

RACISM AND BIGOTRY AS GROUNDS FOR IMPEACHMENT

CHARLIE MARTEL[∞]

ABSTRACT

Building on years of anti-racist organizing and advocacy, millions of Americans took to the streets to protest racism and demand racial justice in mid-2020. Much of the protest was directed at President Donald Trump—a president whose words and actions were racially polarizing and who deliberately incited racist hostility. This president was also impeached twice, yet issues of racism and bigotry were rarely discussed as impeachable offenses. The idea of impeaching President Trump for racism was initially rejected by Congress, and racism and bigotry were not the basis for either Trump impeachment.

This raises important questions: Were those considering impeachment wrong to dismiss racism as a reason for ending a presidency? Are racism and bigotry grounds for impeachment?

In this Article, I answer yes. The history of presidential impeachment shows that congressional impeachment managers considered racism and civil rights violations grounds for impeachment and removal. Presidential racism is an immediate threat to the lives and well-being of millions of Americans directly subject to such bigotry. It also assaults multi-racial democracy in ways that hurt Americans who are not direct targets. A racist president cannot be trusted to enforce constitutional and statutory civil rights protections—and is likely to break those laws.

My argument has five parts (following an Introduction in Part I). In Part II, I will argue that the Framers of the Constitution established impeachment to protect against broad, deep, and immediate threats to the nation. Presidential racism is such a threat. In Part III, I will show that the history of presidential impeachment pre-Trump demonstrates, albeit imperfectly, that racism and civil rights concerns are legitimate impeachment considerations. Part IV discusses the

[∞] Charlie Martel is Visiting Professor of Law at the University of Maryland Carey School of Law. Previously he was Professor of Practice at Washington & Lee University School of Law and Adjunct Professor at the American University Washington College of Law. He taught courses on National Security Legislation, Legal Profession, and Legal Writing. Professor Martel served as Investigative Counsel for the U.S. Senate Homeland Security and Government Affairs Committee, where his work included investigations on counter-terror and humanitarian disaster response. He has a Master's degree in International Human Rights Law from the London School of Economics and has worked with human rights, refugee rights, and immigrant rights organizations. He is grateful to the editorial staff of the *N.Y.U. Review of Law and Social Change* for their hard work in editing this Article and for publishing it. The Article is dedicated to those now working and protesting for racial justice and the ancestors who blazed that trail.

constitutional and statutory prohibitions on racial discrimination that characterize America's "Second Founding." A racist president should be impeached and removed to preserve the fundamental rights protected by these laws. Part V gives an overview of key impeachment principles derived from this history that show racism and bigotry are impeachable offenses. Finally, Part VI examines examples of impeachable racism focusing on what former-President Trump said and did as a candidate and president.

I. INTRODUCTION.....	201
II. CONSTITUTIONAL IMPEACHMENT PROVISIONS AND THE FRAMERS’ INTENT	204
III. HISTORY OF IMPEACHMENT	210
A. Johnson Impeachment	211
1. Johnson’s Racism and Obstruction of Civil Rights Law	212
2. Racist Turmoil in 1866: White Mob Attacks on Black Americans and Johnson’s Speaking Tour	215
3. Impeachment.....	219
4. Lessons from Johnson’s Impeachment	221
B. Nixon Impeachment Proceedings.....	225
1. Background.....	225
2. Grounds for Impeachment	226
i. The House Judiciary Committee Memorandum.....	226
ii. Process and Articles of Impeachment	229
C. Clinton Impeachment.....	230
D. Restraint: Presidents Who Were Not Impeached	232
IV. LAWS A RACIST PRESIDENT CANNOT BE TRUSTED TO ENFORCE: THE “SECOND FOUNDING” OF EQUAL RIGHTS AND OTHER CONSTITUTIONAL DUTIES.....	233
A. The “Second Founding” of Racial Equality	233
B. Other Constitutional Provisions Threatened by Presidential Racism	235
V. PRESIDENTIAL RACISM AND BIGOTRY IS GROUNDS FOR IMPEACHMENT	237
VI. REAPING THE WHIRLWIND: WHAT IS IMPEACHABLE RACISM AND BIGOTRY?	243
VII. CONCLUSION.....	259

Every great question in American history has involved race . . . and no matter if Presidents betray us, or Senators fail their duty, we will one day see the flag floating from the lakes to the coast, from sea to sea, and it will represent impartial justice to all races and people.

—Wendell Phillips, abolitionist and civil rights advocate,
supporting impeachment of President Andrew Johnson,
May 13, 1868¹

I was not included in that “We, the People.” . . . But through the process of amendment, interpretation, and court decision I have finally been included in “We, the People.”

—Representative Barbara Jordan, Black American Congress-
woman, opening statement in the impeachment hearing of
President Richard Nixon, July 25, 1974²

Here’s [a] radical proposition: the knowing, intentional, and serial stoking of racial tensions is an impeachable offense.

—Benjamin Wittes, Senior Fellow and Law Analyst,
Brookings Institution, July 29, 2019³

1. BRENDA WINEAPPLE, *THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION* 346 (2019).

2. *Debate on Articles of Impeachment: Hearing Before the H. Comm. on the Judiciary*, 93d Cong. 111 (1974) (statement of Rep. Barbara Jordan, Member, H. Comm. on the Judiciary) [hereinafter *Hearing*]; ‘*My Faith in the Constitution Is Whole; It Is Complete; It Is Total.*’, MILLER CTR., <https://millercenter.org/the-presidency/impeachment/my-faith-constitution-whole-it-complete-it-total> [https://perma.cc/4PMX-R57T] (last visited Sept. 18, 2020) [hereinafter *Faith in the Constitution*]. Representative Jordan’s defense of the Constitution and her invocation of the exclusion of Black Americans from its rights has been described “by historians as one of the greatest speeches in all of American history.” *Words Matter Podcast: The Legendary Barbara Jordan on Impeachment*, WORDS MATTER MEDIA (Feb. 8, 2021), <https://podbay.fm/p/words-matter/e/1612771532> [https://perma.cc/SB8S-PKUQ].

3. Benjamin Wittes (@benjaminwittes), TWITTER (July 29, 2019, 7:35 AM), <https://twitter.com/benjaminwittes/status/1155804157145690112> [https://perma.cc/5BAZ-HH73]; see also *Benjamin Wittes*, TWITTER, <https://twitter.com/benjaminwittes> [https://perma.cc/G7CJ-NU73] (last visited Sept. 18, 2020). Ultimately Wittes recommended against including racism as a basis for impeaching Trump. Susan Henessy, Quinta Jurecic & Benjamin Wittes, *So You Want to Impeach the President?*, LAWFARE (September 24, 2019), <https://www.lawfareblog.com/so-you-want-impeach-president> [https://perma.cc/MS9W-BFCA] (“The House thus needs to focus on those offenses that make the strongest case of misuse of presidential power, rather than wading into difficult questions concerning the impeachability of pre-presidential conduct, sexual misconduct, racism or other moral failures.”).

I. INTRODUCTION

Can a President be impeached for racism or bigotry?⁴ In this Article I answer yes.

I rely heavily on the law in reaching my conclusion that racism and bigotry are impeachable. Yet I write at a time when American reality and American law (or more properly, the civil rights and constitutional law on which I rely) are two profoundly different things when it comes to racism. American law, including the constitutional and statutory provisions I cite in this Article, prohibits racism and bigotry across the entire landscape of American life and establishes—on paper—a commitment to a pluralistic, multi-racial, multi-ethnic, religiously tolerant country. These laws have advanced these goals and made the country a different—and better—place than it was before they were passed.

However, my reliance on the law should not be misread as a conclusion that the law has achieved racial justice and equality. Far from it. Despite constitutional and statutory legal protections for civil rights, other aspects of American law—criminal law, zoning law, election law—enable, and even advance, continued systemic and institutional racism against Black Americans.

Law aside, the reality of American life is that pervasive racism is deadly and destructive to non-White Americans. We see Black Americans killed by White police and vigilantes.⁵ Anti-Asian violence is on the rise.⁶ Most racial minorities are many times more vulnerable to the ongoing coronavirus pandemic and receive

4. The Oxford Dictionary defines racism as “prejudice, discrimination, or antagonism directed against a person or people on the basis of their membership in a particular racial or ethnic group, typically one that is a minority or marginalized.” *Racism*, OXFORD DICTIONARY (Lexico 2020), <https://www.lexico.com/en/definition/racism> [<https://perma.cc/67TM-S4R9>] (last visited Aug. 28, 2020). For brevity’s sake, “racism and bigotry,” “racism,” and “bigotry” are occasionally used interchangeably to refer to bias based on race, ethnicity, nationality, or religion. Systemic and institutional racism and implicit racist bias, though real and destructive, are not in themselves impeachable, though they could contribute to a president saying or doing overtly racist things that would warrant impeachment. My conclusion that racism and bigotry are grounds for impeachment of course applies to a president of any race. Because American history teaches that the far more likely danger is that of a White racist president, or a president bigoted against those who practice faiths that are marginalized, the article will discuss the issue in that context when it specifically refers to race or religion. That said, a president demonstrably racist toward Whites, or bigoted against those who practice Christianity or one of its denominations, should also be impeached. Throughout this piece I capitalize “Black” and “White” to reflect both as racial identities, to avoid characterizing Whiteness as race-normative, and to follow increasing adoption of this convention by authors and publications.

5. See Elliott McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd’s Life*, CNN (June 23, 2020), <https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html> [<https://perma.cc/GVG5-5V4T>]; Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/W5M7-VRF5>].

6. Weiyi Cai, Audra D.S. Burch & Jugal K. Patel, *Swelling Anti-Asian Violence: Who Is Being Attacked Where*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/interactive/2021/04/03/us/anti-asian-attacks.html> [<https://perma.cc/F2G3-7Q9T>].

overall lower quality healthcare than their White counterparts.⁷ The criminal legal system punishes Black Americans and other racial minorities far more often and more harshly—and it wrongfully convicts them of crime at disproportionate rates.⁸ After White police and vigilantes killed Breonna Taylor, Ahmaud Arbery, Rayshard Brooks, and George Floyd within weeks in the first half of 2020,⁹ millions of Americans took to the streets in thousands of multi-racial protests across the country to demand racial justice and equality.¹⁰ The reality of widespread systemic, institutional, and societal racism in America shows that to achieve racial justice, fundamental changes are needed that go well beyond legal reform.

One such change would be acknowledging that racism and bigotry are acts of violence against Americans, American society, and American laws and political institutions so grave that they warrant impeachment. In this Article I explore the history and study of impeachment to explain why this is so.

This Article has five main parts. Part II examines the history and text of the Constitution's impeachment provisions, particularly the purpose and grounds for impeachment. Part III describes past impeachment efforts, primarily those targeting Presidents Andrew Johnson, Richard Nixon, and Bill Clinton, emphasizing the

7. See *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTR. FOR DISEASE CONTROL AND PREVENTION (Apr. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/RZ7Z-KMKU>]; COMM. ON UNDERSTANDING AND ELIMINATING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, BD. ON HEALTH SCIS. POL'Y & INSTITUTE OF MEDICINE, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 1* (Brian D. Smedley, Adrienne Y. Stith, & Alan R. Nelson eds., 2002); AGENCY FOR HEALTHCARE RESEARCH QUALITY, *2019 NATIONAL HEALTHCARE QUALITY & DISPARITIES REPORT, ES1–ES2* (2020), <https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhqrd/2019qdr.pdf> [<https://perma.cc/FD94-R5YX>]; see generally *id.* at D1–D92.

8. U.S. SENTENCING COMM'N, *DEMOGRAPHIC DIFFERENCES IN SENTENCING 2, 4, 7* (2017), <https://www.ussc.gov/research/research-reports/demographic-differences-sentencing> [<https://perma.cc/G9ZE-MP7P>] (Black men received longer sentences than White men for same offenses); see generally Samuel R. Gross, Maurice Possley & Klara Stephens, *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [<https://perma.cc/A26U-34VB>] (“Judging from the cases we know, a substantial majority of innocent people who are convicted of crimes in the United States are African Americans.”).

9. See Khaleda Rahman, *From George Floyd to Breonna Taylor, Remembering the Black People Killed by Police in 2020*, NEWSWEEK (Dec. 29, 2020), <https://www.newsweek.com/george-floyd-breonna-taylor-black-people-police-killed-1556285> [<https://perma.cc/SZ7V-SJNG>].

10. Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That's Making History*, L.A. TIMES (June 7, 2020), <https://www.latimes.com/california/story/2020-06-07/george-floyd-protests-unite-black-activists-new-allies> [<https://perma.cc/S8Z6-GYUN>] (“The protests in the wake of the killing of Floyd—a 46-year-old black man who died after a Minneapolis police officer knelt on his neck while he was begging for air—have mobilized people from all races and walks of life who have not been previously been [sic] actively involved in racial justice issues. . . . In this way, Floyd's killing has created a wide, multicultural activist movement unprecedented in scope when compared with other notorious cases of police abuse.”); Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/DCZ7-RUV2>].

participants' understanding of impeachable offenses and how race, civil rights, and related issues influenced impeachment. Part IV demonstrates the gravity of presidential racism by examining constitutional and statutory civil rights laws, as well as other constitutional obligations that a racist president would threaten. This review includes the Constitution's Take Care Clause, oath of office provision, and Commander-in-Chief power. Part V applies factors and considerations from history and commentary on impeachment, concluding that presidential racism and bigotry, considered generally, warrant impeachment. This Part also crafts standards for impeaching a president for racism and bigotry. Part VI gives examples of racism and bigotry that would warrant impeachment, focusing on the Trump presidency. As former President Trump's conduct prompted some consideration of whether his words and actions regarding people of color and Muslims demonstrate impeachable unfitness for the office,¹¹ I consider those words and deeds as examples of conduct that would justify an impeachment inquiry.

Though racism was not mentioned in any of the Trump impeachment articles,¹² the issue was raised during congressional debate about impeachment. At least one member of Congress, Representative Al Green, moved to impeach Trump for racism before articles of impeachment were eventually passed.¹³ Green pushed for impeachment multiple times, including in December 2017, when he introduced two articles of impeachment citing Trump's racist actions and

11. See, e.g., Wittes, *supra* note 3. This Article was initially submitted after Trump's first January 2020 impeachment (and acquittal) and before Trump's second impeachment for conduct related to the January 6, 2021 assault on the U.S. Capitol. Racism was not listed as a ground for impeachment in the articles of impeachment in either case. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted), <https://www.congress.gov/116/bills/hres755/BILLS-116hres755enr.pdf> [<https://perma.cc/T2GU-TRND>]; Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021) (enacted), <https://www.congress.gov/bill/117th-congress/house-resolution/24/text> [<https://perma.cc/9W2C-VHVR>]. Several commentators and at least one member of Congress did, however, argue that racism is impeachable. See, e.g., Peter Irons, *Trump's Racism Is an Impeachable Offense. The Precedent of Andrew Johnson Proves It*, NBC NEWS (July 30, 2019), <https://www.nbcnews.com/think/opinion/trump-s-racism-impeachable-offense-precedent-andrew-johnson-proves-it-ncna1035951> [<https://perma.cc/4RQM-PDWB>]; Cristina Marcos, *Al Green Calls for Including Trump's 'Racism' in Impeachment Articles*, THE HILL (Dec. 4, 2019), <https://thehill.com/homenews/house/473038-al-green-calls-for-including-trumps-racism-in-impeachment-articles> [<https://perma.cc/BEH3-3RWN>]. In Part VI, I address whether Trump's role in the January 6th assault on the U.S. Capitol could be considered a factual basis for impeachment for racism.

12. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted), <https://www.congress.gov/116/bills/hres755/BILLS-116hres755enr.pdf> [<https://perma.cc/T2GU-TRND>]; Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021) (enacted), <https://www.congress.gov/bill/117th-congress/house-resolution/24/text> [<https://perma.cc/9W2C-VHVR>].

13. See, e.g., Press Release, Congressman Al Green, Congressman Al Green's Memorandum on Impeachment (Dec. 4, 2019), <https://algreen.house.gov/press-release/congressman-al-green%E2%80%99s-memorandum-impeachment> [<https://perma.cc/7APS-BNGY>]. Representative Green's call preceded Trump's first impeachment.

comments,¹⁴ and July 2019, when he justified impeachment on the grounds of Trump's "long history of abusing his office for the unconstitutional purpose of promoting racism and bigotry."¹⁵ In December 2019, Green referred to the 1868 Johnson impeachment articles as a historical precedent, maintained that impeachable offenses need not be crimes, and described racism as a "constant kitchen-table issue for Black people."¹⁶ Green's repeated moves to impeach Trump for racism were soundly rejected by the House of Representatives.¹⁷ One commentator who previously suggested Trump's racist incitement could be impeachable ultimately recommended against impeachment for racism.¹⁸ During the 2021 Senate impeachment trial of Trump for inciting the January 6, 2021 attack on the U.S. Capitol, impeachment managers argued that racism motivated the attackers—but did not attribute racism directly to Trump himself.¹⁹

While this Article analyzes legal texts and history to assess whether presidential racism and bigotry are impeachable, impeachment cannot be reduced entirely to academic analysis. Politics has a say, and it is important to acknowledge political realities. Racism is among the most polarizing subjects in a very polarized country. Seeking to impeach and remove a president on these grounds would undoubtedly unleash powerful and unpredictable political dynamics.

While the politics of impeachment for racism may be hard, it is a hard case worth fighting for because the principle of impeachment for racism is, to borrow a phrase from the Declaration of Independence, "self-evident."²⁰ A president motivated by bigotry, and whose presidential words and actions express such bigotry, is unfit for the office.

II.

CONSTITUTIONAL IMPEACHMENT PROVISIONS AND THE FRAMERS' INTENT

The Constitution's provisions on impeachment are short but mighty. They give Congress the power to impeach and remove a president from office. The Constitution creates a two-part process: first, the House of Representatives is empowered to impeach a president (and other impeachable officers), and the Senate then conducts an impeachment trial. A president is removed upon votes of two-thirds

14. Scott Detrow, *Democrat Pushes Vote on Trump Impeachment. It Didn't Succeed*, NPR (Dec. 6, 2017), <https://www.npr.org/2017/12/06/568818578/democrat-pushes-vote-on-trump-impeachment-dont-expect-it-to-succeed> [<https://perma.cc/M2VF-743Y>].

15. Adam Willis, *U.S. Rep. Al Green's Third Attempt to Impeach Trump Falls Flat*, TEX. TRIB. (July 17, 2019), <https://www.texastribune.org/2019/07/17/al-greens-third-attempt-impeach-donald-trump-fails/> [<https://perma.cc/JH75-S5N9>].

16. Press Release, Congressman Al Green's Memorandum on Impeachment, *supra* note 13.

17. See Willis, *supra* note 15.

18. See *supra* note 3.

19. Glenn Thrush, *Impeachment Managers Raise the Role of Racism in the Capitol Riot*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/racism-capitol-riot.html> [<https://perma.cc/SG23-CR4Q>].

20. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of the Senate to convict. The grounds for impeachment under the Constitution are “Treason, Bribery, or other high Crimes and Misdemeanors.”²¹

The discussions of impeachment at the Constitutional Convention in 1787, though brief, show that the Framers offered contextual guidance on which offenses are “high Crimes and Misdemeanors.”²² Initially, there was debate over whether a president should ever be subject to impeachment, with at least one delegate arguing that the president should be impeachable at the will of Congress²³ and others taking the opposite view that the president should not be impeachable.²⁴ Delegate George Mason, who ultimately proposed the “high Crimes and Misdemeanors” language, insisted on impeachment as necessary to protect against presidential abuses of power, arguing “[n]o point is of more importance than that the right of impeachment should be continued,” adding “[s]hall any man be above Justice?”²⁵

A short but critical focal point of the Framers’ consideration of impeachment centered on establishing what actions constitute a “high Crime or Misdemeanor” for which a president can be impeached. This debate is what one scholar described as “the one and only discussion of the phrase at the 1787 Constitutional Convention,” which lasted “perhaps five minutes.”²⁶ The discussion between George Mason, Gouverneur Morris, and James Madison focused on whether a president should be impeachable for “maladministration,” for treason or bribery, or for different conduct:

COL. MASON. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. . . . Attempts to subvert the Constitution may not be Treason as above defined . . . [I]t is the more necessary to extend [] the power of impeachments. [Mason] movd. to add after “bribery” “or maladministration.” . . .

MR. MADISON. So vague a term will be equivalent to a tenure during [the] pleasure of the Senate . . .

MR. GOVR. MORRIS. . . . An election of every four years will prevent maladministration.

21. U.S. CONST. art. I, § 2; *id.* art. II, § 4.

22. Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 606 (1999) (“The Founders did not discuss the meaning of ‘other high Crimes and Misdemeanors’ extensively, certainly not in any way that definitively resolves the precise meanings of those terms. Nevertheless, the context and content of the Founders’ principal discussions about the phrase ‘other high Crimes and Misdemeanors’ provide an important back-drop to contemporary efforts to understand the meaning of the phrase.”).

23. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1911) [hereinafter Farrand].

