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Hyperpartisanship, Impeachment, and the Unchecked Executive Branch

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**HYPERPARTISANSHIP, IMPEACHMENT, AND THE
UNCHECKED EXECUTIVE BRANCH**

Lindsay Dreyer¹

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I. INTRODUCTION

On January 6, 2021, Congress assembled to perform “one of its most

¹ Lindsay Dreyer is a third-year law student at Mitchell Hamline School of Law. The author worked for Senator Klobuchar in the Senate Judiciary Committee during the spring of 2021, and her experience working on the impeachment trial inspired this Paper.

solemn constitutional responsibilities”: the electoral count.² As the House and the Senate convened in their respective rooms, and with Vice President Mike Pence presiding, President Donald Trump held the “Save America Rally” in the Ellipse within the National Mall just a short distance from the Capitol Building.³ For nearly an hour, President Trump spoke to the crowd, reiterating his claim that the Democrats stole the election and “exhort[ing] the crowd to ‘fight much harder’ to ‘stop the steal’ and ‘take back our country.’”⁴ At the end of his speech, President Trump called on his supporters to march to the Capitol,⁵ and at 1:30 p.m. they began their ascent up Constitution Avenue.⁶ Around 2:15 p.m., the pro-Trump mob breached the Capitol building.⁷ For hours, chaos ensued. Congressmembers were evacuated as rioters attacked Capitol law enforcement with “sledgehammers, baseball bats, hockey sticks, crutches, flagpoles, police shields, and fire extinguishers.”⁸ Once inside, the rioters vandalized the building: “They left bullet marks in the walls, looted art, smeared feces in hallways, and destroyed monuments.”⁹ As the Capitol was seized for the first time since 1814,¹⁰ President Trump was silent. For more than three hours, President Trump merely watched, described by those around him as “borderline enthusiastic,”¹¹ before releasing a scripted video, telling the insurrectionists, “We love you, you’re very special. . . . But go home and go home in peace.”¹² Five people died during the insurrection, and more than

² PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP, PART I: TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 117TH CONG., 1ST SESS., S. DOC. NO. 117-2, at 23 (2021) [hereinafter House Brief].

³ *Id.* at 24.

⁴ *Id.* at 42.

⁵ President Trump concluded his speech on January 6 by saying, “[W]e’re going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we’re going to the Capitol . . . So let’s walk down Pennsylvania Avenue.” Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [https://perma.cc/26AS-3DW9].

⁶ Shelly Tan, Youjin Shin & Danielle Rindler, *How One of America’s Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/> [https://perma.cc/Z4E2-H8X3].

⁷ *Id.*

⁸ House Brief, *supra* note 2, at 44.

⁹ *Id.* at 48.

¹⁰ British troops set the U.S. Capitol on fire during the War of 1812. *Burning of Washington, 1814*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/August_Burning_Washington.htm [https://perma.cc/P7D7-XKMP].

¹¹ House Brief, *supra* note 2, at 51.

¹² *Id.* at 54.

seven hundred individuals have since been arrested.¹³

The entire country, and much of the world,¹⁴ watched the events unfold on January 6. It will remain etched in our minds and engraved in history as one of America's ugliest days.¹⁵ The worst fear of the Framers of the Constitution had been realized: the President of the United States refused to concede the election and called on his supporters to attack the legislature. One could not have imagined a more blatantly impeachable act. The House moved swiftly, voting to impeach President Trump on January 12, 2021, by a vote of 232 to 197, and charging the President with incitement of insurrection.¹⁶ On February 9, 2021, the impeachment trial began, and on February 13, President Trump was acquitted.¹⁷ This result, though disappointing, was not altogether surprising. Republicans had vehemently expressed their opposition to impeachment proceedings from the beginning.¹⁸ Still, both sides agreed that President Trump's actions were inexcusable, with House Minority Leader Kevin McCarthy going so far as to state that "[t]he president bears responsibility for [the] attack on Congress."¹⁹ America was left wondering, how can the president of the United States be condemned by both sides of Congress for inciting an attack on the Capitol only to be acquitted of the incitement charge? The answer

¹³ Madison Hall, Skye Gould, Rebecca Harrington, Jacob Shamsian, Azmi Haroun, Taylor Ardrey & Erin Snodgrass, *761 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All*, INSIDER, <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [<https://perma.cc/P77T-MAS5>] (Jan. 26, 2022).

¹⁴ The Canadian Prime Minister, Justin Trudeau, tweeted, "Canadians are deeply disturbed and saddened by the attack on democracy in the United States." @JustinTrudeau, TWITTER (Jan. 6, 2021, 5:17 PM), <https://twitter.com/JustinTrudeau/status/1346959061862912004> [<https://perma.cc/HYT6-425U>]. The British Prime Minister, Boris Johnson, described the scene as "disgraceful." @BorisJohnson, TWITTER (Jan. 6, 2021, 3:06 PM), <https://twitter.com/BorisJohnson/status/1346926138057220103> [<https://perma.cc/4LDK-ASFW>].

¹⁵ Tan et al., *supra* note 6.

¹⁶ Weiyi Cai, *A Step-by-Step Guide to the Second Impeachment of Donald J. Trump*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/08/us/politics/trump-second-impeachment-timeline.html> [<https://perma.cc/7AE6-J4AV>].

¹⁷ *Id.*

¹⁸ See Mike DeBonis & Seung Min Kim, *Nearly All GOP Senators Vote Against Impeachment Trial for Trump, Signaling Likely Acquittal*, WASH. POST (Jan. 26, 2021), https://www.washingtonpost.com/politics/gop-senators-to-question-basis-for-trump-impeachment-signaling-likely-acquittal/2021/01/26/cd7397dc-6002-11eb-9061-07abcc1f9229_story.html [<https://perma.cc/2J24-LEPN>] (noting that the vote against the impeachment trial "demonstrated the continued sway Trump holds over GOP officeholders, even after his exit from the White House under a historic cloud caused by his refusal to concede the November election.").

¹⁹ Jennifer Haberkorn, *House Minority Leader McCarthy Blames Trump for Riot but Opposes Impeachment*, L.A. TIMES (Jan. 13, 2021), <https://www.latimes.com/politics/story/2021-01-13/kevin-mccarthy-blames-trump-for-riot-but-opposes-impeachment> [<https://perma.cc/ZT4J-CFX2>].

has to do with both the erosion of the impeachment tool and the growth of hyperpartisanship in America. This Paper attempts to explain the degradation of impeachment as a useful check on the executive branch and the dangerous effect an unchecked executive branch can have on our country.

Part II of this Paper outlines the history of impeachment, from its British roots to its incorporation into the U.S. Constitution and early application in America. Part III explains the elements of a successful impeachment: (1) a divided government; (2) broad public support; and (3) a threat to our constitutional order. Part IV applies those elements to the second impeachment of Donald Trump and explains why President Trump's defenses were meritless. The impeachment elements have become hurdles the country must overcome before utilizing impeachment to constrain the power of the executive. Part V highlights the rise of hyperpartisanship and normalization of impeachment. Although once a useful deterrent, impeachment has been overcome by hyperpartisanship, and the result is a growing executive branch with little incentive to play by the rules.²⁰ Part VI describes ways in which the impeachment power could be strengthened and other checks that can be used to temper the power of the executive branch. Finally, the Paper proposes that the real issue underlying the growing power of the executive branch is not a dysfunctional impeachment tool, but rather, a dysfunctional Congress.²¹

II. HISTORY OF IMPEACHMENT

A. *British Roots*

The concept of impeachment as a check on government power can be traced back to England. The king was immune from all official government action, including impeachment, but the king's ministers and other government officials were not.²² Thus, while the king himself could not be impeached, impeachment could still serve as an important check on the king's power. The impeachment power proved to be an essential tool of Parliament as it struggled to constrain the king.²³ Through impeaching the king's ministers, Parliament was able to exercise some measure of control over the monarchy.²⁴ This power struggle between Parliament and the king

²⁰ See *infra* Part V.

²¹ See *infra* Section VI.B.

²² Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 57 (1999).

²³ STAFF OF S. COMM. ON THE JUDICIARY, 93D CONG., REP. ON THE CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, at 2249 (Comm. Print 1974), <https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3-5-6.pdf> [<https://perma.cc/CTR4-SHXQ>].

²⁴ *Id.*

peaked in 1649 with the execution of Charles I and the creation of the Commonwealth.²⁵ Leading up to the execution, Parliament attempted to restrain King Charles I's power by impeaching and removing his closest ministers.²⁶

The impeachment power in England was an expansive one. Impeachment applied in cases of "high treason," "misdemeanors," "malversations," and "high Crimes and Misdemeanors."²⁷ The phrase "high Crimes and Misdemeanors" originated in 1386 during the impeachment of Michael de la Pole, the King's Chancellor and Earl of Suffolk.²⁸ De la Pole was charged with "breaking a promise he made to the full Parliament to execute" a parliamentary ordinance and "failing to expend a sum that Parliament had directed to be used to ransom the town of Ghent."²⁹ The phrase "high Crimes and Misdemeanors" encompassed both political and criminal offenses, and it was this phrase that was often utilized to constrain ministers of the king who disobeyed or deceived Parliament.³⁰

The remedy for impeachment was not limited to removal from office or disqualification from future office.³¹ Those impeached were subject to "the full range of criminal penalties," including the death penalty.³² Additionally, impeachment was not limited to government officials.³³ Private parties could commit impeachable acts and be convicted of those acts by Parliament.³⁴ In this way, impeachment was expansive in its reach and consequence.

B. Constitutional Convention

When establishing the American government, the Framers of the Constitution looked to the British concept of impeachment. Rather than using impeachment to indirectly temper the president's power, as was done in Britain, the Framers decided to extend the impeachment power to directly reach the office of the president.³⁵ The Framers envisioned

²⁵ *Id.*

²⁶ *See id.*

²⁷ *Id.* at 2250.

²⁸ *Id.*

²⁹ *Id.* at 2251.

³⁰ *Id.* The second time the phrase "high Crimes and Misdemeanors" appeared was in 1450, during the impeachment of William de la Pole, Duke of Suffolk. De la Pole was charged with "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws." *Id.* While it was de la Pole who was impeached, the impeachment served to punish the King for his abuse of power. *Id.*

³¹ Harold J. Kent, *Can President Trump Be Impeached as Mr. Trump? Exploring the Temporal Dimension of Impeachments*, 95 CHI.-KENT L. REV. 537, 540 (2020).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *See* STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 23, at 2252-53.

impeachment serving as an essential check on the president's executive authority.³⁶ While the king of Great Britain was sacred and untouchable, the Framers wanted the American president to be held accountable and, if necessary, impeached and removed from office.³⁷ While the Framers expanded impeachment to include the president, they decided to confine the power to “[t]he President, Vice President, and all civil officers,” excluding private citizens from its scope.³⁸ Thus, impeachment was a check on government power only, not on the general public.³⁹

The Framers next had to determine the body of offenses for which the president and other civil officers could be impeached. At the time, there were no federal crimes, only a body of common law offenses.⁴⁰ Many delegates suggested that impeachment should apply to offenses outside of the common law, urging the inclusion of offenses such as “maladministration,” “corrupt administration,” and “neglect of duty.”⁴¹ Madison objected to the term “maladministration,” arguing that “[s]o vague a term will be equivalent to a tenure during the pleasure of the Senate.”⁴² The term “maladministration” was then replaced with the phrase “high Crimes and Misdemeanors” with no conversation as to how exactly the phrases differed.⁴³

Despite the lack of a clear definition, evidence suggests the phrase “high Crimes and Misdemeanors” was meant to embrace more than just common law offenses.⁴⁴ The Framers borrowed the phrase itself directly from the British usage of the term, which included a wide range of political offenses, including abuse of power and neglect of duty.⁴⁵ Still, the Framers feared that impeachment power would be exploited by political factions.⁴⁶ Alexander Hamilton expressed his concern that the impeachment power would “be regulated more by the comparative strength of parties, than by

³⁶ *Id.* (“Impeachment was to be one of the central elements of executive responsibility in the framework of the new government as [the Framers] conceived it.”).

