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UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Chapter 11

The US impeachment process: fit for purpose in a hyper-partisan era?

Clodagh Harrington and Alex Waddan

11.1 Introduction

This chapter considers the possibility that the rarely used constitutional remedy for 'treason, bribery or other high crimes and misdemeanours' has been weaponised to such an extent that the integrity of the process is significantly undermined. In the context of prior use and misuse, the route to contemporary challenges will be explored, with a focus on how the practice has been over and under-utilised in the modern era, as the politics of the times has dictated. From the drama and constitutional crisis of the Andrew Johnson presidency to the calls to impeach President Joe Biden, observations are drawn regarding this imperfect but durable emergency measure.[1]

11.2 The US impeachment process: fit for purpose in a hyper-partisan era?

'Much talked about but rarely done' is the adage often used to describe the US impeachment process.[2] Or, it was before this method of final resort was employed against President Trump in 2019 and again in 2021. If the prime process of presidential impeachment is to protect the constitutional order, then ordinary citizens should, ideally, be pleased if issues of treason, bribery or other 'high crimes or misdemeanors' are a rarity.[3] As it is, the process has never fully played out inasmuch as a president has never been removed from office as a consequence of impeachment.

The exact process for impeachment provoked considerable debate at the Philadelphia constitutional convention, but not a fully transparent outcome. There was not, in fact, unanimity on the need for any process at all with some framers arguing that elections would provide the venue for dismissing an unsatisfactory chief executive. On the other hand, Eldridge Gerry from Massachusetts, who became Vice President to James Madison and more notoriously gave his name to dubious map making, maintained that 'A good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them.'[4] A primary concern was to protect against potential presidential bribery and treason and once it was established that such crimes needed a means by which the legislature could apply sanction against the executive, the list of potential offences was broadened to include 'other high Crimes and Misdemeanors'.[5] This phrase came from British law and concerned actions by public officials deemed to be against the state. Yet, having settled on that terminology there was little further effort to define exactly what it meant at the convention and little clarification has come since.

Hence, in truth impeachment is a quasi-legal process and whether it is applied against a president is inevitably political and not a strict assessment of whether a president broke any specific law. As Alexander Hamilton reminds us in the *Federalist Papers* (65) the prosecution of the impeached will invariably agitate 'the passions of the whole community.'[6] Clearly, parallels can be drawn from here with the twenty-first century, as contemporary media technology notwithstanding, some themes are constant.

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[1] US Constitution, Article II, Section 4, Historical Background on Impeachable Offenses, https://constitution.congress.gov/browse/essay/artII-S4-4-2/ALDE_00000699/#:~:text=Article%20II%2C%20Section%204%3A,other%20high%20Crimes%20and%20Misdemeanors accessed 23 February 2023.

[2] Matthew Wills, 'Impeaching History,' Jstor Daily, 19 January 2017, https://daily.jstor.org/impeaching-history/ accessed 23 February 2023.

[3] Frank Bowman, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump*, (Cambridge University Press 2019) 193.

[4] US House of Representatives, (n.d.) Impeachment Origins and Developments: From the Constitution to the Modern House (undated) https://history.house.gov/Institution/Origins-Development/Impeachment/ accessed 22 February 2023

[5] ibid.

[6] Alexander Hamilton, *Federalist Paper 65*, 7 March 1788, https://avalon.law.yale.edu/18th_century/fed65.asp accessed 23 February 2023.

In 1788, Hamilton warned that there will always be 'the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.'[7] Famously, of course, political parties were not mentioned in the Constitution. Even if this was not the sense of parties that Hamilton was referring to, this oversight, or naivety, on the part of the framers was particularly unfortunate with regard the future efficacy of the House impeachment and Senate trial process given the way partisan 'passions', rather than considered deliberation, have organized the thinking of legislators when faced with the prospect of removing a president.

The first impeachment and trial of President Donald Trump clearly broke very much along party lines, but Senator Mitt Romney, a Republican from Utah, in February 2020 became the first senator to vote to convict a president of their own party on an article of impeachment.[8] Hence it took over 230 years for a Senator of the President's party to cross party lines in a vote. This data point is perhaps misleading inasmuch as Nixon's resignation came after Republican Senator Barry Goldwater from Arizona led a delegation to the White House to inform the president that there would be at most 16 votes to acquit as most GOP senators had now turned against their putative party figurehead.[9] Subsequent evidence, however, suggests that this example from the 1970s remains the exception.

Hence, it may be that the challenges facing impeachment as a viable process in the twenty-first century are more magnified than new. In his opening arguments at President Trump's first impeachment trial, House Intelligence Chairman Adam Schiff quoted from a letter written by Alexander Hamilton to George Washington. Literary style aside, the content was as relevant in 2021 as it was in 1792. Schiff reiterated the grave concerns about a leader who may subvert the interests of the nation in pursuit of his own interests, this time in relation to a former reality television star and businessman. When quoting Hamilton again at the end of his opening speech, Schiff raised the former's hope that the Senate would turn out to be an institution capable of acting beyond the constraints of faction:

> Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in this own situation, to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the Representatives of the people, his accuser?[10]

It seems unlikely that Schiff sincerely expected these words to persuade Republican Senators to vote to convict President Trump. In truth, while it is tempting to compare all scandals to Watergate, and especially the *dénouement* of that episode, it is often an unhelpful comparison. First, it took place at a time of particular tumult, with trust in authority undermined by the unravelling of the war in Vietnam. Second, Goldwater's intervention and its role in forcing Nixon's resignation has accorded the investigation into what happened and the turn against the sitting president a somewhat undeserved *imprimatur* of bipartisanship. Most congressional Republicans defended Nixon until the evidence became irrefutable. There was a mix of reasons for this. Some believed Nixon and wanted to protect him and his family. Others were simply following their partisan inclinations, while others were more sceptical of Nixon and his behaviour but 'supported Nixon because they feared alienating Nixon loyalists'.[11] These may not have been in the majority amongst Republican voters, but they were a key part of the party's activist base.

