
TO (PRETEND TO) REVIEW OUR BOOK[†]

*Laurence H. Tribe & Joshua Matz**

In the world according to Professor Michael Stokes Paulsen, impeachment turns out to be a remarkably simple subject. So simple, in fact, that it's unclear why it would merit a book, let alone a spate of studies. Here's the scoop: a few sources from the late 1780s decisively show that "the impeachment judgment is properly concerned . . . solely with the question whether the wrongs committed are themselves sufficiently serious wrongs as to warrant exercise of the impeachment power."¹ Nothing else can ever be relevant. If a legislator concludes that the President's wrongs are "sufficiently serious," he or she is obliged to vote for the President's immediate removal from office. And in assessing seriousness, legislators can look only to neutral factors derived from "original, objective public meaning."² This approach shields us from "considerations of strategy, practicality, and partisan politics."³ It also reveals that the impeachment power has been drastically underutilized in American history: Presidents Andrew Johnson and Bill Clinton, and potentially James Buchanan and Woodrow Wilson (among quite a few others), should never have completed their terms in office.⁴ Only a partisan hack — with dodgy motives and even dodgier methods — could support any other view of impeachment.⁵

That's where we come in: we're the hacks. Paulsen is explicit on this point. In his telling, we engaged in a devious "partisan gerrymander,"⁶ deliberately reverse engineering an impeachment standard to ensnare as many Republicans as possible while letting Democrats off the hook. We were able to do so, Paulsen adds, only because we didn't stick to originalist methods.⁷ By falsely asserting that originalism doesn't provide a clear and determinate framework for impeachment analysis,

[†] Responding to Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689 (2018).

* Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School. Joshua Matz is the publisher of *Take Care*. He is also of counsel at Gupta Wessler PLLC and Kaplan Hecker & Fink LLP. We are grateful for Charles ("Quent") Fox, Medha Gargeya, Emily Massey, and Zach Tan for first-rate research assistance, and to the editors of the *Harvard Law Review* for their helpful comments.

¹ Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 694 (2018).

² *Id.* at 693.

³ *Id.* at 724.

⁴ *See id.* at 724 n.86.

⁵ *See id.* at 691–92, 724.

⁶ *Id.* at 724.

⁷ *See id.* at 695–96.

we invented judgment calls vulnerable to partisan manipulation.⁸ And then we engaged in precisely such skulduggery, making up new standards and invoking irrelevant considerations. But, alas, we did a bad job. Having written a whole book to oust President Donald J. Trump while saving President Clinton’s legacy, we stumbled at the finish line — first by offering “contradictory warnings” about the strategic risks and political wisdom of impeachment, and then by failing to demand President Trump’s removal.⁹

Paulsen blends accusations of willful bad faith with insinuations of scholarly and strategic incompetence. These aren’t minor charges. You might therefore expect that Paulsen would have engaged seriously with our arguments. If so, you’d be disappointed. As one of our colleagues candidly remarked, “it’s almost like he didn’t read the book.” In accusing us of methodological dishonesty, Paulsen repeatedly and egregiously misdescribes our thesis, reasoning, and conclusions. He then ignores entire sections of the book that refute core premises of his “naïve” view.¹⁰ Throughout, he rips text out of context to complain about contradiction. In short, he has reviewed a book that we didn’t (and wouldn’t) write. And he has accompanied that “review” with a supposedly originalist theory of impeachment that is neither originalist nor persuasive.

We are happy to engage in a debate about the proper approach to questions of impeachment. These are exceptionally difficult issues. Our own thinking about them is still evolving. We therefore welcome good faith, well-reasoned criticism of our book. But Paulsen’s essay — in particular, Part III — is no such thing. And at the risk of inadvertently lending undeserved credibility to Paulsen’s essay, we will address his many errors in detail. We do so to ensure that readers are not led astray, either by his “review” or by his own theory of impeachment. We also see this as an opportunity to reflect upon the steady, unavoidable importance of good judgment — by many actors and in many settings — over the course of a presidential impeachment process.

At bottom, Paulsen’s account of impeachment seeks to deny, isolate, or automate as many instances of judgment as possible, leaving only a single question for a single actor: in the eyes of Congress, did the President commit a sufficiently serious and wrongful act to require his removal? This framing is meant to keep the legislature maximally shielded from potentially corrupting influences. But it comes at an intolerable cost. In his zeal to deny the necessity or validity of any other judgments, Paulsen misreads the Constitution, constructs an indefensible account of impeachable offenses, and denies the discretion vested in Congress (and, through it, the American people) to decide the nation’s fate in times of presidential tyranny. Paulsen also fails to address many of the most

⁸ See *id.* at 704–05.

⁹ *Id.* at 716.

¹⁰ *Id.* at 693.

important actors and decision points in an impeachment process; declines to recognize key questions bearing on the real-world conditions that make an impeachment possible; forbids any political consideration of the consequences we might endure from impeaching or failing to impeach a President; and misses the profound connection between impeachment and democracy.

When it comes to the impeachment power, we cannot escape a horde of tough judgments. As scholars and citizens, the Constitution calls upon us to grasp that fact and face it head on. We wrote our book in recognition of that reality. Paulsen wrote his review in denial of it.

I. WHY WE WROTE THIS BOOK

Paulsen asserts that “[f]rom start to finish, [our] book is about the prospects for impeaching and removing Trump.”¹¹ This unyielding focus on the current President is (apparently) leavened only by the fact that we “are nearly as obsessed with Clinton.”¹² Never mind that Paulsen spends more time on Clinton in his 36-page review than we do in our 245-page book. Set aside the fact that we say virtually nothing about President Trump in three out of six chapters (and address President Trump in only a few sections of the remaining three). Paulsen is *certain* that our goal in writing this book was to end Trump’s presidency and validate President Clinton’s acquittal. Everything else is epiphenomenal — or, worse, duplicitous.

We won’t keep you in suspense: Paulsen is completely wrong.

As recognized by every reviewer *other* than Paulsen (including a number of principled conservatives), our main goal in writing *To End a Presidency* was to identify the many judgment calls in any impeachment process and to offer a reasoned, cautious framework for thinking about them.¹³ Obviously, President Trump’s election was an impetus for this

¹¹ *Id.* at 707.

¹² *Id.* at 708.

¹³ See, e.g., David Frum, *Impeachment Is Not the Answer*, THE ATLANTIC (May 22, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/impeachment-is-not-the-answer/560855/> [<https://perma.cc/E9T3-NXHQ>]; *How to Impeach a President*, THE ECONOMIST (May 12, 2018), <https://www.economist.com/books-and-arts/2018/05/11/how-to-impeach-a-president> [<https://perma.cc/8G3N-HBV2>]; K. Sabeel Rahman, *There Are No Shortcuts for a Democracy in Crisis: On the Limits of Impeachment Talk*, TAKE CARE (June 7, 2018), <https://takecareblog.com/blog/there-are-no-shortcuts-for-a-democracy-in-crisis-on-the-limits-of-impeachment-talk> [<https://perma.cc/N3VN-PF45>]; Jennifer Rubin, *The Most Important Book on Impeachment in Decades*, WASH. POST (May 14, 2018), <https://wapo.st/2rIQO7V> [<https://perma.cc/7UE5-MTKB>]; Richard Salomon, *Navigating the Use of Impeachment*, N.Y. JEWISH WEEK (May 18, 2018, 12:40 PM), <https://jewishweek.timesofisrael.com/navigating-the-use-of-impeachment/> [<https://perma.cc/D5E5-79GZ>]; Ganesh Sitaraman, *Impeaching Trump: Could a Liberal Fantasy Become a Nightmare?*, THE GUARDIAN (May 22, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/may/22/donald-trump-impeach-book-to-end-a-presidency> [<https://perma.cc/G35N-XTAQ>].

undertaking. “It’s now clear,” we explain, “that as long as Trump holds the nation’s highest office, Americans will actively debate his impeachment.”¹⁴ Because that debate will occur in a “highly unstable climate” of “political polarization, incendiary rhetoric, and widespread anxiety,” there is a particularized need for a “cool and evenhanded reflection” on “impeachment’s role in the US constitutional order.”¹⁵ But our motives for writing the book also extend far beyond President Trump. As we discuss in Chapters Five and Six — which Paulsen all but omits from his review — a variety of unhealthy trends have conspired in recent years to make “impeachment talk” a weapon of first resort in partisan combat.¹⁶ This degradation and normalization of impeachment has encouraged wildly unrealistic expectations on both sides of the aisle about its capacity to either save or destroy our political system.¹⁷ These developments have also fueled “promiscuous, hyperpartisan, and implausible calls for impeachment that reinforce (and accelerate) a cycle of broken politics.”¹⁸ The perverse result is that a power designed to save our democracy from presidential tyranny is serving mainly as a catalyst of hardball politics and democratic dysfunction.¹⁹

