Is Presidential Impeachment Like a Coup?

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ABSTRACT

It is not uncommon for supporters of a president threatened with impeachment to denounce the proceedings as a kind of coup. There are obvious differences between an impeachment conducted in accord with the terms of a constitution and a lawless military coup, and yet such rhetoric might raise a real claim that the congressional impeachment power, at least relative to an elected president, has fallen into a kind of obsolescence and can no longer be legitimately used. Such constitutional features of indirect democracy as the power of presidential electors to choose a president have fallen into practical illegitimacy despite their continued formal existence as part of the American constitutional scheme. It might be argued that presidential impeachments have fallen into the same status. Moreover, there might well be some particular circumstances in which critics are justified in charging that Congress is attempting to overturn the election results through the abuse of the impeachment power. But consideration of the distinctive features of the constitutional impeachment power should reassure us that in most circumstances the use of the constitutional power to remove a president by congressional action would not be comparable to a coup.

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INTRODUCTION

The U.S. Constitution was drafted to incorporate various mechanisms of political accountability that are only indirectly democratic, the most prominent at the moment being the impeachment clause and the ability of electorally accountable legislators to remove an elected president. As American political culture has subsequently democratized, that has left the status of these provisions unclear. Are such constitutional features obsolescent and of dubious legitimacy, or are they justifiable within a modern constitutional democracy?

More pointedly, is a presidential impeachment like a coup? It has become something of a talking point among defenders of President Donald Trump that his impeachment by a Democratic majority in the U.S. House of Representatives would be somehow illegitimate. The president himself took the lead in offering this framing, declaring in a tweet that "what is taking place is not an impeachment, it is a COUP."[1] That rhetoric soon made its way into presidential campaign ads.[2] Presidential confidante and Fox News anchor Sean Hannity informed his viewers that he would no longer refer to the impeachment inquiry as a "political witch hunt" but rather, as an "attempted coup of a duly elected president."[3] Trump's supporters have insisted that this is not "hyperbole" but an accurate description of the actions of the "deep state" in attempting to oust an elected president.[4] Indeed, the president's strongest supporters derided the "slow-motion coup d'état" that they thought Trump had been facing since the beginning of his presidency.[5]

The Trump administration is not the first to reach for this rhetoric. President Bill Clinton's supporters likewise denounced their Republican foes for pursuing a "coup." Dick Morris, Clinton's former campaign advisor, declared, "If the American people continue to believe that Clinton

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[1] Donald Trump (@realdonaldtrump), TWITTER (Oct. 1, 2019, 7:41 PM), https://twitter.com/realdonaldtrump/status/1179179573541511176?lang=en.
[2] Davey Alba & Nick Corasanti, *False Claims of a "Coup," Shared by Trump*, NEW YORK TIMES (Oct. 3, 2019).
[3] Eliza Relman, *Sean Hannity Slams Impeachment Inquiry as a "Compulsive, Psychotic Witch Hunt" and Falsely Calls It an "Attempted Coup*," BUSINESS INSIDER (Oct. 9, 2019).
[4] Victor Davis Hanson, *Suddenly the "Coup" Concerns Don't Seem So Far-Fetched*, MERCURY NEWS (Nov. 22, 2019).
[5] James Downton, *We are Watching a Slow-Motion Coup D'etat*, THE FEDERALIST (May 19, 2017) https://thefederalist.com/2017/05/19/watching-slow-motion-coup-detat/ [https://perma.cc/8HSY-AEWT].

should stay in office, Congress must not – must dare not – remove him. This would be a coup d'état."[6] The political columnist Robert J. Samuelson warned that "what is at issue is overturning an election" and thought we should face up to the fact that it would not be "inflammatory and offensive" to simply call the impeachment effort an attempted "coup."[7] Democratic Representative Jerry Nadler labelled Clinton's impeachment "a thinly veiled coup d'état."[8] Harvard law professor Alan Dershowitz accused the House of pursuing "a legislative coup d'état."[9] Hillary Clinton agreed.[10] Between the Clinton and Trump presidencies, the members of Congress exchanged scripts on whether a presidential impeachment is best thought of as a "coup."[11]

It is tempting to dismiss such rhetoric as overheated but ultimately harmless, but perhaps we should take it more seriously than that. Denouncing one's political opponents for fomenting a coup d'état is particularly dangerous rhetoric. Like White House Counsel Pat Cipollone's letter asserting that the impeachment inquiry against Donald Trump was "invalid" and "illegitimate," such rhetoric encourages supporters to think that we have departed from the confines of the constitutional order and at least threatens the possibility that an extraordinary and lawless response might be justified.[12] Such rhetoric announces that we are operating in a state of exception and that the normal rules of the political game no longer apply.

There is also a genuine possibility that such rhetoric reflects a real shift in our practical governing Constitution. To be sure, the constitutional text specifies that it is possible for Congress to impeach and remove an elected president. Nonetheless, Congress has never actually used that device to remove a sitting president from office, and it is not inconceivable that the power that the Framers entrusted to the national legislature has fallen into desuetude. Perhaps the congressional impeachment power, at least as applied to an elected official, is so out of keeping with modern constitutional and political mores that its actual use would be widely regarded as illegitimate. In the modern era of a "plebiscitary presidency,"

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[6] Dick Morris, *Let the Punishment ($4.5M) Fit the Crime*, THE HILL (Sep. 23, 1998).
[7] Robert J. Samuelson, *Why Clinton Should Stay*, WASH. POST (Sep. 24, 1998).
[8] Philip J. Trounstine, *Deep Partisan Chasm over What's at Stake*, SAN JOSE MERCURY NEWS (Dec. 9, 1998).
[9] Ruth Marcus, *Panel Unclear on Impeachment Role; Lawmakers to Clash in Attempt to Define Standards and Constitutional Duties*, WASH. POST (Dec. 6, 1998).
[10] HILLARY RODHAM CLINTON, LIVING HISTORY 489 (2004).
[11] JM Rieger, *Then and Now: How Lawmakers Characterize Impeachment as a "Coup" to Protect their Own*, WASH. POST (Oct. 9, 2019).
[12] Letter from Pat Cippolone to Nancy Pelosi (Oct. 8, 2019), https://www.lawfareblog.com/white-house-letter-congress-impeachment-inquiry [https://perma.cc/C9Y6-BH26].

the people may have come to conceptualize their own relationship with the president as to be so direct and immediate that no intermediary could appropriately intercede.[13] Perhaps within the context of our living Constitution, a congressional impeachment and removal of a sitting president should be regarded as the functional equivalent of a bloodless coup and of no greater authority or legitimacy than a traditional coup by military leaders?

I believe that we still have reasons to resist this conclusion and to embrace the impeachment power as a still vital feature of our constitutional scheme. A presidential impeachment is not like a coup. This essay begins by examining constitutional provisions that delegate non-policymaking functions to elected assemblies and the reasons why some of those provisions have fallen out of favor and been formally or informally abandoned. It then considers the impeachment power and some reasons why it should be distinguished from those other devices and accepted as still legitimate and available for use. In doing so, it also suggests circumstances when the House might have a particularly heavy argumentative burden to bear if it wishes to remove a president by impeachment.

