

IMPEACHMENT VS. INDICTMENT: HOW TO HANDLE CRIMINALITY IN THE
EXECUTIVE BRANCH

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ABSTRACT

Whether a sitting president can be prosecuted while in office has been a debated question with no clear answer. During Watergate and the White-water investigations, special and independent counsels struggled to decide whether to indict a sitting president. On one side, the Department of Justice (DOJ) guidelines prohibited indictment, on the other, prosecutors were concerned with potential harm to the rule of law if there was no indictment. In most circumstances, a president who engaged in criminal activities should face impeachment, as the Constitution mandates, rather than be subject to criminal proceedings while in office. The only exception is if the president engaged in treasonous criminal conduct.

This Article discusses the constitutional method of addressing criminality within the Executive Branch. Through an examination of the impeachment process, including analysis of President Trump’s impeachment, this Article explores the potential benefits and weaknesses of pursuing such action. Next, this Article examines whether a sitting president can be indicted. The DOJ guidelines are at odds with the mandates establishing special and independent counsel investigations faced with this very decision. Finally, this Article recommends that treason is the only criminal statute that overrides the sanctity of the Executive Branch.

Treason is the only offense that would justify the indictment of a sitting president. This infrequently used criminal statute seeks to protect the integrity of the country and punish betrayal by those who benefit from its protections. A president not only owes allegiance to the United States but also swore oaths to take office. Against this backdrop, this Article discusses the Mueller Report along with the House of Representatives’ Report on aid being withheld from Ukraine.

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[†] I would like to thank several of my colleagues for their assistance and moral support for this project including Professors Mark Killenbeck, Sharon Foster, Brian Gallini, Ann Killenbeck, Jordan Woods, and Beth Zilberman. Additionally, I would like to thank Matthew Eggert for his excellent research assistance for this Article.

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INTRODUCTION

No principles are more firmly rooted in our traditions, or more at stake in the decision facing this office and the Grand Jury, than that there shall be equal justice for all and that “[n]o man in this country is so high that he is above the law.”

—Carl B. Feldbaum, George T. Frampton, Gerald Goldman, and Peter F. Rient¹

Special Counsel Robert Mueller investigated allegations of Russian interference in the 2016 election.² While the Mueller Report did not establish a criminal conspiracy between the campaign and Russian agents, it did find the Trump Campaign “would benefit electorally from information stolen and released through Russian efforts.”³ After the investigation ended, President Trump requested reelection assistance from other countries,⁴ sparking concern about what legal options were available to address his conduct.⁵ As special counsel grappled with whether President Trump should be indicted, Congress took a different legal route. In response to

1. Memorandum from Carl B. Feldbaum, George T. Frampton, Gerald Goldman, & Peter F. Rient to Leon Jaworski 4 (Feb. 12, 1974), reprinted in Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 728, 732 (1999) [hereinafter Feldbaum Memo] (quoting U.S. v. Lee, 106 U.S. 196, 220 (1882)).

2. Robert S. Mueller III, *Robert Mueller: Roger Stone Remains a Convicted Felon, and Rightly So*, WASH. POST (July 11, 2020), <https://www.washingtonpost.com/opinions/2020/07/11/mueller-stone-oped/?arc404=true>.

3. *Id.*

4. See Michael C. Bender & Rebecca Ballhaus, *Trump Put Re-Election Prospects Ahead of National Interest, Bolton Alleges*, WALL ST. J. (June 17, 2020, 9:26 PM), <https://www.wsj.com/articles/trump-put-re-election-prospects-ahead-of-national-interest-bolton-alleges-11592423359>.

5. *See id.*

his communications with Ukraine, Congress impeached President Trump.⁶ In both forums, the question of whether President Trump's actions constituted treason was considered.

As with other special counsel investigations, the Special Counsel's Investigation and Report⁷ into Russian interference in the 2016 election and the actions of President Trump while in office grappled with whether a sitting president could be indicted. Opponents of the proposition point to the Department of Justice's (DOJ) longstanding guidelines that prohibit bringing criminal charges against a president while he is in office.⁸ Proponents of the idea focus on the lack of any constitutional provision that restricts the practice along with the harm to the rule of law. In the few times the question of prosecution of the President while in office has arisen, it is a special counsel who decides whether to charge and for what offenses.⁹ The typical criminal charges that a special counsel considers are obstruction of justice, abuse of power, or campaign finance violations.¹⁰ However, there has rarely, if ever, been a discussion of treason and what the implications are if a president commits such an act.

A president engaged in criminal acts leading up to the election or while in office should be pursued by either Congress or prosecutors. For criminal acts short of treason that qualify as high crimes and misdemeanors, the Constitution and the DOJ Office of Legal Counsel delineate that impeachment is the more appropriate venue for removal from office. If the president is impeached and removed from office, they may be indicted or charged by either federal or state authorities in accordance with state or federal criminal codes.¹¹ However, if a law enforcement official finds that the president has engaged in treason, criminal charges should be brought

6. *Trump Impeachment: The Short, Medium and Long Story*, BBC NEWS (Feb. 5, 2020), <https://www.bbc.com/news/world-us-canada-49800181>.

7. 1 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) [hereinafter MUELLER REPORT VOLUME I]; 2 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) [hereinafter MUELLER REPORT VOLUME II].

8. See Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Off. of Legal Couns., on the Amenability of the President, Vice President & Other Civil Officers to Federal Criminal Prosecution While in Office, at 1, 18, 24, 32 (Sept. 24, 1973) [hereinafter 1973 OLC Memo Opinion]; see also Memorandum from Randolph D. Moss, Assistant Att'y Gen., Off. of Legal Couns., on A Sitting President's Amenability to Indictment and Criminal Prosecution to the Att'y Gen., at 222 (Oct. 16, 2000) [hereinafter 2000 OLC Memo Opinion].

9. See *Watergate Grand Jury Tried to Indict President Richard Nixon*, UNITED PRESS INT'L ARCHIVES (June 17, 1982), <https://www.upi.com/Archives/1982/06/17/The-Watergate-grand-jury-tried-relentlessly-to-indict-Richard/6784393134400/> (explaining that Leon Jaworski, special prosecutor in the Watergate scandal, did not recommend indicting President Nixon). See generally KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310 (1998) (providing Kenneth Starr's recommendation on whether to charge President Clinton).

10. 28 C.F.R. § 600.4 (1999); see MUELLER REPORT VOLUME I, *supra* note 7, at 183–84.

11. Jan Wolfe, *Can a Sitting U.S. President Face Criminal Charges?*, REUTERS (Feb. 26, 2019, 5:03 AM), <https://www.reuters.com/article/us-usa-trump-russia-indictment-explainer/can-a-sitting-u-s-president-face-criminal-charges-idUSKCN1QF1D3>.

immediately despite the impact it may have on the president's Administration. This framework conflicts with the DOJ's policy on this topic.

The federal government, through either the DOJ, U.S. Attorney's Office, or special counsel, may bring an indictment against a member of the Executive Branch.¹² They have done so several times since the Watergate investigation.¹³ However, in 1973, and again in 2000, the DOJ issued guidelines prohibiting the indictment of a sitting president as a matter of policy.¹⁴ The central focus of the mandate stems from the special and complex duties of a sitting president.¹⁵ A president under indictment would have difficulty governing the country and handling foreign policy matters while also appearing in court for various hearings, crippling their ability to handle the day-to-day duties of running the country. Further, the strict timelines of most criminal prosecutions is not conducive to the responsibilities of the President.¹⁶ The ability to have a fair trial would be near impossible given the daily responsibilities and obligations of the President.¹⁷

An additional problem with the DOJ regulations is that a special counsel may not be bound to them. During the Watergate investigation, a few attorneys within the Special Counsel's Office felt strongly that President Nixon should be indicted if the grand jury found probable cause.¹⁸ Special Counsel Ron Jaworski stated that he believed a sitting president could be an unindicted coconspirator and expressed doubt about a president's immunity from prosecution while in office.¹⁹ Independent Counsel Kenneth Starr also requested that his staff evaluate whether President Clinton should be indicted while in office.²⁰ Much like Special Counsel Jaworski's staff, Independent Counsel Starr's staff stated, "It is proper, constitutional, and legal for a federal grand jury to indict a sitting president for serious criminal acts that are not part of, and are contrary to, the

12. See *Special Prosecutor*, LEGAL INFO. INST. (July 2021), https://www.law.cornell.edu/wex/special_prosecutor; 2000 OLC Memo Opinion, *supra* note 8, at 222, 228 (explaining that the special prosecutor, appointed by the Attorney General, makes recommendations about the indictment of a president or other members of the executive).

13. See generally JACK MASKELL, CONG. RSCH. SERV., INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS (2013) (providing an overview of the special and independent counsel regulations and statutes along with the scope of their prosecutorial power); Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489 (1998) (discussing various prosecutions by special and independent counsels throughout U.S. history).

14. See generally 1973 OLC Memo Opinion, *supra* note 8 (analyzing why a sitting United States President cannot be indicted); 2000 OLC Memo Opinion, *supra* note 8 (affirming the conclusion that a sitting United States President cannot be indicted).

15. See 1973 OLC Memo Opinion, *supra* note 8, at 25–26, 28–29, 33.

16. See *id.* at 28.

17. *Id.* at 25.

18. Feldbaum Memo, *supra* note 1, at 20.

19. See 2000 OLC Memo Opinion, *supra* note 8, at 237 n.14.

20. See Charlie Savage, *Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html>.

[P]resident’s official duties.”²¹ Despite their staff making similar arguments in favor of indictment over two decades apart, both Jaworski and Starr referred their charges to Congress for impeachment rather than choosing to indict.²² Special Counsel Mueller followed this same course.²³

Congress controls the only constitutionally mandated option for the removal of the President or Vice President of the United States.²⁴ To impeach, charges must be brought in the House of Representatives (House), and the Senate serves as the trial forum in determining whether there is sufficient evidence for removal from office.²⁵ Only upon a two-thirds vote of senators can a president be removed from office.²⁶ The grounds for impeachment are “[t]reason, [b]ribery, or other high [c]rimes and [m]isdemeanors.”²⁷ The problem with impeachment is twofold. First, it is a political process, meaning both chambers may have various reasons not to pursue charges or the subsequent trial. As the people’s voice, representatives and senators have motivations that can be swayed by political pressures which may impact their opinion on whether to pursue and prosecute articles of impeachment. To date, no president or vice president has been removed from office through the impeachment process even though three presidents have been brought up on charges in the House.²⁸ Second, impeachment is not a criminal action. While the grounds for impeachment may touch upon criminal activity of the executive, the only penalty for impeachment and removal is the immediate loss of position and a prohibition from future elections.²⁹

The complete lack of accountability to the rule of law or penalty for criminal actions of individuals in the highest levels of the Executive Branch brings into question whether impeachment is sufficient. The damage to the Republic resulting from crimes committed during an election or tenure in office is clear. At a minimum, criminal behavior during the election undermines the credibility of all elections and may even be fraudulent. Crimes that continue or begin while a president or vice president is in office may result in the official being compromised or making sensitive

21. *Id.* (quoting Memorandum from Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of L., on Indictability of the President, to Kenneth W. Starr, Indep. Couns. 55 (May 13, 1998)).

22. *Id.*

23. Sarah N. Lynch & Andy Sullivan, *Mueller Says He Could Not Charge Trump as Congress Weighs Impeachment*, REUTERS (May 29, 2019, 7:49 AM), <https://www.reuters.com/article/us-usa-trump-russia/mueller-says-he-could-not-charge-trump-as-congress-weighs-impeachment-idUSKCN1SZ1OC>.

24. See U.S. CONST. art. II, § 4; *id.* art. I, §§ 2–3.

25. See *id.* art. I, §§ 2–3.

26. *Id.* art. I, § 3, cl. 6.

27. *Id.* art. II, § 4.

28. See Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 534 (2018); see also Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 548–86 (2019) (discussing the potential impeachable offenses President Trump has committed and whether he should be impeached); Seung Min Kim, *In Historic Vote, Trump Acquitted of Impeachment Charges*, WASH. POST (Feb. 5, 2020, 8:33 PM), https://www.washingtonpost.com/politics/in-historic-vote-trump-acquitted-of-impeachment-charges/2020/02/05/8b7ea90e-4832-11ea-ab15-b5df3261b710_story.html.

29. U.S. CONST. art I, § 3, cl. 7.

decisions based upon considerations other than the best interests of the country. More severe criminal behavior undermines faith in the democratic government by making the highest executive officer appear to be above the law.

Impeachment should not be an option for a president who commits treason. Treason is set apart from other crimes by the Constitution because it constitutes a threat against the security and sanctity of the country itself. It is defined as “consist[ing] only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”³⁰ The federal criminal code adopted this definition verbatim.³¹ A key addition to the U.S. Code adds that anyone convicted under this provision is prohibited from ever running for election or holding public office.³²

Treason is different from other crimes because it threatens the sovereignty of the country and the well-being of all citizens. If used to engage in treasonous conduct, the expansive powers granted to a president could lead to national security threats, domestic upheaval, and a plethora of other problems.³³ If a prosecutor believes they possess evidence substantiating the criminal elements of treason, and a grand jury finds probable cause, an indictment should be brought on those involved, including a sitting president.

This Article discusses the complex questions surrounding the indictment of a sitting president for criminal actions committed during the election process or while in office. Part I discusses the constitutional powers of Congress to impeach and remove a president from office. An examination of past impeachments illustrates the political complexity of the impeachment of former President Trump. In Part II, the focus shifts to the DOJ regulations concerning indictment of a sitting president that explain the logistical difficulties of prosecuting a sitting president. Those difficulties include interfering with the duties of running the Executive Branch and ensuring a president’s due process rights.³⁴ Part III explores why the DOJ guidelines may be wrong in protecting the norms and values of our democracy. Both special and independent counsels struggle to follow the guidelines when presented with evidence of clear criminal conduct by a sitting president. Part IV delves into the origins of the constitutional and criminal statutes and evaluates when a sitting president may be indicted for treason.