We firmly believe that Americans can reverse this destructive trend. But to do so, they must “unlearn[] bad lessons of the recent past and adopt[] a saner, more discerning mindset,” in which “[i]mpeachment [is] treated as a last resort in times of crisis — not as a knee-jerk response to hints of misconduct.”²⁰ To facilitate that development, and to promote levelheaded dialogue, we sought to “map out and address the big questions presented by any impeachment,” while exploring “how the impeachment power has shaped (and been shaped by) the broader architecture of our legal and political systems.”²¹ As we observe in the book’s preface, this effort required us to “take seriously the fraught political path toward impeachment; the intricacies of prosecuting, defending, and adjudicating an impeachment case; and the importance of anticipating and seeking to minimize disruptive consequences that may follow.”²² It also led us to “highlight the many decision makers involved and the many decision points they face.”²³ Ultimately, we wrote our book to “identify general principles and frameworks” — based in law, history, and political theory — that can “serve as a basis for bipartisan discussion in this divisive era.”²⁴ Put differently, we wrote our book to help

¹⁴ LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY*, at xi (2018).

¹⁵ *Id.* at xii.

¹⁶ *Id.* at 214–15.

¹⁷ *See id.* at 177.

¹⁸ *Id.* at 239.

¹⁹ *See id.* at 214–16.

²⁰ *Id.* at 240.

²¹ *Id.* at xv.

²² *Id.* at xv–xvi.

²³ *Id.* at xvi.

²⁴ *Id.* at xxi.

the American people make good judgments when impeachment comes up (which, these days, it always does).

We crystallized many of these points in our conclusion, which — true to form — Paulsen completely ignores. With apologies for the lengthy block quote, these paragraphs reflect the core thesis of our book:

In calling for a clear-eyed view of impeachment, we have emphasized realism over fantasy. Impeachment is neither a magic wand nor a doomsday device. Instead, it is an imperfect and unwieldy constitutional power that exists to defend democracy from tyrannical presidents. Deploying this emergency measure always requires extensive national deliberation, as well as agreement from many Americans who originally supported the disastrous leader. Further, even when successfully invoked, impeachment serves only to end a presidency. It doesn't fix the democratic decline that brought a tyrant to power. It doesn't undo the havoc he wreaked while in office. And it doesn't forestall the trauma of expelling him through such extraordinary means. In the wake of an impeachment proceeding, "We the People" must set our world aright.

Maintaining a realistic mindset is important because the Impeachment Clause demands that we exercise sound political judgment — especially at times of crisis. That isn't possible when the public ascribes miraculous powers to impeachment; treats it as a weapon of partisan warfare; or seeks to shift responsibility to the Framers, the pollsters, or the criminal code. Facing the impeachment power head on, with all its complexity and limitations, can be frustrating. But as Andrew Shepherd warned in *The American President* (an Aaron Sorkin film), "America ain't easy. America is advanced citizenship." There are no small mistakes when it comes to ousting a president. It's crucial to get these decisions right.

And as we've seen, impeachment-related judgments are not limited to final votes in the House and Senate. They encompass innumerable choices that arise before, during, and after any hearings on Capitol Hill. On many of these issues, the Constitution says little — or nothing at all. The public must therefore rely upon its general understanding of politics and democracy, sharpened by an appreciation of impeachment's history and purpose.²⁵

Simply stated, our book exists to frame a serious dialogue about impeachment's capacity to preserve or undermine American democracy. Paulsen's review says nothing about this thesis. Yet the entire structure of our book points straight toward it. Drawing heavily on records of the Constitutional Convention, we first explore the origins and purpose of the impeachment power. We next consider what conduct is impeachable as "high Crimes and Misdemeanors." That leads to an exploration of Congress's all but unbounded discretion in deciding whether (and when) to remove presidents who have committed impeachable offenses. Our fourth chapter explores impeachment practice in Congress and the factors that appear to have influenced legislative judgments. We then step

²⁵ *Id.* at 236–37.

back, offering a broad survey of “impeachment talk” in American history and a critique of the “permanent impeachment campaign” that has taken shape over the past two decades.²⁶ Finally, we ask whether a power premised on political consensus can operate effectively — or may instead operate destructively — in this age of partisan polarization.

Of course, several sections of the book address President Trump; it would have been nuts to exclude him. We pull no punches in criticizing President Trump’s many abuses of power and identifying alleged impeachable offenses that deserve closer attention. “But this book,” we state unequivocally in the Preface, “is *not* a brief for removing Trump.”²⁷ To the contrary, we repeatedly emphasize the need for further investigation before deciding whether President Trump has committed “high Crimes and Misdemeanors.”²⁸ We explain why some of President Trump’s supposed impeachable offenses do *not* satisfy the standard set forth in Article II.²⁹ And we examine an array of considerations that might cut against deploying “impeachment talk” — or full-blown impeachment hearings — in response to President Trump’s misdeeds.³⁰

Because he is determined to treat our book as part of a plot against President Trump (and Republicans everywhere), Paulsen points to this cautious analysis as proof that we “lack the political courage of [our] constitutional convictions.”³¹ Again, he is wrong. And again, his wrongness speaks to a central misunderstanding of our project.

Simply put, we wrote *To End a Presidency* because of our “constitutional conviction[]” that an engaged, thoughtful citizenry is essential to the salvation of American democracy. The villain of our book is not Donald Trump. It is democratic decline and the role that fantastical thinking about impeachment has played in that process. Our hero is not Bill Clinton (whom we barely mention). It is every American committed to “[t]ranscending forces of decay, disinformation, and disunion.”³² David Frum saw this clearly in his review of our book: “It is an aspirin to cool a political fever, and a hopeful summons to defend an imperiled democracy with a renewed and enlarged commitment to democratic action.”³³

Paulsen’s criticism thus rests on a profound misunderstanding of *To End a Presidency*. He neither mentions nor engages with our detailed account of why we wrote the book. He never pauses to ask why we included whole chapters that seem inexplicable under his description of our purpose. Instead, he excludes more than half the book from his

²⁶ *Id.* at 152–53.

²⁷ *Id.* at xxi.

²⁸ *See id.* at 58–59.

²⁹ *See id.* at 65–66, 188.

³⁰ *See id.* at 200–21.

³¹ Paulsen, *supra* note 1, at 717.

³² TRIBE & MATZ, *supra* note 14, at 241.

³³ Frum, *supra* note 13.

review, offers a pejorative account of our objectives, and then treats our failure to achieve those goals as proof of cowardice or incompetence (rather than as proof of his own error). It's a pity he chose to write the review that way. This approach misses the whole point of our project.

II. IDENTIFYING IMPEACHABLE OFFENSES

Most of Paulsen's review focuses on the criteria for defining impeachable offenses. Although he agrees with us on many important points, he assails us for departing from an *exclusively* originalist account and for describing a few specific factors as relevant to defining "high Crimes and Misdemeanors." In this Part, we first consider Paulsen's alleged reliance on originalist methodologies. We then briefly reprise our own view of impeachable offenses. Finally, we address Paulsen's insulting allegation that our analysis is deliberately, deviously partisan. As will become clear, Paulsen's failure to engage with our arguments and repeated mischaracterization of our position led his review hopelessly astray.

A. Paulsen's "Originalist" Account of Impeachable Offenses

We have no quarrel with looking to original public meaning in seeking to understand the impeachment power. Indeed, we do so ourselves throughout *To End a Presidency*. But as we explain at length, the problems with relying *solely* on original public meaning to define "high Crimes and Misdemeanors" are substantial and insurmountable.³⁴ To start, although this phrase had accumulated centuries of intellectual baggage in England, "it's unlikely that Americans in the 1780s knew the details of four hundred years of technical English learning" on the subject.³⁵ Certainly there is insufficient evidence of a widespread public assimilation of English meaning to treat it as authoritative. Moreover, "the colonists — and then the Framers — transformed impeachment when they ripped it from its English roots," altering core premises of this ancient power in ways that "weaken the relevance of English practice."³⁶ In our view, this is a key point: under the Constitution, unlike in England, impeachment is "about political accountability and popular sovereignty, not criminal punishment and parliamentary supremacy."³⁷ As Alexis de Tocqueville and Justice Story both noted in the 1830s, American impeachment rests on profoundly different premises (and involves very different judgments) than any European analogues.³⁸

³⁴ See TRIBE & MATZ, *supra* note 14, at xix–xx, 12–16, 34–38.

