¹ This ongoing foreign government loan benefiting the Trump Organization—i.e., benefiting Mr. Trump himself—is also a foreign emolument.

Foreign trademarks

In February and March 2017, the Chinese government granted the Trump Organization a number of long-sought (and long-denied) trademarks. The trademarks are foreign emoluments. Moreover, the publicly reported timeline of President Trump’s statements and actions concerning United States foreign policy

⁷⁸ Keller et al., *supra* note 69, <https://bloom.bg/2Ae4GfQ>; Steve Cuozzo, *China Bank for Trump*, N.Y. Post, Sept. 16, 2008, <http://nyp.st/2kGuHKg>. The Industrial and Commercial Bank of China should not be confused with the separate, but also state-controlled, Bank of China, which is *also* a source of foreign emoluments through the Trump Organization. *See infra* note 81 and accompanying text.

⁷⁹ Stephen Rex Brown, *EXCLUSIVE: Donald Trump made millions from Saudi Arabia, but trashes Hillary Clinton for Saudi donations to Clinton Foundation*, N.Y. Daily News, Sept. 4, 2016, <http://nydn.us/2kHfjxi>.

⁸⁰ Alex Howard, *Turkish Airlines event at Trump Golf Course tees off emolumental problems*, Sunlight Found., Sept. 24, 2017, <https://sunlightfoundation.com/2017/09/24/turkish-airlines-golf-event-at-trump-golf-course-tees-off-emolumental-problems/>; Turkish Airlines, <http://golf.turkishairlines.com/turkish-airlines-world-golf-cup/venues/washington-dc/> (last visited Dec. 4, 2017).

⁸¹ Keller et al., *supra* note 69, <https://bloom.bg/2Ae4GfQ>; Susanne Craig, *Trump’s Empire: A Maze of Debts and Opaque Ties*, N.Y. Times, Aug. 20, 2016, <http://nyti.ms/2kpFwRc>.

with respect to China, and the Chinese government's grant of trademarks to the Trump Organization, raise serious questions about the possibility of quid pro quo agreements and extortion involving the president of the United States and the government of China.

Starting in 2006, the Trump Organization sought to persuade Chinese authorities to award the right to register dozens of trademarks, starting with a trademark for construction services.⁸² During the decade that followed, the Trump Organization made little headway. The Chinese trademark office rejected Trump's application in 2009, and rejected an appeal in 2014.⁸³ Later in 2014, a court in Beijing rejected an appeal, and then in May 2015, two months before Mr. Trump announced his candidacy, a higher Chinese court issued a final judgment rejecting Trump's appeal, even as he continued to apply for additional trademarks.⁸⁴

There matters stood until September 2016, when the Chinese Trademark Office reversed course after more than a decade and invalidated a rival claim for certain Trump trademarks.⁸⁵ Finally, on November 13, 2016, just five days after the election, the Chinese Trademark Office granted preliminary approval to the Trump Organization to register a construction services trademark.⁸⁶

On December 2, 2016, then President-elect Trump accepted a call from the president of Taiwan, making him the first U.S. president or president-elect to do so since before the United States broke diplomatic relations with the Taiwan in 1979.⁸⁷ The call prompted a domestic and international outcry that he had broken with the United States' longstanding "One China" policy.⁸⁸ China lodged a formal complaint with the United States.⁸⁹ Following his telephone call with the president of Taiwan, Mr. Trump publicly stated that the United States' One China policy could change if the United States did not receive concessions from China on trade.⁹⁰

⁸² Jethro Mullen *et al.*, *China Grants Trump a Trademark He's Been Seeking for a Decade*, CNN, Feb. 17, 2017, <http://cnnmon.ie/2npCXQ1>.

⁸³ Zheping Huang, *A Curious Timeline of Trademarks Granted to Donald Trump by an Increasingly Helpful China*, Quartz, Mar. 13, 2017, <https://qz.com/930896>.

⁸⁴ *Id.*

⁸⁵ *Id.*; Mullen *et al.*, *supra* note 82, <http://cnnmon.ie/2npCXQ1>.

⁸⁶ *Donald Trump Scores Legal Win in China Trademark Dispute*, Wall St. J., Nov. 14, 2016, <http://on.wsj.com/2npMUNv>.

⁸⁷ *Trump Agrees to Honour 'One China' Policy Despite Threats*, BBC, Feb. 10, 2017, <http://bbc.in/2npYBsl>; Stephen Collinson *et al.*, *China Lodges Complaint over Trump-Taiwan Call*, CNN, Dec. 3, 2016, <http://cnn.it/2girg9W>.

⁸⁸ Collinson *et al.*, *supra* note 87, <http://cnn.it/2girg9W>.

⁸⁹ *Id.*

⁹⁰ BBC, *supra* note 87, *Trump Agrees to Honour 'One China' Policy Despite Threats*.

In a sudden reversal, on February 9, 2017, President Trump engaged in a telephone phone call with China's president, after which Mr. Trump publicly announced that he would honor the One China policy.⁹¹ On February 10 (the next day), the BBC reported that it was not clear "what, if anything, the Trump Administration . . . won in return."⁹² But on February 15, after the expiration of a three-month objection period and just six days after Mr. Trump made his official One China declaration, the Chinese Trademark Office granted the Trump Organization approval to register a construction services trademark.⁹³

On February 27, President Trump held his first face-to-face meeting with a member of the Chinese leadership, as he met China's top diplomat, State Councilor Yang Jiechi, at the White House.⁹⁴ That same day (February 27), and also on March 6, in an apparent break with usual protocol and ten years of prior rulings, the Chinese Trademark Office gave preliminary approval for the Trump Organization to register thirty-eight additional trademarks.⁹⁵ On March 13, just one week after that action by the Chinese Trademark Office, the Trump administration announced plans for President Trump to host Chinese President Xi Jinping at a two day summit on April 6-7, 2017.⁹⁶

⁹¹ Mark Landler & Michael Forsythe, *Trump Tells Xi Jinping U.S. Will Honor 'One China' Policy*, N.Y. Times, Feb. 9, 2017, <http://nyti.ms/2npxfh7>; BBC, *supra* note 87, *Trump Agrees to Honour 'One China' Policy Despite Threats*.

⁹² BBC, *supra* note 87, *Trump Agrees to Honour 'One China' Policy Despite Threats*.

⁹³ Jackie Northam, *China Grants Trump a Valuable Trademark Registration*, Nat'l Pub. Radio, Feb. 16, 2017, <http://n.pr/2nBjZ8g>.

⁹⁴ *US-China Relations: Trump Meets Senior Official Yang Jiechi*, BBC, Feb. 27, 2017, <http://bbc.in/2nFOA4N>.

⁹⁵ Sui-Lee Wee, *In China, Trump Wins a Trove of New Trademarks*, N.Y. Times, Mar. 8, 2017, <http://nyti.ms/2mGagyv>.

⁹⁶ *Trump Reportedly Plans to Host China's President in April*, CNBC, Mar. 13, 2017, <http://cnb.cx/2nmKGhJ>. The summit indeed took place, not at the White House but at Mar-a-Lago. David Nakamura, *At Mar-a-Lago, Trump welcomes China's Xi in first summit*, Wash. Post, Apr. 7, 2017, <http://wapo.st/2p5cAiz>.

Besides the unconstitutional foreign emoluments, these events, as reported, may violate the federal Hobbs Act⁹⁷ and/or the federal bribery statute.⁹⁸

Foreign government permits and approvals

Finally, many Trump Organization projects abroad require foreign government permits and approvals, a non-cash but substantial financial benefit that also constitutes a foreign present or emolument.

Although the Trump Organization's tax lawyer announced before the inauguration that "[n]o new foreign deals will be made whatsoever during the duration of President Trump's presidency,"⁹⁹ the Trump Organization later retracted the essence of that assurance. It asserted that "[i]mplementing future phasing of existing properties does not constitute a new transaction."¹⁰⁰ The Trump Organization has continued, is continuing, and by all accounts intends to continue to expand its existing foreign

⁹⁷ The Hobbs Act prohibits actual or attempted extortion affecting commerce. *See* 18 U.S.C. §§ 1951(a), (b)(2). Among other conduct, the statute specifically prohibits public officials from obtaining or seeking to obtain property "under color of official right." *Id.* To establish a violation of the Hobbs Act, the government need not show that the public official took "any specific action to induce the offering of the benefit"; rather, "passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power." *United States v. Evans*, 910 F.2d 790, 796 (11th Cir. 1990) (emphasis in original), *aff'd*, 504 U.S. 255 (1992). A public official commits "color of right" extortion in violation of the Hobbs Act "when he or she encourages or accepts payments prompted by the hope that the official will be influenced in the exercise of his or her powers." *United States v. Davis*, 890 F.2d 1373, 1378 (7th Cir. 1989).

⁹⁸ The federal bribery statute prohibits a public official from directly or indirectly demanding, accepting, or seeking anything of value in exchange for being influenced in an official act. *See* 18 U.S.C. §§ 201(a), (b)(2). "The agreement need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain." *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016). The statute also prohibits public officials from accepting gratuities that are given to curry favor, even without a direct quid pro quo. *See* 18 U.S.C. § 201(c)(1)(B); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999).

⁹⁹ *Donald Trump's News Conference: Full Transcript and Video*, *supra* note 63, <http://nyti.ms/2kHSolf>.

¹⁰⁰ Severin Carrell, *Trump's Scotland golf resort proceeds with expansion despite business pledge*, *The Guardian*, Jan. 14, 2017, <http://bit.ly/2kkIYOL>.

properties.¹⁰¹ President Trump's sons continue to forge ahead with Trump Organization business (e.g., opening a golf course in Dubai) and benefit from official escorts of U.S. embassy and presidential protective staff as they do so.¹⁰²

Additional foreign government permits and approvals will inevitably be required for many projects, including:

1. **India:** The Trump Organization reportedly has five projects in India, including a Trump Tower, an apartment project in Mumbai, and an apartment block; Mr. Trump has leased his name to each of the projects.¹⁰³
2. **Indonesia:** The Trump Organization plans to open two new luxury hotels in Indonesia.¹⁰⁴ And he has reportedly “forged relationships with powerful political figures in Indonesia, where such connections are crucial to pushing through big projects.”¹⁰⁵
3. **Philippines:** The Trump Organization has a business interest in a Trump Tower in the Philippines that is on the verge of completion.¹⁰⁶ Recently, Jose E. B. Antonio, a real estate developer who partnered with Mr. Trump on the \$150 million tower, was named the country's special envoy to the United States.¹⁰⁷
4. **Turkey:** The Trump Organization has licensing deals with two Trump Towers in Istanbul. Shares in Trump's Turkish partner on the project surged almost

¹⁰¹ These expansions, including new arrangements with foreign government-owned entities, continued even as this document was being finalized. *See, e.g.,* Anita Kumar, *Despite pledge, Trump company works with a foreign entity. Again.*, McClatchy DC Bureau, Dec. 4, 2017, <http://bit.ly/2koZ64d>; Anita Kumar, *Trump promised not to work with foreign entities. His company just did*, McClatchy DC Bureau, Sept. 11, 2017, <http://bit.ly/2kHmQa6>; Carrell, *supra* note 100.

