



WHEN IS RACIST ABUSE OF OFFICE AN IMPEACHABLE OFFENSE?

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I. INTRODUCTION

When, if ever, is racist abuse of office an impeachable offense? This question is not merely theoretical. Representative Al Green of Texas has introduced multiple resolutions of impeachment based on President Donald Trump's patterns of racist rhetoric and action, and he has promised to introduce another such resolution.¹ Furthermore, the House Judiciary Committee may consider this type of ground as part of an impeachment inquiry. Of course, it is by no means the *only* ground for impeaching President Trump.² But in 2019, it is a live issue.

Congress, however, lacks an accepted test for when bigotry crosses the line. Some have suggested that the answer is never.³ This report provides an argument for why it does, and proposes a constitutional framework—based on text, history, and the purposes of impeachment—that distinguishes the impeachable from the merely deplorable.

Part I of this report briefly summarizes the law of impeachable offenses generally. Part II discusses general criteria for evaluating the impeachability of racist abuse of office, starting with the sources of constitutional duties and standards derived from the intersection of the U.S. Constitution's Take Care Clause and the Equal Protection Clause. Part II also covers the key issues of substantiality and evolving standards.

Part III discusses particular categories of misconduct, and identifies three principal categories of racist action and rhetoric-based impeachable offenses:

1. Advocating that government personnel commit acts of illegal violence.
2. Incitement to discrimination, hostility or violence by third parties, defined for purposes of impeachment analysis as speech that (A)

¹ *Impeachment*, CONGRESSMAN AL GREEN, <https://algreen.house.gov/impeachment> (last visited Sept. 19, 2019).

² See generally RON FEIN, JOHN BONIFAZ, & BEN CLEMENTS, *THE CONSTITUTION DEMANDS IT: THE CASE FOR THE IMPEACHMENT OF DONALD TRUMP* (2018).

³ See Steven Nelson, *Constitutional Scholars Question Impeaching Trump for 'Bigotry'*, WASH. EXAMINER, July 17, 2019, <https://washex.am/2XOhIOi>.

promotes animus, and (B) places people in peril in deliberate indifference to their safety.

3. Adopting, directing, or implementing federal government actions based on an invidious discriminatory purpose.

Finally, Part IV concludes with a brief discussion of the importance of pursuing impeachment on this ground.

Because no president has been impeached on this exact ground, readers are entitled to approach these issues skeptically. But this report demonstrates that impeachment for these offenses is solidly supported by the underlying theory of the impeachment power. A high misdemeanor for this category of abuse of office represents the natural evolution of past congressional impeachment practice as applied to modern understanding of the constitutional principles of equal protection of the laws and a president's unprecedented trampling of the norms that protect those constitutional principles.⁴

II. HIGH MISDEMEANORS UNDER THE IMPEACHMENT CLAUSE

Under Article II of the Constitution, the president may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors."⁵ Contrary to a common misunderstanding, the phrase "high Crimes and Misdemeanors" is not limited to prosecutable crimes. Indeed, the non-partisan Congressional Research Service has noted that "[m]any of the impeachments approved by the House of Representatives have included conduct that did not involve criminal activity" (including the very first case of impeachment and removal in 1804) and that "[l]ess than a third have specifically invoked a criminal statute or used the term 'crime.'"⁶

⁴ Earlier versions of this framework were presented in *The Hill* and in remarks to the Congressional Black Caucus Foundation's 2018 Annual Legislative Conference. See Representative Al Green & Ron Fein, *Trump's Racist Abuses Demand Impeachment*, THE HILL (July 17, 2019), <http://bit.ly/2ZyHaYr>; Ron Fein Joins Congressman Al Green for 'Impeachment: A Necessary Remedy for Bigotry in Policy', FREE SPEECH FOR PEOPLE (Sept. 17, 2018), <http://bit.ly/2ZA6Vrp>.

⁵ U.S. CONST. art. II, § 4.

⁶ Jared P. Cole & Todd Garvey, Cong. Research Serv., *Impeachment and Removal* 1, 7–9 (Oct. 29, 2015), <https://fas.org/sgp/crs/misc/R44260.pdf>.

Rather, impeachable offenses are, as Alexander Hamilton wrote in the *Federalist Papers*, “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”⁷ As the renowned early nineteenth century commentator and U.S. Supreme Court Justice Joseph Story explained, the impeachment power “has a more enlarged operation” than criminal law, and includes what he called “political offences.”⁸ Impeachment, Justice Story argued, is “not so much designed to punish an offender, as to *secure the state*.”⁹

Building from this framework, scholars in recent years have produced varying definitions of the impeachable offense. In the end, however, it is hard to beat the definition that constitutional scholar Charles Black provided on the eve of the Nixon impeachment hearings: “offenses (1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books.”¹⁰

III. EVALUATING THE IMPEACHABILITY OF RACIST ABUSE OF OFFICE

As discussed below, a case for impeachment based on this type of misconduct may lie in at least three instances: when a president urges government officials to commit illegal violence; when a president sows discord within American society by inciting discrimination and violence by third parties; and when a president enacts policies that have no constitutionally-legitimate justification but are rather motivated entirely by bigotry, with thin pretexts or no pretexts at all.

⁷ THE FEDERALIST No. 65, at 394 (Alexander Hamilton) (Charles R. Kesler ed., 2003), https://avalon.law.yale.edu/18th_century/fed65.asp.

⁸ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 764, at 541 (4th ed. 1873), <http://bit.ly/Story764>.

⁹ *Id.* § 803, at 568 (emphasis added).

