

Noah Feldman
Prepared Statement

December 4, 2019

Mr. Chairman and Members of the Committee:

My name is Noah Feldman.

I serve as the Felix Frankfurter Professor of Law at the Harvard Law School. In that capacity, my job is to study and teach the Constitution, from its origins to the present. I've written seven books, including a book on religious liberty under the Constitution; a book on the great Supreme Court justices of the mid-20th century; and a full-length biography of James Madison, often called the father of the Constitution. I'm also co-author of a casebook, Feldman and Sullivan's *Constitutional Law*, now in its 20th edition, as well as many essays and articles on constitutional subjects.

I'm here today to describe:

- why the framers of our Constitution included a provision for impeaching the president;
- what that provision means; and
- how it applies to the question before you and the American people: whether President Donald J. Trump has committed impeachable offenses under the Constitution.

I will begin by stating my conclusions:

- The framers provided for impeachment of the president because they feared that a president might abuse the power of his office to gain personal advantage; to corrupt the electoral process and keep himself in office; or to subvert our national security.
- High crimes and misdemeanors are abuses of power and public trust connected to the office of the presidency.
- On the basis of the testimony and evidence before the House, President Trump has committed impeachable high crimes and misdemeanors by corruptly abusing the office of the presidency. Specifically, President Trump abused his office by corruptly soliciting President Volodymyr Zelensky to announce investigations of his political rivals in order to gain personal advantage, including in the 2020 presidential election.

I. Why the Framers Provided for Impeachment

When the Constitutional Convention opened in late May 1787, Edmund Randolph, governor of Virginia, introducing what came to be called the Virginia Plan, a blueprint for the new government that had been designed and written in advance by James Madison. The Virginia Plan mentioned “impeachments of ... national offices.”¹

¹ I Records of the Federal Convention of 1787, 21-22 (Madison) (May 29, 1787) (Max Farrand ed., 1966) [hereafter Farrand].

On June 2, when the convention was talking about the executive, Hugh Williamson of North Carolina proposed that the executive should be “removable on impeachment and conviction of mal-practice or neglect of duty.”² The convention agreed and put the words in their working draft.

The framers were borrowing the basic idea of impeachment from the constitutional tradition of England. There, for hundreds of years, Parliament had used impeachment to oversee government officials, remove them from office for abuse of power and corruption, and even punish them.

The biggest difference between the English tradition of impeachment and the American constitutional plan was that the king of England could not be impeached. In that sense, the king was above the law, which only applied to him if he consented to follow it. In stark contrast, the president of the United States would be subject to the law like any other citizen.

The idea of impeachment was therefore absolutely central to the republican form of government ordained by the Constitution. Without impeachment, the president would have been an elected monarch. With impeachment, the president was bound to the rule of law. Congress could oversee the president’s conduct, hold him accountable, and remove him from office if he abused his power.

On July 20, 1787, the topic of impeachment came up again at the constitutional convention when Charles Pinckney of South Carolina and Gouverneur Morris, representing Pennsylvania, moved to take out the provision.³

After Pinckney said that the president shouldn’t be impeachable, William Richardson Davie of North Carolina immediately disagreed. If the president could not be impeached, Davie said, “he will spare no efforts or means whatever to get himself re-elected.” Impeachment was therefore “an essential security for the good behaviour of the Executive.” Davie was pointing out that impeachment was necessary to address the situation where a president tried to corrupt elections.⁴

Gouverneur Morris then suggested that the need to run for re-election would be a sufficient check on a president who abused his power. He was met with stiff opposition from George Mason of Virginia, the man who had drafted Virginia’s Declaration of Rights and a fierce republican critic of overweening government power. Mason told the delegates that “No point is of more importance than that the right of impeachment should be continued.” He gave a deeply republican explanation: “Shall any man be above Justice?” he asked. “Above all shall that man be above it, who can commit the most extensive injustice?”⁵

Like Davie, George Mason was especially concerned about the danger that a sitting president posed to the electoral process. He went on to say that presidential electors were in danger of “being corrupted by the Candidates.” This danger, he said, “furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?”⁶

After Benjamin Franklin also spoke in favor of impeachment, something remarkable happened: Gouverneur Morris changed his mind. Morris had been convinced by the argument that elections were not, on their own, a sufficient check on the actions of a president who tried to pervert the course of the

² I Farrand, 88 (Madison) (June 2, 1787).

