

President Trump's Utterly Meritless Claim That Abuse of Power is Not Impeachable

President Trump's lawyers argue that a President's clear abuse of power, absent a technical violation of law, is not impeachable conduct. **That's nonsense.** Even the most cursory examination of (1) the Constitution's text, (2) our Framers' statements about impeachable conduct, (3) the history of impeachments, and (4) widespread legal consensus – shared even by President Trump's own Attorney General, Bill Barr – unequivocally confirms that **abuse of power lies at the heart of all impeachable conduct.**

1. **Text**

The plain text of the Constitution makes crystal clear that abuse of power is the unifying principle behind the delineated conduct for which a President can be impeached:

- The Constitution provides for removal upon impeachment for and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.” In his seminal essay on impeachment, Charles Black explained that the word “other” indicates that those three items are “of the same kind.” Treason and bribery by officeholders are offenses against the body politic – they “subvert the political and governmental process” because the official is acting in his *own* interests, rather than the interests *of the public*. In other words, treason and bribery are impeachable not because they are bad – murder is bad, too. **They are impeachable because they are a particular kind of bad: they are an abuse of official power at the expense of the public good.** Thus, “other high Crimes and Misdemeanors” encompasses offenses that likewise represent abuses of official power.
- The Supreme Court relied on this principle in *Nixon v. Fitzgerald*. It explained that “absolute immunity [against damages] for the President will not leave the Nation without sufficient protection against **misconduct**” because a President can be impeached for that misconduct, not just for crimes. **The Court added that the “threat of impeachment” is a key way “to deter Presidential abuses of office.”**

2. Convention Legislative History

The Constitution's Framers included "high Crimes and Misdemeanors" as grounds for impeachment to encompass abuses of power outside of violations of statutory law:

- **At the time of the Constitutional Convention, no federal criminal laws even existed.** The impeachment clause was adopted on September 8, 1787, and the first federal criminal law was enacted on April 30, 1790, so it is nonsensical to argue the Framers believed that a violation of federal criminal law was a requisite for impeachable conduct. **Indeed, no federal courts even existed when the clause was debated.**
- At the convention, Edmund Randolph explained that a president must be impeachable because he “will have great opportunitys of abusing his power.”
- The Framers rejected a proposal to limit impeachable offenses to only treason and bribery. They also rejected a proposal to allow impeachment for mere “maladministration” — effectively, incompetence or policy disagreements — instead adding “high Crimes and Misdemeanors” in order to encompass what George Mason called “great and dangerous offenses” that would “subvert the Constitution.”
- **As Alexander Hamilton explained in Federalist No. 65, impeachment is different than statutory crimes because “the subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”** Hamilton further explained that impeachable offenses are “POLITICAL” offenses, “as they relate chiefly to injuries done immediately to the society itself.”
 - Moreover, “**misconduct in office**” was a crime at common law. It was defined in an 1846 treatise as when “a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them.” So even if President’s Trump’s lawyers are correct — and they are most certainly not — the allegations against President Trump would still squarely fit within the Framers’ common law understanding of impeachable conduct.

3. Historical Practice

A number of impeachments and convictions in U.S. history were rooted in abuses of power, not simply violations of the law or statutes:

- In 1803, Judge John Pickering was impeached and removed from office by the Senate for making unjustifiable decisions in the courtroom, including presiding over cases while intoxicated, and therefore “degrading...the honor and dignity of the United States.”
- In 1912, Judge Robert Archbald was impeached and convicted by the Senate for corruptly trying to profit from business deals with litigants – despite there being no laws making such behavior illegal at the time – because, as the House manager explained, “all agree that an offense, in order to be impeachable, need not be indictable either at common law or under any statute.”
- The first article of impeachment against President Nixon for obstruction of justice – passed out of the House Judiciary Committee on a bipartisan basis – was grounded, as the House Judiciary Committee explained, in a “serious violation of Richard M. Nixon’s constitutional obligations as President, and not the fact that violations of federal criminal statutes occurred.”

4. Widespread Scholarly Consensus

There is longstanding, widespread legal consensus that abuse of power, even without a violation of law or statute, is squarely impeachable conduct:

- In 1833, Supreme Court Justice Joseph Story observed that impeachment encompasses “the abuse of high offices of trust” and not only “crimes of a strict legal nature.”
- An influential 1880 treatise, “The General Principles of Constitutional Law,” explained that impeachable offenses are “not necessarily offenses against the general laws” or “offenses against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty.”
- Charles Black’s widely respected 1974 essay, “Impeachment: A Handbook,” explains that impeachable conduct includes “offenses which are rather obviously wrong, whether or not ‘criminal,’ and which so seriously threaten

the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator.”

- In a 2018 memo, Attorney General Bill Barr argued: “The fact that President is answerable for any abuses of discretion” – including when he makes “decisions based on ‘improper’ motives” and *not* just criminal acts – “and is ultimately subject to the judgment of Congress through the impeachment process means that the President is not the judge in his own cause.”
- The conservative National Review shot down the claim “that presidents cannot be impeached for any abuse of power unless that abuse took the form of a criminal violation of a statute,” noting “[t]he consensus of those who have studied this question is to the contrary.”
- Even Jonathan Turley, the witness called by House Judiciary Republicans, agrees that, “based on the history of impeachment in both England and the United States, where articles commonly included noncriminal acts,” a president “can be impeached for a noncriminal act.”

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