¹⁰ CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 37 (2d ed. 1998).

A. Sources of constitutional duties

The Constitution's Take Care Clause requires that the president "shall take Care that the Laws be faithfully executed."¹¹ Courts have interpreted this clause in various (sometimes inconsistent) ways.¹² But new historical research on the language of faithful execution (which is also used in the presidential oath or affirmation to "faithfully execute the Office of President") indicates that "faithfully execute" had a well-understood meaning in England and 18th century America. That meaning addressed what would now be called fiduciary duties, including "diligent, careful, good faith, and impartial execution of law or office," and a duty not to act *ultra vires* (beyond the scope of office).¹³

While a full analysis of the meaning of the Take Care Clause is beyond the scope of this report, for present purposes the clause must be understood in light of "the Laws" as they now exist. Those include the Equal Protection Clause of the Fourteenth Amendment, which provides that the government cannot "deny to any person within its jurisdiction the equal protection of the laws."¹⁴ (By its terms, the Fourteenth Amendment is enforceable by the federal government against the states; in 1954, the Supreme Court declared it applicable to the federal government through the Due Process Clause of the Fifth Amendment.¹⁵)

As the political scientist Peter Irons has argued, "By definition, an overtly racist president cannot obey his (or her) constitutional oath to 'take care that the laws be faithfully executed.'"¹⁶ The president's duty to take care that the Equal Protection Clause be faithfully executed requires him to take care that federal and state governments do not deny equal protection of the laws. Obviously, that does not mean that the president is liable or impeachable for every federal or state equal

¹¹ U.S. CONST. art. II, § 2.

¹² Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 PENN. L. REV. 1835 (2016), <http://bit.ly/2ZiOp6G>.

¹³ Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2178 (2019), <http://bit.ly/2ZmyNiG>.

¹⁴ U.S. CONST. amend. XIV, § 1.

¹⁵ *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

¹⁶ Peter Irons, *Trump's Racism is an Impeachable Offense*. See: Andrew Johnson, NBC NEWS (July 30, 2019), <https://nbcnews.to/2Ztg7Op>.

protection violation. But it *does* mean that he has a duty to at least make an effort to ensure that the Equal Protection Clause is followed. And if a president *actively undermines* the Equal Protection Clause, whether by deed or word, that violates the Take Care Clause.

The same logic applies to other laws, including civil rights statutes and criminal statutes prohibiting violent crime. The president's Take Care duty does not make him personally liable or impeachable for every violation of individual constitutional rights, civil rights law, or criminal statutes by federal, state, or local government officers, or by private citizens. But if he *actively undermines* those laws by encouraging violations, that too violates the Take Care Clause.

Finally, these legal principles should be understood in light of larger constitutional norms as expressed in documents that may not be legally binding, but nonetheless help define our constitutional system and traditions. As the constitutional theorist and historian Keith Whittington has explained, an essential aspect of the impeachment power is "to articulate, establish, preserve and protect constitutional norms."¹⁷ Here, a key ideal is the Declaration of Independence's statement of the "self-evident" truth that all people "are created equal."¹⁸ Obviously, this statement was at best aspirational when it was made, and has often been violated or ignored in practice. But a technical analysis of legal principles is enhanced by considering whether a president is making it his deliberate practice to openly contradict or undermine this ideal.

B. Substantiality

In the 1974 Nixon impeachment inquiry, the highly-regarded staff report on *Constitutional Grounds for Presidential Impeachment* concluded that impeachable conduct must meet a "substantiality" requirement: "conduct seriously incompatible with either the

¹⁷ Keith Whittington, *What is the Impeachment Power for?*, LAW & LIBERTY (May 22, 2017), <http://bit.ly/2OrRAUK>.

¹⁸ THE DECLARATION OF INDEPENDENCE (U.S. 1776), para. 2, <https://www.archives.gov/founding-docs/declaration-transcript>.

constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.”¹⁹

Accordingly, merely holding bigoted *views*, without more, is not grounds for impeachment. In the words of the influential Framer Edmund Jennings Randolph at the Virginia Ratifying Convention, “No man ever thought of impeaching a man for an opinion.”²⁰ Nor, without more, would mere private expressions of racist thoughts or use of racist language in conversations with aides or other officials rise to this level.

Finally, as with any case for impeaching and removing a president, one or two stray acts, no matter how deplorable, usually do not suffice. But a consistent pattern or practice acquires a different character.

C. Evolving standards

Impeachment based on bigotry, perhaps more than other grounds for impeachment, must be evaluated by standards that change over time. The historical record is replete with past presidential conduct based on racial motives. Past presidents have owned slaves, called Native Americans “savages” and people of mixed heritage “half-breeds,” and taken countless actions based on bigoted beliefs.²¹ Yet the fact that this conduct was not considered impeachable, illegal, or even unusual at the time does not mean that it cannot be impeachable today.

A useful analogy may be found in the Eighth Amendment context, where the Supreme Court evaluates the cruel or unusual nature of punishments through the lens of “the evolving standards of decency that mark the progress of a maturing society.”²² A similar analysis must prevail here. To give an obvious example, if a president in 2019 ordered the internment of American citizens of Japanese ancestry in desert

¹⁹ STAFF OF HOUSE JUDICIARY COMM., 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 27 (Comm. Print 1974), <https://go.usa.gov/xVmSx>.

²⁰ 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (2d ed. 1881), <http://bit.ly/2ZjrGHE>.

