

Trump University and Presidential Impeachment

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During the 2016 presidential election, President Donald J. Trump faced three lawsuits accusing him of fraud, racketeering, and violation of a variety of other consumer protection laws. These cases focused on a series of wealth seminars President Trump called “Trump University,” which collected over \$40 million from consumers seeking to learn President Trump’s real estate investing strategies. Although these consumer protection cases were civil proceedings, the underlying legal elements in several counts the plaintiff sought to prove run parallel to the legal elements of serious crimes under both state and federal law. Somehow lost in the election’s cacophony was the question of whether President Trump’s alleged fraudulent behavior rises to the level of an impeachable offense under the impeachment clause of the Constitution of the United States.

Addressing this issue of public concern, this Article explores whether the United States House of Representatives could lawfully impeach President Trump and whether the United States Senate could convict President Trump for fraud and racketeering in connection with Trump University. This Article does not address whether impeachment will happen or even if it should happen. Instead, it focuses on whether Congress has the legal right to impeach President Trump should it choose to do so. Part I provides a summary of the evidence assembled in the three recently settled Trump University civil lawsuits. Part II describes the legal claims involved in each matter. Part III briefly summarizes the applicable law of presidential impeachment under the United States Constitution and analyzes whether Congress could reasonably conclude that President Trump’s actions in connection with Trump University are impeachable offenses. In this respect, I consider whether fraud and racketeering are high crimes or misdemeanors, the effect of settlement of civil litigation on Congress’ impeachment rights, and whether impeachment is permissible for preincumbency offenses. Finally, I offer concluding thoughts, considering in particular the policy implications of an American president with a documented history of fraud and racketeering.

I

TRUMP UNIVERSITY BUSINESS PRACTICES

A. “Every single resource Mr. Trump has at his disposal”

In 2005, Trump University opened to much fanfare in a press conference at President Trump’s Manhattan corporate offices.¹ In a promotional video President Trump explained: “At Trump University, we teach success. That’s what it’s all about—success. It’s going to happen to you.”² Similar to elite private universities, Trump University had a vintage trademark featuring a British heraldic lion. But, unlike other universities, Trump University did not have a campus, grade its students, or offer degrees. Reflecting its unorthodox roots, early press descriptions of Trump’s new school explained that “[c]ourses will cost \$300 and will take one to two weeks to complete.”³ Advertising for Trump University focused almost exclusively on Trump’s role in developing the curriculum and selecting the instructors.⁴ As a narrator explained in the promotional video: “Donald Trump is without question the world’s most famous business man. As a real estate developer he has reshaped the New York skyline with some of that great city’s most prestigious and elegant buildings. Now Donald Trump brings his years of experience to the world of business education with the launch of Trump University.”⁵ One newspaper advertisement extolled: “He’s the most celebrated entrepreneur on earth. He’s earned more in a day than most people do in a lifetime. He’s living a life many men and women only dream about. And now he’s ready to share—with Americans like you—the Trump process for investing in today’s once-in-a-lifetime real estate market.”⁶ Trump University distributed similarly breathless marketing materials including newspaper ads and direct mail solicitation letters—all with large color photographs of a smiling Donald Trump in a suit and tie—to cities across the country.

Capitalizing on President Trump’s name recognition, Trump University advertisements emphasized that President Trump

¹ DAVID CAY JOHNSTON, *THE MAKING OF DONALD TRUMP* 117–18 (Gene Roberts & Glenn Kramon eds., 2016).

² Trump Univ., *Trump University Intro*, YOUTUBE (Dec. 5, 2009), <https://www.youtube.com/watch?v=BvaaeHP9xtQ>.

³ Greg Levine, *Trump University Founded for Student “Customers,”* FORBES (May 23, 2005, 3:32 PM), <http://www.forbes.com/2005/05/23/0523autofacescan06.html>.

⁴ Trump Univ., *supra* note 2.

⁵ *Id.*

⁶ See, e.g., Trump Univ., *The Time to Invest in Texas Real Estate is NOW!*, HOUS. CHRON., Sept. 24, 2009, at B4.

“handpicked” Trump University instructors who taught President Trump’s own real estate strategies, techniques, and “Secrets of Real Estate Marketing.”⁷ Trump University staff were trained to “[t]ake every opportunity to emphasize that they need to learn the Trump way for continued and growing success!”⁸ Instructors often boasted of having close personal relationships with President Trump.⁹ Scripts for the ninety-minute sessions were designed to reinforce the perception that instructors were confidants of President Trump.¹⁰ For example, the advertisements reinforced those claims by quoting President Trump: “I can turn anyone into a successful real estate investor, including you.”¹¹ Similarly, President Trump explained, “We’re going to have professors and adjunct professors that are absolutely terrific—terrific people, terrific brains, successful. We are going to have the best of the best These are all people that are handpicked by me.”¹² President Trump continued, “We’re going to teach you better than the business schools are going to teach you, and I went to the best business school. We’re going to teach you better I think it’s going to be a better education and it’s going to be what you need to know.”¹³ A letter signed by President Trump soliciting enrollment in Trump University explained, “[M]y hand-picked instructors will share my techniques, which took my entire career to develop. Then just copy exactly what I’ve done and get rich.”¹⁴

Students, intrigued by these promises, began their Trump University studies by attending widely marketed, “free” ninety-minute introductory classes. Advertisements for these classes promised that students would “learn from Donald Trump’s handpicked instructor a

⁷ *Id.*

⁸ TRUMP UNIV., TRUMP UNIVERSITY 2010 PLAYBOOK 104, 109 (2010) [hereinafter PLAYBOOK].

⁹ *See, e.g.*, Exhibits to the Affirmation of Assistant Attorney General Tristan C. Snell In Support of the Verified Petition at Exhibit K13 Affidavit of Nora Hanna ¶ 6, *New York v. Trump Entrepreneur Initiative LLC*, No. 451463/2013 (N.Y. Sup. Ct. Aug. 26, 2013) [hereinafter Exhibits to Snell Affirmation] (“He said that he was Mr. Trump’s ‘right-hand man.’”).

¹⁰ *See, e.g.*, PLAYBOOK *supra* note 8, at 108 (instructing staff to introduce speakers with the following line, “It is now my pleasure to introduce one of Donald Trump’s top instructors. He has been hand selected because of his expertise and knowledge in the real-estate business.”).

¹¹ Trump Univ., *supra* note 6.

¹² Trump Univ., *supra* note 2.

¹³ *Id.*

¹⁴ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit M4 Letter of Donald J. Trump 000409.

systematic method for investing in real estate that anyone can use effectively. You'll learn foreclosure investing from the inside out. You'll learn how to finance your deals using other people's money. You'll learn how to overcome your fear of getting started."¹⁵

However, the Trump University's confidential employee training manual, called the *Trump University Playbook*, explained that these ninety-minute seminars were not intended to actually teach students.¹⁶ Rather, the goal of these sessions, called "previews" in the *Trump University Playbook*, was to "set the hook" in order to sell three-day seminars, such as the Profit from Real Estate seminars which cost \$1495.¹⁷ The *Trump University Playbook* summarized the point of previews in a heading: "Preview Strategy – 90 Minute Selling."¹⁸ The book explains,

In a one-off selling situation, you are selling to someone who you may or may not see again. You must form a connection in a one to two hour period. And, it must start as soon as the future student walks into the registration area in a preview scenario. The prospective students must make an immediate decision, based on the opportunity, brand, and the newly formed relationship, because they have the most to lose by not making the decision.¹⁹

Despite promising to teach "a systematic method for investing in real estate" in advertisements, the *Trump University Playbook* specifically instructed staff to "[n]ever imply [students] will learn a particular strategy at the preview."²⁰ Despite advertisements promising that "[a]ttendees receive a FREE Secrets of Real Estate Marketing CD-Rom," the *Trump University Playbook* instructed staff to "[n]ever distribute materials unless you have some form of payment, as we want to use these as a sales tool."²¹ Sales staff often falsely promised or implied that President Trump would appear at the three-day trainings. But as one customer explained, "[w]e were also told that at the three-day seminar we would get to have our pictures taken with Donald

¹⁵ Exhibit E at 192, *Cohen v. Trump*, No. 13-cv-2519-GPC-WVG (S.D. Cal. Oct. 27, 2014), ECF No. 220-3.

¹⁶ PLAYBOOK, *supra* note 8, at 6, 19.

¹⁷ *Id.*

¹⁸ *Id.* at 98.

¹⁹ *Id.*

²⁰ *Id.* at 104; compare *Trump Univ.*, *supra* note 6, with PLAYBOOK, *supra* note 8, at 104.

²¹ PLAYBOOK, *supra* note 8, at 117. Compare *Trump Univ.*, *supra* note 6, with PLAYBOOK, *supra* note 8, at 117.

Trump. It ended up being a cardboard cutout of Mr. Trump.”²² Trump University staff were expected to “Create A Sense Of Urgency,” get “in A Sales Mindset,” and be “Ready to Sell, Sell, Sell!”²³

Thousands of students agreed to purchase three-day seminars.²⁴ But, even in these longer courses, the focus at Trump University remained squarely on upselling consumers to a more expensive, next-level service.²⁵ Rather than presenting a meaningful educational program, President Trump’s three-day “Profit from Real-Estate Workshop” was, in the words of the Trump University business handbook, a “sales environment.”²⁶ Sales practices at each seminar were systematically designed, painstakingly choreographed, and implemented ruthlessly.²⁷ The *Trump University Playbook* explains,

Because we decide what happens in the training, an attendee must react to what we say. They don’t have a choice. For example, we can spend hours and hours planning a question that they must deal with and give an answer to within seconds. We also have the advantage of testing the question out on hundreds of people and adjusting it to increase our chances for a desirable response. The attendee does not have the luxury of “practicing” his or her answer. However, we are losing this advantage if we don’t take time to develop what we say and consciously practice what we say.²⁸

Although students were promised in the ninety-minute sessions that the three-day seminars would teach them everything they needed to know about investing in real estate,²⁹ instructors in the three-day seminars said that mentorship programs “would be the only way to

²² Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K17 Affidavit of Kathleen Meese ¶ 3.

²³ PLAYBOOK, *supra* note 8, at 22, 110 (emphasis in original).

²⁴ Order Granting Motion for Class Certification at 6, *Cohen v. Trump*, No. 13-cv-2519-GPC-WVG (S.D. Cal. Oct. 27, 2014), ECF No. 53.

²⁵ See PLAYBOOK, *supra* note 8, at 36.

²⁶ *Id.* at 98.

²⁷ See, e.g., Third Amended Class Action Complaint at 35, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-00940-GPC-WVG (S.D. Cal. Sept. 26, 2012), ECF No. 128 (quoting consumer complaint: “What a SCAM[.] I attended the three day seminar and really learned very, very little. [Their] goal is to talk you into joining the next seminar, which can cost up to 35,000. They use almost Gestapo tactics to sign for this seminar . . . Any questions you ask are never answered.”).

²⁸ PLAYBOOK, *supra* note 8, at 99.

²⁹ See Third Amended Class Action Complaint, *supra* note 27, at 35 (quoting consumer complaint: “I was told that after taking the first 3 day seminar, which cost \$1,500 I could go out start making deals . . . The only thing they want you to do is sign up for the next seminar which can cost up to \$35,000.”).

succeed in real estate investment.”³⁰ Like the ninety-minute sales pitch before the three-day seminars, “teachers” were hired as independent contractors and exclusively paid based on commissions.³¹ At Trump University, no one was ever paid to actually teach the students.³²

Instead, sales staff, posing as teachers, were trained to manipulate students’ emotions in order to sell expensive “Trump Elite” packages. For example, the *Trump University Playbook* explains, “[t]he words ‘I noticed’ have a powerful subconscious effect on people because they send a subliminal message to them that they stood out in the crowd, that they are attractive or charismatic or that they impressed you. It sends a message to the person that you have interest in them. People love recognition and attention.”³³ These manipulative sales tactics were carefully refined and iterated.³⁴ Indeed, to avoid actual teaching, the sales team was instructed to pay “special attention” to avoid “needy attendees” asking questions during breaks that would prevent speakers from making more effective one-on-one sales pitches to the most likely buyers.³⁵ Instead, Trump University trained staff to identify the emotional vulnerabilities of students and exploit those vulnerabilities to sell additional Trump University packages. As the *Trump University Playbook* explained, “[y]ou don’t sell products, benefits or solutions—you sell feelings . . . [because] a sole focus on products leads to objections.”³⁶ Trump University trained staff to use the three-day seminars to pretend to care about their students in order to establish the trust necessary to close each sale: “[T]he critical factor is trust. You have three days to build a relationship where a student accepts you will always keep their best interests at heart.”³⁷

Trump University established this trust in order to take as much money as possible from each of its students. Beginning at registration,

³⁰ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K14 Affidavit of June Harris ¶ 9.

³¹ Verified Petition ¶ 92, *New York v. The Trump Entrepreneur Initiative LLC*, No. 451463/2013 (N.Y. Sup. Ct. Aug. 24, 2013), NYSCEF No. 1.

³² Declaration of Corinne Sommer in Support of Plaintiff’s Motion for Class Certification ¶ 10, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-00940-CAB-WVG (S.D. Cal., Sept. 22, 2014), ECF No. 48-13 (Sommer is the former Trump University Manager of the Events Department.).

³³ PLAYBOOK, *supra* note 8, at 100.

³⁴ *Id.* at 99–100 (“We also have the advantage of testing the question out on hundreds of people and adjusting it to increase our chances for a desirable response. The attendee does not have the luxury of ‘practicing’ his or her answer.”).

³⁵ *Id.* at 37, 39.

³⁶ *Id.* at 100.

³⁷ *Id.* at 99.

Trump University staff would take photographs of every student.³⁸ The purpose of the photograph was to design one-on-one sales portfolios of each student that would allow staff to make more effective sales pitches.³⁹ Using the justification of providing personal financial advice, Trump University would also extract detailed financial information from each student.⁴⁰ The real purpose of obtaining this information was to discover the student's liquidity so instructors could more effectively sell expensive Trump Elite "Bronze," "Silver," and "Gold" packages that cost \$8995, \$19,495, and \$34,995 respectively.⁴¹ The *Trump University Playbook* explained that during the first evening of each three-day seminar,

[T]he team should go through each profile and determine who has the most and least liquid assets and rank them using the following scale:

- E1 – Over \$35,000 of liquid assets
- E2 – Between \$20,000 and \$30,000 of liquid assets
- E3 – Under \$10,000 of liquid assets
- E4 – Less than \$2,000 of liquid assets.⁴²

Ranking students from top to bottom by assets allowed sales staff to target the consumer with the most expensive package for which each consumer could possibly pay.⁴³

An important part of the three-day seminar was convincing students to call their credit card companies to increase their credit limits.⁴⁴ Instructors characterized this part of the training as a way to increase the students' ability to obtain funds to purchase real estate.⁴⁵ However, the real purpose was to ensure that students would have enough

³⁸ *Id.* at 32.

³⁹ *Id.*

⁴⁰ *Id.* at 36.

⁴¹ *See id.* at 9–10.

⁴² *Id.* at 36.

⁴³ *Id.* at 129 (“When you introduce the price, don’t make it sound like you think it’s a lot of money, if you don’t make a big deal out of it they won’t. If they can afford the gold elite don’t allow them to think about doing anything besides the gold elite.”).