I. THE NON-POLICYMAKING ROLES OF ELECTED ASSEMBLIES

At several points, the drafters of the U.S. Constitution assigned representative assemblies additional functions other than lawmaking. The Senate was entrusted with shared powers that might otherwise have been left to the president in creating international treaties and appointing governmental officers. The Senate's unusual role in these areas reflected the lingering distrust of executive power at the time of the founding and the desire to provide an effective check on the newly created president. The Senate was therefore given a share of the executive power. The Senate, in this sense, took on some of the characteristics of the governor's councils that had existed in some of the colonies and states. This aspect of the Senate's power has been routinely used across American history, and its rationale for inclusion within the constitutional scheme remains reasonably robust. There is no possibility that the people themselves would be able to select the hundreds of individuals who are to staff the highest reaches of the executive and judicial branches. The practical options remain to either entrust that power to the president alone or to share it with the Senate, and

[13] On the rise of the plebiscitary president, see THEODORE J. LOWI, THE PERSONAL PRESIDENT (1985); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE (rev. ed., 1997); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS (2005).

there is little sense that these non-lawmaking functions of the Senate conflict with our modern democratic sensitivities.

Other non-legislative roles for Congress have not been as routinely used over the course of American history. They are less familiar as a consequence, but they might also be less readily accepted as legitimate exercises of constitutional authority if they were to be used. To be clear, the question is not whether these are constitutionally valid tasks for Congress to perform. The Constitution is clear about assigning some non-legislative tasks to Congress. What is less clear is whether we still accept the appropriateness of the decision to assign such tasks to representative assemblies. In the extreme, this raises the possibility of what I have elsewhere called a constitutional crisis of fidelity, in which provisions of a constitutional text are abrogated as no longer authoritative.[14]

One of these provisions of indirect democracy has been eliminated from the constitutional scheme by textual amendment. The Constitution of 1787 relied on state legislatures to elect the members of the U.S. Senate. The Seventeenth Amendment adopted in 1913 shifted that responsibility to the people themselves. The original scheme for the selection of senators reflected the desire to give the state governments some direct control of the reconfigured federal government. This constitutional feature was natural in 1787 given what preceded the Constitution. The Continental Congress and then the Confederation Congress were essentially composed of ambassadors of a confederation of quasi-sovereign states. The members of those assemblies were direct representatives of the state governments in the Union's war council. The states had a lesser status after the adoption of the U.S. Constitution, but the Senate provided a continuing commitment to their interests. The states *qua* states were still to be represented in the national council.

After decades of experience under the Constitution and a nationalizing Civil War, senators largely lost any sense that they served as representatives of state governments and instead became representatives of state populations. If senators were supposed to be representing their states rather than their state governments, however, why should they be indirectly elected through the intermediary of the state legislature rather than directly elected by the people themselves? In the original constitutional scheme, senators were directly accountable to their relevant constituents. But as their relevant constituency effectively shifted to the people themselves, senators began to seem insulated from them rather than directly accountable to them. The voters began to demand an immediate say in the choice of senators, and states began to accommodate those demands. At first informally, the people

[14] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CRISES, REAL AND IMAGINED (forthcoming 2020).

were given direct control of an increasing number of senators, until finally, by constitutional amendment, all of the Senate was put under the direct control of the voters.[15]

A second device of indirect election has been informally altered through constitutional construction and the development of a set of norms, practices, and conventions that supplement the constitutional text.[16] The Electoral College was designed to be a temporary, single-purpose Congress to elect a president. The framers had already struggled to settle on a formula for apportioning political power in Congress to satisfy the various competing interests that worried that they would be shortchanged in the transition from the Articles of Confederation to the Constitution. When they turned to the task of designing the executive branch, and resolved on creating a single, independent chief executive, the problem of balancing the competing interests was even more acute. Creating a body that would mirror the composition of Congress and the various compromises in representation that had already been hammered out was an understandable, if clunky solution, to the problem of how to select a president. Once they had ruled out Congress itself as the body best suited for choosing the president, on the grounds that a president chosen by Congress could never be adequately independent of the legislative branch, a shadow Congress was logical.

Perhaps if the delegates in Philadelphia had met a few years later, they might have dispensed with the device of having an actual office of presidential elector. In the summer of 1787, however, it was not clear how each state would prefer to cast its votes for a president. The state governments had directly chosen all the officers of the federal government under the Articles of Confederation, and so it undoubtedly would have seemed like an unnecessarily radical proposal to strip the state governments of any direct role in choosing the person to fill the new office of the president. Creating an intermediate office of presidential elector allowed the various states to make their own independent decisions about how to choose those electors, and thus how to allocate their votes for the president. Perhaps if the framers had had more confidence in their ability to circumvent the state legislatures and still get a new federal constitution ratified, they could have simply placed presidential elections directly in the hands of the citizenry. It would have been simple enough to filter a popular vote through a federal formula in order to determine the winner of a presidential election without the necessity of human intermediaries occupying an office of presidential elector.

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[15] *See* WENDY J. SCHILLER AND CHARLES STEWART III, ELECTING THE SENATE (2014).
[16] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999).

They nonetheless anticipated that at least some of the states would turn the decision over to the voters, but again they failed to fully anticipate how a national popular presidential election would work. They thought it would be difficult for ordinary voters in a far-flung republic to identify and evaluate the potential candidates for a single national office. Voters might be expected to know their own notable home state favorites, but they might not have much awareness of the plausible candidates at the other end of the country. Human electors were expected to be better informed about the national pool of potential presidents and better able to come to some agreement on viable candidates. The rise of organized political parties quickly made that worry obsolete. By the time George Washington left office, parties were organizing to winnow the list of potential candidates down to a manageable number of contenders and to spread the word to ordinary voters about who those candidates were and why they deserved to be chosen for the presidency. To the extent that presidential electors were supposed to solve an information problem for the voters, political parties accomplished the same thing more efficiently and effectively.

As early as 1796, presidential electors became redundant, and political norms developed to render them innocuous. If presidential electors had actual agency and possessed full discretion to cast a ballot for any candidate who in their personal judgment would best serve the country's interest, then the democratic quality of the presidential contest would be significantly reduced. It was soon established that the presidential electors were not expected to have agency. They were to be pledged to a particular candidate and to serve as a mere pass-through for the will of the voters. When, in 1796, a Pennsylvania presidential elector pledged to vote for John Adams instead cast a ballot for Thomas Jefferson, who had won the popular majority in the state, he was taken to task for his audacity in breaking his pledge.

> When I vote for a legislator, I regard the privilege that he is to exercise his own judgement – It would be absurd to prescribe the delegation. But when I voted for the Whelan ticket, I voted for John Adams . . . What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson is to be the fittest man for President of the United States? No – I chose him to *act*, not to *think*.[17]

Across the nineteenth century, commentators used an array of metaphors to emphasize the fact that presidential electors were to be without agency.

