The 50th Anniversary of Watergate: Lessons Learned and Unlearned

Elizabeth Holtzman

I want to begin by acknowledging the extraordinary leadership of former US Congressman Peter Rodino of New Jersey who chaired the House Judiciary Committee during the impeachment proceedings against President Richard M. Nixon. Rodino believed that our democracy was threatened by a president who put himself above the law, and that impeachment could work only if Americans perceived that the process was fair, fact-based and bipartisan. He conducted the proceedings masterfully, guided throughout by that principle, and winning national acclaim.

Since accident plays such an important role in history, it is important to note that Peter Rodino became chair of the Judiciary Committee only because I defeated Emanuel Celler, the previous chair in the Democratic primary for Congress in June 1972, and Rodino was next in line to fill the vacancy. Jimmy Breslin, the noted New York journalist, in his book How the Good Guys Finally Won, claimed that if Celler had been chair during Watergate, Nixon would not have been impeached. Regardless of whether Breslin was right, I am certainly

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1 See Lawrence Spinelli, Establishing the Gold Standard for Presidential Impeachments, 48 SETON HALL J. LEGIS. & PUB. POL’Y 585, 593 (2024).
3 Jimmy Breslin, How the Good Guys Finally Won (1975).
glad that my election to Congress led to Rodino’s becoming chair of the Committee as well as to my participating in the Nixon impeachment process and to Nixon’s resignation itself.

Ironically, Peter Rodino’s ascendancy was not met with universal applause. There was much bigotry about Italian Americans at that time. I know because at least one prominent national political organization refused to support me in my primary because it could enable Rodino to become chair of the Judiciary Committee. So, I am very happy to be speaking about the fiftieth anniversary of Watergate at a law school with which Peter Rodino was so closely allied.

To understand the lessons of Watergate, we need to begin by reviewing some of the facts about Watergate and the impeachment process against Nixon—which many have forgotten and even more may never have learned.

When I was elected to Congress in November 1972, the idea that President Richard Nixon would be impeached and resign from office was the farthest thing from anyone’s mind, including my own. The Watergate break in took place months before, in June 1972, and the coverup, which Nixon personally orchestrated, was so successful that five months later, he won his November 1972 re-election in one of the largest landslides in American history. At the time of the break in, I was not paying much attention to events in Washington. I was in the last days of my own primary for a Congressional seat, and my own campaign office had been broken into and my campaign manager assaulted.

Possibly the best indication of the effectiveness of the criminal conspiracy known as the Watergate cover up was the fact that, despite not having asked for the position, I was put on the House Judiciary Committee, which traditionally dealt with impeachments. If the powers that be had believed there would be a presidential impeachment, they never would have put me on the Committee. After all, I had no political backing and had defeated the Brooklyn Democratic machine, earning their enmity.

And, if I had known that there would be a presidential impeachment, I would have fought hard to get on the Judiciary Committee, instead of trying my utmost, obviously unsuccessfully, to land a different committee assignment.

Amazingly, though, less than a year after Nixon’s landslide November 1972 re-election, the American people were clamoring for Congressional action against him, flooding the House with phone calls,

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telemgrams, and letters. The impeachment proceedings in the House Judiciary Committee started in response to that outcry.

What prompted this public outcry? Just months after Nixon’s re-election, the cover up began to unravel. A conservative, law and order Republican judge, John Sirica, presided over the trial of the burglars who broke into the Democratic National Committee headquarters at the Watergate complex in Washington, DC, and smelled something fishy. All the defendants were pleading guilty, and a former CIA officer was among them. Sirica decided to impose very stiff sentences on the burglars, hoping that one would break down and confess. One did and indicated that there were higher ups involved. Sirica called on the Senate to act. It did, undertaking two vital efforts that turned out to be crucial to the impeachment process.

First, the Senate needed to ensure an independent and thorough investigation of Watergate crimes, because the Justice Department, under Nixon, had faltered—as Sirica noted in the Watergate burglars’ trial. The Senate Judiciary Committee took advantage of a vacancy created when the sitting Attorney General resigned because of his misstatements about Nixon’s involvement in an anti-trust matter. The Committee announced that it would refuse to confirm Nixon’s new appointee for AG unless an independent prosecutor were named to investigate Watergate crimes. The Nixon administration capitulated because it needed an AG in place, and Harvard Law Professor Archibald Cox was named the Watergate Special Prosecutor.