These last points about why Republicans stuck with Nixon are perhaps the ones that should be carried forward from Watergate to help understand impeachment fifty years on. If partisanship kept many Republicans in line through 1973 and early 1974, the stakes of party loyalty were higher half a century on as the effects of increased partisan polarization played out. Moreover, the importance of the loyalist base

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[7] ibid.
[8] Mitt Romney transcript, *PBS*, 5 February 2020, https://www.pbs.org/newshour/show/romney-provokes-republican-wrath-by-voting-to-convict-trump, accessed 22 February 2023.
[9] Martin Waldron, 'Goldwater Expects Only a "Hard Core" Of Senate Votes for Acquitting Nixon', *New York Times*, 8 August 1974, 22.
[10] Adam Schiff transcript, *Politico*, 22 January 2020, https://www.politico.com/news/2020/01/22/adam-schiff-opening-argument-trump-impeachment-trial-102202 accessed 22 February 2023.
[11] Mark Nevin, 'Nixon Loyalists, Barry Goldwater, and Republican Support for President Nixon during Watergate' (2017) 29(3) *Journal of Policy History* 203.

had also grown as had the capacity of political actors to speak directly to that base: And power made little effort to speak truth to its base in that conversation. In the tumultuous frenzy that was the Trump presidential period, citizens could choose their own truth, opting for 'alternative facts' if the actual reality did not suit.[12] That phrase, infamously used by presidential adviser Kellyanne Conway when quizzed on *Meet the Press* about the size of the inaugural crowd in January 2017, came to be a meme that critics used to mock the Trump administrations many misleading claims: Yet, Conway's follow up when asked about 'falsehoods' being spread by the White House press secretary that 'Your job is not to call things ridiculous that are said by our press secretary and our president. That's not your job' is perhaps more revealing about the mindset of Trump and his supporters.[13] It is perhaps this epistemological crisis that has contributed most significantly to undermining the integrity of the impeachment procedure. Supporters of President Trump were not only convinced that he did no wrong but more significantly that the accusations of wrongdoing were inherently illegitimate.[14]

As it was, the earliest impeachment efforts against Trump were unlikely to gain momentum, despite efforts by political opponents shocked at Trump's handling of the far-right marches in Charlottesville and his opinions on NFL footballers taking the knee in solidarity with the Black Lives Matter movement. As early as May 2017, Congressman Al Green (D-TX) had accused the president of 'obstruction of justice.'[15] Not for the last time, the Jacksonian precedent was echoed as Trump was reproached for having 'sown discord among the people of the United States.' When president Trump fired FBI Director James Comey who was overseeing an investigation into suspected Russian interference in the 2016 election, Green was quick to act, but he lacked the necessary support from the Republican controlled House. The Texan made repeated efforts to initiate impeachment proceedings, but sufficient Congressional backing was not forthcoming, including from the Democrat side of the aisle where Nancy Pelosi and other high profile party leaders urged caution.[16]

However tempting or justifiable it seemed to crank the constitutional reprimand procedures into gear, it was clear that doing so in the 115th Congress was never going to bring dividends. Moreover, the Democrat party leadership were doubtless mindful of how efforts would be perceived. The business of government should, and did, remain the priority. As a practical matter the chances of impeachment increased when Democrats took control of the House in January 2019. The animus many activist Democrats felt towards the administration was notoriously expressed by newly elected House member Rashida Tlaib of Michigan on the evening after she had been sworn in: 'we're gonna go in there and we're gonna impeach the motherfucker!' Tlaib offered seven reasons for invoking the spectre of impeachment including paying 'hush money' in 2016 to influence the election, 'abuse of the pardon power' and 'violating the emoluments clause'.[17] While this rhetoric played well with the Democratic base it was unlikely to lead to action and it was easy for Republicans to focus on the intemperate language and the notion that the President's opponents had lost their sense of perspective.

It would take a more serious and tangible matter, that of soliciting foreign interference in a presidential election, for the heavy cannon of impeachment to be wheeled out. In September 2019, the House opened

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[12] Alexandra Jaffe, 'Kellyanne Conway: White House Spokesman Gave "Alternative Facts" on Inauguration Crowd' *NBC*, 22 January 2017, https://www.nbcnews.com/storyline/meet-the-press-70-years/wh-spokesman-gave-alternative-facts-inauguration-crowd-n710466 accessed 22 February 2023.

[13] Eric Bradner, 'Conway: Trump White House Offered "Alternative Facts" on Crowd Size', *CNN*, 23 January 2017, https://edition.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html accessed 22 February 2023.

[14] See for example Richard S Conley (ed), *Donald Trump and American Populism* (Edinburgh University Press 2022).

[15] Representative Green Introduction of President Trump Impeachment Articles, *C-Span*, 6 December 2017, https://www.c-span.org/video/?438072-3/representative-green-introduction-president-trump-impeachment-articles&event=438072&playEventhttps://www.congress.gov/bill/115th-congress/house-resolution/646 accessed 22 February 2023

[16] Linda McPherson, 'House Will Have to Vote on Impeaching Trump, Regardless of Pelosi's Opposition', *Rollcall.com*, 12 March 2019, https://rollcall.com/2019/03/12/house-will-have-to-vote-on-impeaching-trump-regardless-of-pelosis-opposition/ accessed 22 February 2023.

[17] Aaron Rupar, 'New Congress member Creates Stir by Saying of Trump: "We're Going to Impeach This Motherfucker!"' *Vox*, 4 January 2019, https://www.vox.com/policy-and-politics/2019/1/4/18168157/rashida-tlaib-trump-impeachment-motherfucker accessed 22 February 2023.

an impeachment inquiry against Donald Trump and this time it gained traction.[18] Abuse of power and obstruction of power were grave accusations and for a short period, the Trump presidency looked to be in real jeopardy. Inevitable comparisons with Richard Nixon were drawn, and whilst there were some parallels with Watergate, the protagonists, their situations and responses were significantly different.

Post-Watergate legislation and the law of unintended consequence

Impeachment proceedings against Richard Nixon began on October 30 1973 in response to what was arguably the crescendo moment of the Watergate scandal. Ten days earlier, the Saturday Night Massacre took place, when Special Prosecutor Archibald Cox was fired on the orders of the president. It is not the remit of this chapter to re-litigate the events of Watergate but it is worth noting the long term consequences that a moment of such extreme instability brought.[19] These resonate in particular when we consider the circumstances of the second Trump impeachment and the threat to democracy that accompanied his actions and those of his supporters.

