

The Honorable Jerrold Nadler, Chair
The Honorable Mary Gay Scanlon, Vice Chair
Committee on the Judiciary
U.S. House of Representatives

July 30, 2019

Dear Mr. Chairman Nadler and Madame Vice Chairwoman Scanlon,

On behalf of a coalition of national and state organizations advocating for the impeachment of President Trump, we applaud you for starting an impeachment inquiry. As you noted in a recent court filing to obtain grand jury materials underlying Special Counsel Mueller’s report and related investigations, the Committee “is conducting an investigation to determine whether to recommend articles of impeachment.”¹ We write to thank you for starting this impeachment inquiry, but also to convey our concerns about its apparent timeline, scope, and public strategy.

A. Timeline

Based on what we understand of the Committee’s plans, the impeachment inquiry risks taking far too long. That is in large part because the Committee appears to be unnecessarily creating complex schedule dependencies.

For example, while the grand jury materials will presumably be interesting, the unredacted Mueller Report provides more than enough information to discuss and debate one or more articles of impeachment pertaining to the subject matter of the Mueller investigation. However, the court could take months (potentially including appeals) to resolve your application. Similarly, while the testimony of former White House Counsel Don McGahn might be riveting, it is not necessary: Mueller’s team interviewed him for some 30 hours, and the report contains the product of those interviews. If it takes months to resolve disputes with the Department of Justice to enable McGahn’s testimony, it is not worth treating such testimony as essential for the impeachment inquiry.

¹ *Application of the Committee on the Judiciary, U.S. House of Representatives, for an order authorizing the release of certain grand jury materials*, No. 19-GJ-00048, ECF No. 1 (D.D.C. filed July 26, 2019), at 3.

In the meantime, while the Committee may suffer from such delays, the president's continued and escalating attacks on freedom of the press, Members of Congress, and American values represents an ongoing threat to the security of the country against tyranny. To avoid wasting time on unnecessary detours, the Committee should establish a clear timeline for a full impeachment inquiry:

- The Committee should set an **outer bound date certain** for its final vote on whether to approve articles of impeachment to the full House. The Nixon impeachment inquiry took approximately four months from the Watergate Special Prosecutor's March 1974 release of materials to the Judiciary Committee to the July 1974 Committee vote on articles of impeachment. The Clinton impeachment inquiry took approximately three months from the September 1998 release of the Starr Report to the December 1998 Committee vote on articles of impeachment. It has already been more than three months since the Mueller Report was released; two more months is more than sufficient.
- The Committee should announce a **schedule of a series of preparatory hearings** leading up to the final vote, either as a whole or by a subcommittee, devoted to the following sub-topics:
 - Constitutional grounds for presidential impeachment as set forth by the Framers and historical practice.
 - Grounds for impeachment besides those identified in the Mueller report. (See Section B below.)
 - An opportunity for the president, in person or through counsel, to present his case.
- While it is reasonable to seek additional documents or testimony, the Committee should not permit obstruction or delay by the president, the Executive Branch, or the president's allies to derail the schedule. No one document or witness is essential to this impeachment inquiry, and the Committee should **stick to its schedule in the faces of delay or obstinacy** from the White House, the Department of Justice, or President Trump.
- In order to proceed on a timeline demanded by the moment, and for the purpose only of this impeachment inquiry, the Committee should **continue in session during the August adjournment.**²
- Finally, we urge **streamlined committee procedures** for hearings. Alternating questions from the majority and minority pursuant to the five-

² Under House Rule XI(2)(m)(1)(A), the Committee may "sit and act at such times and places within the United States, *whether the House is in session, has recessed, or has adjourned*, and to hold such hearings as it considers necessary." (Emphasis added.)

minute rule is unwieldy. The Committee could delegate all questioning to a single member (or counsel) from each party; or delegate certain questions to standing subcommittees; or create special subcommittees to receive particular testimony.

B. Scope

The Mueller report describes a damning pattern of inviting and welcoming illegal foreign interference in the 2016 election, and then a coverup and obstruction scheme comprising at least ten separate instances of obstruction of justice. The president’s ongoing obstruction and defiance of all congressional oversight investigations—including an apparent policy to fight every subpoena—is itself part of this pattern.³

These are compelling and appropriate topics for an impeachment inquiry. But the Committee should broaden its scope beyond them.