[17] GAZETTE OF THE UNITED STATES 3 (Dec. 15, 1796).

They were "mere passive instruments," "a registering machine," "mere automata," "a messenger," a "mere cogwheel in the machine, a mere contrivance for giving effect to the election of the people."[18] The constitutional practice had developed to reduce the office of the presidential elector to a purely ceremonial one. If "faithless" electors in December successfully hijacked a presidential election and elevated a candidate to the White House who had not won the electoral vote in the national election in November, there is little doubt that the country would face a serious crisis.

The so-called Hamilton Electors tried to revive in 2016 a constitutional feature that had been regarded as unacceptably elitist and antidemocratic for over two centuries. The leaders of this movement lobbying Republican presidential electors to dump Trump argued that if voters showed sufficiently bad judgment in November, then the presidential electors should intercede to correct their mistake. "It's our decision at the end of the day."[19] Even the supporters of the Hamilton Electors thought this was a "terrifying prospect," but still it was time to embrace the "undemocratic" features of the Constitution.[20] It seems doubtful that many others would have been so accepting of resurrecting this undemocratic feature of the Constitution after two centuries of dormancy.[21]

Discretionary voting by presidential electors would seem to be a particularly poor idea to revive. Laying aside the question of whether the constitutional framers ever intended presidential electors to play the role of a "constitutional failsafe" in the case of the voters choosing an unqualified president, this would seem to be a poor candidate for enhancing the scope of indirect democracy in the constitutional system.[22] Two features of the modern Electoral College reinforce the inappropriateness of presidential electors attempting to play a more substantial role in the selection of the president. First, electors are chosen for only a single purpose. Voters are not choosing electors to act on their behalf across a wide range of largely unknown decisions in the future. The electors will only make one decision,

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[18] See Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZONA L. REV. 933 (2017).
[19] *Id.* at 914.
[20] *Id.* at 915.
[21] Though it must be noted that in the midst of the 2016 election fracas, a surprisingly large minority of the public was willing to back the view that presidential electors should be able to break their pledge if they have "significant concerns about the candidate that won their state." *Morning Consult/Politico National Tracking Poll*, POLITICO (December 15-17, 2016), https://www.politico.com/f/?id=00000159-13a6-dc92-a3ff-53b6e74b0001.
[22] On the "constitutional failsafe" dispute in 2016, see Anthony Zurcher, *Could the Electoral College Dump Trump?*, BBC (Dec. 12, 2016), https://www.bbc.com/news/world-us-canada-38297353 [https://perma.cc/D3JE-YUQK]; David S. Cohen, *Will the Electors Vote Their Conscience and Prevent a Trump Presidency?*, ROLLING STONE (Dec. 15, 2016).

and voters know the contours of that decision as well as the electors do. Although voters might want to delegate such a task to an agent if the choice required some specialized knowledge that they do not possess, that is not the case in selecting a president. The framers imagined that it might be, that the average citizen would not possess the kind of information he would need to select a qualified presidential candidate.[23] But even they understood that to be more of an informational problem than an expertise problem.[24] If voters could come into possession of the relevant information, they could pick a candidate as well as a presidential elector could. Once political parties filled the informational gap, the electors lost whatever advantage they once might have possessed. The choice of elector collapses into the choice for the presidency itself. Second, the presidential electors themselves are largely unknown to the voters. For the first several decades, voters generally cast ballots that listed the names of the presidential electors, even though the voters cared little about the identities of the passive instruments that they were sending to cast formal presidential ballot. In the twentieth century, most states dropped the pretense and simply listed the presidential candidate on the ballot and left off the names of the electors. If everyone understood that electors were without agency, then it did not matter who they were, and voters had no reason to know their identity or make any independent assessments of their character or qualifications. The Electoral College ceased to operate as a form of indirect democracy, and as such it remained a viable tool of simple democratic election.

A second feature of the constitutional presidential selection system has not been written out of constitutional practice. In case no presidential candidate wins a simple majority of the votes of the presidential electors, then the House of Representatives chooses the president from the three highest ranking candidates. In doing so, the House votes by state, with each state delegation casting only a single vote.

There are certainly other ways of resolving an election that does not produce a clear majority winner, but the constitutional framers thought presidential elections might frequently be divided among a multitude of candidates. Without political parties, voters might routinely fail to coordinate around a small number of qualified candidates, let alone settle on a single favorite. If the voters themselves, even with the assistance of presidential electors, could not choose a president, then Congress might have a relatively free hand to act on its own. In a context in which legislatures often choose governors, relying on the national legislature to make a decision when the people could not would seem natural.

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[23] JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION (July 17, 1787).
[24] *Id.*

It is difficult to imagine this fallback plan being embraced by the general public as an acceptable option in the modern era. When the 2000 presidential dispute threatened to spill over into Congress for decision without a clear resolution of the Florida vote, surveys showed that the public had little confidence in the legislature and far preferred to have the election dispute resolved in the courts.[25] At this point, Congress is held in sufficiently low regard that there is little trust in its capacity to perform even more routine functions, let alone arbitrate a presidential election dispute or select a president in the face of a divided electorate. Even in 1824, when the House chose John Quincy Adams to serve as a president in the absence of an Electoral College winner, it was assailed as subverting the will of the people and foisting a corrupt bargain on the nation.[26] Congressional intervention in a presidential election would be no better received today. The prospect of the chaos that would ensue if the 2000 election was ultimately resolved in the House helped spur at least some of the justices on the Supreme Court to intervene to cut off the controversy. Congress still possesses the formal constitutional authority to select a president when there is no Electoral College winner, but that formal authority seems particularly inadequate if we ever found ourselves in such a situation.

II. THE IMPEACHMENT POWER

Finally, the drafters leaned on the two chambers of Congress to remove misbehaving federal officers through the impeachment process. Most federal impeachments have involved lower court judges, who cannot otherwise be removed if they refuse to resign. Executive branch officers can simply be fired or, in the case of the president and vice president, turned out of office at the next election. Misconduct by executive branch officers have generally been addressed by means short of impeachment and removal. Nonetheless, it was the possibility of presidential misconduct that motivated the drafters to include the impeachment device in the Constitution in the first place.[27] The prospect of a powerful officer serving for an extended term and engaging in serious misconduct seemed too serious to ignore. Some mechanism would be necessary to address an immediate danger to the republic, and Congress seemed both readily available and armed with adequate judgment to assess the situation and act.

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[25] *See* Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WILLIAM & MARY L. REV. 2093 (2002).
[26] FRED I. GREENSTEIN, INVENTING THE JOB OF PRESIDENT 78–79 (2009).
[27] JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION (July 20, 1787).