30. *Id.* art. III, § 3, cl. 1.

31. *See* 18 U.S.C. § 2381.

32. *See id.*

33. *See generally* Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289 (2015); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

34. 2000 OLC Memo Opinion, *supra* note 8, at 223, 251–52.

I. IMPEACHMENT

The U.S. Constitution provides that Impeachment is the only way to remove a member from office in the Executive and Judicial Branches.³⁵ It is the sole means established for removing a president or vice president from office other than an election.³⁶ However, few people grasp how the impeachment process works and what is necessary to remove a sitting president. While three presidents have been impeached, no president has actually been removed from office.³⁷ This illustrates the political hurdles that come with impeachment.

A. What Impeachment Is and How It Works

The Constitution lays out the impeachment process by dividing the fact-finding and trial between the two chambers of Congress.³⁸ The House is tasked with investigating the facts and drafting the articles of impeachment, similar to the role of a grand jury issuing an indictment.³⁹ Like a grand jury, witnesses may testify, and documents can be subpoenaed or provided to determine whether an impeachable offense has occurred.⁴⁰ The categories of offenses laid out in the Constitution are “Treason, Bribery, or other high Crimes and Misdemeanors.”⁴¹ The House’s articles of impeachment serve as an indictment against the person potentially being removed from office. The Senate conducts the trial.⁴² As with a typical trial, witnesses and evidence may be introduced to prove or disprove the House’s impeachment articles.⁴³ If the president or vice president is impeached, the Chief Justice of the United States presides over the Senate’s

35. See U.S. CONST. art. II, § 4 (“The 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.”); see also Bobbitt, *supra* note 28, at 554–55 (“[S]ince 1789, only nineteen federal officials have been impeached by the House, and of these only eight have been convicted by the Senate. Of the eight persons impeached and convicted, all were judges, and none were indicted on political grounds. In the same period, only two presidents—Andrew Johnson and Bill Clinton—were tried by the Senate, and neither was found guilty.”).

36. See U.S. CONST. art. II, § 4.

37. See Bobbitt, *supra* note 28, at 534; Kim, *supra* note 28.

38. See U.S. CONST. art. I, §§ 2–3.

39. See CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 5–9 (1st ed. 1974).

40. See *id.* at 7–8.

41. U.S. CONST. art. II, § 4.

42. See *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

43. See BLACK, *supra* note 39, at 9–14; see also Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 131–33, 132 n.610 (1999) (discussing the judicial nature of an impeachment trial and the Senate’s power to deny introduction of witnesses or evidence, as exemplified in President Clinton’s impeachment trial). *But see* Kyle Cheney, John Bresnahan, & Andrew Desiderio, *Republicans Defeat Democratic Bids to Hear Witnesses in Trump Trial*, POLITICO (Jan. 31, 2020, 7:58 PM), <https://www.politico.com/news/2020/01/31/murkowski-to-vote-against-calling-witnesses-in-impeachment-trial-109997> (detailing the Senate’s decision not to allow additional witness testimony in President Trump’s impeachment trial).

trial.⁴⁴ Only by a vote of sixty-seven senators or more will the official be removed from office.⁴⁵

While the procedure for impeachment is relatively simple, the devil is always in the details. Impeachment is a political act driven by the elected members of both chambers.⁴⁶ As such, the decision to pursue an impeachment inquiry by the House may be influenced by a number of factors that have little to do with whether or not the civil official should be impeached due to alleged misconduct.⁴⁷ These considerations often involve the political capital involved with the hearing, whether there are other more pressing legislative issues, and a myriad of other factors.⁴⁸ Also, the House may be impacted by the Senate's decision on how the trial should be conducted once the articles of impeachment are submitted.⁴⁹ A sixty-seven-senator vote is a significant number to achieve in order to remove the official. The higher the position of the official being impeached, the less likely that a majority vote is reached.⁵⁰

There were two presidential impeachment proceedings prior to President Trump's. These two impeachments illustrate the complexity of the process and the difficulty of removing a president. President Andrew Johnson faced impeachment after firing Secretary of War Edwin Stanton and appointing his replacement in violation of the Tenure of Office Act.⁵¹ Congress believed President Johnson needed their permission before removing a secretary-level cabinet position,⁵² and his failure to do so was included

44. U.S. CONST. art. I, § 3, cl. 6; *see also* BLACK, *supra* note 39, at 54.

45. U.S. CONST. art. I, § 3, cl. 6.

46. *See* 1973 OLC Memo Opinion, *supra* note 8, at 15–16; *see also* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION, 108 (1978) (“One thing that the writers of the American Constitution made clear was that no matter how close to English precedent they wished to come, the American impeachment process was basically a political process for removal and not an alternative to, or substitute for, criminal proceedings.”).

47. *See* Trautman, *supra* note 28, at 533–34 (citing LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT, xiv (Basic Books, 1st ed. 2018)); *see generally* Nicholas Fandos, *Seeking Unity on Impeachment, Democrats Decided Against Mueller Charges*, N.Y. TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/us/politics/impeachment-mueller-charges.html> (discussing which articles of impeachment against former President Trump were considered and analysis of why the Mueller report charges were not included).

48. *See* Fandos, *supra* note 47.

49. *See generally* Mike DeBonis, *Pelosi Says House May Withhold Impeachment Articles, Delaying Senate Trial*, WASH. POST (Dec. 18, 2019, 10:21 PM), <https://www.washingtonpost.com/politics/some-house-democrats-push-pelosi-to-withhold-impeachment-articles-delaying-senate-trial/2019/12/18/6e25814a-21c5-11ea-a153-dce4b94e4249story.html> (discussing former House Speaker Nancy Pelosi's decision to withhold articles of impeachment regarding former President Trump until the Senate decided how to conduct the hearing).

50. *See* Bobbitt, *supra* note 28, at 554–55. From 1789 to 2018, nineteen federal officials were impeached with only eight officials convicted—none of whom were presidents. *Id.*

51. *See* KURLAND, *supra* note 46, at 116; *see also* Bobbitt, *supra* note 28, at 566 (“By adopting the Tenure of Office Act, Congress sought to require President Johnson to seek senatorial consent before removing his secretary of war.”).

52. *See* Bobbitt, *supra* note 28, at 566.

as one of the eleven grounds for his impeachment.⁵³ Johnson survived impeachment by one vote in the Senate.⁵⁴

The House impeached President Clinton after he lied about a sexual affair during a deposition.⁵⁵ During the civil suit against President Clinton for sexual harassment, he was asked questions about his relationship with White House intern Monica Lewinsky.⁵⁶ He denied having any sexual relationship with Ms. Lewinsky.⁵⁷ The Independent Counsel referred this misconduct to the House. The House relied on the finding of Independent Counsel Starr's report in drafting the articles of impeachment.⁵⁸ As with President Johnson, the Senate's trial did not net the sixty-seven votes necessary to remove President Clinton from office.⁵⁹

The impeachment proceedings of both presidents were highly political and not necessarily driven by clear constitutional misconduct. Johnson's impeachment occurred in the aftermath of the Civil War and Lincoln's assassination.⁶⁰ As the southern states rejoined the Union, congressional challenges arose regarding the President's ability to usurp legislative power.⁶¹ Rather than stating the high crimes or misdemeanors that President Johnson committed, Congress focused on securing the superiority of the Legislative Branch. The House's impeachment grounds served more as a check on perceived Executive Branch overreach rather than true malfeasance by President Johnson.⁶² Similarly, the Republican-led House justified their actions against President Clinton as a means of saving the presidency from his moral failings.⁶³ Their argument was that President Clinton's lying undermined the sacredness of the Office of the President.⁶⁴ Only by holding President Clinton accountable through impeachment could the presidency be restored.

53. KURLAND, *supra* note 46, at 116–17.

54. Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 446 (2000); see KURLAND, *supra* note 46, at 118.

55. See Whittington, *supra* note 54, at 453–54; Brooks Jackson, *Clinton's Three Lies, According to Starr*, CNN (Sept. 21, 1998), <http://www.cnn.com/ALLPOLITICS/stories/1998/09/21/lies.jackson/>.

56. Bobbitt, *supra* note 28, at 531–33.

57. *Id.* at 532–33.

58. See *id.* at 533 (“The Judiciary Committee conducted few real hearings of its own, choosing instead to rely mostly on the independent counsel’s report as a basis for impeachment.”); see H.R. Res. 611, 105th Cong. (1998) (listing the articles of impeachment against former President Clinton).

59. See 145 CONG. REC. 2375–78 (Feb. 12, 1999) (reporting the Senate’s roll call votes for both articles of impeachment against former President Clinton, neither of which received even a simple majority vote); see also Associated Press, *Roll Call of Votes on Articles of Impeachment*, N.Y. TIMES (Feb. 12, 1999), <https://archive.nytimes.com/www.nytimes.com/library/politics/021399ap-rollcall-vote.html>.

60. See KURLAND, *supra* note 46, at 116; see also Whittington, *supra* note 54, at 426–28.

61. See Whittington, *supra* note 54, at 430.

62. *Id.* at 442–44.

63. See *id.* at 454 (“Republicans cast themselves in the role of saving the presidency from Clinton’s offenses. The logic of their position required them to raise the presidency to an elevated status in order to contrast our heroic expectations of its ideal occupant with the sordid actions of its actual incumbent.”).

64. See *id.* at 454–55.

These examples demonstrate that a presidential impeachment may have little to do with charges of treason, bribery, or high crimes and misdemeanors as the Constitution delineates. Instead, the opposite political party used the impeachment process to undermine the sitting president. In both cases, the articles of impeachment focused on alleged violations falling under the high crimes and misdemeanor provision.⁶⁵ Yet, the misconduct proscribed was only tenuously related to constitutional grounds.

Conversely, the impeachment that did not occur—which would have resulted in the actual removal of a president—resulted from President Nixon’s direct involvement in Watergate.⁶⁶ Both the Senate Select Committee’s investigation into Watergate and the special counsel’s subsequent investigation found substantial misconduct and criminal activity throughout the Executive Branch up to and including the President.⁶⁷ Had President Nixon not resigned, it was believed that the Democrat-held Senate would have removed him from office after the Supreme Court ordered the release of the Nixon tapes.⁶⁸ The tapes revealed that President Nixon ordered a cover-up of his Administration’s involvement in the Watergate break-in and other abuses of power.⁶⁹ The House prepared articles of impeachment against President Nixon, but they were not voted on prior to his resignation from office.⁷⁰

The Senate’s Watergate investigation revealed an extensive abuse of power by numerous members of the Nixon Administration and the Committee to Re-elect the President.⁷¹ Such open hearings and bipartisan examination of political and criminal activity are the constitutional check envisioned by the founding fathers in establishing the impeachment process.⁷² Unlike the impeachment of Presidents Johnson and Clinton, the pressure of the investigation on President Nixon led to substantive checks on the Executive Branch, thus ensuring this level of misconduct and abuse of power did not occur again.

President Trump was impeached against this backdrop. The Mueller Report’s findings of numerous allegations of obstruction of justice by President Trump during the course of the special counsel’s investigation into Russian interference with the 2016 election. However, after that

65. See *Impeachment Trial of President Andrew Johnson, 1868*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm#7> (last visited May 12, 2023); H.R. Res. 611, 105th Cong. (1998).

66. See Trautman, *supra* note 28, at 542.

67. See JAMES DOYLE, *NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI* 33–35, 335 (1977); see also *THE SENATE WATERGATE REPORT, ABRIDGED* 150–66 (Carroll & Graf 2005).

68. See Trautman, *supra* note 28, at 540–42.

69. *Id.* at 541–42; see Bobbitt, *supra* note 28, at 519–20.

70. Bobbitt, *supra* note 28, at 520.

71. See Trautman, *supra* note 28, app. A at 587 (reproducing the articles of impeachment against former President Nixon).

72. See Trautman, *supra* note 28, at 533 (citing LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* xii (Basic Books, 1st ed. 2018)); see also KURLAND, *supra* note 46, at 119–20.

investigation concluded, it was Trump's actions toward Ukraine which resulted in impeachment. Democratic leadership opened an inquiry into the President's malfeasance in his dealings with Ukraine's military aid.⁷³ Many of Mueller's findings are repeated in the evidence uncovered by the House's investigation into the Ukraine.⁷⁴ Some members of Congress assert that the public does not understand the findings of the Mueller Report, and therefore there were no grounds for impeachment.⁷⁵ Instead, Democrats held congressional hearings before the judiciary, federal intelligence agencies, and the Ways and Means Committees to ascertain whether there was corruption in the Trump Administration.⁷⁶ This approach frustrated Democratic members and a growing number of the public as they sought a more expansive impeachment process.⁷⁷ It is this tension that sparked renewed debate on the viability of indicting a sitting president.

B. The Types of Impeachment Charges: High Crimes and Misdemeanors

Once the House decides to move forward with an impeachment inquiry, representatives must vote on what charges should be pursued.⁷⁸ As the representatives consider their vote, evidence is presented to substantiate each count.⁷⁹ Treason and bribery qualify under the Constitution and are understood in the same way as their criminal counterparts. As will be discussed later, treason should be charged if there is evidence against a sitting president that supports it.⁸⁰ However, most impeachable offenses fall in the high crimes and misdemeanors category.⁸¹

High crimes and misdemeanors encompass misconduct against the nation-state,⁸² including an infraction that is outside the scope of official

73. Zachary B. Wolf & Sean O'Key, *The Trump-Ukraine Impeachment Inquiry Report*, Annotated, CNN (Dec. 3, 2019), <https://www.cnn.com/interactive/2019/12/politics/trump-ukraine-impeachment-inquiry-report-annotated/>. See generally H.R. REP. NO. 116-335 (2019) [hereinafter Impeachment Inquiry Report].

74. See, e.g., H.R. REP. NO. 116-335, at 29 (2019).

75. See Darren Samuelsohn, 'What's the Point?' Lawmakers Fess Up to Not Fully Reading the Mueller Report, POLITICO (July 9, 2019, 5:01 AM), <https://www.politico.com/story/2019/07/09/congress-read-mueller-report-1402232>.