³⁵ *Id.* at 40–41.

³⁶ *Id.* at 40.

³⁷ *Id.*

³⁸ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 135–39 (Boston, John Allyn 1882); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 785, at 554–55 (Boston, Little, Brown & Co. 1873).

At the Constitutional Convention, very few delegates addressed impeachable conduct at all. None did so in detail, and we don't know whether the views of those who spoke are representative of all thirty-nine men who signed the Constitution. Further, the relevant colloquy was famously brief. As Professor Cass Sunstein notes, "there was apparently no discussion of just what 'other high crimes and misdemeanors' meant. Those words seem to be a bit like the cavalry, coming at the end to save the day."³⁹ While we can extrapolate from some of the surrounding discussion, a few pages of scattered, inconsistent dialogue in the Convention records simply cannot support strong claims about impeachable offenses.

Looking beyond Convention Hall, "the definition of impeachable conduct was barely discussed at most state ratifying conventions," except at a very high level of generality.⁴⁰ Moreover, "[g]iven the diversity of state impeachment practice, it's likely that Americans around the country had divergent understandings of the Impeachment Clause that they ratified."⁴¹ In fact, "[e]ven individual Framers were at times inconsistent."⁴² For example, "[j]ust two years after objecting to 'maladministration' [as the operative term for impeachable offenses], [James] Madison apparently reversed course."⁴³ "Speaking in the First Congress about presidential power, [Madison] opined that 'the wanton removal of meritorious officers would subject [the president] to impeachment and removal' for 'an act of maladministration.'"⁴⁴ It would appear that President Madison, who participated in the debate leading to the adoption of "high Crimes and Misdemeanors," didn't assign enduring significance to the Convention's precise choice of language.

Consistent with the conclusion that "high Crimes and Misdemeanors" lacked a clear, accepted "original meaning," citizens and legislators in the late 1700s and early 1800s called for impeachment over a dizzying array of alleged offenses. As we recount in the book:

A nonexhaustive list from that period includes (1) John Adams's extradition of a mutinous British Navy sailor to England, amid rumors that the sailor was a captured American; (2) Thomas Jefferson's supposed "deliberate neglect" in failing to appoint a Collector of the Port of Boston; (3) Andrew Jackson's contested decision to withdraw federal deposits from the Bank of the United States; (4) John Tyler's alleged misuse of the veto power; (5) Franklin Pierce's refusal to intervene militarily against pro-slavery forces in

³⁹ CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN'S GUIDE* 47–48 (2017).

⁴⁰ TRIBE & MATZ, *supra* note 14, at 37.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (second alteration in original).

“Bleeding Kansas”; and (6) James Buchanan’s suspected involvement in corrupt deals with members of Congress.⁴⁵

The records of these debates do not reveal any settled understanding. If anything, they reveal profound and deeply politicized disagreements on this issue from the very outset — including among the Framers themselves.

True to form, Paulsen offers little substantive response to our extended explanation of why original public meaning alone is an insufficient guide to defining the phrase “high Crimes and Misdemeanors.”⁴⁶ Nor does he consider our more general arguments about the impropriety of total reliance on originalism in assessing when and where to deploy the impeachment power, given that many factual, legal, and structural constitutional premises of the original understanding no longer hold true.⁴⁷ Instead, Paulsen offers nothing but general encomia to originalism and platitudes about its unparalleled ability to discipline interpretation.⁴⁸ He accompanies this praise for his favorite methodology with a wholly conventional summary of roughly a dozen Founding-era sources, which supposedly serve to “confirm a uniformly broad understanding of ‘high Crimes and Misdemeanors.’”⁴⁹

And then, without citing a *single* source or linking *any* of these specific criteria to evidence of original meaning, Paulsen pulls from his hat seven distinct impeachable offenses. Here’s his offering:

The Constitution’s original meaning supports a sweeping power of the two houses of Congress to remove officials for conduct *they* judge to be: in serious violation of the Constitution; an abuse or misuse of power lawfully possessed; a serious failure to perform the duties of office faithfully and responsibly; a betrayal of the public trust or compromise of vital national interests; corrupt conduct of any of a number of possible varieties; a serious criminal-law offense incompatible with continuance in public office; or other serious non-criminal personal misconduct.⁵⁰

We have read Paulsen’s review repeatedly and still have no idea where these criteria come from. This isn’t to say we think they are wrong; we agree with much of the list (though we think it goes too far in describing several of the appropriate grounds for presidential impeachment). But the notion that these criteria come from “objective public meaning”⁵¹ is altogether fanciful. We are aware of no historical source that lists them together as the relevant criteria and Paulsen points

⁴⁵ *Id.* at 34–35.

⁴⁶ Paulsen asserts that “the Framers of the U.S. Constitution in fact plainly *did* have the English impeachment standard and practice in mind,” but never substantiates that point, never addresses the many and significant transformations wrought by the Americanization of impeachment, and never shows that the original public meaning captured the full English gloss. Paulsen, *supra* note 1, at 697 n.26.

⁴⁷ See TRIBE & MATZ, *supra* note 14, at 14–16.

⁴⁸ See Paulsen, *supra* note 1, at 704–05.

⁴⁹ *Id.* at 699.

⁵⁰ *Id.* at 693.

⁵¹ *Id.*

us to none. Nor does he link each criterion to evidence of Founding-era public understanding, other than that at an exceptionally (and thus worthlessly) high level of generality.

To be sure, Paulsen cites a sprinkling of seven statements — made at three state ratifying conventions — in which delegates responded to fear of specific presidential misdeeds by opining that impeachment would be appropriate. He also quotes a few lines about the purpose of the impeachment power from the Constitutional Convention (before “high Crimes and Misdemeanors” was adopted as the standard) and from *The Federalist No. 65* and *The Federalist No. 66* (which are silent on nearly all of Paulsen’s listed criteria). Yet as any minimally-competent historian would emphasize, these sources utterly fail to support Paulsen’s sweeping claim of “objective public meaning.” That is true for many reasons. There are far too few sources; they come from a decisive minority of state conventions; there is no proof that anyone other than a few elites in a few jurisdictions held these views; there is no proof that even a majority of advocates for ratification of the Constitution agreed with these statements; none of the sources that Paulsen cites enumerates more than one or two of his criteria, and there is no evidence that any speaker (or anyone else) would have agreed on all or even most of them; many of these advocacy-oriented statements, made during debates, were plainly speculative; and the claim of consensus on this list is undermined rather than supported by subsequent statements and practice regarding presidential impeachment in the nation’s early decades.

In his determination to prove the merits of originalism — and to deny the need for judgments of our own — Paulsen has dramatically overplayed his hand. Historical sources do not get us to Paulsen’s seven-point list of impeachable offenses; divining it out of thin air seems a betrayal of the originalist approach he champions.

So, too, does his subsequent assertion that in assessing these criteria, legislators enjoy “broad discretion,”⁵² but *only* with respect to considering “the seriousness of the believed wrongdoing,” including whether the act “*really was* wrong,” what “degree of *harm*” it caused, whether it was done “*willfully*,” and whether it was “isolated or reflect[ed] instead a *pattern* of recurrent, persistent misconduct.”⁵³ Again, we do not dispute this list. In our book, we describe each of these criteria as highly relevant to assessing impeachable offenses — and spend many pages showing how that conclusion follows from constitutional text and structure (needless to say, Paulsen omits any mention of our analysis, even when it supports his conclusions).⁵⁴ But the idea that this four-step list is

⁵² *Id.* at 700.

⁵³ *Id.* at 719.

⁵⁴ *Id.*

exclusive, or that it follows from “objective public meaning” alone, is without historical foundation. Paulsen is winging it.