24. 2 *id.* at 64–65.

25. *Id.* at 65.

26. CHARLES L. BLACK, JR. & PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK 26 (2018).

COL. MASON withdrew “maladministration” & substitutes
 “other high crimes & misdemeanors” . . .²⁷

There was no discussion at the Convention of what “other high crimes and misdemeanors,” which could topple a president, meant.²⁸ Nonetheless, important conclusions can be drawn. First, the Framers decided it was necessary to empower Congress to remove a president by impeachment outside of election and before the end of a term; Mason said “[n]o point is of more importance.”²⁹ Second, impeachment shows up a lot in the Constitution. One commentator has observed that the frequent references to impeachment—in six separate clauses and all three articles establishing the powers of the three branches of government—show impeachment’s centrality to a “well-functioning separation of powers regime.”³⁰ Third, the Framers gave the impeachment power to a political branch—Congress—not the judiciary, allowing political considerations as well as legality to influence impeachment proceedings. Finally, the Framers made it difficult to remove a president through impeachment, establishing a high substantive standard for impeachment and requiring a two-thirds supermajority of the Senate for removal.

Additional conclusions concern the standard for impeachment: “high Crimes and Misdemeanors.” This requires more than congressional disapproval of, or disagreement with, the president because the delegates rejected the idea of impeachment by Congress without cause.³¹ Further, because impeachment for “maladministration” was also rejected,³² impeachment requires more than showing that the president performed poorly or made bad decisions.³³ As one leading constitutional scholar, Laurence Tribe, explained, the “duty” to limit impeachment to misconduct well beyond incompetence or policy disputes is “heightened in presidential impeachments in particular, where the decapitation of the Executive Branch and the nullification of a national election are threatened.”³⁴

Finally, the Framers intended “high Crimes and Misdemeanors” to allow impeachment for 1) a range of misconduct and 2) serious misconduct. Mason

27. 2 Farrand, *supra* note 23, at 550 (capitalization of delegates added).

28. CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 47 (2017) [hereinafter *SUNSTEIN, CITIZEN’S GUIDE*].

29. 2 Farrand, *supra* note 23, at 65.

30. Gene Healy, *Indispensable Remedy: The Broad Scope of the Constitution’s Impeachment Power*, CATO INST. (Sept. 12, 2018) <https://www.cato.org/publications/white-paper/indispensable-remedy-broad-scope-constitutions-impeachment-power> [<https://perma.cc/QJ38-ERMY>] (quoting Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, in *THE CONSTITUTIONAL PRESIDENCY* 229, 241 (Joseph M. Bessette & Jeffrey K. Tulis, eds., 2009)).

31. See *SUNSTEIN, CITIZEN’S GUIDE*, *supra* note 28, at 51 (claiming the Convention debates, though incomplete, “rule out” the idea that the Framers gave congressional power to summarily fire a president through impeachment).

32. See BLACK, *supra* note 26, at 27.

33. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 172 (3d ed. 2000) (“[A] president cannot properly be impeached for poor policy choices or even for gross incompetence.”).

34. *Id.* at 163.

objected to limiting impeachment to treason and bribery because “this will not reach *many great and dangerous* offences.”³⁵ Although Congress cannot impeach a president arbitrarily, there are “many great and dangerous offences” for which a president may be impeached, and Congress has the power to impeach and remove a president for misconduct within that range of gravity.³⁶

The Framers’ intent on impeachment was further explained by Alexander Hamilton in *The Federalist Papers*. Hamilton repeatedly mentioned violation of public trust and public harm as grounds for removal. In Federalist No. 65, Hamilton wrote that impeachment was for: “those offenses which proceed from the misconduct of public men, or, in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”³⁷

Here, Hamilton argued that the jurisdiction of the Senate during impeachment trials includes presidential harm that may be political in nature and that demonstrates an “abuse or violation of some public trust” relating “chiefly to injuries done immediately to the society itself.”³⁸ Impeachable conduct should involve a breach of trust placed in the president by the public or by virtue of presidential power. The term “injuries done immediately to the society itself” suggests gravity and urgency, and, additionally, emphasizes public harm.³⁹

In subsequent Federalist essays, Hamilton reinforced the idea that impeachment is a remedy for grave violations of public trust. Hamilton wrote that impeachment was for those “who, by their conduct, shall have proved themselves unworthy of the confidence reposed in them”⁴⁰ and that a single executive provided “the opportunity of discovering with facility and clearness the misconduct of the persons [the people] trust, in order either to [effect] their removal from office or to [effect] their actual punishment in cases which admit of it.”⁴¹

These principles were discussed in constitutional ratification debates. In North Carolina, delegate (and future Supreme Court Justice) James Iredell said impeachment “will arise from acts of great injury to the community.”⁴² The ratification debates also answer a subject of frequent contemporary debate: whether impeachment is limited to crimes. Madison, one of the most influential Framers, explained that impeachment was not so limited.⁴³

35. 2 Farrand, *supra* note 23, at 550 (emphasis added).

36. *Id.*

37. THE FEDERALIST NO. 65, at 330–31 (Alexander Hamilton) (Ian Shapiro ed., 2009).

38. *Id.*

39. *Id.* at 331.

40. THE FEDERALIST NO. 66, at 338 (Alexander Hamilton) (Ian Shapiro ed., 2009).

41. THE FEDERALIST NO. 70, at 359 (Alexander Hamilton) (Ian Shapiro ed., 2009).

42. SUNSTEIN, CITIZEN’S GUIDE, *supra* note 28, at 58–59 (quoting 4 THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 113 (Johnathan Elliot ed., 1863) [hereinafter Elliot]).

43. *Id.* (citing Elliot at 401, 498, 500).

The principle of impeachment as a remedy for a range of grave offenses against the public, including but going beyond criminality, was embraced by early authoritative commentators. Supreme Court Justice Joseph Story, in his landmark *Commentaries on the Constitution of the United States*, wrote that “crimes of a strictly legal character fall within the scope of the power,” but he added that impeachment “has a more enlarged operation, and reaches what are aptly termed political offences.”⁴⁴ Story echoed Mason’s notion that “many great and dangerous offences”⁴⁵ are impeachable, writing that such offenses “are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty.”⁴⁶

Like Hamilton, Story emphasized that impeachment protects public rights against public harm and abuse of public trust. Representative Barbara Jordan, in her historic 1974 impeachment statement that leads this Article, quoted Story when she said that “[i]mpeachment is intended for occasional and extraordinary cases where a superior power acting for the whole people is put into operation to protect their rights and rescue their liberties from violations.”⁴⁷

The idea that racism or bigotry warrants impeachment surely never crossed the Framers’ minds. Many Framers and citizens enslaved Black people. Among the enslavers was George Washington, who the Framers correctly envisioned would be the first President.

But impeachment for racism should be front of mind now. There is no need to wade into a debate on textualism and originalism because the Constitution and a body of American statutory law now unequivocally prohibit racism.⁴⁸ As we will see in Part IV, the Framers’ Constitution evolved to include post-Civil War amendments that emancipated Black Americans and empowered them with the same rights as White Americans. The historical and legal impact of these Reconstruction-era amendments was so profound that leading historian Eric Foner

44. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (Melville M. Bigelow ed., Little, Brown & Co. 5th ed. 1891) (1891).

45. 2 Farrand, *supra* note 23, at 550.

46. STORY, *supra* note 44, at 559.

47. See *Hearing*, *supra* note 2.

48. These constitutional provisions and statutes are the subject of Part IV. See discussion *infra* Part IV. While the debate regarding the validity of originalism and textualism as methods of constitutional interpretation is beyond the scope of this Article, it is worth remembering that whatever the Framers’ views on race, the Constitution has since been amended to reflect a society in which equal rights are protected. The Framers’ original Constitution provided that each enslaved human being counted as three-fifths of a person for apportioning representation, thereby politically empowering White enslavers and sanctioning slavery. *Slavery and the Making of America—the U.S. Constitution, Article 1, Section 2. The “Three-Fifths Clause”*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/legal/docs2.html> [<https://perma.cc/RTK9-4KUN>] (last visited May 6, 2021). The Framers as a group were wrong on race and so was the original Constitution they drafted. However, the Framers were wise to create a Constitution that could evolve by amendment and interpretation. It has so evolved, and the Constitution that once entrenched enslavement now prohibits it, and includes amendments prohibiting racial discrimination in voting and requiring equal protection under the law.

described them as the “Second Founding.”⁴⁹ These constitutional provisions were later joined by a comprehensive statutory framework of protection against racism and bigotry inspired by the 20th century civil rights movement.

There should be no doubt today that a president who is racist in word, deed, and policy is impeachable. Given the power a president has over policy and the actions of the federal government, a racist president would threaten harm to everyone who is a demographic target of such bigotry in virtually every aspect of life. Such actions are an “abuse or violation of some public trust” that Hamilton described as warranting impeachment, because all Americans have the right to have confidence that laws protecting equality and advancing the principles of a pluralistic society will be embraced by the president.⁵⁰ Consider, by way of example, a hypothetical White racist president. In a country where almost 100 million people are not White⁵¹ and where those people are protected by the Constitution and federal statutes, racist words and actions by this hypothetical president would be what Hamilton called injuries “to the society itself,”⁵² and such a president would be, as Hamilton described, “unworthy of the confidence reposed in them.”⁵³ A racist or bigoted president could do great harm to the tens of millions of people toward whom such a president is hostile. These injuries would conflict with an array of constitutional and statutory civil rights protections, and the abuses of a such racist president would constitute what the Framers called “great and dangerous offences” falling into the range of impeachable conduct.⁵⁴

Still, as Professor Tribe observed in his treatise, “[m]ore than in most areas of constitutional law, impeachment is a topic where the devil is indeed to be found in the details.”⁵⁵ For evidence of racism or bigotry in presidential word or deed to be impeachable, it must be unmistakable. Otherwise, impeachment would unacceptably constrict presidential authority. One trust placed in a president is to speak on issues of race and discrimination. Moreover, virtually every policy a president enacts will have a disparate impact on some demographic group. None of this is impeachable unless it goes beyond “maladministration” or legitimate policy differences; there must be powerful evidence of racist or bigoted motivation. Exercising careful judgement is critical to avoid the weaponization of impeachment as a tool to remove or weaken presidents in response to policy disputes or insensitive statements that do not emphatically evince racism or bigotry.

49. See generally ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) [hereinafter Foner, *Second Founding*].

50. THE FEDERALIST NO. 65, *supra* note 37, at 330.

51. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY DEMOGRAPHIC AND HOUSING ESTIMATES (2016), <https://data.census.gov/cedsci/table?q=acs%20demographic%201-year%202016&tid=ACSDP1Y2016.DP05&hidePreview=false> [https://perma.cc/UEH2-UGP5].

52. THE FEDERALIST NO. 65, *supra* note 37, at 331.

53. THE FEDERALIST NO. 66, *supra* note 40, at 338.

54. 2 FARRAND, *supra* note 23, at 550.

55. TRIBE, *supra* note 33, at 152.

III. HISTORY OF IMPEACHMENT

Twenty federal officials have been impeached—fifteen judges, three presidents, one senator and one Secretary of War.⁵⁶ Eighteen full Senate impeachment trials have taken place, including two for former President Trump.⁵⁷ Eight officials, all judges, were convicted.⁵⁸ Review of these impeachments does not precisely define what warrants impeachment. The Congressional Research Service, in two studies, concluded that “precedents provide some guidance as to what has been viewed as an impeachable offense, as do the debates at the Constitutional Convention of 1787, but the outside boundaries of the language have not been fully explored;”⁵⁹ that “review of some of the precedents on the question of what constitutes an impeachable offense suggests that the answer to this question is less than completely clear;”⁶⁰ and that “the meaning of ‘high Crimes and Misdemeanors’ is not defined in the Constitution or in statute and remains somewhat opaque.”⁶¹

Discerning precedent in impeachment is less determinative than elsewhere in law. Unlike judicial decisions, it is hard to identify the “holding” in impeachment (particularly when the Senate acquits),⁶² and therefore past impeachment decisions are “best viewed as ‘a form of persuasive authority’”⁶³ for determining the scope of impeachment.⁶⁴ That said, the history of impeachment at least tells us what congressional participants considered impeachable, or not, and why.

Historical review helps answer one question pertinent to impeachment for racism or bigotry: an impeachable offense need not be a crime. The Congressional Research Service observed that prior impeachments show “that conduct which may not constitute a crime, but which may still be serious misbehavior bringing

56. SUNSTEIN, CITIZEN’S GUIDE, *supra* note 28, at 108–13; Grace Panetta & Lauren Frias, *Here Are All the US Presidents Who Have Been Impeached*, BUSINESS INSIDER (Feb. 9, 2021), <https://www.businessinsider.com/list-of-impeached-us-presidents-2019-12> [<https://perma.cc/4XTJ-HEJF>] (noting that former President Trump was the most recent and third president to be impeached).

57. ELIZABETH B. BAZAN, CONG. RSCH. SERV., 98-186, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE 16–17 (2010). Former President Trump was impeached by the House and tried in the Senate twice, bringing the total number of impeachment trials to 18. Domenico Montenegro, *Senate Acquits Trump in Impeachment Trial—Again*, NPR (Feb. 13, 2021), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again> [<https://perma.cc/6KHT-CPZD>].

58. JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R44260, IMPEACHMENT AND REMOVAL I (2015).

59. BAZAN, *supra* note 57, at 31.

60. *Id.* at 30.

61. COLE & GARVEY, *supra* note 58, at 7.

62. Healy, *supra* note 30; *see also* Black, *supra* note 26, at 46 (“[A]n acquittal blunts any precedent.”).

63. Healy, *supra* note 30 (quoting Frank O. Bowman III & Stephen L. Sepinuck, “*High Crimes and Misdemeanors*”: *Defining the Constitutional Limits of Presidential Impeachment*, 72 S. CAL. L. REV. 1522–23 (1999)).

64. Healy, *supra* note 30.

disrepute upon the public office involved, may provide a sufficient ground for impeachment.”⁶⁵

Further, the articles of impeachment in two of the three significant pre-Trump presidential impeachment proceedings included conduct that was not criminal. Article X of the Johnson impeachment, for speeches attacking Congress, did not include a criminal charge.⁶⁶ Though the great majority of the impeachment charges against Nixon related to crimes, one out of nine counts in article I of Nixon’s impeachment, for “false or misleading public statements for the purpose of deceiving the people of the United States,” did not allege a criminal act.⁶⁷ To be sure, both the Johnson and Nixon impeachment articles were largely based on charges of criminality. Having said that, history and constitutional commentary overwhelmingly support the conclusion that grave but non-criminal offenses are impeachable. I next consider the Johnson, Nixon, and Clinton impeachments for lessons on whether a president may be impeached for racism or bigotry.

A. Johnson Impeachment

Careful consideration of Johnson’s impeachment supports the principle that racism constitutes an impeachable offense. Racism and obstruction of civil rights drove the political dispute that helped motivate Johnson’s impeachment.⁶⁸ As leading Reconstruction-era historian Eric Foner argues, “Republicans . . . had practical reasons for desiring Johnson out of office, especially the growing conviction that his actions threatened the success of Reconstruction.”⁶⁹ Foner added that “nowhere [in the impeachment articles] were the real reasons Republicans wished to dispose of Johnson mentioned.”⁷⁰ Johnson was a White supremacist and tried to block the Republican post-Civil War agenda of advancing emancipation for formerly enslaved Black Americans. While this conflict undergirded the impeachment, the articles of impeachment themselves centered on Johnson’s violation of a statute—the Tenure of Office Act (“TOA”)⁷¹—in his firing of Secretary of War Edwin Stanton and replacing him without Senate approval as required by

65. BAZAN, *supra* note 57, at 23 (discussing impeachments of judges for non-criminal conduct); *see also* COLE & GARVEY, *supra* note 58, at 7 (“The notion that only criminal conduct can constitute sufficient grounds for impeachment does not, however, comport with historical practice.” (citations omitted)).

66. Cong. Globe 40th Cong., 2d Sess. 1400 (1868).

67. H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 2 (1974).

68. *See generally* JON MEACHAM, TIMOTHY NAFTALI, PETER BAKER & JEFFERY A. ENGEL, IMPEACHMENT: AN AMERICAN HISTORY 51 (2018) (explaining that Republicans attempted to impeach Johnson four times for political reasons).

69. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 334 (2014) [hereinafter Foner, *Reconstruction*].

70. *Id.* at 335 (citing Johnson’s “political outlook, the way he administered the Reconstruction Acts, and his sheer incompetence” as the reasons for impeachment).

71. Tenure of Office Act, Pub. L. No. 39-154, 14 Stat. 430 (1867) (repealed 1887).

the Act.⁷² Seven of the 11 impeachment articles alleged Johnson violated the TOA, and three claim a “violation of the . . . laws of the United States,” from which a violation of the TOA can be inferred.⁷³ The remaining article was for a series of Johnson speeches that, according to the articles, intended to “bring [Congress] into disgrace, ridicule, hatred, contempt and reproach.”⁷⁴

Conclusions vary on the wisdom and impact of Johnson’s impeachment. If one focuses on the articles of impeachment, the answer is simple—there was no case for impeachment. Johnson concluded that the TOA was unconstitutional, and he was right. The Act was repealed in 1887, and the Supreme Court later affirmed that it is unconstitutional for Congress to require a president to obtain its consent before firing a cabinet member.⁷⁵ It is now inconceivable that a president could be impeached for replacing a cabinet member absent exceptional circumstances constituting independent grounds for impeachment. The speeches for which Johnson was impeached, though inflammatory, arguably fell within accepted bounds of political rhetoric.

However, when one considers the actual reasons for Johnson’s impeachment, things get more complex. Johnson’s White supremacism and obstruction of racial justice were the unwritten articles of impeachment. Because racial justice was a hotly contested, unresolved political question at the time, some consider Johnson’s impeachment congressional overreach on issues properly limited to electoral, legislative, or judicial resolution.⁷⁶ An alternative legacy is that Johnson’s impeachers were right to take the fight for Black rights to impeachment, and that racism was sufficient to end a presidency by impeachment a century and a half ago, before racial justice and civil rights were the unrealized legal and societal norms that they are now.

I. Johnson’s Racism and Obstruction of Civil Rights Law

The consuming debate of the post-Civil War era concerned Reconstruction of the South and the rights of Black Americans who were formerly enslaved.⁷⁷ The goal of the Republican Party, with overwhelming majorities in Congress,⁷⁸ was to condition reentry into the Union on accepting Black equality in voting, property,

72. Cong. Globe 40th Cong., 2d Sess. Art. I–IX, XI (1868).

73. *See id.*

74. Cong. Globe 40th Cong., 2d Sess. Art. X (1868).

75. *See Myers v. United States*, 272 U.S. 52, 53 (1926).

76. *See, e.g., JOHN F. KENNEDY, PROFILES IN COURAGE* 145–46 (1956) (“ . . . Edmund Ross and those who stood with him in the Johnson impeachment trial selflessly sacrificed themselves to save the nation from reckless abuse of legislative power.”); *SUNSTEIN, CITIZEN’S GUIDE*, *supra* note 28, at 106 (“Johnson was a terrible president, but his impeachment violated the constitutional plan.”). *See infra* Section III(A)(4) for more detailed consideration of the legacy of the Johnson impeachment.

77. *See MEACHAM, NAFTALI, BAKER & ENGEL, supra* note 68, at 48.

78. *See id.* at 50.

and many other rights.⁷⁹ Legislatures in the South passed “black codes,” laws that prevented Black people from “owning property, travelling freely, making contracts, and enjoying any form of civil rights or due process.”⁸⁰

Johnson, a pro-Union Democrat during the Civil War,⁸¹ became an unelected president opposing the will of the elected Republican Congress that sought to pass comprehensive civil rights legislation. In resisting civil rights, Johnson promoted the interests of the defeated Southern states not yet readmitted to the Union.⁸² As one historian noted,

[t]he problem was that the principle on which Johnson had embarked was one of white supremacy in the wake of a war fought not least to create a more inclusive national political order. He opposed Reconstruction legislation designed to protect the hard-won rights of blacks from the racist policies of the individual states.⁸³

The stark divide between Johnson’s White supremacist racism and the commitment of Republicans to Black civil rights is clearly captured in remarks by Johnson and his leading congressional opponent, Representative Thaddeus Stevens. The chasm between Stevens and Johnson was fundamental and morally irreconcilable. Johnson, described by one historian as “[r]acist even by the offensive standards of his own day,”⁸⁴ had the following to say about White supremacy: “[t]his is a country for white men, and, by G-d, as long as I am president it shall be a government for white men;”⁸⁵ “White men alone must manage the South;”⁸⁶ and “I am for a white man’s government in America.”⁸⁷

Stevens fought back, invoking human rights principles. Stevens categorically rejected the White supremacy embraced by Johnson, stating: “[t]his is not a ‘white man’s Government.’ To say so is political blasphemy.”⁸⁸ In 1867, he referenced the Declaration of Independence in support of his campaign for racial justice, saying that “[a]ll men are created free and equal” and “all rightful government is founded on the consent of the governed.”⁸⁹

79. See generally *id.* at 48–51, 58–60, 64–67.

80. See WINEAPPLE, *supra* note 1, at xxiii.

81. See *id.* at 56 (explaining that Johnson railed against secessionists in Washington).

82. See MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 49 (“Johnson was quick to give the white South the leeway to prevent advances in civil rights.”).