76. See Emmarie Huettelman, *Where They Stand: Inquiries into Trump's Team and Russian Meddling*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/politics/congress-trump-russia-investigations.html> (describing the various House and Senate Committees that are investigating misconduct in the Trump administration); see also Lauren Gambino, *The Top Democrats Set to Make Trump's Life Miserable in 2019*, THE GUARDIAN (Jan. 1, 2019), <https://www.theguardian.com/us-news/2019/jan/01/house-committee-chairs-democrats-investigate-trump>.

77. See Karoun Demirjian, *Democrats on Hill Rally to Protect Mueller Probe*, WASH. POST, Jan. 27, 2018, at A1; see also Gabriella Muñoz, *Progressive Groups Unhappy with Articles of Impeachment*, WASH. TIMES (Dec. 10, 2019), <https://www.washingtontimes.com/news/2019/dec/10/progressive-groups-unhappy-articles-impeachment/>.

78. See BLACK, *supra* note 39, at 6-7.

79. *Id.*

80. See discussion *infra* Section IV.

81. See Madeleine Carlisle, *What Are High Crimes and Misdemeanors? Here's the History*, TIME (Jan. 17, 2020, 9:22 AM), <https://time.com/5745616/high-crimes-and-misdemeanors/>.

82. See 1973 OLC Memo Opinion, *supra* note 8, at 11 ("In 1790 and 1791 James Wilson, a signer to the Declaration of Independence and Associate Justice of the Supreme Court, in his law lectures, defined the term 'high misdemeanors' as malversation in office and he asserted: 'In the

duties. These offenses do not need to be a criminal infraction and in many cases would not qualify as such.⁸³ However, because many of the charges brought against government officials result from either a special or independent counsel's report, the various charges take on the appearance of criminal infractions. As is seen in the articles of impeachment against Presidents Johnson, Nixon, and Clinton, the charges were largely based on conduct impacting the integrity of the office or republic.⁸⁴

Obstruction of justice falls under the high crimes and misdemeanor provision.⁸⁵ It is defined as “when an individual ‘corruptly’ endeavors to impede or influence an investigation or other proceeding, and the word ‘corruptly’ is understood to mean ‘with an improper purpose.’”⁸⁶ A president's improper use of the powers of the office constitutes obstruction of justice.⁸⁷ Often, this manifests in the improper use of official powers for personal benefit or gain.⁸⁸ Political actions that do not, or only tangentially, advantage the official would not be considered an abuse of power.⁸⁹ Both of the special and independent counsel charges presented to Congress had abuse of power as one of the “crimes” committed by President Nixon.⁹⁰

During the Watergate investigation, the House Judiciary Committee prepared articles of impeachment against President Nixon based upon the special counsel's investigation and the results of the Senate's Commission.⁹¹ The obstruction counts focused on President Nixon's improper use of powers to interfere with the Federal Bureau of Investigation's (FBI) inquiry into the Watergate burglary and his refusal to cooperate with the Senate Committee investigating Watergate.⁹² Clearly, using his official powers to avoid accountability for covering up criminal activity in his reelection campaign was for President Nixon's own personal gain. The House Judiciary Committee voted to approve the articles of impeachment, leading to President Nixon's resignation.⁹³ Similar to President Nixon, Presidents Clinton and Trump faced obstruction of justice charges focused on interfering with investigations into their potentially criminal behavior.⁹⁴

United States and in Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments.”) (footnote omitted) (quoting 1 WORKS OF JAMES WILSON [1790–1791] 425–26 (1967)).

83. Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”*: Basic Principles, 67 GEO. WASH. L. REV. 712, 717 (1999); KURLAND, *supra* note 46, at 108–09.

84. See H.R. JOURNAL, 40th Cong., 2d Sess. 440–50 (1868); Trautman, *supra* note 28, app. A at 587–91; H.R. Res. 611, 105th Cong. (1998).

85. Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1302 (2018).

86. *Id.* at 1282 (quoting the definition of “corruptly” as defined in 18 U.S.C. § 1515(b) (2018)).

87. See *id.*

88. *Id.*

89. *Id.* at 1282–83.

90. See Trautman, *supra* note 28, app. A at 587–94.

91. See Bobbitt, *supra* note 28, at 519–21; see also KURLAND, *supra* note 46, at 119–21.

92. See Bobbitt, *supra* note 28, at 521; see also Ann M. Murphy, *All the President's Privileges*, 27 J. L. & POL'Y 1, 13–15 (2018).

93. See Bobbitt, *supra* note 28, at 519–21.

94. See generally H.R. Res. 611, 105th Cong. (1998); H.R. Res. 755, 116th Cong. (2019).

President Clinton faced articles of impeachment after lying under oath during a civil deposition.⁹⁵ Of the various counts proposed by the House, two counts were approved to send to the Senate for a full trial.⁹⁶ Article III constituted an obstruction of justice charge based on President Clinton's actions encouraging witnesses to lie under oath or withhold information from the independent counsel.⁹⁷ As is often said, the cover-up is worse than the crime.⁹⁸ After President Clinton denied sexual relations with Ms. Lewinsky, he took action to ensure his lying was not uncovered.⁹⁹

Special Counsel Mueller followed the same protocol as Special Counsel Cox and Independent Counsel Starr, and referred his report to Congress. The House weighed whether to open an impeachment inquiry against President Trump based on the findings in the Mueller Report, along with other allegations of misconduct against the President.¹⁰⁰ A significant number of representatives supported an impeachment inquiry despite the concerns of House Speaker Nancy Pelosi.¹⁰¹ After Mueller testified before the House Intelligence and Judiciary Committees concerning his two volume report, Speaker Pelosi chose not to pursue an impeachment

95. H.R. Res. 611, 105th Cong. (1998).

96. *See id.*

97. *See id.* at Article II. (“In his conduct while President of the United States, William Jefferson Clinton . . . has prevented, obstructed and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding.”). Ultimately, the House found that President Clinton's actions had “undermined the integrity of his office . . . brought disrepute on the Presidency . . . betrayed his trust as President and . . . acted in a manner subversive of the rule of law and justice to the manifest injury of the people of the United States.” *Id.* It was determined that President Clinton's conduct “warrant[ed] impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.” *Id.*

98. Katie McNally, *Watergate: Miller Center Revisits the Infamous ‘Cover-Up Worse Than Crime’*, UNIV. OF VA. TODAY (June 15, 2017), <https://news.virginia.edu/content/watergate-miller-center-revisits-infamous-cover-worse-crime>.

99. Russell Riley, *The Clinton Impeachment and Its Fallout*, UNIV. OF VA. MILLER CTR., <https://millercenter.org/the-presidency/impeachment/clinton-impeachment-and-its-fallout> (last visited May 12, 2023); *see* Whittington, *supra* note 54, at 454–56 (“The necessity of impeachment did not arise from Clinton's actions as President but from the inconsistencies between his private actions and his public role.”). *But see* Hemel & Posner, *supra* note 85, at 1306–07 (discussing how over 400 law professors expressed that the House Articles of Impeachment against President Clinton were improper) (“The professors argued that ‘making false statements about sexual improprieties is not a sufficient constitutional basis to justify the trial and removal from office of the President of the United States,’ but they emphasized that—by contrast—a ‘President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers.’” (quoting Bernard J. Hibbitts, *More Than 430 Law Professors Send Letter to Congress Opposing Impeachment*, JURIST (Nov. 6, 1998), <https://web.archive.org/web/19990128143405/http://jurist.law.pitt.edu/petit1.htm>).

100. *See* Tom McCarthy, *House Kills Attempt to Impeach Trump for ‘Disgracing’ Presidency*, THE GUARDIAN (July 17, 2019, 7:57 PM), <https://www.theguardian.com/us-news/2019/jul/17/house-kills-attempt-to-impeach-trump-for-disgracing-presidency>.

101. *See id.*; Nicholas Fandos, *Trump Officials Turn Over Whistle-Blower Complaint as Impeachment Inquiry Begins*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/us/politics/whistle-blower-complaint-trump.html>. *See generally* Giovanni Russonello, *Impeachment Polls Show a Steady Rise in Support*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/politics/impeachment-monmouth-poll.html>.

inquiry.¹⁰² The political calculations informing Speaker Pelosi's decision do not diminish the significant findings of the Mueller Report.

The Mueller Report detailed the extent of Russian interference into the 2016 presidential election, along with President Trump's efforts to obstruct justice by interfering with the subsequent investigation. Mueller's team found that there was insufficient evidence to establish a conspiracy between Russian assets and the Trump Campaign.¹⁰³ However, his report does reveal an openness to obtain help from Russian nationals in the 2016 general election.¹⁰⁴ Campaign officials took meetings with Russian agents, planned to build a Trump tower in Moscow then lied about it, and worked with Wikileaks to obtain and disseminate harmful information about several officials in the Democratic National Committee (DNC).¹⁰⁵ A few Trump Campaign officials were prosecuted for their criminal conduct; however, none of those actions directly implicated President Trump.¹⁰⁶

102. See Julie Hirschfeld Davis & Mark Mazzetti, *Highlights of Robert Mueller's Testimony to Congress*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/politics/mueller-testimony.html>; Grace Segers, *Pelosi Stops Short of Calling for Impeachment After Mueller's Testimony Before Congress*, CBS NEWS (July 24, 2019, 9:29 PM), <https://www.cbsnews.com/news/nancy-pelosi-reacts-to-robert-mueller-testimony-congress-today-2019-07-24-live-stream/>.

103. MUELLER REPORT VOLUME I, *supra* note 7, at 9 ("Second, while the investigation identified numerous links between individuals with ties to the Russian government and individuals associated with the Trump Campaign, the evidence was not sufficient to support criminal charges.").

104. See *id.* at 8–10, 174–75; see also Indictment at 3, *United States v. Internet Rsch. Agency LLC*, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018) (indicting Russian agents for engaging in manipulation of social media to create an infrastructure of disinformation by faking online U.S. personas to skew the election results); *Read the DOJ Memo Authorizing Mueller to Investigate Potential Manafort Collusion*, CNN (Apr. 3, 2018, 9:17 AM), <https://www.cnn.com/2018/04/03/politics/read-rosenstein-aug-2-memo/index.html> (reprinting the August 2, 2017 Memorandum from Rod J. Rosenstein to Robert S. Mueller, III, suggesting Mueller "investigate allegations that President Donald Trump's former campaign chairman Paul Manafort" colluded with Russian officials during the 2016 election); Indictment at 1–3, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. Oct. 30, 2017) (indicting Paul Manafort and Richard Gates for their misleading and incorrect statements regarding their work as Ukrainian agents and the payment they received from Ukraine); Kaitlyn Schallhorn, *How Paul Manafort is Connected to Trump, Russia Investigation*, FOX NEWS (Nov. 27, 2018), <https://www.foxnews.com/politics/how-paulmanafort-is-connected-to-trump-russia-investigation> (discussing Manafort's conviction); Statement of the Offense at 1–3, *United States v. Papadopoulos*, No. 1:17-cr-00182-RDM (D.D.C. Oct. 5, 2017) (stipulating that George Papadopoulos made various "false statements and material omissions to the FBI" regarding Russian interference in the 2016 election); Spencer S. Hsu & Rosalind S. Helderman, *Former Trump Adviser George Papadopoulos Sentenced to 14 Days in Plea Deal with Mueller Probe*, WASH. POST (Sept. 7, 2018, 5:26 PM), https://www.washingtonpost.com/local/public-safety/former-trump-adviser-george-papadopoulos-sentenced-to-14-days-in-plea-deal-with-mueller-probe/2018/09/07/bef367a2-b210-11e8-aed9001309990777_story.html; Statement of the Offense at 1–2, *United States v. Flynn*, No. 1:17-cr-00232-RC (D.D.C. Dec. 1, 2017) (stipulating that Michael T. Flynn "made materially false statements and omissions" to the FBI regarding the 2016 election); Ryan Lucas, *Trump Pardons Michael Flynn, Who Pleaded Guilty to Lying About Russia Contact*, NPR (Nov. 25, 2020, 4:13 PM), <https://www.npr.org/2020/11/25/823893821/trump-pardons-michael-flynn-who-pleaded-guilty-to-lying-about-russia-contact>.

105. See MUELLER REPORT VOLUME I, *supra* note 7, at 5–6, 44, 66–68, 176.

106. See *id.* app. D at 1–6; see also Spencer S. Hsu, Rachel Weiner, & Matt Zapotosky, *Roger Stone Guilty on All Counts of Lying to Congress, Witness Tampering*, WASH. POST (Nov. 15, 2019, 2:02 PM), https://www.washingtonpost.com/local/public-safety/roger-stone-jury-weighs-evidence-and-a-defense-move-to-make-case-about-mueller/2019/11/15/554fff5a-06ff-11ea-8292-c46ee8cb3dce_story.html.

Mueller did find numerous instances of President Trump obstructing justice by attempting to influence the special counsel investigation.¹⁰⁷ Similar to President Nixon, Mueller found that President Trump had interfered with the FBI and requested that the Central Intelligence Agency's (CIA) other executive departments thwart the special counsel.¹⁰⁸ President Trump went further in his efforts to stop the investigation by requesting that White House officials like Don McGahn, Hope Hicks, and K.T. McFarland lie about his actions and statements related to the investigation.¹⁰⁹ Mueller explained that “the President’s position as the head of the Executive Branch provided him with unique and powerful means of influencing official proceedings, subordinate officers, and potential witnesses—all of which is relevant to a potential obstruction-of-justice analysis.”¹¹⁰ Following the DOJ guidelines, Special Counsel Mueller stated he could not charge a sitting president and referred his report to Congress.¹¹¹ This pattern of obstructing investigations through the misuse of executive power continued through to the House Intelligence Committee’s investigation into Ukraine’s military aid delay.

As the 115th Congress decided whether to impeach President Trump, the political nature of the process became clear. Speaker Pelosi’s refusal to move forward with impeachment after Mueller’s Report, despite growing calls from her caucus to do so, demonstrated a political assessment that had little or nothing to do with whether crimes were committed. For this reason, the Constitution, the DOJ, and legal scholars separate the criminal process from the congressional powers to remove federal officials from office.