⁴⁴ *See, e.g.*, Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K15 Affidavit of Robert Jones ¶ 8.

⁴⁵ *Id.* (“During the three-day seminar, there was very strong pressure to sign up for one of Trump’s mentorship programs. Towards the end of the course, the speakers told us to increase our credit limits so that we could use our credit cards to pay for the advanced Trump Elite course.”).

liquidity to purchase Trump Elite mentorship packages by the end of the seminar.⁴⁶ As a former student, Wilma Fisher, explained,

[T]he Trump speakers encouraged us to call our credit card companies to request that our credit limits be increased. The Trump speakers said that we would need the extra capital for real estate investment, but in reality they just wanted us to have more money available for extremely expensive mentorship programs. Those who were successful in having their credit card limits increased were celebrated and cheered by the Trump staff like they had just been induced into a fraternity.⁴⁷

Ms. Fisher's explanation is corroborated by the *Trump University Playbook* which trained employees to sell mentoring programs to students, no matter how dire their financial situation.⁴⁸ Trump University relied on sales scripts to train Trump University staff to ignore and overcome students' resistance to maxing out their credit cards to pay for more Trump University services.⁴⁹ For example, the *Trump University Playbook* gave the following model dialogue:

OBJECTION: I DON'T LIKE USING MY CREDIT CARDS AND GOING INTO DEBT –OR– I JUST PAID MY CREDIT CARDS OFF

[Answer:] I see, do you like living paycheck to paycheck? Do you like just getting by in life? Do you enjoy seeing everyone else but yourself in their dream houses and driving their dream cars with huge checking accounts? Those people saw an opportunity, and didn't make excuses, like what you're doing now. Most wealthy people made their money in real estate and it usually started with a decision to get the knowledge and skills to be successful. You need to look at what this small investment will fix in your life. You can stop living paycheck to paycheck, build your retirement account and pay cash for your dream car. You're here today because you're sick and tired of being sick and tired and you want to change that—you're not alone. I'm going to help you take your first step to create the life you've dreamed of. Follow me and let's get you enrolled. Congratulations!⁵⁰

According to the *Trump University Playbook*: "Money is never a reason for not enrolling in Trump University; if they really believe in

⁴⁶ Declaration of Ronald Schnackenberg in Support of Plaintiff's Motion for Class Certification ¶ 4, *Makaeff v. Trump Univ., LLC*, 3:10-cv-00940-CAB-WVG (S.D. Cal. Sept. 22, 2014), ECF No. 48-9; Declaration of Corinne Sommer, *supra* note 32, ¶ 8.

⁴⁷ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K9 Affidavit of Wilma Fisher ¶ 6.

⁴⁸ PLAYBOOK, *supra* note 8, at 99.

⁴⁹ *Id.* at 112–13.

⁵⁰ *Id.*

you and your product, they will find the money. You are not doing any favors by letting someone use lack of money as an excuse.”⁵¹ To this end, Trump University sales staff pressured families to mortgage their homes and cash out their retirement funds to purchase Trump Elite packages.⁵² At the heart of every closing one-on-one sales pitch were sales scripts that promised “every single resource Mr. Trump has at his disposal” and “most importantly a hand-selected, Trump-certified, multi-millionaire mentor.”⁵³ These appeals to Trump’s judgment and expertise were effective in convincing thousands of consumers to purchase Trump Elite mentoring packages that cost, in some cases, more than the entire annual salary of typical employees at one of Trump’s now-bankrupt casinos.⁵⁴

B. “Phantom Mentors”

After the excitement of the high-intensity sales pitches wore off, many customers became upset, demanded refunds, and submitted complaints to the Better Business Bureau (BBB), state attorneys general, and the Federal Trade Commission.⁵⁵ Customers complained that Trump University newspaper advertisements, direct mail letters, and the ninety-minute sales pitches for the three-day seminars were false or misleading. In one typical example, a consumer complained to the New York State Education Department:

I responded to a free workshop from Donald Trump University. At the workshop, they sold me on taking the next step to further my real estate education. At the weekend seminar I went to (\$995) all they did was try to sell me the next package for \$35K. I paid \$995 and a weekend of my life to hear a long pitch.⁵⁶

⁵¹ *Id.* at 99.

⁵² Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K13 Affidavit of Nora Hanna ¶ 11.

⁵³ PLAYBOOK, *supra* note 8, at 129.

⁵⁴ *Blackjack Dealer Salaries in Atlantic City, New Jersey*, SALARY.COM, <http://www1.salary.com/NJ/Atlantic-City/Blackjack-Dealer-salary.html> (last visited Sept. 20, 2016) (reporting a median annual Blackjack Dealer salary in Atlantic City, New Jersey, of \$17,259, as of August 29, 2016); *see also* Russ Buettner & Charles V. Bagli, *How Trump Profited on Failed Casinos*, N.Y. TIMES, June 12, 2016, at A1.

⁵⁵ *See, e.g.*, Matt Novak, *These Former “Students” Say Trump University Was a Scam*, GIZMODO (Aug. 25, 2015, 1:20 PM), <http://gizmodo.com/these-former-students-say-trump-university-was-a-scam-1726235122> (quoting from Federal Trade Commission Complaints obtained through Freedom of Information Act request).

⁵⁶ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit L36 Complaint of Daniel Rivera 000334.

Former Trump University students complained so frequently that the BBB eventually lowered the Trump University's rating.⁵⁷ The BBB explained: "During the period when Trump University appeared to be active in the marketplace, BBB received multiple customer complaints about this business. These complaints affected the Trump University BBB rating, which was as low as D- in 2010."⁵⁸

While complaints about Trump University three-day seminars were common, it was the students that purchased costly mentoring packages that suffered most. Despite paying as much as \$35,000, consumer complaints against Trump University reveal that many purchasers of Trump Elite mentoring packages did not receive meaningful real estate mentoring.⁵⁹ Consumers complained that Trump University's Trump Elite mentors,

- did not return phone calls;
- set up voicemail inboxes that did not accept messages;
- were inexperienced or could not provide useful advice;
- advised students to engage in illegal practices;
- blamed students for their inability to make money;
- frequently delayed or refused to provide refunds despite promised "guarantees."⁶⁰

Many Trump University students lost their life savings or were forced into bankruptcy by their expenditures on the Trump University's "phantom mentors."⁶¹ Trump University students themselves paint a troubling picture of broken promises and neglect. For example, Trump University took thousands of dollars from a

⁵⁷ *Statement by Better Business Bureau Servicing Metropolitan New York and Council of Better Business Bureaus*, BETTER BUS. BUREAU (Mar. 8, 2016) [hereinafter BETTER BUS. BUREAU], <http://www.bbb.org/council/news-events/news-releases/2016/03/statement-by-better-business-bureau-servicing-metropolitan-new-york-and-council-of-better-business-bureaus/>.

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, Novak, *supra* note 55 (quoting student complaint to the FTC stating, "The program as a whole—and especially the mentoring—has been an absolute, utter waste and completely failed to live up to its promises.").

⁶⁰ Request for Approval to File Original Petition and Application for Permanent Injunction, *Texas v. Trump Univ. LLC*, No. AG 093157089 (Tex. Consumer Prot. & Pub. Health Div. May 6, 2010); Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K6 Affidavit of Nelly Cunningham ¶ 9; Novak, *supra* note 55; *see also* PLAYBOOK, *supra* note 8, at 114 ("Mr. Trump won't listen to excuses and neither will we. Excuses will never make you more money; they will just continue to cost you more missed opportunities in life.").

⁶¹ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit L32 Louis Piatt Complaint 000315.

divorced, unemployed woman from Seattle, Washington, who was suffering from multiple sclerosis and a stroke.⁶² Even though she had no experience in real estate, instructors encouraged her to max out her credit cards to invest in more classes.⁶³ When she filed a complaint with the Federal Trade Commission, she wrote, “I wanted to depend on me, not my government . . . I don’t understand how they can take my money and not help me”⁶⁴

Some Trump University customers were outraged with their treatment. For example, one customer explained,

Trump University and their staff should be ashamed of themselves! They RUINED my credit!!! They told me I would get my large investment back in my first real estate deal because I would have access to amazing mentors and course content. I did what they told me in all of the courses and it was nonsense! I maxed out my credit cards because I thought Donald Trump wouldn’t have such a sorry excuse for a school just to make more money. But he is a greedy man so I should have known. Be aware that when they tell you to increase your credit limit to purchase real estate it’s really to scam you out of tons of money that you’ve worked so hard for.⁶⁵

Still another customer from New York explained,

My entire “mentorship” with [my Trump University mentor] consisted of three telephone conversations I wasted my entire life savings on Trump. I spent \$1,495 on the Trump three-day seminar and \$24,995 on the Trump Gold Elite mentorship package, only to be demeaned and belittled. I feel like such a fool. Trump did not help me with my real estate investment questions. Nor did I learn anything of application to other real estate transactions. My finances deteriorated significantly and I was left insolvent by Trump University.⁶⁶

Many complaints suggest that Trump University particularly targeted older Americans. For example, the adult child of one consumer complained,

This is the biggest SCAM I’ve ever seen! My 82 year old father went to a free seminar promising to make him rich through real estate. The seminar was solely for the purpose of upselling him into attending a \$1500 three day workshop by promising him they would teach him

⁶² Exhibits to Snell Affirmation, *supra* note 9, at Exhibit L39 Rita Scharbach Complaint 000357.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Third Amended Class Action Complaint, *supra* note 27, at 37–38 (quoting Trump University customer complaint).

⁶⁶ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K6 Affidavit of Nelly Cunningham ¶¶ 8, 11–12.

how to buy and sell foreclosures for huge profits . . . [H]e goes to the 3 day workshop and when he comes home we find out that they pressured him into spending \$35k MORE! . . . Then he proceeds to tell us how the majority of people there were SENIORS like him! These aren't long term investors here, these are people being tricked into thinking they can make a quick profit! If this isn't the definition of preying on the elderly then I don't know what is.⁶⁷

Another student explained to a Trump University instructor that she could not afford to purchase the Trump Elite Gold mentoring package because she needed her resources to care for her child with Down's Syndrome.⁶⁸ The Trump University instructor persuaded the mother to buy the Trump Elite Gold mentoring package, guaranteeing that she would make back her \$25,000 in sixty days.⁶⁹ The instructor promised her that he would be her personal mentor, that she could make unlimited calls to him for life, and that she would receive valuable real estate leads, legal forms, and lifetime access to Trump University webinars.⁷⁰ But, after the mother agreed to buy the mentoring package, Trump University substituted a different mentor who blamed her for being unprepared and did not provide any useful advice.⁷¹ Eventually all the phone numbers she received were disconnected and none of the real estate leads, legal forms, or lifetime access to webinars were provided.⁷² Despite asking for a refund, she explained,

I was unable to get my refund and am still paying off my debts from my Trump tuition. Donald Trump received \$25,000 of my money. For my \$25,000, I have a lifetime membership to nothing! No one contacted me and I have not been able to contact anyone because the phone numbers have all been disconnected. There is no Trump University.⁷³

Far from unusual, consumers filed complaints like these with the BBB, law enforcement offices in at least eleven states, the Federal Trade Commission, and the U.S. Department of Justice.⁷⁴

These consumer complaints were further corroborated by sworn statements of former Trump University employees. For example,

⁶⁷ Third Amended Class Action Complaint, *supra* note 27, at 37.

⁶⁸ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K17 Affidavit of Kathleen Meese ¶¶ 8–9.

⁶⁹ *Id.* ¶¶ 13, 20.

⁷⁰ *Id.* ¶¶ 8, 13, 19.

⁷¹ *Id.* ¶ 14.

⁷² *Id.* ¶ 20.

⁷³ *Id.*

⁷⁴ Complaint ¶ 50, *Cohen v. Trump*, No. 3:13-cv-02519-DMS-RBB (S.D. Cal. Oct. 18, 2013), ECF No. 1.

former Trump University Sales Executive, Jason Nichols, explained, “salespeople, including me, uniformly told consumers, from the script, that: ‘Instructors will be holding your hand, showing you the way.’ This was not true. The instructors and mentors ignored students and stopped returning calls shortly after they were paid.”⁷⁵ Corinne Sommer, former manager of the events department that coordinated Trump University training seminars, concurred.

Because of the pay structure, mentors had no incentive to call consumers back or work with them once the consumer signed up and the mentor was paid. The focus of the mentors seemed to be on getting new sales and new commissions. As a result, I recall that mentors rarely returned phone calls from students or spent much time talking with them. I received calls from many angry students telling me that they had been trying to reach their mentor to no avail.⁷⁶

Similarly, Ronald Schnackenberg, a former sales manager for Trump University, testified,

[A]t a live event in New York City in April 2007, I spoke to a couple After the hard-sell sales presentation, they were considering purchasing the \$35,000 Elite program. I did not feel it was an appropriate program for them because of their precarious financial condition—they had no money to pay for the program, but would have had to pay for the program using his disability income and taking out a loan based upon equity in his apartment. Trump University reprimanded me for not trying harder to sell the program to this couple. Another sales person . . . talked them into buying the \$35,000 seminar after I refused to sell this program to them. I was disgusted by this conduct and decided to resign.⁷⁷

Schnackenberg summed up his work at Trump University this way: “Based on my personal experience and employment, I believe that Trump University was a fraudulent scheme, and that it preyed on the elderly and uneducated to separate them from their money.”⁷⁸

II

FRAUD, RACKETEERING, AND TRUMP UNIVERSITY

When officials in President Trump’s home state of New York inevitably began looking into consumer complaints, they quickly

⁷⁵ Declaration of Jason Nicholas in Support of Plaintiffs’ Motion for Class Certification ¶ 15, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-00940-CAB-WVG (S.D. Cal. Sept. 22, 2014), ECF No. 48-9.

⁷⁶ Declaration of Corinne Sommer, *supra* note 32, ¶ 10.

⁷⁷ Declaration of Ronald Schnackenberg, *supra* note 46, ¶ 4.

⁷⁸ *Id.* ¶ 15.

discovered that Trump University did not meet even the most basic labeling and licensing requirements of the state.⁷⁹ In many jurisdictions it is common for the names of certain business types to be reserved for only those businesses that meet specific legal criteria.⁸⁰ For example, a barber shop is not legally entitled to call itself a bank. In New York, the state legislature adopted laws that restrict the use of the word “University” to only those institutions that are either designated by the New York Board of Regents or have a private university charter from the legislature.⁸¹ President Trump unambiguously violated New York law by naming a “university” after himself.

In addition to its illegal name, New York law provides that “[n]o private school which charges tuition or fees related to instruction . . . shall be operated by any person . . . for the purpose of teaching or giving instruction in any subject or subjects, unless it is licensed by the [D]epartment [of Education].”⁸² The purpose of this law is to allow the state Department of Education to monitor teaching quality and protect vulnerable students.⁸³ President Trump never bothered to obtain a license and illegally used independent contractors for solicitation, hired unlicensed teachers and an unlicensed school director—all of which were obvious violations of New York Law.⁸⁴ When New York officials wrote to President Trump, explaining how he was operating an illegally-named and unlicensed for-profit school, he refused to change the name and simply ignored authorities for nearly five years.⁸⁵ After

⁷⁹ *New York v. Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d 66, 67 (N.Y. App. Div. 2016).