Impeachment is not primarily about the punishment of crimes, but rather the prevention of tyranny. In the words of the influential early constitutional commentator and Supreme Court Justice Joseph Story, impeachment “is not so much designed to punish an offender, as to *secure the state*.”⁴ President Trump has repeatedly engaged in autocratic abuses of power that are outside the purview of the Mueller report. And while the evidence for some of this misconduct might benefit from confirmatory witness testimony, most of it has occurred in public—from the president’s own mouth or Twitter feed. These additional abuses of power include, but are not limited to, the following.

1. Abuse of power by directing law enforcement to investigate and prosecute political adversaries and critics, and to undermine the freedom of the press.

A classic move of a tyrant or autocrat is to abuse government power to attack his adversaries and critics. Since taking office, Trump has repeatedly pressured the Department of Justice, the Federal Bureau of Investigation, and other law

³ Of note, the third article of impeachment against President Nixon was for defying congressional subpoenas. See House Judiciary Comm., *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, at 4, 120 Cong. Rec. 29,220 (1974).

⁴ Joseph Story, *Commentaries on the Constitution* (1833) § 803 (emphasis added).

enforcement agencies to investigate and prosecute political adversaries.⁵ Often, he accuses his political adversaries and critics of *treason* simply for (as an example) failing to applaud his State of the Union speech.⁶ Moreover, he has undermined the freedom of the press by repeatedly demonizing all critical reporting as “fake news” or the Stalinesque “enemy of the people,” while seeking or threatening to use the levers of government power (such as criminal punishment, merger review, and even postal rates) against critical media and pressuring news organizations to fire particular editors or reporters whose coverage displeases him.⁷ In a unanimous resolution passed last August, the U.S. Senate described Trump’s attacks on the press and stated that the Senate “condemns the attacks on the institution of the free press and *views efforts to systematically undermine the credibility of the press as an attack on the democratic institutions of the United States.*”⁸ The president has been, by the Senate’s own definition, “attack[ing] the democratic institutions of the United States” for essentially his entire term in office. If attacking the democratic institutions of the United States is not grounds for impeachment, it is hard to imagine what might be.

The Committee need not reason from first principles, because history provides ample precedent for impeachment on these grounds. Over the course of the nineteenth and twentieth centuries, Congress impeached three federal judges on charges categorized as “vindictive use of power.” These included impeaching Judge James H. Peck in 1826 for a single instance of retaliation against a lawyer who had criticized one of his decisions; Judge Charles Swaine in 1903 for maliciously using the criminal contempt power to imprison two lawyers and a litigant; and Judge George W. English in 1926 for “threatening to jail a local newspaper editor for printing a critical editorial.”⁹ And in 1974, Congress’s second article of impeachment against President Richard Nixon cited his use of federal investigative agencies (including the Internal Revenue Service and the FBI) against

⁵ See chapter 4 of Ron Fein, John Bonifaz, & Ben Clements, *The Constitution Demands It: The Case for the Impeachment of Donald Trump* (Melville House, 2018), for a sampling of President Trump’s extensive efforts to misuse the Department of Justice and other federal law enforcement to target named political adversaries and critics, including but not limited to President Obama, Hillary Clinton, James Comey, Huma Abedin, Andrew McCabe, and assorted reporters, athletes, and others.

⁶ Ali Vitali, *Trump: Democrats’ muted State of the Union reaction ‘treasonous,’* NBC News, Feb. 5, 2018.

⁷ See Fein *et al.*, chapter 8.

⁸ S. Res. 607 (115th Cong., Aug. 16, 2018) (emphasis added).

⁹ House Judiciary Comm., *Constitutional Grounds for Presidential Impeachment 20* (93d Cong., Feb. 1974), <http://bit.ly/CGPI1974>.

political opponents “for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office.”¹⁰

The Nixon impeachment article provides a template for the impeachable offense. Like Nixon, Trump has attempted to direct the criminal investigative powers of the federal government against political opponents. Like Nixon, Trump has done this “for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office.” Based on this precedent, Trump’s attempts to direct 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. That is true regardless of whether these attempts have yet succeeded—like Trump, Nixon also faced some refusal by law enforcement officials. As Professor Frank Bowman notes, “it is not acceptable for a president either to *employ, or threaten to employ*, the agents and ministers of the criminal law of the United States against his enemies for political gain. A president who does so engages in precisely the class of misconduct perilous to the maintenance of republican government for which the founders designed the remedy of impeachment.”¹¹

Trump’s efforts 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, simultaneously erode the rule of law, undermine the independence of law enforcement from politics, and compromise the constitutional right to due process of law. And by repeatedly criticizing respected and independent journalistic institutions and specific news stories as “fake” and the press itself as “corrupt” based on little or nothing more than dislike of unfavorable coverage, threatening (even if empty) to somehow change libel laws (i.e., reduce First Amendment protection for the press), “take away credentials,” or revoke licenses for television networks with critical coverage, the president is undermining a critical foundation of a free society.