³⁷ *Id.* at 2254.

³⁸ U.S. CONST. art. II, § 4.

³⁹ *See id.*

⁴⁰ Frank O. Bowman, III & Stephen L. Sepinuck, “*High Crimes & Misdemeanors*”: *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1523–24 (1999).

⁴¹ *Id.* at 1524.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1525; *see* THE FEDERALIST NO. 64, at 360 (Alexander Hamilton) (The Colonial Press ed., 1901) (writing about impeachable offenses, Hamilton stated, “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”).

⁴⁵ *See supra* Section II.A.

⁴⁶ *See* LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 105 (Basic Books 2018).

the real demonstrations of innocence or guilt.”⁴⁷ For that reason, the Framers struggled when determining who should have the authority to impeach.

First, Edmund Randolph suggested that the judiciary handle impeachments.⁴⁸ Then Charles Pickney proposed that a “House of Delegates” would bring impeachment charges that would be tried in the Senate and judiciary.⁴⁹ John Dickinson argued that impeachment should be “left in the hands of the States” and suggested officials be removable “on the request of a majority of the Legislatures of individual States.”⁵⁰ For over three months, the delegates debated who should have the impeachment power, jumping back and forth between different combinations of the state legislatures, the House, the Senate, and the judiciary until finally they settled on impeachment by the House and conviction by the Senate.⁵¹ This back and forth demonstrates the Framers’ awareness of the significance of impeachment power and underscores their fear that such power would be abused.

Lastly, the Framers narrowed the remedy for impeachment. While Parliament’s impeachment power allowed for criminal sanctions after an impeachment conviction, the Framers decided to limit the remedy to “removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”⁵² Those impeached and convicted were still subject to criminal penalties outside of the impeachment proceedings.⁵³ In that way, the Framers explicitly distinguished an impeachment proceeding from a criminal proceeding.

III. ELEMENTS OF A SUCCESSFUL IMPEACHMENT

No president has been impeached and removed from office. Still, instances where presidents have been nearly impeached, or impeached but not removed, shed light on what a successful impeachment would require. Three patterns emerge from an analysis of our country’s use of the impeachment power. First, impeachment requires a divided government.⁵⁴ That is, impeachment will only be successful where the parties that control both Houses of Congress are different than the party in control of the White House.⁵⁵ Second, impeachment requires broad public support.⁵⁶ And third,

⁴⁷ *Id.*

⁴⁸ *Id.* at 114.

⁴⁹ *Id.* at 114–15.

⁵⁰ *Id.* at 115.

⁵¹ *Id.* at 115–16.

⁵² U.S. CONST. art. I, § 3, cl. 7.

⁵³ *See id.* (“[B]ut the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”).

⁵⁴ *See infra* Section III.A.

⁵⁵ *Id.*

⁵⁶ *See infra* Section III.B.

impeachment requires a threat to our constitutional order.⁵⁷ All three elements must be present for the impeachment tool to be effective.

A. *Divided Government*

The Framers of the Constitution saw separation of powers as the foundation of American government. In a 1775 letter to Richard Henry Lee, John Adams proposed creating three branches of government.⁵⁸ He wrote, “It is by ballancing [sic] each of these Powers against the other two, that the Effort in humane Nature towards Tyranny, can alone be checked and restrained and any degree of Freedom preserved in the Constitution.”⁵⁹ The separation of powers was “designed to make parties ineffective”⁶⁰ by creating a maze-like system that would thwart any party’s attempt to power grab. But increased partisanship has made separation of powers vulnerable.⁶¹ This is most apparent when the president’s party also controls both Houses of Congress, which is often referred to as a “unified government.”⁶² Justice Jackson explained the danger of a unified government in *Youngstown Sheet & Tube Co. v. Sawyer*: “Party loyalties and interests, sometimes more binding than law, extend [the president’s] effective control into branches of government other than his own, and he often may win, as a political leader, what he cannot command under the Constitution.”⁶³ The executive branch benefits the most from a unified government. When the president’s party controls the White House and both Houses of Congress, “the power of the Presidency is effectively unchecked.”⁶⁴

In fact, the House has only impeached two presidents before President Donald Trump, and both instances occurred during a divided government.⁶⁵ The impeachment of Presidents Andrew Johnson and Bill Clinton occurred when Democrats controlled the White House and Republicans controlled both Houses of Congress.⁶⁶ Democrat Andrew Johnson’s impeachment

⁵⁷ See *infra* Section III.C.

⁵⁸ Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), <https://founders.archives.gov/documents/Adams/06-03-02-0163> [https://perma.cc/Q958-Z25B].

⁵⁹ *Id.*

⁶⁰ Lee Drutman, *There is No Separation of Powers Without Divided Government*, VOX (Jan. 3, 2018), <https://www.vox.com/polyarchy/2018/1/3/16844848/separation-of-powers-divided-government> [https://perma.cc/7ZWS-BM2S].

⁶¹ See *infra* Section V.A.

⁶² *Id.*; see William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 519 (2008) (“[W]hen the President’s party controls the Congress, he or she can proceed virtually uncontested.”).

⁶³ 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

⁶⁴ Marshall, *supra* note 62.

⁶⁵ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2345 (2006).

⁶⁶ *Id.*

occurred during a period of extraordinary partisan domination in Congress: Republicans controlled 57 out of 66 seats in the Senate and 173 out of 220 seats in the House.⁶⁷ When Democrat Bill Clinton was impeached, Republicans controlled 55 out of 100 seats in the Senate and 226 out of 435 seats in the House.⁶⁸ Additionally, the Watergate investigation occurred when the Democrats controlled Congress and Republicans controlled the White House.⁶⁹ While Nixon resigned before the House impeached him, there is little doubt that an impeachment would have been pursued.⁷⁰

Given the “party loyalties and interests” described by Justice Jackson,⁷¹ impeachment has only been used as a check on Executive power during a divided government. As political scientist Lee Drutman candidly noted, “There is no separation of powers without divided government.”⁷²

B. Importance of Public Support

Even with a divided government, impeachment will not succeed unless the public at large has lost faith in the president’s ability to fulfill his or her duties. The Reagan presidency best illustrates this fact.

Ronald Reagan became the 40th president of the United States in 1981. He was a charismatic former actor who ran on a platform of anticommunism and “supply-side” economics.⁷³ President Reagan won the election by a landslide, with a final electoral college vote of 489 to 49.⁷⁴ Then, in 1984, he won reelection.⁷⁵

In the 1980s, President Reagan supported the Contras rebel group in

⁶⁷ *Id.* at 2367.

⁶⁸ *105th Congress (1997-1999)*, THE CONG. PROJECT, <https://www.thecongressproject.com/105th-congress-19971999> [https://perma.cc/8DYS-EKL9].

⁶⁹ Levinson & Pildes, *supra* note 65, at 2345.

⁷⁰ Richard Lyons & William Chapman, *Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11*, WASH. POST (July 28, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm> [https://perma.cc/TJE9-38AS].

⁷¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

⁷² Drutman, *supra* note 60.

⁷³ *Presidency Of Ronald Reagan: Domestic Policies*, BRITANNICA, <https://www.britannica.com/biography/Ronald-Reagan/Presidency#ref214230> [https://perma.cc/3HAG-NDS6].

⁷⁴ *Ronald Reagan: Election Of 1980*, BRITANNICA, <https://www.britannica.com/biography/Ronald-Reagan/Governorship-of-California#ref214227> [https://perma.cc/3MX5-SXNH].

⁷⁵ Frank Newport, Jeffrey M. Jones & Lydia Saad, *Ronald Reagan From the People’s Perspective: A Gallup Poll Review*, GALLUP (June 7, 2004), <https://news.gallup.com/poll/11887/ronald-reagan-from-peoples-perspective-gallup-poll-review.aspx> [https://perma.cc/Z5ZN-VJK7].

Nicaragua.⁷⁶ Congress forbade any efforts to fund the Contras and their efforts to overthrow the government in Nicaragua.⁷⁷ In November 1985, President Reagan authorized a secret initiative to sell military weapons to Iran in exchange for the country's help in securing the release of American hostages in Lebanon.⁷⁸ The deal broke a number of trade embargoes and contradicted President Reagan's public statement that he would not negotiate with the Iranian terrorists.⁷⁹ In addition, a portion of the \$48 million earned from the arms sale was diverted to a secret fund to purchase weapons for the Contras, violating congressional laws prohibiting aid.⁸⁰

When details of the Iran-Contra Affair came to light, the public demanded answers, and "Reagan built a defense on negligence and ignorance."⁸¹ Miraculously, the public believed him. This was in part due to President Reagan's ability to shift the focus to his subordinates, and his argument that there was no "smoking gun."⁸² Nevertheless, evidence clearly showed that President Reagan ordered the deal and was involved in the planning.⁸³ President Reagan "us[ed] public assets to purchase indirect sustenance for an activity that Congress had specifically prohibited," and he continuously violated acts of Congress and lied to cover up his actions.⁸⁴ His actions, apart from being illegal, directly violated the division of power between the executive and legislative branch.

The Iran-Contra Affair most certainly constituted an impeachable offense. While some called for impeachment, the House never even opened an inquiry.⁸⁵ A major reason why impeachment was not pursued was due to the public's approval of President Reagan.⁸⁶ Polls showed that the American people still trusted the president.⁸⁷ Despite all that President Reagan was accused of, he remained popular, and the call for impeachment was a rather weak one.⁸⁸ Although the government was divided in 1987—

⁷⁶ TRIBE & MATZ, *supra* note 46, at 72.

⁷⁷ Doug Rossinow, *Politics Saved Ronald Reagan from Impeachment. That Might Happen Again for Donald Trump.*, WASH. POST (Oct. 4, 2019), <https://www.washingtonpost.com/outlook/2019/10/04/politics-saved-ronald-reagan-impeachment-that-might-happen-again-donald-trump/> [https://perma.cc/CSN5-TJ8D].

⁷⁸ Andrew Glass, *Reagan Explains Secret Sale of Arms to Iran, Nov. 13, 1986*, POLITICO (Nov. 13, 2013), <https://www.politico.com/story/2013/11/reagan-explains-secret-sale-of-arms-to-iran-nov-13-1986-099742> [https://perma.cc/B2XQ-XPEL].

⁷⁹ TRIBE & MATZ, *supra* note 46, at 72.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Rossinow, *supra* note 77.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See TRIBE & MATZ, *supra* note 46, at 73.

⁸⁷ *Id.*

⁸⁸ Shortly after the public learned about the Iran-Contra affair, "Reagan's job approval rating

Democrats controlled both Houses of Congress⁸⁹ and Republicans controlled the White House—the Iran-Contra Affair demonstrated that impeachment will not be successful unless the president has lost the public’s confidence.

C. *Threat to Constitutional Order*

Even with a divided government and public support for impeachment, one question remains: what is an impeachable act? Since the ratification of the Constitution, no president has been removed from office by impeachment; however, on several occasions the House has drafted articles of impeachment. Moreover, the instances in which the House has chosen *not* to draft articles of impeachment also shed light on early America’s understanding of the impeachment power and what constitutes an impeachable offense.