The Senate’s second effort was to form a special select committee to investigate Watergate. The veteran Senator Sam Ervin, a sagacious expert on the Constitution who called himself a “country lawyer,” was its chair and Howard Baker, a conservative Republican from Tennessee, its vice chair. Baker, working closely with Nixon’s White House, asked some questions specifically designed to show that Nixon had nothing to do with Watergate. Those questions—“what did the president know

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6 Bart Barnes, John Sirica, Watergate Judge, Dies, Wash. Post, Aug. 15, 1992 (noting Sirica’s desire to get to the bottom of the Watergate cover up); see, e.g., United States v. Liddy, 397 F. Supp. 947, 952 (D.D.C. 1975) (noting the harm caused by Liddy and other Nixon-associated defendants in eroding the public trust in the political process).

7 See Anthony J. Gaughan, Watergate, Judge Sirica, and the Rule of Law, 42 McGeorge L. Rev. 343, 368 (2016) (recounting the pressure from Judge Sirica on Sam Dash, majority counsel for the Senate Watergate committee).

8 Id. at 354–58.
and when did he know it?"—became famous. The answers they prompted, however, showed that Nixon was deeply involved in Watergate, not that he was innocent. To his credit, Baker ended his alliance with the White House over Watergate and worked to uncover the facts.

A critical event happened in the spring of 1973. John Dean, Nixon’s White House counsel, testified to the Senate Watergate Committee that he had told Nixon there was a cancer on the presidency—that presidential pardons were being offered and hush money was being paid to the jailed Watergate burglars to keep them quiet about higher ups. According to Dean, Nixon said he knew where more money could be found to continue to pay off the burglars. Of course, Nixon denied saying this.

When the Senate Committee uncovered the existence of a White House taping system a few months later, it was clear that the tapes could prove who was lying about the payoffs to the Watergate burglars, Dean or Nixon. Special Prosecutor Cox subpoenaed the tapes and was pursuing them through the courts, but Nixon ordered his new AG to fire Cox to stop him from getting the tapes. The new AG and his Deputy, however, both refused to fire Cox, and resigned instead. (Cox was fired by the next in line at the Justice Department.) These events happened on October 23, 1973, and became known as the Saturday Night Massacre.

It was immediately clear to many Americans that Nixon was trying to cover up the truth about hush money payments to the burglars. If the tapes could exonerate Nixon, he would not have tried to block the Special Prosecutor from obtaining them—and the two top Justice Department officials would not have resigned if they thought the order to fire Cox were justified.

The American people did not want their country to become a banana republic, where criminal presidents could fire prosecutors who were investigating them.

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10 Id.
12 Id.
investigating them willy nilly. They demanded action. The House had refused to do anything about Nixon and Watergate before the Saturday Night Massacre, but afterwards, it knew it had to go forward with impeachment proceedings.

Impeachment was the tool given to us by the Constitution’s framers to deal with a rogue or criminal president. But members of the Judiciary Committee were wary about using it. Impeachment had been tried only once before against a president, Andrew Johnson, and not only did it fail, but the proceedings had been widely condemned. Failure was not an option for us because the stakes were too high. Aside from the Watergate break in, Nixon was asserting grandiose powers. He was refusing to spend money that Congress had appropriated (the process was called impoundment) and wanted single-handedly to dismantle a federal agency, the Office of Economic Opportunity, without Congressional approval. Moreover, his massive secret and unilateral bombing of Cambodia had just been disclosed a few months before. Nixon’s firing the Watergate Prosecutor to block his criminal investigation was part and parcel of a larger and frightening picture.

The House Judiciary Committee had no blueprint for how to rein in a president run amok, except to conduct the impeachment process in a fair, lawyerlike way, while seeking to the greatest extent possible the support of the Committee’s conservative Southern Democrats and its Republicans.