Removing wayward judges has been relatively uncontroversial. The possibility of removing a president before the natural expiration of his term is inherently controversial. Alexander Hamilton anticipated that:

> the prosecution of the "misconduct of public men . . . will seldom fail to agitate the passions of the whole community, and divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases 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.[28]

It is no surprise that opponents of a presidential impeachment are likely to characterize the effort to truncate a presidential term as a "coup." Of course, such rhetoric seems excessive in that impeachment is a mechanism for removing a president that is clearly provided for in the constitutional text and is exercised in a constitutionally prescribed manner. The legal process of cashiering a president by the elected legislature is hardly comparable to the illegal removal of the head of the civilian government by military force.

Overheated though it may be, the rhetoric of impeachment as coup reflects a real sense that the premature removal of a president is a particularly serious move. Congress has long recognized that impeaching a president is a more significant step than impeaching a judge. There are more ways of holding a president accountable, and voters are more invested in the fate of a president than in the fate of trial judge. It is impossible to separate the possibility of impeaching a president from electoral and partisan calculations. A presidential impeachment will have political repercussions that an ordinary judicial impeachment will not, and the members of the Congress that will be contemplating and judging a presidential impeachment will necessarily have to consider the political ramifications of pursuing such a course of action. By entrusting the impeachment power to an elected body, the framers were ensuring that political considerations would be at play in any impeachment. In the case of a president, that would certainly mean that the president's allies in Congress would likely rally to his side and that those who had been previously opposed to the president would be prominent among those supporting an impeachment. Mixed

[28] THE FEDERALIST NO. 65 (Alexander Hamilton).

motives and motivated reasoning abound. There is no such thing as a pure apolitical presidential impeachment.

Although the constitutional framers anticipated that a presidential impeachment would stir partisan passions, they still imagined, or at least hoped, that Congress, and particularly the Senate, could act as a deliberate body capable of judiciously evaluating charges of misconduct. Recent impeachment inquiries have highlighted the extent to which congressional views on impeachment are influenced by the perceived views of their constituents. If Congress is simply a pass-through for the opinions of the general public, then presidents might feel that a Congress controlled by the partisan opposition is doing little more in an impeachment than taking advantage of a partisan tool to attempt to unseat a president who could not be defeated at the ballot box. A thoroughly partisan impeachment might be seen as illegitimate and abusive, even if it is formally consistent with constitutional procedures.

Is there reason to think that the impeachment power has been hollowed out by an increasingly democratic culture? Even though it has not been formally excised from the constitutional text like the state legislative selection of senators has been, it might survive as a vestigial organ like the presidential electors that could not be expected to function without provoking a legitimacy crisis. Although presidential impeachments remain difficult, it seems unlikely that they should be regarded as broadly illegitimate and incompatible with our contemporary constitutional practices and values.

Notably, although the impeachment power is viewed through a partisan lens, it is not broadly regarded as beyond the pale. Partisans have come to think that impeachment efforts directed against their own president are inappropriate and conducted in bad faith, but partisans are also likely to think that impeachment efforts directed against the opposition's president are appropriate and justified.[29] There is not much evidence of a significant bipartisan distrust of the impeachment power itself. While even many partisans would likely object to faithless electors elevating their favored

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[29] *See, e.g.,* Aaron Bycoffe, Ella Koeze, & Nathaniel Rakich, *Do Americans Support Impeaching Trump?*, FIVETHIRTYEIGHT (Nov. 21, 2019), https://projects.fivethirtyeight.com/impeachment-polls/ [https://perma.cc/F7VK-KWYE]. As Republicans were ramping up criticisms of how President Barack Obama was using executive power in the summer of 2014, over half of Republican respondents reported thinking that the president should be impeached, while few Democrats felt the same. *CNN/ORC Poll*, CNN (Jul. 2014) http://i2.cdn.turner.com/cnn/2014/images/07/24/rel7e.pdf [https://perma.cc/UCP4-YXDA]. As Democrats were ramping up criticisms of President George W. Bush over the Iraq war in 2006, roughly half of Democratic respondents reported thinking that the president should be impeached, while few Republicans felt the same. *Newsweek/Princeton Survey Research Associates Poll* (March 16-17, 2006).

candidate into the White House, it is unlikely that there is a similar underlying skepticism of the impeachment power per se.

There are a variety of circumstances in which Congress might pursue a presidential impeachment, and the circumstances might matter for how we think about the charge of an impeachment overturning an election. In some extreme cases, we might think that such a criticism of a presidential impeachment would indeed be warranted, but thinking through such extreme cases also helps to clarify why impeachments should not generally be likened to a bloodless coup.

A. Charges and Standards

Unlike presidential electors choosing a favored presidential candidate, legislators contemplating a presidential impeachment are not asked to make an open-ended decision about who they think would make the best president. An impeachment inquiry is neither a job interview nor a job evaluation. The Constitution empowers the House to impeach and the Senate to convict only upon demonstrable evidence that the president has engaged in misconduct. To be sure, the standard of misconduct that the Constitution provides is neither detailed nor specific. But the constitutional drafters pointedly did not empower Congress to dismiss the president on a vote of no confidence. They empowered the House to charge the president with having committed identifiable offenses, and they charged the Senate with the duty to evaluate the strength of those charges. As a consequence, the impeachment power charges the members of Congress with the responsibility of performing a more specific task than the Electoral College charges the presidential electors with performing. Members of Congress are not asked to put themselves in the shoes of the average voter and choose a president. They are asked to perform a more juridical task that voters themselves are not asked to perform and would not be expected to ever perform. The House and Senate are not asked to contemplate what the Hamilton Electors posited that presidential electors should consider, whether a candidate is qualified or fit to be president. The House and Senate are asked to perform a more fact-based inquiry (did the president commit specific alleged offenses?) and a more limited evaluative inquiry (does the alleged misconduct rise to the level of an impeachable offense justifying removal?). Rather than simply coopting the people's role in an election, Congress performs a different and more limited function when contemplating an impeachment.

The significance of this limited constitutional role assigned to Congress by the constitutional drafters might become particularly weighty if we were to try to expand the scope of impeachable offenses. Then-House

minority leader Gerald Ford infamously suggested in 1970 that impeachable offenses were simply whatever a majority of the House wanted them to be.[30] The cynicism of Ford's suggestion is particularly corrosive of any effort at sustaining constitutional responsibility, but it has a further implication as well. It posits that Congress should not bother to attempt to discern the meaning of the impeachment clause, which is an unhealthy approach for government officials to take to their constitutional duties generally. Moreover, it has the effect of transforming the impeachment power into a general assessment of quality and fitness. In doing so, it erases the lines distinguishing the role of the Congress and the role of the general electorate. Ford made his own suggestion in the context of a proposed impeachment of Associate Justice William O. Douglas, where he at least did not have to grapple with the problem of a democratically elected official. For Congress to contemplate removing a president on the basis of such a loose standard as "whatever" the House wants invites the complaint of a coup and undermines the ability of the House to resist the claim that it is simply seeking to overturn an election.