83. *Id.* at 58–59.

84. *Id.* at 212.

85. WINEAPPLE, *supra* note 1, at xviii (quoting ERIC MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 184 (1960)).

86. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 49 (quoting Foner, *supra* note 69, at 180).

87. *Id.* at 54 (quoting DAVID O. STEWART, IMPEACHED: THE TRIAL OF ANDREW JOHNSON AND THE FIGHT FOR LINCOLN’S LEGACY 14 (2009)).

88. WINEAPPLE, *supra* note 1, at 88.

89. *Id.* at xviii.

Johnson began his presidency by defying Congress's intention to make Black rights in the South the foundation of post-Civil War policy. In May 1865, just a month and a half after Lincoln's assassination thrust him into office, Johnson issued proclamations establishing provisional governments in eight of eleven former Confederate states, thereby allowing them to deny Black Americans their rights.⁹⁰

Congress squelched Johnson's proclamations with the Civil Rights Act of 1866 ("CRA"). The Act was an important and seminal step toward racial equality, establishing birthright citizenship (abrogating the Supreme Court's infamous *Dred Scott*⁹¹ ruling that free Black Americans were not citizens), equal protection under the law, and an array of property, legal, and contract rights.⁹² The 1866 CRA prohibited denial of citizenship rights to Black Americans and rendered "black codes" (and Johnson's order allowing them) illegal.⁹³ Another civil rights controversy was over the Freedmen's Bureau, established in 1865 to provide work, education, assistance, and land to newly freed slaves.⁹⁴ In early 1866, Congress passed the Freedmen's Bureau Bill to extend the Bureau's life and authority.⁹⁵ There was a powerful case for extending the Bureau, which educated almost one million formerly enslaved Black Americans and protected them from violence and discrimination at the hands of Southern Whites.⁹⁶

The 1866 CRA and the Freedmen's Bureau Bill dramatically expanded civil rights protections for Black Americans. Johnson vetoed both,⁹⁷ claiming the legislation was unconstitutional because Southern states were not reseated in Congress.⁹⁸ One Senator correctly protested that under Johnson's rationale, Congress was illegitimate and could exercise no power until Southern states were readmitted.⁹⁹ Johnson also said that protecting Black Americans was a state, not federal, responsibility and described the Freedmen's Bureau as patronage for Blacks.¹⁰⁰

Congress overrode Johnson's veto of the 1866 CRA within two weeks.¹⁰¹ When an amended Freedmen's Bureau Bill was vetoed by Johnson on July 16, 1866,¹⁰² Congress overrode Johnson's veto the same day.¹⁰³ In 1867, Johnson

90. Healy, *supra* note 30 (citing STEWART, *supra* note 87).

91. *Dred Scott v. Sandford*, 60 U.S. 383, 396 (1857).

92. Civil Rights Act of 1866, 14 Stat. 27–30 (1866) (amended 1991).

93. WINEAPPLE, *supra* note 1, at 112.

94. *Id.* at 17.

95. *Id.* at 111–13.

96. *Id.* at 113.

97. *Id.*

98. *Id.*

99. *Id.* at 114 (citing CONG. GLOBE, 39th Cong., 1st Sess. (1866)).

100. WINEAPPLE, *supra* note 1, at 114.

101. *Id.* at 124–26.

102. Andrew Johnson, *Veto Message* (July 16, 1866), <https://www.presidency.ucsb.edu/documents/veto-message-441> [<https://perma.cc/E8XB-6BTS>].

103. Freedmen's Bureau Bill, ch. 200, 14 Stat. 173 (1866).

vetoed legislation establishing Black voting rights; Congress again overrode the veto.¹⁰⁴

The volley of vetoes and overrides continued. Johnson vetoed Reconstruction legislation that provided military authority to protect civil rights in the South; this veto was overridden by Congress.¹⁰⁵ He later ordered the Attorney General to curb other enforcement powers so greatly as to effectively gut the 1866 CRA, leaving enforcement of the Act to the discretion of state governments that enacted “black codes” and other racist laws.¹⁰⁶ When Congress restored the military civil rights enforcement powers nullified by Johnson’s order, Johnson vetoed the bill, and again was congressionally overridden.¹⁰⁷ Fifteen Johnson vetoes were overridden by Congress—the most of any president in history, despite his relatively short time in office.¹⁰⁸

Concerns over the constitutionality of the 1866 CRA motivated Congress to enshrine the Act’s protections in the Constitution through the Fourteenth Amendment.¹⁰⁹ Preserving these rights in the Constitution had an advantage beyond placing them outside of legislative rescission. Since the President plays no official role in passing and ratifying constitutional amendments, Johnson could not veto or otherwise block the Amendment, though he did vigorously oppose it.¹¹⁰ The Fourteenth Amendment established birthright citizenship, contained the Equal Protection Clause (guaranteeing equal protection under the law), and extended the Due Process Clause—previously applicable to the federal government under the Fifth Amendment¹¹¹—to the states.¹¹²

2. *Racist Turmoil in 1866: White Mob Attacks on Black Americans and Johnson’s Speaking Tour*

As the bitter conflict between Johnson and Congress over race and civil rights continued, racial tensions burst into deadly racist mob attacks in Memphis and New Orleans.¹¹³ From April 30 through May 3, 1866, rioters in Memphis killed

104. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 50.

105. *Id.* at 64.

106. WINEAPPLE, *supra* note 1, at 200; *see also id.* at 65 (citing STEWART, *supra* note 87, at 84).

107. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 65 (citing STEWART, *supra* note 87, at 84–85); *see also* WINEAPPLE, *supra* note 1, at 202–03.

108. David Priess, *How a Difficult, Racist, Stubborn President Was Removed from Power—If Not from Office*, POLITICO (Nov. 13, 2018), <https://www.politico.com/magazine/story/2018/11/13/andrew-johnson-undermined-congress-cabinet-david-priess-book-222413> [<https://perma.cc/DJK6-CGX5>].

109. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 79 (2007). *See also* ROGER NEWMAN, *THE CONSTITUTION AND ITS AMENDMENTS* 8 (1999).

110. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 50; U.S. CONST. art. V.

111. U.S. CONST. amend. V.

112. U.S. CONST. amend. XIV.

113. WINEAPPLE, *supra* note 1, at 127–32; *id.* at 140–44

forty-eight people, injured seventy to eighty more, and destroyed property throughout the city.¹¹⁴ White crowds stormed the streets¹¹⁵ and Black people experienced by far the worst of the violence. Forty-six of the forty-eight dead were Black, homes and churches were burned in Black neighborhoods,¹¹⁶ and every Black school and church in Memphis was destroyed.¹¹⁷ Some blamed Johnson for inciting the violence.¹¹⁸

Three months later, deadly violence broke out in New Orleans.¹¹⁹ The riots, which took place in late July 1866, were a response to a state-constitutional convention held to amend the state constitution to protect Black suffrage.¹²⁰ Protesters fought counter-protesters, and while accounts differ on how the violence started and the number of casualties,¹²¹ the victims were disproportionately Black and Republicans who supported Black rights. The violence was deadly and brutal.¹²²

It was in this national cauldron of violent, White racist uproar that Johnson made the incendiary speeches that led to his tenth article of impeachment. In August 1866, less than three weeks after the New Orleans riots and four months after the Memphis riots, Johnson criticized the actions and legitimacy of Congress to White House visitors.¹²³ Johnson said that it “is a Congress of only part of the States,” and accused Congress of perpetuating disunion, encroaching upon constitutional rights, and exercising power which “would result in despotism or monarchy itself.”¹²⁴

114. E.B. WASHBURN, MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 101, at 36 (1886).

115. WINEAPPLE, *supra* note 1, at 128. One account reported that the White mobs that rioted cheered for Johnson and chanted his call for “a white man’s government.” *Id.* at 129 (citing WILLIAM WELLS BROWN, THE NEGRO IN THE AMERICAN REBELLION: HIS HEROISM AND HIS FIDELITY 350 (1867)).

116. H.R. REP. NO. 101, at 34–36.

117. *Id.* at 20–21.

118. WINEAPPLE, *supra* note 1, at 132.

119. *Id.* at 140–45.

120. *Id.* at 140–144.

121. *Id.* at 144; CARYN COSSÉ BELL, REVOLUTION, ROMANTICISM, AND THE AFRO-CREOLE PROTEST CULTURE IN LOUISIANA 1718–1868, at 262 (1997).

122. One historian provided a gruesome eyewitness account, writing that “whites stomped, kicked, and clubbed the black marchers mercilessly. Policemen smashed the institute’s windows and fired into it indiscriminately until the floor grew slick with blood. They emptied their revolvers on the convention delegates, who desperately sought to escape. Some leapt from windows and were shot dead when they landed. Those lying wounded on the ground were stabbed repeatedly, their skulls bashed in with brickbats. The sadism was so wanton that men who kneeled and prayed for mercy were killed instantly, while dead bodies were stabbed and mutilated.” Eddie Hobbs, *To Impeach a President, the Hard Road and Why You Cannot Rely Upon It*, EDDIE HOBBS (Oct. 15, 2018), <http://eddiehobbs.com/to-impeach-a-president> [<https://perma.cc/2U75-JK5G>] (quoting RON CHERNOW, GRANT 575 (2017)). This brutal account is a chilling warning on how deadly racist incitement can be.

123. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 61–62.

124. *Id.* at 62; Cong. Globe 40th Cong., 2d Sess. Art. X (1868).

Shortly thereafter, Johnson went on a speaking tour.¹²⁵ On September 8th, Johnson, responding to crowd taunts blaming him for the New Orleans riots,¹²⁶ fired back to claim that the riots were part of a Republican Congressional conspiracy to empower Black people at the expense of Whites:

If you will take up the riot of New Orleans and trace it back to its . . . immediate cause, you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the Radical Congress, you will find that the riot at New Orleans was substantially planned.

. . .

[T]he intention was to enfranchise one portion of the population, called the colored population . . . and at the same time disenfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about.¹²⁷

Johnson claimed Republicans in New Orleans made speeches “incendiary in their character, exciting that portion of the population, the Black population, to arm themselves and prepare for the shedding of blood.”¹²⁸ Johnson called these convention participants “traitor[s] to the Constitution of the United States” and participants in a “rebellion . . . having its origin in the Radical Congress.”¹²⁹ Johnson then again blamed the Republicans for the New Orleans bloodshed: “So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed, and every drop of blood that was shed is upon their skirts and they are responsible.”¹³⁰

Johnson followed with a bizarre response when the crowd charged him with being a traitor,¹³¹ claiming that his opponents “compare themselves with the Savior” when in fact they had a “diabolical and nefarious policy.”¹³²

These were tumultuous speeches in a tumultuous time, and they were met with a tumultuous response. One crowd booed and noisily heckled Johnson to stop speaking.¹³³ A headline from the *Chicago Tribune* called Johnson’s speeches “The Ravings of a Besotted and Debauched Demagogue.”¹³⁴ A government official resigned and derided Johnson for visiting Lincoln’s grave “with the bloody

125. WINEAPPLE, *supra* note 1, at 151.

126. *Id.* at 153.

127. Cong. Globe 40th Cong., 2d Sess. (1868).

128. *Id.*

129. *Id.*

130. *Id.*

131. WINEAPPLE, *supra* note 1, at 155 (Johnson replied, “I have been traduced, I have been slandered, I have been called Judas Iscariot.”).

132. Cong. Globe 40th Cong., 2d Sess. Art. X (1868).

133. WINEAPPLE, *supra* note 1, at 156.

134. *Id.*

outrages of Memphis and New Orleans unpunished.”¹³⁵ Congressional Republicans responded with a series of laws in 1867 designed to stop Johnson from blocking their agenda.¹³⁶ The Tenure of Office Act was one of those laws.¹³⁷

While one later commentator has called the article of impeachment based on Johnson’s speeches “ridiculous,”¹³⁸ context makes it understandable. The speeches came just weeks after White opposition to Reconstruction precipitated bloody racist mob attacks in two cities; the riots shocked a nation still reeling from the violence of the Civil War. A contemporary of Johnson’s blamed him: “[Johnson] fostered a spirit that engendered massacre, and afterward protected the evil-doers. He spoke, both . . . in private and openly to the public, as if the Congress elected by the faithful States was an illegal body.”¹³⁹

The ranting, pugnacious tone of Johnson’s speeches, criticized in the article of impeachment,¹⁴⁰ reinforced widespread fear that he did not possess the stability, character, and temperament to be president at so fragile a national moment. Johnson’s delivery of such inciteful speeches during an outbreak of murderous racist violence unquestionably contributed to his impeachment; they so concerned his impeachers that they made the speeches an article of impeachment. The speeches were, as charged in the impeachment article, “inflammatory” and intended to incite “resentment.”¹⁴¹ As one historian noted, “[i]n a moment where he might have offered reassurance to an anxious, divided nation, he instead fiercely criticized his Republican opponents and chose to promote fears of conspiracy.”¹⁴²

Notwithstanding the President’s need for a wide latitude in communication, the Johnson impeachment article offers a wise principle that applies to racialized provocations by presidents—such statements may be so destructive as to warrant impeachment. The history of Johnson’s impeachment shows that presidential words or deeds that intentionally incite violent, racist hostility toward Congress, citizens, or others in America can warrant impeachment, particularly if joined by other dangerous offenses. It is worth noting that history haunts the present. Johnson’s racist incitements happened simultaneously with brutal post-Civil War mob massacres of Black Americans. It is hard to avoid comparison to Trump’s racist incitements, which accelerated and contributed to an atmosphere of violence toward people of color and ultimately a riotous attack on the U.S. Capitol by a mob that included racists. This will be discussed in more detail in Part VI.

135. See *id.* at 158 (citing 11 PAPERS OF ANDREW JOHNSON 285 (Roy LeGraf, Ralph Haskins, & Paul Bergeron eds., 1994)).

136. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 63–64.

137. *Id.* at 64.

138. BLACK, *supra* note 26, at 46.

139. Priess, *supra* note 108.

140. See Cong. Globe 40th Cong., 2d Sess. (1868) (describing Johnson as “speaking in a loud voice” and making “loud threats and bitter menaces . . . amid the cries, jeers, and laughter of the multitudes then assembled”).

141. Cong. Globe 40th Cong., 2d Sess. (1868).

142. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 59.

3. *Impeachment*

The Tenure of Office Act (TOA) prevented a president from firing and replacing a cabinet member without Congressional approval.¹⁴³ The Act was passed to protect Edwin Stanton,¹⁴⁴ whose continuance in the cabinet was mired in controversy.¹⁴⁵ Congress built an impeachment trigger into the TOA, borrowing the Constitution's language to provide that violation of the Act was "a high misdemeanor."¹⁴⁶

There were four attempts to impeach Johnson.¹⁴⁷ One was prompted by a racist annual message Johnson delivered to Congress in December 1867. In the message, Johnson claimed that Reconstruction threatened Southern states with "negro domination," compared Reconstruction to slavery, described Reconstruction as racial vengeance against Whites, and called for the repeal of Reconstruction legislation.¹⁴⁸ Johnson's message included what historian Eric Foner called "probably the most blatantly racist pronouncement ever to appear in an official state paper of an American president":¹⁴⁹

No independent government of any form has ever been successful in [Black people's] hands On the contrary, wherever they have been left to their own devices they have shown a constant tendency to relapse into barbarism.¹⁵⁰

Johnson also claimed Reconstruction would "Africanize the half of our country."¹⁵¹ The letter shocked Congress and prompted calls for impeachment, with a prominent congressional aide calling Johnson's message an "abominable appeal to prejudice."¹⁵²

Initial impeachment efforts were defeated primarily because Johnson was charged with offenses that were political, not criminal, in nature.¹⁵³ However, when Johnson fired Stanton in February of 1868 in violation of the TOA,¹⁵⁴ the

143. Tenure of Office Act, 14 Stat. 430, 430–32 (repealed 1887).

144. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 51.

145. *Id.* at 70–71.

146. WINEAPPLE, *supra* note 1, at 428–29.

147. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 51 (citing ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 491–509 (1960)).

148. WINEAPPLE, *supra* note 1, at 226–27 (citing 13 PAPERS OF ANDREW JOHNSON 280–306, 1867).

149. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 49 (citing FONER, *supra* note 69, at 180).

150. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 49; WINEAPPLE, *supra* note 1, at 227.

151. WINEAPPLE, *supra* note 1, at 228.

152. *Id.* at 228 (citing MARK DE WOLF HOWE, PORTRAIT OF AN INDEPENDENT: MOORFIELD STOREY 48 (1932)). Johnson's racist diatribe was not part of the impeachment articles passed against him, though the House included other Johnson statements.

153. *Id.* at 229–31; MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 68–69.

154. WINEAPPLE, *supra* note 1, at 248.

House had what was missing before: an illegal act. The House was so eager to impeach Johnson that it voted for impeachment before articles of impeachment were drafted and presented.¹⁵⁵

Though the central argument in the Senate trial addressed TOA issues,¹⁵⁶ Johnson's racism and obstruction of Black rights were key arguments in the case for removal made by House impeachment managers.¹⁵⁷ They raised the murderous racist violence in New Orleans and Memphis and imputed it to Johnson,¹⁵⁸ with one impeachment manager calling for expediting the trial because "fellow-citizens are being murdered day by day" and adding that once Johnson was removed, "the murders will cease."¹⁵⁹

Stevens argued to the Senate that the "real issue was Reconstruction" and Johnson's unwillingness to "create a free and fair country."¹⁶⁰ Impeachment manager Thomas Williams maintained that Johnson should be removed for his obstruction of Black rights: disempowering the Freedman's Bureau, usurping congressional power over Reconstruction, abusing veto power to obstruct Reconstruction, urging states to reject the Fourteenth Amendment, and encouraging deadly racist violence in the South.¹⁶¹ Johnson's defense team responded that Congressional disagreement with Johnson over Reconstruction "is removed from the case" and that Johnson exercised his constitutional rights in opposing congressional attempts to create and protect Black rights.¹⁶²

The Senate fell one vote short of removal.¹⁶³ The deciding vote was Kansas Republican Edmund Ross, who later explained that there were "insufficient proofs," that a conviction would have degraded the presidency and established "Congressional autocracy," and that a partisan impeachment was dangerous to the country.¹⁶⁴ Some attribute less lofty motivations to Republicans who voted against removal. Had Johnson been impeached, Senator Benjamin Wade would have assumed the Presidency;¹⁶⁵ he was considered extreme by many who preferred the election of General Ulysses Grant, a popular Civil War hero considered more moderate.¹⁶⁶ Others warned that removing Johnson would weaken Republican unity needed to win the election and possibly even strengthen Johnson's

155. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 72 (citing STEWART, *supra* note 87, at 148).

156. WINEAPPLE, *supra* note 1, at 302.

157. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 75 (citing a pro-impeachment Congressman who argued that Johnson's Reconstruction policies were a threat to the nation).

158. WINEAPPLE, *supra* note 1, at 328.

159. *Id.* at 311.

160. *Id.* at 327.

161. *Id.* at 328.

162. *Id.* at 331–32.

163. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 75, 79.

164. *Id.* at 78–79.

165. *Id.* at 80.

166. *Id.* at 69; WINEAPPLE, *supra* note 1, at 376–77.

prospects as a Democratic candidate.¹⁶⁷ Some accounts describe last minute “low dealings,”¹⁶⁸ while others describe allegations of outright bribery.¹⁶⁹ Grant was nominated by the Republican party eight days after Johnson was acquitted,¹⁷⁰ and he won the 1868 election in part because he received hundreds of thousands of votes from Black men in the South.¹⁷¹

4. *Lessons from Johnson’s Impeachment*

Much of the commentary on the Johnson impeachment criticizes his impeachers. One scholar observed “[h]istory has not been kind to that impeachment effort”¹⁷² and later described the impeachment as an “unconstitutional, even farcical . . . case stud[y] in what the United States should avoid.”¹⁷³ Charles Black, in a 1974 essay widely considered one of the best on impeachment, wrote that “the Johnson impeachment is, to say the least, by no means universally regarded today as a paradigm of propriety or of unimpassioned law.”¹⁷⁴ Black described article X, accusing Johnson of disgracing Congress in his 1866 speeches, as “ridiculous.”¹⁷⁵

Criticism of the Johnson impeachment is based on two arguments: 1) Johnson was impeached on the basis of an unconstitutional statute that improperly limited presidential power,¹⁷⁶ and 2) Congress abused its authority by impeaching Johnson over a policy dispute about Reconstruction.¹⁷⁷ Chief Justice William Rehnquist, among the critics of the Johnson impeachment, saw acquittal as establishing that impeachment “would not be a referendum on the public official’s performance in office,” and wrote that as to policy disputes a president “would be answerable only to the country as a whole in the quadrennial presidential elections, and not to Congress through the process of impeachment.”¹⁷⁸ Sunstein wrote that “Johnson was impeached less because of a violation of law—though there was a violation of law—than because radical Republicans were critical of Johnson on unambiguously political grounds.”¹⁷⁹ John F. Kennedy, in his book *Profiles in Courage*, called the Johnson impeachment a “reckless abuse of legislative power” and dedicated a chapter in tribute to Ross, whose acquittal vote spared Johnson

167. WINEAPPLE, *supra* note 1, at 375, 406.

168. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 75.