2. Corruption of electoral process

As the Mueller report shows, President Trump invited and welcomed foreign assistance in the 2016 election, and he has explicitly refused to forgo such

¹⁰ House Judiciary Comm., *Impeachment of Richard M. Nixon, President of the United States* 3.

¹¹ See Frank Bowman, *President Trump committed another impeachable offense on Friday*, Slate, Nov. 3, 2017.

assistance in 2020. But he is also an unindicted co-conspirator in *another* criminal interference in the 2016 election. President Trump’s former personal attorney, Michael Cohen, pleaded guilty to federal crimes for making illegal surreptitious hush money to influence the 2016 election. As Cohen told both a federal court and the Committee on Oversight and Reform, he made these illegal payments—for which he is presently serving time in federal prison—“in coordination with and at the direction of” President Trump.¹²

The reason to recommend an article of impeachment on this ground is to *protect the 2020 election*. Aspiring autocrats who win power through democratic elections rarely submit to re-election without a thumb on the scales. If Mr. Trump was willing to go to these criminal lengths to influence the 2016 election as a private citizen, only the naïve would believe that *President* Trump, with vastly more power available to him, will not do even worse. As Framers George Mason asked at the Constitutional Convention: “Shall the man who has practised corruption and by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?”¹³

3. Abuse of office to promote and act upon racial hostility

Another classic move of a would-be tyrant is to demonize and target racial, ethnic, or religious minorities. To be sure, much of President Trump’s activity in this area does not violate a specific criminal statute. But contrary to a common misunderstanding, the phrase “high Crimes and Misdemeanors” is not limited to prosecutable crimes.¹⁴ As Professor Charles Black wrote in his classic 1974 text on impeachment, impeachable offenses include serious misdeeds that “are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books.”¹⁵

¹² See Dara Lind, *Michael Cohen: “Individual 1 is Donald J. Trump,”* Vox, Feb. 27, 2019.

¹³ James Madison, *Notes of Debates in the Federal Convention of 1787* (July 20, 1787), http://avalon.law.yale.edu/18th_century/debates_720.asp. While impeachment usually focuses on conduct that occurs in office, impeachment can also address corruptly obtaining the office in the first place. Indeed, in 2010, Judge Thomas Porteous was impeached and convicted substantially for conduct that occurred before he assumed federal office—including making false statements to the Senate and FBI in connection with his nomination and confirmation.

¹⁴ See Jared P. Cole & Todd Garvey, Cong. Research Serv., *Impeachment and Removal* 1, 7–9 (Oct. 29, 2015); House Judiciary Comm., *Constitutional Grounds for Presidential Impeachment* 21–25.

¹⁵ Charles L. Black, Jr., *Impeachment: A Handbook* 37 (Yale University Press, 1974).

President Trump’s racist rhetoric and actions form a pattern rising to the level of an impeachable offense. Under the Constitution, the president has a duty to “take care that the laws be faithfully executed.”¹⁶ That includes ensuring that the government not “deny to any person within its jurisdiction the equal protection of the laws.”¹⁷

Obviously, mere racist *beliefs* are not impeachable. In the words of the influential Framers Edmund Jennings Randolph, “No man ever thought of impeaching a man for an opinion.”¹⁸

But racist action and rhetoric can rise to the level of an impeachable offense in several ways. First, it is an impeachable offense when the president urges government officials to violate the law, especially with violence. Second, it is an impeachable offense when the president sows discord within American society by encouraging bigotry and violence. Such rhetoric fulfills no identifiable governmental function, but is simply misuse of his taxpayer-funded position to sow racial hostility. Finally, it is an impeachable offense when the president enacts policies that have no constitutionally-legitimate justification but are rather motivated entirely by bigotry, with thin pretexts or no pretexts at all.

