



# WHEN IS RACIST ABUSE OF OFFICE AN IMPEACHABLE OFFENSE?

A report issued by Free Speech For People, By the People,  
CREDO Action, and Equal Justice Society

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## EXECUTIVE SUMMARY

The report, *When is racist abuse of office an impeachable offense?*, sets forth a comprehensive constitutional framework to answer that question in the Trump era and beyond.<sup>1</sup> The following is a summary of the key points in this report, along with relevant constitutional, legal, and impeachment-precedent benchmarks.

1. Impeachable high crimes and misdemeanors do *not* need to be prosecutable crimes. They can also include non-criminal “political offences.”

(Congressional Research Service, *Impeachment and Removal* (2015); Hamilton, Federalist No. 65; Story, *Commentaries on the Constitution* (1833); Black, *Impeachment: A Handbook* (1974))

2. Relevant constitutional standards:

- Take Care Clause (art. II, § 2)
- Equal Protection Clause (amend. XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497 (1954))
- Due Process Clause (amend. V)
- Norms/ideals: Decl. of Independence, ¶ 2 (all persons “are created equal”)

3. Categories of impeachable misconduct

A. Racist public rhetoric

*Historical precedent for impeachment based on inflammatory rhetoric:*  
Chase (1804), Humphreys (1862), Johnson (1868)

1. Advocating that government officials commit acts of illegal violence

(Due Process Clause; 10 U.S.C. § 877(1); 18 U.S.C. § 2)

2. Incitement to discrimination, hostility, or violence by third parties

(1) President’s rhetoric promotes, inflames, and amplifies a  
“bare . . . desire to harm a politically unpopular group”

(Equal Protection Clause; Int’l Covenant on Civil & Political Rights (1966), art. 20; *Romer v. Evans*, 517 U.S. 620 (1996); *Plyler v. Doe*, 457 U.S. 202 (1982))

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<sup>1</sup> See Free Speech For People, By the People, CREDO Action, & Equal Justice Society, *When is racist abuse of office an impeachable offense?*, <http://bit.ly/BigotryReport> (Sept. 2019).

- (2) President’s rhetoric “places a person in peril in deliberate indifference to their safety”

(Due Process Clause; *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993))

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

- Pattern or practice of denying equal protection of the law
- Must be *intentional* discrimination, but intent can be inferred
- “Evolving standards”: test by standards of today, not 1868/1787
- Can be liable for actions of subordinates where president ratifies or is indifferent to their misconduct

(Equal Protection Clause; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Washington v. Davis*, 426 U.S. 229 (1976); *Trop v. Dulles*, 356 U.S. 86 (1958))

4. What does *not* meet the standard

- Mere racist opinions, whether stated publicly or privately
- “Maladministration”—bad policy or mismanagement
- A few stray acts; need a pattern
- Minor violations; need “substantiality”

5. Why impeach on this ground?

Key purposes of impeachment include:

- Limit further “injuries done immediately to the society itself” (Hamilton, Federalist No. 65)  
The “Trump Effect” (quantifiable increases in racial violence and hostility associated with Trump rhetoric) is such an injury. Impeaching Trump on this ground would delegitimize his stream of abuse as the official voice of the United States and tamp down Trump Effect.
- “Articulate, establish, preserve and protect constitutional norms” (Prof. Keith Whittington)  
Missing this opportunity to (re-)establish norms would convey that racist misuse of official position is acceptable in a president, so long as he does not *also* extort a foreign government to harm his domestic political opponents.

To view the full report, please visit: <http://bit.ly/BigotryReport>