169. WINEAPPLE, *supra* note 1, at 371.

170. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 79.

171. WINEAPPLE, *supra* note 1, at 406.

172. Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 295 (1998) [hereinafter Sunstein, *Impeaching*].

173. SUNSTEIN, CITIZEN’S GUIDE, *supra* note 28, at 85.

174. BLACK, *supra* note 26, at 46.

175. *Id.*

176. *See, e.g.*, SUNSTEIN, CITIZEN’S GUIDE, *supra* note 28, at 104–06.

177. *Id.* at 104–05; *see also* Sunstein, *Impeaching*, *supra* note 172, at 295.

178. WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 271 (1992).

179. Sunstein, *Impeaching*, *supra* note 172, at 295 (citing REHNQUIST, *supra* note 178, at 245).

from removal. Kennedy credited Ross with saving the constitutional authority of the presidency.¹⁸⁰

There is an alternative, positive assessment of Johnson's impeachment: that his impeachers were on the right side of history. From this perspective, describing the conflict that drove the impeachment as a purely political debate, insufficient for the urgent remedy of impeachment, is wrong because it gravely understates the stakes of the Reconstruction battle over race and Black rights. As one commentator wrote, "[i]t trivializes Johnson's impeachment to characterize it as rooted in mere policy differences."¹⁸¹ Furthermore, "[i]n 1868, the situation was far more serious, the consequences more far-reaching" than those of the later impeachment proceedings against Nixon and Clinton.¹⁸² What hung in the balance was "the opportunity, for the first time, of [America] fulfilling its promise of a free and fair republic in which the blessings of liberty and justice were secured for everyone."¹⁸³ Johnson was "incompetent, inadequate, unfit for office, and a menace to the welfare of the people, all the people, he had sworn to serve."¹⁸⁴ The future of racial equality was at stake, and impeachment was warranted because

[t]he impeachers believed that with Andrew Johnson, a man who was not an adroit leader, not a supple thinker, and not a humanitarian but a man who'd repeatedly vetoed postwar legislation, imperiled the lives of at least four million [Black] people, sought to inflame racial tensions, render black citizens defenseless, and restore civic power to slaveholders, who'd insulted Congress as well as individuals, and who had coarsened public discourse—that with this man, this President . . . no future worth the many hopeful lives lost on the battlefield, in the cities and the countryside, would ever be possible.¹⁸⁵

Through this lens, Johnson's impeachment "had not succeeded, but it had worked."¹⁸⁶ Johnson had improperly tried to "seize control of Reconstruction,"¹⁸⁷ and impeachment demonstrated that the "President was not a king, that all actions have consequences"; warned the nation about Johnson's "regressive policies"; and offered hope for "the path toward a free country, a just country, a country and a people willing to learn from the past, not erase or repeat it."¹⁸⁸

180. KENNEDY, *supra* note 76, at 145–46 (stating that Ross' vote "may well have preserved . . . constitutional government in the United States").

181. Healy, *supra* note 30.

182. WINEAPPLE, *supra* note 1, at 419.

183. *Id.*

184. *Id.* at 420.

185. *Id.*

186. *Id.* at 421.

187. Healy, *supra* note 30.

188. WINEAPPLE, *supra* note 1, at 421.

Johnson's impeachment shrunk his power to obstruct the Republican civil rights agenda. Soon-to-be President Grant observed that "Johnson had been taught a lesson which he would not forget." One biographer described the post-impeachment Johnson as a "president in limbo."¹⁸⁹ The impeachment was a blow to Johnson's aspiration to run for president as a Democrat,¹⁹⁰ and it contributed to the election of the pro-Reconstruction Grant, who oversaw a short-lived expansion of civil rights protections before the Jim Crow era of segregation that followed his presidency.¹⁹¹

If one accepts this account, Johnson's impeachment was imperfect and outright wrong insofar as it rested on the unconstitutional Tenure of Office Act, but it was right on the most important moral issue not only of the time, but possibly in the entire history of the country: protecting Black rights with what was then the most comprehensive humanitarian policy agenda in the nation's history. A recent commentator wrote this about the congressional Republicans' agenda to expand civil rights:

... Taken together, these measures established the equality of Americans before the law and, for the first time, made its preservation a federal concern. They amounted to nothing less than a social revolution, a promise of an America that belonged to all Americans, not just to white men.

....

If the goal of impeachment was to frustrate Johnson's efforts to make America a white man's country again, it was an unqualified success.¹⁹²

Johnson was impeached for being a racist who obstructed the nation's journey to racial equality, sanctuary, and justice, and who incited racial violence and conflict as part of his obstruction. The laws promoted by the Johnson impeachers were major steps toward the fuller citizenship and emancipation of Black Americans (as well as other minorities those laws now protect). Johnson, with his White supremacist obstruction of these laws and his vision of a racist society, was

189. Priess, *supra* note 108, at 8.

190. MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 70 (describing Johnson's ambition to be the 1868 Democratic nominee).

191. As president, Grant led federal legal and military opposition to "crush the Ku Klux Klan." Foner, *Second Founding*, *supra* note 49, at 121; *See also* Foner, *Reconstruction*, *supra* note 69, at 457–58. He also signed civil rights legislation. Allen Pusey, *March 1, 1875: Grant signs the Civil Rights Act*, A.B.A. J. (Mar. 1, 2014), https://www.abajournal.com/magazine/article/march_1_1875_grant_signs_the_civil_rights_act [<https://perma.cc/GSG4-UQSW>]. However, in the last quarter of the 19th century, the civil rights advances for Black Americans in the South were reversed. *See generally*, Foner, *Reconstruction*, *supra* note 69, at 524–34, 575–87, 592–93 (describing how a "system of racial segregation [became] embedded in Southern law" by the 1890s).

192. Yoni Applebaum, *Impeach Donald Trump*, THE ATLANTIC (Mar. 2019), <https://www.theatlantic.com/magazine/archive/2019/03/impeachment-trump/580468/> [<https://perma.cc/US5U-C5TX>].

irredeemably wrong, and his impeachers, in promoting civil rights protections and advocating for equal rights and a fair society, were right.

A grieved counterfactual is what would have happened if, instead of impeachment based on the Stanton firing and the TOA, the Johnson impeachers crafted articles of impeachment based largely on his racist obstruction of civil rights laws and the necessity of such laws to advance foundational principles of universal rights and citizenship for Black Americans. While it is difficult to imagine a different result, the historical legacy of the impeachment might be seen in a more positive light.

One Johnson impeacher, James G. Blaine, later came to believe that acquittal was the correct outcome for the articles of impeachment presented—but observed that if Johnson’s racism was impeachable he would have been removable.¹⁹³ Blaine observed that in addition to having incited the murderous White mob riots in Memphis and New Orleans, Johnson had:

been guilty of trying to obstruct passage of the Fourteenth Amendment; of ignoring the rights and safety of the formerly enslaved; of a willingness to return the reins of power to the formerly rebellious; and of insisting that the [B]lack man be denied the vote but counted in determining the number of representatives to send to the House.¹⁹⁴

Blaine concluded, “[c]ould the President have been legally and constitutionally impeached for these offenses . . . he should not have been allowed to hold his office for an hour beyond the time required for a fair trial.”¹⁹⁵ But instead of impeaching Johnson for his racist offenses, the Johnson impeachers and impeachment “articles as a whole implicitly accepted what would become the central premise of Johnson’s defense: that only a clear violation of the law warranted a President’s removal.”¹⁹⁶

Perhaps the Johnson impeachers erred in not impeaching Johnson for the real reasons they deemed him unfit for the presidency. Perhaps the right lesson to draw from the Johnson impeachment is that a racist president who used his presidential power to obstruct racial equality and Black rights came one vote from removal in an America where the laws and societal norms against racism were not as advanced as they are now. Put in contemporary terms, Johnson’s impeachers believed Black lives mattered so much that a racist president was impeachable. Perhaps they should have said so in the articles of impeachment.

193. WINEAPPLE, *supra* note 1, at 418.

194. *Id.*

195. *Id.*

196. FONER, *Reconstruction*, *supra* note 69, at 335.

B. Nixon Impeachment Proceedings

1. Background

Though the Nixon impeachment process did not concern race or civil rights, it provides guidance about the grounds for impeachment, offenses that could supplement racism, and the role of hearings and public opinion in the impeachment process. The Nixon impeachment articles resulted from the Watergate break-in, presidential abuse of law enforcement power, and lying to cover up the role of the president and key aides in the scandal.¹⁹⁷

A key lesson from the Nixon impeachment process is how a careful and informative congressional process can educate the public and grow popular support for impeachment. Public support for Nixon's removal from office grew from 19% in June 1973 (just after the start of the Senate Watergate hearings) to 57% in August 1974 (just before Nixon was forced to resign).¹⁹⁸ Shortly after the House Judiciary Committee voted to move impeachment to a full House vote,¹⁹⁹ damning transcripts of presidential tapes were made public by the White House.²⁰⁰ These tapes confirmed that Nixon was guilty of illegal conduct, that he had personally orchestrated the Watergate coverup from the very beginning, and that he lied to Congress, federal investigators, and the public about what had taken place and his role.²⁰¹ These were all subjects of Senate and House investigation hearings in the prior year. Though Nixon was neither impeached by the House nor removed by the Senate, the House Judiciary passed impeachment articles on a bipartisan vote in late July of 1974. In early August, members of the Republican leadership told Nixon he had lost Republican support in Congress and that he would be impeached by the House and removed by the Senate.²⁰² Nixon announced his resignation on August 8, 1974.²⁰³

197. See MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, 83–153 (discussing the Nixon impeachment process).

198. Andrew Kohut, *How the Watergate Crisis Eroded Public Support for Richard Nixon*, PEW RESEARCH CTR. (Sept. 25, 2019), <http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon> [<https://perma.cc/X8Q8-2WNM>].

199. Andrew Glass, *House panel moves to impeach Nixon, July 27, 1974*, POLITICO (July 27, 2016 12:08 AM), <https://www.politico.com/story/2016/07/house-panel-moves-to-impeach-nixon-july-27-1974-226094> [<https://perma.cc/A349-AFMD>].

200. See MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 151.

201. See *id.* at 149–51.

202. John Naughton, *Nixon Slide from Power: Backers Give Him the Final Push*, N.Y. TIMES (Aug. 12, 1974), <https://www.nytimes.com/1974/08/12/archives/nixon-slide-from-power-backers-gave-final-push-former-defenders.html> [<https://perma.cc/BGJ9-KLVR>].

203. See *id.*; Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A01.

2. *Grounds for Impeachment*

i. *The House Judiciary Committee Memorandum*

The Nixon impeachment process is relevant here in part because Congress affirmed bases for impeachment that would encompass impeachment for racism. In February 1974, the House Judiciary Committee staff published a memorandum, *Constitutional Grounds for Presidential Impeachment*, to “report[] upon the history, purpose and meaning of the constitutional phrase, ‘Treason, Bribery, or other high Crimes and Misdemeanors.’”²⁰⁴ The memo, considered an authoritative study,²⁰⁵ was prepared before the investigation concluded and was “intended to be a review of the precedents and available interpretive materials, seeking general principles to guide the Committee” once fact-finding was done.²⁰⁶

The Nixon impeachment is worthy of attention because it amplifies principles described previously, as well as impeachment factors cited by scholars and commentators that would support impeachment for racism and bigotry. Committee staff researched the history of the drafting and ratification of the Constitution’s impeachment provisions, discussed above in Part II, as well as the thirteen impeachments that had taken place at that time. Several of the staff’s conclusions help guide an assessment of whether racism and bigotry are grounds for impeachment.

First, the House staff concluded that impeachment was appropriate for a range of grave presidential offenses against the public trust, as the Framers did not define impeachable offenses with precision but instead used a broad phrase: “high Crimes and Misdemeanors.”²⁰⁷ The staff explained that there are “no fixed standards for determining whether grounds for impeachment exist. The framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.”²⁰⁸

Impeachment offenses, wrote the staff, do not “fit neatly or logically into categories.”²⁰⁹ This is because impeachment is “intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office.”²¹⁰ The staff observed that the Framers placed great emphasis on violations of public trust and harm to the public.²¹¹ There were “three broad categories” of impeachable offenses identified by the Framers:

204. STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., *CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 3* (Comm. Print 1974) [hereinafter *Constitutional Grounds for Presidential Impeachment*].

205. See, e.g., Healy, *supra* note 30.

206. *Constitutional Grounds for Presidential Impeachment*, *supra* note 204, at 2.

207. U.S. Const. art. II, § 4.

208. *Constitutional Grounds for Presidential Impeachment*, *supra* note 204, at 2.

209. *Id.* at 21.

210. *Id.*

211. *Id.* at 9, 13.

(1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.²¹²

Reviewing the history of House impeachments, the staff found that what was “common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions.”²¹³ As discussed earlier, racism and bigotry are unquestionably such offenses against the public trust.

Second, the staff agreed with prior conclusions that criminal conduct was not necessary for impeachment, writing that “[t]he American experience with impeachment . . . reflects the principle that impeachable conduct need not be criminal.”²¹⁴ The staff relied in part on the Framers’ reliance on English history.²¹⁵ The staff also analyzed prior impeachments, concluding that “the House has placed little emphasis on criminal conduct. Less than one-third of the 83 articles the House has adopted have explicitly charged the violation of a criminal statute or used the word ‘criminal’ or ‘crime’ to describe the conduct alleged”²¹⁶ The staff noted that at least ten of the thirteen impeachments that the House voted on since 1789 included charges that were not violations of criminal law.²¹⁷ Echoing Justice Story’s concern about limiting impeachment to criminality, the staff warned that “[t]o confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government,” adding that “[s]ome of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.”²¹⁸ This is important because racism, though an offense, is often not a criminal offense. While a president charged with racism in articles of impeachment would likely resort to the defense that the conduct was not a crime, history shows that this defense has no merit.

Third, the staff recognized that impeachment could be warranted for a pattern or combination of acts considered together. The staff noted that several impeachments “explicitly rested upon a ‘course of conduct’ or have combined disparate charges in a single, final article” and that “[s]ome of the individual articles seem to have alleged conduct that, taken alone, would not have been considered

212. *Id.* at 18.

213. *Id.* at 21.

214. *Id.* at 23.

215. *Id.* at 5–7 (discussing Hamilton’s reliance on English history and precedent of impeachment for non-statutory purposes).

216. *Id.* at 21.

217. *Id.* at 24.

218. *Id.*

serious.”²¹⁹ This would quite likely apply to a presidential impeachment inquiry on racist conduct, where the impeachers would rely on a series of words and deeds to establish racism clear and grave enough to warrant impeachment and removal.

Fourth, the staff noted the centrality of three presidential duties in the Constitution: “‘to take Care that the Laws be faithfully executed,’ to ‘faithfully execute the Office of President of the United States’ and to ‘preserve, protect, and defend the Constitution of the United States.’”²²⁰ Noting that these affirmative duties are “difficult to define . . . in the abstract” and that they afford broad discretion to the president to act, the staff wrote that the duties also establish limits that include “the duty not to abuse his powers or transgress their limits—not to violate the rights of citizens.”²²¹ These constitutional duties have been central to articles of impeachment in all presidential impeachments. In fact, they were mentioned in every article of the Nixon, Clinton, and Trump impeachments.²²²

Fifth, the memorandum closed by recognizing that “[n]ot all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality.”²²³ This requirement goes to the gravity of misconduct and the necessity of restraint in the use of impeachment.²²⁴ The staff advised that “[b]ecause impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.”²²⁵ As explained in Parts II, IV, and V of this article, racism and bigotry must be considered a substantial offense against the Constitution, statutory law, people, and public trust of the country.

219. *Id.* at 21. The staff later counseled that “the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events.” *Id.* at 27.

220. *Id.* at 27 (observing that the last two of these duties come from the constitutionally prescribed oath of office). These duties were referenced intermittently throughout the Johnson impeachment articles. See *The Impeachment of Andrew Johnson (1868) President of the United States*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7 [<https://perma.cc/S82Y-X4HR>] (last visited May 6, 2021). All three duties are explicitly referenced in each one of the Nixon and Clinton impeachment articles. See H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305; Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (enacted), <https://www.congress.gov/105/bills/hres611/BILLS-105hres611enr.pdf> [<https://perma.cc/SA4G-42UV>].

221. *Id.*

222. See generally H.R. REP. NO. 93-1305; Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (enacted) <https://www.congress.gov/105/bills/hres611/BILLS-105hres611enr.pdf> [<https://perma.cc/SA4G-42UV>]; Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted), <https://www.congress.gov/116/bills/hres755/BILLS-116hres755enr.pdf> [<https://perma.cc/T2GU-TRND>]; Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021) (enacted), <https://www.congress.gov/bill/117th-congress/house-resolution/24/text> [<https://perma.cc/9W2C-VHVR>].

223. *Constitutional Grounds for Presidential Impeachment*, *supra* note 204, at 28.

224. *Id.* at 27.

225. *Id.* at 28.

ii. *Process and Articles of Impeachment*

Reviewing the Nixon impeachment proceedings as guidance on impeachment for racism or bigotry, it is worth considering the process as well as the substantive articles of impeachment. As to process, Congress ensured that the public was well-informed about Nixon's conduct and the proceedings themselves. The facts and grounds for impeachment were the subject of months of congressional hearings, many of them nationally televised, starting in May of 1973 and continuing until shortly before Nixon's resignation.²²⁶ Second, in part because of how well informed the country was about the facts, law, and process, public opinion shifted dramatically from overwhelming majority opposition to Nixon's removal in the summer of 1973 to majority support by August 1974.²²⁷ Third, impeachment was bipartisan. House Republicans voted for the articles of impeachment and Republican congressional leaders ultimately urged Nixon to resign. While it is fair to be skeptical about public opinion shifts and bipartisanship in today's polarized environment, one lesson from the Nixon impeachment process is that public, bipartisan support can be cultivated by thoughtful, thorough, and fair congressional fact-gathering and presentation of evidence.

It is noteworthy that all three of the Nixon impeachment articles invoked the president's constitutional duty to faithfully execute the laws under the "Take Care" Clause and presidential obligations under the oath to execute the office and to preserve, protect, and defend the Constitution.²²⁸ As will be discussed next in Part IV, a racist president cannot be trusted to take care to execute the many laws that protect civil rights and prohibit discrimination, preserve and protect the constitutional amendments that establish and protect those rights, or safely carry out constitutional commander-in-chief duties.

Article I of Nixon's impeachment articles charged him with obstructing justice by blocking law enforcement and congressional investigations of Watergate.²²⁹ Though such charges would be relevant to racism only if a president improperly interfered with similar investigations, three components of the Nixon obstruction charges are significant. All are about lying. The first is article I(1), which alleges Nixon lied to or mislead federal investigators.²³⁰ This would be precedent for impeaching a president who lied or mislead officials responsible for investigating alleged presidential racism. The second is article I(3), which charges Nixon with causing witnesses to present false and misleading evidence in judicial

226. *The Watergate Hearings*, AM. ARCHIVE PUB. BROAD., https://americanarchive.org/special_collections/watergate [<https://perma.cc/4MQB-HE2C>] (last visited Apr. 17, 2021); see also MEACHAM, NAFTALI, BAKER & ENGEL, *supra* note 68, at 83–153 (describing the Nixon impeachment process including media coverage of hearings).

227. Kohut, *supra* note 198.

228. H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305.

229. *Id.* at Art. I.

230. *Id.*

and congressional proceedings.²³¹ This could apply to a future president if it was demonstrated that administration officials, at a president's behest, lied to Congress about matters related to racist presidential words, actions, motivations, or policies. The third pertinent obstruction article is I(8), charging Nixon with "false or misleading public statements for the purpose of deceiving the people of the United States."²³² This could apply to a president who tells racist or bigoted lies to the public in grave, inciteful, and harmful ways, rendering the president impeachable for such conduct.

Article II charged that Nixon "violat[ed] the constitutional rights of citizens" and that his abuse of law enforcement power caused "manifest injury of the people of the United States."²³³ A racist president who took action or made policy based on racism or bigotry, or who put people at risk for racist or bigoted reasons, or who abused law enforcement power for racist or bigoted ends, would be guilty of these same things.