As it turned out, the evidence the House Judiciary Committee received against Nixon came both from the Senate Watergate Committee and from the Watergate grand jury guided by the Watergate Special Prosecutor. Both the Senate Committee and the Watergate prosecutor existed because of the Senate’s actions in response to Judge Sirica’s concerns. In other words, it was really a matter of happenstance that the evidence was gathered and given to us.

The evidence was overwhelming. I remember feeling as though I were in quicksand—there seemed to be no bottom to the sordid, disturbing facts about Nixon’s misconduct. When I became District Attorney of Brooklyn years later, reviewing wiretaps of organized crime figures had a very familiar ring.

The Watergate coverup alone had many components in addition to the offers of pardons and payments of hush money to the burglars, and the firing of the Special Prosecutor to obstruct his investigation into Nixon’s tapes. For example, Nixon persuaded the head of the Justice

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15 U.S. CONST. art. I, § 2, cl. 5.
16 Gaughan, supra note 7.
Department’s Criminal Division to reveal to him what prosecutorial steps it was planning to take against his top aides, and then Nixon divulged that information to his aides to help them avoid prosecution. Nixon also urged his chief of staff to lie to the Senate Committee, suborning perjury, a crime. Significantly, Nixon was also charged with making false statements to the public in which he claimed that a full investigation had taken place of the White House and his re-election committee and no involvement by anyone in Watergate was found.

By the way, it is important to note that the Watergate grand jury that was indicting Nixon’s top aides in connection with the Watergate cover up wanted to indict Nixon along with them, but the Watergate Special Prosecutor blocked the grand jury.\textsuperscript{17} He advised that it had no power to indict a sitting president.\textsuperscript{18} As a result, the grand jury named Nixon an unindicted co-conspirator, the only president so named in our country’s history up to that point.

Nixon’s abuses of power went far beyond what we think of as Watergate. Far beyond. Here are some examples. Nixon approved the Huston Plan, a blueprint for government warrantless break ins and wiretaps.\textsuperscript{19} The decision memo that Haldeman sent announcing Nixon’s approval was recalled, but parts of the program went forward.\textsuperscript{20}

Nixon also set up in the White House a special unit, called the Plumbers, that would do its own surveillance operations. One of those operations involved the break in into the psychiatrist’s office of Daniel Ellsberg, the man who leaked the Pentagon Papers and was being prosecuted for the leak.\textsuperscript{21} Nixon ratified this break in designed to obtain information with which to smear Ellsberg.\textsuperscript{22}


\textsuperscript{18} Id.


\textsuperscript{20} Id. (noting Nixon expected to check boxes where he approved, but his team realized this would mean the president signing off on such a sweeping plan of domestic spying over the objections of his own FBI).


Furthermore, Nixon ordered illegal wiretaps and other surveillance of journalists, and wiretaps of White House staffers, including one who was working for his top Democratic opponent in the presidential race, Senator Ed Muskie. This provided Nixon with a convenient pipeline into Muskie’s campaign. Nixon also ordered the creation of an “enemies list” consisting of top Democratic donors and activists and directed that IRS audit them for harassment purposes.

Nixon misused agencies of government, including the CIA, which was barred from interfering in US domestic affairs. Nonetheless, the Ellsberg burglars secured assistance from the CIA in their illegal actions.

In addition to absorbing the mountain of facts regarding Watergate and other matters, we also worked hard on the Judiciary Committee to understand the Constitutional grounds for impeachment. The constitutional grounds are “treason, bribery and other high crimes and misdemeanors.” While treason was defined in the Constitution and the elements of bribery were well known, no one quite knew what a “high crime and misdemeanor” was. Some Republicans argued that the term “high crimes and misdemeanors” limited impeachment to the crimes listed in the US Criminal Code, but that view did not prevail. Among other reasons, there was no US Criminal Code at the time of the country’s founding, so how could violation of a non-existent statute in a non-existent criminal code be a prerequisite for impeachment?