The recollection that 'a lot of things happened that made it feel like a siege' may have been uttered by anyone facing the storming of the Capitol on January 6 2021 by raging Trump supporters. In fact, this was a comment from Watergate era outgoing deputy attorney general William Ruckleshaus. After the firing of Special Prosecutor Archibald Cox, his press secretary Jim Doyle tried to leave his office with a copy of the Declaration of Independence under his arm. 'Just stamp it void and let me take it home' he told an FBI agent.[20] Doyle's response was far from unique. Another Cox staffer, James Vorenberg, agreed that 'there was a real sense [that]…there was a sort of danger of a fascist takeover.'[21]

Historian Theodore White later wrote that the explosion of public sentiment after the Saturday Night firing of Cox was as 'fierce and instantaneous as the day Pearl Harbour had been attacked or the day that JFK had been assassinated.'[22] This offers a clear reminder to us in the twenty-first century that in this pre-social media age, 'alternative facts' were less available to the public. How people chose to respond was entirely up to them, and conspiracy theories have a long tradition in American political history, but with a limited number of news outlets with a wide reach largely providing one narrative the message was less muddied than in an age where the mainstream media's gatekeeper role has been lost.

Before Archibald Cox's replacement was appointed, Watergate events were unfolding parallel to the Special Prosecutor investigation. The House Judiciary Committee granted Chairman Peter Rodino (D-NJ) broad subpoena powers in its upcoming investigation, armed with a $1 million dollar budget and a staff 206 strong, among then law graduate Hillary Rodham.[23]

Unsurprisingly, there was a certain amount of tension between the Watergate impeachment committee and the Special Prosecutor's office with regard to the exchange of information. Their agendas differed. The committee's priority was to acquire impeachment information, whilst the Special Prosecutor's was to ensure secrecy to protect criminal cases, hence the inevitable friction.[24]

Almost a half century later, the House Committee investigating allegations of Russian meddling in a US presidential election again found itself at odds with the Special Prosecutor. This time, a respected Republican former FBI Director did not give the committee what it had hoped for when he was invited to address them in July 2019. A smoking gun or even a soundbite would have caused Democrats to rejoice, but it was not to be. The *Mueller Report* investigated allegations of conspiracy or coordination

[18] Domenico Montenaro and Susan Davis, 'Pelosi Announces Formal Impeachment Inquiry into President Trump.' *NPR*, 24 September 2019, https://www.npr.org/2019/09/24/763700264/trumps-ukraine-call-may-be-game-changer-on-impeachment accessed 23 February 2023.
[19] For full accounts see Stanley I Kutler, *The Wars of Watergate: the Last Crisis of Richard Nixon* (WW Norton & Co 1992) or Michael Schudson, *Watergate in American Memory: How we Remember, Forget and Reconstruct the Past* (Basic Books 1992).
[20] James Doyle, *Not Above the Law: the Battles of Watergate Prosecutors Cox and Jaworski* (Morrow 1977) 201.
[21] Ken Gormley, *Archibald Cox: Conscience of a Nation* (Perseus 1997) 360.
[22] Theodore White, *Breach of Faith: the Fall of Richard Nixon* (Scribner 2016) 268.
[23] Philip Heymann, 'Independent Counsel.' *Frontline* interview, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/heymann.html accessed 23 February 2023.
[24] Katy Harriger, *The Special Prosecutor in American Politics* (Kansas University Press, 2000) 29.

between the Trump presidential campaign and Russia, along with obstruction of justice. A Saturday Night Massacre style firing of the special prosecutor was stymied, as outlined by Mueller. In this instance, it alleged that White House lawyer Don McGahn was instructed by the president to inform the acting attorney general that Mueller had to be removed. Not for the only time, the Report inferred, did President Trump's staff act as a buffer when his instincts to act were not in the best interest of the country.[25] Treading carefully and with extreme precision, Mueller concluded that there we identifiable links between Trump campaign officials and entities connected to the Russian government. In addition, his report flagged ten instances in which Donald Trump may have obstructed justice.[26]

As Mueller made every effort to remain out of the foray, Democrats were increasingly divided regarding how, if at all, his report should be utilised for impeachment purposes. As it turned out, Mueller's damning conclusions were not a key focus of the impeachment articles. Nonetheless, they were significant in underpinning the arguments made by Democrats for the president to go. As *Politico* quipped, if Mueller was the Old Testament of Trump scandals, then Ukraine was the New.[27]

The impeachment politics of Washington DC had come a long way since the agonizing path to justice facing the Watergate Congressional committee. As the Nixon impeachment process got underway, the Democrat leadership was eager to appear as non-partisan as possible. The man from Yorba Linda became 'the first president in 106 years to be recommended for impeachment.'[28] On August 8 1974, Richard Nixon resigned. For many, this significant moment acted as a means of restoring faith in a system that was stretched to breaking point, but nonetheless survived. As far as the media was concerned, resignation was an admission of guilt. When considered in relation to, for example, either set of impeachment charges against Donald Trump, especially the second, Nixon's misdeeds appear comparatively subtle. Only when the Watergate 'smoking gun' tape was uncovered was the end of the Nixon presidency a real possibility.[29]

Drawing conclusions on his time as Special Prosecutor, Leon Jaworski observed that 'from Watergate, we learned what generations before us have known: our constitution works. And during the Watergate years it was interpreted again so as to reaffirm that no-one – absolutely no-one – is above the law.'[30] Decades later, candidate Trump boasted on the campaign trail that he could stand in the middle of Fifth Avenue and 'shoot somebody and I wouldn't lose any voters.'[31] With this claim he threw down the gauntlet in relation to being above the law. Whilst he didn't actually slay anyone on New York's best-known street, deaths resulting from the January 6 2021 assault on the Capitol included four on the day, another some time later, and four police suicides.[32]

As the post Watergate efforts to preclude future abuses of public trust were, perhaps clumsily, put into place, such abuses were hardly a new concern for legislators. In 1788, James Madison wrote that 'if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place, oblige it to control itself.'[33] Watergate illustrated that the government was not controlling