As mentioned previously, there was—and still is—some uncertainty as to exactly which offenses were included in the Constitution’s Impeachment Clause.⁹⁰ During the second impeachment of President Trump, one of the main defenses during trial was that the power of impeachment is limited solely to criminal offenses.⁹¹ Aside from the history of the phrase “high Crimes and Misdemeanors” and the writings of the Framers, Early America’s use of the Impeachment Clause demonstrates how this defense lacks merit.⁹²

In 1804, Vice President Aaron Burr killed Alexander Hamilton, former Secretary of the U.S. Treasury, during a duel in Weehawken, New Jersey.⁹³ Hamilton had allegedly made disparaging comments about Burr.⁹⁴ And when Hamilton refused to deny making such comments, Burr challenged him to a duel.⁹⁵ Although dueling was illegal at the time, the two agreed to meet in secret at a popular dueling ground.⁹⁶ With one shot, Burr

remained below 50% throughout most of 1987 but gradually recovered in 1988.” Lydia Saad, *Gallup Vault: Reaction to Iran-Contra 30 Years Ago*, GALLUP (Nov. 25, 2016), <https://news.gallup.com/vault/198164/gallup-vault-reaction-iran-contra-years-ago.aspx> [https://perma.cc/TP8E-LNQR].

⁸⁹ *100th Congress (1987–1989)*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Congressional-Overview/Profiles/100th/> [https://perma.cc/55R3-JZYA].

⁹⁰ See *supra* Section II.B.

⁹¹ See *infra* Section IV.B.1.

⁹² See Legal Information Institute, *Impeachable Offenses: Historical Background*, CORNELL UNIV. L. SCH., <https://www.law.cornell.edu/constitution-conan/article-2/section-4/impeachable-offenses-historical-background> [https://perma.cc/T68P-N4BH].

⁹³ Jeff Wallenfeldt, *Burr-Hamilton Duel*, BRITANNICA (Oct. 10, 2018), <https://www.britannica.com/event/Burr-Hamilton-duel> [https://perma.cc/5TAZ-KTJP].

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

fatally struck Hamilton in the abdomen.⁹⁷ The public was outraged when Hamilton's death was made public, and New Jersey swiftly charged Burr with murder.⁹⁸ Congress, on the other hand, never considered impeaching Burr.⁹⁹ In fact, eleven senators instead called on New Jersey to drop the murder charge.¹⁰⁰

If impeachment was limited to criminal offenses, the vice president murdering a former civil officer would most certainly qualify for impeachment. The fact that Congress did not even consider impeaching Vice President Burr shows that impeachment was seen as something different than a punishment for crimes. Congress was more concerned about the proper functioning of the government.¹⁰¹ According to the senators, dismissal of the murder charge was necessary "to facilitate the public business by relieving [Burr] from the peculiar embarrassments of his present situation, and the Senate from the distressing imputation thrown on it."¹⁰² Although Burr committed a crime, neither Congress nor the general public was concerned about Burr's ability to perform his duties as vice president.¹⁰³ Congress instead focused on Burr's ability to perform his duties and the public's confidence rather than the criminality of Burr's actions.¹⁰⁴ In this way, impeachment is designed to protect the public and *not* merely to punish an official for wrongdoing.

Another event in early American history that provides insight into the impeachment power is the call to impeach President John Tyler.¹⁰⁵ In April 1841, just one month after his inauguration, President William Henry Harrison passed away, making John Tyler "the first vice president to ascend to the presidency."¹⁰⁶ Although both Harrison and Tyler ran on the Whig ticket, Tyler disagreed with major pieces of the Whig agenda.¹⁰⁷ As president, Tyler continuously clashed with the Whig-controlled Congress, often vetoing legislation aligned with Harrison's campaign promises, such as the establishment of a central bank.¹⁰⁸ So enraged by President Tyler's

⁹⁷ *Id.*

⁹⁸ TRIBE & MATZ, *supra* note 46, at 43.

⁹⁹ See Michael Stokes Paulsen, *Could Aaron Burr Have Been Impeached for the Duel?*, LAW & LIBERTY (July 11, 2018), <https://lawliberty.org/could-aaron-burr-have-been-impeached-for-the-duel/> [<https://perma.cc/8VP8-B68E>].

¹⁰⁰ TRIBE & MATZ, *supra* note 46, at 43.

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *Id.*

¹⁰⁷ *Historical Highlights: A Petition for a Presidential Impeachment*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/HistoricalHighlight/Detail/15032448949> [<https://perma.cc/UD45-9KC8>].

¹⁰⁸ *Id.*

conduct, members of Congress expelled President Tyler from the Whig party and discussed impeachment.¹⁰⁹ Then in 1842, the Democrats took control of Congress, quieting the call for impeachment.¹¹⁰ When Virginia Representative, John Minor Botts, introduced an impeachment resolution on July 10, 1842, the resolution failed.¹¹¹ The call to impeach President Tyler was rooted almost exclusively in partisan politics.¹¹² He had not abused his power or neglected his duties as president; rather, he went against the will of his political party.¹¹³ Calling for impeachment was the Whig party's way of retaliating.¹¹⁴ The failure of the impeachment resolution showed that the impeachment tool was working as it should.¹¹⁵ Impeachment was not meant to be a tool of the majority party, waged when a party disagrees with the policy decisions of the president.¹¹⁶ The failure of the resolution was a direct rebuke of that notion.

The next time an impeachment resolution was brought to the House floor, it was successful.¹¹⁷ Vice President Andrew Johnson was sworn in as president shortly after Abraham Lincoln's death and in the aftermath of the Civil War.¹¹⁸ Johnson became president during one of the most trying times in our country's history.¹¹⁹ He was universally disliked and a staunch racist.¹²⁰ Historians have described him as "a rigid, dictatorial racist who was unable to compromise or to accept a political reality at odds with his own ideas."¹²¹ Due to his stubbornness and general incompetence, Johnson has been judged as one of our country's worst presidents.¹²² President Johnson vetoed every landmark civil rights bill that came before him and favored a more lenient reconstruction policy.¹²³ When Congress overrode his veto, President Johnson "refused to enforce the laws and interpreted them in bad

¹⁰⁹ *Id.*

¹¹⁰ TRIBE & MATZ, *supra* note 46, at 19.

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See* STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 23, at 2252–53.

¹¹⁷ *President Andrew Johnson Impeached*, HISTORY, <https://www.history.com/this-day-in-history/president-andrew-johnson-impeached> [<https://perma.cc/MH5N-H7VF>].

¹¹⁸ Elizabeth R. Varon, *Andrew Johnson: Impact and Legacy*, UNIV. OF VA.: MILLER CTR., <https://millercenter.org/president/johnson/impact-and-legacy> [<https://perma.cc/UC2V-HVBK>]. The country was in the process of rebuilding after the Civil War. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.* ("Because of his gross incompetence in federal office and his incredible miscalculation of the extent of public support for his policies, Johnson is judged as a great failure in making a satisfying and just peace.")

¹²³ *Id.* Most notably, President Johnson vetoed the Civil Rights Act of 1866. *Id.* He also opposed the Fourteenth Amendment. *Id.*

faith.”¹²⁴ He seemed more aligned with the Southerners than those who elected him and President Lincoln.¹²⁵

Fearing that President Johnson would fire the members of Lincoln’s cabinet, Congress passed the Tenure of Office Act in 1867 over President Johnson’s veto.¹²⁶ The bill prohibited presidents from removing any official confirmed by the Senate without Senate approval.¹²⁷ Believing the bill to be unconstitutional, President Johnson replaced Secretary of War, Edwin M. Stanton, with General Ulysses S. Grant, without obtaining the requisite Senate approval.¹²⁸ The Supreme Court refused to rule on the constitutionality of the bill, and, after pushback by Congress, General Grant gave the position back to Stanton.¹²⁹ In February 1868, President Johnson again decided to fire Stanton and appointed General Lorenzo Thomas as Secretary of War.¹³⁰

Three days later, President Johnson was impeached.¹³¹ Few congressmen at the time actually believed President Johnson committed impeachable offenses.¹³² Rather, President Johnson was seen as incompetent and unfit to be president.¹³³ Congress felt that his violation of the Tenure of Office Act was their best chance at removing him.¹³⁴ In May 1868, President Johnson avoided conviction in the Senate by one vote, cast by Republican Senator Edmund Ross.¹³⁵ Although Senator Ross disliked President Johnson and his policies, Ross knew that violating the Tenure of Office Act—an Act many thought to be unconstitutional itself—did not rise to the level of an impeachable offense.¹³⁶

The impeachment of President Johnson was about political expediency.¹³⁷ President Johnson greatly impeded Congress’s efforts to deal with the aftermath of the Civil War and grant rights to the freed slaves in the South.¹³⁸ Congress, and the Republican party at large, felt that Johnson was a bad president.¹³⁹ The House had a hard time pleading its case because its argument was less about the Tenure of Office Act and more about the

¹²⁴ TRIBE & MATZ, *supra* note 46, at 54.

¹²⁵ See Varon, *supra* note 118.

¹²⁶ *President Andrew Johnson Impeached*, *supra* note 117.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² NEAL KATYAL, *IMPEACH: THE CASE AGAINST DONALD TRUMP 29–30* (Mariner Books 2019).

¹³³ *Id.*

¹³⁴ *Id.* at 30.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *id.*

¹³⁹ See TRIBE & MATZ, *supra* note 46, at 56.

president's general incompetence.¹⁴⁰ The failed impeachment of President Johnson teaches us that impeachment will not be successful without an articulable impeachable offense. Presidents cannot, and should not, be removed merely because they are disliked. That is not to say that President Johnson did not commit impeachable acts. He very well may have;¹⁴¹ however, the offense that the House chose to charge, violation of the Tenure of Office Act, was insufficient.¹⁴² For that reason, the impeachment failed.¹⁴³

Early American history demonstrates that what constitutes an impeachable offense is not clear cut.¹⁴⁴ The phrase "high Crimes and Misdemeanors" is not defined in the Constitution; however, history explains that the phrase meant something more than a criminal act.¹⁴⁵ Moreover, impeachment was vulnerable to abuse by political parties.¹⁴⁶ The near impeachment of President Tyler shows how easily impeachment could be misused.¹⁴⁷ Finally, the impeachment of President Johnson illustrates the importance of creating a solid case before impeaching.¹⁴⁸ Even if a president commits impeachable acts, without a strong case and a specific charge, impeachment will likely fail.¹⁴⁹

D. The Elements Applied: Watergate

The only time in American history where there appeared to be a definite impeachable act, widespread public support for impeachment, and a divided government, was after Watergate. While President Nixon resigned before the House could vote on an article of impeachment,¹⁵⁰ it is likely that impeachment would have been successful.¹⁵¹

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 55–56 (“Historians have long debated whether different arguments would have ended Johnson’s presidency . . . But in hindsight, there can be little doubt that House Republicans failed to plead and prosecute their best case on the merits.”).

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See* Legal Information Institute, *Impeachable Offenses: Overview*, CORNELL UNIV. L. SCH., <https://www.law.cornell.edu/constitution-conan/article-2/section-4/impeachable-offenses-overview> [<https://perma.cc/S36S-H67V>].

¹⁴⁵ As mentioned above, Vice President Burr killed Alexander Hamilton, yet Congress did not pursue impeachment. *See* Paulsen, *supra* note 99. While impeachment may encompass some criminal actions, it is focused more on political offenses than criminal. *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See* TRIBE & MATZ, *supra* note 46, at 19.