II. DOJ REGULATIONS ON INDICTING A SITTING PRESIDENT OR VICE PRESIDENT

The initial DOJ regulations regarding indictment of a sitting president were drafted at the height of the Watergate special counsel investigation.¹¹² Two special counsels were tasked with investigating the Watergate break-in and related crimes potentially committed by the Committee to

107. MUELLER REPORT VOLUME II, *supra* note 7, at 1–7 (detailing the efforts and actions of former President Trump to interfere or end the special counsel investigation into Russian interference in the 2016 election).

108. *Id.* at 3–5.

109. *See id.* at 21, 29, 62–63. After Comey publicly disclosed that the FBI was investigating Russian interference in the 2016 presidential election, President Trump “reached out to the Director of National Intelligence and the leaders of the [CIA] and [NSA]” asking them what they could do to “publicly dispel the suggestion that the President had any connection to the Russian election-interference effort.” *Id.* at 3–4. President Trump also contacted Comey directly, despite guidance to avoid direct contact with the DOJ: “Comey had previously assured the President that the FBI was not investigating him personally, and the President asked Comey to ‘lift the cloud’ of the Russia investigation by saying that publicly.” *Id.*

110. *Id.* at 7.

111. *See id.* at 7–8 (“Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him”).

112. *See generally* 1973 OLC Memo Opinion, *supra* note 8.

Re-elect President Nixon.¹¹³ The special counsels' investigations included investigation into President Nixon himself due to evidence from the criminal trials of those involved in the break-in.¹¹⁴ With the special counsel investigation ongoing, the DOJ report focused on questions involving the debate between impeachment and indictment of the Executive. First, the memo questioned whether impeachment must occur first before criminal charges could be brought against the President.¹¹⁵ Second, the DOJ considered which federal court would have jurisdiction if the President was charged criminally.¹¹⁶ Finally, the memo discussed whether any immunity from prosecution would cover the Vice President.¹¹⁷ The Office of Legal Counsel (OLC) grappled with the paramount importance of the rule of law weighed against an individual's, specifically the President's, due process rights.

A. Which Goes First: Impeachment or Indictment?

Impeachment is not a precursor to criminal charges, which are mutually exclusive in their scope and purpose. According to the DOJ, impeachment is a political act handled by Congress.¹¹⁸ The sole consideration in impeachment proceedings is whether a government official should be removed from office based on a determination of inappropriate behavior.¹¹⁹ The regulations chronicle the civil employees that have been impeached, including members of the Executive and Judicial Branches.¹²⁰ The Constitution explicitly indicates that criminal actions are separate from the considerations of Congress' impeachment powers.¹²¹ Further, the OLC studied the historical debate between impeachment with simultaneous criminal indictments.¹²² The OLC's analysis focused on cases where officials were removed from office while being prosecuted at the same time or before their congressional hearings.¹²³ The OLC understood that there may be

113. See DOYLE, *supra* note 67, at 45–47 (narrating the nomination and appointment of Archibald Cox as special prosecutor); see also Harriger, *supra* note 13, at 496 (describing the firing of Archibald Cox and replacement by Leon Jaworski as special prosecutor).

114. See LEON FRIEDMAN, UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT 209–19 (1974) (providing the brief special counsel presented to the U.S. Supreme Court regarding the need for President Nixon's tapes to reveal his potential culpability in the Watergate cover-up and other criminal activity).

115. 1973 OLC Memo Opinion, *supra* note 8, at 1.

116. *Id.*

117. *Id.*

118. See *id.* at 4–5, 12.

119. *Id.* at 2. (“Judgment in cases of Impeachment 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”) (quoting U.S. CONST. art. I, § 3, cl. 7).

120. 1973 OLC Memo Opinion, *supra* note 8, at 8 (defining civil employees as “appointed by one of the methods provided for in Article II, section 2, clause 2 of the Constitution, i.e., by the President by and with the advice of Senate, or, on the basis of a statutory authorization, by the President alone, the Courts of Law, or a Head of a Department” (citing United States v. Mouat, 124 U.S. 303, 307 (1886))).

121. See *id.* at 2–3; see also Paul Savoy, *A Path to Prosecuting President Trump*, JUST SECURITY (July 27, 2018), <https://www.justsecurity.org/59789/path-prosecuting-president-trump/>.

122. See 1973 OLC Memo Opinion, *supra* note 8, at 10–17.

123. *Id.*

overlap between the criminal offenses charged against an appointed official and the grounds for impeachment.¹²⁴ While such overlap may make a congressional inquiry or prosecution difficult, it does not preclude either from happening first or concurrently.¹²⁵ The OLC memo outlines the importance of both proceedings as protecting the integrity of the rule of law.¹²⁶

B. Why the President Is Different

The OLC recognized the importance of the independence of both criminal and impeachment proceedings on any appointed official. However, that independence does have limits. Both the original 1973 OLC memo and the reevaluation completed in 2000 found that a sitting president is the only official in both the Executive and Judicial Branches who may not be indicted.¹²⁷ The rationale for this restriction hinges largely on the due process rights that any criminal defendant is entitled to.¹²⁸ These protections make it significantly harder when the criminally accused is the President.

OLC's analysis began by acknowledging that there is no constitutional provision immunizing a president from criminal prosecution while in office.¹²⁹ The President is the head of one of the three branches of government, but the President is not above the law.¹³⁰ The Framers of the Constitution purposefully structured the Executive Branch in a way that ensured its head did not have the unlimited powers of a king.¹³¹ The distinction between the President and a king is the fundamental principle that everyone is subject to the rule of law.¹³² This includes holding a president answerable to subpoenas and subpoenas duces tecum.¹³³ Presidents have had to sit for depositions as well as disclose documents and provide

124. See *id.* at 13 (discussing instances of constitutional overlap between the criminal code on Bribery and Treason and impeachment).

125. *Id.* at 16–17.

126. *Id.*

127. *Id.* at 5, 32, 37; 2000 OLC Memo Opinion, *supra* note 8, at 1.

128. See 1973 OLC Memo Opinion, *supra* note 8, at 34.

129. See *id.* at 18 (recognizing that the Constitution lays out the grounds for impeachment but is silent on immunity from prosecution—this is the crux of the objection to the DOJ regulations).

130. See generally U.S. CONST. art. II, §§ 1–4; see also *United States v. Nixon*, 418 U.S. 683, 706–07 (1974) (“To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.”); *Clinton v. Jones*, 520 U.S. 681, 694–95, 705–06 (1997) (subjecting the President to a civil subpoena).

131. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 602–03 (2004); see generally Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009).

132. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 72 (2009) (discussing the constitutional mandate that all executive officials, including the President, obey the law).

133. See *Clinton*, 520 U.S. at 694.

additional discovery while holding office.¹³⁴ The Supreme Court has upheld such actions in civil proceedings.¹³⁵ Given that a president can be sued while in office or criminally investigated by special or independent counsel, the implication that a president's conduct in violation of the federal criminal code will go unaddressed is problematic.

In any type of criminal case, when a person is charged with a crime, they are arrested and, in short order, brought before a court for arraignment.¹³⁶ At this proceeding, the charges are read to the individual, and a plea of not guilty is usually entered.¹³⁷ This commences prosecution procedures where the defendant goes through a pretrial hearing that may include a preliminary hearing, suppression hearings, and various other court appearances.¹³⁸ A defendant is present at many, if not all, of these court hearings.¹³⁹ These due process rights ensure that the accused has the right to a fair trial.¹⁴⁰ The OLC recognizes that when the accused is a sitting president, these rights are exponentially more complicated.¹⁴¹

Two of the questions addressed in the OLC report regarding federal prosecution were which federal court would have jurisdiction and how a jury would be composed.¹⁴² More importantly, a president would be expected to attend most court appearances in his criminal case.¹⁴³ Presidential duties make these appearances complicated, if not almost impossible.¹⁴⁴ A criminal prosecution would impair a president's ability to execute his official duties both nationally and internationally.¹⁴⁵ An ongoing criminal prosecution would undermine the president's authority domestically both with the people and with Congress.¹⁴⁶ Further, given that many of the President's powers are concentrated internationally, the specter of criminal charges would undermine the office's credibility with other nations.¹⁴⁷

134. See *id.* at 703–05; see also *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692d).

135. See *Nixon*, 418 U.S. at 713; *Clinton*, 520 U.S. at 703–05. See generally *Morrison v. Olson*, 487 U.S. 654 (1988).

136. See FED. R. CRIM. P. 10.

137. See *id.*

138. See generally FED. R. CRIM. P. 12.

139. See U.S. CONST. amend. VI; see also FED. R. CRIM. P. 43.

140. See U.S. CONST. amends. V, VI, VIII, XIV; see also Jerald H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 304–06 (2001).

141. See 1973 OLC Memo Opinion, *supra* note 8, at 26–29.

142. *Id.* at 25 (“The considerations here involved are that the ordinary courts may not be able to cope with powerful men, and second, that it will be difficult to assure a fair trial in criminal prosecutions of this type”).

143. See *id.* at 27 (discussing several court decisions requiring high governmental officials to personally appear in civil matters despite the general rule that such officials are exempted from appearing, and inquiring whether a president would be required to attend court in a criminal case).

144. *Id.* at 28 (explaining that the President's court attendance in “connection with [a criminal trial], however, would interfere with the President's unique official duties, most of which cannot be performed by anyone else. It might be suggested that the same is true with the defense of impeachment proceedings; but this is a risk expressly contemplated by the Constitution . . .”).

145. *Id.* at 30.

146. See *id.* at 30–31.

147. 1973 OLC Memo Opinion, *supra* note 8, at 30–31.

These considerations do not necessarily eliminate a sitting president from prosecution, but they do illuminate the difficulties in the decision to do so. The OLC's memo found that separation of powers exempted the President from criminal prosecution because of the impact on the duties of the office.¹⁴⁸

Another problem that is unique to the President is executive privilege. The Supreme Court has recognized executive privilege as “constitutional underpinnings” and “implicit in the President’s Article II powers and in the Constitution’s separation of powers scheme.”¹⁴⁹ Potentially, the witnesses and documents a prosecution would rely on by subpoena or other means may fall within the scope of information protected by executive privilege: “This privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter.”¹⁵⁰

In 2000, the OLC revisited its 1973 memo concerning criminally charging a sitting president. The revised memo evaluated the legal basis of the 1973 memo considering changes in caselaw and policy.¹⁵¹ However, they held firm that a sitting president could not be indicted.¹⁵² They summarized the earlier memo stating that a sitting president is subject to the criminal code, and the federal courts have jurisdiction.¹⁵³ Based on the earlier separation of powers doctrine, the OLC found that the duties of the President necessitated exemption from criminal prosecution while in office,¹⁵⁴ but acknowledges the lack of any constitutional support for its position of not indicting or pursuing prosecution while a president is in office.¹⁵⁵ Additionally, the OLC guidelines are nonbinding, although DOJ norms favor abiding by them.¹⁵⁶ This viewpoint is not supported by those

148. *Id.* at 24, 32–33.

149. Ann M. Murphy, *All the President’s Privileges*, 27 J.L. & POL’Y 1, 14 (2018) (first quoting *U.S. v. Nixon*, 418 U.S. 683, 705–06; then quoting Jonathan K. Geldert, *Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy*, 49 B.C. L. REV. 823, 829 (2008)). The 1973 DOJ OLC Memorandum speaks to this issue: “[T]he problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case.” 1973 OLC Memo Opinion, *supra* note 8, at 26.

150. 1973 OLC Memo Opinion, *supra* note 8, at 27.

151. 2000 OLC Memo Opinion, *supra* note 8, at 222.

152. *Id.* at 222–23.

153. *See id.* at 226–27.

154. *Id.* at 236 (“The OLC memorandum in particular concluded that the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation’s chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function.”).

155. *Id.* at 236–37.

156. *See* Fred Barbash, *Justice Department Opinions Take on the Force of Law – But Are Not, in Fact, the Law*, WASH. POST (May 31, 2019, 7:00 AM), https://www.washingtonpost.com/world/national-security/justice-department-opinions-take-on-the-force-of-law-but-are-not-in-fact-the-law/2019/05/30/f4efe222-8280-11e9-933d-7501070ee669_story.html; Memorandum from the Dep’t. of Just. On Best Practices for OLC Legal Advice on Written Opinions to Att’y’s of the Off. (July 16, 2010) (available at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>).

in the position to determine whether to bring charges. In fact, in two instances, the attorneys in the special and independent counsel's offices have refuted this argument.¹⁵⁷

III. INDICTING A SITTING PRESIDENT: WHY THE OLC MEMORANDUMS WERE WRONG

Special and independent counsels were appointed to investigate wrongdoing by Presidents Nixon and Clinton, respectively.¹⁵⁸ To handle the complex nature of these cases, both counsels were comprised of attorneys, federal agents, and other support staff.¹⁵⁹ Inherent in these investigations was the possibility of discovering criminal activity by various individuals within the scope of the investigation, including President Nixon. During Watergate and the investigation of President Clinton, staff attorneys argued in favor of indicting the sitting president they were investigating.¹⁶⁰ Despite DOJ regulations prohibiting the practice, several prosecutors argued vehemently for presenting criminal charges to the grand jury.¹⁶¹ The crux of their argument and the evidence they gathered supported their assertions that no one, not even the President, is above the rule of law.¹⁶² Resting their arguments on originalist texts, precedent, and analysis, the staff attorneys explained why a sitting president could be indicted for criminal actions committed before and while in office.