¹⁰² *See* Eric Lipton & Susanne Craig, *Trump Sons Forge Ahead Without Father, Expanding and Navigating Conflicts*, N.Y. Times, Feb. 12, 2017, <http://nyti.ms/2l88CYa>; Amy Brittain & Drew Harwell, *Eric Trump's business trip to Uruguay cost taxpayers \$97,830 in hotel bills*, Wash. Post, Feb. 3, 2017, <https://wpo.st/-5Hb2> (describing pre-inauguration trip).

¹⁰³ Kalish Babar, *Donald Trump meets Indian partners, hails PM Modi's work*, Economic Times, Nov. 17, 2016, <http://ecoti.in/owmzxa>.

¹⁰⁴ Richard C. Paddock & Eric Lipton, *Trump's Indonesia Projects, Still Moving Ahead, Create Potential Conflicts*, N.Y. Times, Dec. 31, 2016, <http://nyti.ms/2kHiVz5>; Keller et al., *supra* note 69, <https://bloom.bg/2Ae4GfQ>.

¹⁰⁵ Paddock & Lipton, *supra* note 104, <http://nyti.ms/2kHiVz5>.

¹⁰⁶ Kurt Eichenwald, *How Donald Trump's Business Ties Are Already Jeopardizing U.S. Interests*, Newsweek, Dec. 13, <http://bit.ly/2hooq7c>; Paddock & Lipton, *supra* note 104, <http://nyti.ms/2kHiVz5>.

¹⁰⁷ Paddock & Lipton, *supra* note 104, <http://nyti.ms/2kHiVz5>.

11 percent after the U.S. elections.¹⁰⁸ In December 2015, in response to a question as to Turkey’s NATO membership and reliability as a partner, Trump admitted that “I have a little conflict of interest, because I have a major, major building in Istanbul.”¹⁰⁹

5. **United Arab Emirates:** There are two Trump-branded and operated golf clubs in the UAE. All services, including electricity, water, and roads, “come at the discretion of the government,” including “government approvals to serve alcohol, not to mention other regulatory issues.”¹¹⁰
6. **United Kingdom:** Trump appears to have tried to exploit his position and access to leaders of the United Kingdom in the service of the two golf courses in Scotland in which he owns an interest, each of which also boasts a hotel: Trump Turnberry (which the Trump Organization bought in 2014), and Trump International Golf Links Scotland (which it built) in Aberdeenshire, Scotland.¹¹¹ The Trump Organization plans to extend the Aberdeenshire course by “extending its boutique hotel and building a second 18-hole golf course.”¹¹² Mr. Trump told the New York Times that he “might have” mentioned an offshore wind farm near the Aberdeenshire course with Nigel Farage, the former leader of the U.K. Independence Party, whom Mr. Trump has recommended as an ambassador to the United States.¹¹³ Mr. Trump reportedly believes the wind farm may spoil the view from the golf course and tried to prevent it from being developed.¹¹⁴

Although the Foreign Emoluments Clause contemplates that Congress may grant express waivers, the president has not requested, and Congress has not granted, any waivers respecting any of the emoluments and profits that Trump has received or

¹⁰⁸ Keller et al., *supra* note 69, <https://bloom.bg/2Ae4GfQ>.

¹⁰⁹ Lisa Marie Segarra, *Donald Trump told Steve Bannon he has a “conflict of interest” in Turkey in a 2015 interview*, TIME, Apr. 19, 2017, <http://ti.me/2pRHHyb>.

¹¹⁰ Jon Gambrell, *AP Exclusive: Golf club shows pitfalls of Trump presidency*, AP News, Jan. 4, 2017, <http://bit.ly/2AooeOk>.

¹¹¹ Carrell, *supra* note 101, <http://bit.ly/2kkIYOL>; Keller et al., *supra* note 69, <https://bloom.bg/2Ae4GfQ>.

¹¹² Carrell, *supra* note 101, <http://bit.ly/2kkIYOL>.

¹¹³ Greg Sargent, *Trump may have just flatly and openly admitted to a conflict of interest*, Wash. Post, Nov. 22, 2016, <http://wpo.st/FRdX2>; Danny Hakim & Eric Lipton, *With a Meeting, Trump Renewed a British Wind Farm Fight*, N.Y. Times, Nov. 21, 2016, <https://nyti.ms/2jMoGgN>; Keller et al., *supra* note 69, <https://bloom.bg/2Ae4GfQ>.

¹¹⁴ Hakim & Lipton, *supra* note 113, <https://nyti.ms/2jMoGgN>. The wind farm is expected to be operational in early 2018. See Kim Hjelmgaard, *Neighbors of Trump golf course in Scotland decry a bully trying to expand*, USA Today, Aug. 2, 2017, <https://usat.ly/2wlgp6P>.

accrued since the president was inaugurated, or is expected to receive or accrue during the remainder of his time in office.

2. Emoluments from federal, state, and local governments

The Constitution's Domestic Emoluments Clause provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and *he shall not receive within that Period any other Emolument from the United States, or any of them.*"¹¹⁵

This provision, which is not waivable by Congress or any other authority, is designed to prevent corruption, as Alexander Hamilton explained:

Neither the Union, nor any of its members, will be at liberty to give, *nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act.* He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.¹¹⁶

President Trump continues to own businesses that benefit financially from the federal government that he now heads (as well as from state and local governments). As explained above, President Trump owns a broad range of personal and business holdings in the United States—including several that result in his receiving income or other benefits from the federal government (beyond his salary), or from state and local governments. Some of the most egregious examples include the following.¹¹⁷

Profiting personally from official government travel

When President Trump visits a Trump golf club, as he has on approximately 25% of the days since his inauguration,¹¹⁸ he is accompanied by a protective detail of the U.S. Secret Service. The Secret Service, in turn, uses taxpayer funds to rent golf carts to accompany him; as of November 29, 2017, the Secret Service had spent \$144,975 on golf cart rentals *alone* at Trump golf courses.¹¹⁹ This figure does not include hotel stays and meals. Other government officials accompany the president on such visits,

¹¹⁵ U.S. Const., art. II, § 1, cl. 7 (emphasis added).

¹¹⁶ The Federalist No. 73 (Alexander Hamilton) (emphasis added), http://avalon.law.yale.edu/18th_century/fed73.asp.

¹¹⁷ The list continues to expand. For regularly updated lists, see *supra* note 69.

¹¹⁸ See Trump Golf Count, *President Trump's Golf Outings*, <http://trumpgolfcount.com/displayoutings> (last visited Dec. 4, 2017).

¹¹⁹ Jessica Estepa, *Secret Service spent \$7,500 on golf carts during Trump's Thanksgiving Mar-a-Lago trip*, USA Today, Nov. 29, 2017, <https://usat.ly/2nf6DDn>; Julia Fair, *Secret Service spent \$137K on golf carts to protect Trump at New Jersey, Florida clubs*, USA Today, Oct. 5, 2017, <https://usat.ly/2yLvorf>.

and incur such expenses, as well. For example, in March 2017 the Coast Guard paid \$1,092 (\$546 per night at rack rate) for an official to stay at Mar-a-Lago, apparently for an off-site meeting of the National Security Council.¹²⁰

While all presidents' travel results in other officials incurring expenses (including for protective details on presidents' vacation travel), it is unprecedented for such expenses to be paid to a facility owned by the president from which he profits.

Executive branch action to benefit Trump businesses

President Trump's control over the vast modern powers of the executive branch means that favorable federal regulatory action benefiting his businesses also counts as a government benefit.

For example, President Trump's ongoing lease of Washington, D.C.'s Old Post Office Pavilion, in which the Trump International Hotel is located, violates an explicit clause in the General Services Administration lease contract providing: "No . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom . . ." ¹²¹ In late November 2016, members of Congress wrote the GSA requesting information about the "imminent breach-of-lease and conflict of interest issues created by President-elect Donald Trump's lease with the U.S. Government for the Trump International Hotel building in Washington, D.C." ¹²² The GSA responded in mid-December that it could not make a determination "until the full circumstances surrounding the president-elect's business arrangements have been finalized and he has assumed office." ¹²³ After he assumed office, the GSA announced that it had concluded that this clause somehow did not apply. ¹²⁴

The president's business arrangements for his term in office have been announced (and do not include any meaningful separation from his ownership interest in the hotel) and he has completed nearly one year in office, but the GSA is not pursuing any legal action to enforce the unambiguous and mandatory term in the contract.

¹²⁰ Drew Harwell & Amy Brittain, *Taxpayers billed \$1,092 for an official's two-night stay at Trump's Mar-a-Lago club*, Wash. Post, Sept. 15, 2017, <http://wapo.st/2y3C9VB>.

¹²¹ Steven L. Schooner & Daniel I. Gordon, *GSA's Trump Hotel Lease Debacle*, Gov't Executive, Nov. 28, 2016, <http://bit.ly/2k4VNcG>.

¹²² Letter from Hon. Elijah E. Cummings et al. (Nov. 30, 2016), <http://bit.ly/2k56NqN>.

¹²³ Allan Smith, *Federal agency responds to letter from Democratic lawmakers claiming it said Trump must fully divest himself of his DC hotel*, Business Insider, Dec. 14, 2016, <http://read.bi/2k4WYZM>.

¹²⁴ Letter from Kevin Terry, GSA, Mar. 23, 2017, https://www.gsa.gov/cdnstatic/Contracting_Officer_Letter_March_23_2017_Redacted_Version.pdf.

That favorable regulatory treatment provides President Trump a significant financial benefit from the federal government above and beyond his federal salary.

Subsidies, tax breaks, and other direct and indirect payments

Many of Trump's businesses receive federal and state government subsidies and tax breaks. For example, since 1980, Mr. Trump and his businesses have "reaped at least \$885 million in tax breaks, grants and other subsidies for luxury apartments, hotels and office buildings in New York."¹²⁵

For most of 2017, Trump International Hotels Management LLC, was paid to operate the Trump SoHo hotel in New York, NY, which since 2015 has been owned by the CIM Fund III real estate fund. About half of the total \$2.37 billion investment in CIM Fund III comes from state and local public pension funds.¹²⁶ These public investors are required to pay quarterly management and performance fees to CIM Fund III. Meanwhile, under the agreement, CIM Fund III paid President Trump's company 5.75% of gross hotel operating revenue. Furthermore, CIM Fund III paid operating and overhead charges on the unsold hotel suite units (about two-thirds of the total units). The total payments from CIM Fund III to Trump's company amounted to millions of dollars per quarter; about half of the payments flowed from public state and local pension funds.¹²⁷ This arrangement ended only in December 2017, when CIM Fund III terminated its contract with Trump International Hotels Management prematurely.¹²⁸

3. Legal analysis

A December 2016 white paper by Prof. Laurence Tribe of Harvard Law School, Ambassador (ret.) Norman Eisen (former chief ethics counsel to President Barack

¹²⁵ Charles V. Bagli, *A Trump Empire Built on Inside Connections and \$885 Million in Tax Breaks*, N.Y. Times, Sept. 17, 2016, <http://nyti.ms/2cXa60i>.

¹²⁶ Julia Harte, *Exclusive: A New York hotel deal shows how some public pension funds help to enrich Trump*, Reuters, Apr. 26, 2017, <http://reut.rs/2pyu2QG>.