The most fundamental and consistent characteristic of the Trump presidency is that he has repeatedly, and for purposes unrelated to any lawful function of his office, misused his official position to disseminate false or misleading public statements for the purpose of sowing hatred and hostility among the people of the United States on the basis of race, color, religion, or national origin; approved, condoned, or counselled law enforcement and the military to unlawfully injure or kill persons in their custody; approved, condoned, or counselled private parties’ harassment and unlawful violence against individuals and groups on account of race, color, or religion; misused his official position to retaliate publicly against citizens engaged in lawful protest pertaining to allegations of government misconduct; and singled out Members of Congress of color for particular demonization.¹⁹

¹⁶ U.S. Const., art. II, § 3.

¹⁷ U.S. Const., amend. XIV, § 1.

¹⁸ 3 Elliot’s Debates 401 (debate at Virginia Ratifying Convention).

¹⁹ Of particular note, the tenth article of impeachment against President Andrew Johnson cited a feverish rant in which Johnson blamed a white-led massacre on congressional efforts to extend the vote to black people, and also charged him with making “inflammatory and scandalous harangues, and . . . loud threats and bitter menaces” against Congress. See U.S. Senate, *The Impeachment of Andrew Johnson (1868) President of the United States*, <https://go.usa.gov/xyF7z>.

But that is only where it starts; it ends somewhere far darker. President Trump’s actions at the nation’s southern border come directly from a tyrant’s playbook. His actions there include separating children from their families (with no intent of reunification) and detaining children and families in internment camps under cruel and unconstitutional conditions; misusing the United States military by deploying it to the southern border for improper purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing the existence of an urgent national security threat at the border in an effort to influence the 2018 election.

The reasons to impeach for this conduct are not just the risk of encroaching tyranny. In the *Federalist Papers*, Alexander Hamilton wrote that impeachable offenses “relate chiefly to injuries done immediately to the society itself.”²⁰ Trump’s race-baiting—no less than his obstruction of justice—causes ongoing injury to American society. Social scientists have quantified the “Trump Effect”: measurable increases in racial violence and hostility associated with Trump rhetoric.²¹ We are at the point in America where chanting the name of the president of the United States at an opposing high school basketball team is universally understood as a racial taunt.²² An article of impeachment on these grounds would not *end* the Trump Effect, but it would *delegitimize* it as the official voice of the United States.²³

²⁰ *The Federalist* No. 65.

²¹ See, e.g., Maureen B. Costello, Southern Poverty Law Ctr., *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation’s Schools*, at 4 (Nov. 28, 2016), <https://bit.ly/2JfMUye>; Christopher N. Morrison et al., *Assaults on Days of Campaign Rallies During the 2016 US Presidential Election*, 29 *Epidemiology* 490, 492 (July 2018), <http://bit.ly/2xHK2Vr>; Brian Levin & John David Reitzel, Ctr. for the Study of Hate & Extremism, *Report to the Nation: Hate Crime Rise in U.S. Cities and U.S. Counties in Time of Division and Foreign Interference*, at 3-4 (May 2018), <http://bit.ly/2JlendN>.

²² See Dan Barry & John Eligon, ‘Trump, Trump, Trump!’ How a President’s Name Became a Racial Jeer, *N.Y. Times*, Dec. 16, 2017.

²³ Professor Keith Whittington has noted that one critical function of impeachment—what he calls “actually the most important” function—is “to articulate, establish, preserve and protect constitutional norms.” Keith Whittington, *What is the Impeachment Power For?*, *Law & Liberty*, May 22, 2017, <http://bit.ly/2OrRAUK>. The constitutional norm of equal protection of the laws is arguably in more danger today from President Trump than any president since Andrew Johnson.