The 2000 OLC memo addressed concerns for the rule of law when a president is exempt from prosecution while in office:

With respect to immediate prosecution, we can identify three other governmental interests that might be impaired by deferring indictment and prosecution until after the accused no longer holds the office of President: (1) avoiding the bar of a statute of limitations; (2) avoiding the weakening of the prosecution's case due to the passage of time; and (3) upholding the rule of law.¹⁶³

The staff attorneys challenged each of these issues as they sought to bring their case before the grand jury to determine whether to indict the President. However, Independent Counsel followed the OLC memo

157. See Feldbaum Memo, *supra* note 1, at 1–2; Memorandum from Ronald D. Rotunda, The Albert E. Jenner, Jr. Professor of L., on Indictability of the President to Kenneth W. Starr, Indep. Couns.1 (May 13, 1998) [hereinafter Rotunda Memo].

158. Ron Elving, *Potent But Unpredictable: How Special Counsels Have Posed a Special Threat*, NPR (Mar. 21, 2019, 3:33 PM), <https://www.npr.org/2019/03/21/699982049/potent-but-unpredictable-how-special-counsels-have-posed-a-special-threat>.

159. See, e.g., Feldbaum Memo, *supra* note 1, at 21; *Meet Team Starr*, CBS NEWS (July 28, 1998, 5:08 PM), <https://www.cbsnews.com/news/meet-team-starr/>.

160. Feldbaum Memo, *supra* note 1, at 1–2; Rotunda Memo, *supra* note 157, at 1.

161. Feldbaum Memo, *supra* note 1, at 1–2; Rotunda Memo, *supra* note 157, at 2, 55.

162. Feldbaum Memo, *supra* note 1, at 1–4; Rotunda Memo, *supra* note 157, at 55.

163. 2000 OLC Memo Opinion, *supra* note 8, at 255–56.

referring the recommendation to Congress instead of empaneling a grand jury.¹⁶⁴

In 1974, attorneys from the Watergate Special Prosecutor's Investigation drafted a memorandum requesting permission to submit an indictment against President Nixon to a grand jury.¹⁶⁵ They based this request on several arguments countering the OLC guidelines.¹⁶⁶ The fundamental reason for their position was protecting the rule of law and the critical point that no one, not even the President, is above it.¹⁶⁷ The special counsel attorneys focused on three reasons why they should be able to present their prepared case and potential indictment to the grand jury. First, the special counsel staff attorneys examined the language of the Attorney General's mandate creating the Watergate Special Counsel:¹⁶⁸ "[T]he Special Prosecutor's 'duties and responsibilities' include 'full authority for investigating and prosecuting . . . allegations involving the President . . .'"¹⁶⁹ The Watergate Special Counsel's Office obtained extensive evidence against senior advisors to President Nixon which implicated him directly¹⁷⁰ using executive agencies like the Internal Revenue Service (IRS) and FBI to investigate President Nixon's enemies, settle lawsuits against companies who donated to the President, and undermine the DNC.¹⁷¹

Public outrage over Watergate and the President's direction in handling the cover-up "created a crisis of confidence in the President, the

164. *Id.* at 256–57, 260. *See generally* Feldbaum Memo, *supra* note 1; Rotunda Memo, *supra* note 157.

165. Feldbaum Memo, *supra* note 1, at 1–2. The special counsel attorneys submitted the memo to Special Counsel Leon Jaworski after the events of the Saturday Night Massacre where former Special Counsel Archibald Cox was fired by Solicitor General Robert Bork. President Nixon initially demanded that the Attorney General and Deputy Attorney General fire Special Counsel Cox, but they refused to do so and resigned in protest. *See generally* Ron Elving, *A Brief History of Nixon's 'Saturday Night Massacre'*, NPR (Oct. 21, 2018, 8:12 AM), <https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre>.

166. *See* Feldbaum Memo, *supra* note 1, at 1–2; *see also* Charlie Savage, *Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html>.

167. Feldbaum Memo, *supra* note 1, at 4–5.

168. *Id.* at 2.

169. *Id.* (second and third alterations in original) (quoting Dep't of Just. Ord. No. 551-73, 38 Fed. Reg. 30,738, 30,738–79 (Nov. 7, 1973)); *see also* OFF. OF THE DEPUTY ATT'Y GEN., ORD. NO. 3915-2017, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (2017) (detailing the scope of the special counsel's authority to investigate and prosecute matters related to the 2016 election, the Trump Campaign, and Russian interference).

170. *See* Tiffany R. Murphy, *Prosecuting the Executive*, 56 SAN DIEGO L. REV. 105, 131–37 (2019); *see also* Bonnie Berkowitz & Dylan Moriarty, *How the Watergate Scandal Broke to the World: A Visual Timeline*, WASH. POST (June 13, 2022), <https://www.washingtonpost.com/history/interactive/2022/timeline-watergate-scandal-revelations/> (detailing how, by the time of the Special Counsel memorandum, jurors had convicted the Watergate burglars, senior counsel Haldeman and Ehrlichman along with Attorney General Kleindienst resigned their positions, and President Nixon fired White House Counsel John Dean. More importantly, the existence of President Nixon's tapes containing his recorded conversations in the Oval Office became known. Their jobs involved interviewing and investigating these people amongst many others closely associated with the President. As they prepared charges against many of these individuals, their evidence kept returning to President Nixon.).

171. *See* Murphy, *supra* note 170, at 128–133.

Presidency, and the criminal justice system.”¹⁷² If the special prosecutor failed to act when the public saw numerous crimes being committed by those in power, trust in the DOJ and prosecutors to faithfully execute the law would corrode.¹⁷³ If prosecutors did not act in the face of clear evidence known to the public inculcating the President, what does that say about justice overall and their part in it? People saw those affiliated with the Committee to Re-elect President Nixon and those in his White House being arrested and testifying before Congress admitting to crimes during the Senate Select Committee’s hearings.¹⁷⁴ They readily admitted awareness if not direct knowledge by the President.¹⁷⁵ The special counsel attorneys grew concerned that in the face of that televised admission of crimes the criminal justice system could not justify failing to apply the same law to all citizens regardless of their position.

The special counsel attorney’s second ground for requesting an indictment focused on preserving the rule of law. In their estimation, it would do more harm to the Republic for a president to go unindicted:

The implications of such a conclusion would be unfortunate under ordinary circumstances; but we are not faced with ordinary circumstances—we are dealing with the very man in whom the Constitution reposes not only the most power in our society but also the highest and final obligation to ensure that the law is obeyed and enforced.¹⁷⁶

Having a president who committed crimes while holding such immense power could single-handedly undermine constitutional integrity. A president swears oaths to not only uphold the tenants of the Constitution but also to see that they are properly enforced.¹⁷⁷ When that individual breaks the law, a conflict exists between the Executive and their ability to oversee its obligations.¹⁷⁸

Third, the special counsel distinguished its role from the role of impeachment by Congress. Impeachment is a political act operating in a separate sphere from the duties of the special prosecutor.¹⁷⁹ While the special prosecutor’s report and supporting documentation would be reviewed by

172. Feldbaum Memo, *supra* note 1, at 3.

173. *See id.* at 3, 6–7. *See generally* Nicholas Fandos, Michael S. Schmidt, & Mark Mazzetti, *Some on Mueller’s Team Say Report Was More Damaging Than Barr Revealed*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/politics/william-barr-mueller-report.html> (discussing conflicting accounts of discussions between the special counsel’s team and Attorney General Barr regarding what information from the Mueller Report should be released). *See also* Edwin Rios, *Reports: Mueller Complained Barr’s Letter About Russia Investigation Lacked Proper “Context”*, MOTHER JONES (Apr. 30, 2019), <https://www.motherjones.com/politics/2019/04/mueller-barr-letter-russia-report-complaints/>.

174. *See* DOYLE, *supra* note 67, at 33–34; *see also* Berkowitz & Moriarty, *supra* note 170.

175. *See* Berkowitz & Moriarty, *supra* note 170.

176. Feldbaum Memo, *supra* note 1, at 4.

177. *See* U.S. CONST. art. II, § 1, cl. 8; *id.* art. II, § 3.

178. *See* Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1050, 1052–55 (1999).

179. *See* Bobbitt, *supra* note 28, at 519; *see also* 1973 OLC Memo Opinion, *supra* note 8, at 10–11.

Congress, their obligation to prosecute offenses was a separate calculus. Given the duties of both the House and Senate in an impeachment proceeding, the special prosecutors argued it was a political action.¹⁸⁰ The grounds for impeachment may be the same as those brought in an indictment, but Congress could find actions worthy of impeachment that would not be criminalized and vice versa.¹⁸¹ Relying on Congress to be the final arbiter of the special prosecutor's report and recommendations would be a dereliction of the special prosecutor's duties.¹⁸²

Finally, the special counsel staff attorneys pushed back directly on the OLC's argument about the separation of powers, specifically asserting that an indictment would cripple the President's ability to run the Executive Branch. Indictment of a sitting president would be, at most, on par with the disruption that impeachment would cause.¹⁸³ A criminal prosecution must operate on a specified timeline, while impeachment could, and likely would, drag on for considerably longer.¹⁸⁴ The benefits of a public trial with clearly enumerated charges would not only aid the public's confidence that the law applies to everyone equally but would also allow for full evaluation of those charges in a more efficient manner. The Constitutional provision for impeachment lends itself to the presumption that interference with executive function would happen but would not thwart the ability of the Executive Branch to function.¹⁸⁵

Many of the Watergate staff attorneys' arguments were echoed in the independent counsel's report on President Clinton and similar arguments are being made related to Special Counsel Mueller's investigation.¹⁸⁶ In the aftermath of Watergate, Congress created the Office of Independent Counsel as part of Ethics in Government Act that included extensive

180. See Feldbaum Memo, *supra* note 1, at 5–6; see also 1973 OLC Memo Opinion, *supra* note 8, at 15–16.

181. See Feldbaum Memo, *supra* note 1, at 6.

182. *Id.* at 9.

183. *Id.* at 15.

184. *Id.*

185. *Id.* at 16.

186. *Id.* at 14 (“If at some future time circumstances require appointment of a new ‘Special Prosecutor,’ then the precedent set here would not be a dangerous one. Moreover, even if the risks of future abuse were great, which we think they are not, those risks would have to be weighed against the harmful precedent of failing to act appropriately in the case before us. The best way to prevent a situation like the one we have now from occurring again is to assure that the criminal justice process fulfills its historic responsibilities, thus reaffirming the principle that the President, like everyone else, is subject to prosecution for commission of serious crimes.”). The staff attorneys for the Watergate Special counsel were prescient for the findings of the independent and special counsel investigations of Presidents Clinton and Trump. See Carlos Lozada, *Every Report on Past Presidential Scandal Was a Warning. Why Didn't We Listen?*, WASH. POST (Mar. 22, 2019, 10:40 AM), <https://www.washingtonpost.com/outlook/2019/03/22/every-report-past-presidential-scandal-was-warning-why-didnt-we-listen/>. In both cases, the counsel found criminal conduct by the president but did not present to a grand jury for potential indictment. See MUELLER REPORT VOLUME I, *supra* note 7, at 9, 157; John F. Harris & Bill Miller, *In a Deal, Clinton Avoids Indictment*, WASH. POST (Jan. 20, 2001), <https://www.washingtonpost.com/archive/politics/2001/01/20/in-a-deal-clinton-avoids-indictment/bb80cc4c-e72c-40c1-bb72-55b2b81c3065/>.

oversight of the Executive Branch, including the President.¹⁸⁷ Independent Counsel Kenneth Starr investigated President Clinton's actions both prior to and during his time in office.¹⁸⁸ As Starr grappled with whether to charge the President or submit his report to Congress, he requested that Professor Ronald D. Rotunda, Assistant Majority Counsel to the Senate Watergate Committee, write a report on whether the independent counsel could indict President Clinton while he was in office.¹⁸⁹ The analysis conducted by Professor Rotunda, who critiqued the OLC Memo applying to the Independent Counsel's Office, utilized many of the same arguments as the Watergate staff attorneys' and yielded the ultimate conclusion as the Watergate special prosecutors: a sitting president can be indicted and prosecuted.¹⁹⁰ His only caveat was that the President could not be imprisoned until he left office.¹⁹¹ Rotunda found that the independent counsel statute provided Starr more flexibility in the prosecution decision than the special counsel provision in effect during Watergate and for Mueller.¹⁹²

The Special Counsel's Office could not start an investigation unless the U.S. Attorney General authorized it. After enactment of the Ethics in Government Act, the independent counsel acted wholly separate from the DOJ.¹⁹³ The Supreme Court recognized the legitimacy of the Office of Independent Counsel in *Morrison v. Olson*,¹⁹⁴ including the "constitutional-ity of grand jury investigations under" its purview.¹⁹⁵ As such, Independent Counsel Ken Starr stood on stronger footing to indict a sitting president than the Watergate special prosecutor had in a role created by DOJ regulations.¹⁹⁶ Yet, Starr submitted his report to Congress rather than bringing

187. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. §§ 101–505 (2012)).

188. See KENNETH W. STAR, INDEP. COUNS., COMMUNICATION, H.R. DOC. NO. 105-310, at 11 (1998).

189. Rotunda Memo, *supra* note 157, at 1.

190. *Id.*

191. *Id.*

192. *Id.* at 6–7. Compare Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867–73, with 5 U.S.C. §§ 1212, 1216 (2012). The Independent Counsel Reauthorization Act replaced "1987" with "1994" and "reauthorize[d] the independent counsel law for an additional 5 years." Pub. L. No. 103-270, 108 Stat. 732 (codified as amended in scattered sections of 28 U.S.C.). In 1999, 28 U.S.C. § 599 overruled the Act. 28 U.S.C. § 599 (1999).

193. See Rotunda Memo, *supra* note 157, at 6–7; see also 28 U.S.C. § 591(a)–(b). The lapsed independent counsel statute was amended in 1994 to guide the target of the investigation to include conflicted persons:

[T]he DOJ is conclusively deemed to have a conflict of interest in criminal investigations because of the covered persons' political power or importance to the success of an administration. These "covered persons" include the President, the Vice President, cabinet level officials (including the Attorney General), certain high-ranking officials in the Executive Office of the President and the DOJ, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, and certain officials involved in the President's national political campaign.

Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 465 (1996).

194. 487 U.S. 654 (1988).