¹²⁷ A concerted public campaign, bolstered by a letter led by Rep. Ted Lieu and 11 other Members of Congress from California, directed at the California and New York state public pension funds, urged them to either work with other pension fund investors in CIM Fund III to demand that CIM Fund III sell the Trump SoHo property and terminate its relationship with the Trump Organization because of these illegal domestic emoluments, or, alternatively, divest their interest in CIM Fund III. See Julia Harte, *Campaign urges U.S. public pension funds to divest from owner of Trump hotel*, Reuters, July 19, 2017, <http://reut.rs/2vizeYK>.

¹²⁸ Hui-yong Yu & Caleb Melby, *Trump Organization Bought Out of Its Contract for Trump SoHo*, Bloomberg Quint, Nov. 23, 2017, <https://goo.gl/8vo6rz>; see also Shanna Cleveland, Free Speech For People, *Curbing Corruption One Step at a Time: Taking Trump out of Trump SoHo. A Victory for Divest Trump SoHo*, Nov. 27, 2017, <https://freespeechforpeople.org/curbing-corruption-trump-soho/>.

Obama), and Professor Richard Painter (former chief ethics counsel to President George W. Bush), and published by the Brookings Institution, concluded that, unless Mr. Trump took credible action to address these conflicts, he would be violating the foreign emoluments ban from the *moment he took office*, due to “a steady stream of monetary and other benefits from foreign powers and their agents” deriving from his existing business arrangements.¹²⁹ As a result, since he did not resolve these conflicts before inauguration, he has been violating the Foreign Emoluments Clause since the moment he took office.¹³⁰

A July 2017 white paper by the Constitutional Accountability Center similarly discusses and updates how the president’s business arrangements violate the Domestic Emoluments Clause.¹³¹

Violating either of the emoluments clauses is grounds for impeachment, as the Founders made clear. In July 1787, during debate about impeachment at the Constitutional Convention, Gouverneur Morris of Pennsylvania (known as the “Penman of the Constitution”) observed that “no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate [the president] in foreign pay, without being able to guard against it by displacing him.”¹³² James Madison (sometimes called the “Father of the Constitution”) thought an impeachment provision would be “indispensable” as a safeguard against a president who “might pervert his administration into a scheme of speculation” or “betray his trust to foreign powers.”¹³³

¹²⁹ Norman L. Eisen, Richard Painter, & Laurence H. Tribe, Brookings Governance Studies, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, <http://brook.gs/2i1i3Ht> (Dec. 16, 2016), at 2.

¹³⁰ See Norman L. Eisen & Richard W. Painter, *Trump Could Be in Violation of the Constitution His First Day in Office*, The Atlantic, Dec. 7, 2016, <http://theatlantic.com/2016/12/7/trump-constitution/>; see also Richard W. Painter et al., *Emoluments: Trump’s Coming Ethics Trouble*, The Atlantic, Jan. 18, 2017, <http://theatlantic.com/2017/1/18/trump-emoluments/>.

¹³¹ See generally Brianna J. Gorod, Brian R. Frazelle, and Samuel Houshower, Constitutional Accountability Ctr., *The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, https://www.theconstitution.org/sites/default/files/briefs/20170726_White_Paper_Domestic_Emoluments_Clause.pdf (July 2017).

¹³² James Madison, *Debates in the Federal Convention of 1787*, http://avalon.law.yale.edu/18th_century/debates_720.asp (July 20, 1787).

¹³³ *Id.* “Speculation” means illegal enrichment, such as embezzlement, particularly from public funds. See, e.g., John Ash, *New and Complete Dictionary of the English Language* (1775) (defining “speculation” as “[t]he crime of robbing the public, an embezzlement of the public money”); Noah Webster, *A Compendious Dictionary of the English Language* 219 (1806) (defining “speculation” as “embezzlement of the public money”).

Similarly, at the Virginia Ratifying Convention in June 1788, Edmund Jennings Randolph (Governor of Virginia, a delegate to the Constitutional Convention, and later the first Attorney General of the United States and second Secretary of State) responded to a concern about influence over the president by stating in clear terms:

There is another provision against the danger, mentioned by the honorable member, of the President receiving emoluments from foreign powers. *If discovered, he may be impeached.* By the 9th section of the 1st article, “no person, holding an office of profit or trust, shall accept of any present or emolument whatever, from any foreign power, without the consent of the representatives of the people;” and by the 1st section of the 2^d article, his compensation is neither to be increased nor diminished during the time for which he shall have been elected; and he shall not, during that period, receive any emolument from the United States or any of them. I consider, therefore, that he is restrained from receiving any present or emolument whatever. It is impossible to guard better against corruption.¹³⁴

This is consistent with the views of other Framers, including Alexander Hamilton of New York, who described impeachable offenses as arising from “the misconduct of public men, or in other words from the abuse or violation of some public trust.”¹³⁵ Similarly, in the North Carolina ratification convention, future U.S. Supreme Court Justice James Iredell described impeachable conduct as including instances where the president “acted from some corrupt motive,” giving the example of a president receiving “a bribe . . . from a foreign power, and under the influence of that bribe . . . [getting Senate] consent to a pernicious treaty.”¹³⁶

This is also consistent with congressional precedent. At least six of the 19 impeachments in our history have alleged “the use of office for personal gain or the appearance of financial impropriety while in office.”¹³⁷ Examples of such grounds for impeachment, which congressional historians have grouped under the heading of “Using the Office for an Improper Purpose or Personal Gain,”¹³⁸ include the 1912 impeachment of Judge Robert W. Archbald. He was charged with “using his office to secure business favors from litigants and potential litigants before his court.” Three

¹³⁴ 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 486 (1891) (emphasis added), <http://bit.ly/2BHU37L>.

¹³⁵ The Federalist No. 65 (Alexander Hamilton), http://avalon.law.yale.edu/18th_century/fed65.asp.

¹³⁶ 4 Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 126, <http://bit.ly/2BHO91G>.

¹³⁷ Deschler, *supra* note 3, ch. 14 App.

¹³⁸ William Brown, *House Practice: A Guide to the Rules, Precedents and Procedures of the House* (2011), ch. 27, § 4, at 598.

other federal judges were charged with “misusing their power . . . for personal profit.”¹³⁹

Unfortunately, President Trump’s refusal to separate his presidential duty from his business interests has the effect of undermining the integrity of the presidency and disregarding his constitutional oath to “faithfully execute the office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”¹⁴⁰ His ongoing receipt of income and other financial benefits through his businesses disregards his constitutional oath to “preserve . . . the Constitution of the United States,” undermines the integrity of the executive branch, and abuses the public trust.

C. Conspiring with others to commit crimes involving his presidential campaign’s solicitation and receipt of things of value from a foreign government and other foreign nationals, and to conceal those violations

1. Facts

The following facts on the public record support further inquiry into what the president knew during his campaign and prior to assuming office, what he knows now, and whether he has participated in, facilitated or can be held accountable for concealment of engagement with one or more foreign governments as part of his election campaign.

On June 3, 2016, Donald Trump Jr., Trump’s eldest son, exchanged a series of emails setting up a meeting to receive “incriminating information” about his father’s general election opponent, which was described as coming from the Russian government, as “part of Russia and its government’s support for Mr. Trump.” On June 9, 2016 Donald Trump Jr., Paul Manafort, Trump’s then-campaign manager, and Jared Kushner, Trump’s son-in-law and senior advisor, met with several Russian citizens linked to the government, with the intention of acquiring the information offered in the June 3 emails.

More than a year later, on July 8, 2017, the day this meeting was publicly revealed, Donald Trump Jr. released a public statement about the circumstances and purpose of the meeting.¹⁴¹ This statement was later shown to be misleading.¹⁴² It has been

¹³⁹ *Id.*

¹⁴⁰ U.S. Const. art. II, § 1, cl. 8.

¹⁴¹ See Jacob Pramuk, *Here’s Donald Trump Jr.’s full statement on his meeting with a Russian lawyer*, CNBC, July 9, 2017, <http://cnb.cx/2w0wmA7>.

¹⁴² See Lori Robertson & Robert Farley, *Donald Trump Jr.’s Evolving Statements*, Fact Check, Jul 13, 2017, <http://www.factcheck.org/2017/07/donald-trump-jr-s-evolving-statements/>.

reported that, on July 8, 2017, President Trump personally dictated his son’s misleading statement about the meeting.¹⁴³

2. Legal analysis

The Federal Election Campaign Act (FECA) prohibits the solicitation, acceptance, or receipt of “a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election” from a foreign national (foreign government, foreign business, or foreign citizen not a lawful permanent resident of the United States).¹⁴⁴ While most violations of FECA do not give rise to criminal charges, some do,¹⁴⁵ and the allegations here are particularly serious. Furthermore, apart from any violations of criminal law, the fact that the president’s campaign was conspiring with what it understood to be representatives of a foreign government to influence the election is precisely the type of foreign intrigue directed at undermining our Republic that the Founders feared.¹⁴⁶

To be sure, current publicly available evidence does not indicate whether the president himself was personally aware of this particular meeting. However, an impeachment investigation is warranted by the circumstances.

First, even before the June 9, 2016 meeting, then-candidate Trump’s foreign policy adviser, George Papadopoulos—who has pleaded guilty to making false statements to FBI agents in connection with this investigation—informed Trump and other

¹⁴³ Ashley Parker et al., *Trump dictated son’s misleading statement on meeting with Russian lawyer*, Wash. Post, July 31, 2017, <http://wapo.st/2vh7dmA>.

¹⁴⁴ 52 U.S.C. § 30121(a).

¹⁴⁵ Knowing and willful violations of FECA are subject to imprisonment for up to five years, depending on the nature of the offense. *See* 52 U.S.C. § 30109(d); *see, e.g.*, U.S. Dep’t of Justice, *Campaign Manager Sentenced to 24 Months for Coordinated Campaign Contributions and False Statements*, June 12, 2015, <https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/campaign-manager-sentenced-to-24-months-for-coordinated-campaign-contributions-and-false-statements>; U.S. Atty. for S.D.N.Y., *Dinesh D’Souza Pleads Guilty In Manhattan Federal Court to Campaign Finance Fraud*, May 20, 2014, <https://www.justice.gov/usao-sdny/pr/dinesh-d-souza-pleads-guilty-manhattan-federal-court-campaign-finance-fraud>.

¹⁴⁶ The fact that some of this activity occurred before the president assumed office, is not a bar to impeachment. *See* Cole, *Impeachment and Removal*, *supra* note 12, at 15-16. For example, in 2010, Judge Thomas Porteous was impeached and convicted for conduct, much of which occurred before he assumed federal office—including making false statements to the Senate and FBI in connection with his nomination and confirmation. *Id.* Furthermore, the effort to conceal the meeting with a misleading public statement occurred well into Trump’s presidency.

campaign advisors at a March 31, 2016 campaign meeting that he could help arrange a meeting between then-candidate Trump and the Russian president.¹⁴⁷

Second, by all accounts, campaign officials at the very highest levels attended the June 9 meeting. As the House Judiciary Committee made clear in its second article of impeachment against President Richard Nixon, a pattern of activity by subordinates may be attributed to the president for purposes of impeachment.¹⁴⁸

The president is more closely tied to the effort to conceal the meeting, and the potential illegal activity (e.g., under FECA) that may have occurred, through a misleading public statement. This involvement could also constitute obstruction of justice.