Paulsen frames his review as yet another clash of high-minded, objective originalism against willy-nilly living constitutionalism. Yet this tired and rather tedious framing is incorrect. His own “originalist” position is unsupported by history and shot through with patently unoriginalist arguments. Our book, in contrast, carefully draws what lessons we can from originalism — while recognizing that the Framers did not answer every question.

B. Our View of Impeachable Offenses

You wouldn’t guess it from Paulsen’s review, but our book spends over forty pages dissecting the meaning of “high Crimes and Misdemeanors.”⁵⁵ This analysis draws carefully on all the traditional tools of interpretation: constitutional text and structure, original public meaning, historical practice, and the purpose of the impeachment power.⁵⁶ We will briefly summarize our position here, in order to address Paulsen’s critique.

To start, we reject the frequent claim that “high Crimes and Misdemeanors” is an empty phrase. As a historical matter, “a broad cross-section of the public has grasped that the Constitution demands wrongdoing of a very high order to justify impeachment . . . [w]e don’t live in a system where political differences alone bring an end to four-year presidential terms.”⁵⁷ As a structural matter, the constitutional requirement of a Senate supermajority requires “bipartisan agreement on any particular application” of this standard and thereby “prevent[s] it from being bent out of shape.”⁵⁸ And as an interpretive matter, “[a] fair-minded study of the Constitution and our history *does* reveal some principled insights about the meaning of ‘high Crimes and Misdemeanors.’”⁵⁹

On this last score, we identify “three important points” that follow from the Convention records and that can be fleshed out “by considering the text itself and the structure of the Constitution.”⁶⁰

First, “nobody at the Convention objected to capturing [an open-ended category of] ‘great and dangerous offenses’ beyond treason and bribery.”⁶¹ This signals that the delegates did not secretly have a discrete list of offenses in mind. Drawing on the interpretive principle of

⁵⁵ See TRIBE & MATZ, *supra* note 14, at 25–68.

⁵⁶ See *id.*

⁵⁷ *Id.* at 28.

⁵⁸ *Id.* at 126.

⁵⁹ *Id.* at 35–36.

⁶⁰ *Id.* at 37.

⁶¹ *Id.*

ejusdem generis — and engaging in a careful study of “Treason”⁶² and “Bribery”⁶³ — we can identify what sorts of “great and dangerous” offenses are covered.⁶⁴ Generally speaking, such offenses involve betrayal, corruption, abuse of power, the risk of grave injury, and intentional wrongdoing.⁶⁵ They also speak to character: someone who would knowingly aid our enemies, or sell out the public interest for private gain, is the kind of person likely to betray us again and who poses an ongoing threat.⁶⁶

Second, “high Crimes and Misdemeanors” do not capture mere “maladministration,” which the Framers consciously rejected as the standard for ending a presidency.⁶⁷ There must be actual wrongdoing, not just incompetence or general shabbiness. And this wrongdoing must involve harm to the polity — rather than merely to private persons — as evidenced by use of the word “high.”⁶⁸ The significance of the word “high” here is confirmed by comparison to every other constitutional provision referencing “offenses” or “crimes,” none of which uses the word “high.”⁶⁹

Finally, “the Constitution doesn’t contemplate impeachment by ambush.”⁷⁰ This principle follows from the Framers’ references to evil deeds and deliberate malfeasance. It is also supported by the Bill of Attainder Clause and the Ex Post Facto Clause, which establish principles of fair notice for those who will suffer legislative sanction. “This rule protects the president against impeachment for reasonable, good-faith errors. At the same time, it means that presidents may not plead ignorance of the norms and customs that now define constitutional governance.”⁷¹

Guided by text, structure, history, and the Convention records, we can thus enumerate key characteristics of “high Crimes and Misdemeanors”:

[L]ike treason and bribery, they involve corruption, betrayal, or an abuse of power that subverts core tenets of the US governmental system. They require proof of intentional, evil deeds that risk grave injury to the nation. Finally, they are so plainly wrong by current standards that no reasonable official could honestly profess surprise at being impeached.

In short, when a president commits an impeachable offense, he has done something so awful that we must seriously consider removing him without waiting for the next election. We face that decision because the president

⁶² *Id.* at 29–31.

⁶³ *Id.* at 31–34.

⁶⁴ *Id.* at 38–39.

⁶⁵ *See id.*

⁶⁶ *Id.* at 38.

⁶⁷ *Id.* at 39.

⁶⁸ *Id.* at 40.

⁶⁹ *See id.*

⁷⁰ *Id.* at 42.

⁷¹ *Id.*

has lost legitimacy and viability as our leader, and because we fear he'll inflict further damage to our polity if he remains in power.⁷²

As we note, “[m]aking these judgments requires a nuanced view of current circumstances, a realistic assessment of whether the president poses a continuing risk, and a substantive conception of how the chief executive may exercise power.”⁷³ Moreover, in practice, “[w]hen a leader is called to answer for his sins, case-specific variables swiftly overtake broad claims about the meaning of ‘high Crimes and Misdemeanors.’”⁷⁴

*C. Paulsen’s Accusation of Deliberate
Distortion and a Partisan Gerrymander*

By and large, Paulsen agrees with the bulk of this account — though he complains that we don’t rely *solely* on originalism.⁷⁵ Notably, he agrees with our conclusion that an impeachable offense need not involve criminality and our view that a pattern of improper acts can collectively constitute an impeachable offense.⁷⁶ Paulsen reserves his main critique for our so-called “Clinton Carve Out” — “the ways in which [we] deliberately depart from the Constitution’s original meaning to limit the scope of the impeachment power.”⁷⁷ In particular, he objects to the fact that we would allow consideration of three factors:

1. Use of the formal powers of the office to further wrongdoing
2. Unviability as a national leader
3. Posing a prospective risk of harm to the nation that cannot be avoided short of removing the President from office.⁷⁸

“[T]hese addenda,” Paulsen claims, “appear out of nowhere.”⁷⁹ He infers that they exist only to support “the conclusion that President Trump is impeachable, and that President Clinton was not.”⁸⁰

Ridiculous. We’ll start by addressing his claim that we invented these criteria. We’ll then address his charge that we deliberately erred in our analysis so that we could attack President Trump while defending President Clinton.

Paulsen’s first objection — that we focus solely on abuse of the formal powers of the office — is easily dismissed: we never say that this is *necessary* for an offense to be impeachable. In fact, we say the opposite, explaining that pre-election misconduct in aid of securing the presidency

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Paulsen, *supra* note 1, at 704–05.

⁷⁶ See TRIBE & MATZ, *supra* note 14, at 43–58.

⁷⁷ Paulsen, *supra* note 1, at 693 (emphasis omitted).

⁷⁸ *Id.* at 705–06.

⁷⁹ *Id.* at 706.

⁸⁰ *Id.*

through corrupt means is paradigmatically impeachable.⁸¹ We also conclude that criminal wrongdoing without any abuse of power can (under rare circumstances) be impeachable.⁸² To be sure, it will very often be the case that impeachable offenses *do* involve abuses of power. But our main concern in the book isn't to show that this is required for impeachment; rather, it is to reject the gravely misguided claim that use of Article II powers *cannot* be impeachable.⁸³ Paulsen's mistaken belief that we view this criterion as decisive comes from page 21 of our book, where we explain why "the case for impeaching Clinton was a weak one."⁸⁴ But there, we are not explaining why he didn't commit "high Crimes and Misdemeanors." We are offering a global assessment of the case for removing President Clinton, which — as we explain below — turns partly on a judgment as to whether his swift removal was necessary and in the national interest.⁸⁵

This leaves the two criteria that we actually *do* invoke in defining "high Crimes and Misdemeanors": (1) whether the President's misconduct renders him unviable as the leader of our democracy and (2) whether the President's misconduct suggests that leaving him in office for the duration of his four-year term would result in a continued risk of harm to the nation.

Paulsen believes that these criteria lack any conceivable basis in constitutional law, and that we invented them to justify President Clinton's acquittal. To understand why Paulsen is wrong, it's helpful to start where we did in writing our book — with Professor Charles L. Black, Jr.'s canonical study, *Impeachment: A Handbook*. Like nobody before him, Black identified and framed many of the key judgments in an impeachment.