George Mason, an architect of the Constitution’s impeachment clause, proposed the term high crimes and misdemeanors because he wanted to reach the “great and dangerous offenses” that are not covered by the words treason or bribery. Accordingly, the term “other high crimes and misdemeanors” must mean acts that are similar in gravity and dangerousness to treason and bribery. But, since “high crimes and misdemeanors” are political crimes under long established British legal and parliamentary precedents, they must also adversely affect Americans or the integrity of our government in the way treason and

25 See generally Elizabeth Holtzman with Cynthia Cooper, Who Said It Would Be Easy?: One Woman’s Life in the Political Arena 37–59 (1996) (describing our work on the Committee throughout the impeachment inquiry).
26 U.S. Const. art. 2, § 4.
27 Id.
bribery do.\textsuperscript{29} My personal definition of a high crime and misdemeanor was, and remains, a grave abuse of a president’s power that threatens the rights of Americans or our democracy. I believe the Judiciary Committee’s three Articles of Impeachment adopted against Nixon met that definition.

The Committee’s first Article involved the Watergate cover up and contained many elements of obstruction of justice charges.\textsuperscript{30} But the Committee made very clear that the Article was not charging that Nixon violated any obstruction of justice statute. The Second Article listed Nixon’s abuses of power and it was the article that garnered the most Republican votes.\textsuperscript{31} The Third Article charged Nixon with obstructing the impeachment inquiry by refusing to provide documents in response to Judiciary Committee subpoenas and in some cases supplying doctored ones instead. This article received the fewest votes.\textsuperscript{32}

In the last decade new information emerged suggesting Nixon stymied the Paris Peace talks in the fall of 1968.\textsuperscript{33} Worried that a peace treaty ending the Vietnam War would cause him to lose the upcoming November 1968 presidential election, Nixon secretly persuaded the South Vietnamese government to walk out of the talks.\textsuperscript{34} Nixon won the election, but the Vietnam war tragically continued for more than four years, unleashing untold deaths of Americans and Vietnamese and widespread destruction. Had we known about this in 1974, I believe we would have included it as an impeachable offense.

But I cannot be sure. There were two proposed articles of impeachment that the Committee rejected.\textsuperscript{35} One dealt with the Nixon’s concealment of the secret bombing of Cambodia, which I drafted. Nixon ordered the dropping of a huge number of bombs on that country, creating untold devastation and, according to some, leading to the horrific Khmer Rouge takeover. But Nixon ordered that the bombing be kept secret from Congress and the American people, and there was no

\textsuperscript{29} Id.

\textsuperscript{30} Articles of Impeachment Adopted by the House of Representatives Committee on the Judiciary, 93d Cong. 2d sess., (Jul. 24, 1974).

\textsuperscript{31} Id.

\textsuperscript{32} Id.


\textsuperscript{34} Id.

Congressional authorization for it. The failure to hold Nixon accountable for wartime misconduct of this magnitude may have encouraged another president, George W. Bush, to feel he could use lies and deceit to persuade the Congress to approve the Iraq War, as well as authorize a regime of torture and still face no consequences. The second rejected article dealt with emoluments, specifically the US government’s adding improvements to two of Nixon’s properties and Nixon’s taking an improper tax deduction for a gift of his papers to the National Archives.

On the point of bipartisanship, it is critical to note that one of the very first steps the Committee Chair Peter Rodino took after the Saturday Night Massacre was to hire an impeachment counsel for the Committee. He insisted on a Republican counsel, a clear sign of his seriousness of purpose. He was not going to opt for short term partisan gains but was going to embed bipartisanship wherever he could in the impeachment process. As a result, the Committee had two Republican counsels, one hired by the Democrats and one by the Republicans.

Rodino also yielded to many Republican procedural requests, so that the focus remained on substance. Significantly, the Committee’s Articles of Impeachment were drafted by a group of conservative Southern Democrats and moderate Republicans. I believe Rodino’s fairness and concern about bipartisanship played a key role in winning their support. This was critical to securing enough votes for impeachment. It was also critical to persuading the American people that the Judiciary Committee, most of whose members were Democrats, wasn’t simply trying to undo Nixon’s landslide election but was protecting the country from a rogue and even criminal president in accordance with the terms of the Constitution.