²¹ See, e.g., David Johnson, *Slaves at the White House Did More Than Just Build it*, TIME (July 28, 2016), <https://ti.me/2ahGH1o>; Brian Hicks, *The Cherokees vs. Andrew Johnson*, SMITHSONIAN MAG., Mar. 2011, <http://bit.ly/2Zp2Iqd>.

²² *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

camps, that would be grounds for impeachment; the fact that FDR did it in 1942 is no defense.²³

A recent historical example illustrating this point was the impeachment of Judge Samuel Kent in 2009.²⁴ Kent was impeached on charges stemming from sexual misconduct against female court employees. It is doubtful that the Framers would have considered this an impeachable offense in 1787. But standards evolve, and the House of Representatives considered it impeachable in 2009. (Kent, like President Richard Nixon, resigned before his Senate trial.)

Similarly, for purposes of the Take Care Clause, the president's constitutional duty to take care that the Equal Protection Clause be faithfully executed is evaluated by the standards of today—not 1868, let alone 1787.

IV. CATEGORIES OF MISCONDUCT

A. Racist public rhetoric

It may seem odd to impeach a president over his speech. But when the president speaks in public, whether in an “official” speech or in a campaign activity, his words have a disproportionate impact. To be sure, the president in his individual capacity has the First Amendment right to freedom of speech, and in his official capacity he must be afforded a wide berth to speak on matters of public policy as he sees fit. But there comes a point at which presidential speech exceeds all appropriate bounds. This can be easily illustrated by an extreme hypothetical: Suppose a president stood before cameras in the Rose Garden and announced the launch of a racial holy war, in which all

²³ See *Japanese Relocation During World War II*, NAT'L ARCHIVES, <https://go.usa.gov/xVWhH> (last updated Apr. 10, 2017).

²⁴ IMPEACHMENT OF JUDGE SAMUEL B. KENT, H.R. Rep. No. 111-159, at 5 (2009), <https://go.usa.gov/xVy2B> (quoting IMPEACHMENT OF WALTER L. NIXON, JR., H.R. Rep. No. 101-36, at 5 (1989)) (quotation marks omitted); *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 IMPEACHMENT OF ALCEE L. HASTINGS, H.R. Rep. No. 100-810, at 6 (1988)).

federal law enforcement officers would be permitted to kill people of color at will, and private citizens were encouraged to do the same. If that is not an impeachable offense, then the concept has no meaning. The question, then, is where to draw the line, and why.

1. General considerations

From a theoretical perspective, there are two overlapping reasons to consider a pattern of racist tirades as a ground for impeachment: reinforcement of constitutional norms, and limiting ongoing harm to the nation.

The first reason is norm-reinforcing. As noted earlier, an essential aspect of the impeachment power is “to articulate, establish, preserve and protect constitutional norms.”²⁵ Citing as examples the impeachments of Justice Chase and President Johnson (discussed below), Professor Whittington argues that this larger constitutional function is well established in American (and British) history as a means of establishing or reinforcing constitutional norms. In these cases, “[t]he actual removal of the impeached official is almost beside the point. The impeachment is the message.”

Impeachment on this ground would emphasize that it is *not acceptable* for the president of the United States to misuse 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; or to approve, condone, or counsel private parties’ harassment and unlawful violence against individuals and groups on account of race, color, or religion.

The second reason is consequentialist. As noted earlier, Alexander Hamilton described impeachable offenses as causing “injuries done immediately to the society itself.”²⁶ (Representative Green has frequently cited this language in support of his articles of impeachment.) Social scientists and investigators have quantified the

²⁵ Whittington, *supra* note 17.

²⁶ See *supra* note 7.

“Trump Effect”—measurable increases in racial violence and hostility associated with Trump rhetoric.²⁷

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. When the fans of a predominantly white team chant “Trump! Trump! Trump!” at a predominantly black or Latino team, everyone involved understands *exactly* what that means.²⁸

The Trump Effect constitutes an “injury . . . to the society itself,” and as long as Trump remains president, with his every word treated as inherently newsworthy, his racist tirades will continue to inflict this damage. At minimum, impeaching Trump would delegitimize this stream of abuse as the official voice of the United States, and could help reduce the flames before there is a conflagration.

²⁷ See Mike Levine, ‘No Blame?’ ABC News Finds 36 Cases Invoking ‘Trump’ in Connection With Violence, Threats, Alleged Assaults, ABC NEWS (Aug. 14, 2019), <https://abcn.ws/2yQScsw>; Michael Kunzelman & Astrid Galvan, *Trump Words Linked to More Hate Crime? Some Experts Think So*, AP NEWS (Aug. 7, 2019), <http://bit.ly/2AsBiAS>; Brian Levin & Lisa Nakashima, *Report to the Nation 2019: Factbook on Hate & Extremism in the U.S. & Internationally* 36–37, CTR. FOR THE STUDY OF HATE & EXTREMISM (July 2019), <http://bit.ly/2ArSjv1>; Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes* (Jan. 31, 2019), <https://ssrn.com/abstract=3102652>; *2017 Hate Crime Statistics Released: Report Shows More Departments Reporting Hate Crime Statistics*, FED. BUREAU OF INVESTIGATION (Nov. 13, 2018), <https://go.usa.gov/xVmZK>; Rosemary K.M. Sword & Philip Zimbardo, *The Trump Effect: An Update*, PSYCHOLOGY TODAY (Jan. 30, 2018), <http://bit.ly/2QgNQpM>; 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, *Report to the Nation: Hate Crime Rise in U.S. Cities and U.S. Counties in Time of Division and Foreign Interference* 3–4, CTR. FOR THE STUDY OF HATE & EXTREMISM (May 2018), <http://bit.ly/2JlendN>; Janice Williams, *Hate Crimes Against Muslims Are on the Rise in the U.S.*, NEWSWEEK, July 17, 2017, <http://bit.ly/2xJVkbH>; Maureen B. Costello, *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation’s Schools* 4, S. POVERTY LAW CTR. (Nov. 28, 2016), <https://bit.ly/2JfMUye>.