C. Clinton Impeachment

The Clinton impeachment in 1998 centered on allegations of perjury in a sexual harassment lawsuit and in grand jury testimony. Ultimately, this led to an independent counsel investigation which concluded that Clinton had engaged in a range of impeachable offenses intended to obstruct the harassment case.²³⁴ The Independent Counsel report listed eleven separate grounds for impeachment based on these conclusions.²³⁵

Though much of the focus of the Clinton impeachment was on perjury, interference with legal proceedings, and the underlying facts regarding Clinton's extramarital relations, what makes it important here is the extent to which the impeachment was based on civil rights. The two articles of impeachment passed by the House stated ten times that Clinton committed his offenses in a federal "civil rights action" brought against him.²³⁶ Article III, pertaining to obstruction of justice, charged Clinton with a "scheme" to block the civil rights lawsuit.²³⁷

231. *Id.*

232. *Id.*

233. *Id.* at Art. II.

234. KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. Doc. No. 105-310 (1998), <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-2.pdf> [<https://perma.cc/UC5W-SPEA>].

235. *Id.* at 129-210 (describing the independent counsel's findings for eleven "possible grounds for impeachment").

236. Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (enacted), <https://www.congress.gov/105/bills/hres611/BILLS-105hres611enr.pdf> [<https://perma.cc/SA4G-42UV>].

237. Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (introduced in House) <https://www.congress.gov/bill/105th-congress/house-resolution/611> [<https://perma.cc/N928-RBH9>].

One House impeachment manager, Representative (now Senator) Lindsey Graham, based much of his pro-removal argument to the Senate on Clinton's obstruction of the civil rights sexual harassment case against him.²³⁸ Graham maintained that Clinton should not have been allowed to change the standard for impeachment and that obstructing justice was sufficient: "[I]f you believe he obstructed justice in a civil rights lawsuit, don't move the bar."²³⁹

Graham linked Clinton's conduct in the sexual harassment case to the issue of the civil rights of Black Americans. He began by invoking the pre-civil rights segregation in his native South, praising civil rights laws for ending segregation:

I am a child of the South and I will give you my views on civil rights and how we progressed in this country

. . . .

Civil rights have been advanced a lot in my lifetime, but we have a long way to go

. . . .

I started school with no black person in my class. . . . [I]ntegration hit in my area . . . and we're better off as a country.²⁴⁰

Graham described his parents' fear when litigation, legislation, and executive action defeated segregationist resistance to integration of schools, and how Black Americans were not allowed to drink in his parents' restaurant, concluding "[t]hat is not the way it is now, and we are better off for that."²⁴¹ He also invoked the legacy of federal enforcement of civil rights law over the segregationist opposition of Alabama Governor George Wallace.²⁴²

Graham argued that, in the context of civil rights violations, it was "a high crime" when "an important person hurts somebody of low means."²⁴³ He went on to say that an impeachable offense "doesn't have to be a crime," but instead could be committed "when you start using your office and you're acting in a way that hurts people."²⁴⁴ Finally, Graham invoked the president's constitutional obligations to enforce and execute the law: "The President . . . has a duty to see that the law applies to everyone fairly—a higher duty, a higher duty in the Constitution."²⁴⁵

238. 145 CONG. REC. S287–S291 (daily ed. Jan. 16, 1999) (statement of Rep. Graham).

239. *Id.* at S291.

240. *Id.* at S287–88.

241. *Id.* at S288.

242. *Id.* at S289.

243. *Id.*

244. *Id.*

245. *Id.* at S291. As a Senator, Graham voted to acquit in each of the two Trump impeachment proceedings. Jeremy Herb & Sean O'Neill, *How Each Senator Voted on Impeachment*, CNN (Feb. 5, 2020), <https://www.cnn.com/interactive/2020/02/politics/senate-impeachment-vote/> [<https://perma.cc/2PZU-Z5XR>]; *Here's How Senators Voted on Trump's Second Impeachment*, POLITICO (Feb. 13, 2021), <https://www.politico.com/interactives/2021/trump-second-impeachment-senate-vote/> [<https://perma.cc/G6J6-QXFW>].

Graham's reference to the importance of civil rights and equality, and how the norms governing civil rights changed for the better over time, were clearly intended to signify that interference with a sexual harassment lawsuit was a civil rights violation sufficient for impeachment in the present day.²⁴⁶ His personal invocation of the 1960's struggle for Black rights gave powerful moral and historical resonance to his argument. Graham's emphasis of the importance of civil rights demonstrates that these rights are among the principles so fundamentally important to American society that impeachment is warranted to protect them against presidential assault.

D. Restraint: Presidents Who Were Not Impeached

Professor Cass Sunstein, a prominent constitutional law scholar who has written on impeachment, explored the significance of presidents who were not impeached despite arguably grave misconduct. Sunstein observed that these instances "suggest the solidity of the American presumption against impeachment."²⁴⁷ Sunstein concluded that restraint in impeaching presidents "reflect[s] a national judgment that the impeachment device ought not to be used except in the most extreme cases" and that this restraint "reflects a certain set of beliefs about what offenses are legitimately impeachable."²⁴⁸

In a later work, Sunstein listed Franklin Roosevelt's internment of Japanese American citizens as a "serious violation[] of civil rights and civil liberties" sufficient to raise questions of impeachability.²⁴⁹ Roosevelt's internment of Japanese Americans, indefensible and shameful as it was, was upheld by the Supreme Court in the equally indefensible and shameful (and eventually abrogated) *Korematsu* decision.²⁵⁰ As Sunstein observes, factors such as wartime national security deference to the president weigh on the gravity of how presidential conduct is perceived;²⁵¹ Sunstein notes that "there is no escaping judgment about matters of degree."²⁵²

One hopes a future president who implements a policy similar to the Japanese American internment would be stopped and impeached. What are rightly considered unthinkable crimes today were accepted when done by past presidents. Critics may ask: What about the long line of presidents who were surely racists or bigots, particularly measured by contemporary standards? Are we now judging that they were retroactively unfit for the presidency? The answer is that we are using

246. See CONG. REC., *supra* note 229, at 288 ("It used to be in this country, not long ago, there was really no recourse if you were sexually harassed. We have changed things for the better.")

247. Sunstein, *Impeaching*, *supra* note 172, at 296.

248. *Id.* at 299.

249. SUNSTEIN, CITIZEN'S GUIDE, *supra* 28, at 129.

250. *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

251. SUNSTEIN, CITIZEN'S GUIDE, *supra* note 28, at 162.

252. *Id.* at 130.

contemporary standards and contemporary law to judge contemporary presidents. Laws and norms change over time. So must impeachment.

IV.

LAWS A RACIST PRESIDENT CANNOT BE TRUSTED TO ENFORCE: THE “SECOND FOUNDING” OF EQUAL RIGHTS AND OTHER CONSTITUTIONAL DUTIES

A racist president is incapable of enforcing the body of law prohibiting discrimination and promoting civil rights and therefore must be impeached. These laws are established in constitutional amendments and further expressed in a battery of civil rights statutes.²⁵³ These civil rights laws, taken together, are among our most consequential statements of not just law but also national aspiration and identity. They have carried the United States from the days of enslavement of Black Americans to today, when our laws protect equal rights across lines of race, ethnicity, religion, and gender—though, to be sure, to varying degrees.²⁵⁴ Though racist and bigoted injustice is still rife, and the United States has far to go in dismantling institutional and systemic racism,²⁵⁵ every aspect of American life has progressed and been shaped by civil rights laws, so much so that it is impossible to imagine the country without their emancipatory impact. The iconic stature of these protections also derives from the crucible of their birth in two of the nation’s most searing and defining events—the Civil War and the Civil Rights Movement.²⁵⁶ Presidential bigotry not only nullifies civil rights laws; it also assaults a core principle of American identity so dangerously as to demand impeachment and removal.

A. *The “Second Founding” of Racial Equality*

The post-Civil War Congress passed a comprehensive framework of laws and constitutional amendments that, for the first time, wrote racial equality into the Constitution and U.S. law. These laws were joined by civil rights legislation in the 1960s.²⁵⁷ Together, these laws comprise the greatest expansion of rights in U.S. history, so much so that the Civil War era constitutional amendments were described as “The Second Founding” by a leading Reconstruction scholar.²⁵⁸ The civil rights advances of the 1960s can be considered as a continuation of that

253. U.S. CONST. amends. XIV, XV, XIX; Civil Rights Act of 1875, 18 Stat. 335–37; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

254. See Charles Martel, *Are Americans Good Samaritans? How Martin Luther King’s Example Can Empower America’s Humanitarian Majority*, 9 SCHOLAR 213 (2007).

255. *Racial Discrimination*, HUMAN RIGHTS WATCH, <https://www.hrw.org/united-states/racial-discrimination> [<https://perma.cc/RJF2-S88T>] (last visited Apr. 17, 2021).

256. Civil Rights Act of 1875, 18 Stat. 335-337; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

257. U.S. CONST. amends. XIV, XV, XIX; Civil Rights Act of 1875, 18 Stat. 335-337; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

258. See Foner, *Second Founding*, *supra* note 49, at xxiv. See generally Foner, *Second Founding*, *supra* note 49.

Second Founding. What follows is a short summary of those key constitutional and statutory provisions.

*The Fourteenth Amendment.*²⁵⁹ Ratified in 1868, this Amendment established birthright citizenship (conferring citizenship on the formerly enslaved and others born in the United States), required equal protection under law, and extended the obligation to provide due process from the federal government to include the states. It gave constitutional status to the rights in the 1866 Civil Rights Act, and ratification by former Confederate states was required for readmission. The Fourteenth Amendment is the basis for Supreme Court decisions striking down racial segregation in schools,²⁶⁰ denial of citizenship to American-born racial minorities,²⁶¹ judicial enforcement of housing contracts with racist restrictions,²⁶² and prohibition of same sex marriages.²⁶³

*The Fifteenth Amendment.*²⁶⁴ Ratified in 1870, the Fifteenth Amendment prohibited denial of the right to vote based on race. Voting rights were further protected by the Twenty-Fourth Amendment²⁶⁵ and the 1965 Voting Rights Act.²⁶⁶

*Civil Rights Act of 1964.*²⁶⁷ The Civil Rights Act of 1964 was passed because of the Civil Rights Movement, months after Martin Luther King, Jr. gave his “I Have a Dream” speech during the campaign for the law as part of the March on Washington, D.C., for Civil Rights.²⁶⁸ The Civil Rights Act establishes comprehensive prohibitions against discrimination in employment, education, voter registration and literacy tests, public accommodations and facilities, and federal programs.²⁶⁹ Under the Act, discrimination is prohibited on the basis of race, color, religion, national origin,²⁷⁰ and sex.²⁷¹ In June 2020, the Supreme Court held that LGBTQ individuals are protected against discrimination under Title VII of the Civil Rights Act.²⁷²

259. U.S. CONST. amend. XIV.

260. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

261. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

262. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

263. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

264. U.S. CONST. amend. XV.

265. U.S. CONST. amend. XXIV.

266. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

267. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

268. MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 217 (James M. Washington ed., 1986).

269. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

270. Civil Rights Act §§ 201(a), 301(a), 401(b).

271. Civil Rights Act § 703(a).

272. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

*Voting Rights Act of 1965.*²⁷³ The Voting Rights Act of 1965 is another law passed because of the Civil Rights Movement.²⁷⁴ The Act enforced voting rights established by the Fourteenth and Fifteenth Amendments, and it prohibits laws imposing voting requirements that discriminate on the basis of race.²⁷⁵

*Fair Housing Act (Civil Rights Act of 1968).*²⁷⁶ The Fair Housing Act (“FHA”) was passed into law in April 1968, a week after King was assassinated.²⁷⁷ The FHA prohibits discrimination on the bases of race, national origin, sex, familial status, or religion in the sale, rental, and financing of housing.²⁷⁸

*Immigration and Nationality Act of 1965 (“INA”).*²⁷⁹ Under the 1965 INA, “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”²⁸⁰ The 1965 Act rescinded immigration laws that allowed consideration of race and national origin, favored admission of Western Europeans, and banned Asian immigration.²⁸¹ The 1965 INA “was enacted in the shadows of the ongoing civil rights legislation of the early 1960s” and “represented the most far-reaching revisions of U.S. immigration policy of its time.”²⁸² Immigration expert Professor Gabriel Chin stated that “[t]he 1965 act has to be understood as a result of the civil rights movement, and the general effort to eliminate race discrimination from U.S. law.”²⁸³

B. Other Constitutional Provisions Threatened by Presidential Racism

The “Take Care” Clause and the Oath of Office. Together, the constitutional amendments and laws just discussed prohibit racial, ethnic, and religious

273. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

274. The Act was passed shortly after the historic Selma to Montgomery March protest for voting rights. *Alabama: The Selma-to-Montgomery March*, NAT’L PARK SERV., <https://www.nps.gov/places/alabama-the-selmatomontgomery-march.htm> [<https://perma.cc/6647-EZ72>] (last updated Dec. 1, 2020).

275. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

276. Pub. L. 90-284, 82 Stat. 73 (1968); 42 U.S.C. § 3601, *et seq.*

277. *The Fair Housing Act of 1968*, History, Art, and Archives, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1951-2000/hh_1968_04_10/ [<https://perma.cc/D47X-N84Z>] (last visited Apr. 17, 2021).

278. 42 U.S.C. §§ 3604-06.

279. Pub. L. 89-236, 79 Stat. 911 (1968).

280. 8 U.S.C. § 1152(a)(1)(A) (2018).

281. See Office of the Historian, *The Immigration Act of 1924 (The Johnson Reed Act)*, U.S. DEP’T OF STATE <https://history.state.gov/milestones/1921-1936/immigration-act> [<https://perma.cc/278B-NVQX>] (last visited Jan. 30, 2021) (“[T]he most basic purpose of the 1924 Immigration Act was to preserve . . . U.S. homogeneity.”).

282. Mark Georges Pufong, *Immigration and Nationality Act Amendments of 1965*, C.L. IN THE U.S. (July 16, 2012) <https://usciviliberties.org/legislation-and-legislative-action/3954-immigration-and-nationality-act-amendments-of-1965.html> [<https://perma.cc/8EMD-ECEZ>].

283. Lesley Kennedy, *How the Immigration Act of 1965 Changed the Face of America*, HISTORY.COM (Aug. 12, 2019), <https://www.history.com/news/immigration-act-1965-changes> [<https://perma.cc/8JAG-CTC7>] (referring to the work of Professor Gabriel “Jack” Chin).

discrimination in virtually all activities in the United States. It is the president's constitutional duty to enforce these laws, carried out on a day-to-day basis by tens of thousands of Executive Branch employees in the Department of Justice,²⁸⁴ the Department of Homeland Security,²⁸⁵ and agencies like the Equal Employment Opportunity Commission.²⁸⁶ This presidential duty is established in the Constitution's "Take Care" Clause, which states that the president "shall take Care that the Laws be faithfully executed."²⁸⁷ A similar duty arises from the oath of office set forth in the Constitution, which requires the president to swear to "faithfully execute the Office of President of the United States, and . . . to the best of my Ability[] preserve, protect[,] and defend the Constitution of the United States."²⁸⁸

Failure or inability to enforce civil rights law, and hostility toward such law, is surely cause for impeachment. This accords with history. Breach of presidential obligations in the Take Care Clause and Oath was charged in every article of the Nixon and Clinton impeachments, and included at various points throughout the Johnson articles.²⁸⁹

Commander-in-Chief Responsibility. Under Article II, Section 2 of the Constitution, the president is commander-in-chief of the armed forces.²⁹⁰ The consequences of this life-and-death power in the hands of a racist or bigot are potentially cataclysmic, as the U.S. military's nuclear and conventional war capabilities make it the most lethal force in history.²⁹¹

284. See, e.g., *Organization, Mission and Functions Manual: Civil Rights Division*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-civil-rights-division> [<https://perma.cc/3K3X-9JFA>] (last visited March 12, 2021); *About Division Overview*, U.S. DEP'T OF JUSTICE, VOTING SECTION, <https://www.justice.gov/crt/about-division-overview> [<https://perma.cc/8YJ9-BPYT>] (last visited Mar. 12, 2021); *Housing And Civil Enforcement Section Overview*, U.S. DEP'T OF JUSTICE, HOUS. & CIVIL ACTION SECTION, <https://www.justice.gov/crt/housing-and-civil-enforcement-section-overview> [<https://perma.cc/9359-FQCN>] (last visited March 12, 2021); U.S. DEP'T OF JUSTICE, EXEC. OFF. OF IMMIGR. REVIEW, About the Office, <https://www.justice.gov/eoir/about-office> (last visited March 12, 2021) (stating the agency's primary mission as "adjudicating immigration cases by . . . administering the Nation's immigration laws" including its anti-discrimination provisions).

285. *Mission and Core Values*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/mission-and-core-values> [<https://perma.cc/UTK5-A7HP>] (last visited March 12, 2021) (stating that "everyone we affect will be treated with dignity and courtesy regardless of the outcome of their case").

286. *Overview*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/overview> [<https://perma.cc/BX5A-KC5Q>] (last visited Apr. 19, 2021).

287. U.S. CONST. art. II, § 3.

288. U.S. CONST. art. II, § 1.

289. See H.R. Res. 648, 93d Cong. (1974); H.R. Res. 611, 105th Cong. (1998); Cong. Globe 40th Cong., 2d Sess. 1400 (1868).

290. U.S. CONST. art. II, § 2.

291. See Christopher Woody & Jenny Cheng, *Here's the Hardware the World's Top 25 Militaries Have in Their Arsenals*, BUS. INSIDER (Mar. 1, 2018), <https://www.businessinsider.com/here-are-the-worlds-most-powerful-militaries-2018-2> [<https://perma.cc/K4U7-9DT2>].

A racist president is a threat to the lives of servicemembers. Forty percent of those who serve in the military are not White.²⁹² A bigoted president is morally unfit to lead a pluralistic military or to give orders to servicemembers whose humanity and rights such a president does not value.

A racist or bigoted president cannot be trusted to consider and protect the lives of servicemembers and civilians when making decisions about life-threatening operations. A racist president is dangerous to civilians where the military is deployed. According to a 2019 study, the U.S. military is using deadly force (crewed combat or uncrewed strikes) in at least fourteen countries.²⁹³ Nine are majority Black countries in Africa; five are in the Middle East or South Asia where most of the population is not White.²⁹⁴ Virtually all of the countries are majority Muslim and all have significant populations of Muslims.²⁹⁵ Troops have been deployed to the southern border to respond to immigrants who are Latinx and Black.²⁹⁶ The implications of a racist president's motives in deploying troops to places populated by people who are not White or who practice Islam, or in issuing orders for the unwarranted use of deadly force against them, are horrifying. Presidential war power is too much power for a racist.

V.

PRESIDENTIAL RACISM AND BIGOTRY IS GROUNDS FOR IMPEACHMENT

Drawing from history and commentary on impeachment, the following list of factors and considerations establish that a president can and should be impeached for racism or bigotry.

Restraint. Impeachment is an extraordinary act and should be rare. The Framers structured it that way by requiring grave misconduct for impeachment and a

292. Kim Parker, Anthony Cilluffo & Renee Stepler, *6 Facts About the U.S. Military and Its Changing Demographics*, PEW RSCH. CTR. (Apr. 13, 2017), <https://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/> [https://perma.cc/2MYD-SCU4].

293. See Stephanie Savell, *Where We Fight: US Counterterrorism War Locations 2017-2018*, COSTS OF WAR: WATSON INST. OF INT'L & PUB. AFFAIRS AT BROWN UNIV. (2019), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2019/US%20Counterterrorism%20War%20Locations%2C%202017-18%2C%20with%20Smithsonian%20and%20CoW%20attributions.pdf> [https://perma.cc/3C5K-VZMS].

294. *Id.* The nine African countries where US troops are in combat are Tunisia, Libya, Mauritania, Mali, Niger, Cameroon, Central African Republic, Kenya, and Somalia. *Id.* The five Middle Eastern / South Asian countries where US troops are in combat are Syria, Iraq, Yemen, Saudi Arabia, and Afghanistan. *Id.*

295. See *Mapping the Global Muslim Population*, PEW RSCH. CTR. 13, 16, 20, 30 (Oct. 2009), <https://www.pewresearch.org/wp-content/uploads/sites/7/2009/10/Muslimpopulation.pdf> [https://perma.cc/9WBA-LZN9] (showing populations for Afghanistan, Tunisia, Libya, Syria, Iraq, Yemen, Saudi Arabia, Mauritania, Mali, Niger, Somali, Cameroon, Central African Republic, and Kenya).

296. See Matthew S. Schwartz, *Pentagon Deploying 3,750 Troops to Southern Border*, NPR, (Feb. 4, 2019) <https://www.npr.org/2019/02/04/691222383/pentagon-deploying-3-750-troops-to-southern-border> [https://perma.cc/HN9L-PMSU].

supermajority in the Senate for removal.²⁹⁷ Restraint is reflected by history—impeachment proceedings were not undertaken for several presidents despite serious presidential misconduct,²⁹⁸ only three presidents have been impeached,²⁹⁹ and no president has been removed by the Senate (though one—Nixon—resigned when impeachment and removal appeared certain).³⁰⁰

Vital interests are protected by restraint.³⁰¹ Some guiding principles follow. The constitutional debates teach that congressional disapproval with presidential performance or policy is insufficient for impeachment. As Charles Black noted, “whatever may be the grounds for impeachment and removal, dislike of a president’s policy is definitely not one of them, and ought to play *no* part in the decision on impeachment.”³⁰² General low character is not enough; impeachment should require “a charge of a definite act or acts.”³⁰³ Impeachment should be avoided if there are alternatives, such as legislation, censure, or court challenge, that effectively and finally resolve presidential misconduct.³⁰⁴

Applying principles of restraint helps to assess evidence. Generalized accusations are not enough for impeachment; there must be concrete words or actions that unmistakably demonstrate racist or bigoted presidential motivation.