In the end, seven Republicans, or about thirty percent of their total number, joined with all the Democrats in voting for impeachment. There was no glee among the Democrats when the Articles were adopted. Even I, who strongly disliked Nixon and his policies, found that casting the vote to impeach him was one of the most unpleasant and somber things I ever had to do. And, as is well known, Rodino himself went back to his office after the first vote and cried.

At the start of our hearings, the US Supreme Court, including all the justices Nixon appointed, unanimously ordered the smoking gun tape released. The Watergate Special Prosecutor had sued Nixon to obtain

37 See Glass, supra note 35.
it and Nixon countered that it was national security material. The Supreme Court ruled that the needs of a criminal proceeding outweighed the president’s claim of secrecy.

As it turned out, the smoking gun tape had nothing to do with national security, a mantra Nixon used repeatedly to try to cover up his misdeeds.\(^3\) Instead, the tape revealed Nixon’s personally directing his chief of staff to get the CIA to stop the FBI’s investigation into the Watergate break in just days after the burglars were arrested. With that revelation of Nixon’s undeniable and personal participation in the cover up, all the Republican holdouts on the Judiciary Committee, including the most conservative and fervent Nixon adherents, announced that they would vote to impeach Nixon. Given the unanimous support of the House Judiciary Committee members and the widespread public support the Judiciary Committee proceedings garnered, Nixon’s impeachment by the full House and conviction and removal from office by the Senate were inevitable.

The inevitable was speeded up when top Republicans in the House and Senate, including Barry Goldwater, told Nixon he didn’t have the votes in a Senate trial. Accordingly, Nixon resigned on August 9, 1974.

What were the critical ingredients of the Judiciary Committee’s success? The fact that impeachment started when the public called for action against the president. The fact that information for the impeachment was developed extensively by several entities, the Watergate grand jury and the Senate Watergate Committee, which, importantly, educated Americans about the facts of Watergate through its public hearings. The fact that Republicans both inside and outside the Congress put country above party, including Judge John Sirica and the Republican Supreme Court justices who joined all the Democratic appointees in supporting the release of Nixon’s tapes. And, the fact that the Judiciary Committee members, under Rodino’s wise leadership, for the most part comported themselves professionally. To this day, the House Judiciary Committee’s work has never been seriously criticized. It remains the high-water mark for impeachments.

What has happened to presidential impeachments since then is not an encouraging story. The impeachment proceedings against President Bill Clinton were triggered by a Republican Special Prosecutor Kenneth Starr, who recommended that Congress impeach Clinton for lying about his sexual interactions with Monica Lewinsky, a twenty-two-year-old White House intern. Starr had no prosecutorial background and had

represented important Republican interests in several lawsuits. He was not the embodiment of the independent and experienced non-partisan special prosecutor the law envisioned. While the Judiciary Committee approved four charges, the House of Representative adopted only two—perjury before the grand jury (about Monica Lewinsky) and obstruction of justice (tampering with witnesses in connection with a civil suit that involved Monica Lewinsky).

The American people never supported the impeachment of Clinton, which they consistently viewed as a political ploy to remove a popular president from office.⁴⁰ Although the House voted for impeachment with a handful of Democrats in support, the Senate failed to amass the two-thirds vote required for conviction and removal. Clinton's behavior was both puerile and disgraceful, but, in my opinion, it never met the constitutional standard for impeachment. He did not use the power of his office to lie or to have sexual encounters with Lewinsky, nor did his lies deal with matters of state, but private conduct. Moreover, his misconduct did not rise to the required level of gravity or dangerousness to our democracy or to any person's liberties that the Constitution’s framers viewed as justifying a president's removal. In my view, impeaching Clinton was an abuse of power by the House.

Next is an impeachment that never happened but should have been taken up by Congress.⁴¹ As we know now, President George W. Bush took the US into war with Iraq in 2003 on a basis of lies and deceit.⁴² Among other things, Bush claimed that Saddam Hussein, the dictator of Iraq, was in cahoots with Al Qaeda, which was false.⁴³ (That was a politically useful argument, because many Americans were eager to avenge the attacks of 9/11 which they knew originated with Al Qaeda.) Bush also claimed that Iraq had weapons of mass destruction.⁴⁴ Not only did this turn out to be false, but the US agencies expert on nuclear weapons had advised the president prior to

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⁴² *See generally Holtzman, supra note 36.*

⁴³ Holtzman, *supra* note 36, at 220.