As noted above, impeachable offences are not co-extensive with indictable crimes. If the Trump campaign is, upon investigation, shown to have engaged in unprecedented, and previously unimaginable collaboration with one or more foreign governments, such engagement and any subsequent efforts to conceal it may amount to a high crime and misdemeanor for which impeachment is appropriate. Impeachment remains an appropriate remedy regardless of the outcome of pending criminal proceedings.

D. Advocating illegal violence, giving aid and comfort to white supremacists and neo-Nazis, and undermining constitutional protections of equal protection under the law

1. Facts

On July 28, 2017, in a speech to police officers, the president openly encouraged police to be “rough” with arrested persons. The president stated:¹⁴⁹

And when you see these towns and when you see these thugs being thrown into the back of a paddy wagon — you just see them thrown in, rough — I said, please don't be too nice. (Laughter.) Like when you guys put somebody in the car and you're protecting their head, you know, the way you put their hand over? Like, don't hit their head and they've just killed somebody — don't hit their head. I said, you can take the hand away, okay?

¹⁴⁷ United States v. Papadopoulos, No. 17-CR-00182-RDM, ECF No. 19 (D.D.C. Oct. 5, 2017) (Statement of the Offense), ¶ 9.

¹⁴⁸ See *Articles of Impeachment against Richard M. Nixon*, *supra* note 55; see also Black, *Impeachment: A Handbook*, *supra* note 58; Chong, *To Impeach a President: Applying the Authoritative Guide from Charles Black*, *supra* note 58.

¹⁴⁹ Philip Bump, *Trump's speech encouraging police to be "rough," annotated*, Wash. Post, July 28, 2017, <http://wapo.st/2tKWxsK>.

This speech was widely understood, including by police chiefs nationwide, as endorsing police brutality, i.e., encouraging police to cause bodily harm to arrested persons and violate their constitutional rights.¹⁵⁰ Furthermore, since statements by the president can establish executive branch policy, it also implies that the Department of Justice will de-prioritize enforcement of such police misconduct.¹⁵¹

President Trump has also advocated defiance of the law in other contexts. For example, in a June meeting at the White House, Native American leaders complained to the president that federal laws make it hard for them to mine coal.¹⁵² The president reportedly responded: “Obama’s gone, and we’re doing things differently here . . . So what I’m saying is, just do it.” When a tribal leader began to enumerate legal impediments to mining the coal, the president repeated:

No. You’ve got to just do it. Just do it. Chief, chief, what are they going to do? Once you get it out of the ground are they going to make you put it back in there? I mean, once it’s out of the ground it can’t go back in there. You’ve just got to do it. I’m telling you, chief, you’ve just got to do it.

One of the Native American leaders then asked another official in the room, “Can we just do that?” The official reportedly began to explain how the administration was planning to roll back regulations—in other words, that at some point in the future, the legal barriers to the coal mining would be removed. But the president again interjected:¹⁵³

Guys, I feel like you’re not hearing me right now. We’ve just got to do it. I feel like we’ve got no choice; other countries are just doing it. China is not asking questions about all of this stuff. They’re just doing it. And guys, we’ve just got to do it.

¹⁵⁰ Cleve R. Wootson Jr. & Mark Berman, *U.S. police chiefs blast Trump for endorsing ‘police brutality’*, Wash. Post, July 30, 2017, <http://wapo.st/2kbuOli>.

¹⁵¹ Indeed, the Department of Justice appears to have done just that, by taking steps to end its investigations of, and remedial support for, local police departments with a history of such misconduct. See, e.g., Sari Horwitz et al., *Sessions orders Justice Department to review all police reform agreements*, Wash. Post, Apr. 3, 2017, <http://wapo.st/2nRko7Z>.

¹⁵² Jonathan Swan, *The unfiltered version of Trump’s meeting with Native American leaders*, Axios, Nov. 6, 2017, <http://bit.ly/2idy3I4>.

¹⁵³ *Id.*

In context, there is no reasonable way to read this other than as the president openly encouraging knowing and willful violation of federal law.

On August 12, 2017, the president gave a statement after the white supremacist rallies and terrorist attack in Charlottesville, Virginia—in which one woman was killed and more than 50 people were injured at the hands of a self-proclaimed white nationalist—the president criticized violence “on many sides, on many sides” thus equating violent white supremacists with counter-protesters.¹⁵⁴ On August 15, he gave an additional statement in which he insisted that there were “very fine people” amongst the marching white supremacists.¹⁵⁵ On August 22, the president publicly bemoaned the firing of a CNN commentator (Jeffrey Lord) for tweeting the Nazi salute “sieg heil.”¹⁵⁶ This pattern of statements has been widely understood, particularly by the white supremacists and neo-Nazis themselves, as an expression of implicit support for views that are “directly subversive of the principle of equality at the heart of the Fourteenth Amendment.”¹⁵⁷

On August 17, the president tweeted: “Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!”¹⁵⁸ The president was almost certainly repeating an Internet urban legend that he had recited during the presidential campaign:

¹⁵⁴ Jenna Johnson & John Wagner, *Trump condemns Charlottesville violence but doesn't single out white nationalists*, Aug. 12, 2017, <http://wapo.st/2fCne0v> (video).

¹⁵⁵ Meghan Keneally, *Trump lashes out at 'alt-left' in Charlottesville, says 'fine people on both sides'*, ABC News, Aug. 15, 2017, <http://abcn.ws/2vGcEcV>.

¹⁵⁶ Andrew deGrandpre, *Trump laments 'poor' Jeffrey Lord, the CNN analyst fired for tweeting a Nazi salute*, Wash. Post, Aug. 22, 2017, <http://wapo.st/2xrmsap>.

¹⁵⁷ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (overturning Virginia's statute banning interracial marriage).

¹⁵⁸ <https://twitter.com/realDonaldTrump/status/898254409511129088>.

They were having terrorism problems, just like we do. And he caught 50 terrorists who did tremendous damage and killed many people. And he took the 50 terrorists, and he took 50 men and he dipped 50 bullets in pigs' blood — you heard that, right? He took 50 bullets, and he dipped them in pigs' blood. And he had his men load his rifles, and he lined up the 50 people, and they shot 49 of those people. And the 50th person, he said: You go back to your people, and you tell them what happened. And for 25 years, there wasn't a problem. Okay? Twenty-five years, there wasn't a problem.¹⁵⁹

While no evidence supports this anecdote about General Pershing, if military service-members did anything like this today, their actions would likely constitute war crimes.¹⁶⁰ An imperative to “study” this incident issued by the president, who the Constitution designates as “Commander in Chief of the Army and Navy of the United States,”¹⁶¹ cannot be dismissed as merely a suggestion that the history faculty at the military academies should add it to a course syllabus. To the contrary, the president’s imperative could be interpreted as an order to commit war crimes.¹⁶²

Furthermore, the anti-Muslim bigotry evident in the president’s suggestion, when combined with the president’s campaign promise for a “total and complete shutdown” of Muslims entering the country and his administration’s various immigration orders that have been held by multiple federal courts to discriminate against Muslims on the basis of religion, foments religious hatred and undermines the constitutional guarantee of equal protection of the laws.

On November 28 and 29, 2017, President Trump shared three inflammatory and misleading anti-Muslim videos on Twitter. He retweeted three posts by Jayda Fransen, a leader in the United Kingdom’s far-right “Britain First” party who has previously been convicted and imprisoned in the United Kingdom for “religious

¹⁵⁹ Jenna Johnson & Jose A. DelReal, *Trump tells story about killing terrorists with bullets dipped in pigs' blood, though there's no proof of it*, Wash. Post, Feb. 20, 2016, <http://wapo.st/1OkWQMMy>.

¹⁶⁰ See 18 U.S.C. § 2441(d)(1)(D).

¹⁶¹ U.S. Const. art. II, § 2, cl. 1.

¹⁶² By analogy, under the Uniform Code of Military Justice, a person who “counsels” or “commands” an offense is considered a “principal” subject to punishment as if he had committed the offense himself. 10 U.S.C. § 877(1).

aggravated harassment.”¹⁶³ After the president’s tweets, the office of U.K. Prime Minister Theresa May stated: “It is wrong for the president to have done this . . . Britain First seeks to divide communities by their use of hateful narratives that peddle lies and stoke tensions.”¹⁶⁴ The aid and comfort to white supremacists in the United States constituted by the president’s tweets was unmistakable. For example, white supremacist leader David Duke welcomed the president’s tweets with the message “Thank God for Trump! That’s why we love him!”¹⁶⁵

The pardon of Joseph Arpaio, discussed below in Section III.E, also supports this ground for an impeachment investigation.

2. Legal analysis

The president’s conduct flies in the face of at least three constitutional obligations. First, he has a duty to “take care that the laws be faithfully executed.”¹⁶⁶ Second, he has a constitutional obligation to protect the citizenry against “domestic Violence.”¹⁶⁷ Third, he has an obligation to ensure that the federal government (and, less directly, state and local governments) not “deny to any person within [their] jurisdiction the equal protection of the laws.”¹⁶⁸

No previous president has ever tested these principles as severely as Donald Trump; consequently, there is no directly applicable precedent. But taken as a whole, this pattern and course of conduct constitutes an abuse of power and of public trust that justifies a congressional investigation and hearings on whether impeachment is warranted.

The president’s open advocacy of illegal violence—evidently endorsing police misconduct against arrested persons, and war crimes—violates his obligations to “take care that the laws be faithfully executed” and to ensure “the equal protection of

¹⁶³ Eileen Sullivan & Dan Bilefsky, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain’s Leader Condemns Them*, N.Y. Times, Nov. 29, 2017, <https://nyti.ms/2ByPyHZ>. The tweets themselves are available here:

<https://twitter.com/JaydaBF/status/935609305574903812>;

<https://twitter.com/JaydaBF/status/935805606447013888>;

<https://twitter.com/JaydaBF/status/935775552102981633>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ U.S. Const., art. II, § 2.

¹⁶⁷ U.S. Const., art. IV, § 4.

¹⁶⁸ U.S. Const. amend. XIV, § 1. The Fourteenth Amendment applies to states; the same principle applies to the federal government through the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

the laws.”¹⁶⁹ Furthermore, his expressions of sympathy and support to unspecified “very fine people” who were marching alongside neo-Nazis and white supremacists in the streets of Charlottesville gives aid and encouragement to such persons in the future.¹⁷⁰

E. **Abusing the pardon power**

1. Facts

On Friday evening, August 25, 2017, President Trump issued his first presidential pardon to Joe Arpaio, the former sheriff of Maricopa County, Arizona.

For over 20 years, Arpaio had run the Maricopa County Sheriff’s Office with shocking cruelty and lawlessness, particularly against Latinos.¹⁷¹ In 2011, the U.S. Department of Justice found that the Sheriff’s Office engaged in systemic unconstitutional policing.¹⁷² Later in 2011, a federal judge in Arizona issued a

¹⁶⁹ Cf. Black, *Impeachment: A Handbook*, *supra* note 58 (“Suppose a president were to announce and follow a policy of granting full pardons, in advance of indictment or trial, to all federal agents or police who killed anybody in line of duty, in the District of Columbia, whatever the circumstances and however unnecessary the killing. . . . [C]ould anybody doubt that such conduct would be impeachable?”).