¹⁴⁸ *See id.* at 56.

¹⁴⁹ *See id.*

¹⁵⁰ Faith Karimi, *Watergate Scandal: A Look Back at Crisis that Changes US Politics*, CNN (May 17, 2017), <https://www.cnn.com/2017/05/17/politics/watergate-scandal-look-back/index.html> [<https://perma.cc/8WV9-GY68>].

¹⁵¹ *See* *Richard Nixon Biography*, BIOGRAPHY.COM, <https://www.biography.com/us-president/richard-nixon> [<https://perma.cc/X32P-PFPG>].

Late at night on June 17, 1972, five men broke into the Democratic National Committee headquarters in Washington, D.C. and attempted to wiretap the building and steal documents.¹⁵² The White House successfully distanced itself from the burglars initially, and President Nixon was re-elected later that year.¹⁵³ In March 1973, several of the burglars pled guilty to conspiracy and other federal charges.¹⁵⁴ Judge John Sirica, who presided over the burglars' trials, released a letter written by one of the burglars who said White House officials pressured him into pleading guilty.¹⁵⁵ As more information emerged, the Senate voted to create an investigative committee to look into Watergate.¹⁵⁶ A White House aide told the Senate that President Nixon taped his Oval Office conversations, and Archibald Cox, the Watergate special prosecutor, quickly moved to subpoena the tapes.¹⁵⁷ President Nixon refused to turn the tapes over and ordered the Solicitor General to fire Cox.¹⁵⁸ At this point, the call for impeachment was growing, and the release of several of the subpoenaed tapes sealed President Nixon's fate.¹⁵⁹ The tapes directly connected President Nixon to the burglary and revealed that he tried to stop the FBI investigation.¹⁶⁰ The House Judiciary Committee swiftly approved three articles of impeachment, but President Nixon resigned before the House could vote on the articles.¹⁶¹

What made Watergate different than other controversial presidential acts was not that the acts were criminal. President Andrew Johnson and President Ronald Reagan also likely committed crimes while in office.¹⁶² Neither was the cover up, as President Reagan too had lied and tried to hide the Iran-Contra arms sale from Congress.¹⁶³ What made Watergate different was that the crime President Nixon committed was an "abuse of public trust" that "undermined our democracy itself."¹⁶⁴ Watergate is an excellent illustration of the type of act that constitutes a "high Crime and Misdemeanor." It takes more than a violation of a criminal statute, obstruction of justice, or a pattern of corruption.¹⁶⁵ A high crime and misdemeanor must strike at something deeper: it must threaten our constitutional order.¹⁶⁶ While many past presidential acts did not all rise to

¹⁵² Karimi, *supra* note 150.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *supra* Sections III.B-C.

¹⁶³ See *supra* Section III.B.

¹⁶⁴ KATYAL, *supra* note 132, at 37.

¹⁶⁵ See *supra* Sections III.B-C.

¹⁶⁶ See KATYAL, *supra* note 132, at 37.

that threshold, there is no question that Watergate did.

Watergate also shows how the threat of impeachment had some teeth. President Nixon resigned rather than going through an impeachment trial.¹⁶⁷ In that way, even without a conviction, the impeachment power served as a successful check on executive power.

IV. SECOND IMPEACHMENT OF PRESIDENT DONALD J. TRUMP

Because it unfolded on television for millions of Americans to watch, the January 6, 2021, insurrection was perhaps the most graphic abuse of public trust in our country's history. In the House's Brief in support of the second impeachment of President Trump, the House Impeachment Managers stated, "If provoking an insurrectionary riot against a Joint Session of Congress after losing an election is not an impeachable offense, it is hard to imagine what would be."¹⁶⁸ For the first time, our country did not have a peaceful transition of power between presidential administrations.¹⁶⁹

Several Republican Representatives and Senators immediately condemned President Trump's actions. Representative Liz Cheney said in a statement, "There has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution."¹⁷⁰ Senate Majority Leader Mitch McConnell called President Trump "practically and morally responsible for provoking that event of that day."¹⁷¹ Representative Tom Rice released a statement, saying, "[T]his utter failure is inexcusable."¹⁷² And Representative Adam Kinzinger said, "[I]f these actions—the Article II branch inciting a deadly insurrection against the Article I branch—are not worthy of impeachment, then what is an impeachable offense?"¹⁷³

Despite these comments, President Trump was acquitted of the

¹⁶⁷ See Karimi, *supra* note 150.

¹⁶⁸ House Brief, *supra* note 2, at 59.

¹⁶⁹ *Id.* at 60 ("Since President George Washington willingly relinquished his office after serving two terms, our Nation has seen an unbroken chain of peaceful transitions from one presidential administration to the next—that is, until January 6, 2021.").

¹⁷⁰ Joshua Wolfson, Brandon Foster & Camille Erickson, *Cheney Says She Will Vote to Impeach Trump*, CASPER STAR TRIB. (Jan. 12, 2021), https://trib.com/news/state-and-regional/govt-and-politics/cheney-says-she-will-vote-to-impeach-trump/article_a20535b6-8ce5-553f-8759-87514fcdacad.html [<https://perma.cc/4HXZ-2D5A>].

¹⁷¹ Alan Fram, *GOP's McConnell: Trump Morally Responsible for Jan. 6 Attack*, AP NEWS (Feb. 13, 2021), <https://apnews.com/article/capitol-siege-donald-trump-impeachments-trump-impeachment-mitch-mcconnell-0a14d2e41e376331580b98a992f7d856> [<https://perma.cc/93F2-QEUV>].

¹⁷² Domenico Montanaro, *These Are The 10 Republicans Who Voted to Impeach Trump*, NPR (Jan. 14, 2021), <https://www.npr.org/2021/01/14/956621191/these-are-the-10-republicans-who-voted-to-impeach-trump> [<https://perma.cc/KL7M-D5AE>].

¹⁷³ *Id.*

impeachment charges.¹⁷⁴ Senate Majority Leader Mitch McConnell refused to hold a special session in the Senate, which forced the impeachment trial to be moved until *after* Joe Biden's presidential inauguration, further complicating the proceedings.¹⁷⁵ Congress's failure to convict President Trump exposed deeper issues within our democracy.¹⁷⁶ While President Trump may have been the wrongdoer, Congress was the enabler. No matter how blatant and frankly outrageous President Trump's actions may have been on January 6, the acquittal confirmed the unyielding nature of the impeachment tool. The three elements of impeachment—a divided government, public support, and a threat to constitutional order¹⁷⁷—are not merely general guidelines of a successful impeachment. Rather, they are permanent barriers that must be surmounted for impeachment to be effective. It is not that impeachment *might* fail without the presence of each element. Without the unqualified presence of each, impeachment *will* fail.

A. Elements

As outlined above, there are three general elements of a successful impeachment: (1) a divided government; (2) public support; and (3) a threat to our constitutional order.¹⁷⁸ While both parties agreed that January 6 threatened our constitutional order,¹⁷⁹ the country did not have a completely divided government nor widespread public support for the impeachment.¹⁸⁰

1. Divided Government

The first half of Trump's presidency occurred under a unified government. Republicans controlled the White House, House of Representatives, and Senate.¹⁸¹ The 2018 midterm election shifted power within Congress, with Democrats taking control of the House of

¹⁷⁴ Lisa Mascaró, Eric Tucker & Mary Clare Jalonick, *Trump Acquitted, Denounced in Historic Impeachment Trial*, AP NEWS (Feb. 13, 2021), <https://apnews.com/article/donald-trump-capitol-siege-riots-trials-impeachments-b245b52fd7d4a079ae199c954baba452> [https://perma.cc/G8CC-8UQF].

¹⁷⁵ Alexander Bolton, *McConnell Won't Agree to Reconvene Senate Early for Impeachment Trial*, THE HILL (Jan. 13, 2021), <https://thehill.com/homenews/senate/534053-mcconnell-wont-agree-to-reconvene-senate-early-for-impeachment-trial> [https://perma.cc/HZ5W-YV28].

¹⁷⁶ See John Nichols, *The Senate Has Failed America*, THE NATION (Feb. 13, 2021), <https://www.thenation.com/article/politics/senate-impeachment-insurrection/> [https://perma.cc/P236-4NZZ].

¹⁷⁷ See *supra* Sections III.A–C.

¹⁷⁸ See *id.*

¹⁷⁹ See *infra* Section IV.A.3.

¹⁸⁰ See *infra* Sections IV.A.1–2.

¹⁸¹ During the 115th Congress, Republicans controlled the Senate 51 seats to 49 and the House 235 seats to 193. *115th United States Congress*, BALLOTPEdia, https://ballotpedia.org/115th_United_States_Congress [https://perma.cc/W3PY-C7QU].

Representatives and gaining an additional forty seats.¹⁸² But Republicans maintained control of the Senate and actually gained two additional seats after the midterm.¹⁸³ The government was technically a divided one after the 2018 midterm election, but it was not divided by much.¹⁸⁴ Democrats controlled 235 out of the 435 seats in the House, and Republicans controlled 53 out of the 100 seats in the Senate.¹⁸⁵ While this division was enough to initiate impeachment proceedings—which actually occurred twice in the previous two years¹⁸⁶—the fact that Republicans maintained control over the Senate made conviction unlikely. Without a fully divided government, meaning *both* houses controlled by the party opposite the president, impeachment is futile.

2. Public Support

The next element is public support. Although most of Congress, at the minimum, at least acknowledged the connection between President Trump's actions and the insurrection—even if not going so far as to call it incitement—much of the country refused to admit even that much.¹⁸⁷ The *New York Times* found that half of Republicans did “not accept the *verified fact* that conservative protestors, supporters of former President Donald J. Trump, attacked the U.S. Capitol”¹⁸⁸ Even more shocking, fifty-five percent of Republicans believed that the insurrection was started by “violent left-wing protesters trying to make Trump look bad.”¹⁸⁹ The fact that over half of Republicans refused to believe the video evidence in front of them demonstrates just how polarized the parties have become. People on both sides of the aisle have become so engrained in party politics, and social media and polarized news sources have only fed into this delusion.¹⁹⁰

It is not surprising then, given these statistics, that the Senate did not have enough votes to convict the president. Public support is a key element of impeachment. Impeachment is controlled by Congress, and Congress is

¹⁸² *Results from the 2018 Midterm Elections*, L.A. TIMES (Nov. 6, 2018), <https://www.latimes.com/projects/la-pol-na-us-general-election-results-2018/> [<https://perma.cc/5LTW-PDCS>].

¹⁸³ *Id.*

¹⁸⁴ See *115th United States Congress*, *supra* note 181.

¹⁸⁵ *Id.*

¹⁸⁶ Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [<https://perma.cc/C425-AHT6>].

¹⁸⁷ See Glenn Thrush, *More than Half of Republicans Blame the Jan. 6 Capitol Attack on “Left-Wing” Rioters, a New Poll Finds*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/republican-capitol-attack.html> [<https://perma.cc/ETV4-BQMZ>].

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *Id.* “The F.B.I. has said there is no evidence to support those claims.” *Id.*

¹⁹⁰ See *infra* Section V.A.

composed of elected officials who, due to the frequency of elections, perpetually have reelection in the back of their minds. Congress's constant fixation on reelection becomes further evident when looking at the Republican Senators who voted to convict President Trump: Richard Burr, Bill Cassidy, Susan Collins, Lisa Murkowski, Mitt Romney, Ben Sasse, and Pat Toomey.¹⁹¹ Of the seven, only one—Lisa Murkowski—faces a reelection in 2022.¹⁹² Two of the senators—Richard Burr and Pat Toomey—are retiring at the end of their term.¹⁹³ In fact, at the time of the impeachment trial, only three Republican Senators had announced their retirement,¹⁹⁴ and Rob Portman was the only one who did not vote to convict.¹⁹⁵ The remaining senators who voted to convict are years away from reelection.¹⁹⁶ Without the political pressure, senators are more willing to vote against their party.¹⁹⁷ Even so, a majority of the Republican senators in this case still fell in line. Thus, the rule is confirmed: if a large portion of the public does not support impeachment, then impeachment will fail.