Among the more difficult, but most important, evidentiary considerations is whether there is evidence of racism or bigotry that goes beyond policy disputes or insensitive remarks. By way of example, virtually all presidential actions related to civil rights or immigration will have a disparate impact on demographic groups. It would be wrong for actions or policies that restrict immigration, or that comprise a more limited interpretation of civil rights, to be impeachable unless there was compelling evidence that the president was motivated by racist or bigoted bias. Similarly, a president will need to speak about issues of race, civil rights,

297. See MAJ. STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 47 (Comm. Print 2019), <https://www.govinfo.gov/content/pkg/CPRT-116HPRT38513/html/CPRT-116HPRT38513.htm> [<https://perma.cc/M8CD-XWPK>].

298. Sunstein, *Impeaching*, *supra* note 172, at 281, 296–98 (discussing forbearance in cases in which presidents might have been impeached).

299. *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> [<https://perma.cc/U4XU-KDCD>] (last visited Apr. 18, 2021).

300. See *supra* Part III, Section B; Domenico Montaro, *There Is Precedent for Trying a Former Government Official, Established 145 Years Ago*, NPR (Jan. 29, 2021), <https://www.npr.org/2021/01/29/961330810/there-is-precedent-for-trying-a-former-government-official-established-145-years> [<https://perma.cc/KMC7-JMTU>].

301. BLACK, *supra* note 26, at 4 (likening impeachment to “high-risk major surgery, to be resorted to only when the rightness of diagnosis and treatment is sure”); see also SUNSTEIN, *CITIZEN’S GUIDE*, *supra* note 28, at 80–81.

302. BLACK, *supra* note 26, at 28 (emphasis in original); see also TRIBE, *supra* note 33, at 172 (stating that the “president cannot properly be impeached for poor policy choices or even for gross incompetence”).

303. BLACK, *supra* note 26, at 36.

304. See *id.* at 58–61; Gerhardt, *supra* note 22, at 604. I relied extensively on Professor Gerhardt’s article and approach in identifying factors, though the factors I list are not identical.

immigration, and many other matters connected to racial, religious, or ethnic identity. It would dangerously undermine a president's capacity to lead if impeachment or its threat constrained such speech. It should be presumed that the remedy for disagreeable presidential communications is the political process and elections, rather than impeachment, unless such speech, considered with other action, unmistakably demonstrates racism or bigotry.

Substantiality and Harm to the Nation. The Framers' "high crimes and misdemeanors" standard is generally understood to mean that the purpose of impeachment is to protect the country from the gravest of presidential offenses—those which cause or threaten deep or widespread harm to the nation. The Framers and early commentators emphasized that impeachable offenses must cause great public harm and constitute a violation of public trust.³⁰⁵ As one scholar noted, "to be impeachable, the President must have engaged in large-scale abuses of distinctly presidential powers."³⁰⁶ An expert on the history of presidential impeachment concluded that with rare exception impeachable offenses "involve the serious misuse of office or official prerogatives or breaches of the public trusts held."³⁰⁷ Commentators have observed that impeachable offenses must be "extremely serious"³⁰⁸ and have "indisputable seriousness."³⁰⁹

While the substantiality factor cabins impeachable conduct by setting a high standard for gravity, there is a broad and undefined range of misconduct that meets that standard. George Mason, in proposing the "high crimes and misdemeanors" language, warned that without such breadth impeachment will not reach "*many* great and dangerous offenses."³¹⁰ Justice Story observed impeachable offenses "are so various in their character, and so indefinable" that they should be "examined upon very broad and comprehensive principles of public policy and duty."³¹¹ The 1974 House Judiciary staff wrote that impeachable offenses do not "fit neatly and logically into categories" and that impeachment is "intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office."³¹² Racism is an offense that will often be expressed not just in a single act but in a series of them. Here, the 1974 House Judiciary staff guidance that a course of conduct may be considered in assessing impeachability is instructive.³¹³ One way to assess whether the offenses are substantially grave is whether

305. See *supra* Part II; Gerhardt, *supra* note 22, at 603 (stating that the "weight of authority" is that Framers understood impeachable "offenses were characterized further as serious abuses of official power or serious breaches of the public trust").

306. Sunstein, *Impeaching*, *supra* note 172, at 283.

307. Gerhardt, *supra* note 22, at 604.

308. BLACK, *supra* note 26, at 34.

309. TRIBE, *supra* note 33, at 181.

310. SUNSTEIN, *CITIZEN'S GUIDE*, *supra* note 28, at 56 (emphasis added).

311. STORY, *supra* note 44, at 599.

312. *Constitutional Grounds for Presidential Impeachment*, *supra* note 204, at 21.

313. *Id.* (observing that impeachable offenses cannot easily be categorized and is "intended to reach a broad variety of conduct"). *But see* BLACK, *supra* note 26, at 43–44 (explaining the risks of using the "substantiality" requirement of the offense to "'stack[]' petty charges.").

they threaten direct and urgent harm; Hamilton wrote that impeachment was for conduct causing “injuries done immediately to the society.”³¹⁴

Presidential racism or bigotry falls within the range of serious offenses against which impeachment protects the country, because a racist president would threaten direct and immediate harm to the entire nation. Even enslavement-era commentary from Justice Story recognized that impeachment empowered Congress to act for the people “to protect their rights and rescue their liberties from violations,”³¹⁵ and there can be no doubt that presidential bigotry is a direct attack on essential rights and liberties. The Nixon articles of impeachment, though not about racism, were about injury to public rights, as they stated Nixon “violat[ed] the constitutional rights of citizens” and that his abuse of law enforcement power caused “manifest injury of the people of the United States.”³¹⁶

A racist president would directly endanger tens of millions of Americans against whom such a president harbors discriminatory hostility, Americans who would be at risk of life-shattering suffering from discriminatory policy or even violence at the hands of presidential incitement. Racism in the White House injures all citizens, regardless of identity, who cherish living in a nation where every person has physical sanctuary and where equal rights and justice are foundational principles of law. Racism and bigotry in the presidency further assault the multi-racial, religiously tolerant pluralism such laws and rights promote. A racist president threatens constitutional amendments and federal laws prohibiting discrimination and protecting equality.³¹⁷ This battery of laws that express principles of equality, justice, citizenship, and morality are so fundamental that they are a central component of American aspirational identity. As described earlier, a racist commander-in-chief wielding presidential war power poses lethal danger to demographic groups he is bigoted against in military service and to foreign civilians in the line of fire.³¹⁸

The national crisis created by the coronavirus pandemic is another life-and-death example of presidential responsibility that cannot sensibly be entrusted to a racist or bigoted president. A president’s authority to declare emergencies, to direct federal resources, to deploy military assets, to work with Congress in passing emergency legislation—or the decision not to take such actions—cannot be influenced by hostility based on race, ethnicity, religion, or other bigotry.

Protection Against Threat of Continuing Harm. Impeachment considerations include whether presidential misconduct carries an urgent risk of injury and ongoing public harm. Constitutional scholar Charles Black, in his landmark treatise on

314. THE FEDERALIST NO. 65, *supra* note 37, at 31.

315. *Hearing*, *supra* note 2, at 113 (quoting Story, J.).

316. H.R. Res. 648, 93d Cong. (1974).

317. *See* discussion *supra* Part IV, at 137.

318. *See* discussion on commander-in-chief responsibility *supra* Part IV, at 140-41.

impeachment,³¹⁹ wrote that impeachment is warranted for offenses that make a president's "continuance in office dangerous to public order"³²⁰ and explained that impeachment was protective against future harm, reasoning "we remove [the president] principally because we fear [the president] will do it again."³²¹ Black concluded that "'high Crimes and Misdemeanors' . . . ought to be held to those 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."³²² Tribe has observed that "impeachment and removal from office are designed principally as a means of protecting the nation from one whose continuation in office would be a source of peril"³²³ and that one purpose of impeachment is to "protect the nation from harm done or threatened by an official who abuses power or subverts the Constitution."³²⁴ Impeachment is warranted for "objective misconduct that seriously undermines the official's fitness for office . . . measured by the risks, both practical and symbolic, that the officer poses to the republic."³²⁵ Presidential racism and bigotry are a direct threat to everyone in the demographic group subject to the president's ill will and to the array of constitutional provisions and statutes that outlaw such discrimination. Racism and bigotry also assault the notion of America as a multi-racial democracy where all benefit when equal rights are shared and protected. It is fair to use impeachment to remove a president who presents a continuing danger of such a threat.

Conduct Unfit for National Leadership. Impeachment scholars recognize that the presidency carries extraordinary moral power and that impeachment is appropriate to protect the ethical credibility this power demands. Black wrote that a president could be impeached for acts "plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books," or conduct rendering a president "not thinkable as a national leader."³²⁶ Another scholar noted a president may be impeached for action that "fall[s] outside of the paradigmatic case" but is nonetheless "so outrageous and thoroughly incompatible with an official's status or responsibilities that they effectively disable the official from being able to continue to function at all in his or her present office."³²⁷ The 1974 House Judiciary Committee similarly observed that impeachment was appropriate for "behaving in a manner grossly incompatible with the proper function and

319. Professor Philip Bobbit, in authoring the preface to the new edition version of the treatise, described it as "the standard work" on the subject. BLACK, *supra* note 26, at xi.

320. *Id.* at 35.

321. *Id.* at 36 (describing "prospective" considerations for impeachment).

322. *Id.* at 36.

323. TRIBE, *supra* note 33, at 155.

324. *Id.* at 158.

325. Healy, *supra* note 30, at 16 (quoting John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 652 (1999)).

326. BLACK, *supra* note 26, at 34–36. Black identified treason and bribery as examples of what he categorized as conduct unthinkable for a president. *Id.* at 35.

327. Gerhardt, *supra* note 22, at 604.

purpose of the office.”³²⁸ Put simply, some things are so morally out of bounds that a president cannot do them and expect to stay in office. Racism and bigotry are surely among the things that are so immoral as to render a person ethically unfit for the presidency.

Criminality Unnecessary. Presidential racism or bigotry need not be criminal to be impeachable. As described earlier, there is a broad consensus that criminality is not required for impeachment.³²⁹ Articles of impeachment for presidents have included non-criminal charges.³³⁰ As Black put it, limiting impeachment to criminal offenses “is unwarranted—even absurd.”³³¹

Lying/Incitement. A hallmark of racism is to say untrue things that diminish the humanity of others, to spread such lies, and to incite action against people based on untruths. A president can be impeached for lying whether the lies are criminal (as were Clinton’s) or not (as were some of Nixon’s). Lying is impeachable if it betrays the “public trust with respect to a matter central to governance.”³³² For example, the Nixon articles of impeachment included the non-criminal charge of lying to the public about the coverup and investigation.³³³ Scholars agree that deliberate lying may be impeachable depending on the criminality, frequency, and gravity of the lies, and context in which the lies occur.³³⁴

As for incitement, the Johnson impeachment for inflammatory speeches suggests a common-sense principle that presidential incitement is impeachable when it can be reasonably foreseen to lead to harm. Constitutional scholar Philip Bobbitt wrote that “incitements to violence against . . . ethnic or religious groups” could be impeachable, depending on “the consistency and persistence of the incitements, the practical effects on the body politic of such septic exhortations, and even the seriousness with which they are made (and taken).”³³⁵ Bobbitt concluded that “a president who both contributes to and benefits politically from this debased condition might be removed from office after a historic tragedy” such as a civil

328. *Constitutional Grounds for Presidential Impeachment*, *supra* note 204, at 3.

329. *See supra* notes 43–44, 65–67, 214–218.

330. *See* BAZAN, *supra* note 57, at 23 (2009); *see also* Healy, *supra* note 30, at 1; COLE & GARVEY, *supra* note 58, at 23; Cong. Globe 40th Cong., 2d Sess. 1400 (1868); H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES: REPORT OF THE H. COMM. ON THE JUDICIARY TOGETHER WITH ADDITIONAL, MINORITY, AND DISSENTING VIEWS TO ACCOMPANY H.R. 611, H.R. REP. NO. 105-803, at 5–7, 21, 23–24 (1998), <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc3/html/GPO-CDOC-106sdoc3-15.htm> [<https://perma.cc/US7E-XM9X>].

331. *See* BLACK, *supra* note 26, at 32.

332. *See id.* at 128 (noting that a sustained pattern of lying about the premise of a US-involved war could be an impeachable action).

333. *See* H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305.

334. *See* SUNSTEIN, CITIZEN’S GUIDE, *supra* note 28, at 308; *see also* Gerhardt, *supra* note 22, at 619 (noting an “absence of integrity” is impeachable depending on the circumstances surrounding the behavior); BLACK, *supra* note 26, at 32 (claiming “circulation of known lies” about an election opponent may be impeachment if part of a broader pattern).

335. BLACK, *supra* note 26, at 137.

conflict.³³⁶ Therefore, a racist or bigoted president who abuses the pulpit of the office to spread lies about the human targets of his bigotry, or to incite resentment or even violence against them, is impeachable.

Racism and Civil Rights in Presidential Impeachment. A final factor is that racism and civil rights concerns heavily influenced two presidential impeachments. Johnson's impeachment was the congressional response to his White supremacy, his racially inflammatory speeches, his perceived encouragement of murderous violence against Black Americans, his racist message to Congress in December of 1867, and his relentless obstruction of the Reconstruction Black rights agenda.³³⁷ Civil rights were raised in the articles and arguments for Clinton's impeachment.

Scholars recognize that discrimination is impeachable. Black wrote that overt religious discrimination in presidential appointments "would clearly be a gross and anti-constitutional abuse of power, going to the life of our national unity, and it would be absurd to think that a president might not properly be removed for it."³³⁸ This would be even more true of racial or religious bigotry and harm that would extend beyond administration appointments to the entire country. As noted above, Prof. Bobbitt described racist incitement as a reason for impeachment,³³⁹ a conclusion that is a good introduction to our next question—what specific conduct would constitute impeachable racism or bigotry?

VI.

REAPING THE WHIRLWIND: WHAT IS IMPEACHABLE RACISM AND BIGOTRY?

It is the lawyer's temptation to search for a clear standard for impeachment, but this search is in vain. The Framers established a standard that demands grave public harm but allows for a broad range of misconduct to satisfy that demand. They empowered elected officials to make impeachment decisions, which means that political and societal norms and sensibilities will necessarily determine outcomes. That is why Johnson was not impeached for some of the worst presidential racism, obstruction, and incompetence in U.S. history, but instead for breaking a law that was unconstitutional.³⁴⁰ That is why impeachment of Roosevelt for racist concentration camps that might be shocking today was not considered.³⁴¹ That is why Clinton was impeached for a personal scandal that most Americans concluded was insufficient to end his presidency (though it outraged Clinton's

336. *Id.* As demonstrated in Part V, Trump's incitements meet Bobbitt's tests for impeachment.

337. See discussion of the Johnson impeachment, *supra* Part III.

338. BLACK, *supra* note 26, at 31.

339. See *supra* Part V, at 146-47.

340. See *supra* Part III, at 123-124.

341. See *supra* Part III, Section D; SUNSTEIN, CITIZEN'S GUIDE, *supra* note 28, at 129-30.

political opponents and many supporters).³⁴² There are not clear rules for what is enough for impeachment, and it is hard to draw lines.

That said, the harm of a racist president is among the gravest dangers the country can face. Some guidelines—and guardrails against excess—should be established. There must be evidence of overt racism, either through a single statement or act or a series of them. The actual or threatened racism must seriously harm, or threaten to seriously harm, people or the law. Impeachment should not be warranted for presidential words or conduct that can be prevented or remedied short of impeachment by judicial or legislative intervention or elections. These guidelines would protect against abuse of impeachment to punish or intimidate presidents for legitimate policy initiatives, such as immigration expansions or restrictions, remedial action such as affirmative action or reparations, or good-faith proposals to increase or contract the scope of a range of protections of rights. It should also be observed that policies or actions intended to remedy racism and discrimination are not grounds for impeachment.

Presidential words should be measured by a similar rule of reason. One can easily anticipate defenders of a president raising First Amendment and free speech objections to impeachment based in part on racist or bigoted statements. While one has a First Amendment right to say outrageous things about race, religion, or other facets of identity, one does not have a First Amendment right to be President of the United States. A president who reveals by words racist or bigoted motivations and intentions, or who incites violence based on racist or bigoted hostility, is unfit to remain in office.

The gravity of removing a president through impeachment requires careful congressional consideration of words, deeds, and consequences, and ultimately a conclusion that a president has caused grave damage by abusing the public trust so severely that ending the presidency by impeachment and removal is required to stop the danger. The principle of restraint in impeachment is critical on questions of racism or bigotry to avoid weaponizing impeachment by turning it into an ever-present looming threat of a Congressional removal. Alone, policy disagreements with differing racial or ethnic impact would not be enough to impeach. Presidents should speak out on matters of racial, ethnic, and religious consequence, and it would be unhealthy to impeach a president who did this unskillfully, insensitively, and perhaps even offensively.

The most obvious evidence would be presidential statements that unmistakably demonstrate racist or bigoted motive, such as slurs. The “n-----” slur is a uniquely ugly act, bound as it is to centuries of enslavement, lynching, societal discrimination, and racial violence that continues to shatter the lives of tens of millions of Black people to this very day. It is emblematic of hundreds of years of

342. Drew Desilver, *Clinton's Impeachment Barely Dented His Public Support, and It Turned Off Many Americans*, PEW RESEARCH CTR. (Oct. 3, 2019), <https://www.pewresearch.org/fact-tank/2019/10/03/clintons-impeachment-barely-dented-his-public-support-and-it-turned-off-many-americans/> [<https://perma.cc/TG5T-MZ7V>].

America's brutal racism against Black people. As a general matter, a president who says that word is unfit for office and should be impeached.³⁴³

Other statements that reveal beyond dispute presidential racism or bigotry would also be grounds for impeachment. Suppose, for example, a president said that there are too many of a racial, ethnic, or religious group in the country, or in elected office, or urged supporters to vote against candidates for explicitly racist or bigoted reasons. Support of racist or bigoted institutions or organizations, such as the Ku Klux Klan or neo-Nazis, would render a president unfit and impeachable.

Another category of explicit racism would be presidential policy statements that prove intent beyond doubt, demonstrating the president acted against people for racist or bigoted reasons. For example, a president who cut health care programs to intentionally deny care to a racial, ethnic, or religious group, or who refused to appoint officials or judges from such a group, would be impeachable.

These cases are obvious but unlikely. It is hard to imagine a contemporary president would say such glaringly racist or bigoted things publicly, even if he or she harbored such motivation. It is more likely that a racist or bigoted president would be revealed through a pattern of words, actions, and consequences, combining public conduct with evidence from the media, congressional oversight, and litigation.

Here, intellectual honesty requires dispensing with "what if" hypothetical presidents and directly considering former President Trump's conduct on race and treatment of people of color and Muslims. While no doubt there have been racists and bigots in the White House, Trump's racial provocations were central to his political ascendancy and presidency and are unique in the post-Civil Rights era history of the United States. Trump is deliberately and frequently racially offensive at best and outright racist at worst.³⁴⁴ A 2019 poll conducted by Quinnipiac University showed a majority of American voters believe Trump is a racist.³⁴⁵

Trump's words and deeds raise serious questions relevant to what constitutes grounds for impeachment for racism and bigotry. In the words of one federal judge

343. It is also possible to imagine a context in which use of this slur would not indicate that the president is racist; for example, if a Black president used the slur in an appropriate context or if a president used the slur in the distant past and there is powerful proof that the president does not currently harbor racist sentiments.

344. See, e.g., Casey Ryan Kelly, *Donald J. Trump and the Rhetoric of White Ambivalence*, 23 Rhetoric & Pub. Aff. 195, at 203–04 (2020), <https://www.jstor.org/stable/10.14321/rhetpublaffa.23.2.0195> [<https://perma.cc/LC5B-MZCR>]; David A. Graham, Adrienne Green, Cullen Murphy & Parker Richards, *An Oral History of Trump's Bigotry*, THE ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/> [<https://perma.cc/SR9Q-3KWZ>]; Ta-Nehisi Coates, *The First White President*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> [<https://perma.cc/N4RC-TNY4>].