The closer the standard for impeachable offenses is shifted toward a general consideration of individual fitness and competence or quality of policy preferences, the more it mirrors the choice being presented to the voters at an election and the more it suggests that Congress is merely reevaluating the decision that the voters made. Gene Healy's proposal that we construe the impeachment clause as embodying some form of a broad "maladministration" standard so that Congress could more easily rid the country of incompetent chief executives runs up against this problem.[31] While such an understanding of the scope of impeachable offenses would make it easier to remove presidents who cannot sustain a favorable job approval rating, it would inevitably drive legislators to contemplate the same factors that voters consider when choosing a president in the first place. The legislator has some new information regarding the president's actual job performance that was unknown at the time of the election, but assessing such information is precisely what we think voters normally do at election time. Rather than allowing voters to fill an office for a fixed period, a more malleable impeachment standard sets up the Congress as a permanent review board charged with reassessing how well the voters' choice is working out and cutting short that term of office whenever legislators are dissatisfied.

The rhetoric of a coup against the president implies some form of lawlessness in toppling the legitimate head of state. Congress is sheltered from such a charge precisely by being able to say that their act of

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[30] 116 CONG. REC. 3113 (Apr. 15, 1970).
[31] *See* GENE HEALY, INDISPENSABLE REMEDY (2018).

impeachment is lawful in that the Constitution both provides for and constrains such a power. If the constitutional constraints on the impeachment power are beaten down and erased by a creative interpretation of the impeachment clause, then it leaves only a discretionary power undisciplined by any legal standards. That Congress is lawfully entrusted with such a power to remove a president is retained, but the actual exercise of that power is rendered lawless by removing critical constitutive features.

It is similarly the menace of a lawless Congress that Alan Dershowitz exploits to argue for the possibility of judicial review of the decision to impeach and remove a sitting president.[32] If Congress were to attempt to remove a president for an act that no one credibly thought met the constitutional standard for an impeachable offense, then it would be hard to distinguish what Congress was doing from some form of coup. If a newly elected Democratic majority in Congress simply announced that no Republican will be suffered to sit at the Resolute desk and on that basis it was ousting the incumbent president, we could not credit it with adhering to a lawfully constituted mechanism for removing the president. A Congress that was no longer following the inherited constitutional rules in seeking to dismiss the president would necessarily be acting outside the law and without the benefit of any constitutional legitimacy. Continuing to call that process an "impeachment" would only be attempting to mask what the legislature was doing. We might have reason to prefer that Congress be the agent of such a lawless act rather than a junto of generals, but it would be lawless and constitutionally illegitimate nonetheless.

The difficulty comes when we move away from extreme hypotheticals. Dershowitz conjures an image of a House recklessly pursuing an illegal and unconstitutional impeachment that violates the Constitution's substantive limitation that a president can only be impeached for treason, bribery, and other high crimes and misdemeanors. In practice, however, the House is unlikely to pursue an impeachment based on charges that no one credibly believes meet the constitutional standard. It might well pursue an impeachment based on conduct that is more controversially within the scope of impeachable offenses. Dershowitz himself favors a very narrow view of the scope of the impeachment power, and thus characterizes almost any impeachment as "illegal" in the sense that it is inconsistent with his own preferred understanding of the proper basis for an impeachment. But saying the House has departed from Dershowitz's personal understanding of the Constitution and saying the House has departed from any reasonable understanding of the Constitution are two quite different things. We might think that the senators who share Dershowitz's view should properly vote to

[32] ALAN DERSHOWITZ, THE CASE AGAINST IMPEACHING TRUMP (2018).

acquit a president brought up on such charges, and we might even think that a Senate that departs from Dershowitz's view should be properly criticized as misguided, but to go further and assert that such a Senate is participating in a coup would be a folly.

Constitutional disagreements are intrinsic to the constitutional enterprise. It is no more than a familiar bit of partisan rhetoric to accuse those with whom one disagrees of acting lawlessly. We should be able to distinguish true lawlessness from mere interpretive disagreements and avoid demonizing antagonists in ordinary constitutional disputes as being not merely wrong but also lawless and illegitimate. There are imaginable circumstances in which a presidential impeachment might look like a coup, but there are few realistic scenarios in which the House would pursue such an impeachment and the Senate would convict on the basis of it.

So long as the House restrains itself to pursuing impeachment charges that fall within the reasonable bounds of the constitutional standard of high crimes and misdemeanors, then it would be performing a constitutionally lawful function that is quite distinct from what voters are asked to do every four years and that seems to be an essential safeguard within the constitutional scheme. The further the House drifts, however, from traditional understandings of impeachable offenses, the greater the concern that it will be operating without any meaningful constraints and appropriating a role more properly left to the voters.

B. Succession

Although critics charge Congress with attempting to "undo" an election through a presidential impeachment, the limited options available to Congress in the impeachment process matter. Congress is empowered to remove a president and disqualify him or her from future office. Congress is not empowered to choose a successor. The impeachment power would be markedly different if, upon the conviction of a sitting president for an impeachable offense, it directed Congress to immediately select his or her successor. In this hypothetical constitutional scheme, the prospect of Congress supplanting voters through impeachment would be very real. Upon conviction by the Senate under such a scheme, the House would be able to select Hillary Clinton, Nancy Pelosi, or Elizabeth Warren to serve the remainder of Donald Trump's presidential term.

However, the Constitution provides that the sitting vice president succeeds an impeached president upon conviction by Senate trial. This may have presented problems under the original constitutional design, as the framers assumed, or perhaps hoped, that political parties would be a minor feature of American politics. Based on this assumption, they designed a

presidential selection system in which the candidate with the most votes became president and the candidate with the second-most votes became vice president. Although a scheme in which the runner-up assumes the duties of office if the winner is incapable of serving out the term might work for beauty pageants, it is less serviceable in a political landscape with organized political factions. When the runner-up represents not just the second-best but an ideological alternative, then prospect of presidential succession in the case of impeachment could have dramatic political consequences. If the vice president is the electoral loser and not just the recipient of the second-highest vote count, then the congressional decision to elevate the vice president to first place through the use of the impeachment power would indeed mean overturning the election results.

Today, the vice president is chosen as part of a party ticket to serve alongside the president pursuant to the Twelfth Amendment. The vice president is not a partisan rival or the runner-up in the presidential election. The vice president is a non-presidential candidate selected by the president and the president's party as the president's successor should the president be unable to serve his entire term of office. Rather than undoing a presidential election, an impeachment and conviction simply trigger the further consequence of the electorate's own choice.