4. Corruption and self-enrichment

Most tyrants seek to use their positions of government power for self-enrichment. It is a national embarrassment that, in plain violation of the Foreign and Domestic Emoluments Clauses of the U.S. Constitution,²⁴ for two and a half years President Trump has continued to own (through the thinnest of veneers) companies that do extensive business with supplicants from foreign governments, state and local governments, and corporate lobbies. In particular, through his businesses, President Trump receives unconstitutional *foreign* emoluments in the forms of foreign payments at the Trump International Hotel in Washington, D.C., and other Trump properties in the United States, credit from foreign state-owned banks; foreign trademarks, and foreign government permits and approvals for Trump properties abroad. And he receives unconstitutional *domestic* emoluments by profiting personally from official government travel, executive branch action to promote his own businesses, and subsidies, tax breaks, and other direct and indirect government payments to his businesses.²⁵

Congress and others have tried to address this through the courts (so far, without success), but the Framers made clear that violation of the emoluments clauses was impeachable. In July 1787, at the Constitutional Convention in Philadelphia, the delegates debated whether to include a provision for impeaching the president. 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.”²⁶ James Madison (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.”²⁷ As Madison explained in

²⁴ The Foreign Emoluments Clause prohibits emoluments from foreign governments: “[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*, from any King, Prince, or foreign State.” U.S. Const. art. I, § 9, cl. 8 (emphasis added). The Domestic Emoluments Clause prohibits emoluments from the federal, state, and local governments: “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.*” U.S. Const. art. II, § 1, cl. 7 (emphasis added).

²⁵ See Fein *et al.*, chapter 1, for an extensive review of the facts of these emoluments.

²⁶ Madison, *Notes of Debates in the Federal Convention of 1787* (July 20, 1787).

²⁷ *Id.*

arguing for the impeachment power, “corruption” in the presidency “might be fatal to the Republic.”²⁸

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) argued for ratifying the new Constitution. When George Mason, opposing the Constitution, raised concerns about foreign influence over the president, Randolph responded: “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.* . . . It is impossible to guard better against corruption.”²⁹

C. Public strategy

While we were pleased to see the Committee begin an impeachment inquiry, we have been disheartened by the haphazard and at times contradictory communications. Within a 48-hour span starting in the late afternoon after Mueller’s testimony, the Speaker stated at a widely-anticipated press conference that the House would not consider impeachment hearings because “we still have some matters outstanding in the courts”; the Committee stated in a federal court filing that “this Committee is conducting an investigation to determine whether to recommend articles of impeachment”; Chairman Nadler suggested at a press conference announcing that filing that the Committee was “exercising its authority to investigate all of these scandals and to decide what to do about them, which could include articles of impeachment,” but that this was not necessarily an “impeachment inquiry”; and Vice Chairwoman Scanlon and several other Members of the Committee penned a piece in *The Atlantic* to explain that the Committee is, in fact, “mov[ing] forward with the impeachment process.” These confusing messages have created a need for erudite analyses to argue that the Committee has, in fact, started an impeachment inquiry.³⁰

Preparing the American public for the impeachment process—to understand what the Committee is already doing, and where it is going—is critical. But due to the muddled rollout, many Americans may not even realize that the Committee has, in

²⁸ *Id.*

²⁹ 3 Elliot’s Debates 515 (debate at Virginia Ratifying Convention) (emphasis added).

³⁰ Laurence H. Tribe, *We are finally on the path to Trump impeachment and saving what our Founders gave us*, USA Today, July 28, 2019; Joshua Matz, *The House has already opened an impeachment investigation against Trump*, Wash. Post, July 26, 2019.

fact, begun an impeachment inquiry. When Chairman Peter Rodino launched an impeachment inquiry regarding President Richard Nixon on October 30, 1973, there was no ambiguity; it was reported exactly as such on the front page of the next day's New York Times.³¹

Mr. Chairman Nadler and Madame Vice Chairwoman Scanlon, we urge you to promptly make a clear and unambiguous public statement, ideally with Speaker Pelosi, Representative Schiff, and Representative Cummings present and participating, announcing that the Committee has in fact begun an impeachment inquiry, without any qualifications or hedging.

Thank you again for your important first steps toward a full impeachment inquiry. We look forward to working with you on the next steps.

Sincerely,

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Signed By:

Free Speech For People
By The People
Courage Campaign
CREDO Action
Democracy for America
Empire State Indivisible
Indivisible

Lawyers for Good Government
Mainers for Accountable Leadership
March for Truth
Progressive Democrats of America
Women's March

³¹ James M. Naughton, *House Panel Starts Inquiry on Impeachment Question*, N.Y. Times, Oct. 31, 1973. Compare Nicholas Fandos & Charlie Savage, *Raising Prospect of Impeaching Trump, House Seeks Mueller's Grand Jury Secrets*, N.Y. Times, July 26, 2019. The distinction between the headlines alone convey the lack of clarity as to what the Committee is doing today, as opposed to in 1973.