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[25] Rosalind S Helderman and Matt Zapotosky, 'A President, a Prosecutor and the Protection of American Democracy,' *Introduction to the Mueller Report*, (Simon & Schuster 2019).
[26] Mark Sherman, The Ten Instances of Possible Obstruction in Mueller Report, *AP News*, 18 April 2019, https://apnews.com/article/donald-trump-ap-top-news-elections-james-comey-north-america-e0d125d737be4a21a81bec3d9f1dffd8 accessed 23 February 2023.
[27] John Bresnehan, Heather Caygle and Kyle Cheney, 'Why Democrats Sidelined Mueller in Impeachment Articles' *Politico*, 10 December 2019, https://www.politico.com/news/2019/12/10/democrats-sidelined-mueller-trump-impeachment-080910 accessed 23 February 2023.
[28] Kutler (n 19) 527.
[29] See Gormley (n 21) for a full analysis of this period.
[30] Leon Jaworski, *The Right and the Power* (Reader's Digest Press 1976) 279.
[31] Steve Gibson and Ginger Holland, 'Confident Trump Says Could "Shoot Somebody" and Not Lose Voters' *Reuters*, 23 January 2016, https://www.reuters.com/article/us-usa-election-idUSKCN0V10WN accessed 23 February 2023.
[32] Robert Farley, 'How Many Died as a Result of Capitol Riot?' *Factcheck*, 21 March 2022, https://www.factcheck.org/2021/11/how-many-died-as-a-result-of-capitol-riot/ accessed 23 February 2023.
[33] James Madison, *The Federalist 51*, 6 February 1788, https://founders.archives.gov/documents/Madison/01-10-02-0279 accessed 23 February 2023.

itself at all, hence the perceived need for new legislation. Reaction to Watergate was the culmination of a growing concern regarding ethics in government over the previous quarter century.

If the shadow of the Watergate near-impeachment and presidential resignation had a shape, it came in the form of the 1978 Ethics in Government Act. On May 3 1977, President Carter requested Congress to pass a new law which would 'require the appointment of a special prosecutor to investigate and prosecute alleged offenses by high level government officials.'[34] The Executive branch of government had taken a reputational bruising, and this post-imperial era of Congressional resurgence tipped the power balance in an opposite direction. However inevitable or desirable this development was, it still took place in an era when the branches of government balanced each other with some success. Such an argument became harder to make in the hyper-partisan twenty-first century Washington environment. Arguably, strands of this dysfunction could be traced back to the well-meaning but misguided efforts of the Carter era to legislate ethics and force the Executive to toe a tightly principled line.

Writing decades later, with the benefit of hindsight, former Attorney General Elliott Richardson criticised the Ethics Act and argued that it was based on a host of negative assumptions, notably that public officials were too weak, greedy or unprincipled to be willing or able to do the right thing. Whilst the relevant rules, such as 'recusal' for the mere appearance of a conflict of interest did have a role in the promotion of reform, Richardson's issue with them was that they generated the illusion that morality could be legislated.[35] Clearly, in the post-Watergate era, there was an appetite, perhaps a perceived necessity for over-legislation.

Such a propensity was not new. In 1965, President Johnson inadvertently created a monster with Executive Order 11222, which established what became known as the appearance standard.[36] Far more radical than any previous efforts, it directed all federal employees to avoid the appearance of impropriety, and the Office of Government Ethics (OGE) had the unenviable task of overseeing this ambiguous measure. The Ethics Act had established the OGE in order to impose and oversee requirements on personal financial disclosure and post-employment restrictions. Trying to implement Executive Order 11222 which warned against activities that 'might result or create [the appearance of] an impropriety could only result in difficulty. As a former OGE director put it, 'you can hang anybody on that language.'[37]

Washington lawyer Peter W. Morgan summed up the negative evolution of ethics management in the post-1978 era, stating that 'success in Washington more and more is gauged not by how many substantive accomplishments one can point to, but rather whether and how well one has avoided any charges of mis-conduct or ill-chosen words.'[38] This period of growth in public integrity management did contribute to an improvement in ethics management practices of federal agencies and departments. The newly powered bureaucracy of the era was something that presidents found difficult to accept. Furthermore, public awareness of government activity and corruption had increased through the 1960s and 1970s. From the 1966 Freedom of Information Act which gave reporters new means of acquiring information on government activities, to the 1971 Pentagon Papers case, the way was paved for reduced tolerance of non-disclosure and overall high-level misconduct.[39]

At the time, such developments may have appeared, and sometimes were, heavy handed. However, they were put in place with a view to precluding the worst excesses of those in positions of substantial power. Fast-forward to the 2016 presidential election and Donald Trump repeatedly offered casual responses to serious questions about how his business interests would be managed if he became president. He

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[34] S.555 Ethics in Government Act, 95th Congress, 1977-78, https://www.congress.gov/bill/95th-congress/senate-bill/555 accessed 23 February 2023.
[35] Elliott Richardson, *Reflections of a Radical Moderate* (Pantheon 1996) 200-201.
[36] Prescribing standards of ethical conduct for Government officers and employees, Executive Order 11222, 8 May 1965, https://www.archives.gov/federal-register/executive-orders/1965.html accessed 23 February 2023.
[37] G. Calvin McKenzie, *Scandal Proof: Do Ethics Laws make Governments Ethical?* (Brookings 2002) 69.
[38] Robert North Roberts and Marion T Doss Jr, *From Watergate to Whitewater: the Public Integrity War* (Praeger 1997).
[39] FOIA.gov, https://www.foia.gov/about.html; *New York Times Co v United States* 403 U.S. 713 (1971) First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/505/new-york-times-co-v-united-states#:~:text=United%20States%20(1971)&text=Often%20referred%20to%20as%20the,prior%20restraint%20by%20the%20government accessed 23 February 2023.

genuinely did not seem concerned about the appearance or existence of impropriety. From the relatively frivolous, if inappropriate actions of his daughter using 2016 campaign appearances to promote items from her fashion brand, to the alarm regarding possible collusions with Russian state actors during the election, those concerned with the problem of legislating government ethics decades earlier had perhaps been more visionary than their contemporaries gave them credit for.[40]

Watergate's legacy was essentially the passage of a swathe of tougher conflict-of-interest and ethics laws, which both raised the standards of acceptable behaviour and set new hair-trigger traps for public officials. (It also bred a journalistic culture that expected politicians to be more open with the public about their personal lives.) The creation of the OSP helped to set in motion a new dynamic whereby reaction to executive misdemeanour was more institutionalised and powerful, a situation which would be increasingly illustrated as serious investigations unfolded in the 1980s and 1990s. The broad political consequences of Watergate were far-reaching and profound on both the legislative activity and political climate of Congress, the conduct of presidential politics and the political orientation of the media.[41]

Following on from Archibald Cox's famous warning of the dangers of a government of men rather than laws, Elliott Richardson later offered an interesting corollary stating 'the outcome of Watergate, we keep hearing, proved that our system worked, that our government is one of laws and not of men. That's so. But it was never intended to mean good laws without good men, which will always be needed.'[42] Inevitably, there would be administrations not always brimming with good men. And, there would be good men who made bad decisions or had lapses in judgement. In 1983, President Reagan signed the amended Ethics in Government bill into law, despite the reservations of his administration.[43] The line between good men and bad decisions became blurred beyond recognition.