345. *Trump is Racist, Half of U.S. Voters Say, Quinnipiac University National Poll Finds; but Voters Say Almost 2-1 Don't Impeach President*, QUINNIPIAC UNIV. (July 30, 2019), <https://poll.qu.edu/national/release-detail?ReleaseID=3636> [<https://perma.cc/5WEF-ZYJF>].

who affirmed the decision to block a Trump immigration and travel ban on the grounds that the program was discriminatorily motivated, “[w]e cannot shut our eyes to such evidence when it stares us in the face.”³⁴⁶ Trump’s conduct falls into three categories of grave breach of public trust potentially worthy of impeachment inquiry: 1) racial discrimination, 2) religious discrimination, and 3) racial and bigoted incitement. These categories of discrimination link Trump’s inflammatory, racialized charges against racial, ethnic, and religious groups to policies which inflict grave harm on people in those same groups.

On race discrimination, Trump made derogatory and untrue statements about Black and Latinx immigrants during his campaign³⁴⁷ and his presidency,³⁴⁸ charging them with violence and criminality and using these falsehoods to justify a broad range of policies blocking immigrants from entering the United States or removing those who were in the United States legally. Trump’s frequent characterization of the immigrant population as largely dangerous and criminal is not true.³⁴⁹ Trump’s damaging words about immigrants were deepened by damaging deeds that hurt them terribly—and that had a disparate racial impact. By way of example, four Trump immigration policies with such impact were:³⁵⁰

1) Rescission of the Deferred Action for Childhood Arrivals program (DACA). The Obama-era DACA program was created by a 2012 DHS memorandum that protected immigrants from removal if they were brought to the United

346. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d. 554, 599, n.20 (4th Cir. 2017) (en banc), *vacated and remanded on other grounds*, 138 S. Ct. 353 (2017).

347. *See, e.g., ‘Drug Dealers, Criminals, Rapists’: What Trump thinks of Mexicans*, BBC (Aug. 31, 2016), <https://www.bbc.com/news/av/world-us-canada-37230916> [<https://perma.cc/FUR8-AQNH>].

348. *See, e.g., Eugene Scott, Trump’s Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/> [<https://perma.cc/P2AY-H57J>].

349. Stephanie Leutert, *Who’s Really Crossing the U.S. Border, and Why They’re Coming*, LAWFARE (June 23, 2018, 10:04 AM), <https://www.lawfareblog.com/whos-really-crossing-us-border-and-why-theyre-coming> [<https://perma.cc/2CC3-6N5W>]; Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/> [<https://perma.cc/K8QX-DWZG>].

350. As the discussion reflects, these policies impacted demographic groups subject to Trump’s verbal provocations and led to court challenges. The list is not exclusive. For another Trump policy that assaulted vulnerable groups, *see* Associated Press, *Trump Plans to Slash Refugee Admissions to US to Record Low*, U.S. NEWS & WORLD REP. (Oct. 1, 2020), <https://www.usnews.com/news/us/articles/2020-09-30/trump-set-to-miss-required-deadline-for-2021-refugee-quota> (noting the cuts in numbers of refugees admitted).

States as young children.³⁵¹ An estimated 1.7 million people were eligible for DACA protection,³⁵² and by 2016 over 700,000 were granted the protection (with over 500,000 later renewing DACA status).³⁵³ Ninety-four percent of those protected from deportation under DACA are from Central or South America.³⁵⁴ Trump rescinded DACA in 2017.³⁵⁵ In 2020, the Supreme Court vacated the Trump rescission of DACA on procedural grounds.³⁵⁶

2) Cancellation of Temporary Protected Status (TPS). TPS is discretionary immigration relief that the Secretary of the Department of Homeland Security can provide to victims of humanitarian crisis such as natural disaster or ongoing armed conflict.³⁵⁷ In 2018, Trump moved to end TPS that allowed over 327,000 immigrants from El Salvador, Haiti, Nicaragua, and Sudan to remain in the country.³⁵⁸ The TPS protections for these countries were in place for a decade for Haiti, and for periods of eighteen to twenty-two years for the remaining three countries.³⁵⁹ Those Trump sought to deport “lived in this country for years, if not decades.”³⁶⁰ The rescission of TPS was upheld by the Ninth Circuit Court of Appeals as within the Trump administration’s statutory (under the TPS statute) and administrative

351. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/V7DU-6HK5>] (last visited June 2, 2021) (remarks of President Obama announcing DACA); U.S. DEP’T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/WVS5-WVZM>] (DHS announcement implementing DACA).

352. Jeffrey S. Passel and Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW RESEARCH CTR. (Aug. 14, 2012), <https://www.pewresearch.org/hispanic/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/> [<https://perma.cc/Q9YJ-B8WV>].

353. *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2016*, U.S. CITIZENSHIP AND IMMIGRATION SERV. (June 30, 2016), https://www.uscis.gov/sites/default/files/document/data/daca_performance-data_fy2016_qtr3.pdf [<https://perma.cc/C322-GCCK>].

354. Gustavo Lopez & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RESEARCH CTR. (Sept. 25, 2020), <https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/> [<https://perma.cc/8HNS-XZTF>].

355. U.S. DEP’T OF HOMELAND SEC., MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (Sept. 5, 2017) <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/46VT-2YB5>].

356. U.S. Dep’t of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1901 (2020) (vacating rescission as violative of the Administrative Procedure Act (“APA”).

357. 8 U.S.C. § 1254(a)(b).

358. Brennan Weiss, *The Trump Administration Has Ended Protections for Immigrants from 4 Countries—Here’s When They Will Have to Leave the US*, BUS. INSIDER (Jan. 11, 2018, 6:01 PM), <https://www.businessinsider.com/trump-has-ended-temporary-protection-status-for-4-countries-2018-1> [<https://perma.cc/NCC4-BZEQ>].

359. See Ramos v. Wolf, 975 F.3d 872, 880-83 (9th Cir. 2020) (discussing TPS history in the four countries).

360. *Id.* at 900 (Nelson, J., concurring).

authority (under the APA).³⁶¹ The Ninth Circuit rejected a constitutional challenge to the rescission of TPS under the Equal Protection Clause, reasoning that the plaintiffs had not shown nexus between Trump's alleged discriminatory animus toward Latinx and Black immigrants and the rescissions.³⁶² The court did not, however, address whether the evidence supported the conclusion of whether Trump in fact was motivated by discrimination.

3) A series of travel bans levelled against majority Muslim and Black nationals. Trump issued a series of travel bans. The first, which came shortly after his inauguration in 2017, barred nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, and was blocked by court temporary restraining order.³⁶³ A second version removed Iraq³⁶⁴ and a third version removed Sudan and added Chad, North Korea and Venezuela.³⁶⁵ The third version of the ban was upheld by the Supreme Court in *Trump v. Hawaii*.³⁶⁶ The Court based its decision primarily on the statutory deference to the president on vetting of immigrants and limited judicial review of presidential decisions on national security.³⁶⁷ In considering the Equal Protection Clause challenge to the ban, the Court applied the “rational basis” standard of scrutiny, and under that test upheld that ban because there was a legitimate national justification for the ban independent of its alleged unconstitutionality.³⁶⁸ The Court did not determine whether Trump's statements reflected discriminatory animus or reach conclusions about whether the ban was based on such discrimination, instead evaluating the national security justification proffered by the administration.³⁶⁹ In January 2021, Trump added three African countries—Nigeria, Eritrea, and Tanzania—to the ban and re-added Sudan (which had been withdrawn from the ban), as well as Myanmar and Kyrgyzstan.³⁷⁰

4) The public charge rule. The Trump administration also enacted a policy, the “public charge” rule,³⁷¹ which inflicted disparate harm on Asian American/Pacific Islander and Latinx immigrants who were legally present in the

361. *Id.* at 891-92.

362. *Id.* at 897-98.

363. *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (describing countries subject to travel ban); No. C17-0131JLR, 2017 WL 462040 (W.D. Wa. Feb. 3, 2017) (blocking travel ban).

364. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13210-13211 (Mar. 6, 2017).

365. Proclamation No. 9645, 82 Fed. Reg. 45161, 45163 (Sept. 24, 2017).

366. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

367. *Id.* at 2408-10 (assessing statutory deference); *id.* at 2422 (assessing national security).

368. *Id.* at 2420.

369. *Id.* at 2441 (Sotomayor, J., dissenting) (noting the majority's refusal to apply heightened scrutiny for “religious animus or discrimination”).

370. Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to Travel Ban*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html> [<https://perma.cc/X6QF-EHXB>].

371. DHS Inadmissibility on Public Charge Grounds, 8 C.F.R. pts. 103, 212-14, 245, 248 (2019), <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds> [<https://perma.cc/5L9H-CEEC>].

country.³⁷² The “public charge” rule permitted immigration officials to deny permanent resident status or work permits to immigrants based on their use or anticipated use of public benefits.³⁷³ According to a study by the nonpartisan Migration Policy Institute, “[t]he rule is likely to make millions of people in immigrant households—both citizens and noncitizens—fearful of receiving public benefits.”³⁷⁴ The Institute concluded the rule “will fall particularly hard on the two largest racial/ethnic immigrant groups: Latinos and Asian American/Pacific Islanders.”³⁷⁵

Additional evidence of racial motive is found in media reports of statements attributing Trump with disparaging majority-Black and Latinx countries as he demanded his appointees implement policies that reduced immigration from those countries while favoring immigration from majority-White European countries. Among the worst of these was a report that Trump called nations with Black leaders “s—hole countries.”³⁷⁶ The architect of Trump’s immigration regime, Stephen Miller, promoted White supremacist websites and publications and praised 1920’s-era U.S. immigration policies that were explicitly racist³⁷⁷ and that were ultimately rescinded and replaced by immigration law barring such discrimination.³⁷⁸ Several federal judges, issuing injunctions against various Trump immigration policies, determined that statements by Trump demonstrated that racial hostility was a reason for the policies.³⁷⁹

While restrictive immigration policy alone is not racist, this disturbing constellation of facts means that it is legitimate to ask if the entire Trump immigration policy program was infected with goals and motives that are racist or bigoted. Implementation of a regime of immigration policies with the goal of wholesale exclusion of millions of Black and Latinx immigrants because of race would be racism worthy of impeachment. The damage done by these policies was deepened

372. Jeanne Batalova, Michael Fix & Mark Greenberg, *Millions Will Feel Chilling Effects of U.S. Public-Charge Rule That Is Also Likely to Reshape Legal Immigration*, MIGRATION POL’Y INST. (Aug. 2019), <https://www.migrationpolicy.org/news/chilling-effects-us-public-charge-rule-commentary> [<https://perma.cc/7DAU-K89M>].

373. DHS Inadmissibility on Public Charge Grounds, 8 C.F.R. pts. 103, 212–14, 245, 248 (2019), <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds> [<https://perma.cc/5L9H-CEEC>].

374. Batalova, Fix & Greenberg, *supra* note 372.

375. *Id.*

376. Eli Watkins & Abby Phillip, *Trump Decries Immigrants from ‘Shithole Countries’ Coming to US*, CNN (Jan. 12, 2018, 9:53 AM), <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html> [<https://perma.cc/JWF7-2PWZ>].

377. Michael Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, S. POVERTY L. CTR. (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails> [<https://perma.cc/VDT7-S7NS>] [hereinafter *SPLC report*] (Miller reportedly agreed when an aide to Senator Jeff Sessions proposed that “there should be no immigration for several years . . . [f]or assimilation purposes” by responding “[l]ike Coolidge did”).

378. Immigration and Naturalization Act, 8 U.S.C. § 1152(a)(1)(A) (2018).

379. *See, e.g.*, *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 518–19, 523–24 (9th Cir. 2018); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018).

by harsh immigration detention conditions, which the U.S. government itself acknowledged to include dangerous overcrowding,³⁸⁰ unsanitary and unhealthy facilities,³⁸¹ and family separation deeply traumatic for children.³⁸² Official government admission that such policies were an intentional deterrent and defense of such policies as legal³⁸³ would fairly be part of such an inquiry as evidence that racist immigration policies were deliberately cruel.

Consideration of religious bigotry would focus on Trump's explanation of the reasons for his Muslim-targeted travel ban. As candidate and president, Trump made inflammatory, untrue accusations about Muslims, including claims that there was "great hatred towards Americans by large segments of the Muslim population" and that Muslims had "no sense of reason or respect for human life."³⁸⁴ He argued that his charges justified the travel ban that was initially directed primarily toward majority-Muslim countries.³⁸⁵ Though the third version of the Muslim-targeted travel ban was upheld by the Supreme Court,³⁸⁶ judges who enjoined the first two bans held that Trump's statements about Muslims were evidence that the ban was the result of discriminatory intent.³⁸⁷ Moreover, the Supreme Court, in upholding the third version of the ban, did not reach the question of whether Trump's statements demonstrated discriminatory intent; instead, the Court relied on the absence of discriminatory language from the order and applied a standard that allowed it to accept the administration's national security justification as legitimate.³⁸⁸

380. Memorandum from John V. Kelly, Acting Inspector Gen., Dep't Homeland Sec., to Kevin K. McAleenan, Acting Sec'y, Dep't Homeland Sec., Management Alert—DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center (May 30, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/Mga/2019/oig-19-46-may19-mgmt-alert.pdf> [<https://perma.cc/C4R5-NS6W>].

381. Helen Christophi, *Feds Tell 9th Circuit: Detained Kids 'Safe and Sanitary' Without Soap*, COURTHOUSE NEWS SERV. (June 18, 2019) <https://www.courthousenews.com/feds-tell-9th-circuit-detained-kids-safe-and-sanitary-without-soap/> [<https://perma.cc/7C2M-67XP>].

382. JOANNE M. CHIEDI, U.S. DEP'T OF HEALTH AND HUM. SERVS., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY, OEI-09-18-00431 (2019), <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf> [<https://perma.cc/5A5P-NTBN>].

383. Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018, 12:14 P.M.) <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> [<https://perma.cc/SBH3-CPN2>]. Christophi, *supra* note 356.

384. Donald Trump, Presidential Candidate Donald Trump Rally in Mount Pleasant, South Carolina, C-SPAN (Dec. 7, 2015), 31:03–17, 34:05–09, <https://www.c-span.org/video/?401762-1/presidential-candidate-donald-trump-rally-mount-pleasant-south-carolina&live=> [<https://perma.cc/Q4F7-UQLC>].

385. *Id.*

386. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

387. *IRAP v. Trump*, 857 F.3d 554, 628–29 (4th Cir. 2017); *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1126–27, 1135–39 (D. Haw. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724, 736–37 (E.D. Va. 2017).

388. *Trump v. Hawaii*, 138 S. Ct. at 2420–21.

The third issue is incitement: Trump's racialized statements have inspired racial conflict, threats, or violence. Trump's inflammatory words about immigrants and Muslims were broadcast nationally on the most visible platforms in America. He reportedly proposed shooting immigrants at the border³⁸⁹ and joined in laughter when an attendee at a rally shouted that immigrants should be shot.³⁹⁰ A gunman who targeted and killed immigrants and Latinx people echoed Trump's characterization of immigrants,³⁹¹ and in the wake of the murders Latinx people reported that they were terrified of being attacked.³⁹² Presidential language describing identifiable demographic groups as dangerously criminal, enemies of the country, and even terrorists casts them as hate objects with predictable results: hate crimes increased substantially after Trump's election.³⁹³ A national security expert reported that armed non-governmental militias had been taking anti-immigrant vigilante action at the southern border and preparing for civil violence in direct response to Trump's language about immigration invasion.³⁹⁴

Trump's racial incitement includes a series of tweets and verbal attacks in July and August 2019 on four members of Congress who oppose his policies.³⁹⁵ The four congresswomen Trump targeted share identity with groups Trump previously disparaged: one is Latinx, two are Black, one is an Arab-American, one is a Somali-American refugee, and two are Muslims.³⁹⁶ Trump's statements included a taunt that the congresswomen should "go back and help fix the totally

389. Meghan Vazquez, *Trump Reverses Claim that US Would Shoot Rock-Throwing Migrants*, CNN (Oct. 18, 2019), <https://www.cnn.com/2018/11/02/politics/donald-trump-rock-throwing-migrants/index.html> [<https://perma.cc/7H8Q-5F5Z>]; Michael D. Shear & Julie Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html> [<https://perma.cc/KY3Q-SV9L>].

390. FOX NEWS, "Only in the Panhandle" President Trump Laughs at Shooting Migrants, YOUTUBE (May 9, 2019), <https://www.youtube.com/watch?v=yMCKzCJHfcU> [<https://perma.cc/9SWC-FW74>].

391. Peter Barker & Michael D. Shear, *El Paso Shooting Suspect's Manifesto Echoes Trump's Language*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html> [<https://perma.cc/98Y7-X3ZS>].

392. Adrian Carrasquillo (@Carrasquillo), TWITTER (Oct. 20, 2019), <https://twitter.com/i/moments/1158931430321414146> [<https://perma.cc/W3SZ-32RY>].

393. Griffin Connolly, *House to Probe Rise in Hate Crimes Since Trump Was Elected*, ROLL CALL (Apr. 4, 2019), <https://www.rollcall.com/2019/04/04/house-to-probe-rise-in-hate-crimes-since-trump-was-elected/> [<https://perma.cc/6HJ8-U3YK>].

394. Mary B. McCord, *Armed Militias Are Taking Trump's Civil War Tweets Seriously*, LAWFARE (Oct. 2, 2019), <https://www.lawfareblog.com/armed-militias-are-taking-trumps-civil-war-tweets-seriously> [<https://perma.cc/2H5X-MN5F>].

395. Rebecca Morin, *Trump Triples Down on His Controversial Tweets About 'the Squad.'* *Here's What We Know*, USA TODAY (July 15, 2019), <https://www.usatoday.com/story/news/politics/2019/07/15/trumps-tweets-the-squad-heres-what-we-know/1736706001/> [<https://perma.cc/VA4Z-X2B5>]. Trump's tweets are not accessible since he was suspended from Twitter, so news reports quoting the tweets are used as sources.

396. Kate Sullivan, *Here Are the 4 Congresswomen Known as 'the Squad' Targeted by Trump's Racist Tweets*, CNN (July 16, 2019), <https://www.cnn.com/2019/07/15/politics/who-are-the-squad/index.html> [<https://perma.cc/D5LL-53GZ>].

broken and crime infested places from which they came.”³⁹⁷ Statements that people should go back to other countries is considered evidence of illegal discrimination by the federal government.³⁹⁸ It is a racist slur to tell people of color to “go back to your country.”

Trump did not stop with one tweet but continued with eight days of attacks on the congresswomen.³⁹⁹ Trump accused the congresswomen of hating America and supporting terrorist groups against which the United States is at war.⁴⁰⁰ People made death threats to at least two of the congresswomen following Trump’s statements.⁴⁰¹

Trump singled out one of the four, Congresswoman Ilhan Omar, with particularly vicious attacks. Representative Omar is a Black American of Somali national origin, a war refugee, and a Muslim.⁴⁰² Days after his tweets attacking the four congresswomen, he devoted several minutes attacking Representative Omar during a speech as the crowd repeated Trump’s bigoted taunt by chanting “send her back” and booing the mention of her name.⁴⁰³

Context matters greatly in assessing the danger of presidential language. Part of the context for Trump’s racist use of the presidential bully pulpit is that he has made many of his most inflammatory statements about people of color and Muslims at large rallies in front of crowds of cheering, chanting supporters, with the

397. Matthew Yglesias, *Trump’s Racist Tirades Against “the Squad,” Explained*, VOX (July 18, 2019), <https://www.vox.com/2019/7/15/20694616/donald-trump-racist-tweets-omar-aoc-tlaib-pressley> [<https://perma.cc/27L6-ASRE>] (quoting the series of Trump July 14, 2019 tweets).

398. Discrimination includes “comments like ‘go back where you come from.’” U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm?flag=MSF0951a18> [<https://perma.cc/NQ3U-C77K>] (last visited Jan. 26, 2021). Trump’s words were also factually incorrect. The congresswomen were in their country of citizenship, as all four are U.S. citizens (as they must be to serve in Congress) and three were born U.S. citizens. *AOC, Omar, Pressley, Tlaib: Who Are ‘the Squad’ of Congresswomen?*, BBC NEWS (July 18, 2019), <https://www.bbc.com/news/world-us-canada-48994931> [<https://perma.cc/F9NV-DWUR>].

399. Ros Krasny, *President Trump Continues Attacks on Democratic Congresswomen, Saying They Are Not ‘Capable’ of Loving the U.S.*, BLOOMBERG/TIME (July 19, 2019), <https://time.com/5631135/trump-squad-tweets-attacks/> [<https://perma.cc/85LM-ZHRE>].

400. Adam Edelman & Dareh Gregorian, *Trump Steps up Attacks on Progressive Congresswomen, Says They ‘Hate Our Country’ and Israel*, NBC NEWS (July 15, 2019), <https://www.nbcnews.com/politics/donald-trump/trump-demands-radical-left-Congresswomen-apologize-him-u-s-israel-n1029831> [<https://perma.cc/PR5F-TDR7>].