⁴⁴ *See Holtzman, supra* note 36, at 222.
the invasion that there were no weapons of mass destruction as did UN inspectors.45

The US government’s deceptions cut deep. Many US soldiers in Iraq kept declaring that their actions were payback for 9/11.46 It wasn’t until later that Americans fully understood the extent to which they, or their loved ones, had been “had.”

Aside from deceiving Congress, which may itself have constituted a crime, Bush personally authorized a regime of torture against US detainees who had been apprehended after the US invaded Afghanistan and were thought to be connected with Al Qaeda, Osama bin Laden, or the attacks of 9/11. That torture regime appeared to violate US criminal laws prohibiting torture and war crimes (cruel and inhuman treatment of detainees). Bush also initiated a wiretapping program which may well have violated the law.47

Nonetheless, Congress never acted against Bush. Thousands of American lost their lives in the Iraq war that the American people were told was going to be a “cakewalk,” with our troops joyously welcomed by the Iraqi people. Instead, US forces were greeted by a virulent and long-lasting insurgency and billions were spent on the invasion that we were told was going to cost very little. Our reputation as a lawful nation crashed amid the revelations of presidentially authorized torture. The geopolitical result was not good either: Iran, a country hostile to the US, after the war obtained substantial influence over Iraq.

Deceiving Congress into voting to support a war effort, risking the lives of thousands of Americans and even more Iraqis, forcing us to spend huge sums on the war were all presidential acts that fit under the rubric of “high crimes and misdemeanors.” They were great and dangerous offenses that undermined our democracy. Clearly, Congress cannot play the equal role the Constitution assigned it in decision-making about whether to go to war if it is given false information by the president. Nor can the American people act as a check against an unnecessary war if they are also lied to in the process.

Still, despite these egregious acts by President Bush, Congress did nothing—an echo of the House Judiciary Committee’s refusal to hold Nixon accountable for his secret bombing of Cambodia. This illustrates one of the ways that the impeachment power has failed. If Congress does not have the backbone or resolve to use impeachment against a

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45 See Holtzman, supra note 36, at 222–23.
president who abuses the war-making power to place lives and treasure at risk, we remain at the mercy of unscrupulous, criminal presidents.

The next impeachment involved what President Donald J. Trump called his “perfect” phone call in 2019 to Prime Minister Volodymyr Zelensky of Ukraine in which Trump asked for a “favor.” The favor was for Zelensky to announce that his government would undertake an investigation into the activities in Ukraine of Vice President Joe Biden and his son Hunter, who served on the Board of Directors of Burisma, a Ukrainian company.

In accordance with US anti-corruption policy, as Vice President, Biden had called for the head prosecutor of Ukraine to be fired. The European governments also supported the prosecutor’s firing. But Trump claimed Biden wanted the prosecutor fired to cut off the prosecutor’s investigation into Burisma. This was not true—the prosecutor has no investigation of Burisma underway.

As Trump was wont to do, he turned the situation upside down. Although Biden was fighting corruption in Ukraine, Trump wanted to paint Biden as the corrupt party. Trump’s purpose was crassly political. Announcing an investigation would imply that both Bidens had done something corrupt and possibly illegal in Ukraine. Since Joe Biden was Trump’s likely Democratic opponent in the upcoming presidential race, smearing Biden, especially if it were done by a third party, in this case Ukraine, would be very useful to Trump in his 2020 re-election bid.

Although no quid pro quo had been specifically mentioned in the “perfect” phone call, Trump had just recently frozen nearly $400 million in desperately needed military aid for Ukraine and Trump’s Ambassador to the European Union had already advised Ukrainian officials that US military aid would not resume unless Zelensky announced an investigation into the Bidens. No actual investigation was needed, just an announcement of one.

Trump was using the power of his office to extract a personal and political favor that would help him in his presidential re-election campaign. And he was asking a foreign country to produce the favor and was using the club of withholding $400 million in military aid to extract it. Withholding the aid was not lawful according to Congress’ General Accountability Office, and contrary to US foreign policy which supported Ukraine in its resistance to Russia.