There might be circumstances when the charge of overturning the election would have more bite. If the office of the Vice President were to be vacant and the established rules for succession were to pass the office of the president down to an opposition leader, then Congress might more plausibly be said to have the power to overturn the will of the electorate.[33] When the Senate weighed whether to convict President Andrew Johnson, the vice presidency was vacant and the next in line of succession was the Republican Senator Benjamin Wade. The possibility of transferring power from a member of the National Union party ticket on which the people had voted in 1864 to a leader of the Radical Republican faction in Congress gave credence to the complaints of Johnson's supporters that the congressional Republicans were unwilling to abide by the results of the 1864 election. In the worst imaginings of modern Republicans, a Democratic Congress might seek to impeach and remove not only President Donald Trump but also Vice President Mike Pence.[34] In such a scenario,

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[33] The Twenty-Fifth Amendment created a vehicle for filling a vacancy in the office of the Vice President, but that still requires a successful nomination and confirmation vote by the two chambers of Congress. U.S. Const., Amend. XXV, Sec. 2. By statute, the Speaker of the House is now the first in line of succession to the presidency if both the office of the President and the office of Vice President are vacant. 3 USC § 19.

[34] *See, e.g.*, Martin London, *Spiro Agnew's Lawyer: Mike Pence Should Be Worried About Impeachment Too*, TIME (October 4, 2019).

House Speaker Nancy Pelosi would stand to inherit the White House, and Congress would have managed to wrench the presidency from the hands of the Republicans and placed it in the hands of the Democrats. The current statutory order of presidential succession at least creates the possibility of a presidential impeachment resulting in a shift in partisan control.

Partisan transitions are not the only impeachments that might seem particularly consequential. Imagine the circumstances in which a political outsider wins the White House at the top of a presidential ticket that includes a figure from the political establishment. If party leaders promptly executed an impeachment and removal so as to remove the populist outsider and install one of their own in the Oval Office, then the president's supporters might have valid grounds for complaint that a cabal of the political elite was unwilling to respect the choice of the people to elevate someone who promised to drain the swamp. Congress might stand against the president, and ultimately against the electorate, not only by virtue of partisan divisions but also by virtue of other divisions. The will of the voters might be frustrated by a presidential removal, even if partisan control of the White House does not change. There might be times when the voters are uniquely invested in the person at the top of the presidential ticket such that the replacement of that person by anyone else would always carry with it the stench of illegitimacy.[35]

If a minority political party had tried to improve its chances at victory by including in the vice presidential slot a recent party switcher and managed to win the White House, even as the traditional majority party won control of the two chambers of Congress, then we might worry about another scenario that could plausibly be said to undo the election. If Congress promptly impeached and removed the faithful representative of the minority party, elevating the vice president who shares many of the values and interests of the majority party, then the members of the minority party might reasonably complain that they had been badly treated by Congress. For instance, if a Democratic congressional majority could elevate a John Tyler-type Vice President to the presidency, then Whigs might have a case to make that they had not merely suffered the bad luck

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[35] The frequent charge that Donald Trump's supporters are unusually cultish in their affection for him implies the possibility that Trump is a unique political leader and that any successor would necessarily be illegitimate to his base. *See, e.g.,* Mike Murphy, *Trump Supporters Are in a Cult, and Mitch McConnell is One of the Them, Says Dan Rather*, MARKETWATCH (November 23, 2019). Vice President Mike Pence's strong approval rating among Republican voters might suggest that partisanship, rather than personal charisma, is the most salient factor. *Morning Consult/Politico National Tracking Poll #191151* (November 15-17, 2019). Vice President Joe Biden had a comparable approval rating among Democrats during Barack Obama's presidency. Andrew Dugan, *Hillary Clinton Is Still Popular, More So Than Obama, Biden*, GALLUP.COM (April 23, 2013).

that had always been part of the risk of their electoral strategy. They might argue instead that they had suffered from a form of constitutional hardball that suggested that the Democrats were not willing to abide by election results that they did not like.

Under more ordinary circumstances, removing a president for misconduct and elevating his hand-picked successor to the high office cannot reasonably be seen as subverting the election results. Had Al Gore been made to complete the last two years of Bill Clinton's term of office, it would hardly have been a coup against the people of the United States who had voted for Clinton-Gore in 1996. The removal of Bill Clinton from the presidency would have been consequential for Bill Clinton, but there is no plausible interpretation of such an outcome that could characterize it as a concerted effort to rebuff the people's choice of a political, policy, or ideological coalition to guide the executive branch. Substituting one post-Reagan New Democrat with another could hardly be said to countermand the course that the people had set for the government.

The vice-presidential selection might seem to be an afterthought of relatively little consequence. Even so, the voters understand that they are electing a team to run the executive branch and that the vice president will be but "a heartbeat away from the presidency." If fate should intervene such that the vice president must assume the office of the President of the United States, that contingency was anticipated in the election returns. There might be extreme circumstances in which Congress triggers the presidential succession and the implications are fundamentally inconsistent with democratic sentiments. Nevertheless, in most cases, the fact that Congress can remove a president but cannot determine his successor undercuts the claim that a presidential impeachment is like a coup.

C. Mandates

When assessing the legitimacy of a presidential impeachment, we might think that it matters not only who might succeed a president who has been impeached and removed, but also how a president came into office in the first place. The office of the president is, of course, constitutionally defined, and every individual who enters into the office inherits all the constitutional authority that accompanies the office. That constitutional authority is substantial and has become more so over time as precedents favoring presidential power have accumulated.[36]

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[36] On the president's constitutional authority, see LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH (2014). On the significance of this authority even for politically weak presidents, see MICHAEL J. GERHARDT, THE FORGOTTEN PRECEDENTS (2013); Jordan T.

But the political authority of presidents has been more variable than the baseline authority provided by the constitutional office would suggest. The political context in which an individual assumes the presidency matters, with some presidents finding themselves severely hampered by a hostile climate and other presidents finding themselves able to lead a vigorous political coalition.[37] Moreover, presidents have long claimed additional political authority resting on claims of an electoral mandate. As presidential campaigns became more national and organized and central to American political life, presidents have tried to leverage their success on the campaign trail to enhance their authority to lead the government after their inauguration.[38] Politically weak presidents might be more vulnerable to an impeachment.[39] Does the standard for impeaching a president likewise vary with their political situation?

Would Congress face a larger legitimacy problem if it sought to impeach some presidents as opposed to others? Perhaps charges of a congressional coup against the president would ring particularly hollow if the president in question had little political authority. It does not seem credible that the effective threshold of a presidential impeachment is lower for most ordinary cases in which presidential authority is at a low tide. Presidents who squeak into office without a significant electoral mandate or "preemptive" presidents, who achieve electoral victory despite a general political and ideological disadvantage facing their political coalition, are no less presidential. Presidents like Woodrow Wilson and Dwight Eisenhower –both preemptive presidents who won the White House despite leading the minority political party of their era—or George W. Bush and Grover Cleveland—both of whom won the presidency by a historically small electoral college and popular vote margin—seem to have as credible a claim to their office without undue congressional interference as any other. They may not be as well situated to rally political support when hit by political scandal, but a congressional impeachment is not likely to seem any more legitimate as a consequence of their limited political authority.

Cash, *The Isolated Presidency: John Tyler and Unilateral Presidential Power*, 7 AMER. POL. TH. 26 (2018).