195. Rotunda Memo, *supra* note 157, at 6.

196. See *id.* at 45 n.140.

his case before the grand jury or filing a criminal complaint against President Clinton.¹⁹⁷

The tension between the rule of law and the separation of powers, emphasizing the complexity of presidential duties, is the reason that neither Special Prosecutor Jaworski nor Independent Counsel Starr opted to indict the main targets of their investigations. Instead, both turned over their reports and supplementing documentation to Congress.¹⁹⁸ The decision to leave the fate of a sitting president to Congress' impeachment power has and continues to be seen by many as an abdication of the counsel's duties because their reports detailed criminal conduct.¹⁹⁹ The argument from scholars and the public is that the rule of law suffers when violations of the federal criminal code by the one person with significant power over the fate of many are found but go unaddressed.²⁰⁰ The response to this is to charge the criminal conduct once a president leaves office. The OLC opts for this course, and Jaworski and Starr would agree.

What the OLC failed to consider are the types of crimes a sitting president may commit that would justify immediate charges. Both the Watergate special prosecutors and Independent Counsel Starr considered the specific crimes they believed Presidents Clinton and Nixon committed, but the OLC's position is to take a global view of the issue brought before it. A blanket exemption without considering the types of crimes a sitting president commits sets a dangerous precedent. Relying on Congress to handle blatant and likely severe criminality, such as treason, may not be sufficient to address the harm done to rule of law.²⁰¹

IV. WHY TREASON IS DIFFERENT

Despite having the most serious factual implications, treason is an infrequently used criminal statute. It is included in the Constitution as both a criminal infraction and a ground for an impeachment inquiry.²⁰² Treason differs from other crimes because it involves individuals threatening the nation's sovereignty by seeking to undermine its existence. Treason is infrequently charged;²⁰³ however, that does not diminish its importance. The Constitution defines treason as:

197. See Whittington, *supra* note 54, at 453–55.

198. *Id.*; UNITED PRESS INT'L ARCHIVES, *supra* note 9.

199. See Feldbaum Memo, *supra* note 1, at 9 (“[W]e do not believe that mere transmission of our evidence to Congress is a satisfactory means of discharging our responsibilities or those of the Grand Jury. Nor do we believe that our decision about how to proceed in the matter of the President should be influenced by the likelihood that some ‘political’ mechanism will determine his ‘fitness’ for office or by any other abstract notion of how ‘justice’ can be served other than by enforcement of the criminal law.”).

200. See Bobbitt, *supra* note 28, at 544; see also Harriger, *supra* note 13, at 495; Donald J. Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. MICH. J.L. REFORM 45, 57–58 (1982).

201. Feldbaum Memo, *supra* note 1, at 1–4.

202. See U.S. CONST. art. III, § 3; *id.* art. II, § 4.

203. *Treason*, FINDLAW (Mar. 1, 2019), <https://www.findlaw.com/criminal/criminal-charges/treason.html>.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.²⁰⁴

If Congress moved for impeachment based on potential treasonous acts, the House would likely look to the Constitution to determine what facts would prove such conduct. However, for criminal cases, the U.S. Code defines treason as:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.²⁰⁵

In both provisions, the core elements are the same; treason involves either direct action against the nation's integrity or providing "aid and comfort" to enemies of the nation.²⁰⁶ Because those charged with or convicted of treason seek to undermine the integrity of a nation-state, the harm to the people and the country cannot be understated. Those who engage in treason threaten the cornerstone of a country's security and ability to function. It is disloyalty to the country to a degree that seeks to harm the country's very existence. As discussed below, treason is seen as primarily occurring in times of war.²⁰⁷ However, the second clause of the constitutional provision and its corresponding federal law illustrates a greater threat.

A. The Constitutional History of the Treason Provision

As with many constitutional provisions, the treason section derives almost verbatim from English law.²⁰⁸ Whereas the English treason laws focused on attempts to overthrow or declare war against the king, the founding fathers sought to ensure the integrity of the fledgling nation through its definition of treason.²⁰⁹ A primary concern of the drafters focused on who could be charged for treason. Questions concerning citizenship or mere presence in the country were debated as being a significant

204. U.S. CONST. art. III, § 3.

205. 18 U.S.C. § 2381.

206. See U.S. CONST. art. III, § 3, cl. 1; 18 U.S.C. § 2381.

207. See B. Mitchell Simpson, III, *Treason and Terror: A Toxic Brew*, 23 ROGER WILLIAMS U. L. REV. 1, 8 (2018).

208. See *id.* at 5–6.

209. See Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 871–72 (2006).

basis for a treason charge.²¹⁰ James Wilson, who drafted the treason provisions, focused the article's locus on obedience to the United States rather than citizenship.²¹¹ Wilson defined obedience as "[a]ny person who received protection from the United States."²¹² Courts adopted this definition clarifying that those who receive protection from the country commit treason regardless of whether their allegiance was perpetual or temporary.²¹³

Under that framework, a person does not have to be a citizen to be convicted of treason.²¹⁴ If the individual enjoys the protections or benefits of a country, then that individual owes allegiance to that country.²¹⁵ The federal code adopted this language in its first clause indicating the significance of distinguishing those who enjoy the country's protections from those who do not as a bedrock of the duties owed to the country.²¹⁶ If the person could enjoy the country's protections, the person would be bound by the country's laws.²¹⁷

Once allegiance is established, the next element focuses on whether a defendant has either levied war against the country or provided aid and comfort to the enemy.²¹⁸ Early in the country's history, treason focused on groups of people or armed force to establish this element.²¹⁹ Most treason prosecutions, which continued sporadically through the Civil War years, arose from the first prong of the statute involving levying war or a rebellion against the sovereign.²²⁰ Since the mid-twentieth century, treason prosecutions based on levying war have been all but nonexistent.²²¹ As such, the second prong of providing aid and comfort takes on greater significance.

A treason prosecution relying on providing aid and comfort to the enemy can be more amorphous than the initial option of the constitutional provision or federal statute. First, the prosecutor must provide the factual

210. See Simpson, *supra* note 207, at 10.

211. See Larson, *supra* note 209, at 883; see also Simpson, *supra* note 207, at 10 (discussing that a person who breaches their allegiance is one who has violated the underlying social contract of the country).

212. Larson, *supra* note 209, at 883.

213. See, e.g., *United States v. Wiltberger*, 18 U.S. 76, 97 (1820); *Young v. United States*, 97 U.S. 39, 62 (1878).

214. See *Young*, 97 U.S. at 65 (explaining that "the same rule of exclusion applies to him as an alien, that would if he had been a citizen.").

215. Simpson, *supra* note 207, at 40.

216. See 18 U.S.C. § 2381.

217. See Larson, *supra* note 209, at 874 ("American treason law, however, consistently holds that treason is not a breach of citizenship, but a breach of allegiance. Persons other than citizens can be tried for treason in circumstances in which they can be said to owe a 'local' or 'temporary' allegiance to the United States. The sources that bear on this issue, however, are decidedly eclectic, and its full contours have never been subjected to significant academic scrutiny.")

218. 18 U.S.C. § 2381.

219. See *United States v. Burr*, 25 F. Cas. 201, 202–03 (C.C.D. Va. 1807) (No. 14694A).

220. See Simpson, *supra* note 207, at 20, 32; see also Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1860–63 (2010).

221. See Simpson, *supra* note 207, at 32 (explaining how in the twentieth century "[t]reason prosecutions no longer charged levying war against the United States").

basis of what aid and comfort was given.²²² The Court defined this element by adopting the English definition, finding that:

“[A]n act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort” and “an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country . . . is . . . giving of aid and comfort.”²²³

Aid and comfort take on many forms including spying or providing funds and military equipment to an enemy.²²⁴

Second, the prosecutor must establish who the “enemy” is, whether that be a foreign country or group.²²⁵ After the ratification of the Constitution, an “enemy” qualified as those still holding allegiance to Britain.²²⁶ The typical understanding follows that an enemy is a country that the United States has officially declared war against.²²⁷ However, the statutory definition is broader, defining an enemy as “any country, government, group, or person that has been engaged in hostilities, whether or not lawfully authorized, with the United States.”²²⁸ Therefore, anyone who aided a country with whom the United States warred against or whose efforts hurt the country’s war effort are clearly treasonous. Many of the treason cases arose out of the second World War for that very reason.²²⁹ However, reliance solely on an official declaration of war is a limited definition given the complexity of international relationships in the later twentieth and twenty-first centuries.

Who qualifies as an enemy state may not be clear. First, there are enemy states and actors which the United States cannot or will not officially declare war against.²³⁰ Diplomatic and political complexities make it difficult to officially declare war on various hostile foreign nations and

222. *Cramer v. United States*, 325 U.S. 1, 29–30 (1945) (“[T]o prove giving of aid and comfort would require the prosecution to show actions and deeds . . .”).

223. *Id.* at 28–29 (quoting *The King v. Casement* [1917] 1 KB 98 (Lord Reading CJ)).

224. Simpson, *supra* note 207, at 19.

225. See *Cramer*, 325 U.S. at 29 (“[T]he crime of treason consists of two elements: adherence to the enemy; and rendering *him* aid and comfort.”) (emphasis added).

226. See James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITTSBURGH L. REV. 99, 108–09 (1983).

227. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant. . . . We [have] held that ‘[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.’”) (fourth alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942)).

228. 50 U.S.C. § 2204(2).

229. See Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. STATE U. L. REV. 635, 638–39 (2009).

230. Cf. Larson, *supra* note 209, at 916–18 (explaining that there are few American decisions that address the meaning of “enemy” in the context of the Treason clause but that there is no reason to believe American law has departed from the early English understanding of the term: that enemies are not limited to states in which there was a formal declaration of war and was not limited to states at all, as it could include rogue groups of individuals).

groups.²³¹ Further, making war declarations could cause complications for the country's allies. For example, the Cold War and the Global War on Terrorism involved countries with whom the United States had strained relations or hostilities.²³² There was no formal declaration of war against the U.S.S.R. even though it was clearly seen as an enemy nation unofficially.

Recently, the U.S. military actions against Al-Qaeda and ISIS do not involve nation states but hostile groups within other countries. Military actions against those groups are sanctioned despite no official declarations of war against the country in which they reside.²³³ However, people or groups in the United States who aided those countries would be considered treasonous for their actions.²³⁴ Actions falling into this category include providing intelligence information to enemy actors, sowing discord in election processes, or interfering with U.S. citizens both in the country and abroad.²³⁵

Another difficulty arises when hostile actions are taken against the United States where diplomacy and international relations may not allow for formal military actions against the country. Countries have engaged in hostile actions against the United States including hacking,²³⁶

231. See Stacie D. Gorman, *In the Wake of Tragedy: The Citizens Cry out for War, But Can the United States Legally Declare War on Terrorism?*, 21 PENN. STATE INT'L L. REV. 669, 674–84 (2003) (explaining the complexities and overlap of the Constitution and international law that make official declarations of war a difficult decision, especially in the context of terrorist threats).

232. See Barbara Slavin, *The Global War on Terrorism Wrecked Relations with Iran*, ATL. COUNCIL (Sept. 7, 2021), <https://www.atlanticcouncil.org/commentary/article/the-global-war-on-terrorism-wrecked-relations-with-iran/>. The Cold War rested on the premise that an official declaration of war with the former U.S.S.R. would result in mutually assured destruction of both countries by nuclear war but fallout for millions of people in other countries. See Erin Blakemore, *What Was the Cold War—and Are We headed to Another One?*, NAT'L GEOGRAPHIC (Mar. 23, 2022), <https://www.nationalgeographic.com/culture/article/cold-war>.

233. See Crane, *supra* note 229, at 688–89.

234. See Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1495–96 (2009); see also Crane, *supra* note 229, at 692.

235. See MUELLER REPORT VOLUME I, *supra* note 7, at 36–65; see also Simpson, *supra* note 207, at 39–45.

236. See Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election (July 13, 2018) (available at <https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election>); *Russian Interference in 2016 U.S. Elections*, FBI, <https://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections> (last visited May 14, 2023).

espionage,²³⁷ or other bad acts.²³⁸ These actions impede not only governmental agencies but also states and corporations as well.²³⁹

B. Does Russian Election Interference Constitute a Hostile Act?

The U.S. relationship with Russia is complex. As a holdover from Cold War days, Russia remains a country where the United States has diplomatic relations, but it is also often seen as having a hostile intent towards the United States and its allies.²⁴⁰ The State Department reports that the United States established diplomatic relations with the Russian Federation on December 31, 1991.²⁴¹ However, the existence of diplomacy does little to curtail hostile acts, if not direct attacks, on a country. Russia's actions during the 2016 presidential election are considered by the intelligence community and some justice officials as a direct attack akin to a declaration of war.²⁴² As such, would the aid of an enemy country in this situation be considered treasonous?

In February 2014, Russia invaded Ukraine, causing the United States and several other countries to impose sanctions.²⁴³ In response to the 2014 Russian violation of Ukraine's sovereignty and territorial integrity, the United States downgraded the bilateral political and military relationship and suspended the Bilateral Presidential Commission, a body jointly founded in 2009 by the United States and Russia to promote cooperation between the two countries.²⁴⁴ President Obama imposed new sanctions against Russia for its actions including closing Russian properties in the

237. See MICHAEL J. SULICK, *AMERICAN SPIES: ESPIONAGE AGAINST THE UNITED STATES FROM THE COLD WAR TO THE PRESENT* (2013) (discussing espionage committed against the United States throughout history).

238. See, e.g., Faliq Hassan, Ben Hubbard, & Alissa J. Rubin, *Protesters Attack U.S. Embassy in Iraq, Chanting 'Death to America'*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2019/12/31/world/middleeast/baghdad-protesters-us-embassy.html>; José Bautista, Isabella Kwai, & John Ismay, *U.S. and Ukrainian Embassies Targeted by Letter Bombs in Spain*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/2022/12/01/world/europe/spain-letter-bombs.html>.