⁸⁰ *See, e.g., Le Drugstore Etats Unis, Inc. v. N.Y. State Bd. of Pharmacy*, 307 N.E.2d 249, 252 (N.Y. 1973) (holding retailer could not conduct business under the name “Le Drugstore” without being licensed as a pharmacy); *Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs*, 610 S.W.2d 867, 871 (Tex. Civ. App. 1980) (prohibiting use of the word “engineering” in a corporate name where the business was not legally qualified to engage in the practice of engineering).

⁸¹ N.Y. EDUC. LAW § 224(1)(a) (McKinney 1991) (“No individual . . . not holding university, college or other degree conferring powers by special charter from the legislature . . . shall . . . use, advertise or transact business under the name university . . . unless the right to do so shall have been granted by the regents . . .”).

⁸² N.Y. EDUC. LAW § 5001(1) (McKinney 2016).

⁸³ Licenses And Permits—Private Schools—Vocational Education, 2012 N.Y. LAWS 1088 (“Legislative intent. The legislature hereby finds and declares that there is a growing need to protect students enrolled in certain non-degree granting proprietary schools from inadequate job training and school closure, which disrupts the academic progress of these students and jeopardizes their tuition funds.”).

⁸⁴ *See* N.Y. EDUC. LAW §§ 5001–5010 (McKinney 2016).

⁸⁵ *New York v. Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d 66, 67 (N.Y. App. Div. 2016) (“By letter dated May 27, 2005, the New York State Department of Education (SED) notified Donald Trump individually, Sexton, and Trump University that they were violating

exercising considerable patience, the New York Attorney General eventually sued to enforce state law.⁸⁶

A. State of New York v. The Trump Entrepreneur Initiative, LLC
f/k/a/ Trump University

While the New York Attorney General’s complaint included counts of licensing and labeling violations, it was the first, and most prominently featured, count that captured the headlines in August of 2013—Fraud.⁸⁷ The New York Court of Appeals explained, “[t]he elements of a cause of action for fraud require [1] a material misrepresentation of a fact, [2] knowledge of its falsity, [3] an intent to induce reliance, [4] justifiable reliance by the plaintiff and [5] damages.”⁸⁸ Fraud is both a crime and a civil tort. In most states, the attorney general has the discretion to attack fraud either by charging the fraudster with a crime or suing civilly.⁸⁹ Both approaches have benefits and drawbacks. Prosecuting fraud as a crime requires proof “beyond a reasonable doubt,” while a civil case generally only requires proof by a “preponderance of the evidence”—a lower burden of proof.⁹⁰ Moreover, successfully prosecuting fraud as a crime can

the New York Education Law by using the word ‘University’ when it was not actually chartered as one.”).

⁸⁶ Press Release, N.Y. Attorney Gen. Office, A.G. Schneiderman Sues Donald Trump, Trump Univ. & Michael Sexton for Defrauding Consumers out of \$40 Million With Sham “University” (Aug. 25, 2013), <https://ag.ny.gov/press-release/ag-schneiderman-sues-donald-trump-trump-university-michael-sexton-defrauding-consumers> [hereinafter Schneiderman Press Release].

⁸⁷ Michael Gormley, *N.Y. AG Sues Trump, ‘Trump University,’ Claims Fraud*, USA TODAY (Aug. 26, 2013, 7:09 PM), <http://www.usatoday.com/story/money/business/2013/08/24/trump-university-fraud-ny/2696367/>.

⁸⁸ *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (N.Y. 2009).

⁸⁹ See, e.g., TEX. GOV’T CODE ANN. § 402.0231 (2003) (establishing a “corporate integrity unit” in the Texas Attorney General’s office to assist in both the prosecution and civil administrative enforcement of corporate fraud); 71 PA. STAT. AND CONS. STAT. ANN. §§ 732-204(d), 205(a) (West 2017) (establishing the Pennsylvania Attorney General’s jurisdiction over civil consumer affairs violations and criminal prosecutions).

⁹⁰ Compare 1 WHARTON’S CRIMINAL EVIDENCE § 2:3 (15th ed. 1997) (“[I]n a criminal case, the prosecution has the burden of production and the burden of persuasion on the question of guilt and the standard of proof is ‘beyond a reasonable doubt.’”) with 10 AMERICAN LAW OF TORTS § 32:105 (2012) (for civil fraud claims in most states “proof by a mere preponderance of the evidence is held to be sufficient”). In some states, the standard of proof for civil tort claims departs from the normal civil preponderance of the evidence standard by requiring an intermediate “clear and convincing” burden of proof. 10 AMERICAN LAW OF TORTS § 32:105 (2012); see also *In re Winship*, 397 U.S. 358, 364 (1970) (In criminal cases, “the Due Process Clause protects the accused against conviction

sometimes leave the incarcerated defendant without resources to actually repay victims and can also take much longer to bring the defendant to trial.⁹¹ Even in civil fraud cases, courts routinely dismiss fraud allegations if the accusations are conclusory or do not point to particular facts or circumstances justifying the case.⁹² To survive a motion to dismiss, “averments of fraud must be accompanied by the ‘who, what, when, where, and how’” of the misconduct charged.⁹³

In the state of New York’s case against President Trump, the top law enforcement officer of New York accused Trump University of making the following material misrepresentations in its marketing:

- consumers would learn “everything [they] need[ed] to know” to become successful real estate investors;
- consumers would quickly recoup their investment by doing real estate deals, with some instructors claiming that consumers would earn tens of thousands of dollars within thirty days;
- instructors were “handpicked” by Donald Trump;
- consumers would be taught Donald Trump’s very own real estate strategies and techniques;
- consumers would receive access to private sources of financing (“hard money lenders”); and
- the three-day seminar would include a year-long “Apprenticeship Support” program.⁹⁴

Although President Trump and Trump University aggressively litigated the New York Attorney General’s case for over three years, they failed to obtain a dismissal of New York’s fraud accusations and

except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

⁹¹ See Daniel Faichney, Comment, *Autocorrect? A Proposal to Encourage Voluntary Restitution Through the White-Collar Sentencing Calculus*, 104 J. CRIM. L. & CRIMINOLOGY 389, 413 (2014) (explaining that “[b]etween 2000 and 2002, [federal] criminal debt collection rates stood around 4%,” and “offenders expecting prosecution or conviction . . . have considerable incentives to hoard, hide, or perhaps rapidly spend the funds they obtained before losing access to them upon conviction.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 11–12 (2005), http://www.gao.gov/assets/250/2452_27.pdf (“a major problem hindering” restitution collection is “the long time intervals between the criminal offense and the judgment.”).

⁹² 37 AM. JUR. 2D *Fraud and Deceit* § 444 (2017).

⁹³ Order Granting in Part and Denying in Part Defendant Donald Trump’s Motion to Dismiss at *4, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-0940-IEG-WVG (S.D. Cal. May 16, 2011).

⁹⁴ Schneiderman Press Release, *supra* note 86.

lost his counter claims.⁹⁵ President Trump's initial litigation strategy was to seek dismissal of the case because the claims were too old,⁹⁶ because there were fine print disclosures that disclaimed any responsibility for false representations,⁹⁷ and to argue that President Trump himself could not be held accountable for the alleged fraud and violations committed by Trump University.⁹⁸ President Trump also filed a countersuit claiming that the New York Attorney General's office was harassing him with a malicious prosecution and asked for \$100 million in damages.⁹⁹ While some of the alleged illegal activity occurred before the applicable statute of limitations, much of it—including the alleged fraud—did not.¹⁰⁰ The trial judge dismissed President Trump's malicious prosecution counterclaim as premature and baseless.¹⁰¹ The court also refused to resolve the case through summary judgment.¹⁰² Following President Trump's unsuccessful appeal, which allowed the Attorney General's fraud claim to proceed, the 2016 presidential election occurred while the parties were attempting to resolve several discovery disputes.¹⁰³

B. Low v. Trump University, LLC and Cohen v. Trump University, LLC

Private litigants first sued President Trump and Trump University in 2010.¹⁰⁴ The initial complaint listed over ten different violations of consumer protection laws, including the violation of California's Unfair Competition Law, false advertising, breach of contract, and

⁹⁵ *New York v. Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d 66, 67 (N.Y. App. Div. 2016).

⁹⁶ Trump Respondents' Affirmation in Support of Motion to Dismiss ¶ 4, *New York v. Trump Entrepreneur Initiative LLC*, No. 451463/2013 (N.Y. Sup. Ct. Oct. 31, 2013), NYSCEF No. 21.

⁹⁷ *Id.* ¶ 27.

⁹⁸ *Id.* ¶¶ 175–77.

⁹⁹ Trump Respondents' Verified Answer with Counterclaim to the Petition at 70, *New York v. Trump Entrepreneur Initiative LLC*, No. 451463/2013 (N.Y. Sup. Ct. Mar. 3, 2014), NYSCEF No. 61.

¹⁰⁰ *New York v. Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d 66, 73 (N.Y. App. Div. 2016).

¹⁰¹ *New York v. Trump Entrepreneur Initiative LLC*, No. 451463/2013, 2014 slip op. 32685 at *14–15 (N.Y. Sup. Ct. Oct. 8, 2014).

¹⁰² *Id.* President Trump did succeed in eliminating the N.Y. Attorney General's claim for violations of the Federal Trade Commission's three-day rescission notice rule on the grounds that the illegal activity occurred more than three years prior to filing. *Id.*

¹⁰³ *Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d at 73.

¹⁰⁴ See generally Class Action Complaint, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-00940-GPC-WVG (S.D. Cal. Apr. 30, 2010), ECF No. 1.

fraud.¹⁰⁵ The parties aggressively litigated *Low v. Trump* for over six years.¹⁰⁶

Similar to the New York litigation, President Trump's early efforts to fight the case included filing a countersuit accusing a former student of defamation.¹⁰⁷ President Trump's counterclaims spawned extensive litigation, which proceeded alongside the original case.¹⁰⁸ President Trump claimed that the named plaintiff in the putative class action against him was defaming him because she initially gave Trump University a favorable student evaluation.¹⁰⁹ On appeal, the U.S. Court of Appeals for the Ninth Circuit explained,

Trump University . . . argues that Makaeff's early testimonials praising Trump University indirectly prove that she acted with a high degree of awareness of the probable falsity of her later statements. However, it is plausible that Makaeff sincerely believed in Trump University's offerings when she submitted her written and videotaped testimonials. The gist of Makaeff's complaint about Trump University is that it constitutes an elaborate scam. As the recent Ponzi-scheme scandals involving one-time financial luminaries like Bernard Madoff and Allen Stanford demonstrate, victims of con artists often sing the praises of their victimizers until the moment they realize they have been fleeced.¹¹⁰

Eventually, the district court struck President Trump's defamation counterclaim and awarded attorney fees and costs to the student that President Trump sued.¹¹¹ The attorneys for the student expended nearly three-quarters of a million dollars in defending against President

¹⁰⁵ *Id.* ¶ 5; *see also* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss at *1, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-940-IEG-WVG, 2010 WL 3988684 (S.D. Cal. Oct. 12, 2010). The plaintiffs later amended their complaint to add claims relating to Florida residents. Third Amended Class Action Complaint, *supra* note 27, at 78–80. Tarla Maekeff, the original class representative in the private Trump University litigation, eventually asked to drop out of the case because she “want[ed] her life back without living in fear of being disparaged by Trump on national television.” *See* Chris Isidore, *Woman Who Sued Trump University Wants Out of Case*, CNNMONEY (Mar. 11, 2016, 11:40 AM), <http://money.cnn.com/2016/03/11/news/companies/trump-university-donald-trump-tarla-makaeff/index.html>.

¹⁰⁶ *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, *supra* note 105.

¹⁰⁷ *See* *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 258 (9th Cir. 2013).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 271.

¹¹¹ Order Granting Plaintiff/Counterdefendant's Special Motion to Strike Defendant/Counterclaimant's Defamation Counterclaim at 1014, *Makaeff v. Trump Univ., LLC*, 26 F. Supp. 3d 1002 (S.D. Cal. 2014).

Trump's defamation claim—all of which President Trump and Trump University were ordered to repay.¹¹²

President Trump's other efforts to extinguish the case also failed. Among the three most important milestones in the six year saga were: (1) the district court's order preserving most of the consumers' counts over President Trump's motion to dismiss;¹¹³ (2) the certification of a class action for all consumers that purchased a Trump University three-day seminar or Elite program in California, New York, and Florida;¹¹⁴ and (3) the denial of President Trump's motion for summary judgment on a variety of state consumer protection claims that included statutory fraud counts, such as California's financial abuse of the elderly statute and Florida's misleading advertising law.¹¹⁵

Unlike many private consumer protection lawsuits, which often gradually lose steam, the Trump University claims gathered momentum as plaintiffs amassed additional evidence and prevailed on various motions.¹¹⁶ Most notably, in 2013, the consumers' counsel in the *Low* litigation filed a second, related lawsuit called *Cohen v. Trump*.¹¹⁷ The *Cohen* case pleaded a single claim: racketeering.¹¹⁸ The Racketeer Influenced and Corrupt Organizations Act (RICO) is a

¹¹² Order Granting in Part and Denying in Part Plaintiff/Counter Defendant Tarla Makaeff's Request for Fees and Costs at *1, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-0940-GPC-WVG (S.D. Cal. Apr. 9, 2015) ("The Court AWARDS Makaeff fees in the amount of \$790,083.40, and costs in the amount of \$8,695.81.").

¹¹³ Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, *supra* note 105, at *8–9.

¹¹⁴ Order Granting in Part and Denying in Part Plaintiff's Motion to Certify Class Action, Appoint Class Representatives, and Appoint Class Counsel at *20, *Makaeff v. Trump Univ., LLC*, No. 3:10-cv-0940-GPC-WVG (S.D. Cal. Feb. 21, 2014).

¹¹⁵ Order Granting in Part and Denying in Part Defendant Donald J. Trump's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment at 980, *Makaeff v. Trump Univ., LLC*, 145 F. Supp. 3d 962 (S.D. Cal. Nov. 18, 2015) ("Financial abuse of an elder occurs when a defendant '[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud . . ."). Although the plaintiff stipulated to dismissal of the common law fraud claim in *Low v. Trump*, multiple remaining statutory counts require proof of the common law elements of fraud. *See id.* at 981 (Under the Florida Misleading Advertising Law, the plaintiff must "prove reliance on the alleged misleading advertising, as well as each of the other elements of the common law tort of fraud in the inducement.").

¹¹⁶ *See, e.g.*, Order Denying Defendants' Motion for Leave to File Renewed Motion for Decertification at 4, *Low v. Trump University, LLC*, No. 3:10-cv-0940-GPC-WVG (S.D. Cal. Aug. 29, 2016), ECF No. 506 (rejecting President Trump's arguments that students were not uniformly exposed to the alleged "core" misrepresentations and that individual issues of reliance, causation, and materiality predominated).

¹¹⁷ *See Cohen v. Trump*, 200 F. Supp. 3d 1063, 1067 (S.D. Cal. 2016).