²⁸ See Dan Barry & John Eligon, ‘Trump, Trump, Trump!’ How a President’s Name Became a Racial Jeer, N.Y. TIMES, Dec. 16, 2017, <https://nyti.ms/2kzNg3j>.

2. Historical precedent

While the Framers were not concerned about racist tirades per se in 1787, they certainly understood the danger of demagoguery. Alexander Hamilton opened the Federalist Papers by warning of “the perverted ambition” of men who “hope to aggrandize themselves by the confusions of their country,” and closed them by warning of “the military despotism of a victorious demagogue.”²⁹

Just as importantly, congressional precedent supports impeachment based on public rants and harangues. In 1804, the House impeached Supreme Court Justice Samuel Chase for, among other offenses, “delivering to [a] grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the grand jury, and of the good people of Maryland.”³⁰ The Senate failed to convict on that charge by four votes, yet as Whittington notes, the message was received. Since then, federal judges have tended to refrain from political harangues from the bench.

In 1862, Congress impeached and removed Judge West Humphreys, who had joined the Confederacy. The very first article of impeachment charged that, at a public meeting in Nashville, he “did endeavor by public speech to incite revolt and rebellion within said State against the Constitution and Government of the United States, and did then and there publicly declare that it was the right of the people of said State, by an ordinance of secession, to absolve themselves from all allegiance to the Government of the United States, the Constitution and laws thereof.”³¹

Just six years later, in 1868 Congress impeached (and very nearly convicted) President Andrew Johnson based on his efforts to block post-

²⁹ THE FEDERALIST No. 1, at 28 (Alexander Hamilton) (Charles R. Kesler ed., 2003), https://avalon.law.yale.edu/18th_century/fed01.asp; THE FEDERALIST No. 85, *id.* at 526, https://avalon.law.yale.edu/18th_century/fed85.asp; see also Bob Bauer, *A President's Words Matter, Part II: Impeachment Standards and the Case of the Demagogue*, LAWFARE (Oct. 11, 2017), <http://bit.ly/2Lu4AnM>.

³⁰ CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, *supra* note 19, at 45.

³¹ 3 Asher C. Hinds, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2390, at 810 (1907), <https://go.usa.gov/xVZqk>.

Civil War Reconstruction so that the defeated Confederate states could re-impose the antebellum system of white supremacy. The impeachment charges centered on Johnson's efforts to fire a pro-Reconstruction official.³² But the tenth article of impeachment charged him with making "inflammatory and scandalous harangues, and . . . loud threats and bitter menaces," including a feverish rant in which the president blamed a white-led massacre on congressional efforts to extend the vote to black people.³³ (At the Senate trial, the House managers abandoned their efforts before this article could be presented for a vote.)

3. Application to President Trump

In the case of President Trump, the sheer volume, vitriol, and nakedness of his bigoted public rhetoric exceeds anything in modern memory. As just a few examples, Trump has publicly accused the vast majority of American Jews of "disloyalty" (a calumny that even the notoriously antisemitic President Nixon did not utter in public); singled out multiple Members of Congress of color for particular demonization; and even slurred an entire U.S. city.³⁴

The House of Representatives has already formally condemned some of these statements, and the NAACP voted unanimously to call for his impeachment on this basis—a step that it had apparently never taken before, even with President Nixon.³⁵ Several criteria can be relevant in

³² *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, <https://go.usa.gov/xVZq5> (last visited Sept. 19, 2019).

³³ See *id.* (article 10, specification 3), see also Laine Kaplan-Levenson, *An Absolute Massacre: The 1866 Riot at the Mechanics' Institute*, WMNO (July 14, 2016), <http://bit.ly/2LcmzPE>.

³⁴ See Philip Rucker & Ashley Parker, *Trump's Lost Summer: Aides Claim Victory, But Others See Incompetence and Intolerance*, WASH. POST, Sept. 1, 2019, <https://wapo.st/30RAFWj>; Eileen Sullivan, *Trump Again Accuses American Jews of Disloyalty*, N.Y. TIMES, Aug. 31, 2019, <https://nyti.ms/2zeslec>.

³⁵ H. Res. 489, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-resolution/489>; Colby Itkowitz & Wesley Lowery, 'Very Bold Move:' NAACP Votes to Support Trump Impeachment, WASH. POST, July 23, 2019, <https://wapo.st/2M8NpKD>; cf. N.Y. TIMES, *N.A.A.C.P. Board Leaves Stand on Nixon Unchanged*, Nov. 25, 1973, <https://nyti.ms/1iIFVLR>.

determining when this type of deplorable presidential speech crosses into impeachable territory.

a) Advocating illegal violence by government personnel

At a bare minimum, the Take Care Clause prohibits the president from advocating obviously illegal government action. The president simply lacks the authority to issue plainly illegal orders. Consequently, any presidential orders, instructions, or counsel to government officials to violate the law are beyond the scope of his office.

The question is when it rises to the level of an impeachable offense. There are contexts where a president asking government officials to violate the law is not sufficiently serious to merit impeachment. A president who told a White House employee to fraudulently display the emblem of the 4-H Club would be advocating commission of a federal crime,³⁶ but that alone probably does not justify impeachment. Yet there is little controversy that giving other forms of illegal orders, such as asking aides to impede a law enforcement investigation, can be both criminal and impeachable.