³ II Farrand 64 (Madison) (July 20, 1787).

⁴ Id.

⁵ Id. at 65.

⁶ Id.

electoral process. Morris told the other delegates that he now believed that “corruption & some few other offences to be such as ought to be impeachable.”⁷

James Madison, the lead architect of the Constitution, now spoke. He insisted that it was “indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate.” Standing for reelection “was not a sufficient security.” The president, Madison said, “might lose his capacity after his appointment. He might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers.” And if the president lost his capacity or acted corruptly, Madison concluded, that “might be fatal to the Republic.”⁸

The upshot of this conversation in the constitutional convention was that the framers believed that elections were not a sufficient check on the possibility of a president who abused his power by acting in a corrupt way. They were especially worried that a president might use the power of his office to influence the electoral process in his own favor. They concluded that the Constitution must provide for the impeachment of the president to assure that no one would be above the law.

Now that the framers had settled on the necessity of impeachment, what remained was for them to decide exactly what language to use to define impeachable offenses. On September 4, a committee replaced the words “malpractice or neglect of duty” with the words “treason or bribery.”

On September 8, George Mason objected forcefully that the proposed language was not broad enough. The word treason had been narrowly defined by the Constitution, he pointed out, and so would “not reach many great and dangerous offences.” He drew the other delegates attention to the famous impeachment trial that was taking place at the time in England – that of Warren Hastings, the former governor general of Bengal. Hastings was “not guilty of Treason,” Mason pointed out, but of other alleged misdeeds. Mason added that “Attempts to subvert the Constitution may not be Treason as above defined.” Mason proposed to add the words “or maladministration” after “treason or bribery.”⁹

Madison replied to Mason that the word “maladministration” was “vague” and amounted to “tenure during pleasure of the Senate.” In response, Mason withdrew the word “maladministration” and substituted “other high crimes & misdemeanors [sic] against the State.”¹⁰ The words “against the state” were then changed almost immediately to “against the United States.” Later, the convention’s committee on style settled on the final language, which says that

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.¹¹

II. What the Constitution Means by High Crimes and Misdemeanors

⁷ Id. and see also id. at 68.

⁸ Id. at 65-66.

⁹ II Farrand, 550 (Madison) (September 8, 1787). The term “maladministration” likely came from the great English legal writer William Blackstone, who described a “high misdemeanor” defined as “mal-administration of such high officers, as are in public trust and employment.” Officers charged with this conduct, Blackstone had written, are “usually punished by the method of parliamentary impeachment.” IV Blackstone *121.

¹⁰ Id. at 551.

¹¹ Constitution of the United States, Art. II sec. 4.

High Crimes and Misdemeanors

The words “high crimes and misdemeanors” had a well-understood meaning from centuries of English impeachment trials. They were in common use in impeachments. Indeed, those words had just been used by the House of Commons in impeaching Warren Hastings – the impeachment to which Mason referred minutes before he proposed the words “high crimes and misdemeanors.”¹²

The phrase “high crimes and misdemeanors” was an expression with a concrete meaning. The word “high” in the phrase modified both words that followed: “high crimes” and “high misdemeanors.” The word “high” meant “connected to high political office.” As Alexander Hamilton explained in Federalist No. 65, the phrase “high crimes and misdemeanors” referred to

those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.¹³

Thus, the essential definition of high crimes and misdemeanors is the abuse of office. The framers considered the office of the presidency to be a public trust. Abuse of the office of the presidency is the very essence of a high crime and misdemeanor.

To be clear, when the framers chose these words “high crimes and misdemeanors,” there was no longer any meaningful difference between “high crimes” and “high misdemeanors.” The words were used interchangeably in the Hastings impeachment. The distinction in criminal law between felonies and misdemeanors is not implicated in the framers’ phrase.

Abuse of Trust for Personal Advantage

The classic form of the high crime and misdemeanor of abuse of office is using the office of the presidency for personal advantage or gain, not for the public interest.

When the framers specifically named bribery as a high crime and misdemeanor, they were naming one particular version of this abuse of office that was familiar to them.