In evaluating what kinds of offenses are impeachable, Black turned his attention to crimes such as murder. Recognizing that they may not destroy our political system or involve abuse of power, he nonetheless concluded that they can be impeachable:

Many common crimes — willful murder, for example — though not subversive of government or political order, might be so serious as to make a president *simply unviable as a national leader*; I cannot think that a president who had committed murder could not be removed by impeachment. But the underlying reason remains much the same; such crimes would so stain a president as to make his continuance in office dangerous to public order. Indeed, *it may be this prospective tainting of the presidency that caused even treason and bribery to be made impeachable.*

⁸¹ TRIBE & MATZ, *supra* note 14, at 60.

⁸² *See id.* at 50–51.

⁸³ *Id.* at 61–63.

⁸⁴ *Id.* at 21.

⁸⁵ We could have been clearer on this point in our early discussion of President Clinton. That said, we are *explicit* in Chapter Two that impeachable offenses need not involve use of official powers.

So far as *punishment* goes, we could punish a traitorous or corrupt president after his term expired; *we remove him principally because we fear he will do it again, or because a traitor or the taker of a bribe is not thinkable as a national leader.*⁸⁶

Black grounded this sensible conclusion in constitutional text and structure. Textually, he derived it using *ejusdem generis*: the qualities he emphasizes are essential attributes of “Treason and Bribery,” and are thus attributes of “high Crimes and Misdemeanors.” Structurally, he inferred it from Article I, Section 3, which limits the consequences of impeachment to removal from office. He might also have cited the Bill of Attainder Clause: the Constitution bans legislative punishments of particular individuals for particular acts that they committed in the past, but allows impeachment because its orientation is “forward-looking and preventive.”⁸⁷ As we note in the course of describing the nature of an impeachment hearing: “While backward-looking in its assessment of specific acts already committed by the president, the orientation of an impeachment is primarily prospective and probabilistic. The all-important question is whether we must remove a leader whose continuation in office poses a grave risk.”⁸⁸

We certainly did not include these criteria as part of a nefarious conspiracy to condemn President Trump and vindicate President Clinton. We included them because we are convinced by Black’s textual, structural, and purposive reasoning. Paulsen uncharitably presumes that any legal argument without a hook in his account of “original, objective public meaning” must have been hatched in bad faith. That simply isn’t so.

Paulsen seeks to bolster his accusations by alleging that we have engaged in a partisan gerrymander: “Not only is Trump deserving of impeachment . . . but so too has nearly every Republican President since Richard Nixon likely engaged in impeachable wrongdoing deserving of at least serious investigation.”⁸⁹ He gets this wrong, too, cherry-picking quotes out of context and repeatedly mischaracterizing our position.

For starters, despite Paulsen’s claim that we’re out to impeach every Republican in sight, we do not conclude that *any* president since Richard Nixon has, in fact, committed impeachable offenses. That includes all the Republican presidents (as well as the Democratic ones). We conclude only that certain presidents engaged in conduct meriting investigation. In particular, we believe that it was appropriate for Congress to investigate the Nixon pardon (Ford),⁹⁰ the Iran-Contra

⁸⁶ CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 39 (1974) (emphasis added).

⁸⁷ TRIBE & MATZ, *supra* note 14, at 47.

⁸⁸ *Id.* at 95.

⁸⁹ Paulsen, *supra* note 1, at 691 (emphasis omitted).

⁹⁰ See TRIBE & MATZ, *supra* note 14, at 170.

Affair (Reagan and George H.W. Bush),⁹¹ charges of perjury and obstruction (Clinton),⁹² and alleged conspiracy or collusion with foreign powers to affect U.S. elections (Trump).⁹³ As we note, while the congressional investigation into President Ford was thorough and properly led to the abandonment of impeachment talk, the Iran-Contra investigation was terminated for political reasons before it offered entirely satisfactory answers to key questions about Presidents Reagan and Bush's knowledge of wrongdoing.⁹⁴ That is hardly an idiosyncratic view among observers.⁹⁵

In sum, our view of the historical record is that Presidents Gerald Ford, Jimmy Carter, Bill Clinton, George W. Bush, and Barack Obama did not commit impeachable offenses. We also believe that allegations of impeachable conduct by Reagan and George H.W. Bush are without merit; although a more penetrating Iran-Contra investigation might have shown otherwise, we appreciate the reasons why congressional leaders decided to end their investigation of each of those presidents (including their desire to avoid a traumatic impeachment so soon after Watergate and their fear of weakening America's global position during sensitive Cold War negotiations). Finally, we believe that President Trump may well have committed "high Crimes and Misdemeanors" and that a thorough investigation is already amply warranted.

From these mainstream judgments, many of which he badly distorts, Paulsen infers that we built our entire account of impeachment as a partisan trap. That is an almost comically unsound and unfair inference.

Speaking of implausible inferences: Paulsen makes a similarly baseless move when he seeks to condemn our whole book because we fail to engage in false equivalence when describing partisanship.⁹⁶ We agree that our story places more blame on the right than the left in its discussion of recent trends toward democratic dysfunction. But we stand by that view. As Professors Joseph Fishkin and David Pozen have shown, "[f]or a quarter of a century, Republican officials have been more willing

⁹¹ See *id.* at 72–75.

⁹² We don't say this explicitly in the book because we consider it self-evident that these accusations merited a full investigation.

⁹³ See *TRIBE & MATZ*, *supra* note 14, at 59–63.

⁹⁴ See *id.* at 170, 72–75.

⁹⁵ See, e.g., WILLIAM S. COHEN & GEORGE J. MITCHELL, *MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS* 31–75 (1988); DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960*, at 231–66 (2008); Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 296–97 (1998); Editorial, *Iran-Contra's Unfollowed Leads*, N.Y. TIMES, May 2, 1990, at A26; Seymour M. Hersh, *The Iran-Contra Committees: Did They Protect Reagan?*, N.Y. TIMES, Apr. 29, 1990, § 6 (Magazine), at 47; Anthony Lewis, *The Empty Chair*, N.Y. TIMES, Feb. 27, 1987, at A27; Arthur L. Liman, *Reagan and Iran-Contra*, N.Y. TIMES, Sept. 30, 1990, § 4A, at 19. See generally LAURENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* (1997).

⁹⁶ See Paulsen, *supra* note 1, at 714.

than Democratic officials to play constitutional hardball — not only or primarily on judicial nominations but across a range of spheres.⁹⁷ And there is ample evidence that partisan tribalism, in all its manifestations, is *especially* pronounced on the right under President Trump.⁹⁸ Understanding this fact is vital to any truthful analysis of current impeachment dynamics. Paulsen’s claim that tribalism is “equally applicable to partisans on both sides”⁹⁹ may seem admirably impartial, but it is both false and a political position in its own right — one that we cannot endorse, not even to artificially appear more even-handed.

That leaves only a single remaining grievance in Part III of Paulsen’s review: he is deeply offended by our “extreme position that Clinton’s impeachment was constitutionally unjustifiable, not just that it was unwise.”¹⁰⁰ But this “position” is not “extreme” — and our adherence to it is hardly a reason to doubt our motives or the arguments we develop.

We have little interest in relitigating the Clinton impeachment. The arguments on all sides are well known. Suffice it to say, while we believe that perjury and obstruction are in many circumstances impeachable, we do not believe that President Clinton’s particular misconduct cleared that threshold. This sets us apart from Paulsen, who suggests sympathy for the view that President Clinton’s conduct was “constitutionally and ethically indistinguishable from Nixon’s.”¹⁰¹ Unlike Paulsen, we have no difficulty distinguishing false statements about sexual misconduct with a White House intern from false statements about a massive criminal conspiracy by a president and his close associates to suborn perjury, obstruct justice, and bribe witnesses — all with an eye to concealing the use of private goons and domestic intelligence services to sabotage political opponents.¹⁰² Moreover, for the reasons given above, we assign weight to the fact that President Clinton did not lose public legitimacy as president and did not appear to threaten grave peril if he remained in office. Although Paulsen maintains that we could have made a “splash” by concluding that President Clinton committed “high Crimes and Misdemeanors,” that would have been dishonest.¹⁰³ We have carefully reviewed President Clinton’s case and do not believe he committed impeachable offenses; we reject Paulsen’s invitation to throw President Clinton overboard as part of a cynical gambit to impress conservative readers and gain media attention.

⁹⁷ Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018).

⁹⁸ See TRIBE & MATZ, *supra* note 14, at 209–14.

⁹⁹ Paulsen, *supra* note 1, at 715 n.75.