239. See, e.g., David E. Sanger, Nicole Perloth, & Eric Schmitt, *Scope of Russian Hacking Becomes Clear: Multiple U.S. Agencies Were Hit*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/12/14/us/politics/russia-hack-nsa-homeland-security-pentagon.html>? (explaining how Russian hackers compromised software used by approximately 18,000 individuals associated with the Pentagon, intelligence agencies, nuclear labs, and Fortune 500 companies).

240. See Simpson, *supra* note 207, at 9.

241. See *U.S. Relations With Russia*, U.S. DEP'T OF STATE (Sept. 3, 2021), <https://www.state.gov/u-s-relations-with-russia/>.

242. See Jordan Williams, *Durbin Says Alleged Russian Hack 'Virtually a Declaration of War'*, THE HILL (Dec. 16, 2020, 11:47 AM), <https://thehill.com/policy/cybersecurity/530461-durbin-says-alleged-russian-hack-virtually-a-declaration-of-war/>.

243. See Shaun Walker, Harriet Salem, & Ewen MacAskill, *Russian 'Invasion' of Crimea Fuels Fear of Ukraine Conflict*, THE GUARDIAN (Feb. 28, 2014, 7:27 PM), <https://www.theguardian.com/world/2014/feb/28/russia-crimea-white-house>; Dan Roberts & Ian Traynor, *US and EU Impose Sanctions and Warn Russia to Relent in Ukraine Standoff*, THE GUARDIAN (Mar. 6, 2014, 3:03 PM), <https://www.theguardian.com/world/2014/mar/06/us-eu-sanctions-obama-russia-ukraine-crimea>.

244. See *U.S.-Russia Bilateral Presidential Commission*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/p/eur/ci/rs/usrussiabilat/index.htm> (last visited May 14, 2023); *2009 U.S.-Russia Bilateral Presidential Commission: Mission Statement*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/p/eur/ci/rs/usrussiabilat/c38418.htm> (last visited May 14, 2023).

United States and ordering Russian diplomats to leave the United States.²⁴⁵ The sanctions imposed on Russia restricted its ability to engage with many countries internationally and greatly impacted its economy.²⁴⁶ These sanctions caused a crippling ripple effect, limiting the marketability of Russia's oil and other natural resources.²⁴⁷ It became imperative for President Putin to find a way to mitigate the harm these sanctions caused.

Heading into the 2016 presidential election, Russian counterintelligence officials began executing a plan to affect the election to the benefit of then-candidate Donald Trump.²⁴⁸ Democratic nominee Hillary Clinton held no sympathy for Russia, specifically President Putin.²⁴⁹ During her tenure as Secretary of State, she criticized the legitimacy of President Putin's reelection in the face of credible proof of election interference in his favor.²⁵⁰ Her statements vexed President Putin, leading him to take direct actions that affected her presidential candidacy.²⁵¹ President Putin feared what the combination of a Clinton presidency and the National Atlantic Treaty Organization (NATO) could mean for himself and Russia, which led to a sophisticated plan to interfere with the election on various levels.²⁵²

After firing FBI Director James Comey, President Trump met with the Russian Foreign Minister Sergei Lavrov and Russian Ambassador Sergey Kislyak.²⁵³ President Trump restricted media access to this meeting.²⁵⁴ During this meeting, the President gave sensitive intelligence to the Russians, told them he was unconcerned with Russian interference in the 2016

245. See Exec. Order No. 13,660, 79 Fed. Reg. 13491 (Mar. 6, 2014); Lauren Gambino & Sabrina Siddiqui, *Obama Expels 35 Russian Diplomats in Retaliation for US Election Hacking*, THE GUARDIAN (Dec. 30, 2016), <https://www.theguardian.com/us-news/2016/dec/29/barack-obama-sanctions-russia-election-hack>.

246. See Anton Troianovski, *Russia Keeps Getting Hit With Sanctions. Do They Make a Difference?*, WASH. POST (Aug. 22, 2018, 5:54 PM), <https://www.washingtonpost.com/world/europe/russia-keeps-getting-hit-with-sanctions-do-they-make-a-difference/2018/08/21/f466db1c-a3ec-11e8-ad6f-080770dcddc2story.html>.

247. See *id.*

248. Abigail Abrams, *Here's What We Know So Far About Russia's 2016 Meddling*, TIME (Apr. 18, 2019, 8:20 AM), <https://time.com/5565991/russia-influence-2016-election/>.

249. Anthony J. Gaughan, *Putin's Revenge: The Foreign Threat to American Campaign Finance Law*, 62 HOW. L.J. 855, 863–67 (2019).

250. See Michael Crowley & Julia Ioffe, *Why Putin Hates Hillary*, POLITICO (July 25, 2016, 6:20 PM), <https://www.politico.com/story/2016/07/clinton-putin-226153> (“With the protesters accusing Putin of having rigged recent elections, the Russian leader pointed an angry finger at Clinton, who had issued a statement sharply critical of the voting results. ‘She said they were dishonest and unfair,’ Putin fumed in public remarks, saying that Clinton gave ‘a signal’ to demonstrators working ‘with the support of the U.S. State Department’ to undermine his power. ‘We need to safeguard ourselves from this interference in our internal affairs,’ Putin declared”).

251. See *id.*

252. See *id.*; see also Jeffrey Goldberg, *It's Official: Hillary Clinton is Running Against Vladimir Putin*, THE ATLANTIC (July 21, 2016), <https://www.theatlantic.com/international/archive/2016/07/clinton-trump-putin-nato/492332/>.

253. Julie Vitkovskaya & Amanda Erickson, *The Strange Oval Office Meeting Between Trump, Lavrov and Kislyak*, WASH. POST (May 10, 2017, 5:44 PM), <https://www.washingtonpost.com/news/worldviews/wp/2017/05/10/the-strange-oval-office-meeting-between-trump-lavrov-and-kislyak/>.

254. See *id.*

election²⁵⁵ and said he doubted Russia was responsible for election interference.²⁵⁶ When Russian media published the general details of the meeting, President Trump's comments about Russian interference were deeply troubling to the public and congressional members.²⁵⁷ His comments were not the first time he contradicted known intelligence reports along with a congressional investigation that supported the same.²⁵⁸ President Trump's statements are just one example of many that illustrate a troubling relationship with President Putin.

It was the firing of FBI Director Comey which led to the appointment of a special counsel to investigate Russian interference in the 2016 election.²⁵⁹ Deputy Attorney General Rod Rosenstein appointed Robert Mueller to oversee all aspects of the investigation that originated within the FBI.²⁶⁰ Special Counsel Mueller built an extensive team of federal prosecutors and FBI agents to handle the daunting task of uncovering the extent of Russia's interference with the 2016 presidential campaign and who from the Trump campaign may have conspired with those agents.²⁶¹ Mueller was tasked with prosecuting or referring for charges any persons or entities who violated federal law.²⁶²

In his report, Special Counsel Mueller detailed extensive interference in the 2016 election by Russia, including manipulation of social media accounts, the creation of false campaign events, and hacking and dissemination of DNC emails.²⁶³ According to the investigation conducted by Special Counsel Mueller, two groups of Russian government agents engaged in coordinated efforts aimed at helping then-candidate Donald Trump be elected president.²⁶⁴ The first effort targeted social media with various false ads and events to sway voters away from candidate Hillary Clinton and aid the Trump campaign.²⁶⁵ Special Counsel Mueller found that Russian agents traveled to the United States "under false pretenses for

255. See *id.*; Shane Harris, Josh Dawsey, & Ellen Nakashima, *Trump Told Russian Officials in 2017 He Wasn't Concerned About Moscow's Interference in U.S. Election*, WASH. POST (Sept. 27, 2019, 8:26 PM) (explaining that President Trump was "unconcerned" about Russian interference in the 2016 election. Few officials knew of the full comments for fear of publicity).

256. Harris, Dawsey, & Nakashima, *supra* note 255.

257. *Id.*; Vitkovskaya & Erickson, *supra* note 253.

258. See John Bowden, *Trump's Evolving Remarks on Russian Election Interference*, THE HILL (June 1, 2019, 11:27 AM), <https://thehill.com/homenews/administration/446392-trumps-evolving-remarks-on-russian-election-interference/>.

259. *Trump's Firing of FBI Head Comey Triggered Probe: Ex-Official McCabe*, REUTERS (Feb. 14, 2019, 7:06 AM), <https://www.reuters.com/article/us-usa-trump-russia-mccabe/trumps-firing-of-fbi-head-comey-triggered-probe-ex-official-mccabe-idUSKCN1Q320M>.

260. Press Release, Dep't of Just., Appointment of Special Counsel (May 17, 2017) (available at <https://www.justice.gov/opa/pr/appointment-special-counsel>).

261. Abigail Abrams, *Robert Mueller's Report Will Be Released Soon. Here Are the Biggest Questions About the Trump-Russia Investigation*, TIME (Apr. 11, 2019, 4:49 PM), <https://time.com/5541532/robert-mueller-trump-russia-investigation/>.

262. See *id.* Accepting foreign assistance in an election is a federal crime. *Foreign Nationals*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/foreign-nationals/#:~:text=Foreign> (last visited May 14, 2023).

263. MUELLER REPORT VOLUME I, *supra* note 7, at 1.

264. *Id.*

265. *Id.*

collecting intelligence to inform [Russian] operations.”²⁶⁶ The second was a more direct attack on the DNC through the hacking and release of stolen documents.²⁶⁷ Russian efforts succeeded in damaging the credibility of the Clinton campaign. Whenever negative news surfaced on then-candidate Donald Trump, Russian efforts mitigated the impact by providing more harmful information about Hillary Clinton from the hacked material.²⁶⁸

During the 2016 election, then-candidate Donald Trump repeatedly stated openness to Russian aid in finding incriminating evidence against Hillary Clinton.²⁶⁹ According to the Mueller Report, Trump’s campaign officials met with Russian agents to obtain the results of research against his opponent.²⁷⁰ Further, then-candidate Donald Trump solicited the hacking of the DNC during his campaign speeches along with public events.²⁷¹ Russia coordinated its efforts in hacking the DNC to aid Trump.²⁷² Requesting foreign support for his personal benefit became a pattern for then-President Trump after his election that continues to concern Congress.²⁷³

C. President Trump’s Interactions with Russia After the Mueller Report

President Trump’s affinity for Russia, specifically President Putin, baffles the intelligence community and many state department officials.²⁷⁴ Many of his military and foreign policy decisions were aimed at directly aiding Russian interests or undermining nations that oppose Russia. For example, President Trump’s drastic course change regarding the Kurds in Syria allowed Russia to gain a stronger foothold in the region.²⁷⁵ Further, his comments about withdrawing from NATO and claims that it unfairly relies on U.S. funding undermined the very organization designed to keep

266. See Indictment at 2, 9, *United States v. Internet Rsch. Agency LLC*, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018); see also MUELLER REPORT VOLUME I, *supra* note 7, at 4 (other Russian agents stole U.S. identification to infiltrate social media to “sow discord in the U.S. political system”).

267. MUELLER REPORT VOLUME I, *supra* note 7, at 4.

268. See, e.g., *id.* at 7.

269. *Id.* at 5 (explaining how candidate Trump publicly welcomed Russian hacking into Hillary Clinton’s campaign and her personal emails. Wikileaks dumped hacked emails from campaign chair Podesta.).

270. See *id.* at 6, 40, 43–44.

271. See Allie Malloy & Paul LeBlanc, *Trump in 2016: ‘I Love Wikileaks,’ Trump Now: ‘I Know Nothing About Wikileaks’*, CNN (July 24, 2019, 4:55 PM), <https://www.cnn.com/2019/04/11/politics/wikileaks-donald-trump-julian-assange-campaign/index.html>.

272. See MUELLER REPORT VOLUME I, *supra* note 7, at 6–7.

273. See Kate Brannen, *Trump’s True Betrayal: A Pattern of Soliciting Foreign Interference in US Elections*, JUST SEC. (Dec. 3, 2019), <https://www.justsecurity.org/67581/trumps-true-betrayal-a-pattern-of-soliciting-foreign-interference-in-us-elections/>; Matthew Choi, *‘I Think I’d Take It’: Trump Says He Might Not Report Foreign Help to FBI in 2020*, POLITICO (June 12, 2019, 11:50 PM), <https://www.politico.com/story/2019/06/12/trump-fbi-foreign-information-1362788>.

274. See, e.g., Zachary Cohen, *Trump Says He Likes Putin. US Intelligence Says Russia Is Attacking American Democracy*, CNN (Sept. 22, 2020, 5:11 PM), <https://www.cnn.com/2020/09/22/politics/trump-putin-election-interference-intelligence-assessment/index.html>.

275. Jason Motlagh, *‘Trump Is Pleased to Watch Us Suffer’ – Scenes from the President’s Kurdish Betrayal*, ROLLING STONE (Oct. 31, 2019), <https://www.rollingstone.com/politics/politics-news/trump-syria-kurds-906419>.

Russian aggression in check.²⁷⁶ These actions were in direct opposition to the United States' longstanding military and foreign policy objectives concerning Russia.

The underpinnings of Trump's affinity for President Putin are illustrated in the Mueller Report. The Report described President Trump's openness, that was first communicated during the Trump campaign, to taking assistance from Russia during the 2016 presidential election.²⁷⁷ While then-candidate Trump vehemently denied any dealings with Russia, evidence of several direct and indirect contacts with Russian oligarchs undermined his assertions.²⁷⁸ Mueller detailed numerous contacts that his team deemed disconcerting, especially given the immense power that a president possessed in the area of foreign policy.²⁷⁹ Ultimately, Mueller found that the contacts did not rise to the level of a conspiracy but emphasized the danger for a candidate to engage in such actions.²⁸⁰

Russia's actions during the 2016 election did not end there. The intelligence community sees Russia's actions as a continued threat to the country's core function—electing its leaders, especially the President.²⁸¹ During the 2018 midterm elections, officials found that the criminal activity outlined in the Mueller Report had not stopped.²⁸² Voting is a fundamental right, and domestic manipulation of that right is a criminal act.²⁸³ Therefore, a foreign power's intentional action to do the same should be considered a hostile act, if not a direct attack. The military community classifies Russia's actions as such.²⁸⁴

276. See Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. from NATO, Aides Say Amid New Concerns Over Russia*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html>.