Two of the most prominent English impeachment trials known to the framers both involved bribery. One was the impeachment trial of Warren Hastings, to which George Mason referred by name at the convention. Hastings was impeached for, among other things, “corruption, peculation, and extortion.”¹⁴ The major allegation associated with this impeachment article was that he had solicited and received bribes or gifts from people in Bengal while serving as governor general.

The other was the 1725 impeachment of Lord Macclesfield, the Lord Treasurer of England, for taking bribes or payments to sell offices. There, too, bribery was the central issue. The articles of impeachment

¹² As for the word treason, the framers wanted to differentiate themselves from English tradition, so they defined that term specifically in the Constitution.

¹³ Federalist No. 65 (Hamilton), *The Federalist Papers*, 396 (Clinton Rossiter ed., 1961).

¹⁴ House of Commons, Article of Impeachment, Article VI, House of Lords Sessional Papers, 1794-95, 34-36 (Torrington ed. 1974).

charged Macclesfield with taking bribes to sell offices under color of office – that is, while he occupied the official role of treasurer.¹⁵

Other Abuses of Office

Beyond the case of abuse of office for personal gain, the framers understood that abuse of office could take a variety of other forms. Other forms of abuse of office include the use of the office of the presidency to corrupt the electoral process or to compromise the national interest or national security.

It is important to note that the traditional meaning of high crimes and misdemeanors was *not* restricted to acts defined as ordinary crimes by statute. The language was deliberately meant to be flexible enough to incorporate a range of abuses of power that endanger the democratic process, because the Framers understood that they could not perfectly anticipate every possible abuse of power by the president.

III. How High Crimes and Misdemeanors Applies to President Trump’s Alleged Conduct

The Constitution specifies that House of Representatives shall have “the sole Power of Impeachment.” It is therefore the constitutional responsibility of the members of the House to determine whether they believe the sworn testimony that has been offered in the course of this impeachment inquiry and to decide whether to impeach President Trump. My role is not to address the determination of credibility that is properly yours. Rather, my job is to describe how the constitutional meaning of impeachable offenses applies to the facts described by the testimony and evidence before the House.

President Trump’s conduct described in the testimony and evidence clearly constitutes an impeachable high crime and misdemeanor under the Constitution. According to the testimony and to the publicly released memorandum of the July 25, 2019, telephone call between the two presidents, President Trump abused his office by soliciting the president of Ukraine to investigate his political rivals in order to gain personal political advantage, including in the 2020 presidential election.

This act on its own qualifies as an impeachable high crime and misdemeanor.

The solicitation constituted an abuse of the office of the presidency because Pres. Trump was using his office to seek a personal political and electoral advantage over his political rival, former vice president Joe Biden, and over the Democratic Party. The solicitation was made in the course of the president’s official duties. According to the testimony presented to the House, the solicitation sought to gain an advantage that was personal to the president. This constitutes a corrupt abuse of the power of the presidency. It embodies the framers’ central worry that a sitting president would “spare no efforts or means whatever to get himself re-elected.”

¹⁵ The Tryal of Thomas Earl of Macclesfield, In the House of Peers, For High Crimes and Misdemeanors; Upon an Impeachment by the Knights Citizens and Burgesses in Parliament Assembled, In the Name of Themselves and of All the Commons of Great-Britain. Begun the 6th Day of May 1725, And from Thence Continued by Several Adjournments Until the 27th Day of the Same Month. Published by Order of the House of Peers. London: Printed by Sam. Buckley in Amen-Corner, 1725.

Soliciting a foreign government to investigate an electoral rival for personal gain on its own constitutes an impeachable high crime and misdemeanor under the Constitution.

The House heard further testimony that President Trump further abused his office by seeking to create incentives for Ukraine to investigate Vice President Biden. Specifically, the House heard testimony that President Trump

- Placed a hold on essential U.S. aid to Ukraine, and conditioned its release on announcement of the Biden and Crowdstrike investigations; and
- Conditioned a White House visit sought by President Zelensky on announcement of the investigations.

Both of these acts constitute high crimes and misdemeanors impeachable under the Constitution. By freezing aid to Ukraine and by dangling the promise of a White House visit, the president was corruptly using the powers of the presidency for personal political gain. Here, too, the president's conduct described by the testimony embodies the framers' concern that a sitting president would corruptly abuse the powers of office to distort the outcome of a presidential election in his favor.