¹⁰⁰ *Id.* at 708 (emphasis omitted).

¹⁰¹ *Id.* at 722.

¹⁰² See TRIBE & MATZ, *supra* note 14, at 20–23.

¹⁰³ Paulsen, *supra* note 1, at 712.

That said, to the extent our book gives the impression “that it was not fairly possible that anyone could have supported impeachment of Clinton in good faith,” we should clarify that this is *not* our view.¹⁰⁴ President Clinton’s case involved difficult judgments. Amid all the partisan rancor, some people (though few congressional Republicans) undoubtedly favored President Clinton’s removal for entirely valid reasons. With the benefit of hindsight — and with vital insights from the #MeToo movement — we are especially sensitive to the grave abuse of official power and privilege inherent in President Clinton’s conduct.¹⁰⁵

* * *

Paulsen’s discussion of impeachable offenses rests on three pillars: (1) an account supposedly grounded in “original, objective public meaning”;¹⁰⁶ (2) a forthright accusation that we “deliberately” varied from that account by inventing criteria “out of nowhere”;¹⁰⁷ and (3) an insulting charge that we did so for partisan motives that call our whole project into disrepute.¹⁰⁸ None of these pillars withstand scrutiny.¹⁰⁹

III. RESPONDING TO IMPEACHABLE CONDUCT

The remainder of Paulsen’s criticisms flow from his mechanical view of impeachment. As he sees it, sources from the 1780s provide decisive guidance on what conduct is impeachable. If a president has engaged in such conduct, Congress *must* remove him. And that’s all any legal scholar should say on the subject. Everything else is mere politics.

One of our goals in writing *To End a Presidency* was to repudiate precisely this one-step vision of the impeachment process: “[A]n account of some specific misdeed allegedly committed by the president; a sprinkling of nonspecific quotes by Framers of the Constitution; and then a solemn thumbs-up or -down on whether the president must immediately be impeached.”¹¹⁰ Such writing “treats as the *only* question what should really be the first of *many* questions: whether the president may have

¹⁰⁴ *Id.* at 691–92.

¹⁰⁵ See TRIBE & MATZ, *supra* note 14, at 21.

¹⁰⁶ Paulsen, *supra* note 1, at 693.

¹⁰⁷ *Id.* at 693, 706.

¹⁰⁸ *Id.* at 693.

¹⁰⁹ On the subject of Paulsen’s errors: he accuses us of arguing that legislators should oppose impeachment whenever it is borne of partisan motives, regardless of the charges’ underlying merit. *Id.* at 710–11, 720–21. We never make that claim. We contend only that legislators should not *impeach* out of partisan motives, not that they should *oppose* impeachment simply because its advocates may be partisans. See TRIBE & MATZ, *supra* note 14, at 138–40.

¹¹⁰ TRIBE & MATZ, *supra* note 14, at xv.

committed an impeachable offense.”¹¹¹ To truly understand the impeachment process — and the operation of the impeachment power — we must ask a host of questions about history, law, politics, and institutional design. That means taking seriously the Framers’ considered judgment to entrust this political decision about political abuses to a political branch of government.

Paulsen views our analysis of these issues as proof of our inclination to muck around in dirty waters. But in truth, it is his refusal to engage with these issues — or to recognize their legitimacy as topics of inquiry — that renders his account incomplete and largely useless. Similarly, Paulsen’s complaint about “contradictory warnings”¹¹² reflects his inability to grasp a key part of our project: building a framework to help guide judgments on impeachment by identifying factors that might cut toward or against it.

A. *The Power Not to Impeach*

In Paulsen’s telling, impeachment involves only a single inquiry: Did the President commit “Treason, Bribery, or other high Crimes and Misdemeanors”? When the answer is “yes,” Congress has no discretion in deciding what happens next. Removal from office through impeachment is an automatic, mandatory minimum sentence for certain presidential misdeeds. To be sure, Paulsen opens by declaring that Congress has a “broad range of discretion” on matters of impeachment.¹¹³ But in practice, he concludes, this discretion means little: it extends only to judging whether the President has committed acts that are “sufficiently serious” to warrant impeachment.¹¹⁴ As a matter of constitutional law, then, the sole interesting question is defining and applying the standard for those misdeeds. If we’re in the mood for a parlor game, we can take that general standard, glance back across history, and debate whether Congress missed a bunch of impeachments that it should have undertaken. Indeed, Paulsen plays that game in the final pages of his review, awarding Congress a series of check-pluses and check-minuses — though his final view is that Congress has adhered to an (unjustified) practice of “under-impeachment.”¹¹⁵

Given this premise of his position, we admit to genuine astonishment that Paulsen never engages substantively with the constitutional reasoning presented in Chapter Three of our book, entitled “To Impeach or

¹¹¹ *Id.*

¹¹² Paulsen, *supra* note 1, at 716.

¹¹³ *Id.* at 718.

¹¹⁴ *Id.* at 694; *see also id.* at 718 (identifying a wide range of other considerations and asserting that “the impeachment judgment is properly concerned with *none* of these things”).

¹¹⁵ *Id.* at 703 (emphasis omitted).

*Not to Impeach.*¹¹⁶ There, we present a detailed argument for the proposition that impeachment and removal are *always* discretionary as a matter of constitutional law. We couldn't be clearer about it:

[T]he Constitution explicitly states that Congress may not end a presidency unless the president has committed an impeachable offense. But nowhere does the Constitution state or otherwise imply that Congress *must* remove a president whenever that standard is met. Even when members of the House and Senate believe that the president has committed “high Crimes and Misdemeanors,” they possess a legally unlimited prerogative not to end his term in office.

. . .

Like all grants of discretion in the Constitution, this one is open to abuse. No document can guarantee the wise or responsible exercise of the powers that it establishes. Legislators might reflexively oppose removal out of personal or partisan loyalty to the president — or for other unworthy reasons. But in the hands of a conscientious legislator, the power *not* to impeach allows full consideration of all factors relevant to ending a presidency. In other words, it allows Congress to exercise judgment.¹¹⁷

In the course of the twenty pages that follow these paragraphs, we develop a textual, structural, and historical account of Congress's discretion in deciding whether to impeach and remove the President. We open that analysis by considering — and squarely rejecting — arguments that the Senate violated the Appointments Clause of the Constitution when it declined to hold confirmation hearings for Chief Judge Garland. As we conclude, “[i]n our separation of powers, rarely is [Congress] affirmatively commanded by the Constitution to do something. . . . Where Congress is vested with constitutional powers, it is almost always vested with corresponding discretion about whether and when to use them.”¹¹⁸ With this structural principle in place, we then explain why the text of the Constitution makes impeachment discretionary, not mandatory:

Article I, Section 2 provides that the House “shall have the sole Power of Impeachment.” Article I, Section 3 states that the Senate “shall have the sole Power to try all Impeachments.” This simply isn't the kind of language that the Constitution uses to mandate official action. While it is true that the president “shall be removed from office” if impeached and convicted, the word *shall* in this sentence addresses the consequences of conviction, not the decision whether to bring charges in the first place.

In contrast, consider how the Constitution describes the Senate when it convenes as a court of impeachment: “When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.” This is

¹¹⁶ See TRIBE & MATZ, *supra* note 14, at 69–108. Paulsen notes the existence of this chapter in a footnote, but merely asserts his disagreement without addressing any of our legal arguments or analyses. See Paulsen, *supra* note 1, at 722 n.83. This “response” is barely worthy of the name.

¹¹⁷ TRIBE & MATZ, *supra* note 14, at 70–71.

¹¹⁸ *Id.* at 77.

what mandatory constitutional language looks like. To adjudicate articles of impeachment, the Senate *must* be on “Oath or Affirmation” and the chief justice *must* preside if the president is in the dock. Further, to convict the defendant, two-thirds of the Senate *must* support that outcome. Nothing about this text admits of discretion.