277. See MUELLER REPORT VOLUME I, *supra* note 7, at 89–95.

278. See *id.* at 66–173; see also *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 10–15 (2019) (statement of Michael Cohen).

279. See MUELLER REPORT VOLUME I, *supra* note 7, at 66–173.

280. See *id.* at 2. The Mueller Report found that there was no conspiracy between the Trump Campaign and Russian interference. “[T]he evidence was not sufficient to charge any Campaign official as an unregistered agent of the Russian government or other Russian principal.” *Id.* at 9. “Further, the evidence was not sufficient to charge that any member of the Trump Campaign conspired with representatives of the Russian government to interfere in the 2016 election.” *Id.* However, the full picture of interference could not be discovered because of the deletion of text messages, emails, and failure of some people to cooperate with the investigation. *Id.* at 10.

281. See Ken Dilanian, *U.S. Intel Officials Worry Their Latest Findings About Russian Election Interference Are Being Distorted*, NBC NEWS (Feb. 25, 2020, 5:35 PM), <https://www.nbcnews.com/politics/national-security/u-s-intel-officials-worry-their-latest-findings-about-russian-n1142821>.

282. See Jeremy Herb, *US Intel Chiefs Unanimous That Russia Is Targeting 2018 Elections*, CNN (Feb. 13, 2018, 8:53 PM), <https://www.cnn.com/2018/02/13/politics/intelligence-chiefs-russia-2018-elections-target/index.html>.

283. See Carroll Rhodes, *Federal Appellate Courts Push Back Against States' Voter Suppression Laws*, 85 MISS. L.J. 1227, 1228–29 (2017); Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2211, 2281 (2018); see also 52 U.S.C. § 10307.

284. See Lizzie Dearden, *Russia's Meddling in US Election Could Be 'Act of Aggression,' Says NATO Commander*, INDEP. (Mar. 3, 2017, 2:11 PM),

President Trump consistently undermined military intelligence warnings of the hostile intent of Russia and other countries.²⁸⁵ Instead, he made foreign policy decisions that benefited Russia and pushed against congressional actions that negatively impacted Russia.²⁸⁶ Further, his private conversations with Putin without other state or administration officials raise serious questions about their relationship. That President Trump is adamant about not divulging the details of these conversations, refusing to believe negative intelligence, calls into question whether his actions violated his oaths resulting in allegiance to a foreign power. These actions were concerning to Congress as well as those in the Executive Branch.²⁸⁷ A growing concern was that President Trump was not only self-serving in most of his actions but also that his actions aided a foreign government at the detriment of the United States.²⁸⁸ The next Section examines specific conduct by President Trump in evaluating whether his behavior could qualify as treason.

D. Foreign Interference in the 2020 Election

In June 2019, President Trump gave an interview with George Stephanopoulos, acknowledging he would accept foreign information on a political opponent.²⁸⁹ President Trump's brazen acknowledgment of foreign powers interfering in the country's elections was not an aberration but a pattern beginning during his 2016 campaign, continuing throughout his Administration, and through his reelection bid.²⁹⁰ The President's

<https://www.independent.co.uk/news/world/europe/russia-donald-trump-hacking-us-election-act-of-war-collective-defence-nato-commander-donald-trump-uk-fake-news-a7609551.html>.

285. See Cohen, *supra* note 274; Dilanian, *supra* note 281.

286. See Marshall Cohen, *37 Times Trump Was Soft on Russia*, CNN (Aug. 4, 2020, 10:36 AM), <https://www.cnn.com/2019/11/17/politics/trump-soft-on-russia/index.html>.

287. Julian E. Barnes & Matthew Rosenberg, *Trump's Efforts to Hide Details of Putin Talks May Set Up Fight With Congress*, N.Y. TIMES (Jan. 13, 2019), <https://www.nytimes.com/2019/01/13/us/politics/trump-putin-russia-meetings.html>.

288. Philip Rucker & Shane Harris, *Tumult At Home, Ailing Alliances Abroad: Why Trump's America Has Been a 'Gift' to Putin*, WASH. POST (Oct. 25, 2020, 8:00 AM), https://www.washingtonpost.com/politics/trump-russia-putin/2020/10/24/4edb462e-13bb-11eb-ba42-ec6a580836ed_story.html.

289. *Transcript: ABC News' George Stephanopoulos' Exclusive Interview With President Trump*, ABC NEWS (June 16, 2019, 5:58 PM), <https://abcnews.go.com/Politics/transcript-abc-news-george-stephanopoulos-exclusive-interview-president/story?id=63749144>.

STEPHANOPOULOS: Your campaign this time around, if foreigners, if Russia, if China, if someone else offers you information on opponents, should they accept it or should they call the FBI?

TRUMP: I think maybe you do both. I think you might want to listen, I don't, there's nothing wrong with listening. If somebody called from a country, Norway, "We have information on your opponent." Oh, I think I'd want to hear it.

STEPHANOPOULOS: You want that kind of interference in our elections?

TRUMP: It's not an interference, they have information. I think I'd take it. If I thought there was something wrong, I'd go maybe to the FBI. If I thought there was something wrong. But when somebody comes up with oppo research, right, that they come up with oppo research. Oh, let's call the FBI. The FBI doesn't have enough agents to take care of it, but you go and talk honestly to congressmen, they all do it, they always have. And that's the way it is. It's called oppo research.

Id.

290. See *id.*; see also MUELLER REPORT VOLUME I, *supra* note 7, at 1, 5–8; Herb, *supra* note 282.

comments were not abstract but a prelude to further solicitations. Such solicitations became apparent with the House Intelligence Committee's investigation into congressionally approved Ukraine aid being withheld by the President in exchange for damaging information on Democratic presidential candidate Joe Biden and his family.²⁹¹ The investigation uncovered numerous communications from Trump allies to Ukrainian officials pressuring Ukraine to announce an investigation into the Bidens.²⁹² This quid pro quo would result in the release of nearly \$400 million in military aid to help Ukraine in their war against Russia only if they announced a corruption investigation of the Bidens.²⁹³

Efforts to gain foreign assistance to help President Trump's reelection did not stop with Ukraine but also included a direct plea for China's assistance.²⁹⁴ These solicitations of foreign interference in the country's elections alarmed the intelligence community, state and local officials charged with handling voting, and Congress.²⁹⁵ Numerous states received federal funding to secure their elections but concerns still exist that it may not have been enough.²⁹⁶ The failure to take any national action made the 2020 election vulnerable to attack from various hostile actors.²⁹⁷

Besides soliciting aid from foreign powers, President Trump refused to marshal the resources at his disposal to protect the country from future foreign interference. Direct attacks against the United States using bombs or tanks are unlikely, instead enemies will likely use technology to undermine the country's institutions or utilities. President Trump's refusal to act, despite a plethora of evidence of foreign attacks, may have been rooted in his comments to Russian officials. As mentioned previously, President Trump told Russian officials that he doubted Russia had interfered in the 2016 election.²⁹⁸ Both President Trump and President Putin mocked the

291. See Impeachment Inquiry Report, *supra* note 73, at 13–15.

292. See *id.* at 13–23.

293. See *id.* at 13–15, 17–18.

294. See Peter Baker & Eileen Sullivan, *Trump Publicly Urges China to Investigate the Bidens*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/politics/trump-china-bidens.html> (“‘China should start an investigation into the Bidens, because what happened in China is just about as bad as what happened with Ukraine,’ Mr. Trump told reporters as he left the White House to travel to Florida. His request came just moments after he discussed upcoming trade talks with China and said that ‘if they don’t do what we want, we have tremendous power.’”).

295. See *id.*; see also Impeachment Inquiry Report, *supra* note 73, at 8–11 (“[T]he solicitation of new foreign intervention was the act of a president unbound, not one chastened by experience. It was the act of a president who viewed himself as unaccountable and determined to use his vast official powers to secure his reelection.”).

296. See Press Release, U.S. Election Assistance Comm’n, U.S. Election Assistance Commission Announces All Eligible States and Territories Have Requested HAVA Funds (July 16, 2018) (available at <https://www.eac.gov/news/2018/07/16/us-election-assistance-commission-announces-all-eligible-states-and-territories>).

297. See Jordain Carney, *Senate GOP Blocks Three Election Security Bills*, THE HILL (Feb. 11, 2020, 1:25 PM), <https://thehill.com/homenews/house/482569-senate-gop-blocks-three-election-security-bills/> (“Democrats tried to get consent to pass two bills that require campaigns to alert the FBI and Federal Election Commission (FEC) about foreign offers of assistance, as well as legislation to provide more election funding and ban voting machines from being connected to the internet”).

298. Harris, Dawsey, & Nakashima, *supra* note 255.

inference during a summit.²⁹⁹ Given the cavalier behavior of the President and his continued favorable behavior towards the Russian leader at the expense of the United States, these comments caused great concern.³⁰⁰

Federal and state officials warned U.S. citizens of increased efforts by Russia to hack Democratic candidates along with sowing discord on social media.³⁰¹ Calls for the Administration to take preventative action against these attacks were largely unheeded.³⁰² Both the President and the Senate refused to act to strengthen election protections despite the clear indication that not only Russia, but other countries as well, may interfere in our elections.³⁰³

President Trump took oaths not only to uphold the laws of the country, but also to abide by the Constitution.³⁰⁴ However, at numerous times during his tenure, former President Trump's actions were contrary to those oaths. Special Counsel Mueller testified about the pervasive and persistent attacks by Russia that would continue until stopped.³⁰⁵ FBI Director Wray echoed those comments in his testimony before Congress.³⁰⁶ After Florida and Arizona explained foreign attempts to infiltrate their elections,³⁰⁷ it was clear that action needed to be taken. Yet, there has been only minimal response to those pleas.

299. Peter Baker & Michael Crowley, *Trump and Putin Share Joke About Election Meddling, Sparking New Furor*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/trump-putin-election.html>.

300. Steve Benen, *Alongside Putin, Trump Makes Light of Foreign Election Interference*, MSNBC (June 28, 2019, 6:00 AM), <https://www.msnbc.com/rachel-maddow-show/alongside-putin-trump-makes-light-foreign-election-interference-msna1247741>.

301. See Doina Chiacu, *FBI Director Wray: Russia Intent on Interfering With U.S. Elections*, REUTERS (July 23, 2019, 8:52 AM), <https://www.reuters.com/article/us-usa-election-security/fbi-director-wray-russia-intent-on-interfering-with-u-s-elections-idUSKCN1U11XW> (discussing testimony before Congress on meetings and efforts the FBI has done to thwart Russian interference efforts in the 2020 election); see also Matthew Rosenberg, Nicole Perlroth, & David E. Sanger, *'Chaos Is the Point': Russian Hackers and Trolls Grow Stealthier in 2020*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/2020/01/10/us/politics/russia-hacking-disinformation-election.html>.

302. See Chiacu, *supra* note 301; see also Nicholas Fandos, *New Election Security Bills Face a One-Man Roadblock: Mitch McConnell*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/us/politics/election-security-mitch-mcconnell.html>.

303. See Fandos, *supra* note 302.

304. See U.S. CONST. art. II, § 1, cl. 8. ("I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.")

305. *Mueller Gave a Warning on Russian Meddling. Congress—and America—Should Listen*, WASH. POST (July 24, 2019, 6:46 PM), https://www.washingtonpost.com/opinions/mueller-gave-a-warning-on-russian-meddling-congress--and-america--should-listen/2019/07/24/b337acf2-ae4f-11e9-a0c9-6d2d7818f3da_story.html.

306. See Chiacu, *supra* note 301.

307. See Frances Robles, *Russian Hackers Were 'In a Position' to Alter Florida Voter Rolls, Rubio Confirms*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/us/florida-russia-hacking-election.html>; Mike Levine & Pierre Thomas, *Russian Hackers Targeted Nearly Half of States' Voter Registration Systems, Successfully Infiltrated 4*, ABC NEWS (Sept. 29, 2016, 5:02 AM), <https://abcnews.go.com/US/russian-hackers-targeted-half-states-voter-registration-systems/story?id=42435822>.

CONCLUSION

Everyone is entitled to due process when facing criminal charges, including the President of the United States. Because of the rights guaranteed to a criminal defendant, indicting a president while in office would be extremely difficult—but not impossible. The President bears a considerable number of daily responsibilities, not only as the head of the Executive Branch but also addressing potential threats and other sensitive problems. To ensure the balance of these competing realities, the DOJ grappled with determining whether a sitting president can be indicted during investigations by the Watergate special counsel and the Clinton independent counsel. For the most part, the DOJ Inspector General properly found that a sitting president cannot be indicted because of the near impossibility of ensuring the President's rights without disrupting the duties of the office.

However, the staff attorneys for both investigations rightfully pointed out the potential harm to the country when the most powerful person in the country is allowed to actively subvert the rule of law. The abuses of power by a president and the Executive Branch can have a disastrous effect on the country. This was clearly seen in the actions of President Nixon and the senior members of his Administration and campaign. It also occurred when President Trump and his administration provided leniency to Russia despite clear evidence of continued attacks on the country. Special Counsel Mueller's investigation and the investigation by the House Intelligence Committee, reveal misconduct by a President displaying little concern for upholding the laws or protecting the country from foreign interference in future elections.

Based upon President Trump's prior actions in the 2016 election and solicitation of foreign assistance for his reelection campaign, there was considerable concern that the 2020 election would be compromised. President Trump's willingness to engage with nation states that would harm the United States' democratic process can be seen as giving aid and comfort to the enemy. President Trump's acquittal from impeachment charges resulting from his manipulation of Ukraine aid money for his personal gain almost guaranteed that such election interference would continue or be further encouraged. Of perhaps greater concern was President Trump's tendency to bend to President Putin's whims at the potential cost of the country. As the President, the Constitution and other laws provided Trump with an abundance of power that is not easily checked by the other branches of government. Having that power put citizens and our allies around the world at risk.