49 See id.
50 Id. at 2.
Trump’s phone call fit the definition of high crimes and misdemeanors. It involved using the powers of his office as president. It was a clear abuse of those powers to ask a foreign country to do something that would not benefit the United States but would benefit Trump personally and politically. Worst of all, Trump was using his presidential power to interfere in the upcoming US presidential election.

It is worth noting that although the “perfect” phone call was an abuse of power, Trump, his counsel, and many Republicans argued that an abuse of power had to violate the criminal law to constitute a high crime and misdemeanor. Plainly, they disregarded the Nixon impeachment precedent, where the second Article of Impeachment included numerous charges of Nixon’s abuses of power that were not charged as violations of the criminal law.

The House had voted a second charge of obstruction against Trump, based on his stonewalling House impeachment inquiry subpoenas calling for information about the “perfect” phone call. But the Senate refused to ask for additional witnesses. Indeed, Senate leader Mitch McConnell openly admitted that he was closely coordinating with the White House counsel’s office on the handling of the impeachment trial, even though the Constitution requires Senators sitting on an impeachment trial to take a special oath pledging to do “impartial justice.”

Predictably, then, the impeachment based on the “perfect” phone call failed. No Republican in the House supported it and only one Republican Senator, Mitt Romney, did. Trump was impeached but not convicted for the “perfect” phone call.

Given that the evidence was clear, why weren’t more Republican supporting impeachment? At the time, I was concerned that basing an impeachment on one phone call (plus the failure to respond to subpoenas seeking information related to the phone call), serious as those acts were, might not persuade the public and thus Congress of the need to undo a presidential election and remove a sitting president. Speaker Nancy Pelosi reportedly wanted the impeachment to be narrowly focused. But as we know from the Nixon impeachment, the American people were able to comprehend and support the numerous impeachment charges against Nixon. In fact, the very multiplicity of those charges lent weight to the conclusion that Nixon’s misconduct endangered our democracy requiring his removal from office.

51 Id.
The pressure for the first Trump impeachment came primarily from members of Congress and others in government who were shocked and angry at Trump’s attempted extortion of Ukraine. But there was nothing approaching the public outcry for congressional action that Watergate prompted. And, of course, the Republican Senators were undoubtedly intimidated by Trump’s strong grip on his electoral base. As with the secret bombing of Cambodia and the Iraq War, Congress backed away again from seeking accountability for an act involving a foreign country.

The second impeachment against Trump, involved his malign efforts to seize power and stay in office despite having lost the 2020 presidential election. This is the only time in our country’s history that a president rejected the basic constitutional norms of our democracy. His actions have generated two indictments against him, one, a state case in Fulton County, Georgia and the other, a federal indictment, in the District of Columbia. Trump’s alleged conduct included: falsely claiming that his election had been stolen even though in sixty plus cases courts rejected his position; seeking fake electors to replace certified electors in battleground states that he lost so that Biden would lose the Electoral College vote despite having won enough votes to secure it, and when none of those efforts worked, calling his supporters to a rally in Washington on January 6, 2021, that he said would be “wild;” claiming at the rally that Vice President Mike Pence had the power to count the false electors’ ballots or send the “disputed” ballots back to the states for legislative action (to undo Biden’s victories); directing the attendees at the rally to the Capitol and sitting by and failing to take any action for several hours while his supporters attacked the Capitol, obstructed and delayed the constitutionally mandated certification of the electoral college ballots for the first time in our country’s history, maimed and injured the police forces protecting the Capitol, desecrated the Capitol, and threatened the lives of Pence and members of Congress. Trump was not convicted by the Senate in this case either, garnering only seven Republican votes there and 10 Republican votes in the House.