11.3 The wonders of Ronald Reagan's non-impeachment

To the external observer, perhaps the most perplexing tale of non-impeachment in the modern presidency is that of Ronald Reagan. In 1983, not for the last time, the former actor was accused of elevating militarism over diplomacy by invading the tiny island of Grenada.[44] House Resolution 370 accused the 40th president of 'the high crime or misdemeanour of ordering the invasion of Grenada in violation of the constitution of the United States, and other high crimes and misdemeanours ancillary thereto.'[45]

The group of seven House members were led by the Congressman from Texas, known affectionately to some as Henry B. Gonzalez, D-Impeachment. He had become increasingly concerned at the onset of 'presidential government' not least as Reagan neglected to request a declaration of war before proceeding to take on a nation whose entire population could fit inside a football stadium.[46]

Resolution 370 was unlikely to grow impeachment legs, as such efforts in the early days of an administration, later illustrated by the examples against Presidents Trump and Biden demonstrated. However credible the accusations may have been, hauling out the big guns of constitutional reprimand seemed pre-emptive to many, not least against a popular president who had additional public sympathy after surviving a 1981 assassination attempt. During Reagan's second term, Gonzalez introduced new articles of impeachment. Four years after the previous effort, these six articles accused the president of

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[40] Sheela Kolhatkar, 'Trump's Conflict of Interest Problem' *New Yorker*, 14 November 2016, https://www.newyorker.com/business/currency/trumps-conflict-of-interest-problem accessed 23 February 2023.
[41] John B Thompson, *Political Scandal: Power and Visibility in the Media Age*, (Polity 2000) 209.
[42] Schudson (n 19) 101; Carroll Kilpatrick, 'Nixon Forces Firing of Cox; Richardson, Ruckleshaus Quit', *Washington Post*, 21 October 1973, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm accessed 23 February 2023.
[43] Ethics in Government Act amendment 1983, https://www.congress.gov/bill/98th-congress/house-bill/2684?s=1&r=36 accessed 23 February 2023; Katy Harriger, *The Special Prosecutor in American Politics* 11.
[44] Wendell Bell, The American Invasion of Grenada: a Note on False Prophesy, *Foresight*, Vol 3 No 10 (2008) https://sociology.yale.edu/sites/default/files/invasion_of_grenada_foresight.pdf accessed 23 February 2023.
[45] John Nichols, *The Genius of Impeachment: the Founders Cure for Royalism* (New Press 2006).
[46] ibid.

violating US law and of 'acting in a manner contrary to his trust as president and subversive of constitutional government.'[47]

Much has been written on the content and consequences of the Iran Contra affair, so suffice it to say that it involved the privatization of US foreign policy and arguably more serious executive transgressions than had occurred in Watergate. *New York Times* columnist Anthony Lewis later surmised that the abuse of power now known to have taken place in the Reagan administration were more serious, more fundamental than those involved in Watergate.[48]

History demonstrated that impeachment has always been more about politics than crime and this instance was no exception. High level officials in the Reagan administration had committed serious transgressions. Not for the first time, Henry Gonzalez made efforts at speaking truth to power, stating that 'The Congress must stop a president who has a heedless disregard for the constitutional responsibility of the Congress.'[49] If the buck stops with the president, then it should have landed resoundingly on Reagan's desk. It didn't. Or, if it did, no-one was willing to look.

By selling arms to Iran, at first via Israel and later directly, the Reagan administration acted in violation of its own foreign policy principles. Money began to roll in around the same time that funding for the Contras in Nicaragua was drying up. Colonel Oliver North, tasked with overseeing the arms sale came up with the 'neat idea' of diverting the surplus Iranian money to the Contras.[50] When the story of the arms sales broke via an overseas news outlet, it was clear that the Reagan administration had made a deliberate and sustained effort to ignore and deceive Congress. The scandal raised the suspicion that, not for the first time, the US presidency was out of control.

When the scandal broke the Reagan presidency became little short of paralysed. Reagan himself grew so withdrawn that Chief of Staff Howard Baker even considered invoking the 25th amendment. As Baker's advisor, Jim Cannon, realised, this could cause a constitutional crisis. However, he concluded, if the Commander in Chief was an incompetent as his aides indicated, invocation of the 25th amendment might be the only way to serve the national interest.[51] Or, one might argue that in the light of events that at best constituted legal misdeeds, impeachment proceeding would have been the most appropriate course of action. Considering the eagerness with which opponents of twenty-first century executives were ready to roll out the impeachment process, it seems astounding in hindsight that President Reagan and involved officials avoided this.

Iran Contra, like Watergate, highlighted the principle that the United States is a constitutional republic of limited government. Nixon's effort to legitimise the Imperial Presidency was encapsulated in his contention 'when the president does it, that means it is not illegal.'[52] This flew in the face of constitutional principle. The president cannot be above the law. As Supreme Court judge Louis Brandeis put it in 1928, 'Crime is contagious. If the government becomes a law breaker, it breed contempt for law, it invites every man to become a law unto himself, it invites anarchy.'[53] Long after the events of Iran Contra, in his concluding observations, Independent Counsel Lawrence Walsh posed the question regarding what protection do the people of the US have against a concerted action by powerful officials?[54]

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[47] 'Articles of Impeachment Introduced, But Given No Chance of Passage, *Associated Press*, 6 March 1987 https://apnews.com/article/ce090643c85cf3c1065d06427d85e1d9 accessed 23 February 2023.
[48] 'Iran-Contra, Revisited', *New York Times*, 15 October 1998, https://www.nytimes.com/1998/10/15/opinion/l-iran-contra-revisited-344036.html accessed 23 February 2023.
[49] 'Articles of Impeachment' AP, 6 March 1987, https://apnews.com/article/ce090643c85cf3c1065d06427d85e1d9 accessed 23 February 2023.
[50] 'North Says He Used Contra Money to Reimburse Self: Calls False Letters to Hide Secord Gift "Grossest" Act,' *LA Times*, 8 July 1987, https://www.latimes.com/archives/la-xpm-1987-07-08-mn-2721-story.html accessed 23 February 2023; For a full account, see Oliver North, *Under Fire: An American Story* (Harper Collins 1991).
[51] Jane Mayer and Doyle McManus, *Landslide: the Unmaking of the President* (Fontana 1989) 10.
[52] United States v Nixon: Nixon's View on Presidential Power, Landmarkcases.org, https://www.landmarkcases.org/assets/site_18/files/us_v_nixon/teacher/answers/activity_nixons_views_nixon_answer.pdf accessed 23 February 2023.
[53] James Pfiffner, *The Modern Presidency* (Cengage Learning 2010) 215.
[54] Lawrence Walsh, *Iran Contra Report* Part XI, Concluding Observations, https://irp.fas.org/offdocs/walsh/part_xi.htm accessed 23 February 2023.