[37] On the variable authority of presidents, see STEPHEN SKOWRONEK, supra note 13, at 17-32; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007).

[38] On presidential mandates, see Richard J. Ellis and Stephen Kirk, *Jefferson, Jackson, and the Origins of the Presidential Mandate, in* SPEAKING TO THE PEOPLE (Richard J. Ellis ed., 1998); Michael J. Korzi, *The Seat of Popular Leadership: Parties, Elections, and the ?Nineteenth-Century Presidency*, 29 PRES. STUD. Q. 351 (1999); PATRICIA HEIDOTTING CONLEY, PRESIDENTIAL MANDATES (2001) ; LAWRENCE J. GROSSBACK, DAVID A.M. PETERSON, JAMES A. STIMSON, MANDATE POLITICS (2006); Julia R. Azari, *Institutional Change and the Presidential Mandate*, 37 SOC. SCI. HIST. 483 (2013).

[39] Skowronek, supra note 13, at 44.

Nonetheless, some presidents are uniquely vulnerable to being toppled by a hostile Congress. In particular, presidents who come to office by unconventional means might not merely be lacking the kind of electoral mandate that Franklin D. Roosevelt or Ronald Reagan could boast but might be suffering from a legitimacy deficit of their own.

Perhaps vice presidents who inherit the Oval Office outside of a national election of their own have a more limited claim to the office if Congress threatens them with impeachment. Gerald Ford, President Nixon's vice president at the time of Nixon's resignation, is arguably exemplary of this situation because Spiro Agnew, not Ford, was on the presidential ticket during the 1972 presidential election. Nevertheless, Ford became president upon Nixon's resignation, and is the only vice president to have assumed the office without being a part of the original presidential ticket during the general election. Instead, President Ford became president as a result of Nixon's nomination and Senate confirmation and is the only president that never ran in a national election, except as an incumbent.

Ford might have been unique in not being included on a presidential ticket, but some vice presidents before him faced their own struggles in assuming the presidential mantle. The first vice president to succeed to the presidency on the death of his predecessor, John Tyler, was derided as "His Accidency" and snubbed by former-President John Quincy Adams as a mere "acting president."[40] Likewise, Andrew Johnson's opponents in the House preferred to style him "Vice President and acting President of the United States" while pursuing his impeachment.[41]

Other presidents have come to office without the strong endorsement of the electorate. John Quincy Adams was himself the only president to have ever won the White House without having won a majority of the Electoral College. His selection by the House of Representatives was denounced by the Jacksonians as a corrupt bargain and a stain upon the presidency.[42] Rutherford Hayes was awarded the presidency in 1876 despite contested election results and without a popular vote majority. Donald Trump won a clean Electoral College victory in 2016 but failed to secure even a plurality of the popular vote (no candidate in 2016 won a popular vote majority given the relative success of third-party candidates). Woodrow Wilson managed to win a majority of the electoral vote, while barely breaking 40 percent of the popular vote in a fractured field in 1912, while Abraham Lincoln did even worse in 1860.

Would the House have a lighter burden to bear in arguing for the impeachment of a president who had come to office by such a path?

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[40] EDWARD P. CRAPOL & JOHN TYLER, THE ACCIDENTAL PRESIDENT 10 (2012).
[41] EDWARD MCPHERSON, HAND BOOK OF POLITICS FOR 1868 at 188 (1868).
[42] LYNN HUDSON PARSONS, THE BIRTH OF MODERN POLITICS 106–10 (2009).

Certainly, the supporters of Donald Trump do not think so, and their position seems generalizable. Regardless of how an individual comes into the presidency, his constitutional authority seems adequate to resist a claim that Congress could depose him at will. Regardless of how they assumed office or the level of their broader political support, every president possesses the same baseline level of constitutional authority. That constitutional floor includes a commitment that presidents do not serve a term "equivalent to a tenure during pleasure of the Senate," as Madison insisted during the Philadelphia convention debates.[43] The office of the president was created to be independent of Congress, even if the president is unpopular or lacking in political support. Once placed into office, Gerald Ford or John Quincy Adams could not be displaced as president by the Congress simply because it had come to prefer an alternative, even it was Congress that played the key role in placing them there. A president with little political authority may be more likely to have his vetoes overridden or his nominees left unconfirmed, but he does not lose the constitutional authority to issue vetoes or nominate officers. He is entitled to every day of his four-year term, though he may have little prospect of receiving another.

Admittedly, no reasonable person could argue that an attempt to impeach and remove President Ford would have been an attempt to overturn a democratic election. Ford's authority rested entirely in the constitutional office of the presidency without the supplement of normal democratic credentials that a president can claim, but even that authority is sufficient to resist an insufficiently justified congressional impeachment attempt. His hold on his office is secure, absent the same impeachable offenses that would endanger any other president despite the unusual path by which he arrived in the White House. No other president has been in Ford's shoes. Each can claim some democratic legitimacy. Each was *elected*, not appointed, to the presidency. They may not have scored impressive victories relative to other presidents, but they competed in an electoral race and emerged the victor. They are the chosen representative of an electoral constituency, and the stakes of pursuing their removal are necessarily different and higher than they would be in the case of a judge or an appointed executive officer. Impeaching a president is different than impeaching a secretary of state, even in cases where a president won the election by a small margin.

At the same time, no president is immune from being held to account by impeachment. Presumably, Donald trump was attempting to claim such an immunity when he tweeted a 2016 presidential election map

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[43] JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION (September 8, 1787).

that dared Congress to "try to impeach this."[44] From a pragmatic political perspective, he may be right that Congress will find it difficult to impeach and remove a president who remains popular with voters, regardless of what offenses he committed. From a constitutional perspective, the size of the president's electoral victory does not render his impeachment any more or less of a coup. President Nixon won a historically impressive victory in 1972, with over 60 percent of the popular vote and nearly the entire electoral vote. Despite vanquishing George McGovern in such a dominant fashion, Nixon resigned in disgrace less than two years later to avoid his inevitable impeachment and removal. However a president is elected, their hold on office is defined by the constitution. A president who has demonstrably committed serious impeachable offenses cannot hide behind the security of his electoral win.

D. Timing

Timing might matter in how much credence we should give to a president's fulminations against impeachment as a kind of coup. We still must face the fundamental concern that led the framers to include an impeachment power in the constitutional text in the first place. Four years is a long time to trust a single individual with substantial power, and things can go wrong before the next election cycle in a system of fixed terms of office. At the Philadelphia Convention, James Madison pointed out that the "limitation of the period of his service" was not a sufficient security for the public since "loss of capacity or corruption" could arise "after his appointment."[45] The framers empowered Congress to act not to undo the choice of the people, but to address changed conditions that the people are not able to address themselves. This gives us good reasons to think that Congress should not attempt to re-litigate the last election by reframing past acts known to the voters as newly impeachable offenses. The impeachment device was built into the constitutional design because something new might happen that demands a more immediate response than waiting for the next election would allow. If nothing new has happened, then impeachment becomes hard to justify. The people have spoken and are entitled to their choice of a political leader, no matter how fervently members of the Congress think that choice was mistaken.