¹⁷⁰ Compare, for example, the “park patrol” in *United States v. Allen*, wherein “nine white supremacists who were ‘patrolling’ the park for racial minorities and Jews, surrounded them wielding weapons, berated them with racial epithets, and forced them out of the park for no reason other than their race.” *United States v. Allen*, 341 F.3d 870, 873 (9th Cir. 2003). The white supremacists in that case were convicted of conspiring to threaten or intimidate persons in violation of statutes that protect against the interference with federally protected rights on the basis of race and religion. Notably, the court rejected the appeal of one defendant who claimed that he was not a member of an official white supremacist group, and that his association and participation in the “park patrol” was merely “casual.” *Id.* at 890-91. The president’s insistence that “very fine people” were amongst the marching white supremacists in Charlottesville gives aid and comfort by suggesting that those who march alongside armed neo-Nazis and white supremacists are not criminal conspirators, but rather “very fine people.”

¹⁷¹ See, e.g., Jacey Fortin, *A Guide to Joe Arpaio, the Longtime Sheriff Who Escaped Strife*, N.Y. Times, Aug. 27, 2017, <https://nyti.ms/2vzWwbh>; Hilary Hanson & Sam Levine, *Local newspaper tears into former Sheriff Joe Arpaio in savage Twitter thread*, Huffington Post, Aug. 26, 2017, <http://bit.ly/2icbHXw> (summarizing Arpaio’s history).

¹⁷² See Letter from Thomas E. Perez, Asst. Atty. Gen., U.S. Dep’t of Justice, *United States’ Investigation of the Maricopa County Sheriff’s Office*, Dec. 15, 2011, https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

preliminary injunction barring the Sheriff's Office from enforcing federal immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state charges.¹⁷³ In 2012, the judge issued findings of fact and conclusions of law determining that the Sheriff's Office had violated the constitutional rights of Latinos by targeting them during raids and traffic stops, and issued a permanent injunction.¹⁷⁴ However, Arpaio refused to obey the injunction, and in May 2016, the judge ruled he was in civil contempt of court for deliberately disobeying the order.¹⁷⁵

The judge also referred the matter to a second federal judge in Arizona for an investigation of *criminal* contempt. On July 31, 2017, after a five-day trial, the judge determined that Arpaio had "willfully violated the order by failing to do anything to ensure his subordinates' compliance and by directing them to continue to detain persons for whom no criminal charges could be filed," and found him guilty of criminal contempt of court. Sentencing was set for October.¹⁷⁶

President Trump made clear that he was displeased with this course of events. In the spring, Trump reportedly had asked Attorney General Sessions whether the Department of Justice might abandon the criminal contempt case; when rebuffed, Trump decided to let the case go to trial with the plan of pardoning Arpaio if he was convicted.¹⁷⁷

Two weeks after the verdict, Trump told Fox News that he was considering a pardon for Arpaio, and that Arpaio "doesn't deserve to be treated this way" because he "has protected people from crimes and saved lives."¹⁷⁸ On August 22, just days after the

¹⁷³ *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959 (D. Ariz. 2011), *aff'd sub nom.* *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012).

¹⁷⁴ *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), *aff'd in part, vacated in part on other grounds*, 784 F.3d 1254 (9th Cir. 2015).

¹⁷⁵ *See* *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, ECF No. 1677 (Findings of Fact) (D. Ariz. May 13, 2016); *see also* *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2016 WL 3996453, at *1 (D. Ariz. July 26, 2016), *appeals dismissed sub nom.* *Melendres v. Maricopa Cty.*, No. 16-16659, 2017 WL 4317167 (9th Cir. July 27, 2017), No. 16-16663, 2017 WL 4315029 (9th Cir. Aug. 3, 2017).

¹⁷⁶ *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at *7 (D. Ariz. July 31, 2017), <http://bit.ly/2k5SgQB>.

¹⁷⁷ Tom LoBianco & Jeff Zeleny, *Trump asked Sessions to consider dropping Arpaio prosecution, official says*, CNN, Aug. 27, 2017, <http://cnn.it/2iy3vjM>.

¹⁷⁸ Gregg Jarrett, *Trump 'seriously considering' a pardon for ex-Sheriff Joe Arpaio*, Fox News, Aug. 14, 2017, <http://fxn.ws/2uDfRwz>.

white supremacist rally in Charlottesville, Virginia, Trump rhetorically asked a Phoenix campaign audience, “Was Sheriff Joe convicted for doing his job?”¹⁷⁹

On August 25, he issued a pardon. In a two-paragraph statement, the White House stated: “Throughout his time as Sheriff, Arpaio continued his life’s work of protecting the public from the scourges of crime and illegal immigration. Sheriff Joe Arpaio is now eighty-five years old, and after more than fifty years of admirable service to our Nation, he is worthy candidate for a Presidential pardon.”¹⁸⁰ Trump also added in a tweet, “He kept Arizona safe!”¹⁸¹

2. Legal analysis

The Constitution grants the president “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”¹⁸² But the Constitution’s structure makes every provision in the body of the document, including provisions conferring broad power, subject to limitation by amendments that impose restrictions on government. As the Supreme Court stated in 1968:¹⁸³

[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to ‘lay and collect Taxes,’ but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws.

Notwithstanding the breadth of the pardon power, there are lines that must not be crossed. The pardon of Arpaio “sends a message to Latinos that they do not deserve equal rights, and affirms to the judiciary that Trump has no respect for the rule of law.”¹⁸⁴ As one law professor noted before the pardon issued:

¹⁷⁹ Max Walker & Josh Frigerio, *Sheriff Joe Arpaio pardon: President Trump hints ‘he’ll be fine’*, ABC 15 News, Aug. 23, 2017, <http://bit.ly/2k3M6k8>.

¹⁸⁰ The White House, *President Trump Pardons Sheriff Joe Arpaio*, Aug. 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/08/25/president-trump-pardons-sheriff-joe-arpaio>.

¹⁸¹ <https://twitter.com/realdonaldtrump/status/901263061511794688>.

¹⁸² U.S. Const., art. II, § 2, cl. 1.

¹⁸³ *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

¹⁸⁴ Mark Joseph Stern, *Trump’s Arpaio pardon is a bad sign for Mueller’s investigation*, *Slate*, Aug. 26, 2017, <http://slate.me/2iaSs0p>.

An Arpaio pardon would express presidential contempt for the Constitution. Arpaio didn't just violate a law passed by Congress. His actions defied the Constitution itself, the bedrock of the entire system of government. For Trump to say that this violation is excusable would threaten the very structure on which his right to pardon is based.

Fundamentally, pardoning Arpaio would also undermine the rule of law itself.

The only way the legal system can operate is if law enforcement officials do what the courts tell them. Judges don't carry guns or enforce their own orders. That's the job of law enforcement. . . . When a sheriff ignores the courts, he becomes a law unto himself. The courts' only available recourse is to sanction the sheriff. If the president blocks the courts from making the sheriff follow the law, then the president is breaking the basic structure of the legal order.¹⁸⁵

That is what happened here. The exercise of the pardon power in the circumstances of Arpaio's case undermines judicial protection of constitutional rights and tramples constitutional constraints on the president's authority to pardon.¹⁸⁶ The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees individuals the right to a hearing before an independent judicial body before any branch of the federal government may deprive those individuals of life, liberty or property.¹⁸⁷ Under due process principles, the judiciary serves as the counter-majoritarian guardian of constitutionally protected individual rights against encroachment by the political branches of government. Critically, the power of contempt for violating injunctions requiring government officers to cease their unconstitutional actions—or risk fine, imprisonment or both—is a vital means by which the judiciary enforces constitutional rights. As the U.S. Court of Appeals for the Ninth Circuit explained in 2014:

[T]he purpose of contempt proceedings is to uphold the power of the court . . . and to ensure that the court's vindication of litigants' rights is not merely symbolic. Our orders would have little practical force, and

¹⁸⁵ Noah Feldman, *Arpaio Pardon Would Show Contempt for Constitution*, Bloomberg, Aug. 26, 2017, <https://bloom.bg/2yXFIBH>.

¹⁸⁶ See Br. of Amici Curiae Martin Redish, Free Speech For People and Coalition To Preserve, Protect and Defend in Opposition to Motion of Defendant Joseph Arpaio for Vacatur and Dismissal with Prejudice, *United States v. Arpaio*, No. 16-CR-01012-SRB, ECF No. 228-1 (D. Ariz. filed Sept. 11, 2017), <http://bit.ly/2k2bZkl>, *appeal filed*, No. 17-10448 (9th Cir. Oct. 19, 2017).

¹⁸⁷ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 530-32 (2004); *Bartlett v. Bowen*, 816 F.2d 695, 703-07 (D.C. Cir. 1987); *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948).

would be rendered essentially meaningless, if we were unable to prevent parties bound by them from flagrantly and materially assisting others to do what they themselves are forbidden to do.¹⁸⁸

If the president is unconstrained in employing his pardon power to relieve government officers of accountability and risk of penalty for defying injunctions imposed to enforce constitutional rights, that action will permanently impair the courts' ability to protect those inalienable rights. The result would be an executive branch freed from the judicial scrutiny required to assure compliance with the dictates of the Bill of Rights and other constitutional safeguards.

The invocation of the pardon power in the Arpaio case differs in critical ways from the traditional use of that power. When the president pardons a private individual who has been convicted of a crime, no risk arises that constitutional restraints on federal and state officials will be circumvented in that case or others. In the Arpaio case, by contrast, the pardon operates (and was likely specifically intended) to achieve precisely the result of diminishing courts' injunctive powers to enforce constitutional limits on official action. Arpaio violated myriad individuals' constitutional rights, then ignored an injunction prohibiting his continuing to do so. Through his pardon, the president sent a signal to all law enforcement officers that if their unconstitutional actions further presidential policies or preferences, they stand to benefit from the exercise of his pardon power.¹⁸⁹

The Constitution loses its effectiveness as a restraint on government, and as a guarantor of individual rights, if the pardon power may be employed with impunity as it was in Arpaio's case. That pardon has the effect and purpose of "devalu[ing] constitutional and statutory protections of a vulnerable minority" and "undercut[ing] the power of the judiciary to enforce the law against officials who believe they can

¹⁸⁸ *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 951–52 (9th Cir. 2014).