401. Chelsea Ritschell, *Alexandria Ocasio-Cortez Receives So Many Death Threats Her Staff Performs Visitor Risk Assessments*, THE INDEP. (Mar. 21, 2019), <https://www.independent.co.uk/news/world/americas/ocasio-cortez-death-threats-democrat-risk-assessment-security-staff-aoc-green-new-deal-trump-a8833751.html> [<https://perma.cc/6BXH-43FE>]; Tim Elfrink, *‘This Is Endangering Lives. It Has to Stop’: Rep. Ilhan Omar Says Death Threats Spiked After Trump Tweet*, WASH. POST (Apr. 15, 2019), <https://www.washingtonpost.com/nation/2019/04/15/this-is-endangering-lives-it-has-stop-rep-ilhan-omar-says-death-threats-spiked-after-trump-tweet/> [<https://perma.cc/T32G-MAMF>].

402. *About*, REP. ILHAN OMAR, <https://omar.house.gov/about> [<https://perma.cc/KW6F-3NZK>] (last visited Apr. 19, 2021).

403. NBC News, *Crowd Chants ‘Send Her Back’ as Trump Talks About Rep. Ilhan Omar*, YOUTUBE (July 17, 2019), <https://www.youtube.com/watch?v=Q40aww9051g> [<https://perma.cc/WY28-X53U>].

most provocative of his words rebroadcast by the national media. A particularly disgraceful example of this was an October 2019 rally in Minneapolis, Minnesota, where Trump railed against state and local officials for admitting Somali immigrants.⁴⁰⁴ He also continued his assault on Representative Omar, calling her “America-hating.”⁴⁰⁵ At this rally, Trump elicited boos as he spoke against Somali refugees⁴⁰⁶—people who are Black, mostly Muslim, in the United States legally and often as citizens. He also promoted hostility toward government officials who were doing their jobs in properly admitting Somali immigrants.⁴⁰⁷

Consideration of whether Trump’s conduct constituted racialized incitement would include his inspiration for, and response to, the White supremacists, neo-Nazis, and Ku Klux Klansmen who marched on Charlottesville, Virginia in August 2017. The White supremacists expressed support for Trump during and after their rally.⁴⁰⁸ The Charlottesville march was described as “the largest gathering of [W]hite nationalists in decades,”⁴⁰⁹ marked with threats and the murder of a peaceful counter-protestor,⁴¹⁰ and met with virtually unanimous shock and condemnation.⁴¹¹ Trump provoked controversy and outrage when he blamed the violence on both sides and included White supremacists in his statement that there were “very fine people on both sides.”⁴¹² A year and a half later, he continued to

404. Allyson Chiu, ‘*Stunning in Ugliness & Tone*’: *Trump Denounced for Attacking Somali Refugees in Minnesota*, WASH. POST (Oct. 11, 2019), <https://www.washingtonpost.com/nation/2019/10/11/trump-somali-refugees-minneapolis-rally/> [<https://perma.cc/H682-N9AZ>].

405. John Bosen, *Trump Attacks Omar as ‘America-Hating Socialist’ at Minnesota Rally*, THE HILL (Oct. 10, 2019), <https://thehill.com/homenews/house/465339-trump-calls-omar-an-america-hating-socialist-at-minnesota-rally> [<https://perma.cc/XUG7-A4MC>].

406. *Donald Trump Hits Out at Bidens, Somali Refugees and Ilhan Omar at Minnesota Rally—Video*, REUTERS, at 2:15 (Oct. 11, 2019), <https://www.theguardian.com/global/video/2019/oct/11/donald-trump-hits-out-at-bidens-somali-refugees-and-ilhan-omar-at-minnesota-rally-video> [<https://perma.cc/C4Y3-QGKA>].

407. *Id.*

408. Zachary Cohen, *Trump’s Mixed Messaging Sparks Concerns of ‘Emboldened’ White Supremacists*, CNN (Aug. 19, 2017), <https://www.cnn.com/2017/08/19/politics/trump-remarks-alt-right/index.html> [<https://perma.cc/3WCN-BK3W>].

409. Joel Gunter, *A Reckoning in Charlottesville*, BBC NEWS (Aug. 13, 2017), <https://www.bbc.com/news/world-us-canada-40914748> [<https://perma.cc/7JAY-BYHR>].

410. Steve Almasy, Kwegyirba Croffie & Madison Park, *Teacher, Ex-Classmate Describe Charlottesville Suspect as Nazi Sympathizer*, CNN (Aug. 15, 2017), <https://www.cnn.com/2017/08/12/us/charlottesville-car-crash-suspect-idd/index.html> [<https://perma.cc/CYC9-FQJ4>].

411. *See, e.g.*, Noah Barkin & Alistair Smout, *Trump’s Stance on Virginia Violence Shocks America’s Allies*, REUTERS (Aug. 16, 2017), <https://www.reuters.com/article/us-usa-trump-allies/trumps-stance-on-virginia-violence-shocks-americas-allies-idUSKCN1AW2HA> [<https://perma.cc/5CLL-73HT>].

412. *Trump: You Had Very Fine People, on Both Sides*, CNBC (Aug. 15, 2017), <https://www.cnn.com/video/2017/08/15/trump-i-think-theres-blame-on-both-sides.html> [<https://perma.cc/8CTM-RCFU>].

defend the White supremacists who marched and repeated his own praise of them.⁴¹³

Trump's racism surfaced again in a series of incitements and provocations in June of 2020, following weeks of national protests for racial justice in the wake of the killings of several Black people by police and armed vigilantes. Trump opened his 2020 presidential campaign with a June 20 rally in Tulsa, Oklahoma, the site of one of the worst racist massacres of Black Americans by White Americans in the history of the United States.⁴¹⁴ Trump's Tulsa speech was described by one national publication as a "litany of racially offensive stereotypes."⁴¹⁵ In the speech, Trump used a slur against Asians to describe the Covid-19 pandemic and spoke of a hypothetical break-in by a Latinx man into a woman's apartment, again raising the racist trope of racialized criminality and violence.⁴¹⁶

Trump used the Tulsa speech to continue false, racialized smears against Representative Omar, saying in part: "She would like to make the government of our country just like the country from where she came—Somalia. No government, no safety, no police, no nothing, just anarchy. And now, she's telling us how to run our country."⁴¹⁷

This is, first, untrue in every respect. Representative Omar has not called for anarchy or an abolition of the police and government.⁴¹⁸ Nor has she called for the United States to follow the Somali government.⁴¹⁹ Trump's attack on Representative Omar repeats his racist stereotyping of Black governance (a vice he shares with the impeached Johnson). As an international publication pointed out,

413. Joan Coaton, *Trump's New Defense of His Charlottesville Comments Is Incredibly False*, VOX (Apr. 26, 2019), <https://www.vox.com/2019/4/26/18517980/trump-unite-the-right-racism-defense-charlottesville> [<https://perma.cc/5E82-CCUM>].

414. Russell Cobb, *Trump Rally in Tulsa, a Day After Juneteenth, Awakens Memories of 1921 Racist Massacre*, THE CONVERSATION (June 19, 2020), <https://theconversation.com/trump-rally-in-tulsa-a-day-after-juneteenth-awakens-memories-of-1921-racist-massacre-140915> [<https://perma.cc/S5JL-GZN2>].

415. Jose A. Del Real, *With 'Kung Flu,' 'Thugs,' and 'Our Heritage,' Trump Leans on Racial Grievance as He Reaches for a Campaign Reset*, WASH. POST (June 21, 2020), https://www.washingtonpost.com/politics/with-kung-flu-thugs-and-our-heritage-trump-leans-on-racial-grievance-as-he-reaches-for-a-campaign-reset/2020/06/21/945d7a1e-b3df-11ea-a510-55bf26485c93_story.html [<https://perma.cc/7ADU-E5YL>].

416. *Id.*

417. See *Viewpoint: What Donald Trump Gets Wrong About Somalia*, BBC NEWS (July 6, 2020), <https://www.bbc.com/news/world-africa-53268582> [<https://perma.cc/TS38-6G4J>].

418. Aaron Blake, *Conservatives Claim Ilhan Omar Called for 'Dismantling' U.S. Economy and Political System. Here's What She Actually Said.*, WASH. POST (July 8, 2020), <https://www.washingtonpost.com/politics/2020/07/08/what-ilhan-omar-actually-said-about-dismantling-systems-us-government/> [<https://perma.cc/2NYQ-S6JZ>].

419. See Mayank Aggarwal, *Ilhan Omar Hits out at Trump for Doing 'Literally What Somali Dictators Used to Do'*, THE INDEP. (Nov. 4, 2020), <https://www.independent.co.uk/news/world/americas/us-election-2020/ilhan-omar-trump-somali-dictators-b1585981.html> [<https://perma.cc/3MPV-F265>] ("The irony of worrying about people turning America into Somalia, while allowing Trump to do literally what Somali dictators used to do. . . . [W]e shouldn't need our [elections] monitored.").

“Trump sounded derisive and patronising against Somalia Trump’s wild assertion that Somalia has no government runs counter to the fact that the US recognised the post-civil war Somali government in 2013 and has since posted two ambassadors.”⁴²⁰

Second, in addition to being factually wrong about what Omar said and did, Trump was racist in his exclusion of Omar from American identity. Trump portrayed Omar as un-American and even non-American in referring to her as someone “telling us how to run our country,” presumably excluding her from the “us” and the “our.” More to the point, as a citizen and as a member of Congress, Representative Omar has the right to participate in the leadership of the country as would any citizen or congressional representative.

Trump’s assault on Black leaders included a false charge that former President Barack Obama committed treason.⁴²¹ Trump offered no evidence in support of this, unsurprisingly, as there is no such evidence for these wildly unhinged charges. One could make the case that a president could be impeached for making false accusations of grave crimes or national betrayal regardless of who the target of such charges is. Calling a former president a traitor without evidence adds to the shock of this. It cannot and should not be ignored that, yet again, Trump incited hatred toward non-White national leaders and called them enemies of the country.

Trump was not done. The next day, he posted videos of individual crimes committed by Black people and called for protests.⁴²² There are people of all races committing crimes that are not racially motivated, and Trump’s equivalence of such individual crimes with America’s long history of intentional racism is a hallmark of White supremacy.⁴²³ That Trump engaged in racialized provocation as most of the nation was gripped with pain and protest over the racism and violence inflicted on Black Americans at a moment of unique national conscience on racial justice is more proof of his racism and bigotry.

The lethal threat of Trump’s racial and religious incitements was amplified by his other encouragements of illegal deadly force, described by a conservative commentator as “palpably dangerous.”⁴²⁴ They collectively created a climate of violence that placed Trump’s targets at risk of deadly attack. A former Assistant Attorney General for National Security at the Department of Justice reported that

420. *Id.*

421. Felicia Sonmez, *Trump, Without Evidence, Accuses Obama of ‘Treason’*, WASH. POST (June 22, 2020), https://www.washingtonpost.com/politics/trump-without-evidence-accuses-obama-of-treason/2020/06/22/14bc42c6-b4f3-11ea-aca5-cbb63d27e1ff_story.html [https://perma.cc/D9S5-FNVV].

422. Tim Elfrink, *Trump Tweets Videos of Black Men Attacking White People, Asks ‘Where Are the Protesters?’*, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/nation/2020/06/23/trump-videos-black-violence-protests/> [https://perma.cc/6AFZ-ETR2].

423. *Id.*

424. Andrew P. Napolitano, *Judge Andrew Napolitano: Trump’s Call with Ukraine President Manifests Criminal and Impeachable Behavior*, FOX NEWS (Oct. 3, 2019), <https://www.foxnews.com/opinion/judge-andrew-napolitano-trump-attacks-presidency?fbclid=IwAR0zPI21DfHJb1xu-CtrpxKr99O8M47FMdtjsSzSh0PYAlhix3k24Boj3M> [https://perma.cc/2TFY-WUT9].

armed non-governmental militias were taking anti-immigrant vigilante action at the southern border and preparing for civil violence in direct response to Trump's language about immigration invasion; "the militia movement," she wrote, "has shown that it will take action based on the president's statements."⁴²⁵ A former senior homeland security official, after the Charlottesville march, stated that Trump "obviously reignited" White supremacist groups and that "[i]t is incumbent on the President to tone down the rhetoric and be clear that the US government has a zero-tolerance policy when it comes to racially charged hate group[s] . . . [who] commit violence, spread fear, and divide the country."⁴²⁶

Commentators observed that rather than tone down his rhetoric, Trump "seriously stoked the fire."⁴²⁷ Answering the question of whether Trump is responsible for inciting violence, they wrote:

No one incident can be laid at President Trump's feet. Yet when a president talks the way Trump talks over a long period of time, when he deploys rhetoric routinely that can be expected to stir the pot of violent extremism, when one can predict—as we did—prospectively the manner in which such rhetoric will interact with a political community and yield violence, and when violence then materializes in precisely the hypothesized fashion, it would be unreasonable to deny that there is a connection.⁴²⁸

These predictions of violence came true again on January 6, 2021, when Trump's incitements provoked a deadly armed attack on the U.S. Capitol by thousands of Trump supporters as members of Congress were certifying his defeat in the 2020 election.⁴²⁹ Trump and others spoke at the rally just before the attack, provoking the mob to overthrow the election results and re-install Trump illegally as President.⁴³⁰

There is evidence that racism is part of what drove those who attacked the Capitol. At least one of the rioters carried the Confederate flag, the symbol of racist sedition, into the Capitol.⁴³¹ The crowd built a hangman's noose and

425. McCord, *supra* note **Error! Bookmark not defined.**

426. Cohen, *supra* note 408.

427. Quinta Jurecic & Benjamin Wittes, *More CVE for White People: The Radicalization Process Revisited*, LAWFARE (Aug. 6, 2019), <https://www.lawfareblog.com/more-cve-white-people-radicalization-process-revisited> [<https://perma.cc/3U9S-4AAZ>].

428. *Id.*

429. *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/> [<https://perma.cc/A6QG-3VWY>].

430. *Transcript of Trump's Speech at Rally Before US Capitol Riot*, ASSOCIATED PRESS (Jan. 13, 2021), <https://www.usnews.com/news/politics/articles/2021-01-13/transcript-of-trumps-speech-at-rally-before-us-capitol-riot>.

431. Clint Smith, *The Whole Story in a Single Photo: An Image from the Capitol Captures the Distance Between Who We Purport to Be and Who We Have Actually Been*, THE ATLANTIC (Jan. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/confederates-in-the-capitol/617594/> [<https://perma.cc/PC7B-963A>].

hanging stand on the Capitol lawn, symbols of the murderous racist brutality of lynching by hanging.⁴³² A Black Capitol police officer who defended members of Congress and their staffs reported that he was called the “n-----” slur fifteen times; this officer described the mob as “racist ass terrorists.”⁴³³ Initial law enforcement investigations revealed that white supremacists on the federal terrorist watch list were part of the mob that stormed the Capitol.⁴³⁴

The gravity of Trump’s incitement of the Capitol riot prompted Twitter, the social media platform where Trump had over 80 million followers, to permanently suspend Trump “due to the risk of further incitement of violence.”⁴³⁵ Though Twitter did not mention racism, the company determined Trump’s tweets related to the Capitol riot violated its “Glorification of Violence” policy.⁴³⁶ Twitter also stated that Trump’s tweets “must be read in the context of broader events in the country,” concluding that the tweets could be mobilized to incite violence.⁴³⁷ Though Trump was impeached for inciting the riot, the racist implications of the attack were not part of the impeachment articles.⁴³⁸

Trump’s presidency was marked by racist words and conduct against non-Whites and religious minorities that, in its totality, is historically unprecedented in the post-World War II civil rights era in the United States. This has profound implications for the consideration of impeachment. Trump’s provocations were a signature of his political ascendancy and a constant theme of his candidacy and presidency. There were highly visible incidents that millions of Americans, arguably most Americans, consider racist or bigoted. These include coarse, vulgar, and untrue accusations that non-Whites and Muslims are deadly criminals and terrorists, and direct reliance on these calumnies to argue for a range of policies that impose life-shattering harm on those people. Trump’s statements have given aid and comfort to racist, anti-Muslim, and anti-Semitic hate groups.⁴³⁹ As noted

432. Nicole Carroll, *The Backstory: ‘We Are Done Talking.’ What We Witnessed as the President of the United States Incited a Mob of Supporters to Riot*, USA TODAY (Jan. 8, 2021), <https://www.usatoday.com/story/opinion/2021/01/08/journalists-witness-capitol-riot-trump-supporters-damage/6580244002/> [<https://perma.cc/UR6F-QA28>].

433. Emmanuel Felton, *Black Police Officers Describe the Racist Attacks They Faced as They Protected the Capitol*, BUZZFEED NEWS (Jan. 9, 2021), <https://www.buzzfeednews.com/article/emmanuelfelton/black-capitol-police-racism-mob> [<https://perma.cc/4R4Q-JW6Q>].

434. Devlin Barrett, Spencer Hsu & Marissa Lang, *Dozens of People on FBI Terrorist Watch List Came to D.C. the Day of Capitol Riot*, WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/national-security/terror-watchlist-capitol-riot-fbi/2021/01/14/07412814-55f7-11eb-a931-5b162d0d033d_story.html [<https://perma.cc/6QX6-62FS>].

435. *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [<https://perma.cc/9VKC-YF3W>].

436. *Id.*

437. *Id.*

438. *Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, H.R. Res. 24, 117th Cong. (2021) (enacted), <https://www.congress.gov/bill/117th-congress/house-resolution/24/text> [<https://perma.cc/9W2C-VHVR>].

439. *See, e.g.*, Ben Collins & Brandy Zadrozny, *Proud Boys Celebrate After Trump’s Debate Callout*, CBS (Sept. 29, 2020), <https://www.nbcnews.com/tech/tech-news/proud-boys-celebrate-after-trump-s-debate-call-out-n1241512> [<https://perma.cc/NBJ6-W9AQ>].

earlier, one of his most senior advisors charged with immigration policy supported organizations and publications sympathetic with the goals of such groups and reportedly promoted a return to now-rescinded immigration policies that were explicitly racist.⁴⁴⁰

Trump's incitements include statements that are legally actionable as discrimination; they provoked hate crimes and death threats, including against members of Congress. These statements have led armed anti-immigration vigilantes to patrol the border,⁴⁴¹ and his characterization of immigrants as invaders was shared by a murderer who believed this justified killing twenty-two people.⁴⁴² Though racism was not the sole or primary driver of the January 6 attack on the Capitol, the use of racist language and symbolism by the rioters suggest that racism was part of the extremism that motivated the attackers.⁴⁴³ Thus, Trump's provocation is what Professor Bobbit described as an example of impeachable incitement—consistent, persistent, taken seriously by the public, benefitting the president politically and resulting in “historic tragedy.”⁴⁴⁴ It is said that bad facts make bad law, but these bad facts make for a bad president. Congress ought to consider actions like these, by Trump or a future president, worthy of impeachment inquiry. This is not to criticize those who crafted the Trump impeachment articles or the impeachment managers for what they impeached Trump for. It is rather to observe that Trump's racism and bigotry were equally worthy of impeachment.

One necessary question to ask is whether systemic and institutional racism played a role in dismissing out of hand the inclusion of racism and bigotry as grounds for impeachment. The answer is clear. The decisionmakers and powerful gatekeepers behind impeachment have almost all been White men, even today.⁴⁴⁵

It cannot be ignored that when it comes to impeachment, there are disproportionately few people of color and socioeconomic disadvantage at the table of decisional power.⁴⁴⁶ And this matters. Racism ends and devastates the lives of tens of millions of Americans who will never get anywhere near a congressional office for a meeting, much less to hold office. And yet this deep, incalculable suffering

440. SPLC report, *supra* note 377.

441. Mary Lee Grant & Nick Miroff, *U.S. Militia Groups Head to Border, Stirred by Trump's Call to Arms*, WASH. POST (Nov. 3, 2018), https://www.washingtonpost.com/world/national-security/us-militia-groups-head-to-border-stirred-by-trumps-call-to-arms/2018/11/03/ff96826c-decf-11e8-b3f0-62607289efee_story.html [https://perma.cc/S3ZN-PVEB].

442. Tim Arango, Nicholas Bogel-Burroughs & Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/03/us/patrick-crusius-el-paso-shooter-manifesto.html> [https://perma.cc/8TWF-5E97].

443. *See supra* Part VI, at 160–61.

444. *See supra* Part V, at 146.

445. *See* Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RESEARCH CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/> [https://perma.cc/3VGA-J6XD] (finding that over three-quarters of the members of the most diverse House in history are white).

446. *Id.*

beyond remedy has never been considered grounds for impeachment because most of the people who make decisions about what is impeachable will never experience this racism and do not care enough about it. That needs to end.

VII. CONCLUSION

Impeachment sends a message about what is unacceptable in a president, and that sends a message about what is unacceptable in this country. One hopes a well-founded impeachment for demonstrated racism and bigotry would meet with historical praise as part of a continued national journey to equality and rights, and influence future presidents and presidential aspirants to continue to lead that journey. Impeaching a president for racism would be one step toward making racism unacceptable. Failure to impeach a proven racist would tell future presidents that they can get away with racism and racist, bigoted political opportunism. This would send a dangerous message to the country that when it comes to impeachment, presidential racism is a lesser offense unworthy of prosecution or trial, that condemnation of presidential racism is still limited to political or judicial contestation and resolution by election just as it was when Johnson was acquitted in 1868.