3. *Threat to Our Constitutional Order*

The final element of a successful impeachment is a threat to constitutional order. As history has shown, this requires something more than a crime or act of corruption.¹⁹⁸ It is hard to imagine a more significant threat to constitutional order than the attempt of one branch to usurp the power of another and overturn an election.

As the House Brief explains, President Trump not only invited the insurrectionists to the Capitol and encouraged them to “fight like hell,” but he stoked lies about the election results for months before.¹⁹⁹ He convinced his supporters that the election had been “rigged” and “stolen.”²⁰⁰ He

¹⁹¹ Barbara Sprunt, *7 GOP Senators Voted to Convict Trump. Only 1 Faces Voters Next Year*, NPR (Feb. 15, 2021), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/15/967878039/7-gop-senators-voted-to-convict-trump-only-1-faces-voters-next-year> [https://perma.cc/76QT-MTV2].

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*; *List of U.S. Congress Incumbents Who Are Not Running for Re-Election in 2022*, BALLOTPEdia, https://ballotpedia.org/List_of_U.S._Congress_incumbents_who_are_not_running_for_re-election_in_2022 [https://perma.cc/9DPV-JEDQ] (Dec. 6, 2021).

¹⁹⁵ See Sprunt, *supra* note 191.

¹⁹⁶ *Id.* Mitt Romney faces reelection in 2024, while Bill Cassidy, Susan Collins, and Ben Sasse will not have to campaign again until 2026. *Id.*

¹⁹⁷ See Weiyi Cai & Kenan Davis, *Full List: Where Every Senator Stands on Convicting Trump*, N.Y. TIMES (Feb. 14, 2021), <https://www.nytimes.com/interactive/2021/01/25/us/politics/senate-impeachment-whip-count.html> [https://perma.cc/V4QQ-4KKC].

¹⁹⁸ See *supra* Section III.D.

¹⁹⁹ House Brief, *supra* note 2, at 24.

²⁰⁰ *Id.* at 12.

pressured Georgia officials to overturn the results and “find 11,780 votes.”²⁰¹ When that did not work, he became more desperate. He focused his efforts on members of Congress, urging them to reject the Electoral College vote during the January 6 electoral count.²⁰² All the while, President Trump was insisting to his base that he won the election and that it was “[s]tatistically impossible to have lost.”²⁰³

Perhaps most troubling, when the Capitol was breached and as congressional staff barricaded themselves in their offices and hid under desks,²⁰⁴ President Trump did nothing.²⁰⁵ For hours, President Trump just watched.²⁰⁶ Congressional leaders begged him to send help, begged him to tell his supporters to go home.²⁰⁷ President Trump did neither.²⁰⁸ Instead, President Trump called Senator Mike Lee, as he and the other senators were in hiding, “not to check on his safety, or assess the security threat, but to try to persuade him to delay and further obstruct the Electoral College vote count.”²⁰⁹

Even during the Capitol breach, President Trump was focused solely on overturning the election and remaining in power. Vice President Pence had to step in to facilitate the mobilization of the District of Columbia National Guard when President Trump refused to do so.²¹⁰ Three hours after the siege began, President Trump released a scripted video, telling the insurrectionists, “We love you, you’re very special. . . . I know how you feel. But go home and go home in peace.”²¹¹

As the Editorial Board for the *New York Times* put it, “The country was hours away from a full-blown constitutional crisis.”²¹² There is no

²⁰¹ *Id.* at 10.

²⁰² *Id.* at 11-12.

²⁰³ *Id.* at 12.

²⁰⁴ Jaclyn Peiser, *Pelosi Says Staff Hid Under a Table for Hours as Rioters Vandalized Her Office: ‘A Terrible, Terrible Violation’*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/nation/2021/01/11/pelosi-60-minutes-capitol-impeachment/> [https://perma.cc/D647-JZNP].

²⁰⁵ See House Brief, *supra* note 2, at 25.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 53 (“Republican Representative Mike Gallagher tweeted, ‘Mr. President. You have got to stop this. You are the only person who can call this off.’ Mick Mulvaney, the President’s former Acting Chief of Staff, tweeted that President Trump ‘can stop this now and needs to do exactly that. Tell these folks to go home.’”).

²⁰⁸ *Id.* at 52.

²⁰⁹ *Id.* at 52-53.

²¹⁰ Kaitlan Collins, Zachary Cohen, Barbara Starr & Jennifer Hansler, *Pence Took Lead as Trump Initially Resisted Sending National Guard to Capitol*, CNN (Jan. 7, 2021), <https://www.cnn.com/2021/01/06/politics/pence-national-guard/index.html> [https://perma.cc/65CY-23A6].

²¹¹ House Brief, *supra* note 2, at 54.

²¹² The Editorial Board, *Jan. 6 Was Worse than We Knew*, N.Y. TIMES (Oct. 2, 2021), <https://www.nytimes.com/2021/10/02/opinion/jan-6-trump-eastman-election.html> [https://perma.cc/8P79-PLME].

question that January 6 constituted a threat to our constitutional order. January 6 revealed that no matter how great the constitutional threat is, without the two other elements, impeachment will fail.

B. Constitutionality

Perhaps, some may argue, the impeachment failed *not* because the above elements were absent but instead because impeachment in this instance was unconstitutional. President Trump's counsel, and many of the Senate Republicans, brought forth that argument.²¹³ President Trump's counsel made three main arguments against impeachment: (1) impeachment requires a criminal act, which, they argued, was absent here; (2) impeachment violated President Trump's free speech rights; and (3) Congress cannot impeach former officials.²¹⁴ All of these arguments uniformly failed.

1. Criminal Act

Of President Trump's defenses, his argument that impeachment was limited to criminal acts was his weakest. In President Trump's opposition brief, his legal team argued, "It matters greatly that the President did not commit a crime, because the Constitutional requirement for action that is grounds for impeachment is a high crime or misdemeanor."²¹⁵ The brief cited a statement by Professor Jonathan Turley, indicating that every impeachment in our country's history has been based on violations of existing law.²¹⁶ This statement by Professor Turley, as the House Reply Brief pointed out, did not stand for the proposition that impeachable acts *must* involve criminal misconduct.²¹⁷ In fact, in the same written statement to Congress, Professor Turley himself acknowledged that impeachable acts are not limited to criminal offenses.²¹⁸ Moreover, no serious constitutional law scholar argues that a president can only be impeached for criminal misconduct.²¹⁹

²¹³ See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP, PART II: TRIAL MEMORANDUM OF DONALD J. TRUMP, 45TH PRESIDENT OF THE UNITED STATES OF AMERICA, 117TH CONG., 1ST SESS., S. DOC. NO. 117-2, at 107 (2021) [hereinafter Opposition Brief].

²¹⁴ *Id.*

²¹⁵ *Id.* at 182.

²¹⁶ *Id.*

²¹⁷ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP, PART III: REPLY MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 117TH CONG., 1ST SESS., S. DOC. NO. 117-2, at 215 (2021) [hereinafter Reply Brief].

²¹⁸ *Id.* at 215 n.102.

²¹⁹ See Richard Lempert, *Does Impeachment Require Criminal Behavior? In a Word, "No"*, BROOKINGS (Jan. 29, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/29/does->

As mentioned previously, the British concept of impeachment—from which our version of impeachment was borrowed—was also not limited to criminal conduct.²²⁰ “Impeachment was conceived in the English Parliament as a method to control the King’s ministers” and, thus, included non-criminal offenses such as “abuse of power, corruption, and neglect of duty.”²²¹ Early American history demonstrated the same. For example, Congress has impeached several judges for non-criminal conduct. Judge Ritter was removed in 1936 “for the non-criminal act of bringing his court into scandal and disrepute,” and Judge Archbald was removed in 1912 for “non-criminal speculation in coal properties.”²²² And while President Nixon resigned before the House could impeach him, the Judiciary Committee’s allegations also contained non-criminal acts.²²³

Considering history and precedent, President Trump’s lawyers were left without a leg to stand on. While President Trump’s lawyers argued for a narrow—and quite literal—interpretation of high crimes and misdemeanors, that is not how the Founders intended impeachment be defined.²²⁴ Impeachment was designed to address “violation of some public trust.”²²⁵ While that often *does* involve criminal conduct, it is not a requirement.

2. Free Speech

President Trump’s First Amendment defense did not fare any better. President Trump’s lawyers centered the bulk of their defense on the First Amendment argument.²²⁶ They contended that it was “undeniable that the First Amendment’s protections flow to [President Trump]” and for Congress to punish him for exercising his freedom of speech “would be to do a grave injustice to the freedom of speech in this country.”²²⁷ In response to this defense, 144 constitutional lawyers from around the country from both sides of the aisle—including a founder of the Federalist Society, Steven Calabresi, and the former solicitor general under Ronald Reagan, Charles Fried—called the First Amendment defense “legally frivolous.”²²⁸ “[A]sking

impeachment-require-criminal-behavior-in-a-word-no/ [https://perma.cc/4V5H-G6P4].

Alan Dershowitz is one exception. *Id.* “He acknowledge[d] that his view is a minority viewpoint among scholars.” *Id.* Moreover, even he does not strictly apply the rule, as he as stated that “it is enough that the charged conduct be ‘akin to treason and bribery.’” *Id.*

²²⁰ See *supra* Section II.A.

²²¹ Reply Brief, *supra* note 217, at 215.

²²² *Id.* at 216.

²²³ *Id.*

²²⁴ See THE FEDERALIST NO. 64, *supra* note 44, at 360 (Alexander Hamilton).

²²⁵ *Id.*

²²⁶ See Opposition Brief, *supra* note 213, at 146–47, 154.

²²⁷ *Id.*

²²⁸ Nicholas Fandos, *144 Constitutional Lawyers Call Trump’s First Amendment Defense*

whether President Trump was engaged in lawful First Amendment activity misses the point entirely,” they wrote.²²⁹ “The First Amendment limits the government’s ability to make it unlawful to engage in speech” while impeachment, in contrast, “is not limited to *unlawful* acts.”²³⁰ Thus, the lawyers concluded, “[T]he First Amendment simply does not apply here.”²³¹ Even if it did apply, the “President’s speech and conduct around January 6 constitute unprotected incitement.”²³²

The purpose of impeachment, as the House Managers emphasized in their Reply Brief, is not to “punish” an official.²³³ Congress was not seeking to punish President Trump for his speech. Rather, impeachment serves to “protect the Nation from a President who violated his oath of office and abused the public trust.”²³⁴ Maybe President Trump’s defense would have had weight if it were a criminal proceeding, but, for impeachment, it certainly did not make sense.

3. *Removal of Former Officials*

President Trump’s final argument was perhaps his strongest: Congress cannot impeach former officials. But constitutional scholars still overwhelmingly rejected the argument.²³⁵ Many Republican Senators grasped onto this point when justifying their vote to acquit.²³⁶ It was the support of Republican Senators, not the legal merits of the argument, that made it President Trump’s strongest.