Ordering law enforcement or military officials to commit illegal violence against persons in their control or custody rises to this level. For example, in 2017, the commander-in-chief exhorted the nation to “study” an urban legend about General Pershing committing war crimes against Muslim prisoners of war, not as a cautionary tale but as a model for the future.³⁷ An imperative to “study” this incident issued by the president, whom the Constitution designates as “Commander in Chief of the Army and Navy of the United States,”³⁸ cannot be dismissed as merely a suggestion that the history faculty at the military

³⁶ 18 U.S.C. § 707.

³⁷ Donald J. Trump (@realDonaldTrump), Twitter (Aug. 17, 2017, 11:45 AM), <https://twitter.com/realDonaldTrump/status/898254409511129088>; 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/1OkWQMy>.

³⁸ U.S. CONST. art. II, § 2, cl. 1.

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.³⁹ By analogy, under the Uniform Code of Military Justice, a person who "commands" or even "counsels" an offense is considered a "principal" subject to punishment as if he had committed the offense himself.⁴⁰ And the fact that the president's imperative was not an explicit direct order is of little import. As a federal court has noted, even in the military, "rarely do general officers issue commands or orders in form as such, and by almost universal acceptance their expressed wishes are interpreted by their subordinates as orders."⁴¹ (Of course, this also applies to civilian government officials; as former FBI Director James Comey told Congress, when the president expressed his "hope," as a subordinate he took it as "a direction."⁴²)

A slightly different situation arises when the president advocates that *non-federal* law enforcement officers commit illegal violence. Technically, of course, the president cannot give orders to state or local police. But his rhetoric can have a significant influence. For example, in July 2017, President Trump encouraged police to be "rough" with "thugs" that they arrest, specifically advocating that police *not* take care to avoid causing head injuries to arrested people.⁴³ This speech was widely understood, including by police chiefs nationwide, as endorsing police brutality.⁴⁴ And the United States Department of Justice, which investigates and sometimes sues or criminally prosecutes officers or departments involved in police brutality, answers to the president.

Since statements by the president can establish executive branch policy, this type of advocacy can give a green light to "bad cops," or even to entire departments. Consider Trump's remarks when he announced his

³⁹ See 18 U.S.C. § 2441(d)(1)(D).

⁴⁰ 10 U.S.C. § 877(1).

⁴¹ *Jackson v. McElroy*, 163 F. Supp. 257, 262 (D.D.C. 1958).

⁴² See Alex Ward, *This is the Most Important Moment of the Comey Testimony*, VOX (June 8, 2017), <http://bit.ly/2Hx50cb>.

⁴³ Philip Bump, *Trump's Speech Encouraging Police to be "Rough," Annotated*, WASH. POST, July 28, 2017, <https://wapo.st/2x85h2t>.

⁴⁴ 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>.

pardon of former Arizona sheriff Joe Arpaio. Arpaio, who had a long history of abusive treatment of (mostly Latinx) people in his office's custody, had been convicted of criminal contempt of court for willfully disobeying a court order to stop illegal detentions.⁴⁵ But Trump explained that he issued the pardon because Arpaio was "convicted for doing his job" and "[h]e kept Arizona safe!"⁴⁶ To a law enforcement officer who is inclined to follow Arpaio's example, that reads like a full-throated endorsement of the convicted sheriff's methods.

b) Incitement to discrimination, hostility, or violence by third parties

Even outside the context of exhortations to government officials, presidential rhetoric that is intended, or reasonably foreseeable, to lead to violations of the law by private actors is, at minimum, contrary to the intent of the Take Care Clause. And the president denies equal protection of the law to persons within the United States when he uses his bully pulpit to encourage or exhort private citizens or other third parties to discriminate or commit violence against disfavored groups.

In this area, evolving standards, not only of racist rhetoric in particular but rhetoric in general, are unavoidable. The three particular speeches cited by the House of Representatives in the tenth article of impeachment against Andrew Johnson seem tame on the page to modern readers, but they were apparently incredibly inflammatory at the time—the House noted “the cries, jeers and laughter of the multitudes then assembled in hearing,” and a speech of apparently

⁴⁵ United States v. Arpaio, No. CR-16-01012-001, 2017 WL 3268180, at *7 (D. Ariz. July 31, 2017), <http://bit.ly/2k5SgQB>; 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).

⁴⁶ Donald J. Trump (@realDonaldTrump), Twitter (Aug. 25, 2017, 7:00 PM), <https://twitter.com/realdonaldtrump/status/901263061511794688>; 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>.

similar tone two days later led to shots fired and one dead.⁴⁷ This type of charge requires inescapably political judgments—that is why the Framers vested the power of impeachment in the House of Representatives. Yet this does not mean that standards are impossible.

An incitement standard can provide a starting point. In 1992, the United States ratified the International Covenant on Civil and Political Rights, which provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁴⁸ This raises the complicating question of what constitutes “incitement.” Under the Supreme Court’s *Brandenburg* test, there is a very high bar for *punishing* an individual for incitement: the First Amendment protects speech advocating violence unless it directed to (and likely to result in) inciting or producing “imminent lawless action.”⁴⁹ The prosecution and conviction of chief Nazi propagandist Julius Streicher for incitement to genocide at the International Military Tribunal in Nuremberg probably would not have met that test.⁵⁰

But the question here is not whether the president could be criminally punished. Rather, the question is under what circumstances he should be impeached and removed from office. The First Amendment does not prevent Congress from impeaching and removing the president if he uses his bully pulpit to sow discord within American society by encouraging bigotry and violence. Such rhetoric fulfills no identifiable governmental function; it is simply misuse of his taxpayer-funded position.