¹¹⁸ *Id.*

federal statute that provides criminal penalties and a private, civil right of action to stop corrupt organizations from engaging in a pattern of illegal activity.¹¹⁹ Although organized crime families figured prominently in the legislative history of the RICO statute, Congress adopted language applicable to any corrupt organization that uses a pattern of specifically enumerated crimes.¹²⁰ According to the U.S. Supreme Court, a RICO plaintiff must demonstrate “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”¹²¹

A pattern of racketeering activity is defined as at least two instances of any crime on a statutory list that includes murder, kidnapping, as well as mail fraud and wire fraud.¹²² The federal crimes of mail fraud and wire fraud require a plaintiff to demonstrate two elements: “(1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail [or wires] for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).”¹²³ To show a scheme to defraud, plaintiffs must generally present the same type of evidence of fraud normally at issue in any common law tort claim or state criminal prosecution.¹²⁴ Importantly, plaintiffs’ evidence must show deceit “coupled with a contemplated harm to the victim.”¹²⁵ Nevertheless, “[t]he requisite intent under the federal mail and wire fraud statutes may be inferred from the totality of the circumstances and need not be proven by direct evidence.”¹²⁶ Prosecutors and civil plaintiffs alike can argue that a defendant’s intent may be inferred “from statements and conduct,”¹²⁷ as well as “from the modus operandi of the scheme.”¹²⁸ The intent to defraud can be established “if a representation is made with reckless

¹¹⁹ 18 U.S.C. §§ 1963, 1964(c) (2016).

¹²⁰ S. REP. NO. 91-617, at 79 (1969).

¹²¹ *Sedima, S.P.R.L. v. IMREX Co.*, 473 U.S. 479, 496 (1985).

¹²² 18 U.S.C. §§ 1961(1), (5) (2016).

¹²³ *Schmuck v. United States*, 489 U.S. 705, 721 (1989).

¹²⁴ See 37 AM. JUR. 2D *Fraud and Deceit* § 24 (2017) (listing traditional elements of fraud). Under RICO, “the Government may bring either civil or criminal RICO actions, or both, against a defendant for the same or overlapping unlawful conduct.” U.S. DEP’T OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS 309 (2007), <https://www.justice.gov/sites/default/files/criminal/legacy/2010/11/12/2007civil-rico.pdf>.

¹²⁵ *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (providing an example of legally insufficient evidence of intent).

¹²⁶ *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979).

¹²⁷ *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982) (citing *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979)).

¹²⁸ *United States v. Reid*, 533 F.2d 1255, 1264 (D.C. Cir. 1976).

indifference to its truth or falsity,” including the use of “extravagant claims.”¹²⁹

Only months before the 2016 presidential election, a United States federal district judge held that the plaintiffs in *Cohen v. Trump* raised a triable issue of racketeering based on multiple predicate acts of mail and wire fraud.¹³⁰ Judge Gonzalo Curiel held that President Trump was not entitled to summary judgment on his argument that he did not engage in “conduct” within the meaning of RICO.¹³¹ The Judge pointed to President Trump’s own deposition testimony indicating that he had approved the allegedly fraudulent marketing materials.¹³² Moreover, unlike some RICO cases where the alleged enterprise is informal, President Trump was the founder and majority owner of a limited liability company that, in turn, employed a variety of independent contractors—easily satisfying RICO’s enterprise definition.¹³³ With thousands of allegedly false statements made to consumers in cities all across the country through a variety of print, online, and direct mail representations, the plaintiffs in *Cohen* could have shown a pattern of more than two misrepresentations without difficulty. Perhaps most importantly, Judge Curiel held that this evidence raised triable issues of materiality and intent to deceive.¹³⁴ Moreover, liability for racketeering in the case was not limited to Trump University; Judge Curiel specifically held that President Trump himself was subject to a trial for racketeering in his individual capacity.¹³⁵

President Trump controversially responded by accusing Judge Curiel of bias due to his Mexican American heritage.¹³⁶ But, in both the litigation and in his electoral campaign, President Trump’s foremost talking point was his claim that ninety-eight percent of Trump University students were satisfied.¹³⁷ However, Trump University did

¹²⁹ *Cusino*, 694 F.2d at 187.

¹³⁰ *Cohen v. Trump*, 200 F. Supp. 3d 1063, 1075 (S.D. Cal. 2016).

¹³¹ *Id.* at 1072.

¹³² *Id.*

¹³³ 18 U.S.C. § 1961(4) (2016) (“‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity . . .”).

¹³⁴ *Cohen*, 200 F. Supp. 3d at 1072–75.

¹³⁵ *Id.* at 1075.

¹³⁶ Alan Rappoport, *Judge Faulted by Tramp Has Faced a Lot Worse*, N.Y. TIMES, June 4, 2016, at A12.

¹³⁷ Trump Respondents’ Affirmation in Support of Motion to Dismiss, *supra* note 96, ¶ 19; *You’ve Heard the Rhetoric, Now Learn the Truth*, 98 PERCENT APPROVAL,

not use reliable methods for evaluating instruction. Traditional universities use standard, widely accepted procedures such as proctors or online survey methods to prevent faculty from pressuring students or even surreptitiously discarding negative evaluations.¹³⁸ These time-tested student evaluation methods were not used at the Trump University wealth seminars. At Trump University, the same staff that were being evaluated had control over administering, collecting, and returning the evaluations.¹³⁹ Students reported feeling pressured by Trump University staff to give positive reviews.¹⁴⁰ Even though studies suggest students are less comfortable giving negative feedback in nonanonymous reviews, Trump University evaluation forms required students to include their names and contact information.¹⁴¹ This pressure was particularly acute for Trump University students because the wealth seminars forced students to give nonanonymous evaluations of some of the same individuals who were to serve as their mentors in the future—forcing students to choose between candor and potentially offending their future mentor. Moreover, many of the most troubling allegations of broken promises occurred *after* students filled out evaluation forms. Court documents estimate that between twenty-five and forty percent of paying Trump University students eventually

<https://web.archive.org/web/20160324132939/http://www.98percentapproval.com/> (last visited Oct. 15, 2017).

¹³⁸ See, e.g., SAN JOSE STATE UNIV. OFFICE OF INSTITUTIONAL RESEARCH & STUDENT EVALUATION REVIEW BD., INTERPRETATION GUIDE FOR STUDENT OPINION OF TEACHING EFFECTIVENESS (SOTE) RESULTS 11 (2011), http://www.sjsu.edu/facultyaffairs/docs/2011_SOTE_Interpretation_Guide.pdf (noting that student feedback ratings tend to be higher “if they are not anonymous or the instructor is present, which is why [evaluations] are supposed to be administered by student proctors with no interference from faculty members”); Seth Heinert & T. Grady Roberts, *Factors Motivating Students to Respond to Online Course Evaluations in the College of Agricultural and Life Sciences at the University of Florida*, 60 NACTA J. 189, 189–91 (2016) (noting standard use of proctors or anonymous online evaluations in university student evaluations).

¹³⁹ See Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K13 Affidavit of Nora Hanna ¶ 13 (“I gave a very positive evaluation, though my impression of Trump was later proven wrong.”).

¹⁴⁰ Exhibits to Snell Affirmation, *supra* note 9, at Exhibit K11 Affidavit of Roberto Guillo ¶ 21 (Presenters “pleaded for a favorable rating so that ‘Mr. Trump would invite [them] back to do other retreats.”); see also Michael Barbaro & Steve Eder, *Trump Students Cite Push to Give Positive Reviews*, N.Y. TIMES, Mar. 12, 2016, at A1 (“[H]undreds of pages of legal documents, as well as interviews with former students and instructors, suggest the surveys themselves were a central component of a business model that, according to lawsuits and investigators, deceived consumers . . .”).

¹⁴¹ Christopher J. Fries & R. James McNinch, *Signed Versus Unsigned Student Evaluations of Teaching: A Comparison*, 31 TEACHING SOC. 333, 334 (2003) (“[W]e can conclude that asking students to sign evaluation forms leads to more positive ratings across the board in all categories.”).

demanded their money back.¹⁴² Moreover, President Trump's claims about Trump University's self-proctored evaluations are impossible to reconcile with the BBB's independent "D-" rating. Finally, President Trump's argument is legally irrelevant. It is not a legally-recognized defense to say that a victim of fraud was satisfied with having been lied to. The evidence still remains that President Trump and Trump University lied to their customers, and that was illegal, regardless of what the evaluation forms say.

III

PRESIDENTIAL IMPEACHMENT FOR HIGH CRIMES AND MISDEMEANORS

The U.S. Constitution provides for impeachment of the President in Article 2 Section 4 which reads,

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.¹⁴³

Authority to initiate impeachment proceedings rests exclusively with the U.S. House of Representatives,¹⁴⁴ while the Senate has sole power to try all impeachments.¹⁴⁵ No person may be removed from office by the Senate without concurrence of two thirds of the senators present.¹⁴⁶ When the President is on trial, the Chief Justice of the U.S. Supreme Court presides.¹⁴⁷

¹⁴² Julianna Goldman & Laura Strickler, *Documents Reveal What Trump Actually Said About His University*, CBS NEWS (Mar. 7, 2016, 7:46 AM), <http://www.cbsnews.com/news/elections-2016-donald-trump-university-lawsuits-court-documents-instructors/>; see also Deposition of Donald Trump at 432, *Cohen v. Trump*, No. 13-cv-2519-GPC-WVG (S.D. Cal. Mar. 3, 2016), ECF No. 462-2; Steven Brill, *What the Legal Battle Over Trump University Reveals About Its Founder*, TIME (Nov. 5, 2015), <http://time.com/4101290/what-the-legal-battle-over-trump-university-reveals-about-its-founder/>.

¹⁴³ U.S. CONST. art. II, § 4.

¹⁴⁴ *Id.* art. I, § 2.

¹⁴⁵ *Id.* art. I, § 3.

¹⁴⁶ *Id.* (stating that upon conviction, the Senate may also disqualify the President from the right to "hold and enjoy any Office of honor, Trust or Profit under the United States . . ."); see also ELIZABETH B. BAZAN, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE 5 (Cong. Research Serv. 2010) (demonstrating how Senate votes to remove an official or judge from office are distinct from a vote to prohibit the individual from holding office at a future time, the latter requiring a simple majority).

¹⁴⁷ U.S. CONST. art. I, § 3.

A. *Fraud and Racketeering Constitute Impeachable “High Crimes or Misdemeanors”*

The history of federal impeachment has seen much debate over whether different types of unethical or illegal conduct rise to the level of impeachable high crimes or misdemeanors.¹⁴⁸ Mindful of this debate, Congress could reasonably conclude that fraud and racketeering are impeachable high crimes or misdemeanors based on the Constitution’s plain text, the framers intentions, and past impeachment precedent.

1. *Plain Meaning*

With respect to textual arguments, a plain reading of the presidential impeachment clause seems to suggest that impeachment for fraud and racketeering is permissible. The most basic reading of the phrase, “other high Crimes and Misdemeanors,” is simply that impeachable behavior “is only that which would subject an ordinary person to criminal indictment and prosecution.”¹⁴⁹ Modifying both “crimes” and “misdemeanors,” the adjective “high” suggests that only serious or grave offenses warrant impeachment.¹⁵⁰ The offenses of fraud and racketeering seem to bypass the more difficult legal question of

¹⁴⁸ See generally RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 56–82 (1973) (summarizing 600 years of impeachment history); ASHER C. HINDS, *3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* (1907) (presenting U.S. House of Representatives impeachment materials through the end of the nineteenth century); Edward M. Mezvinsky & Doris S. Freedman, *Federal Income Tax Evasion as an Impeachable Offense*, 63 GEO. L.J. 1071, 1080–81 (1975) (arguing President Nixon’s tax evasion constituted an impeachable high crime or misdemeanor); E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1028, 1040 (1975) (arguing for a fiduciary “breach of public trust” theory of high crimes and misdemeanors).

¹⁴⁹ EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 6 (1999).

¹⁵⁰ See CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 40 (1974) (“General lowness and shabbiness ought not to be enough.”); Frank O. Bowman, III & Stephen L. Sepinuck, *“High Crimes and Misdemeanors”*: *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1529 (1999) (“[A] ‘high crime or misdemeanor’ must be an offense of the most serious kind.”); Paul Fenton, *The Scope of Impeachment Power*, 65 NW. U.L. REV. 719, 746 (1970) (“[I]t is extremely difficult to define the proper standards for an impeachable offense in affirmative terms The only generalization which can safely be made is that an impeachable offense must be serious in nature.”).

whether “misdemeanors” includes impeachment for nonindictable offenses.¹⁵¹

Fraud and racketeering are certainly grave in that they are crimes punishable by lengthy prison sentences in all fifty states. For example, in New York, where President Trump faced allegations of fraud,

A person is guilty of a scheme to defraud in the first degree when he . . . engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more of such persons¹⁵²

First degree fraud is a class E felony in New York¹⁵³ and is punishable by imprisonment for up to four years.¹⁵⁴

Similarly, under federal law, mail fraud and wire fraud are serious felonies. The United States Code states that

Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office or authorized depository for mail . . . any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined under this title or imprisoned not more than 20 years, or both.¹⁵⁵

While President Trump faced allegations of mail and wire fraud as predicate RICO offenses in *Cohen v. Trump*, RICO violations are also serious crimes in and of themselves. Under RICO, “[w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years.”¹⁵⁶

Some have argued that the word “other,” modifying high crimes and misdemeanors, suggests the phrase “other high crimes and misdemeanors” should include only those crimes that are similar in nature to bribery and treason.¹⁵⁷ This view draws on the traditional

¹⁵¹ See Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 678 (1916) (“If the word ‘misdemeanors’ refers only to criminal misdemeanors, then it is a useless and unnecessary word, for it is embraced within the word ‘crimes’ and the clause might as well have read only ‘treason, bribery, or other high crimes.’”).

¹⁵² N.Y. PENAL LAW § 190.65 (McKinney 2008).

¹⁵³ *Id.*

¹⁵⁴ N.Y. PENAL LAW § 70.00(2)(e) (McKinney 2004).

¹⁵⁵ 18 U.S.C. § 1341 (2016); see also 18 U.S.C. § 1346 (2016) (“[T]he term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”).

¹⁵⁶ 18 U.S.C. § 1693(a) (2016).

¹⁵⁷ See *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 84 (1998) (statement of Cass R. Sunstein) (applying *ejusdem generis* to the impeachment clause to argue “other high

cannon of construction, *eiusdem generis*—meaning ‘of the same kind.’¹⁵⁸ However, if only crimes closely akin to bribery and treason are impeachable, then the word “misdemeanor” would be superfluous since neither bribery nor treason are mere misdemeanors.¹⁵⁹ Arguably, unlike treason and bribery which involve a crime against the state, the United States government was not a victim of Trump University. Still, members of Congress could reasonably conclude that the word “other” preceding high crimes or misdemeanors signals an intention to depart from an overly narrow reading.

Besides, even if high crimes and misdemeanors include only crimes similar in nature to treason and bribery, in an important sense, fraud and racketeering plausibly qualify. Treason, bribery, fraud, and racketeering are all forms of corruption that members of Congress could reasonably conclude pose a threat to the honest and efficient operation of government. Arguably, both treason and bribery are particular subspecies of fraud insofar as each requires a betrayal of trust and are implemented through tactics of deception. Congress could conclude that the Trump University wealth seminars were a betrayal of those who trusted President Trump to help them fulfill their aspirations. The evidence uncovered in the Trump University cases points to a form of corruption and betrayal that should be of great concern to those that fear corruption and misuse of governmental power.