Legally, the argument failed. As the House Managers noted in their briefs, there is precedent, in both England and early America, for the Senate

‘Legally Frivolous’, N.Y. TIMES (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/us/trump-defense-first-amendment.html> [https://perma.cc/7JXY-5DMK].

²²⁹ *Lawyers Call Trump’s Defense ‘Legally Frivolous’*, N.Y. TIMES (Feb. 5, 2021), <https://www.nytimes.com/interactive/2021/02/05/us/first-amendment-lawyers-trump-impeachment-defense.html> [https://perma.cc/N2GZ-5W3P].

²³⁰ *Id.*

²³¹ *Id.* (“The First Amendment protects the freedoms of speech, press, religion, assembly, and petition; it does not grant the President the freedom to engage in a willful dereliction of duty.”).

²³² *Id.*

²³³ Reply Brief, *supra* note 217, at 208.

²³⁴ *Id.*

²³⁵ *See Constitutional Law Scholars on Impeaching Former Officers*, POLITICO (Jan. 21, 2021), <https://www.politico.com/f/?id=00000177-2646-de27-a5f7-3fe714ac0000> [https://perma.cc/QZN2-9JGM].

²³⁶ After the impeachment, Senator Mitch McConnell stated, “We have no power to convict and disqualify a former officeholder who is now a private citizen.” *McConnell Speech After Trump’s Impeachment Trial Acquittal*, U.S. NEWS (Feb. 14, 2021), <https://www.usnews.com/news/politics/articles/2021-02-14/read-mcconnell-speech-after-trumps-impeachment-trial-acquittal> [https://perma.cc/2MSK-HDWM].

trying an official after they leave office.²³⁷ In fact, in eighteenth century England, *only* former officials were impeached—Lord Chancellor Macclesfield was impeached in 1725 after he left office, and Warren Hastings was impeached in 1787 for “abuses he had committed as the former Governor General of Bengal.”²³⁸

Former officials have also been impeached in America. Senator William Blount was impeached in 1797 for plotting to give Britain control over pieces of Florida and Louisiana.²³⁹ The Senate expelled Senator Blount and *then* commenced an impeachment trial.²⁴⁰ The case was ultimately dismissed “on the ground that Members of Congress are not subject to the impeachment power at all,” but it still serves as an example of Congress conducting an impeachment trial against a former official.²⁴¹ The second example occurred in 1876 with the impeachment of former Secretary of War William Belknap.²⁴² When the House Committee on Expenditures uncovered that Secretary Belknap was stealing money from the government, Secretary Belknap promptly resigned.²⁴³ After his resignation, the House voted to impeach him.²⁴⁴ Although Secretary Belknap argued that the Senate lacked jurisdiction because he was no longer in office, “the Senate voted 37 to 29 that it had jurisdiction.”²⁴⁵ While neither Senator Blount nor Secretary Belknap were ultimately convicted, the Senate did not question its jurisdiction over the cases despite the fact that neither party was currently in office.

Moreover, the House Managers pointed out a potential loophole that would be created if former presidents could not be impeached. They argued,

If the Senate does not try President Trump (and convict him) it risks declaring to all future Presidents that there will be no consequences, no accountability, indeed no Congressional response at all if they violate their Oath to ‘preserve, protect and defend the Constitution’ in their final weeks in office.²⁴⁶

²³⁷ House Brief, *supra* note 2, at 72.

²³⁸ *Id.* at 73.

²³⁹ *Id.* at 93–94.

²⁴⁰ *Id.* at 94.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 95.

²⁴⁶ *Id.* at 72.

The Senate would effectively be creating a “January Exception” for future presidents.²⁴⁷ That precedent, they argued “would horrify the Framers.”²⁴⁸

V. THE RISE OF HYPERPARTISANSHIP AND THE DEGRADATION OF IMPEACHMENT

Despite the weakness of President Trump’s defenses, only fifty-seven senators voted to convict on February 13, 2021.²⁴⁹ While the seven Republican votes for conviction were significant, they ultimately were not enough to reach the sixty-seven votes necessary for disqualification.²⁵⁰ The failed second impeachment of President Trump was the ultimate test of the impeachment elements. Even when handed the most textbook example of an impeachable offense, Congress was unable to convict the president. Impeachment failed because the country lacked both a fully divided government and broad public support for impeachment. Without all three elements, even the most egregious abuse of power will go unchecked. The rise of hyperpartisanship in America and the normalization of impeachment have further reinforced the unyielding nature of the impeachment elements and have made it increasingly difficult to obtain broad public support for impeachment. This Section examines how political polarization and the normalization of impeachment have weakened the impeachment tool.

A. Political Polarization

Since the mid-1970s, we have seen a continuous rise in party polarization.²⁵¹ This hyperpartisanship has made it harder to find middle ground between the Republican and Democratic parties. Without the ability to reach a political consensus, the power of impeachment as an effective check on executive power continues to deteriorate. The rise of hyperpartisanship can be attributed, in part, to three movements: (1) the civil rights movement and Republican control of the South; (2) the culture wars of the 1980s; and (3) the growth of social media.

While the Republican party was initially the party pushing for the

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Weiyi Cai, Annie Daniel, Jon Huang, Jasmine C. Lee & Alicia Parlapiano, *Trump’s Second Impeachment: How the Senate Voted*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/13/us/politics/senate-impeachment-live-vote.html> [https://perma.cc/T9U7-6AGZ].

²⁵⁰ *See id.*

²⁵¹ Nolan McCarty, *What We Know and Don’t Know About Our Polarized Politics*, WASH. POST (Jan. 8, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/> [https://perma.cc/WK6N-ERZR].

passage of civil rights legislation during Reconstruction, the party became increasingly focused on fiscal rather than social policy.²⁵² Republicans became the party of big business in the industrialized North.²⁵³ At the same time, Southern Democrats shifted their focus to state legislative efforts to restrict Black citizens from voting.²⁵⁴ Following Reconstruction, Southern Democrats across the country passed legislation to disenfranchise Black voters.²⁵⁵ With a large portion of Black people unable to vote in the South, the Republican party began to shift its focus to white interests.²⁵⁶ Beginning in the early twentieth century, Southern Republicans began intentionally excluding Black citizens from leadership.²⁵⁷ As the party purged its Black leaders and became increasingly white-focused, more and more white Southern Democrats moved to the Republican party.²⁵⁸ Additionally, President Franklin Roosevelt's New Deal reforms in the 1930s resulted in "significant expansions of government [and] worker power," which Southern Democrats were unhappy about.²⁵⁹ This too led to the increasing expansion of the Republican Party in the white South. At the same time, Black voters were increasingly moving to the Democratic party.²⁶⁰ When Democratic President Lyndon B. Johnson signed the Civil Rights Act of 1964, the movement only intensified.²⁶¹ By the 1960s, the political landscape was transformed.²⁶² The Republican party largely became the party of the South.²⁶³

The culture war following the Civil Rights movement only solidified these changes and further polarized the parties. The culture war was fundamentally "a battle of ideas."²⁶⁴ The 1960s and the Civil Rights movement challenged traditional notions of race, gender, sexual orientation,

²⁵² *Republican Party*, HISTORY (Feb. 1, 2021), <https://www.history.com/topics/us-politics/republican-party> [https://perma.cc/DR66-FWRX].

²⁵³ *Id.*

²⁵⁴ Boris Heersink & Jeffery A. Jenkins, *The Republican Party Is White and Southern. How Did That Happen?*, WASH. POST (Feb. 7, 2020), <https://www.washingtonpost.com/politics/2020/02/07/republican-party-is-white-southern-how-did-that-happen/> [https://perma.cc/H5ER-55D8].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Andrew Prokop, *How Republicans Went from the Party of Lincoln to the Party of Trump, in 13 Maps*, VOX (Nov. 10, 2016), <https://www.vox.com/2016/7/20/12148750/republican-party-trump-lincoln> [https://perma.cc/7TW9-UWY8].

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *See id.*

²⁶⁴ *Culture Wars of the 1980s*, LUMEN LEARNING, <https://courses.lumenlearning.com/ushistory2ay/chapter/culture-wars-of-the-1980s-2/> [https://perma.cc/TZ86-ACYE].

and religion.²⁶⁵ It was a period of awakening in America that was subsequently met with a strong backlash.²⁶⁶ By the 1980s, America was specifically focused on gender and sexual politics.²⁶⁷ Women started to question their role in society; abortion was legalized and the pro-life and pro-choice divide grew larger; and the gay rights movement of the 1960s collided with traditional sexual norms.²⁶⁸ White evangelical Christians mobilized in support of traditional family values and found their home in the more conservative Republican Party.²⁶⁹ While, in the mid-twentieth century, there had been internal divisions in both the Republican and Democratic parties around certain social issues, specifically related to race and religion, these internal divisions began to dissipate in the latter half of the century.²⁷⁰ “Many issues that were once distinct from the party conflict dimension have been absorbed into it.”²⁷¹ This resulted in increased party polarization.

Finally, the growth of social media has contributed to hyperpartisanship. With the creation of social media, more and more people are getting their news exclusively through these platforms.²⁷² In 2016, 18% of United States adults said they often got their news from social media.²⁷³ By 2019, the percentage rose to 28%.²⁷⁴ Moreover, the average age of a Fox News viewer is now sixty-seven years old, and the average CNN viewer is nearly sixty-two.²⁷⁵ Those who get their news from social media are less likely to be informed about current events and more likely to be exposed to conspiracy theories.²⁷⁶ In fact, “[i]n 2013, for instance, a poll found that 13 percent of US voters believed that President Barack Obama

²⁶⁵ Elinor Burkett, *The Second Wave of Feminism*, BRITANNICA, <https://www.britannica.com/topic/feminism/The-second-wave-of-feminism> [<https://perma.cc/N5Q4-7MVD>].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Anna North, *How Abortion Became a Partisan Issue in America*, VOX (Apr. 10, 2019), <https://www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans> [<https://perma.cc/BX47-V7LS>]; *Gay Rights*, HISTORY (May 27, 2021), <https://www.history.com/topics/gay-rights/history-of-gay-rights> [<https://perma.cc/H3WK-EXGP>].

²⁶⁹ Prokop, *supra* note 259.

²⁷⁰ McCarty, *supra* note 251.

²⁷¹ *Id.*

²⁷² See Rani Molla, *Social Media Is Making a Bad Political Situation Worse*, VOX (Nov. 10, 2020, 1:10 PM), <https://www.vox.com/recode/21534345/polarization-election-social-media-filter-bubble> [<https://perma.cc/6RBF-4KAE>].

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 65 (2017).

²⁷⁶ Molla, *supra* note 272.

was *literally* the Antichrist.”²⁷⁷ Additionally, a 2017 Pew Research Center study found that “[55] percent of Democrats and 49 percent of Republicans said that the other party makes them feel ‘afraid.’”²⁷⁸ “Those numbers jump to 70 percent of Democrats and 62 percent of Republicans if we consider ‘highly engaged’ citizens.”²⁷⁹ Social media platforms are calibrated to feed users content that align with their perceptions, creating “ideological echo chambers.”²⁸⁰ While paper and television news outlets have long been ideologically skewed, extreme partisanship has only intensified, with paper and television news outlets increasingly highlighting “content with the biggest emotional punch.”²⁸¹ Many people choose to read and listen to news content that aligns exclusively with their beliefs even if the information is false, which causes them to become further entrenched in their political ideology.²⁸²

Hyperpartisanship makes it harder to reach political consensus. “[C]ongressional voting patterns are more polarized than at any time since the Civil War and Reconstruction era.”²⁸³ Moreover, the country has become geographically more polarized. In 2016, 60% of Americans lived in “landslide” counties, where Republicans or Democrats won by at least twenty points.²⁸⁴ In contrast, “in 1992 only 38 percent of Americans lived in a county that the Republican or Democratic presidential candidate carried by 20 points or more.”²⁸⁵ Given the political landscape as it stands today, the likelihood of Congress agreeing on the use of impeachment is low. This likelihood is made even lower by the fact that, since the 1990s, impeachment has become normalized in our politics.