This impeachment proceeding concerned arguably the most serious charges that Congress has ever dealt with—the effort of a

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president to seize power after having been defeated at the polls.\textsuperscript{54} The facts were clear; the members of Congress had lived through the assault on the Capitol and most Americans saw it as it happened. In addition, the January 6th Committee produced televised hearings that further described and explained Trump’s misdeeds—and was widely watched by Americans. So, why didn’t the impeachment succeed? Politics is one reason. Trump had and continues to have a strong grip on Republicans. Seventy million Americans voted for him in 2020. This undoubtedly intimidated members of Congress who did not want to deal with constituent wrath by voting to impeach or convict Trump.

And there was another “out”—Trump had left office and since the impeachment provision specified conviction and removal from office, it arguably didn’t apply. Although impeachment is intended to remove a dangerous president from office, it also permits the Senate to bar an impeached president from ever holding office again.\textsuperscript{55} That would have been the appropriate remedy for Trump. Nonetheless, the argument gave an excuse for those looking for one, and the Senate failed to produce the super majority constitutionally required for conviction.

What a far cry from the Nixon impeachment, where Republicans and conservative Southern Democrats joined the rest of the Democrats to remove Nixon from office. Clearly, the three Southern Democrats with very pro-Nixon districts and the seven Republicans on the House Judiciary Committee who voted for impeachment were risking their seats and their political futures. Their votes for impeachment required real courage.

So, why weren’t Republican Senators in 2021 putting principle and country over politics? All the Senators were threatened by the mob that attacked the Capitol. They knew that Trump’s claims of a rigged election were phony. They knew what was at stake was democracy itself.

I have no ready answer. Are the people we elect to office now so different from those we elected in the past? Is the cost of running for and winning office so much greater that it outweighs other considerations and discourages members of the House and Senate from voting their conscience? Is the plethora of media outlets so fractionalizing the information that Americans get that it is almost impossible to expect Americans to find common facts much less common ground?

The latest emergence of impeachment shows how much this instrument has become tarnished and degraded. Now, Republicans

\textsuperscript{54} Id.
\textsuperscript{55} U.S. CONST. art I, § 3, cl. 7.
in the House have begun impeachment proceedings against President Joe Biden.\textsuperscript{56} They admit there is not enough evidence to impeach—some even concede there is \textit{no} evidence at all to impeach—but contend that they are conducting the proceeding to see if any evidence exists.\textsuperscript{57} This even though three House committees have been investigating Biden for months with nothing to show for it—not to mention the multiyear investigation of Hunter Biden that began during Trump's presidency and has been going on since.\textsuperscript{58} Clearly, the impeachment committee's claim of searching for evidence is just a ruse.

Impeachment has now become nothing more than a political sword, something to be used to smear or even slay a political opponent, regardless of whether there is a smidgeon of evidence to justify it. It is not a weapon, as the framers intended, to protect the constitutional order by removing a president who endangers it.

I am afraid that the use of impeachment in cases where it is not justified and the failure to use it to protect us when it is justified may have simply neutered impeachment as the protective device the Constitution's framers believed we needed. Having just freed themselves from a monarch, they knew the dangers of unrestrained executive power. They were also well versed in history: they knew that kings—and thus presidents—could commit treason, take bribes, and commit other serious misdeeds.

Initially, the framers thought elections every four years would be enough of a restraint, but then realized that presidents could wreak enormous damage in the four years between elections if left unfettered. The framers agreed to authorize impeachments of a president who engaged in treason, bribery and other high crimes and misdemeanors, and threatened our democracy or the people's liberties. This objective has been forgotten and the drafters of the Constitution's concerns ignored. How we restore impeachment to its proper role, as happened during Watergate, is the challenge for us all.

Other institutions of our democracy are threatened. Voting rights are under attack. Despite revelations of serious ethical lapses, the United States Supreme Court refuses to adopt an ethics code. The House

\textsuperscript{56} Impeaching Joseph R. Biden, Jr., President of the United States, for high crimes and misdemeanors H.R. 503, 118th Cong. 1st Sess. (Jun. 13, 2023).
can't even select a Speaker. Big money and dark money distort our elections and drown out the public's voice. Misinformation flies around the internet. Bigotry is on the rise.

When asked what the Constitutional Convention accomplished in Philadelphia, Ben Franklin famously said that we created "a Republic if you can keep it." Keeping it may be a harder task than we ever imagined. But we cannot afford to turn away from it now.