Consequently, Congress can use a different standard. As noted earlier, the president has a duty to take care that the Equal Protection Clause

⁴⁷ Will Higgins, *Indy’s 6 Weirdest Presidential Visits*, INDIANAPOLIS STAR, Sept. 29, 2016, <http://indy.st/2dpp8eD>.

⁴⁸ International Covenant on Civil & Political Rights, Dec. 19, 1966, art. 20, 999 U.N.T.S. 171, <http://bit.ly/2AtqT8l>; Senate Consideration of Treaty Doc. 95-20 (Apr. 2, 1992), <https://go.usa.gov/xVy2R>.

⁴⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁰ See generally Wibke Kristin Timmermann, *Incitement in international criminal law*, 88 INT’L REV. OF THE RED CROSS 823, 827–28 (Dec. 2006), <http://bit.ly/2Lf7dtJ>.

be faithfully executed. The Supreme Court has long held that government action based on a “bare . . . desire to harm a politically unpopular group” (what the Court has come to call “animus”) violates the Equal Protection Clause.⁵¹ In 1982, the Court specifically applied this doctrine to animus against undocumented immigrants.⁵²

Animus provides the grounding for the first element of our proposed standard. A president whose rhetoric repeatedly promotes, inflames, and amplifies a “bare . . . desire to harm a politically unpopular group” is not taking care that the Fourteenth Amendment be faithfully executed. Notably, the issue is not whether the president *himself* is subjectively motivated by animus. This is *not* because of the difficulty of peering into a man’s soul. If the problem were simply the difficulty in ascertaining whether the president’s rhetoric is “really” motivated by animus, it would simply be a fact-finding issue—if the president offered a non-animus-based justification, Congress could evaluate his credibility. Rather, the more important point is that it *does not matter* what the president’s internal motivations are if his rhetoric *externally* promotes, inflames, and amplifies animus. A president who fans the flames of bigotry simply as opportunistic political expediency is no better than one who actually believes it.

The second element draws from a little-known area of law with the confusing name “substantive due process.” Under the Due Process Clause of the Fifth and Fourteenth Amendments, courts have recognized individuals’ substantive right to be free from government actions that harm life, liberty, and property. Normally, this only applies to action directly by the government; there is no general government obligation to protect life, liberty, and property from private actors.⁵³ However, the “state-created danger” exception applies when government conduct “places a person in peril in deliberate indifference to their safety.”⁵⁴ In one leading case, for example, the court found that

⁵¹ *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

⁵² *Plyler v. Doe*, 457 U.S. 202 (1982).

⁵³ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989); *United States v. Cruikshank*, 92 U.S. 542, 543–47 (1875).

⁵⁴ *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997).

a due process violation could occur when police gave a group of violent skinheads an informal green light to attack protesters.⁵⁵

Under this prong, the question for Congress would be whether a president's political rhetoric places a person or group of people in peril in deliberate indifference to their safety. For example, Congress might compare Trump's daily use of terms like "invasion" at rallies when describing immigrants, with the manifesto left by the El Paso terrorist, who used the same term.⁵⁶ It can be hard to draw a line of "but-for" causation, but experts describe this type of rhetoric as "stochastic terrorism": it predictably leads to individually unpredictable, but statistically inevitable, acts of violence.⁵⁷ The fact that Trump has continued with this type of rhetoric long after events like Charlottesville and Pittsburgh indicates that he is deliberately indifferent to the safety of the people that he demonizes.

Thus, the Equal Protection Clause and the Due Process Clause can provide the two elements for a finding of impeachable incitement to discrimination, hostility, or violence by third parties. A president who (1) makes public statements promoting animus, and (2) in doing so, places people in peril in deliberate indifference to their safety, violates the Take Care Clause by actively undermining the Fifth and Fourteenth Amendments. This is, as it should be, a high standard. But the fact that much of Trump's rhetoric seems to violate it illustrates the importance of the issue.

B. Policy based on invidious discriminatory purpose

Another category occurs when a president determines government *policies* that have no constitutionally legitimate justification but are rather motivated entirely by bigotry, with thin or non-existent pretexts. Again, the "pattern or practice" issue arises: few would suggest

⁵⁵ *Dwanes v. City of New York*, 985 F.2d 94 (2d Cir. 1993).

⁵⁶ See John Fritze, *Trump Used Words Like 'Invasion' and 'Killer' to Discuss Immigrants at Rallies 500 Times*, USA TODAY, Aug. 8, 2019, <http://bit.ly/32fivVL>; Peter Baker & Michael D. Shear, *El Paso Shooting Suspect's Manifesto Echoes Trump's Language*, N.Y. TIMES, Aug. 4, 2019, <https://nyti.ms/2YF5gLT>.

⁵⁷ Jim Ludes, *Stochastic Terrorism: Picks of the Week*, PELL CTR. FOR INT'L RELATIONS & PUB. POL'Y (Aug. 13, 2016), <http://bit.ly/32aMyxN>.

impeaching a president for a single racist policy. But a consistent pattern of policy choices with only fig leaves shielding bigotry-based motivations crosses a line.