B. The Normalization of Impeachment

Prior to the Nixon presidency, few presidents had impeachment resolutions brought in the House. In fact, before Nixon, “only five of [thirty-six] U.S. presidents had an impeachment resolution brought against them.”²⁸⁶ After President Nixon, five of the next eight presidents had

²⁷⁷ TRIBE & MATZ, *supra* note 46, at 203.

²⁷⁸ *Id.* at 201.

²⁷⁹ *Id.*

²⁸⁰ Nicholas DiFonzo, Opinion, *The Echo-Chamber Effect*, N.Y. TIMES (Apr. 22, 2011, 3:56 PM), <https://www.nytimes.com/roomfordebate/2011/04/21/barack-obama-and-the-psychology-of-the-birther-myth/the-echo-chamber-effect> [https://perma.cc/GA4L-PKRR].

²⁸¹ Christopher Mims, *Why Social Media Is So Good at Polarizing Us*, WALL ST. J. (Oct. 19, 2020, 7:00 AM), <https://www.wsj.com/articles/why-social-media-is-so-good-at-polarizing-us-11603105204> [https://perma.cc/S696-UY9V].

²⁸² See DiFonzo, *supra* note 280.

²⁸³ Gaughan, *supra* note 275, at 77.

²⁸⁴ *Id.* at 80.

²⁸⁵ *Id.*

²⁸⁶ Alayna Treene & Margaret Talev, *The Normalization of Impeachment*, AXIOS (Dec. 13, 2019), <https://www.axios.com/impeachment-normalization-trump-68e01523-a9d1-4da4-bc39-793062f020e5.html> [https://perma.cc/YBZ5-C3XT].

impeachment resolutions brought against them in the House.²⁸⁷ Now, it is almost expected that the president will face calls for impeachment during their term.²⁸⁸ This has also made impeachment more political, further deepening the partisan divide.

Perhaps no impeachment was more political than the impeachment of President Clinton, who was charged with perjury and obstructing justice.²⁸⁹ President Clinton had an affair with one of his White House aides, Monica Lewinsky, beginning in November 1995.²⁹⁰ When the story broke, President Clinton denied the allegations during his testimony in a separate and unrelated sexual harassment case involving Paula Jones.²⁹¹ But later President Clinton testified that he did in fact have an affair with Ms. Lewinsky.²⁹² On December 11, 1998, the case was made to impeach President Clinton for lying under oath and obstructing justice.²⁹³ And “[o]n December 19, the House impeached Clinton.”²⁹⁴

There is no question that perjury is wrong and, in certain contexts, could constitute an impeachable offense.²⁹⁵ In the case of President Clinton, however, the perjury was not related to his executive duties, and it certainly did not result in a constitutional crisis.²⁹⁶ There was no sign that President Clinton was unable to effectively govern the country, and “ordinary checks and balances seemed fully capable of addressing any further objections to how Clinton conducted himself while in office.”²⁹⁷

Although the impeachment failed, it marked the beginning of its normalization. Since the 1990s, calls for impeachment have become standard political rhetoric. During President Bush’s first term, his popularity slowly declined due to the Iraq war, his mishandling of Hurricane Katrina, and his illegal surveillance of the public.²⁹⁸ By December 2005, 32% of

²⁸⁷ *Id.*

²⁸⁸ During Obama’s presidency, the House Judiciary Committee held a hearing to discuss impeachment. *See id.* And when asked whether Congress would consider impeaching President Biden, Senator Ted Cruz said, “Yeah, I do think there’s a chance of that, *whether it’s justified or not.*” Rebekah Allen, *Ted Cruz Says Joe Biden Could Be Impeached if Republicans Take U.S. House*, TEX. STAR TRIB. (Jan. 4, 2022), <https://www.texastribune.org/2022/01/04/ted-cruz-joe-biden-impeachment/> [<https://perma.cc/H5UL-AYDW>] (emphasis added).

²⁸⁹ *President Clinton Impeached*, HISTORY: THIS DAY IN HISTORY, <https://www.history.com/this-day-in-history/president-clinton-impeached> [<https://perma.cc/ZVX3-UZLJ>].

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ TRIBE & MATZ, *supra* note 46, at 21.

²⁹⁶ Similar to the duel between Burr and Hamilton, perjury was illegal, but it did not mean Clinton was unable to fulfil his role as president. *See supra* Section III.C.

²⁹⁷ TRIBE & MATZ, *supra* note 46, at 21.

²⁹⁸ *Id.* at 178.

Americans agreed that President Bush should be impeached.²⁹⁹ Those numbers continued to rise, and in 2007, 36% of Americans supported impeachment.³⁰⁰ The call for impeachment was politically skewed: only 9% of Republicans supported impeaching President Bush, while 58% of Democrats were in favor.³⁰¹ Similarly, members of Congress called for Barack Obama's impeachment during his second term.³⁰² Prominent right-wing figures echoed this call.³⁰³ In July 2014, 35% of Americans favored impeaching President Obama.³⁰⁴ The call for impeachment was also partisan; 57–68% of Republicans supported impeaching President Obama, compared to 8–13% of Democrats.³⁰⁵ Impeachment rhetoric reached its peak during the 2016 election. Before President Donald Trump was even inaugurated, people predicted his eventual impeachment.³⁰⁶ Prior to the election, Republican lawmakers discussed impeaching Hillary Clinton if she were to be elected.³⁰⁷ Just two weeks into Trump's presidency, one-third of Americans supported impeachment.³⁰⁸

While impeachment has never been an especially effective tool, it has proven useful when necessary. President Nixon likely would not have resigned if Congress had not called for his impeachment.³⁰⁹ Furthermore, even failed calls for impeachment had the effect of tempering presidential action. After the failed impeachment of President Johnson, he accomplished very little during the rest of his term.³¹⁰ Woodrow Wilson referred to the 1870s as a “Congressional Government,” due to how weak the presidency appeared to be following impeachment.³¹¹ Whatever power the impeachment tool had as a check on the executive power was tested in the 1990s and onward. As our country has become more polarized and calls for impeachment have become the norm, the effectiveness of impeachment has been put into question. January 6 proved to be the ultimate test.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 179.

³⁰¹ *Id.*

³⁰² *Id.* at 183.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *See id.* at 186.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 187.

³⁰⁹ *See supra* Section III.D.

³¹⁰ *See Andrew Johnson*, HISTORY, <https://www.history.com/topics/us-presidents/andrew-johnson> [<https://perma.cc/3QGU-CPQL>].

³¹¹ Elizabeth Varon, *Andrew Johnson's Impeachment and the Legacy of the Civil War*, U. OF VA.: MILLER CTR., <https://millercenter.org/the-presidency/impeachment/andrew-johnsons-impeachment-and-legacy-civil-war-lecture> [<https://perma.cc/8NGL-RJP7>].

VI. DANGEROUS PRECEDENT

A. *Other Checks or Fixes*

Before January 6, 2021, there was unspoken hope that the worst offenses would be enough to unite the country around impeachment. If not, then how could a truly dangerous president be stopped? The aftermath of January 6 proved many wrong. Without a fully divided government, broad public support, and a threat to constitutional order, impeachment will be ineffective. With our country's current polarization, satisfying all three elements seems unlikely. Some have argued that making the voting process anonymous would prevent partisan politics from interfering as extensively in the impeachment process;³¹² however, as explained below, anonymous voting would be difficult to achieve and would likely still invite partisan politics. Others have urged Congress to gravitate away from the impeachment tool, arguing that other mechanisms should be used to check the executive branch.³¹³ While there are several other ways the executive power could be checked, many of the most effective alternatives are rather narrow in scope. Ultimately, these solutions fail to address the root of the problem. While it is the executive power that needs to be controlled, the failure to do so is ultimately a failure of Congress. The solution therefore may be much more complicated. As constitutional law professor Frank O. Bowman III stated, "Impeachment is not broken. Congress is broken."³¹⁴

1. *Make Voting Anonymous*

One way to potentially temper the effect of hyperpartisanship on impeachment would be to make the voting process for both articles of impeachment and the impeachment trial anonymous. In theory, it sounds like a reasonable idea. Then, those Representatives or Senators who would otherwise feel pressured by their party to vote a particular way could vote without such pressure. In President Trump's second impeachment, the idea of a secret ballot gained traction.³¹⁵

³¹² See Robert Alexander, *The Case for Letting Senators Vote Secretly on Trump's Fate*, CNN (Dec. 31, 2019, 12:14 PM), <https://www.cnn.com/2019/12/29/opinions/secret-ballot-trump-senate-impeachment-trial-alexander/index.html> [https://perma.cc/VC6S-YPAD].

³¹³ See Michael S. Rosenwald, *There's an Alternative to Impeachment or 25th Amendment for Trump, Historians Say*, WASH. POST (Jan. 12, 2021, 9:20 PM), <https://www.washingtonpost.com/history/2021/01/11/14th-amendment-trump-insurrection-impeachment/> [https://perma.cc/NH6D-97J9].

³¹⁴ *How to Fix Impeachment*, POLITICO (Dec. 6, 2019, 5:08 AM), <https://www.politico.com/news/magazine/2019/12/06/impeachment-trump-constitution-expert-analysis-076433> [https://perma.cc/NQA3-W4LU].

³¹⁵ See Douglas W. Kmiec, *Donald Trump Should be Convicted Unanimously by Secret Ballot*, THE HILL (Feb. 8, 2021, 9:00AM), <https://thehill.com/opinion/white-house/537318-donald-trump-should-be-convicted-unanimously-by-secret-ballot> [https://perma.cc/GN6N-8G7J].

A secret ballot, however, presents complications. First, there is the question of whether a secret ballot would be constitutional. Article 1, Section five provides that “the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”³¹⁶ That means that if fewer than one-fifth of the House and Senate objected to a secret ballot then anonymous voting would likely be constitutional.³¹⁷

Second, it would require significant bipartisanship. Those Representatives and Senators who would feel pressured during the impeachment vote would likely feel the same pressure to object to the secret ballot. However, some argue that the Article 1, section 5 provision “is subordinate to the specific constitutional provisions on impeachment,”³¹⁸ which hold that the Senate has the “sole power to try impeachments.”³¹⁹ In that case, the Senate could call for a secret ballot with a simple majority.³²⁰ If the Senate were to create a secret ballot as part of its impeachment power, the Supreme Court would likely not intervene.³²¹

Third, even if the House and Senate could get support for the secret ballot, there is nothing stopping Representatives and Senators from sharing their vote with the public. In all likelihood, those who voted in-line with their party would be the most outspoken about their vote.³²² By process of elimination, it would be easy for the public to narrow-down who did not vote along party lines.

2. *Twenty-Fifth Amendment*

When impeachment seems unfeasible, another possible “check” on executive power is the Twenty-Fifth Amendment.³²³ The Twenty-Fifth Amendment was drafted shortly after President John F. Kennedy’s death in 1963.³²⁴ The Constitution did not lay out procedures for replacing a

³¹⁶ Philip Bump, *Why a Secret Impeachment Vote Isn’t Going to Happen*, WASH. POST (Jan. 26, 2021, 3:51 PM), <https://www.washingtonpost.com/politics/2021/01/26/why-secret-impeachment-vote-isnt-going-to-happen/> [https://perma.cc/S652-EQJH] (quoting U.S. CONST. art. 1, § 5).