2. Framers’ Intent

Congress could also reasonably conclude that the founders intended the crimes of fraud and racketeering to be impeachment-worthy. The founders dedicated significant debate to the precise formulation of impeachable offenses, amending the text of the Constitution several

Crimes and Misdemeanors” must be like in kind to treason and bribery); Bowman & Sepinuck, *supra* note 150, at 1528 (“When the Constitution authorizes impeachment for ‘Treason, Bribery, or other high Crimes and Misdemeanors,’ it is saying that a President may be removed for committing treason, taking bribes, or performing other acts similar both in type and seriousness to bribery and treason.”).

¹⁵⁸ See, e.g., *Walling v. Peavy-Wilson Lumber Co.*, 49 F. Supp. 846, 859 (W.D. La. 1943) (Where “general words follow the enumerations of particular classes or persons or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as those enumerated.”). This argument has similarly been based on the *noscitur a sociis* (“it is known by the company it keeps”). See Simpson, *supra* note 151, at 679.

¹⁵⁹ See Simpson, *supra* note 151, at 679 (“[i]nasmuch as the words ‘other high crimes’ exhaust the possibility of everything which ‘in *codem sensu*’ could be *eiusdem generis* with ‘treason’ and ‘bribery,’ and hence the word ‘misdemeanors’ must be discarded as useless, which is forbidden, or else it must be given other than a criminal meaning . . .”).

times before arriving at the phrase “treason, bribery, or other high crimes and misdemeanors.”¹⁶⁰ An early drafting committee proposed language providing that federal officers “shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption.”¹⁶¹ A later draft of the Constitution allowed impeachment for “high crimes and misdemeanors *against the States*.”¹⁶² Still another draft revised the language to allow impeachment for “high crimes and misdemeanors *against the United States*.”¹⁶³ But, the fact that all these phrases were eventually eliminated suggests that the framers ultimately decided to take a broader view of potentially impeachable high crimes.¹⁶⁴

Some scholars have noted that the framers drew the phrase “other high crimes and misdemeanors” out of longstanding English parliamentary precedent.¹⁶⁵ The British government began using an impeachment procedure as early as the thirteenth century.¹⁶⁶ The term high crimes and misdemeanors was a technical term-of-art that evolved within the context of a long political and legal history.¹⁶⁷ But even English sources disagree on the meaning of the term. For example, Blackstone took the view that a crime in violation of some “already known and established law” was a prerequisite to impeachment.¹⁶⁸ But

¹⁶⁰ BERGER, *supra* note 148, at 77–81.

¹⁶¹ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 337 (Max Farrand ed., rev. vol. 1937) [hereinafter FEDERAL CONVENTION]; *see also* Bowman & Sepinuck, *supra* note 150, at 1524 (summarizing evolution of the high crimes and misdemeanors phrasing at the Constitutional Convention).

¹⁶² FEDERAL CONVENTION, *supra* note 161, at 551 (emphasis added) (citations omitted).

¹⁶³ *Id.*; *see also* Simpson, *supra* note 151, at 665 (extracting relevant passages from Farrand’s Records).

¹⁶⁴ FEDERAL CONVENTION, *supra* note 161, at 600. Some have suggested that “against the United States” may have been removed as a matter of style without an intent to change the meaning. Edwin Brown Firmage, *The Law of Presidential Impeachment*, 1973 UTAH L. REV. 681, 694 (1973); Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 687 n.25 (1999).

¹⁶⁵ BERGER, *supra* note 148, at 54.

¹⁶⁶ Simpson, *supra* note 151, at 651.

¹⁶⁷ BERGER, *supra* note 148, at 70–71; Impeachment Inquiry Staff of the House Judiciary Comm., *Constitutional Grounds for Impeachment*, in HIGH CRIMES AND MISDEMEANORS: SELECTED MATERIALS ON IMPEACHMENT 1, 3 (1973); HINDS, *supra* note 148, at 322.

¹⁶⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 256 (Univ. of Chi. Press 1979) (1769) (“[A]n impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.”) (all original use of the descending s has been changed to modern letterform). *But see* Simpson, *supra*

Parliament did in fact impeach officials for nonindictable actions in derogation of their office. As Raul Berger noted, Parliament impeached the Duke of Suffolk in 1450 because he “procured offices for persons who were unfit and unworthy of them” and the Duke of Buckingham because he, “though young and inexperienced, procured offices for himself [and] thereby blocked the deserving.”¹⁶⁹ Early American colonial impeachment laws and practices may have had even more influence on the framers than English customs.¹⁷⁰ Either way, pre-Constitutional British and colonial precedent perhaps has only limited value because “the framers set forth a special impeachment mechanism in the Constitution that reflected their intention to differentiate the newly proposed federal impeachment process from the English and state experiences with impeachment prior to 1787.”¹⁷¹

Moreover, the founders did not speak with a unified voice on what actions constitute a high crime or misdemeanor.¹⁷² Alexander Hamilton, writing in the *Federalist no. 65*, argued that impeachable offenses “are 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.”¹⁷³ Hamilton’s view must be taken with some sense of caution because “Hamilton disagreed with the final version of the federal impeachment process and he left the constitutional convention long before the Constitution was formally approved.”¹⁷⁴ James Wilson, an influential delegate to the Constitutional Convention, law professor, and one of the first Supreme

note 151, at 694 (“[I]t must be said that Blackstone had no better light upon this subject than we have . . .”).

¹⁶⁹ BERGER, *supra* note 148, at 67–68; *see also* Firmage, *supra* note 164, at 683 (“Charges against Attorney General Yelverton in 1621 also included non-criminal offenses such as failing to prosecute after commencing suits and exercising authority before it was properly vested in him.”).

¹⁷⁰ PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805* 268 (1984).

¹⁷¹ MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 3 (2d ed. 2000); *see also* Fenton, *supra* note 150, at 721 (“Although the English practice is undoubtedly of substantial value in construing the impeachment clause, to accept this precedent as an inflexible and unchanging standard would be a grave error.”).

¹⁷² Simpson, *supra* note 151, at 694–95; BAZAN, *supra* note 146, at 28.

¹⁷³ THE FEDERALIST NO. 65 (Alexander Hamilton).

¹⁷⁴ GERHARDT, *supra* note 171, at 13.

Court Justices, held a similar view.¹⁷⁵ Wilson argued that impeachment proceedings are “of a political nature . . . confined to political characters, to political crimes and misdemeanors, and to political punishments.”¹⁷⁶ Historians have explained that these references to political offenses were not simply acts that one faction might disagree with, but were “some palpable abuse or violation of some public trust.”¹⁷⁷

Nevertheless, in a contextually critical sense, the question of whether fraud and racketeering are impeachable offenses easily sidesteps “the most closely debated issue” in “the 200 year history of [federal] impeachments”—namely, whether Congress may impeach for nonindictable crimes.¹⁷⁸ Hamilton and Wilson’s statements favoring a public or political criterion in impeachable offenses should be viewed in the context of this debate. That is to say, there is stronger, more historically robust support for the notion that nonindictable offenses must be political in nature to rise to the level of impeachability. There is much less historical support for the notion that indictable, serious crimes must also be political in nature.

Moreover, the notion that impeachment should be connected to exclusively political offenses was not uniformly shared by all the framers and it was far from clear where the boundary between personal and political offenses was to be drawn. For example, writing in *Federalist No. 64*, John Jay explained that the Constitution had “taken the utmost care” that Presidents shall be persons “of talents and integrity” and, “so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.”¹⁷⁹ The policy objectives of competence, integrity, and good behavior invoked by Jay seem as loosely tied to public wrongs as the plain text of the Constitution itself.

Similarly, Madison’s remarks during the Constitutional Convention seem to take a broader view about the constitutional role of

¹⁷⁵ *Id.* at 21.

¹⁷⁶ *Id.*

¹⁷⁷ HOFFER & HULL, *supra* note 170, at 101 (discussing THE FEDERALIST NO. 65 (Alexander Hamilton)).

¹⁷⁸ Fenton, *supra* note 150, at 725–26; *see, e.g.*, James St. Clair et al., *An Analysis of the Constitutional Standard for Presidential Impeachment*, reprinted in 1 CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS AND MATERIALS 112, 139 (A. Stephen Boyan, Jr. ed., 1976) [hereinafter WATERGATE DOCUMENTS] (Attorneys for President Nixon arguing, “[i]n considering the legal and widely understood meaning of the phrase ‘other high crimes and misdemeanors’ it is clear that it is limited solely to criminal conduct.”).

¹⁷⁹ THE FEDERALIST NO. 64 (John Jay).

impeachment. He argued that it was “indispensable that some provision should be made for defending the Community against [sic] the incapacity, negligence or perfidy of the chief magistrate.”¹⁸⁰ Madison went on to list some of his concerns:

[The President] might lose his capacity after his appointment. He might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distinguishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.¹⁸¹

Even more direct, Benjamin Franklin took a related, yet distinct, view that impeachment was necessary to remove an officer who had “rendered himself obnoxious” and thereby provide a “regular punishment” that would avoid the chaos of assassination and allow “honorable acquittal when he should be unjustly accused.”¹⁸²

Arguably, a heinous offense such as a murder for personal ends or a rape could be sufficiently “obnoxious” to trigger Franklin’s demand for regular punishment, even though both crimes might qualify as private rather than political.¹⁸³ As Judge Posner more recently observed, “at some point the personal becomes political.”¹⁸⁴ Perhaps synthesizing these concerns, Judge Posner has argued that the “abuse of power was

¹⁸⁰ FEDERAL CONVENTION, *supra* note 161, at 65.

¹⁸¹ *Id.* at 65–66; *see also id.* at 65 (statement of Gouverneur Morris agreeing that impeachment was necessary for “corruption & some few other Offences”).

¹⁸² *Id.* at 65 (statements of Benjamin Franklin on assassination and the historical example of the Prince of Orange in the war between France and Holland). Drawing on this language, Professor Josh Chafetz has thoughtfully argued it was the fear of despots—Julius Caesar and Charles I in particular—that led the founding fathers to establish an impeachment procedure for the President. Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 348, 367 (2010); *see also* Firmage, *supra* note 164, at 690 (noting a similar point).

¹⁸³ BLACK, *supra* note 150, at 39; Bowman & Sepinuck, *supra* note 150, at 1553.

¹⁸⁴ RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 109 (1999).

the principal concern of the framers.”¹⁸⁵ Professors Frank Bowman and Stephen Sepichuk’s thoughtful law review article argues that impeachment for nonpolitical offenses is permissible, but that the threshold of gravity or seriousness should be raised as the alleged offense strays further from the functions of the President’s office.¹⁸⁶ Some crimes may be so outrageous that Congress cannot ignore them, even if they do not fall within the paradigmatic offenses involving misuse of office, abuse of power, or threats to the constitutional order.¹⁸⁷

There is also no question that some of the framers were concerned with the use of impeachment as a political weapon. For example, at the Constitutional Convention, Charles Pinkney worried that by making the Senate the “court of impeachment,” it would render the President “too dependent on the Legislature” and thereby, “[i]f he opposes a favorite law, the two Houses will combine against [sic] him, and under the influence of heat and faction throw him out of office.”¹⁸⁸ But, the absence of a single instance of a removed President in the history of the republic seems to confirm Hugh Williamson’s rejoinder to Pinkney that, in fact, “there was more danger of too much lenity than of too much rigour towards the President.”¹⁸⁹

Of course the framers had no occasion to explicitly discuss the particular crimes of fraud or racketeering. Indeed, Congress adopted the federal racketeering statute nearly two centuries after the Constitutional Convention. Nevertheless, today Congress could easily conclude that the crimes of fraud and racketeering were well within the scope of the framers’ view of “other high crimes and misdemeanors.”

¹⁸⁵ *Id.* at 104. Several commentators have argued against a plain reading of the words “high crimes and misdemeanors” in favor of the view that only crimes relating to an official’s public office are impeachable. See BLACK, *supra* note 150, at 35; VAN TASSEL & FINKELMAN, *supra* note 149, at 6; Bowman & Sepinuck, *supra* note 150, at 1523; Merrill Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 KAN. CITY L. REV. 3, 22 (1938); C.S. Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 24 (1927).

¹⁸⁶ Bowman & Sepinuck, *supra* note 150, at 1557 (suggesting that crimes are more impeachable the more closely they relate to the functions of the president’s office). *But see* BLACK, *supra* note 150, at 37 (arguing impeachable high crimes and misdemeanors ought to include offenses “(1) which are extremely serious, (2) which in some way corrupt or subvert the governmental process, and (3) which are plainly wrong in themselves to a person of honor”); *Background and History of Impeachment*, *supra* note 157 (arguing for impeachment of a President only for “egregious misconduct that amounts to the abusive misuse of the authority of his office”).

¹⁸⁷ Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 620–21 (1999).

¹⁸⁸ FEDERAL CONVENTION, *supra* note 161, at 551.

¹⁸⁹ *Id.*

Jay surely would have viewed those crimes as evidence of a lack of integrity and inconsistent with good behavior.¹⁹⁰ Both crimes seem to fit Madison's notion of a "scheme of speculation."¹⁹¹ Morris would probably have viewed them as worthy of his fears of "corruption."¹⁹² And while Hamilton and Wilson favored a political approach to impeachment, they would perhaps be hard pressed to explain how employing a band of traveling salesmen to conduct a nationwide campaign to defraud thousands of citizens is not "the abuse or violation of some public trust."¹⁹³ President Trump's allegedly fraudulent, nationwide advertising campaign for his Trump University scam is far from a private indiscretion behind closed doors. While such a speculative scheme itself may not pose a threat to the republic's constitutional order, reasonable observers might conclude the scheme's author was *capable* of just the sort of tyranny the founders feared most. Can anyone doubt that Franklin would have viewed these acts as "obnoxious"?¹⁹⁴ For his part, George Washington remained stoically silent during all the Constitutional Convention's impeachment debates.¹⁹⁵ But surely we can be confident he would have viewed tawdry frauds against vulnerable and trusting people with quiet, but utter, disdain.¹⁹⁶

3. Congressional Precedent

Congressional leaders that look to past impeachment precedent will find support for the view that fraud and racketeering are impeachable high crimes and misdemeanors. The House of Representatives has voted to impeach federal officials on sixteen occasions, including two Presidents, a cabinet member, a senator, a Supreme Court justice, and eleven other federal judges.¹⁹⁷ The Senate has convicted eight

¹⁹⁰ THE FEDERALIST NO. 64 (John Jay).

¹⁹¹ FEDERAL CONVENTION, *supra* note 161, at 65–66.

¹⁹² *Id.* at 65.

¹⁹³ THE FEDERALIST NO. 65 (Alexander Hamilton).

¹⁹⁴ FEDERAL CONVENTION, *supra* note 161, at 65.

¹⁹⁵ *Id. passim.*

¹⁹⁶ See George Washington, *To The People of the United States, in WASHINGTON'S FAREWELL ADDRESS*, S. DOC. NO. 106–21, at 20–21 (2000) (explaining that "virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?").

¹⁹⁷ *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES (2017) [hereinafter *Individuals Impeached*], <http://history.house.gov/Institution/Impeachment/Impeachment-List/>.

officials.¹⁹⁸ Furthermore, many others have resigned under threat of impeachment including, most notably, President Nixon.¹⁹⁹ Congress' impeachment deliberations with respect to Presidents Johnson, Nixon, and Clinton, as well as the federal judges impeached and removed by Congress, are worth comparing to President Trump's alleged fraud and racketeering.