¹⁸⁹ It is true that, in the 1925 case of *Ex parte Grossman*, the Supreme Court recognized the president's power to pardon an individual for a contempt conviction arising from his flouting an injunction to stop selling liquor in the Prohibition era. 267 U.S. 87, 115, 120 (1925). But Arpaio's case is distinguishable. Arpaio's case involves a pardon issued (1) for criminal contempt (2) for violating an injunction (3) issued to a government official (4) to cease a systemic practice of violating (5) individuals' constitutional rights. By contrast, the presidential pardon in *Grossman* involved only the first two elements. Without the last three elements, the presidential pardon did not implicate the Due Process Clause. With them, the nation confronts a situation that threatens to empower the president, through use of his pardon power, to effectively eliminate the judiciary's ability to protect and enforce constitutional rights.

violate it with impunity.”¹⁹⁰ Government officials who are contemplating or engaged in abusive practices now know that the federal courts pose little threat to them—the president may decide to pardon them if they get into legal trouble.¹⁹¹

The Founders anticipated precisely this scenario. In the Virginia debates over whether to ratify the Constitution, George Mason (who was opposed to the Constitution) criticized the pardon power, arguing in 1788: “Now, I conceive that the President ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he will establish a monarchy, and destroy the republic.”¹⁹²

James Madison (sometimes called the “Father of the Constitution”) responded that impeachment would be the appropriate response to such an abuse of power: “There is one security in this case to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President. . . . This is a great security.”¹⁹³

And in the 1925 case of *Ex parte Grossman*, Chief Justice (and former president) William Howard Taft opined that if a president abused the pardon power, that “would suggest a resort to impeachment.”¹⁹⁴

¹⁹⁰ Frank O. Bowman III, *Pardoning Arpaio: The first verifiable impeachable offense*, Impeachable Offenses, Aug. 26, 2017, <http://bit.ly/2k5ya9h>.

¹⁹¹ Cf. Black, *Impeachment: A Handbook*, *supra* note 58 (“Suppose a president were to announce and follow a policy of granting full pardons, in advance of indictment or trial, to all federal agents or police who killed anybody in line of duty, in the District of Columbia, whatever the circumstances and however unnecessary the killing. . . . [C]ould anybody doubt that such conduct would be impeachable?”).

¹⁹² 3 Elliot’s Debates (June 18, 1788), <http://bit.ly/2k64RDH>.

¹⁹³ *Id.*

¹⁹⁴ *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

F. Recklessly threatening nuclear war against foreign nations, undermining and subverting the essential diplomatic functions and authority of federal agencies, including the United States Department of State, and engaging in other conduct that grossly and wantonly endangers the peace and security of the United States, its people and people of other nations, by heightening the risk of hostilities involving weapons of mass destruction, with reckless disregard for the risk of death and grievous bodily harm

1. Facts

Through a series of public statements (including on Twitter), and beginning particularly in the late summer of 2017, President Trump has made increasingly reckless public threats against North Korea, including that “[b]eing nice to Rocket Man hasn’t worked,”¹⁹⁵ that “[m]ilitary solutions” are “locked and loaded,”¹⁹⁶ that he had instructed the Secretary of State he was “wasting his time” negotiating with North Korean leadership because “we’ll do what has to be done,”¹⁹⁷ that the United States might “have no choice but to totally destroy” North Korea,¹⁹⁸ that North Korea “will be met with fire and fury like the world has never seen,”¹⁹⁹ that diplomacy had failed and “only one thing will work,”²⁰⁰ and that North Korea or its leadership “won’t be around much longer.”²⁰¹

There is serious cause for concern (and senior administration officials have voiced such concerns) about whether President Trump understands the ramifications of his threats. After a July 20, 2017 meeting in which Trump reportedly told senior advisers that he wanted to increase the country’s nuclear weapons stockpile eightfold, the Secretary of State was so alarmed by the president’s lack of understanding of the

¹⁹⁵ <https://twitter.com/realDonaldTrump/status/914565910798782465>.

¹⁹⁶ <https://twitter.com/realDonaldTrump/status/895970429734711298>.

¹⁹⁷ <https://twitter.com/realDonaldTrump/status/914497877543735296>;
<https://twitter.com/realDonaldTrump/status/914497947517227008>.

¹⁹⁸ <https://twitter.com/realDonaldTrump/status/910192375267561472>.

¹⁹⁹ Karen DeYoung & John Wagner, *Trump threatens ‘fire and fury’ in response to North Korean threats*, Wash. Post, Aug. 8, 2017, <http://wapo.st/2hFWk8L>.

²⁰⁰ <https://twitter.com/realDonaldTrump/status/916750042014404608>;
<https://twitter.com/realDonaldTrump/status/916751271960436737>.

²⁰¹ <https://twitter.com/realDonaldTrump/status/911789314169823232>.

risks of nuclear weapons that he reportedly called the president a “moron.”²⁰² That same month, during a dinner with a business executive, National Security Advisor General H.R. McMaster reportedly referred to the president variously as an “idiot” and a “dope” with the intelligence of a “kindergartner.”²⁰³ On an earlier occasion, General McMaster reportedly stated that the president lacks the necessary brainpower to understand the matters before the National Security Council.²⁰⁴ Senator Bob Corker, the Chairman of the Senate Foreign Relations Committee, stated in an interview that “I don’t think he appreciates that when the president of the United States speaks and says the things that he does, the impact that it has around the world, especially in the region that he’s addressing,” and that “he doesn’t realize that . . . we could be heading towards World War III with the kinds of comments that he’s making.”²⁰⁵

Meanwhile, in a departure from North Korea’s customary pause in missile testing during the last three months of the year, on November 29, 2017, North Korea tested an intercontinental ballistic missile with an estimated range of 8,100 miles, reportedly capable of reaching any part of the United States.²⁰⁶

In particular, the existing tension between the United States and North Korea, and the apparent lack of accurate understanding of intentions of the leadership of the other party’s intentions, suggests that threats of invasion or bombing could easily lead to a misunderstanding or miscalculation resulting in the use of nuclear weapons by either or both sides. Such a conflagration could quickly spread to South Korea, Japan, China, and/or Russia, the latter two of which also have—and might be drawn into an exchange of—nuclear weapons. High ranking government officials with access to classified materials not available to the public have suggested that the risk of escalation is serious.

²⁰² Carol E. Lee et al., *Tillerson’s Fury at Trump Required an Intervention from Pence*, NBC News, Oct. 4, 2017, <http://nbcnews.to/2AyNEcu>; MSNBC, *Ruhle: My sources say Tillerson called Trump a ‘F-ing moron,’* Oct. 4, 2017, <http://on.msnbc.com/2BHiRYV>; Graham Lanktree, *Did Rex Tillerson Call Trump a Moron*, Newsweek, Oct. 4, 2017, <https://goo.gl/xq6VT2>; Paul Waldman, *Tillerson won’t say whether he thinks Trump is a ‘moron.’ But he’s not quitting*, Wash. Post, Oct. 4, 2017, <http://wapo.st/2BGQmdN>; Eliza Rehlman, *Trump rages at NBC for report that said Tillerson called him a ‘moron’ after he wanted a dramatic increase in nuclear arsenal*, BusinessInsider, Oct. 11, 2017, <http://read.bi/2yf6eVy>.

²⁰³ Joseph Bernstein, *Sources: McMaster Mocked Trump’s Intelligence At A Private Dinner*, Buzzfeed, Nov. 20, 2017, <http://bzfd.it/2idHOGu>.

²⁰⁴ See *id.*

²⁰⁵ Jonathan Martin, *Read Excerpts From Senator Bob Corker’s Interview With The Times*, N.Y. Times, Oct. 9, 2017, <https://nyti.ms/2yUsYHz>.

²⁰⁶ Zachary Cohen et al., *New missile test shows North Korea capable of hitting all of US mainland*, CNN, Nov. 30, 2017, <http://cnn.it/2icotVU>.

Worse yet, available public evidence suggests that Trump does not fully understand, and/or is unwilling or unable to understand (or is indifferent to), the risks accompanying the use of nuclear weapons, or of how the North Korean leadership could interpret or misinterpret his verbal threats or movement of military forces as military attacks that could lead them to respond with conventional or nuclear attacks on the United States, our allies in the region, or other nations.

2. Legal analysis

There is no directly applicable precedent. Obviously, the Founders, who designated the president as the “Commander in Chief of the Army and Navy of the United State,”²⁰⁷ anticipated neither weapons of mass destruction nor the technological developments that can accelerate the pace of modern events. But by all accounts, the country appears not to be in the hands of a well-informed president who, after carefully considering detailed factual information and the counsel of senior advisers, with full information and full decisional capacity, could take a calculated risk involving strategic gamesmanship. Nor, on the other hand, is this merely a matter of “maladministration.”²⁰⁸

Reckless or wanton endangerment with the potential for millions of deaths constitutes an abuse of power. Reckless endangerment takes place when the conduct occurs, regardless of whether the death or grievous bodily harm actually results. By analogy, military service-members may be charged with “reckless endangerment” for engaging in conduct that is “reckless or wanton,” “likely to produce death or grievous bodily harm to another person,” and “of a nature to bring discredit upon the armed forces.”²⁰⁹ In a recent court-martial prosecution, affirmed by the U.S. Court of Appeals for the Armed Forces earlier this year, a sergeant was convicted of reckless endangerment (and sentenced to ten months’ confinement) for failure to properly inspect parachutes—a matter far less grave than reckless conduct that could trigger

²⁰⁷ U.S. Const. art. II, § 2, cl. 1. The original public meaning indicates that the Founders had a narrow view of this power. See, e.g., Leon Friedman & Burt Neuborne, *The Framers, on War Powers*, N.Y. Times, Nov. 27, 1990, <https://nyti.ms/2BBixKX>.

²⁰⁸ See *supra* note 7.

²⁰⁹ See Manual for Courts-Martial, United States ¶ 100a, at IV-144 (2016 ed.), <http://bit.ly/2hpWku9>; see, e.g., United States v. Herrmann, 76 M.J. 304, 305 (C.A.A.F. 2017) (affirming conviction of reckless endangerment, bad-conduct discharge, and sentence of ten months’ confinement for sergeant who failed to properly inspect parachutes), *reconsideration denied* (C.A.A.F. July 13, 2017). While the president is of course not subject to the Uniform Code of Military Justice, the gravity of his reckless or wanton conduct likely to lead to nuclear war is far greater than that of one sergeant.

nuclear war.²¹⁰ As it happened, the sergeant's reckless endangerment did not lead to any injuries, because another soldier "became suspicious about the speed with which some of these parachutes had been packed," and they were opened and inspected (and found to contain unsafe deficiencies) without being used.²¹¹ The fact that the reckless conduct did not lead, in fact, to any injuries was no defense.

Similarly, here, the president's tweets and threats have already dramatically increased the risk of a nuclear exchange; the fact that it has not yet occurred does not diminish the endangerment. Impeachment hearings could probe whether (as indeed appears) the president's unilateral actions are so ill-informed and in disregard of the risks of deaths on a massive scale as to be not merely negligent, but reckless or wanton.²¹²

Additionally, to the extent that the president's reckless or wanton conduct demonstrates incapacity to perform his duties, Congress could determine that this fits within the rubric of high crimes and misdemeanors, which do not require a

²¹⁰ *United States v. Herrmann*, 76 M.J. 304, 305 (C.A.A.F. 2017), *reconsideration denied* (C.A.A.F. July 13, 2017).

²¹¹ *Id.* at 306.

²¹² *Cf. Black, Impeachment: A Handbook*, *supra* note 58 (noting in passing that, at some point, "a murderous and insensate abuse of the commander-in-chief power [could] amount to a 'high Crime' or 'Misdemeanor' for impeachment purposes").

specific showing of intent to commit misfeasance.²¹³ The protective purposes of impeachment are well suited to address this concern.