1. General considerations

Subjective intent

Here, the president's subjective intent probably *does* matter. Anti-discrimination law distinguishes purposeful (intentional) discrimination from facially neutral government action with a disparate impact. According to the Supreme Court, the Equal Protection Clause only addresses intentional discrimination.⁵⁸ To the extent that we root a standard for impeachability in the Equal Protection Clause, logic would suggest a focus on presidential action motivated by purposeful invidious discrimination. But secret White House tapes are not necessary: as the Court has emphasized, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."⁵⁹

Notably, the touchstone of intent is not whether the *president himself* is prejudiced, but rather whether he acted with intent of invidious discrimination. For example, if the president averred that *he himself* bore no ill will towards Latinx immigrants, but was simply appeasing political supporters who did, that would not insulate his conduct from the Equal Protection Clause.⁶⁰

Policy, bad management, and "maladministration"

At the Constitutional Convention, the Framers settled on the Constitution's current language of "Treason, Bribery, or other high Crimes and Misdemeanors" after considering and rejecting a broader

⁵⁸ *Washington v. Davis*, 426 U.S. 229 (1976).

⁵⁹ *Id.* at 242.

⁶⁰ *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

alternative that included “maladministration.”⁶¹ James Madison objected to this word, arguing that “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate,” and it was withdrawn from consideration. To the extent that original intent of the Framers matters, this record suggests that maladministration—basically, bad management—was not intended to be grounds for impeachment.

This raises the question of presidential responsibility for the actions of subordinates. As Professor Black argued in 1974, 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.”⁶² James Madison explained in the debates of the First Congress that the president’s supervisory role over subordinates makes him subject to impeachment “if he suffers them to perpetrate with impunity high crimes or misdemeanours against the United States, or neglects to superintend their conduct, so as to check their excesses.”⁶³

The question is at what point the president becomes responsible for subordinates’ wrongdoing. Black argued that while “simple carelessness in supervision” would not make the president liable for the acts of those working on his behalf, “the president (like anybody else) is totally responsible for what he commands, suggests, or ratifies” and that “[w]hen carelessness is so gross and habitual as to be evidence of *indifference* to wrongdoing, it may be in effect equivalent to ratification of wrongdoing.”⁶⁴ Notably, in the second article of impeachment against

⁶¹ See Yale Law Sch. Lillian Goldman Library, *Madison Debates September 8*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_908.asp (last visited Sept. 19, 2019); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., rev. ed. 1966); Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 Geo. Wash. L. Rev. 712, 718–19 (1999).

⁶² Black, *supra* note 10, at 46–47; Jane Chong, *To Impeach a President: Applying the Authoritative Guide from Charles Black*, LAWFARE (July 20, 2017), <http://bit.ly/2QtLTGy>.

⁶³ 1 ANNALS OF CONG. 387 (1789) (Joseph Gales ed., 1834), <https://bit.ly/2HrX48U>.

⁶⁴ Black, *supra* note 10, at 46–47 (emphasis in original).

President Nixon, Congress set a precedent by including a pattern of activity by subordinates.⁶⁵

By the same token, the fact that a policy is instituted in the open with the assistance of Senate-confirmed cabinet officials, and published in the Federal Register, does not insulate it from impeachment. On the surface, these types of policy actions may not resemble the types of straight-out-of-the-textbook impeachable offenses (such as treason or obstruction of justice) that may involve a rogue president acting alone or with a small coterie of henchmen. Yet it would be perverse to say that the president could be impeached for running a small scheme out of the Oval Office, but not for implementing a massive federal policy using the apparatus of government under his command.

2. Application to President Trump

Some cases might be tricky. For example, consider the federal government's (and President Trump's) inhumane response to Hurricane Maria in Puerto Rico. The scale of avoidable damage to life and property due to the government's response to the hurricane's aftermath was vast. Yet Congress might reasonably hesitate to impeach on this ground, finding it uncomfortably close to "maladministration." On the other hand, to the extent that the evidence might indicate that Trump was not merely negligent or incompetent in dealing with Puerto Rico, but rather was *deliberately* preventing the federal government from mounting a competent response to the hurricane for the purpose of harming Puerto Ricans as Puerto Ricans, that could move the needle. Similarly, in the case of some of the government's abuses of human rights on the border with Mexico, factual questions of what the president knew and when he knew it could spell the difference between a failure to supervise and ratification of wrongdoing.

But even setting the more factually difficult problems aside, President Trump has provided a lengthy pattern of policy actions that are covered with minimal or no non-invidious pretext. These include (at least the first few versions of) his Muslim ban, which was thinly veiled as a

⁶⁵ See 3 LEWIS DESCHLER, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 15.13, at 2186 (1976), <https://go.usa.gov/xVkQY>.

national security measure, but followed his earlier pledge for a “total and complete shutdown of Muslims entering the United States”; internment camps for Latinx immigrants (including children separated from their parents); border and immigration policies based on his insistence that Latino immigrants are “rapists” while Haiti and African countries are “s—hole countries”; misusing the military by deploying it to the southern border for the political purpose of influencing the 2018 election by inventing a supposed national security threat (which disappeared after the election) from an approaching “caravan” of migrants; and reportedly promising to use the pardon power to create an accountability-free zone for federal officials carrying out his border policies in violation of federal law, such as border agents who illegally deny access to asylum applicants, or officials who disregard federal law in constructing the proposed border wall.⁶⁶

What unites these actions is that they proceed from, and capitalize on, invidious bigotry. One or two might not make a case for impeachment. But putting this entire pattern together, Congress is entitled to conclude that President Trump has *repeatedly* adopted, directed, or implemented federal government actions based on motives of discrimination based on race, religion, or national origin, with only the thinnest of pretexts. This pattern would violate his constitutional obligations to “take Care that the Laws be faithfully executed” and