Beginning with President Johnson, his post-Civil War impeachment proceedings arose in the tumultuous period following President Lincoln's assassination. President Johnson, a unionist Tennessee Democrat, was included on President Lincoln's ticket in order to build national unity during the 1864 election.²⁰⁰ With strong Southern sympathies, President Johnson soon began to clash with the Republican-dominated Congress, bent on enforcing congressional will in the reconstructing-South and extracting political concession before readmitting Southern states to the Union.²⁰¹ After repealing their ordinances of recession at the end of the Civil War, many Southern states reconstituted their prior state governments and adopted laws consigning former slaves to nonvoting, second class citizenship.²⁰² Called "black codes," these laws established rules on vagrancy, apprenticeship, labor contracts, migration, as well as civil and legal rights, all with the goal of making blacks "slaves in everything but name."²⁰³

Congress responded by adopting the Civil Rights Act of 1866, over President Johnson's veto.²⁰⁴ The statute defined African Americans as citizens and preempted the contrary state laws.²⁰⁵ Then, despite President Johnson's opposition yet again, Congress voted to adopt the Fourteenth Amendment, which was eventually ratified by the states.²⁰⁶

¹⁹⁸ *Id.*

¹⁹⁹ John Herbers, *Nixon Resigns*, N.Y. TIMES, Aug. 9, 1974, at A1; see also *Justice's Resignation First Under Impeachment Threat*, 25 CQ ALMANAC 136, 137 (1969), <http://library.cqpress.com/cqalmanac/cqal69-1247815> (discussing resignation of Justice Abe Fortas).

²⁰⁰ DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960* 25–26 (2008).

²⁰¹ ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 3 (1960).

²⁰² KYVIG, *supra* note 200, at 26.

²⁰³ W.E. BURGHARDT DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 167 (1935).

²⁰⁴ Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 198*, 98 YALE L. J. 541, 549 n.56 (1989) ("When Congress eventually overrode Johnson's veto of the Civil Rights Act of 1866, it was the first time that Congress had ever overridden a President on a major political issue.").

²⁰⁵ DUBOIS, *supra* note 203, at 248–50.

²⁰⁶ MCKITRICK, *supra* note 201, at 351; KYVIG, *supra* note 200, at 29.

These political conflicts came to a head when Congress adopted the constitutionally dubious Tenure of Office Act. The act required Senate approval before the President dismissed any officer previously confirmed by the Senate.²⁰⁷ A constitutional crisis emerged when President Johnson attempted to remove the Secretary of War, Edwin Stanton.²⁰⁸ The House responded by quickly voting to impeach President Johnson on eleven articles of impeachment, “nine dealing with Stanton in one way or another.”²⁰⁹ Although the Tenure of Office Act included a criminal penalty for noncompliance, none of the articles of impeachment accused President Johnson of an act traditionally recognized as an indictable crime.²¹⁰ Instead, the articles of impeachment generally relied on the British technical understanding of high crimes and misdemeanors as official misconduct.²¹¹ Following the House’s impeachment vote, the Senate voted thirty-five to nineteen in favor of conviction—missing the required two-thirds majority by a single vote.²¹²

The story of the Watergate scandal preceding President Nixon’s resignation is lengthy and well known.²¹³ As details of the scandal emerged, the House Judiciary Committee voted to recommend three articles of impeachment.²¹⁴ The first article accused President Nixon of personally engaging in a course of conduct to cover up any White House involvement in the burglary at the Democratic Party’s national headquarters.²¹⁵ Among other actions, the House Judiciary Committee

²⁰⁷ See Michael Les Benedict, *A New Look at the Impeachment of Andrew Johnson*, 88 POL. SCI. Q. 349, 364–66 (1973).

²⁰⁸ See *id.* at 366–67.

²⁰⁹ KYVIG, *supra* note 200, at 28. The House Judiciary Committee first considered impeachment of President Johnson in November of 1867. The committee voted five to four against impeachment on the grounds that the articles did not include allegations of any specific crime by the President. JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 49 (1978).

²¹⁰ Act of Mar. 2, 1867, ch. 154, § 6, 14 Stat. 430, 431 (regulating the tenure of certain civil offices); see also LABOVITZ, *supra* note 209, at 56, 66.

²¹¹ Hon. William Lawrence, *A Brief of the Authorities Upon the Law of Impeachable Crimes and Misdemeanors*, reprinted in 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 123, 128–29 (Da Capo Press 1970) (1868).

²¹² LABOVITZ, *supra* note 209, at 88.

²¹³ See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974) (*Washington Post* coverage of the Watergate scandal).

²¹⁴ H.R. REP. NO. 93-1305 (1974), reprinted in *WATERGATE DOCUMENTS*, *supra* note 178, at 1–4.

²¹⁵ *Id.* at 1–2, art. I.

concluded that President Nixon approved surreptitious hush-money payments to the Watergate burglars.²¹⁶ The second article of impeachment accused President Nixon of misusing government agencies to conduct illegal surveillance and violate constitutional rights.²¹⁷ The third article recommended impeachment for refusing to comply with congressional subpoenas.²¹⁸ The Judiciary Committee considered, but voted against, two additional articles of impeachment on President Nixon's efforts to conceal the war in Cambodia and tax evasion.²¹⁹ With respect to the tax evasion article, the Committee voted against impeachment twelve to twenty-six with at least some members of the Committee basing their decisions on the lack of evidence of the President's direct involvement, rather than the impeachability of tax fraud as a crime.²²⁰ Once his impeachment and removal appeared inevitable, President Nixon resigned from office before the full House of Representatives had an opportunity to debate or act on the Judiciary Committee's recommendations.²²¹

In 1998, the House of Representatives began deliberations on the impeachment of President Clinton following a lengthy investigation and report by Independent Counsel, Kenneth Starr.²²² The impeachment proceedings arose out of alleged misrepresentations made by President Clinton regarding a sexual relationship with a White House intern.²²³ The House Judiciary Committee, voting mostly along partisan lines, recommended impeachment on four articles: (1) perjury before a grand jury, (2) perjury during a deposition in a private civil rights lawsuit, (3) obstruction of justice by attempting to influence witnesses in a private civil rights case, and (4) misusing the office of the Presidency by making false or misleading statements to Congress.²²⁴ The House of Representatives voted to impeach on the

²¹⁶ *Id.* at 2, art. I, § 5.

²¹⁷ *Id.* at 3, art. II.

²¹⁸ *Id.* at 4, art. III.

²¹⁹ *Id.* at 38–39.

²²⁰ *Id.* at 45 (roll call vote). For example, one Congressman who voted for impeachment on the Watergate-related articles, voted against the tax fraud Article because “[t]he evidence before the Congress demonstrates that the President engaged in unethical, shabby and disgraceful conduct by grossly underpaying his income taxes while in office. There is, however, no clear and convincing evidence . . . of fraud by the President himself.” *Id.* at 39 (additional views of Wayne Owens).

²²¹ Edwin Brown Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1094 (1974).

²²² See H.R. DOC. NO. 105-310 (1998).

²²³ See *id.* at 131–50.

²²⁴ H.R. REP. NO. 105-830, at 1–5 (1998).

first (228–206) and third (221–212) articles.²²⁵ After a trial with Chief Justice Rehnquist presiding, the Senate acquitted on the perjury article with forty-five votes for conviction and fifty-five votes against.²²⁶ The obstruction of justice vote was equally divided with fifty for conviction and fifty against—seventeen votes short of the required two-thirds majority.²²⁷ President Clinton’s impeachment is the only impeachment in history arising out of efforts to conceal marital infidelity.²²⁸

The alleged fraud and racketeering in the Trump University cases bear an imperfect, but plausible, comparison to the abuse of power and betrayal of public trust that have motivated some of the federal impeachments and removal proceedings of the past. At the level of presidential impeachments, the Trump University fraud and racketeering did not pose a threat to the constitutional order like President Johnson’s willful disregard of the (constitutionally dubious) Tenure of Office Act. On the other hand, unlike the Johnson impeachment, President Trump’s alleged offenses are clearly indictable crimes that would ordinarily be understood to be within the plain meaning of the phrase “high crimes.”

Unlike President Nixon’s involvement in the Watergate Democratic National Committee break in, President Trump’s alleged fraud and racketeering were not crimes committed against the machinery of government. However, President Trump’s alleged crimes did have strains of deceit comparable to President Nixon’s cover up of the Watergate scandal.²²⁹ For example, just as President Nixon went on

²²⁵ Final Vote Results for Roll Call, 543 H.R. Res. 611, 105th Cong. (1998), <http://clerk.house.gov/evs/1998/roll543.xml#Y>; Final Vote Results for Roll Call 545, H.R. Res. 611, 105th Cong. (1998), <http://clerk.house.gov/evs/1998/roll545.xml>; see also Peter Baker & Juliet Eilperin, *Clinton Impeached: House Approves Articles Alleging Perjury, Obstruction*, WASH. POST, Dec. 20, 1998, at A1.

²²⁶ S. DOC. NO. 106-4 (1999); Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST, Feb. 13, 1999, at A1.

²²⁷ Baker & Dewar, *supra* note 226.

²²⁸ JARED P. COLE & TODD GARVEY, CONG. RESEARCH SERV., R44260, IMPEACHMENT AND REMOVAL 12–13 (2015) (listing impeachments for actions incompatible with the function and purpose of office). In 2009 the House impeached Judge Sameul B. Kent from the Southern District of Texas for allegedly sexually assaulting two court employees and later obstructing justice and lying to FBI agents to conceal the assaults. H.R. REP. NO. 111-159, at 2–3, 22–24 (2009).

²²⁹ See H.R. REP. NO. 93-1305, *supra* note 214, at 1–2 art. I, § 8 (recommending impeachment of President Nixon for “making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President . . .”).

national television to tell the country that he was “not a crook,” in a televised presidential debate President Trump attempted to deceive the public about the D- rating his “university” received from the BBB.²³⁰ Although President Trump did not abuse the office of the Presidency in connection with Trump University, reasonable members of Congress could conclude that he did abuse his position of trust as the founder of his allegedly fraudulent real estate seminars. Congress could conclude that this abuse of power and breach of trust is indicative of President Trump’s likely future behavior. It is meaningful that in two of the three instances of serious presidential impeachment deliberations by Congress, deception was an essential feature of the alleged offenses.²³¹ The Trump University cases were at their core cases of deception by President Trump for his personal gain. While these deceptions occurred prior to his time in office—a point discussed in the next section—the fact remains that Congress could conclude that these deceptions reflect a comparable lack of integrity and moral character to that demonstrated in President Nixon’s impeachment proceedings.

President Trump’s alleged fraud and racketeering also have some similarities to President Clinton’s impeachment. Both President Clinton and President Trump’s deceptions were arguably indictable crimes—perjury in the case of Clinton and fraud and racketeering in the case of President Trump. Moreover, both of the alleged crimes had a relatively oblique connection to the constitutional order. Arguably, President Clinton’s alleged grand jury perjury was an offense against the state because his lie was made in a judicial proceeding under oath. But, President Trump’s alleged lies were more publicly facing in that they were part of a national marketing campaign of speculative deceit against consumers—rather than to conceal a personal, sexual indiscretion.

The publically facing nature of President Trump’s alleged fraud and racketeering, combined with the fact that the Constitution does not explicitly require (and indeed was expressly edited not to require) a crime against the government, suggests that President Trump’s alleged crimes are at least as plausible a basis for a high crime or misdemeanor as was President Clinton’s perjury. In at least one respect, the case for President Trump’s impeachment is stronger than all three prior presidential impeachment proceedings. In none of the three prior

²³⁰ See BETTER BUS. BUREAU, *supra* note 57.

²³¹ See H.R. REP. NO. 93-1305, *supra* note 214, at 2; H.R. REP. NO. 105-830, at 1–5 (1998).

presidential impeachment proceedings had a federal judge *already* ruled that evidence would justify a reasonable trier of fact in concluding that the President committed each legal element required to show a grave, indictable crime of deceit.

Past judicial impeachments also offer some basis of comparison to President Trump's alleged fraud and racketeering. Like the president and the vice president, "civil officers"—including federal judges—are subject to the Article II clause providing for impeachment and removal for "other high Crimes and Misdemeanors."²³² However, under Article III, judges also serve life terms "during good Behaviour."²³³ Some commentators have argued that by reading these provisions together, the Constitution provides a lower standard for impeachment and removal for judges than for the president, vice president, or other nonjudicial, civil officers.²³⁴ Even still, examining impeachment and removal precedent necessitates looking at judicial impeachment because of the eight convictions in the history of the republic, all were judges. Table 1 lists these judges, the year of their convictions, and briefly summarizes the nature of their offenses.

²³² U.S. CONST. art. II, § 4.

²³³ *Id.* art. III, § 1.

²³⁴ See Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1529 (1970) ("[S]ince impeachable offenses, i.e., 'high crimes and misdemeanors,' are not identical with all breaches of 'good behavior' but merely overlap in the case of 'great offenses,' there exists an implied power to remove judges whose 'misbehavior' falls short of 'high crimes and misdemeanors.'"). On the other hand, *Federalist No. 64* appears to apply the phrase "good behavior" directly to the presidential impeachments suggesting that some framers may have viewed the judicial and presidential standards as comparable. THE FEDERALIST NO. 64 (John Jay) ("[T]hat motive to good behavior is amply afforded by the article on the subject of impeachments.").

Table 1. Impeached and Convicted United States Officials, 1787-2016

Year	Individual	Office	Summary of Offenses
1804	John Pickering	Judge (D. N.H.)	Intentional evasion and disregard of property law in adjudication; Intoxication and blasphemy on the bench.
1862	West H. Humphreys	Judge (W.D. Tenn.)	Incitement of rebellion against the U.S.; Refusal to hold court; Waging war against the U.S. Government; Ordering unlawful arrests.
1913	Robert W. Archbald	Judge (3d Cir.)	Corruptly took advantage of his position in order to profit for himself; Bribery.
1936	Halsted L. Ritter	Judge, (S.D. Fla.)	Receiving kickbacks; Practicing law as a sitting judge; Tax evasion; Bringing his court into scandal and disrepute.
1986	Harry E. Claiborne	Judge (D. Nev.)	Tax evasion.
1989	Alcee L. Hastings	Judge (S.D. Fla.)	Conspiracy to solicit a bribe; Perjury.
1989	Walter L. Nixon	Judge (S.D. Miss.)	Perjury before a federal grand jury.
2010	G. Thomas Porteous, Jr.	Judge (E.D. La.)	Accepting bribes; Perjury.

Source: U.S. House of Representatives, Office of the Historian, List of Individuals Impeached by the House of Representatives (2016), <http://history.house.gov/Institution/Impeachment/Impeachment-List/>.