G. Directing or endeavoring to direct law enforcement, including the Department of Justice and the Federal Bureau of Investigation, to investigate and prosecute political adversaries and others, for improper purposes not justified by any lawful function of his office, thereby eroding the rule of law, undermining the independence of law enforcement from politics, and compromising the constitutional right to due process of law

1. Facts

The president has endeavored to intervene in law enforcement in large and small ways that undermine the traditional independence of the prosecutorial and judicial functions. For example, the president called Army soldier Bowe Bergdahl a “dirty, rotten traitor” while court-martial charges were pending, and declared that Bergdahl should be executed.²¹⁴ After Bergdahl was convicted, he avoided a jail sentence, in part because of what the military judge called “troubling” remarks from the

²¹³ This is distinct from section 4 of the 25th Amendment. In the debates at the Constitutional Convention, as the Founders discussed an impeachment provision, James Madison argued that it was “indispensable that some provision should be made for defending the Community agst. the incapacity, negligence or perfidy of the chief Magistrate.” James Madison, *Debates in the Federal Convention of 1787*, http://avalon.law.yale.edu/18th_century/debates_720.asp (July 20, 1787). Madison repeated the “incapacity” point, noting that the president “might lose his capacity after his appointment” and “[i]n the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.” *Id.* Another Founder, Gouverneur Morris, who began the debates skeptical of impeachment, later changed his mind, and cited “incapacity” as grounds for impeachment. *Id.* Notably, the first successful impeachment conviction in our history was of a federal judge (John Pickering, in 1804) who had slipped into senile dementia; ultimately, the vigorous congressional debate as to whether his insanity constituted a high crime or misdemeanor was left unsettled as he was ultimately impeached and convicted for drunkenness and mishandling cases. See House Judiciary Comm., *Constitutional Grounds for Presidential Impeachment* 21-25 (93d Cong., Feb. 1974) 42-43, <http://bit.ly/1974StaffReport>. In fact, Pickering’s defenders conceded his mental incapacity, and (unsuccessfully) used it as a *defense* against impeachment, suggesting that he could not form the legal intent necessary to commit wrongdoing or defend himself adequately. See 3 Hinds, *Precedents of the House of Representatives* § 2333 (1907).

²¹⁴ Alex Horton, *Trump’s ‘traitor’ rhetoric looms over Bowe Bergdahl’s sentencing*, Wash. Post, Oct. 23, 2017, <http://wapo.st/2yHJgo6>.

president.²¹⁵ In response, the president tweeted: “The decision on Sergeant Bergdahl is a complete and total disgrace to our Country and to our Military.”²¹⁶

Over the course of 2017, President Trump repeatedly pressured the Department of Justice to investigate and prosecute political adversaries, notably former campaign opponent Hillary Clinton. Here is a sampling of those communications:

On July 24, 2017, President Trump tweeted: “So why aren’t the Committees and investigators, and of course our beleaguered A.G., looking into Crooked Hillarys crimes & Russia relations?”²¹⁷

On November 3, 2017 (the Thursday before Election Day), the president stated in a radio interview:²¹⁸

You know, the saddest thing is, because I am the president of the United States I am not supposed to be involved with the Justice Department. I'm not supposed to be involved with the FBI. I'm not supposed to be doing the kind of things I would love to be doing and I am very frustrated by it. . . .

I look at what's happening with the Justice Department, why aren't they going after Hillary Clinton with her emails and with her dossier, and the kind of money . . . I don't know, is it possible that they paid \$12.4 million for the dossier . . . which is total phony, fake, fraud and how is it used? It's very discouraging to me. I'll be honest.

²¹⁵ See Dakin Andone et al., *Bowe Bergdahl gets dishonorable discharge, avoids prison time*, CNN, Nov. 4, 2017, <http://cnn.it/2hCgluD>.

²¹⁶ <https://twitter.com/realDonaldTrump/status/926492915626663939>.

²¹⁷ <https://twitter.com/realDonaldTrump/status/889467610332528641>. Sometime during the summer of 2017, Trump also reportedly asked a senator to open an investigation into Hillary Clinton. Jonathan Martin et al., *Trump Pressed Top Republicans to End Senate Russia Inquiry*, N.Y. Times, Nov. 30, 2017, <https://nyti.ms/2BBmbo4>.

²¹⁸ *LISTEN: PRESIDENT DONALD TRUMP To LARRY O'CONNOR: I'm Very Unhappy the Justice Department Isn't Going After Hillary Clinton*, WMAL, <http://www.wmal.com/2017/11/03/listen-president-donald-trump-to-larry-oconnor-im-very-unhappy-the-justice-department-isnt-going-after-hillary-clinton/>; Philip Rucker, *Trump pressures Justice Department to investigate 'Crooked Hillary'*, Wash. Post, Nov. 3, 2017, <http://wapo.st/2ztjNIH>.

The next day, the president issued a remarkable series of public statements pressuring the U.S. Department of Justice to investigate Hillary Clinton, the Democratic Party, and other political adversaries.²¹⁹ He tweeted:²²⁰

Everybody is asking why the Justice Department (and FBI) isn't looking into all of the dishonesty going on with Crooked Hillary & the Dems..

...New Donna B book says she paid for and stole the Dem Primary. What about the deleted E-mails, Uranium, Podesta, the Server, plus, plus...

....People are angry. At some point the Justice Department, and the FBI, must do what is right and proper. The American public deserves it!

The real story on Collusion is in Donna B's new book. Crooked Hillary bought the DNC & then stole the Democratic Primary from Crazy Bernie!

Pocahontas just stated that the Democrats, lead by the legendary Crooked Hillary Clinton, rigged the Primaries! Lets go FBI & Justice Dept.

²¹⁹ Rucker, *supra* note 218.

²²⁰ <https://twitter.com/realDonaldTrump/status/926403023861141504>;
<https://twitter.com/realDonaldTrump/status/926403023861141504>;
<https://twitter.com/realDonaldTrump/status/926404584456773632>;
<https://twitter.com/realDonaldTrump/status/926406490763784194>;
<https://twitter.com/realDonaldTrump/status/926417546038923264>.

Ten days later, on November 13, 2017, the Department of Justice announced that it was considering whether to appoint a special counsel to investigate the Clinton Foundation.²²¹

On December 2, 2017, President Trump tweeted:²²²

Many people in our Country are asking what the “Justice” Department is going to do about the fact that totally Crooked Hillary, AFTER receiving a subpoena from the United States Congress, deleted and “acid washed” 33,000 Emails? No justice!

2. Analysis

In 1940, Attorney General Robert Jackson (who would later serve as a Supreme Court Justice and chief prosecutor at the Nuremberg trials after World War II) warned that “the greatest danger of abuse of prosecuting power” was “picking the man”—or, in this case, woman—“ and then . . . putting investigators to work, to pin some offense on [her].”²²³ A chief executive who uses law enforcement to persecute political enemies is characteristic of an authoritarian regime, not a constitutional republic. That is why Republican and Democratic presidents alike have respected the independence of law enforcement. In the case of military courts-martial, such as Bergdahl’s, this limit is formalized in the prohibition of “command influence.”²²⁴

Congress set a precedent with the second article of impeachment against President Richard Nixon, which cited, in its fifth specification, his use of federal investigative agencies against political opponents.²²⁵ Based on this precedent, the president’s attempts to direct the criminal investigative powers of the federal government against political opponents “for purposes unrelated to national security, the

²²¹ Michael S. Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry Into Clinton Foundation*, N.Y. Times, Nov. 13, 2017, <https://nyti.ms/2jAcBI>.

²²² <https://twitter.com/realDonaldTrump/status/937142713211813889>.

²²³ Robert H. Jackson, Attorney General, *The Federal Prosecutor* 5 (Apr. 1, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

²²⁴ 10 U.S.C. § 837(a); Steve Vladeck, *President Trump’s Careless Rhetoric, Unlawful Command Influence, and the Bergdahl Court-Martial*, Just Security, Apr. 5, 2017, <https://www.justsecurity.org/39541/president-trump-bowe-bergdahl-unlawful-command-influence/>.

²²⁵ See *Articles of Impeachment against Richard M. Nixon*, *supra* note 55.

enforcement of laws, or any other lawful function of his office” are grounds for impeachment, regardless of whether these attempts have yet succeeded.²²⁶

H. Undermining the freedom of the press

1. Facts

President Trump has repeatedly referred to major U.S. news organizations as “fake news” and “the enemy of the American people.” Here is a sampling of such statements:

On February 15, 2017, Trump tweeted, “The fake news media is going crazy with their conspiracy theories and blind hatred. @MSNBC & @CNN are unwatchable. @foxandfriends is great!”²²⁷

On February 17, 2017, Trump tweeted: “The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”²²⁸

On March 30, 2017, Trump tweeted: “The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?”²²⁹ On April 30, 2017, his then-chief of staff Reince Priebus confirmed that changing libel laws is “something we’ve looked at,” adding that “newspapers and news agencies need to be more responsible with how they report the news.”²³⁰

On July 2, 2017, Trump tweeted “#FraudNewsCNN #FNN” and circulated a video of him violently wrestling a man covered by a CNN logo.²³¹

On July 22, 2017, Trump tweeted: “A new INTELLIGENCE LEAK from the Amazon Washington Post, this time against A.G. Jeff Sessions. These illegal leaks, like Comey’s, must stop!”²³²

On July 24, 2017, Trump issued a series of tweets in short succession. At 7:23 PM, he tweeted: “The Amazon Washington Post fabricated the facts on my ending massive, dangerous, and wasteful payments to Syrian rebels fighting Assad.....”²³³ At 7:28 PM,

²²⁶ Frank Bowman, *President Trump committed another impeachable offense on Friday*, Slate, Nov. 3, 2017, <http://slate.me/2j6gXw5>.

²²⁷ <https://twitter.com/realdonaldtrump/status/831830548565852160>.

²²⁸ <https://twitter.com/realDonaldTrump/status/832708293516632065>.

²²⁹ <https://twitter.com/realDonaldTrump/status/847455180912181249>.

²³⁰ Jackie Wattles, *Trump’s chief of staff: ‘We’ve looked at’ changing libel laws*, CNN, Apr. 30, 2017, <http://cnnmon.ie/2qildKS>.

²³¹ <https://twitter.com/realDonaldTrump/status/881503147168071680>.

²³² <https://twitter.com/realDonaldTrump/status/888708453560184832>.

²³³ <https://twitter.com/realDonaldTrump/status/889672374458646528>.

he tweeted: “So many stories about me in the @washingtonpost are Fake News. They are as bad as ratings challenged @CNN. Lobbyist for Amazon and taxes?”²³⁴ At 7:36 PM, he tweeted: “Is Fake News Washington Post being used as a lobbyist weapon against Congress to keep Politicians from looking into Amazon no-tax monopoly?”²³⁵

On October 11, 2017, Trump tweeted, “Fake @NBC News made up story that I wanted a ‘ten-fold’ increase in our U.S. nuclear arsenal. Pure fiction, made up to demean. NBC = CNN!”²³⁶ and “With all of the Fake News coming out of NBC and the Networks at what point is it appropriate to challenge their License? Bad for country!”²³⁷

On October 11, 2017, Trump also tweeted, “Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!”²³⁸

On October 11, 2017, Trump told reporters in the Oval Office, “It is frankly disgusting the way the press is able to write whatever they want to write, and people should look into it.”²³⁹

On November 25, 2017, Trump tweeted: “.@FoxNews is MUCH more important in the United States than CNN, but outside of the U.S., CNN International is still a major source of (Fake) news, and they represent our Nation to the WORLD very poorly. The outside world does not see the truth from them!”²⁴⁰

On November 27, 2017, Trump tweeted: “We should have a contest as to which of the Networks, plus CNN and not including Fox, is the most dishonest, corrupt and/or distorted in its political coverage of your favorite President (me). They are all bad. Winner to receive the FAKE NEWS TROPHY!”²⁴¹

On November 29, 2017, Trump asked on Twitter, “[W]hen will the top executives at NBC & Comcast be fired for putting out so much Fake News. Check out Andy Lack’s past!”²⁴²

²³⁴ <https://twitter.com/realDonaldTrump/status/889673743873843200>.