Constitutionally provided Congressional oversight could only work if the legislature was kept informed, but this was not always the case. Decades later, in the toxic political environment of the Trump era, the new and devastating challenge to robust Congressional oversight was the ability for elected officials and their bases to present and believe so-called alternative facts as they saw fit.

In the case of Iran Contra, the shortcomings of the Congressional investigation committee became apparent from its inception. Composed of members of the House and Senate, it resembled two committees rather than one, and was riven by institutional rivalry. In his Final Report, Independent Counsel Walsh concluded that the Congressional Committees knew they had been deceived but did not have the motivation to meaningfully pursue the matter. Such a process would have taken the country to the epicentre of the constitution and the wounds of Watergate had not sufficiently healed for that.

Publicity and expediency were key factors in the Iran Contra Congressional investigation. There was a distinct lack of Watergate repetition at a number of levels. No-one forcefully shouted for impeachment, no-one compared Reagan to Nixon and no-one used the trump card of executive privilege. In Walsh's view, it was the immunity issue, combined with the administration's refusal to declassify relevant intelligence information, was the real scandal of Iran Contra.[55] With hindsight, the avoidance for political reasons of engaging with the impeachment process in this most serious of situations was deeply troubling. It set a disturbing precedent whereby dysfunctional engagement of the impeachment process could, and arguably did, become the norm.

Moreover, the repeated tale played out of a prosecutor with impeccable Republican credentials pursuing a methodical and low-key strategy in investigating a popular president from the same political party. In the case of Ronald Reagan, when the initial furore unfolded about what the scandal meant for his future, Lawrence Walsh resisted participating.[56] Decades later, the highly regarded Robert Mueller persevered in similar, if more melodramatic, circumstances. Operating in the midst of constitutional turbulence and vicious political opposition was a challenge for both GOP stalwarts.

11.4 Fit for Purpose?

If Reagan might be considered lucky to have avoided impeachment proceedings, the reluctance to use that tool had worn off by the mid-1990s as President Clinton was impeached on two counts by the House before being acquitted in the Senate. In this case the enthusiasm of congressional Republicans to sanction the president for his failings was not matched by the public. In matters much simpler to understand than the complex manoeuvrings of Watergate and Iran Contra, opinion polls showed approval for Clinton rising even as his wrongdoing became more apparent. An analysis of Gallup's polling in the summer of 1999, after Clinton's Senate acquittal, revealed, 'the onset of the publicity surrounding the Lewinsky revelations was correlated with a significant jump in Clinton's job approval rating, and the two quarters during which the House and Senate debated impeachment and conviction -- 4th quarter 1998 and 1st quarter 1999 -- saw the public give Bill Clinton the highest job approval ratings of any of the 25 quarters of the Clinton administration to date.'[57] To the extent that conclusions can and should be drawn from these numbers, it does seem as if a majority of the public judged that whatever 'crimes and misdemeanors' Clinton had committed were personal rather than matters of state.[58]

The Clinton Scandals offered an interesting test of whether Congressional Democrats would treat allegations of misconduct by a Democrat president with the same fervour as in the case of a Republican. Naturally, the argument could be made that impeachment and the various incarnations of the independent counsel had continuously been used as partisan tools by those wishing to employ the

[55] Robert Williams, *Political Scandal in the USA* (Keele University Press 1998) 58-59.
[56] See Lawrence Walsh, *Firewall: the Iran Contra Conspiracy and Cover-Up* (WW Norton 1998) for a personal account from the Independent Counsel.
[57] Frank Newport, 'Presidential Job Approval: Bill Clinton's High Ratings in the Midst of Crisis,' 1998, *Gallup*, 4 June 1999, https://news.gallup.com/poll/4609/presidential-job-approval-bill-clintons-high-ratings-midst.aspx accessed 23 February 2023.
[58] Stanley Renshon, '*The Polls*: the Public's Response to the Clinton Scandals, Part 2: Diverse Explanations, Clearer Consequences' (2002) 32(2) *Presidential Studies Quarterly* 412.

gravitas of legal proceedings against their political opponents. There is little doubt that the investigations initiated by Congress against the forty-second president were fuelled by more than simply civic duty. The Culture Wars were underway by the early 1990s albeit in analogue form. When the initial Whitewater special prosecutor was appointed, the measured approach taken by moderate Republican Robert Fiske was met with antipathy and frustration by his GOP brethren. As with Lawrence Walsh and Robert Mueller, any perception of conciliatory approaches by Republicans to these politically charged proceedings was met with anger and frustration from their side of the political aisle. Clearly, the road to impeachment was, and remains, paved with partisan intentions. Increasingly, the role of the culture wars became apparent, not least as the rise of new media facilitated unprecedented ways in which to attack the president. Bill Clinton's unfortunate personal choices brought potentially grave consequences. As it turned out, both the public and relevant members of Congress drew a distinction between this and his capacity to run the country.[59] The same cannot be said about the allegations against President Trump that resulted in his two impeachments in the House.

In the immediate aftermath of the 2022 mid-term elections a consensus quickly emerged that the results were a rebuke to former President Trump as some of the high-profile candidates he had endorsed for federal or state wide office were defeated.[60] Through the earlier part of the year, however, a different group of Republican political actors had either been rebuked by their party base or had withdrawn from political competition before that fate befell them. Of the ten Republican House members who voted with all 222 Democrats to impeach President Trump in January 2021, only two went on to run again in the November 2022 elections. Four retired and four, perhaps most notably Liz Cheney in Wyoming, were defeated in the primary process. Moreover, the two who did make it to the November ballot, David Valadao in California and Dan Newhouse in Washington, prevailed in states with a top-two primary system rather than a more regular party primary.[61] Hence, the conventional narrative prior to the general election was that Trump's hold on the Republican Party remained in place and that it was those Republicans who had called Trump out over the events on January 6 had suffered the greater career damage.