³¹⁷ *See id.*

³¹⁸ Kmiec, *supra* note 315.

³¹⁹ U.S. CONST. art. 1, § 2, cl. 6.

³²⁰ Kmiec, *supra* note 315.

³²¹ *See Nixon v. U.S.*, 506 U.S. 224, 225 (1993) (“[T]he commonsense and dictionary meaning of the word “sole” indicate that this [impeachment] authority is reposed in the Senate alone . . . and the contemporary commentary supports a reading of the constitutional language as deliberately placing the impeachment power in the Legislature, with no judicial involvement, even for the limited purpose of judicial review.”).

³²² U.S. CONST. art. 1, § 5, cl. 3.

³²³ *See* U.S. CONST. amend. XXV, § 1.

³²⁴ *How a National Tragedy Led to the 25th Amendment*, NAT’L CONST. CTR. (Feb. 10, 2021), <https://constitutioncenter.org/blog/how-jfks-assassination-led-to-a-constitutional-amendment-2> [https://perma.cc/9GUZ-HXZ4].

president or vice president in the event that they died, resigned, or were otherwise unable to fulfill their duties.³²⁵ Moreover, there was some confusion as to who would replace Lyndon B. Johnson as vice president after John F. Kennedy's death.³²⁶ The Twenty-Fifth Amendment was "primarily designed to clarify the presidential order of succession."³²⁷ Section 1 states that the vice president shall become president if the president dies, resigns, or is removed from office.³²⁸ Section 2 then provides that when there is a vacancy in the office of the vice president, "the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress."³²⁹ Section 3 allows the vice president to serve as acting president where the president provides a "written declaration that he is unable to discharge the powers and duties of his office."³³⁰ None of these sections are exactly "checks" on executive power as they require unexpected circumstances, such as death, or they require direct action from the president, in the form of a resignation or a written declaration.

It is Section 4 that has been discussed as a potential check.³³¹ Section 4 of the Twenty-Fifth Amendment provides a "multistep process" for the majority of cabinet members along with the vice president to declare the president to be "unable to discharge the powers and duties of his office."³³² The president could immediately send a response, stating that he is, in fact, able to perform his duties.³³³ The vice president and majority of the cabinet would then have to send another declaration to the congressional leaders reiterating their concerns.³³⁴ Within twenty-one days, both houses of Congress would have to vote on whether the president should be permanently stripped of his position.³³⁵ If the votes in both houses fell short of the two-thirds requirement, then the president would resume his role.³³⁶

The requirements of Section 4 are in many ways more onerous than that of impeachment. Impeachment requires only a majority of the House to approve an article of impeachment, whereas Section 4 requires a two-

³²⁵ *Id.*

³²⁶ Michael D. Shear, *What Is the 25th Amendment, and How Does It Work?*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/07/us/politics/what-is-the-25th-amendment-and-how-does-it-work.html> [<https://perma.cc/55Z5-7ZBS>].

³²⁷ *Id.*

³²⁸ U.S. CONST. amend. XXV, § 1.

³²⁹ *Id.* § 2.

³³⁰ *Id.* § 3.

³³¹ *See id.* § 4.

³³² Shear, *supra* note 326 (quoting U.S. CONST. amend. XXV, § 4).

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ U.S. CONST. amend. XXV, § 4.

thirds vote from both houses of Congress.³³⁷ Additionally, impeachment does not require any action on behalf of the vice president or cabinet members.³³⁸ Even putting aside the strict requirements of Section 4, it is unclear whether the Twenty-Fifth Amendment could be used for the same conduct as impeachment. The amendment has been “invoked for short periods of time when Presidents Ronald Reagan and George W. Bush underwent medical procedures.”³³⁹ In both of those instances, the vice presidents only held power as acting president for a few hours.³⁴⁰ Additionally, the amendment was used when Vice President Spiro T. Agnew resigned in 1973 and again when President Richard Nixon resigned the following year.³⁴¹

Section 4, however, has never been invoked.³⁴² Following the January 6 insurrection, members of President Trump’s cabinet allegedly had conversations about whether the amendment should be invoked.³⁴³ Senate Minority Leader Chuck Schumer and House Speaker Nancy Pelosi both released statements, calling on Vice President Pence and cabinet to invoke the amendment.³⁴⁴ Even Republican Representative Adam Kinzinger echoed Schumer and Pelosi’s call, tweeting, “It’s with a heavy heart I am calling for the sake of our Democracy that the Twenty-Fifth Amendment be invoked.”³⁴⁵ The amendment does not define what it means for the president to be “unable to discharge the powers and duties of his office.”³⁴⁶ While there may have been a case for invoking the amendment following

³³⁷ Compare *id.* (“Congress is required to assemble[] [and] determine[] by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office.”), with U.S. CONST. art. I, § 2 (“The House of Representatives . . . shall have the sole Power of Impeachment.”), and U.S. CONST. art. I, § 3 (“The Senate shall have the sole Power to try all impeachments . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

³³⁸ See U.S. CONST. art. I §§ 2-3.

³³⁹ Caitlin O’Kane, *What Is the 25th Amendment, and How Could a President Be Removed from Office?*, CBS NEWS (Jan. 7, 2021, 12:43 PM), <https://www.cbsnews.com/news/what-is-25th-amendment-constitution/> [https://perma.cc/CZA5-64PH].

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Jade Scipioni, *25th Amendment: What It Is and How It Works, According to a Constitutional Law Expert*, CNBC (Jan. 7, 2021, 3:27 PM), <https://www.cnbc.com/2021/01/07/what-is-the-25th-amendment-how-it-works.html> [https://perma.cc/RX3Y-FD2J].

³⁴³ O’Kane, *supra* note 339.

³⁴⁴ Miles Parks, *What the 25th Amendment Says about Removing a Sitting President*, NPR (Jan. 7, 2021, 2:15 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/919400859/what-happens-if-the-president-is-incapacitated-the-25th-amendment-charts-a-course> [https://perma.cc/78PY-6Z4R].

³⁴⁵ Adam Kinzinger (@RepKinzinger), TWITTER (Jan. 7, 2021, 7:46 AM), <https://twitter.com/RepKinzinger/status/1347207878801846276> [https://perma.cc/TGQ9-96AK].

³⁴⁶ U.S. CONST. amend. XXV, § 4.

the January 6 insurrection, it ultimately was not invoked. Given the requirements for invoking the amendment, it seems unlikely that the amendment would be a reasonable substitute for the impeachment power, especially considering the two-thirds voting requirement in Congress and the fact that the vice president and cabinet members will usually be members of the president's political party.

3. *Section 3 of the Fourteenth Amendment*

A more realistic substitute for impeachment, but with a much narrower scope, is Section 3 of the Fourteenth Amendment, which provides the following:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.³⁴⁷

The Fourteenth Amendment was ratified after the Civil War, and Section 3 was designed to prevent federal officers, military officials, and state officials who served in the Confederacy from serving in any future office within the federal or state government.³⁴⁸ The Section was only enforced for a few years until 1872 when “Congress granted an amnesty to most of the men who were barred from office.”³⁴⁹ Since then, the Section has not received much attention.

The January 6 insurrection brought the provisions back to life. Reporters and politicians began to discuss whether Section 3 could apply to President Trump and other individuals who played a role in the January 6 insurrection.³⁵⁰ Section 3 was designed to apply to former officers and thus does not invoke the same constitutional questions as the impeachment of

³⁴⁷ U.S. CONST. amend. XIV, § 3.

³⁴⁸ Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 6, 2021, 1:43 PM), <https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6> [https://perma.cc/WV6N6-L26V].

³⁴⁹ *Id.*

³⁵⁰ James Wagstaffe, *Time to Reconsider the 14th Amendment for Trump's Role in the Insurrection*, JUST SEC. (Feb. 11, 2021), <https://www.justsecurity.org/74657/time-to-reconsider-the-14th-amendment-for-trumps-role-in-the-insurrection/> [https://perma.cc/6A5S-PMQZ].

President Donald Trump.³⁵¹ Moreover, Section 3 requires only a majority of each house of Congress to find that Section 3 is satisfied.³⁵²

The downside of Section 3 is that it only covers a limited amount of corrupt conduct. Unless the president engages in or encourages an insurrection or rebellion, this Section will not be an effective check on executive power. In the exceptional case of President Donald Trump, however, this Section could, and still can, apply.

B. What It Means for Separation of Powers

Overall, it seems unlikely that either reforming impeachment or utilizing other constitutional provisions will be an effective way to temper the growing power of the executive branch. Ultimately, the problem is much deeper rooted. Congress's failure to hold President Trump accountable speaks more to the state of Congress itself than it does the impeachment process. A recent report by the Association of Former Members of Congress found numerous endemic issues within Congress: "[T]he lack of any real across-the-aisle relationships, a schedule that limits opportunities for interaction, too much power concentrated in leadership, constant fundraising demands, discouragement of bipartisanship, [and] the negative influence of round-the-clock media."³⁵³ Moreover, the shift towards working remotely since the beginning of the pandemic has further intensified issues and made bipartisanship more difficult.³⁵⁴

The normalization of impeachment has also intensified since January 2021. On January 21, one day after President Biden's inauguration, Representative Marjorie Greene introduced a resolution for the impeachment of Biden for abuse of power and other high crimes and misdemeanors.³⁵⁵ Then in August, Senator Lindsey Graham called for President Biden's impeachment over the country's withdrawal from Afghanistan.³⁵⁶ The following month, Representative Lauren Boebert introduced articles of impeachment against both President Biden and Vice President Kamala Harris, alleging "collusion with the Taliban."³⁵⁷ While

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ Carl Hulse, *Congress Was Already Broken. The Coronavirus Could Make It Worse.*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2020/07/25/us/congress-broken-partisanship-coronavirus.html> [<https://perma.cc/A9R4-U8KZ>].

³⁵⁴ *Id.*

³⁵⁵ H.R. Res. 57, 117th Congress (2021).

³⁵⁶ Martin Pengelly, *Lindsey Graham Repeats Impeachment Call for Former Friend Joe Biden*, THE GUARDIAN (Aug. 29, 2021), <https://www.theguardian.com/us-news/2021/aug/29/lindsey-graham-impeachment-call-joe-biden-afghanistan> [<https://perma.cc/7C98-T3ZD>].

³⁵⁷ Press Release, Representative Lauren Boebert (Sept. 24, 2021), <https://boebert.house.gov/media/press-releases/rep-lauren-boebert-introduces-articles-impeachment-against-joe-biden-and> [<https://perma.cc/5YRL-3HLM>].

none of these calls for impeachment have been taken seriously, that is part of the problem. Impeachment has been normalized and thus the threat of impeachment is a feeble one. It also distracts Congress from other issues and further polarizes the parties. As Congress fights amongst each other, the power of the executive branch grows.

VII. CONCLUSION

While no president has been impeached and convicted in our country's history, impeachment has been used in the past to temper presidential power. As our country has become more polarized, the usefulness of impeachment as both a deterrent and as a check on executive authority has been put into question. This is, in large part, due to the failure of Congress to unite around impeachment. Because Congress is our most democratic institution, issues within Congress generally speak more broadly to issues within our country. Currently, our country is too polarized to reach a political consensus, even after an armed insurrection. Moreover, impeachment has been weakened by its continued exploitation by both parties in Congress. Without an effective impeachment tool, Congress will have to rethink its checks on the executive branch.