While a detailed analysis of each judicial impeachment and conviction is beyond the scope of this Article, it is worth noting that Congress has impeached and removed judges for dishonesty—including deceptions of a personal financial nature. For example, in 1912, the House impeached and the Senate convicted Judge Robert W. Archbald, from the Third Circuit, for bribery and hearing cases where he had a financial conflict of interest.²³⁵ In 1936, the House of Representatives voted to impeach Judge Halstead L. Ritter for, among

²³⁵ H. COMM. ON THE JUDICIARY, 93D CONG., IMPEACHMENT: SELECTED MATERIALS, 176–83 (Comm. Print 1973).

other allegations, tax fraud.²³⁶ A majority of the Senate voted to remove Judge Ritter on a tax evasion article, but the vote fell just short of the required two-thirds threshold.²³⁷ Instead, over two-thirds of the Senate voted to remove Judge Ritter on the grounds that his actions brought his court “into scandal and disrepute.”²³⁸ In 1986, the House impeached and the Senate removed Judge Harry Claiborne on articles that related exclusively to tax fraud.²³⁹ And most recently, in 2010, the House impeached and the Senate convicted, Judge Porteous on articles relating to his receipt of cash and favors from lawyers appearing in his court, using a false name to elude creditors, and intentionally misleading the Senate during his confirmation.²⁴⁰

Indeed, in six of the eight successful impeachment convictions—seventy-five percent of all convictions upon impeachments in the history of the republic—some form of deceptive conduct was included within the articles of impeachment. And yet, one might argue that never in the history of the republic has there been an impeachment trial concerning a pattern of deception so widespread and sustained as President Trump’s involvement with Trump University.

At the most basic level, the dollar amounts at issue in the alleged Trump University fraud and racketeering claims dwarf the sums involved in every prior impeachment and removal involving financial deception. Arguably, the Trump University cases displayed a more troubling level of cupidity than past convictions. For example, Judge Ritter and Judge Claiborne’s tax frauds victimized the general public by failing to pay their fair share and leaving others to fund the general federal revenue without them. In contrast, Trump University left many vulnerable families and seniors bankrupt by directly and intentionally taking every liquid asset they had.

By believing in President Trump’s allegedly false promises, these students invested their life savings, maxed out their credit cards, and cashed in their retirement savings in the hope of learning President Trump’s real estate secrets from his handpicked mentors. Congress could conclude that President Trump’s alleged fraud was more

²³⁶ H.R. Res. 440, 74th Cong. (1936); *see also* S. DOC. NO. 74-200, at 627–39 (1936).

²³⁷ 80 CONG. REC. 5602–08 (1936); *see also* S. Doc. No. 74-200, at 636 (1936).

²³⁸ 80 CONG. REC. 5606 (1936).

²³⁹ 132 CONG. REC. 17,295–306 (1986) (impeachment articles alleging “Claiborne willfully and knowingly filed a federal income tax return for the year 1979 that failed to report a substantial amount of income”).

²⁴⁰ H.R. REP. NO. 111-427, at 2–5 (2010); Jennifer Steinhauer, *Senate, for Just the 8th Time, Votes to Oust a Federal Judge*, N.Y. TIMES, Dec. 9, 2010, at A27.

mendacious than Judge Ritter or Judge Claiborne's income tax evasion. Although there are important distinctions between judicial impeachment and presidential impeachment, if the financially-related deceptions of previously impeached and convicted judges rise to the level of high crimes or misdemeanors, then Congress could reasonably conclude that President Trump's alleged fraud and racketeering do as well.

B. Settlement of the Trump University Civil Litigation Does Not Preclude Impeachment

As a constitutional matter, it is of no consequence that the Trump University cases arose in civil litigation rather than criminal proceedings. Many crimes have a parallel civil claim that allows victims to seek compensation. Fraud and racketeering are, in this respect, ordinary. With respect to racketeering, Congress explained that it intended to provide for both criminal and civil sanctions because it wanted to provide "equitable relief broad enough to do all that is necessary to free the channels of commerce from illicit activity."²⁴¹ The primary distinction between civil and criminal cases alleging fraud or racketeering is the standard of proof required. In a civil case alleging fraud or racketeering, the plaintiff must prove each element by a preponderance of the evidence.²⁴² In a criminal case, the state must prove each element beyond a reasonable doubt.²⁴³ But in both types of cases, the underlying legal elements are the same.

Moreover, the fact that President Trump has offered to settle with the plaintiffs in the Trump University cases, if anything, strengthens the legal case for impeachment. After the election, but prior to his inauguration, then-President-elect Trump reached a joint settlement agreement with both the attorneys in the class action cases and the New

²⁴¹ S. REP. NO. 91-617, at 79 (1969); see also G. Robert Blakey, *The Rico Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 348-49 (1982) (arguing Congress intended an expansive reading of RICO in cases of fraud).

²⁴² See *supra* note 90 and accompanying text.

²⁴³ Although the Constitution is silent on this point, Congress has debated at length over what standard of proof is applicable to impeachment and removal proceedings. See generally THOMAS B. RIPPY, CONG. RESEARCH SERV., 98-990A, STANDARDS OF PROOF IN SENATE IMPEACHMENT PROCEEDINGS, *passim* (1999) (summarizing congressional debates over impeachment standards of proof). Charles Black explained this point: "Senators have no plainly authoritative guide in this matter, and ought not to be censured for the rule they conscientiously choose to act upon, after thought and counsel, and above all in total awareness of the dangers of partisanship or feelings of distaste." BLACK, *supra* note 150, at 17-18.

York Attorney General. Under the terms of the settlement, President Trump agreed to pay \$25 million—\$21 million going to settle the class action cases and \$4 million to settle New York’s case.²⁴⁴ Although Judge Curiel confirmed the settlement agreement, one student objected to the proposed settlement and appealed to the Ninth Circuit demanding the right to proceed to trial individually.²⁴⁵ The legal issue for members of Congress contemplating impeachment and removal would be whether President Trump engaged in acts that constitute impeachment-worthy high crimes or misdemeanors. If so, the settlement agreements of neither a state government nor private citizens have the legal power to extinguish Congress’s constitutional-impeachment rights. After all, the Constitution does not provide for impeachment “except in cases of settlement” or “unless the attorneys general of the states provide otherwise.”²⁴⁶

On the contrary, the House of Representatives has the “sole” power of impeachment and the Senate has the “sole” power to try such impeachments.²⁴⁷ Of course Congress might consider the terms of settlement in deciding whether impeachment is appropriate, but Congress is not required to do so and in any event. The Trump University settlement is hardly exculpatory. President Trump agreed to the settlement *after* American voters were forced to cast their ballots. At the time of the election, voters did not know that the President would ultimately agree to pay a million dollar fine to the state of New York to settle the state’s fraud and consumer protection claims.²⁴⁸ Moreover, while President Trump did not admit to wrongdoing, agreeing to pay \$25 million to avoid a jury trial is far more indicative of guilt than innocence. To this end, President Trump’s settlement of fraud and

²⁴⁴ Order Granting Joint Motion for Preliminary Approval of Class Action Settlement at *4–5, *Low v. Trump Univ., LLC*, No. 3:10-cv-00940-GPC-WVG (S.D. Cal. Dec. 20, 2016), ECF No. 583.

²⁴⁵ See generally Objector-Appellant’s Opening Brief, *Low v. Trump University, LLC*, No. 17-55635 (9th Cir. June 12, 2017), <http://guptawessler.com/wp-content/uploads/2012/05/Trump-University-6.12-final.pdf>; see also Sherri B. Simpson, *Donald Trump Took \$19,000 of my Money. And I Want Him to Pay*, VOX (May 30, 2017, 8:00 AM), <https://www.vox.com/first-person/2017/5/30/15693016/trump-university-settlement-law-suit> (first person column by objector-appellant explaining rationale for objecting to Trump’s settlement offer).

²⁴⁶ U.S. CONST. art. I, §§ 2–3.

²⁴⁷ *Id.*

²⁴⁸ Steve Eder, *Trump Settles University Suit for \$25 Million*, N.Y. TIMES, Nov. 19, 2016, at A1 (President Trump’s contingent agreement to settle the Trump University cases occurred ten days after the presidential election.).

racketeering allegations associated with Trump University could enhance the legal sufficiency of impeachment proceedings.²⁴⁹

While President Trump was not indicted, impeachment proceedings have never required prior criminal conviction. Neither President Johnson nor President Clinton were convicted of crimes prior to their impeachment. And of the eight impeached and convicted federal judges, only one—Judge Claiborne—had a criminal conviction prior to his removal.²⁵⁰ Indeed, the Constitution explicitly separates impeachment from criminal prosecution.²⁵¹ The breadth of the phrase “other high crimes and misdemeanors,” combined with the nonjusticiability of impeachment, inevitably leaves much to the wisdom and judgment of the House of Representatives and the Senate.²⁵² Despite historical debate over what its meaning should be as a matter of law, it is clear that Congress would be well within its prerogative to impeach and remove a president for grave felonies of deception, such as fraud or racketeering. Congress has a constitutional right to insist upon a president who is not a fraudster or a racketeer as defined in its own laws.

*C. Under the U.S. Constitution, Impeachment Is Permissible for
Preincumbency Offenses*

The plain language of the U.S. Constitution does not limit impeachable offenses to actions that take place while the official is in office. As Justice Scalia once explained, “[t]he words of a governing text are of paramount concern, and what they convey, in their context,

²⁴⁹ It is worth noting that absent his settlement agreements, the civil lawsuits against Trump would have continued to proceed after he assumed office. *See Clinton v. Jones*, 520 U.S. 681, 708–10 (1997) (holding the Constitution does not afford the President temporary immunity from cases seeking civil damages in litigation arising out of events that occurred before he took office).

²⁵⁰ H.R. REP. NO. 99-688, at 22 (1986).

²⁵¹ U.S. CONST. art. I, § 3 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”). This separation of impeachment from other judicial proceedings arose from an awareness of the long and bloody history of political tides in England. The Framers wanted criminal prosecution separate from the political act of removal from office through impeachment so “political passions no longer could sweep an accused to his death.” BERGER, *supra* note 148, at 55.

²⁵² *Nixon v. United States*, 506 U.S. 224, 237–38 (1993).

is what the text means.”²⁵³ Similarly, the Supreme Court has long held that “[t]he framers of the [C]onstitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text.”²⁵⁴ And more particularly, “[i]f the framers were minded to shield misconduct outside of office, they knew well enough how to limit undesirable facets of ‘high crimes and misdemeanors.’”²⁵⁵ For example, the framers could have used the phrase “corrupt, oppressive and other grave misconduct in office” instead of the particular phrase they chose.²⁵⁶ At the most simple level, the Constitution says that Congress may impeach and remove a president for “high crimes and misdemeanors,” not “high crimes and misdemeanors occurring in office.”

This plain reading of the Constitution also reflects the framers’ rejection of George Mason’s proposal to permit impeachment for “maladministration”—an act that by its nature must occur while the official is in office.²⁵⁷ On this point, Madison argued that allowing impeachment for “so vague a term” as maladministration within office would place the tenure of the president at the “pleasure of the Senate.”²⁵⁸ Instead, the framers selected the still flexible, but more concrete, reference to “high crimes.”²⁵⁹ Moreover, George Mason himself also explicitly argued for the permissibility of impeachment during office for at least some forms of conduct that occurred prior to incumbency.²⁶⁰ At one point in the debate, Mason explained that impeachment for preincumbency offenses was necessary if dishonesty or corruption facilitated the President’s election. Otherwise, “the man who has practiced [sic] corruption & by that means procured his appointment in the first instance [would] be suffered to escape punishment, by repeating his guilt.”²⁶¹ Although Mason was speaking

²⁵³ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012).

²⁵⁴ *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

²⁵⁵ BERGER, *supra* note 148, at 197.

²⁵⁶ *Id.* (internal quotation omitted).

²⁵⁷ FEDERAL CONVENTION, *supra* note 161, at 550; BERGER, *supra* note 148, at 78–79; Impeachment Inquiry Staff, Committee on the Judiciary of the U.S. House of Representatives, *Constitutional Grounds for Presidential Impeachment*, in *PRESIDENTIAL IMPEACHMENT: A DOCUMENTARY OVERVIEW* 1, 11–12 (M.B. Schnapper ed., 1974).

²⁵⁸ FEDERAL CONVENTION, *supra* note 161, at 550.

²⁵⁹ U.S. CONST. art. II, § 4.

²⁶⁰ FEDERAL CONVENTION, *supra* note 161, at 65.

²⁶¹ *Id.* Gouverneur Morris also spoke in favor of permitting impeachment for a president’s preincumbent act of “[c]orrupting his electors.” *Id.* at 69.

of impeachment for preincumbency corruption connected to the President's election, the point remains that in his view there was to be no jurisdictional bar to impeachment for offenses that occurred prior to inauguration.

The U.S. Constitution's impeachment provisions are distinguishable in this respect from impeachment provisions in many states. For example, the Virginia Constitution allows impeachment for "offending against the Commonwealth by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor."²⁶² A plain reading of the Virginia Constitution suggests that any impeachable offense must be "against the commonwealth," but only impeachment for malfeasance requires an offense while "in office."

In contrast, under the California Constitution, state officers and judges "are subject to impeachment for misconduct *in office*."²⁶³ Similarly, in Nebraska, "[a] civil officer . . . shall be liable to impeachment for any misdemeanor *in office*."²⁶⁴ Nebraska courts have explained that preincumbency conduct is relevant and admissible in impeachment proceedings "to the extent it bears upon the officer's pattern of conduct and shows the officer's motives and intent as they relate to the officer's conduct while in office."²⁶⁵ Thus, California and Nebraska have adopted looser impeachment standards in the sense that they allow impeachment either for any misconduct in California or for any misdemeanor in Nebraska—instead of only for *high* crimes and misdemeanors. But, a plain reading shows that all three of these states are more strict than the Federal Constitution with respect to the time in which the misconduct must have occurred.

While rare, state constitutional impeachment provisions have occasionally led to impeachment articles for preincumbency conduct. Perhaps the most notable instance of state-government impeachment for preincumbency conduct was the impeachment and conviction of New York Governor William Sulzer who ran into political trouble when he crossed Tammany Hall political bosses in the early twentieth century.²⁶⁶ Notably, the Sulzer articles of impeachment included allegations of filing false statements of campaign receipts and

²⁶² VA. CONST. art. IV, § 17.

²⁶³ CAL. CONST. art. IV, § 18(b) (emphasis added).

²⁶⁴ NEB. CONST. art. IV, § 5 (emphasis added).

²⁶⁵ Nebraska Legislature *ex rel.* State v. Hergert, 720 N.W.2d 372, 391–92 (Neb. 2006).