In short, the Framers knew how to issue commands — and nowhere did they instruct the House and Senate to take aim at every potentially impeachable offender. Instead, they endowed legislators with the *option* of acting, but not with the *duty* to act in every instance where removal would be justifiable. Congress thus bears the heavy burden of exercising judgment.¹¹⁹

Proceeding from this account of Congress’s role, we then examine analogies to grand juries, prosecutors, and judges; describe cases in which Congress could have opened impeachment hearings but declined to do so; and identify powers other than impeachment that Congress might invoke in response to evidence of presidential abuses.¹²⁰ In addition, we offer a general framework to identify and evaluate considerations that might bear on a legislator’s view of when and whether impeachment is the appropriate power to deploy.¹²¹ Chapter Four, in turn, builds on this study by offering a descriptive account of factors that have historically influenced Congress, as well as a prescriptive account of how legislators should think about impeachment judgments.¹²² Throughout these discussions — and quite unlike Paulsen — we warn that “impeachment is a fearsome power,”¹²³ with the potential to inflict a “profound and enduring national trauma,”¹²⁴ and thus should never be triggered unless doing so is truly necessary.¹²⁵

Our core constitutional disagreement with Paulsen thus impels a much larger departure. Paulsen simply assumes that the Constitution requires Congress to impeach and convict whenever the standard for “high Crimes and Misdemeanors” — as determined by “original objective public meaning” — is satisfied. Apparently, neither the nation nor its elected representatives have much of a say in the matter. This view drains nearly all significance from the Framers’ momentous choice to vest impeachment in Congress, with one house serving as prosecutor and the other sitting as judge. It also treats legislative discretion on matters of head-of-state removal as an evil to be avoided at any cost — which seems awfully anomalous for a democratic system.

We offer a very different view. As we read the Constitution, it vests Congress with the duty to make important political judgments on matters of impeachment — including whether to impeach at all. From this

¹¹⁹ *Id.* at 77–78.

¹²⁰ *See id.* at 69–88.

¹²¹ *See id.* at 89–108.

¹²² *See id.* at 109–50.

¹²³ *Id.* at xx.

¹²⁴ *Id.* at 100.

¹²⁵ *Id.* at 108.

premise, it makes perfect sense to reflect upon political, historical, and legal questions bearing on the exercise of congressional judgment. It also makes sense to examine the principles underlying the impeachment power and to explain how those principles can guide legislative decisionmaking. By attacking us for daring to engage in these inquiries, Paulsen reveals his tenuous grasp of our argument and the artificial limits of his own account.

B. *Illuminating the Impeachment Process*

As the prior section suggests, our study is much broader (and much more concerned with reality) than Paulsen's narrow, theoretical focus on which presidential misdeeds are so inherently serious that they should automatically trigger removal. The differences between our accounts only grow when we expand our field of vision to the full impeachment process — and to the role of “impeachment talk.”

First consider the decisions that legislators must make during a full impeachment process. Starting with the earliest whispers of presidential wrongdoing and continuing to a final floor vote, there are *many* such calls. At the very least, they include the following steps:

- (1) holding public hearings on alleged presidential misconduct; (2) investigating the president; (3) publicly or privately using the “i-word”; (4) designating a committee to consider removal; (5) debating and voting on articles of impeachment; (6) voting in the House on those articles; (7) establishing process and procedure for the Senate impeachment trial; (8) conducting the Senate trial; and then (9) voting in the Senate on whether to convict the president.¹²⁶

Because there are so many stages in the impeachment process, there are endless opportunities to affect the outcome. Paulsen's outlook is plagued by tunnel vision; we recognize that legislators must make many choices (in many settings) over the course of an impeachment:

[L]egislators may oppose, ignore, or sabotage efforts to investigate presidential misdeeds, thus preventing definitive proof from coming to light. In the face of any such evidence, they might seek to discredit investigators, confuse the public, distract the press, or promote a milder punishment. They may also refuse to call for impeachment, urge their colleagues to avoid the “i-word,” and criticize anyone who puts that option on the table. At all times, legislators can privately help a president defend against impeachment talk and publicly campaign against it. Once the House has opened impeachment hearings, it can decline to move forward for a host of reasons that have nothing to do with a failure of proof. And senators, in turn, are free to vote against conviction even if they think the president is guilty as charged.¹²⁷

Needless to say, this list is not comprehensive. It identifies only a handful of the decisions that legislators must make — and thus reveals

¹²⁶ *Id.* at 90.

¹²⁷ *Id.* at 70.

that an unrelenting focus on the ultimate vote will miss most of the key judgments. “By the time the process arrives at the final step, millions of less-noticed decisions have shaped how we got there and what’s likely to happen next.”¹²⁸ To grasp how impeachment works, our book addresses the earlier and more political-strategic stages of the process — an effort that draws scorn from Paulsen, who condemns us for even asking these questions.

In thinking about impeachment, it is also important to remember that Congress isn’t the only actor, and that all actors (including Congress) are moved by many different forces. As we explain in our concluding chapter:

[I]mpeachments unfold over months or years, through citizen activism, public deliberation, investigations, committee hearings, floor votes in the House, and a Senate trial. They encompass debates over what the president did, whether he poses a continuing danger if he remains in office, and what the consequences of removing him might be. They involve a host of decision makers in Congress, the White House, the Department of Justice, and the news media — not to mention the broader American public. And these judgments can be shaped by a diverse array of political, personal, and policy considerations, many of which have little to do with the president’s guilt or innocence of the alleged abuses.¹²⁹

As a description of reality, none of this can credibly be doubted. Historians and political scientists have extensively studied the wide range of factors that affect all relevant players in navigating impeachment processes.¹³⁰

Nonetheless, Paulsen alternately ignores and decries this unavoidable fact. As he sees it, political, policy, and strategic considerations are wholly forbidden here: this zone must be cleared of all but a few Framers-approved judgments.¹³¹ Even if Paulsen were right, studying the factors that have historically shaped impeachment would still be a valuable undertaking. But Paulsen isn’t right. Because the Framers entrusted the impeachment power to a political branch — and vested that branch with discretion — it is entirely appropriate for Congress to ask whether ending a presidency is truly in the nation’s best interest. And it is therefore necessary for scholars to assess how Congress should make those judgments: what mindset it should bring to bear, what factors it should (and shouldn’t) consider, what alternatives it might employ, how quickly it should move, what investigatory powers it should wield, and so on. To be sure, there is an unavoidable risk that these legislative judgments will be distorted by distasteful motives and partisan allegiance. But the answer to that problem is not to pretend that there are no judgments to make (or to misread the Constitution as overriding such judgments);

¹²⁸ *Id.* at 90.

¹²⁹ *Id.* at 197–98.

¹³⁰ *See id.* at 142–50.

¹³¹ *See* Paulsen, *supra* note 1, at 718–19.

rather, it is to urge citizens, legislators, and other officials to heed the better angels of their nature.

This may not sound very reassuring. Especially in an era of widely noted dysfunction, it can be tempting to treat the Constitution as a *deus ex machina* that springs to life and protects us in times of crisis. Yet that is to partake of fantasy. As we emphasize, “[n]o matter how compelling the case against a president may seem in the abstract, it can prevail only if 218 representatives and 67 senators are convinced.”¹³² The result is that impeachment *can’t* be understood in isolation from our political system:

[T]he Constitution places a life-or-death bet on the American people and their representatives. It gambles that presidential misconduct risking grave harm to the nation will arouse unified popular opposition so strong that it prevails over partisanship, personal loyalty, and political inertia. This is a noble wager. If the public won’t resist tyrants and defend its form of government, the game is already lost. Democracy has never been a spectator sport. Although impeachment exists to save our political system from tyranny, it can do so only if that same political system rises to the occasion in times of constitutional crisis.¹³³

Because “impeachment depends on the very same democracy that it exists to protect,”¹³⁴ a satisfactory study of impeachment requires close attention to the issues of political process and strategy that Paulsen finds abhorrent.

We undertake that study in Chapters Five and Six, which Paulsen almost completely omits. Chapter Five offers the first-ever historical survey of “impeachment talk” in the United States. There, we show that “[c]ompared to the first two hundred years of the nation’s history, impeachment now plays a drastically more important and disruptive role in US politics.”¹³⁵ After tracing this development to the post-Clinton rise of a “permanent impeachment campaign,” we warn that “[w]hen impeachment talk overtakes our politics, it can cause a lot of harm without doing any good.”¹³⁶ In particular, we caution that “the normalization of impeachment talk can actually leave presidents *freer* to commit abuses,”¹³⁷ even as it “pushe[s] our politics toward extremes.”¹³⁸ This analysis leads us to urge advocates of impeachment to “think strategically about what they’re trying to achieve.”¹³⁹ It would be perverse if

¹³² TRIBE & MATZ, *supra* note 14, at 198.