The people have no similar expectation if a duly elected president engages in new misconduct that could not have been taken into account by

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[44] Donald Trump (@realdonaldtrump), TWITTER (Oct. 1, 2019, 7:05 AM), https://twitter.com/realDonaldTrump/status/1178989254309011456.
[45] JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION (July 20, 1787).

the voters at the last election. There might be some difficult cases if a president were to engage in a form of misconduct that was arguably fully foreseeable at the time of the election. Then, perhaps, we should best take the view that the electorate deserves to have the president that they chose, including all the reasonably foreseeable consequences of choosing such a president. But the impeachment device would be pointless if it could not be used against any new misconduct by a president simply on the grounds that the president's character and disposition was known to the voters at the time of election, and so any future bad behavior had to have been baked into the election results. Presidents must ultimately take responsibility for their own voluntary actions, and if the people elect a cad or a scoundrel to the White House, that does not mean that the election results are being overturned if a president is held to account for misconduct that he might engage in while in office. Voters might be willing to forgive a candidate's history of scandalous behavior, but that is no reason to pardon new scandalous acts undertaken after Inauguration Day.

Timing, however, might matter in a different way. Impeachments that are initiated immediately after an election or immediately preceding one might face a particularly heavy burden to demonstrate that they are justified. If the House were to launch an impeachment inquiry the day after a new president is inaugurated, it would be reasonable to think that the House bears a heavy argumentative burden to demonstrate that it is doing something other than simply rejecting the election results. Somewhat differently, if the House initiates an impeachment in the shadow of an upcoming presidential election, it bears some burden of explaining why the misconduct at hand cannot be adequately addressed at the ballot box. Such burdens are defeasible. A corrupt president might start accepting bribes before the inaugural festivities have even concluded, and a treasonous president might need to be removed, even if he has but a single day remaining to his term of office. But to overcome their argumentative burden, the House must demonstrate that the high crimes and misdemeanors were so serious as to warrant not just the shortening of the president's tenure, but also the bypass of the electoral check.

If impeachment and removal are a political remedy to a certain kind of serious political problem, then there is always a need to assess whether they are an appropriate or necessary remedy for the immediate problem.[46] In some cases, lesser sanctions than removal from office may be adequate, or the offenses may be sufficiently tolerable that immediate removal is not necessary. But in other cases, the misconduct at issue might be so serious and pose such an immediate and ongoing threat to the public welfare that a

[46] *See also* Keith E. Whittington, *A Formidable Weapon of Faction?: The Law and Politics of Impeachment*, WAKE FOREST LAW REVIEW (forthcoming).

delay of years, months, or even weeks before the offending officeholder is removed might be too great of a risk. It is possible to imagine a president who needed to be impeached and removed even when he only had days left in his natural term of office. But there are many circumstances in which we might think that a president has engaged in misconduct that is worthy of condemnation but that does not pose the kind of threat that requires that the levers of power be immediately removed from his hands. The closer an election might be, the more pressing it is that the House be able to provide an explanation for why the voters should not be allowed to evaluate the charges and remedy the problem themselves.

Government officers have been impeached for behavior that seems inconsistent with the dignity and expectations of the office that they hold. Impeachment in such circumstances might serve an important purpose in constructing, buttressing, or enforcing norms of conduct for public officials. The actual removal of such officers might be secondary to the condemnation of the alleged offense. The incompatibility between an individual's conduct and their public role might nonetheless be bearable for some period of time. Congress has seen fit to wait, for example, for criminal prosecutions to play out before seeking to impeach and remove federal judges who have engaged in criminal behavior. Removal might eventually be necessary if a judge convicted of a crime refused to voluntarily step down, but Congress has apparently accepted that lesser measures can be deployed to safeguard the public interest in such cases until an impeachment trial can eventually be held. We might likewise imagine that presidents guilty of grossly inappropriate behaviors do not pose the kind of threat to public safety that demands immediate removal, even if they do deserve condemnation.

CONCLUSION

If the Constitution were being drafted today, it is unlikely that we would include all the same mechanisms of indirect democratic governance that the framers did in 1787. We would be unlikely to want regional legislators to select national legislators or for elected electors to select the national political leader. If the presidency were a mere chief executive, then the voters might reasonably leave the hiring question for that job in the hands of some more directly accountable politicians. But in a modern democracy, the voters expect to select their political leaders themselves.

Nonetheless, some mechanisms of indirect accountability might be useful and justifiable. In particular, a device for impeaching and removing an elected leader for specific acts of misconduct would seem to serve a

function that the people cannot readily perform themselves. Even within a good and largely democratic political system, an indirectly democratic mechanism for monitoring the conduct of the president and intervening when something goes wrong is justifiable. Although we might not design the electoral college the same way today, it seems likely that we would be driven to include some version of the impeachment power.

It is no accident that Congress has primarily used the impeachment power against lower court judges. The record of presidential conduct is hardly unblemished, but the electoral check has generally been thought adequate to discipline and to replace the chief magistrate. Compared to judges, presidents have a stronger base of support in Congress and more resources to put up a fight if challenged by the impeachment power. While some judges have committed the kind of obviously inappropriate acts that unite legislators in the call for their ouster, presidents tend to exercise poor judgment in ways that give rise to more debate and controversy. Successfully pursuing presidential impeachment and removal requires uncommon political fortitude, tenacity, and skill.

It is without question that Congress can abuse the impeachment power, just as any other governmental actor can abuse a discretionary power entrusted to it. Most dramatically, the House might impeach an officer for conduct that no reasonable interpreter would think is an impeachable offense. The Senate might even convict on such a charge. There is no recourse for the unfortunate officer who has had his tenure in office shortened as the result of such an abuse. The legislators will be accountable to their constituents for their hubris and error. The more legislators attempt to expand the scope of the impeachment power in order to attempt to remove a president that they find disagreeable, the more they encroach on the proper realm of those constituents. If legislators find themselves attempting to use the impeachment power to overcome policy disagreements or to avoid an electoral judgment, they risk giving credence to presidential complaints that they are simply seeking to overturn the results of an election. The constitutional remedy of impeachment is sometimes necessary and remains justifiable, not when legislators believe that the voters have made a bad choice, but when they believe that a president has begun to abuse his office in identifiable and intolerable ways.

That presidential impeachments are difficult or controversial or rare does not mean that they are illegitimate. Advocates of a presidential impeachment bear a heavy argumentative burden to justify taking such a drastic step, but there are circumstances in which Congress should be prepared to take such a step. We have multiple means to hold presidents accountable for their actions, and the impeachment power is one of them. Supporters of a sitting president might prefer that he or she be answerable

solely to the voters at the ballot box, but the American system is one of constitutional checks and balances, and not just one of democratic elections.