As it was, 22 months prior to the 2022 mid-terms, in the very immediate aftermath of the insurrection it did look as if the Republican Party leadership would break with the President and condemn the riots and Trump's role in fostering the violence. Several administration officials resigned their positions in protest at the President's behaviour including cabinet secretaries Elaine Chao and Betsy DeVos.[62] As Congress returned to its business as the rioters were cleared from the Capitol on January 6, Kevin McCarthy from California, the Republican leader in the House reflected that events earlier in the day had been 'unacceptable, undemocratic and un-American'.[63] In a Senate speech later in the month, Mitch McConnell declared: 'The mob was fed lies … They were provoked by the president and other powerful people, and they tried to use fear and violence to stop a specific proceeding of the first branch of the federal government, which they did not like.'[64] Yet those words did not result in votes to either impeach or convict Trump. McConnell, who already had a fraught relationship with Trump, did maintain his distance from the former president. McCarthy, on the other hand, ate a full menu of humble pie in his efforts to re-ingratiate himself with Trump as he downplayed the latter's role in the insurrection and so dismissed

[59] ibid.
[60] See, for example, Claire Hansen, 'Trump's No Good, Very Bad Night,' *US News*, 9 November 2022, https://www.usnews.com/news/elections/articles/2022-11-09/trumps-no-good-very-bad-night 23 February 2023.
[61] Geoffrey Skelley, 'With Cheney's Loss, Just Two House Republicans are on the Ballot in November' *FiveThirtyEight*, 16 August 2022, https://fivethirtyeight.com/features/with-cheneys-loss-just-2-house-republicans-who-voted-to-impeach-trump-are-on-the-ballot-in-november/ accessed 23 February 2023.
[62] Aaron Blake, 'One-Quarter of Trump's Cabinet-level Officials Have Rebuked Him Over Jan 6 Riot' *Washington Post*, 12 March 2021, https://www.washingtonpost.com/politics/2021/03/12/one-quarter-trumps-cabinet-level-officials-have-rebuked-him-over-jan-6-riot/ accessed 23 February 2023.
[63] Colby Itkowitz and Mike DeBonis, 'Hostility Between Congressional Republicans and Democrats Reaches New Low Amid Growing Fears of Violence' *Washington Post*, 28 January 2021, https://www.washingtonpost.com/politics/hostility-between-congressional-republicans-and-democrats-reaches-new-lows-amid-growing-fears-of-violence/2021/01/28/ accessed 23 February 2023.
[64] Kelsey Snell and Barbara Sprunt, '"The Mob Was Fed Lies:" McConnell Rebukes Trump For His Role in Capitol Riot,' *NPR*, 19 January 2021, https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/19/958410118/this-mob-was-fed-lies-mcconnell-rebukes-trump-for-his-role-in-capitol-riot accessed 23 February 2023.

the notion that there should be constitutional consequences for a President who encouraged violence in an effort to overthrow an election result.

Evidence later emerged that McCarthy had been more intemperate in his condemnation of Trump than he had publicly acknowledged as audio caught him saying that he would demand the resignation of Trump and declaring 'I've had it with this guy'. McCarthy later denounced this reporting as 'totally false and wrong' despite the fact that he had been recorded saying exactly what he was reported as saying.[65] In January 2023, shortly after becoming Speaker of the House McCarthy said that he would consider allowing a resolution to be put to the chamber from members of the Republican caucus that one or both of Trump's impeachments be removed from the record.[66]

In a 2021 article in the *New Yorker*, Jelani Cobb asked whether the fact that President Trump was impeached twice would stand as testament to the efforts to activate the guard rails protecting democratic politics, or whether the fact that only ten Republicans in the House voted for impeachment and only seven in Senate for conviction, even after the attack on democracy on January 6, reflected more 'the over-all weakness of impeachment as a device to rein in the Presidency.' His answer is that if a President's actions 'weaponizing a mob' are not sufficient to break the bonds of partisanship, then it is difficult to envisage quite what circumstances can make the impeachment process one that presidents will truly fear.[67]

11.5 Alternative routes to censure

There are other threats to the utility of the impeachment process. First, that it is perceived as being too nuclear an option to ever be used. Hence, impeachment and conviction remain the ultimate sanction, but the circumstances are never quite dire enough for it to be unleashed. As noted above, President Reagan did not face impeachment proceedings despite the clear evidence of executive branch wrong doing in the mid-1980s. Earlier, in the 1920s President Warren Harding was not held accountable through impeachment for the corruption in his administration exposed in the Teapot Dome scandal.[68]

Second, that those dire circumstances can be envisaged and the process is employed irregularly, as a means of last resort by a legislature despairing at executive branch abuse, but never successfully to remove a president as partisanship always provides a bulwark of support for the incumbent of the White House in Senate. Given the impeachments of Presidents Clinton and Trump it might seem that this concern is more warranted than the first. Here the focus might be on the trial in Senate rather than the impeachment proceedings launched by the House.

Third, that partisanship moves from providing a means of defense in the Senate to becoming a method of attack in the House as a President comes under threat every time their party loses control of the latter chamber. With regard this last possibility, since the Clinton impeachment it has become the case that partisan figures in Congress will demand impeachment of a President of the other party sometimes with little specific focus. Both Presidents George W Bush and Barack Obama faced calls for impeachment from opponents in Congress.[69] There was in fact a vote in the House to send an impeachment resolution to the House Judiciary Committee in summer 2008, though this was, in reality, a means for Democratic Speaker Nancy Pelosi to shut off any votes or even floor discussion on the articles advanced by the more

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[65] Alexander Burns and Jonathan Martin, "'I've Had It With This Guy": GOP Leaders Privately Blasted Trump After Jan 6' *New York Times*, 13 October 2022, https://www.nytimes.com/2022/04/21/us/politics/trump-mitch-mcconnell-kevin-mccarthy.html accessed 24 February 2023.

[66] Julia Shapero, 'McCarthy Says He Will Look at Expunging Trump Impeachment,' *The Hill*, 13 January 2023, https://thehill.com/homenews/house/3811952-mccarthy-says-he-will-look-at-expunging-trump-impeachment/ accessed 23 February 2023.

[67] Jelani Cobb, 'Why Impeachment Doesn't Work' *New Yorker*, 22 February 2021, https://www.newyorker.com/news/daily-comment/why-impeachment-doesnt-work accessed 24 February 2023.

[68] For detail, see Louis W. Potts, 'Who Was Warren G. Harding?' (1974) 36(4) *The Historian* 621.