¹³³ *Id.* at 198–99.

¹³⁴ *Id.* at 240.

¹³⁵ *Id.* at 153.

¹³⁶ *Id.* at 195.

¹³⁷ *Id.*

¹³⁸ *Id.* at 194.

¹³⁹ *Id.* at 195.

efforts to save democracy through the impeachment power actually undermined our political system.

That anxiety pervades our sixth and final chapter, which confronts a single question: Can the impeachment power operate soundly in an age of broken politics? To frame this discussion, we summarize a burgeoning literature on the origins and nature of democratic dysfunction in the United States.¹⁴⁰ Here, we make no secret of our concern that polarization, hyper-partisanship, echo chambers, tribal epistemology, “dark money” campaign finance, partisan gerrymandering, legislative gridlock, and loss of faith in public institutions have massively weakened our political order.¹⁴¹ We then offer tentative predictions about how these trends might affect (and be affected by) impeachment.¹⁴² Most notably, we contend that judgments about whether to impeach must now place particular emphasis on ensuring the stability of our democratic system.¹⁴³ Will impeachment save us from tyranny and advance political rebirth, or merely escalate a cycle of acrimony, hardball, and discord? To frame reflection on this question, we identify specific respects in which a focus on democracy preservation might either strengthen or weaken the case for a particular presidential impeachment.¹⁴⁴ We also emphasize the importance of strategic savvy in defense of our democratic institutions, since “[t]he same decline and dysfunction that beget a president who threatens democracy itself might also make impeaching that president all but impossible.”¹⁴⁵

Finally, we conclude by warning against magical thinking about impeachment and calling for a renewal of our shared democratic project:

[W]e must abandon fantasies that the impeachment power will swoop in and save us from destruction. It can’t and it won’t. When our democracy is threatened from within, we must save it ourselves. Maybe impeachment should play a role in that process; maybe it will only make things worse. Either way, reversing the rot in our political system will require creative and heroic efforts throughout American life. And at the heart of those efforts will be the struggle to transcend our deepest divisions in search of common purpose and mutual understanding. We must draw together in defense of a constitutional system that binds our destinies and protects our freedom. As Abraham Lincoln once reminded a nation far more divided than ours, “We are not enemies, but friends. We must not be enemies.”¹⁴⁶

Paulsen pays virtually no attention whatsoever to the final half of our book. To the extent he even admits of its existence, Paulsen sees

¹⁴⁰ *See id.* at 197–214.

¹⁴¹ *See id.*

¹⁴² *See id.* at 214–21.

¹⁴³ *See id.* at 219.

¹⁴⁴ *See id.* at 218–21.

¹⁴⁵ *Id.* at 240.

¹⁴⁶ *Id.* at 240–41.

only a deliberate, evil effort to sneak politics into what should be an apolitical process. Indeed, he is scandalized by our interest in “strategic” questions and matters of “political, prudential, and policy judgment[.]”¹⁴⁷ Here, too, Paulsen’s fear of judgment and exceedingly uncharitable approach to our arguments seemingly render him incapable of grasping — let alone reviewing — the book we actually wrote.

In an especially tendentious section of his essay, Paulsen castigates us for failing to offer crystal clear guidance on when (and whom) to impeach. He does so by selectively quoting — without any signposting — from sections of our book whose *whole purpose* is to identify and analyze considerations that might appear on either side of the impeachment ledger. For instance, Paulsen expresses befuddlement at our survey of the risks that Congress must balance in deciding *when* to impeach; apparently, we engage in “waffling” by separately elaborating the risks of haste and of inaction.¹⁴⁸ Paulsen is similarly incensed by our detailed explanation of the ways in which a desire to preserve democracy might cut for or against impeaching a president. To Paulsen, we sinned twice: first by writing a book that guides readers in making difficult judgments without reducing those judgments to simple, one-step rules; and then again by failing to clearly advise readers on whether applying those rules requires removal of the current President.

Ultimately, every single critique in Paulsen’s response rests upon a misunderstanding of our arguments, our conclusions, the Constitution, or all of the above. As Professor David Pozen has recognized, our goal was not to write a “polemic” against President Trump, but rather to invite a “wide-ranging exploration of the dynamics that shape presidential impeachment.”¹⁴⁹ This exploration encompasses the judgments that Americans from all walks of life must make in advancing, opposing, and evaluating calls to end a presidency. It also reaches the judgments that legislators, presidents, cabinet officials, judges, investigators, journalists, and many others must make at every step of the process. We never waver in our conviction that the Constitution is a vital part of this story. But “[w]e most faithfully fulfill the Framers’ vision when we respect the decisions they made, recognize the decisions they declined to make, and carefully exercise the responsibility they entrusted to us.”¹⁵⁰ We must therefore embrace — not deny — the judgments that impeachment asks of us.

¹⁴⁷ Paulsen, *supra* note 1, at 708, 705.

¹⁴⁸ *Id.* at 717.

¹⁴⁹ David Pozen, *Risk-Risk Tradeoffs in Presidential Impeachment*, TAKE CARE (June 6, 2018), <https://takecareblog.com/blog/risk-risk-tradeoffs-in-presidential-impeachment> [<https://perma.cc/Z2YG-JWC9>].

¹⁵⁰ TRIBE & MATZ, *supra* note 14, at xix–xx.

CONCLUSION: THE PATH AHEAD

Although impeachment is one of the Constitution's most formidable powers, it has long been undertheorized. With only a few notable exceptions, most writing on the subject has been crudely partisan or focused on discrete questions arising from particular impeachment hearings. Fortunately, that has begun to change. This is partly due to appreciable public and scholarly support for impeachment proceedings against President Trump. But it also reflects a recognition that trends toward democratic decay will strain our political system in ways requiring closer attention to impeachment — which has the potential to dislodge a tyrant, or exacerbate dysfunction, or both, depending on when and how it is used.

In our view, Paulsen's hyper-restrictive account of impeachment is an unconvincing dead end. It fails as a matter of constitutional interpretation; it refuses to engage with nearly all of the judgments that people in the real world have to make; it offers a wholly inadequate framework for the bare handful of judgments that it does acknowledge; and it deliberately isolates impeachments from the political, social, and democratic contexts crucial to any assessment of whether we can and should end a presidency. Further, its faux "originalism" leads nowhere. Unless we discover a secret, long-lost cocktail napkin from the room where it happened, on which Alexander Hamilton jotted some thoughts about "high Crimes and Misdemeanors," the historical record will do little to clarify many of the toughest judgments arising from impeachment. That includes judgments about which misdeeds qualify and when impeachment is warranted. In his review — and in his footnotes, which cite almost exclusively his own work — Paulsen claims to have divined seven criteria, with a four-part focus, from the "original, objective public meaning."¹⁵¹ But as we've seen, to call this "originalism" is to give the term a bad name. As we navigate impeachment in the coming years, Paulsen's theory shouldn't be (and really can't be) our guide.

Our book aims to propose a more realistic, panoramic, and productive account of the impeachment power in America. As we explain, it is likely that a high baseline of public support for impeaching whoever is president will remain with us long after President Trump has left office.¹⁵² The political machinery, cultural inclination, and partisan polarization that support our permanent presidential impeachment campaign are now firmly established.¹⁵³ Efforts to de-escalate this arms

¹⁵¹ Paulsen, *supra* note 1, at 693.

¹⁵² See TRIBE & MATZ, *supra* note 14, at 214–18.

¹⁵³ See Laurence Tribe & Joshua Matz, *The Danger of Constant Impeachment Talk*, WALL ST. J. (May 4, 2018, 11:02 AM), <https://www.wsj.com/articles/the-danger-of-constant-impeachment-talk-1525446136> [<https://perma.cc/U3LA-9VTZ>].

race — and to promote sound judgments on matters of impeachment — will require extraordinary efforts throughout American life.¹⁵⁴ That includes the legal academy, which is uniquely well positioned to identify and illuminate some of the hardest judgments we may face. There will be some, like Paulsen, who denounce such inquiries for noncompliance with the strictures of their methodological orthodoxy. So be it. Impeachment transcends such narrow thinking. If we are to reckon with the judgments it asks of us, while promoting stability in our democratic order, we must expand our vision. The book we wrote was intended as a step in that direction. We can but hope that many more will follow.

¹⁵⁴ See TRIBE & MATZ, *supra* note 14, at 236–41.