²³⁵ <https://twitter.com/realDonaldTrump/status/889675644396867584>.

²³⁶ <https://twitter.com/realDonaldTrump/status/918110279367643137>.

²³⁷ <https://twitter.com/realDonaldTrump/status/918112884630093825>.

²³⁸ <https://twitter.com/realDonaldTrump/status/918267396493922304>.

²³⁹ Noah Bierman & Brian Bennett, *Trump threatens networks, saying it’s ‘disgusting the way the press is able to write whatever they want’*, L.A. Times, Oct. 11, 2017, <http://lat.ms/2AudGxC>.

²⁴⁰ <https://twitter.com/realDonaldTrump/status/934551607596986368>.

²⁴¹ <https://twitter.com/realDonaldTrump/status/935147410472480769>.

²⁴² <https://twitter.com/realDonaldTrump/status/935844881825763328>.

His administration has also taken retaliatory measures against the independent press, particularly news media that have subjected him to critical coverage. On February 24, 2017, President Trump’s White House barred certain news media—CNN, the New York Times, the L.A. Times, and Politico—from attending a White House press briefing.²⁴³ On May 10, 2017, the White House barred American reporters from witnessing his meeting with Russian Foreign Minister Sergey Lavrov and Russian Ambassador to the United States Sergey Kislyak in the Oval Office, but allowed a Russian photographer to document the meeting.²⁴⁴ (Indeed, the only reason that the U.S. public knows that he met with the Russian officials in the Oval Office is because Russian state media released a photograph.) This is the meeting at which he revealed his motive for firing former FBI Director Comey to the Russian officials.²⁴⁵ In June 2017, his administration prohibited video recordings of White House press briefings.²⁴⁶

President Trump’s rhetoric has encouraged authoritarian foreign governments to attack the very U.S. media that Trump criticizes, endangering not only press freedoms but the lives and safety of American journalists. On May 2, 2017, just ahead of World Press Freedom Day, the Committee to Protect Journalists noted that “President Trump’s oft-tweeted ‘fake news’ epithet, for example, has already been adopted by repressive governments such as China, Syria, and Russia. And when Trump attacked a correspondent during a February press conference, he was cheered by Turkey President Recep Tayyip Erdoğan, the world’s worst jailer of journalists”²⁴⁷ On November 26, 2017, the Ministry of Foreign Affairs of Egypt used Twitter to describe CNN’s coverage of a terrorist attack in the Sinai Desert as “deplorable.”²⁴⁸ And on November 28, 2017, Libyan media attacked a CNN report on

²⁴³ Callum Borchers, *White House blocks CNN, New York Times from press briefing hours after Trump slams media*, Wash. Post, Feb. 24, 2017, <http://wapo.st/2lE6R2t>.

²⁴⁴ Julie Hirschfeld Davis, *Trump Bars U.S. Press, but Not Russia’s, at Meeting With Russian Officials*, May 10, 2017, <https://nyti.ms/2pz45Ms>.

²⁴⁵ Matt Apuzzo et al., *Trump Told Russians That Firing ‘Nutmeg’ Comey Eased Pressure From Investigation*, N.Y. Times, May 19, 2017, <http://nyti.ms/2sY5b6n>; see *supra* Part III.A.1.g.

²⁴⁶ Brian Stelter, *With cameras banned, CNN sends sketch artist to White House briefing*, CNN, June 24, 2017, <http://cnnmon.ie/2s0g8sd>.

²⁴⁷ Joel Simon & Alexandra Ellerbeck, *With press freedom under attack worldwide, US is setting wrong example*, Comm. to Protect Journalists, May 2, 2017, <https://cpj.org/x/6c96>.

²⁴⁸ <https://twitter.com/MfaEgypt/status/934898253006626819>

slave auctions in Libya cited Trump’s November 25 tweet to criticize CNN, and suggested that its government might investigate CNN.²⁴⁹

2. Legal analysis

Freedom of the press is enshrined in the First Amendment to the U.S. Constitution.²⁵⁰ As Justice Black observed in *New York Times Co. v. United States*:²⁵¹

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

Similarly, as President George W. Bush noted on World Press Freedom Day in 2007, “[t]he United States values freedom of the press as one of the most fundamental political rights and as a necessary component of free societies. In undemocratic societies where governments suppress, manipulate, and control access to information, journalists are on the front lines of the people’s battle for freedom.”²⁵² In stark contrast to President Trump, President Bush also condemned “harassment” of journalists abroad.²⁵³

To be sure, many presidents have contentious relations with national media. And Trump is certainly free to criticize particular news stories that he believes are inaccurate. In fact, no individual above-cited individual tweet or statement, standing in isolation, would constitute an impeachable offense.

However, his consistent pattern of repeated verbal attacks on news media and journalists crosses a line. By repeatedly criticizing respected and independent journalistic institutions and specific news stories as “fake news” based on little or

²⁴⁹ Patrick Wintour, *Fake news’: Libya seizes on Trump tweet to discredit CNN slavery report*, *The Guardian*, Nov. 28, 2017, <https://www.theguardian.com/world/2017/nov/28/libya-slave-trade-cnn-report-trump-fake-news>; see also Michael M. Grynbaum, *Trump and Russia Seem to Find Common Foe: The American Press*, *N.Y. Times*, Nov. 27, 2017, <https://nyti.ms/2ibLUi2>.

²⁵⁰ “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. Const. amend. I.

²⁵¹ 403 U.S. 713, 717 (1971).

²⁵² Pres. George W. Bush, *President’s Statement on World Press Freedom Day*, May 3, 2007, 2007 WL 1293207.

²⁵³ *Id.*

nothing more than dislike of their coverage, threatening (even if empty) to somehow change libel laws (i.e., reduce First Amendment protection for the press), and suggesting revocation of licenses for television networks with critical coverage, he is undermining a critical foundation of a free society.

It is no defense that his threats appear not to have deterred journalists visibly so far. First, we can never know how many journalists, editors and owners of media outlets may have been chilled internally. Second, even if the president's threats prove ineffective, an impeachable offense may be based on harassment and threats that fail to achieve their goals. By analogy, the fact that President Nixon's efforts to obstruct justice were unsuccessful did not diminish the danger of his efforts.

The protective purposes of impeachment are well suited to address a chief executive who endangers this pillar of the First Amendment and the foundational institutions on which democracy relies.

IV. AN IMPEACHMENT INVESTIGATION DOES NOT NEED TO WAIT FOR THE CONCLUSION OF OTHER CIVIL OR CRIMINAL PROCEEDINGS

Some have argued that Congress should wait until Special Counsel Robert Mueller first completes his criminal probe before beginning impeachment investigations. Mueller's investigation could indeed provide evidence relevant to some of the grounds for an impeachment investigation. But Congress must not use that pending investigation as an excuse to shirk its duty to conduct its own independent impeachment hearings.

The special counsel's investigation is more limited than the scope of an impeachment investigation. First, his charge focuses on the Russia investigation, "matters that arose or may arise directly from the investigation," and "crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses."²⁵⁴ But it does not cover, for example, violations of the Constitution's Emoluments Clauses. Yet the spectre of a president violating these clauses was specifically cited by the Founders as grounds for impeachment. The special counsel has no jurisdiction with respect to the grounds outside the scope of his appointment; they remain the responsibility of Congress.

Furthermore, Mueller is only authorized to take action based on violations of *federal criminal statutes*. But federal criminal statutes do not include the full range of potential abuses that may constitute "high Crimes and Misdemeanors." The

²⁵⁴ See Rod J. Rosenstein, Acting Atty. Gen., U.S. Dep't of Justice, Order No. 3915-2017, *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters*, May 17, 2017, <https://www.justice.gov/opa/press-release/file/967231/download>; 28 C.F.R. § 600.4(a).

President has unique powers and opportunities for abuse that he shares with literally no one else in the country, and it would not make sense for Congress to pass specific statutes detailing a range of criminal violations that only one person could commit. For example, pardoning Joseph Arpaio does not appear to violate any criminal statute.

Finally, even within the area of overlap, the special counsel must focus on criminal violations that he can *prove in federal court*. Trials in federal courts are subject to procedural and evidentiary requirements that do not apply to a congressional impeachment proceeding. When the House Judiciary Committee conducts an impeachment investigation, it can consider whatever evidence the committee finds appropriate, whether or not a federal judge would allow it to be presented to a jury. The same is true should the matter reach the Senate for a trial.

Similarly, the federal criminal obstruction of justice statutes require proving that the defendant had a particular state of mind when taking action to interfere with an investigation. By contrast, Congress is empowered to decide that the president's actions merit impeachment regardless of his intentions or mental state.²⁵⁵

Moreover, the special counsel's investigation will, by nature, be conducted in secret, except as particular indictments and pleas are unsealed. Furthermore, since, according to some opinions, a sitting president cannot be indicted, it is possible that the special counsel's analysis of the president's misconduct may come in the form of a confidential recommendation to the Department of Justice, which could decline to act on it and bury it so that neither citizens nor journalists nor members of Congress learn its contents until long after Trump's term in office has ended. By contrast, a congressional impeachment investigation will be conducted—at least in part—in the open, laying forth the evidence for the American public as it develops, and in a timely manner.

Finally, in an important sense, an impeachment investigation into the president's corruption and abuses of power does not require a special prosecutor. As we have argued here, the factual evidence supporting many potential bases for impeachment is largely public, and largely undisputed. To be sure, evidence regarding the dealings between Mr. Trump, his campaign, and his administration with the Russian government, and whether any of it was unlawful, is still unfolding. Those issues are factually complex and may involve difficult questions of statutory interpretation, but they do not provide the only basis for impeachment hearings.

Similar reasoning applies to pending litigation involving challenges to the president's violations of the Emoluments Clauses, and to the pardon of Mr. Arpaio. Given the protective purposes of impeachment, the fact that a judicial remedy may be available

²⁵⁵ Laurence H. Tribe, *Why Impeachment Must Remain a Priority*, Take Care Blog, May 23, 2017, <https://takecareblog.com/blog/why-impeachment-must-remain-a-priority>.

to halt or undo specific presidential actions does not obviate the need for Congress to act without further delay in order to prevent continuing harm to the rule of law.

Any impeachment inquiry, and any vote to impeach, as well as the requisite trial that would follow in the Senate, would be a deliberate and deliberative process. By definition, investigation, impeachment and trial would take months to play out. The stakes are high, the dangers to our constitutional system are great. Delay in beginning this process is dangerous and irresponsible.