⁶⁶ See Katie Rogers & Zolan Kanno-Youngs, *Trump Tells Aides ‘Take the Land’ as Impatience Grows on Border Wall*, N.Y. TIMES, Aug. 28, 2019, <https://nyti.ms/347y17K>; Jake Tapper, *Trump Told CBP Head He’d Pardon Him If He Were Sent to Jail for Violating Immigration Law*, CNN (Apr. 13, 2019), <https://cnn.it/2Lsx55D>; Bess Levin, *Administration Admits Border Deployment Was a \$200 Million Election Stunt*, VANITY FAIR, Nov. 19, 2018, <http://bit.ly/2Lnd0xm>; Marina Fang, *It Has Been More Than a Month Since the Government Missed a Federal Judge’s July 26 Deadline to Reunite All of the More Than 2,600 Separated Children*, HUFF. POST (Sept. 7, 2018), <http://bit.ly/2LnmzfP>; Philip Elliott & W.J. Hennigan, *Navy Document Shows Plan to Erect “Austere” Tent Cities for Immigrants on Remote Bases*, TIME, June 22, 2018, <https://ti.me/2Kg9Z3k>; Z. Byron Wolf, *Trump Basically Called Mexicans Rapists Again*, CNN (Apr. 6, 2018), <https://cnn.it/2LnMunK>; Josh Dawsey, *Trump Derides Protections for Immigrants From ‘Shithole’ Countries*, WASH. POST, Jan. 12, 2018, <http://wapo.st/2AQVXfR>; Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST, Dec. 7, 2015, <http://wapo.st/1YV0ViR>.

ensure that the government does not “deny to any person within its jurisdiction the equal protection of the laws.”

Finally, evolving standards mean that past congressional inaction against (or active facilitation of) similar conduct is irrelevant. For example, in the early 19th century, Presidents Van Buren and Jackson *also* instituted racist policies of collecting people into detention camps and expelling them.⁶⁷ But while the Trail of Tears can teach us about our history, it provides no defense against impeachment for comparable conduct in 2019.

V. CONCLUSION

Impeachment for racist rhetoric or policy would be a first. However, it draws from a solid foundation of theory, constitutional text, and congressional precedent. This framework provides a means for Members of Congress and the public to evaluate the impeachability of particular racist rhetoric and acts. As noted earlier, this is a real issue in 2019, not only because of President Trump’s conduct, but because of Representative Green’s proposed articles of impeachment.

Some might worry that impeachment on this ground could set a precedent. It certainly should. In other presidencies, Congress will have to exercise its judgment and see if it can make a case with a straight face. Last year, Senator Marco Rubio and Fox News television host Jeanine Pirro accused former President Obama of stoking racial division.⁶⁸ That is an easy charge to raise on Twitter regarding an ex-president, but the fact that the House did not seek to impeach President Obama on this basis during his presidency suggests that its members recognized at the time that such a charge would not find traction. But if the outcome of impeachment proceedings against Trump on this ground is that future presidents of both parties refrain from inciting and

⁶⁷ See, e.g., Lamar Marshall et al., *Alabama Collection Camps, Forts, Emigrating Depots and Travel Routes Used During the Cherokee Removal of 1838–1839*, NAT’L PARK SERV. (Mar. 2009), <https://go.usa.gov/xV8kN>.

⁶⁸ William Cummings, *Conservatives Fire Back at Obama, Say He Sowed the Division That Led to Trump*, USA TODAY, Sept. 10, 2018, <https://usat.ly/2x3ZveG>.

inflaming bigotry on the basis of race, religion, or national origin, then the impeachment will have performed its norm-reinforcing function.

One of the most poignant early statements of this norm was President George Washington’s famous letter to the Hebrew Congregation of Newport, Rhode Island, written at a time before the First Amendment (with its guarantee of freedom of religion) had yet been ratified by the states.⁶⁹ Washington wrote that “[i]t is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights,” and that the United States government “gives to bigotry no sanction, to persecution no assistance.” Washington concluded with a wish that “every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.”⁷⁰ More recently, the Reverend Dr. Martin Luther King, Jr.—whom the United States recognizes on a par with presidents, with a federal holiday and a memorial on the National Mall between those of Presidents Lincoln and Roosevelt—framed this ideal as the wish that his children “will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”⁷¹

These statements do not create enforceable legal obligations per se, but they do help defined our shared national values. Congress is entitled to consider whether a president who openly scorns these ideals is, in fact, taking care that the legal guarantee of equal protection of the laws will be faithfully executed.

In the end, it comes down to Congress’s assessment of the danger of a particular president. As constitutional law experts Sanford Levinson and Jack Balkin have observed, “the claim that after [over two centuries] America is guaranteed to be ‘dictator-proof’ is entirely too

⁶⁹ Letter from President George Washington to the Hebrew Congregation of Newport, Rhode Island (Aug. 18, 1790), <https://go.usa.gov/xVyYG>.

⁷⁰ *Id.*; cf. *Micah* 4:4.

⁷¹ Rev. Martin Luther King, Jr., *I Have a Dream*, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), <https://go.usa.gov/xVyYh>.

sanguine.”⁷² And in the United States of today, there is no more potent issue upon which to build a tyrannical regime than race. The Framers provided a check against tyranny. The power of impeachment is ready and waiting.

⁷² Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1793 n.14 (2010), <http://bit.ly/2QkOdj9>.

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