[69] See for example Daveid Lindorff and Barbara Olshansky, *The Case for Impeachment: The Legal Argument for Removing President George W Bush from Office* (Thomas Dunn 2007) and Dana Milbank, 'The GOP's Impeachment Fever' *Sentinel & Enterprise*, 9 December 2013, https://www.sentinelandenterprise.com/2013/12/09/dana-milbank-the-gops-impeachment-fever/ accessed 24 February 2023.

radical members of her own caucus.[70] Regular efforts at impeachment in the House would diminish the gravity of the process, turning it into a partisan distraction rather than a means of providing a check on a rogue executive.

Even at times of modern constitutional crisis, restraint has often remained the order of the day. The 25th amendment to the constitution was ratified in 1967, and it is section 4 in particular that may offer a course of action when the president is considered unable to carry out his duties. Whether a political situation may warrant this is of course highly contested. Initial uses by the Nixon and Ford administrations were of a procedural nature, albeit as part of the Watergate political fallout. In 1986, as reactions to the Iran Contra scandal mounted and Chief of Staff Howard Baker seriously considered invoking the 25th amendment, this time, it was section 4 which was deemed relevant. However, Baker's advisor Jim Cannon counselled against the move, fearing the onset of a constitutional crisis. Those involved in these highly delicate and consequential conversations considered the 25th amendment to be a route to serving the national interest and guiding the nation past the moment of danger.[71] An alternative course of action, or inaction, was chosen and Americans were spared the spectacle of their president being judged unfit for office. Section 4 authorises the vice-president and a majority of executive department heads to decide that the president is unable to discharge the powers and duties' of the presidency. Such powers would then be transferred to the vice-president.[72]

In the aftermath of the January 6 violence, the House of Representatives approved what was described as a 'symbolic' resolution which urged vice-president Mike Pence to invoke the 25th amendment against a president many considered incapable of carrying out his presidential duties. Voting 223-205, only Republican Adam Kinzinger (R-IL) joined Democrat colleagues in support. An objective observer may have wondered about Mike Pence remaining loyal to a boss whose supporters were rampaging towards his office only days earlier. Whatever his motivation, the vice-president was not convinced that section 4 of the 25th amendment was the route to take. Instead, he consistently channelled the language of Gerald Ford half a century earlier, calling for a time to heal, rather than to bring down the executive.[73]

11.6 Conclusion

The noises about starting impeachment proceedings against President Biden offer further evidence to support the argument that impeachment has become a more blunt instrument which to swing at political opponents. Retribution rather than consideration of any evidence emerging as a primary motivating factor for initiating impeachment. President Reagan may have avoided impeachment thanks to the lack of a smoking Iran Contra gun, but fallout from the scandal included a constitution suffering from a thousand stab wounds, perplexed liberals and Republicans more vexed at the harm to their party brand. When the opportunity arrived in the 1990s to finally turn the impeachment tables and pursue a popular Democrat president, GOP leaders had no qualms about making a case for high crimes and misdemeanours from what in reality constituted a series of very poor personal choices made by Bill Clinton. As a result, the former Governor of Arkansas received a poll bounce in the aftermath of his impeachment acquittal.[74]

Multiple impeachment efforts were brought against George W Bush, none of which gained traction. Notably, no articles of impeachment were ever drawn up against Barack Obama, with efforts stalled at the hearing stage. As a result, two full administrations ran their course without the political circus that had impacted some of their predecessors. The unprecedented actions taken against Donald Trump were a

[70] Lisa Desjardins, 'Kucinich Effort to Impeach Bush Kicked Into Limbo' *CNN*, 11 June 2008, http://edition.cnn.com/2008/POLITICS/06/11/kucinich.impeach.vote/ accessed 23 February 2023.
[71] Mayer and McManus (n 51) 10.
[72] Joel Goldstein, 'What You Need to Know About the 24th Amendment, Section 4: It Isn't Like Impeachment' *Washington Post*, 8 January 2021 https://www.washingtonpost.com/politics/2021/01/08/what-you-need-know-about-25th-amendment-section-4/ accessed 24 February 2023.
[73] Mike Pence, Full Transcript, 'Face the Nation', *CBS*, 20 November 2022, https://www.cbsnews.com/news/mike-pence-face-the-nation-full-transcript-11-20-2022/ accessed 23 February 2023.
[74] Renshon (n 58).

source of national shock and division, and the second vote in 2021 was 'not just bi-partisan – it's the most bi-partisan impeachment in American history.'[75]

Prior to the Trump years, there was no plausible evidence of a rise in federal corruption since Watergate commensurate with the significant increase in investigation and impeachment efforts in relation to perceived executive misdemeanour. Writing in 1992, Suzanne Garment matched the decline in power of traditional political parties with the increase in the power and influence of the media and new kinds of ideologically based interest groups.[76] Adding the rise of all forms of new media and the success of personality politics, and platforms were guaranteed for attack politics to increasingly become the norm. The fact that Joe Biden faced impeachment efforts from the moment he took office demonstrates the point. The opposition had cried wolf so many times that the lines blurred between authentic calls for impeachment, which may be categorised as when the nation faced a genuine threat due the executive behaviour and decisions, and those that clearly did not meet the bar for high crimes or misdemeanours.

When the behaviour of America's Commander in Chief is deemed to be out of control, there are arguably three key response options. To do nothing may seem like a politically safer option, but at the very least, it sets a poor example. To invoke section 4 of the 25th amendment of the constitution has been considered in extreme circumstances, but never utilised. And so, impeachment remains the preferable, if imperfect, option. Reflecting on this topic in *The Atlantic,* Yoni Applebaum reminded readers of a core component of the America criminal justice system, that the accused is entitled to a fair defense and a change to clear their name. Just as the public should be provided with the opportunity to examine the evidence, a president's supporters and opponents deserve the clarity that only convening impeachment hearings can bring.[77]

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[75] Louis Jacobson, 'The Second Presidential Impeachment of Donald Trump was "the Most Bi-partisan Impeachment in American History"' *CNN*, 21 January 2021, https://www.politifact.com/factchecks/2021/jan/13/jake-tapper/how-bipartisan-was-vote-impeach-donald-trump-histo/ accessed 23 February 2023.
[76] Suzanne Garment, *Scandal: the Crisis of Mistrust in American Politics* (Anchor 1992).
[77] Yoni Applebaum, 'Impeach Donald Trump,' *The Atlantic*, March 2019, https://www.theatlantic.com/magazine/archive/2019/03/impeachment-trump/580468/ accessed 23 February 2023.

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