²⁶⁶ Mathew Lifflander, *The Only New York Governor Ever Impeached*, N.Y. ST. B.J., June 2013, at 10, 13.

expenditures *prior* to taking office.²⁶⁷ A month-long impeachment trial before the state Senate ultimately led to conviction of Governor Sulzer on three articles—two of which concerned preincumbency conduct.²⁶⁸

More recently, in 2013, the Utah Legislature passed a resolution creating a special committee to investigate allegations against a sitting Utah Attorney General for preincumbency offenses that occurred while he was an unelected deputy attorney general.²⁶⁹ The Utah Constitution allows impeachment “for high crimes, misdemeanors, or malfeasance in office.”²⁷⁰ Presumably, the Utah legislature took the view that the words “in office” modified only malfeasance, otherwise an impeachment inquiry for preincumbency high crimes or misdemeanors would have been pointless. Ultimately the state Attorney General resigned before impeachment proceedings could remove him.²⁷¹

At the federal level, preincumbency offenses have played a part in the House of Representative’s impeachment deliberations for three vice presidents: John C. Calhoun, Schuyler Colfax, and Spiro Agnew. In 1826, Vice President John C. Calhoun fell under suspicion of corruption in awarding war contracts during his prior service as Secretary of War. Although the alleged criminal activity predated his time as vice president, Calhoun himself requested that the House of Representatives consider impeachment in hopes of exoneration and the restoration of his reputation.²⁷²

Acting on the request, the House of Representatives appointed a Select Committee to investigate the allegations.²⁷³ After issuing subpoenas and holding hearings, the Select Committee recommended against impeachment and the House declined to pursue the matter further.²⁷⁴ Nevertheless, the formation of a Select Committee, for the purpose of considering potential articles of impeachment, gives some

²⁶⁷ 1 *Proceedings of the Court for the Trial of Impeachments: The People of the State of New York By the Assembly Thereof Against William Sulzer, as Governor* (N.Y. 1913) [hereinafter *Trial of William Sulzer*]; John R. Dunne, *Impeachment as a Political Weapon: The Case of Governor Sulzer*, 6 JUD. NOTICE 31, 33 (2009).

²⁶⁸ *Trial of William Sulzer*, *supra* note 267, at 1686, 1698, 1767–71 (recording guilty votes for Articles 1 and 2 relating to improper campaign expenditures and false affidavit).

²⁶⁹ H.R. Res. 9001, 60th Leg., 1st H. Sess. (Utah 2013) (forming special investigative committee).

²⁷⁰ UTAH CONST. art. VI, § 19.

²⁷¹ Robert Gehrke, *Swallow Resigns, Proclaiming Innocence: ‘Time for the Madness to Stop,’* SALT LAKE TRIB. (Nov. 22, 2013, 12:13 PM), <http://archive.sltrib.com/story.php?ref=/sltrib/home3/57163170-200/swallow-attorney-office-general.html.csp>.

²⁷² HINDS, *supra* note 148, at 97–99.

²⁷³ *Id.* at 98.

²⁷⁴ COLE & GARVEY, *supra* note 228, at 16 n.137.

measure of precedent favoring the notion that impeachment for preincumbency conduct is permissible. If Vice President Calhoun was not subject to possible impeachment for preincumbency war profiteering, then no purpose would have been served by impaneling a Select Committee to investigate the allegations of corruption.

A few decades later, the House Judiciary Committee took the position that impeachment was not appropriate for preincumbency conduct with respect to Vice President Schuyler Colfax. Prior to assuming the vice presidency alongside President Ulysses Grant, Schuyler Colfax served as Speaker of the House.²⁷⁵ Accusations were raised that Colfax had accepted stocks in exchange for taking political positions, favorable to the Union Pacific Railroad, during the construction of the transcontinental railroad.²⁷⁶ Like Vice President Calhoun, Vice President Colfax himself requested that the House consider whether impeachment or some further investigation was necessary.²⁷⁷ After a review of the limited American precedent, the House Judiciary Committee concluded that impeachment

should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect upon him as a man, for impeachment touches the office only, and qualifications for the office, and not the man himself.²⁷⁸

However, as is often the case in bribery accusations, there were significant factual questions about whether Vice President Colfax had truly accepted a bribe in exchange for political acts.²⁷⁹

It is possible that the House Judiciary committee merely used the preincumbency nature of the alleged offense as a method for sidestepping uncomfortable allegations against a former colleague of the same political party in a Congress still weary from the Johnson impeachment. Moreover, because Colfax had only a few months remaining in his term, Congress had little incentive to carefully consider impeachment. In any event, neither the House of Representatives as a whole, nor the Senate, had an opportunity to vote on articles of impeachment against Vice President Colfax.

²⁷⁵ See generally O.J. HOLLISTER, LIFE OF SCHUYLER COLFAX (1886).

²⁷⁶ William MacDonald, *Schuyler Colfax*, in 4 DICTIONARY OF AMERICAN BIOGRAPHY 297, 298 (Allen Johnson & Dumas Malone eds., 1930).

²⁷⁷ COLE & GARVEY, *supra* note 228, at 16 n.137.

²⁷⁸ CONG. GLOBE, 42d Cong., 3d Sess. 1652 (1873).

²⁷⁹ HOLLISTER, *supra* note 275, at 417.

On the other hand, the 1973 resignation of Vice President Spiro Agnew lends some support to the viability of impeachment for preincumbency offenses. Prior to serving as Richard Nixon's vice president, Spiro Agnew served as governor of Maryland and as Baltimore County Executive. A federal probe into Maryland construction contract corruption uncovered several businessmen who confessed to making cash payments to Agnew while he worked for Baltimore County, as Governor of Maryland, and as Vice President.²⁸⁰ As news of the alleged bribes leaked to the press, President Nixon pressured Vice President Agnew to resign because Nixon—who was facing the growing threat of the Watergate scandal—believed “if a vice president were to be impeached, it might then seem all the easier to impeach a president.”²⁸¹

Vice President Agnew struck a plea bargain in which he agreed to resign and offer a *nolo contendere* plea to one count of tax evasion in exchange for the Justice Department's recommendation against prison time.²⁸² Agnew's resignation, sentence to three years of probation, and \$10,000 fine forestalled impeachment proceedings.²⁸³ Nevertheless, the fact that Agnew resigned the vice presidency under threat of impeachment for offenses that occurred primarily, but not exclusively, prior to his term in federal office suggests that his advisors believed that the threat of impeachment and conviction were credible.

Two federal judicial impeachments also provide support for the view that preincumbency offenses can provide a basis for impeachment and removal. First, in 1913, the House impeached, and the Senate convicted, Third Circuit Court of Appeals Judge Robert Archbald for offenses relating to bribery and corruption in office.²⁸⁴ However, some of the illegal actions occurred before his appointment to the Third Circuit, while he was still serving as a federal district court judge.²⁸⁵ Counsel for Judge Archbald argued that impeachment should not be permissible for any acts committed prior to the official's current office lest the “far-reaching” and “absurd” result that presidents could be

²⁸⁰ KYVIG, *supra* note 200, at 129–30.

²⁸¹ JULES WITCOVER, *VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON AND SPIRO AGNEW* 314 (2007). Notably, like Calhoun and Colfax, Vice President Agnew formally requested an impeachment investigation by the House of Representatives believing that this might provide a viable political route to preventing a grand jury indictment. *Id.* at 330.

²⁸² KYVIG, *supra* note 200, at 139.

²⁸³ *Id.*

²⁸⁴ *Individuals Impeached*, *supra* note 197.

²⁸⁵ COLE & GARVEY, *supra* note 228, at 15.

impeached and removed for offenses in their distant past.²⁸⁶ Responding to this point, the managers of Judge Archbald's Senate trial argued:

This right to inquire into the conduct of public officials has been reserved to the people themselves, and this great Senate is the tribunal in which such questions must be tried, and necessarily and properly the powers of this court are broad, strong, and elastic so that all misconduct may be investigated and the public service purified. The fathers of the Constitution realized the importance of reserving unto the people the right to remove an unworthy or unsatisfactory official, and they were indeed wise in not attempting to define or limit the powers of the court of impeachment, but left that power so plenary that no misconduct on the part of a public official might escape its just punishment.²⁸⁷

The managers also relied on several early state impeachments for offenses that occurred during prior offices.²⁸⁸ Ultimately, the Senate convicted Judge Archbald on multiple articles, including one article relating in part to conduct that occurred during his prior judgeship.²⁸⁹

Second, the House impeached, and the Senate convicted, Judge Thomas Porteous in 2010 in part for offenses that occurred before he held any federal office.²⁹⁰ Two impeachment articles against Judge Porteous involved offenses committed both while he was a federal judge and prior to his appointment when he was serving as a state court judge.²⁹¹ An additional article of impeachment, focusing on misrepresentations Judge Porteous made to the Senate during his confirmation process, occurred entirely before his term in office.

Relying on Professor Michael Gerhardt, the House Judiciary Committee impeachment report made a plain, textual argument to justify impeachment of Judge Porteous on the basis of preincumbency conduct: "the Constitution describes certain types of conduct for which

²⁸⁶ 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 458, at 642 (1935).

²⁸⁷ *Id.* at 639 (internal quotations omitted).

²⁸⁸ *See id.* (noting New York's impeachment of Justice George Gardner Butler Barnard, Wisconsin's impeachment of Judge Levi Hubbell, and Nebraska's impeachment of Governor David Butler). *See also* 1 ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL, WITH OBSERVATIONS UPON THE ORDINARY PROVISIONS OF STATE CONSTITUTIONS AND A COMPARISON WITH THE CONSTITUTIONS OF OTHER COUNTRIES § 92, at 579 (1895) ("State senates have sustained articles of impeachment for offenses committed at previous and immediately preceding terms of the same or similar office.").

²⁸⁹ COLE & GARVEY, *supra* note 228, at 15.

²⁹⁰ *Individuals Impeached*, *supra* note 197.

²⁹¹ H.R. REP. NO. 111-427, at 2-5 (2010).

impeachment is warranted (“Treason, Bribery, or other high Crimes and Misdemeanors”), “it does not say *when* the misconduct must have been committed.”²⁹² Taking the example of a preincumbency murder, the impeachment report explained, that “[t]he timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.”²⁹³ After considerable debate, the Senate convicted Judge Porteous on all articles—including the *exclusively* preincumbency conduct article relating to deception of the Senate during his confirmation.²⁹⁴

Arguably, Judge Porteous’ conduct is distinguishable from President Trump’s alleged fraud and racketeering in two respects. First, at the time of these preincumbency offenses, he was serving as a state judge, which is nonetheless a form of public office. Second, the entirely preincumbency impeachment article against him had a nexus with a federal office in that his deceptions were made in the confirmation process itself. However, with respect to the former, it is not clear what textual or policy support would justify ignoring preincumbency treason, bribery or other high crimes or misdemeanors simply because the officer previously worked as a businessman rather than a public servant. These offenses are wrong for everyone—not just government officials. The text of our Constitution does not absurdly provide impeachment for “high crimes and misdemeanors *except in cases of business or profit*.”²⁹⁵

More important than when the offense occurred is whether the offense is so sufficiently grave that it imperils the legitimacy and effectiveness of the office holder. The same can be said with respect to the latter argument. Surely, a fraud against the Senate’s confirmation process suggests untrustworthiness, but are frauds upon widows or orphans somehow better than those upon senators? It is certainly true that precedent favoring impeachment for preincumbency conduct is rare. But, this may have more to do with the reluctance of the public to elect, or the president to nominate, those under suspicion of high crimes or misdemeanors than it has to do with any legal hurdle to conviction. In more typical election years, the public can generally be relied upon to vote against fraudsters and racketeers.

²⁹² *Id.* at 19 (emphasis added) (citing written statement of Prof. Michael J. Gerhardt).

²⁹³ *Id.*

²⁹⁴ COLE & GARVEY, *supra* note 228, at 15.

²⁹⁵ *Cf.* U.S. CONST. art. II, § 4.

But this hints at what is likely the strongest argument against the legality of the impeachment of President Trump for fraud and racketeering in connection with Trump University. Namely, that the election would, in effect, serve as a referendum on whether impeachment is appropriate. A related argument might be that impeachment for preincumbency conduct would allow the House of Representatives to supplant the electoral college even where there was no electoral tie. These arguments are compelling because of the tremendous importance of the single, national election of a president in the political and cultural life of the republic. No Congress has ever impeached and removed a president from office. To do so following an election would be an extraordinary and unprecedented step with momentous implications for the nation.

Nevertheless, there are at least five arguments why the election would not, as a matter of law, preclude President Trump's impeachment and removal. First, the plain language of the Constitution reserves the rights of impeachment to the House and removal to the Senate.²⁹⁶ These rights, like many others, are not provided to the public in our representative form of government. If the country elects a president that has committed bribery, treason, or other high crimes or misdemeanors, then it risks that the efficacy of their votes may be impeded through impeachment and removal by its own elected representatives. We can expect this to be as rare in the future as it has been in the past because the public will still generally vote against candidates with a track record of impeachable offenses. After all, we have no reason to believe that impeachment and removal of one president will somehow embolden the public to vote more often for candidates under suspicion of high crimes. And, if representatives and senators were to concoct false or unpersuasive charges, they themselves would be subject to ouster in their next elections for having flouted the public will. Although Congress' legal power of preincumbency impeachment is *recondite*, it nonetheless remains: the U.S. House and Senate may impeach and remove a president that has committed bribery, treason, or other high crimes or misdemeanors—an election notwithstanding.

Second, unlike the House of Representatives' sole role in resolving electoral college ties, impeachment and removal requires action by both the House and the Senate. By contrast, the Senate has no role in electoral college ties. This suggests that impeachment is simply a

²⁹⁶ U.S. CONST. art. I, §§ 2–3.

separate and unrelated proceeding, not connected to the House's electoral tiebreaker role. The Constitution does not appear to have a mechanism that limits impeachment proceedings other than the elusive, yet high, substantive standard of treason, bribery, or other high crimes and misdemeanors. Thus, the Constitution's impeachment and removal procedures are distinct from *and coequal to* the Constitution's electoral procedures.

Third, President Trump's public misrepresentation of the facts and circumstances surrounding his alleged fraud and racketeering should weigh in the calculus over whether impeachment for preincumbency crimes is appropriate. Just as President Trump appears to have lied to Trump University students, throughout the election he also misrepresented the Trump University cases. Specifically, in a widely viewed presidential debate, President Trump falsely claimed that Trump University had an A rating from the BBB.²⁹⁷ In fact, the wealth seminars had a D- rating during the relevant time period.²⁹⁸ Every nonpartisan fact checking organization that explored the issue, as well as the BBB itself, concluded that President Trump misrepresented the BBB rating in the debate.²⁹⁹

Moreover, during the election campaign, President Trump falsely claimed that the New York Attorney General's case was politically motivated.³⁰⁰ In fact, not only did the state of New York file the case long before the 2016 presidential campaign began, but the state of New York's Trump University case developed out of the bright-line licensing statute violations that had been raised by New York authorities nearly five years prior to the lawsuit.

Most notably, when President Trump suffered setbacks in the private class action cases, he publicly criticized a widely respected judge,

²⁹⁷ See, e.g., Eugene Kiely, *Trump University's D- Rating*, FACTCHECK.ORG (Mar. 8, 2016), <http://www.factcheck.org/2016/03/trump-universitys-d-rating/> (“[W]hat Trump literally holds out as evidence is meaningless and misleading.”); Jon Greenberg, *Fact-checking Donald Trump's claims about Trump University*, POLITIFACT (Feb. 28, 2106, 6:42 PM), <http://www.politifact.com/truth-o-meter/statements/2016/feb/28/donald-trump/fact-checking-donald-trumps-claims-about-trump-uni/> (“Trump's claim is literally wrong and also ignores the university's lower Better Business Bureau scores. We rate it False.”).

²⁹⁸ Greenberg, *supra* note 297.

²⁹⁹ *Id.*; Kiely, *supra* note 297.

³⁰⁰ Eliza Collins, *A Complicated History: Trump and N.Y. Attorney General Eric Schneiderman*, USA TODAY (Sept. 14, 2016, 3:54 PM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/09/14/complicated-history-trump-and-ny-attorney-general-eric-schneiderman/90353238/>.

claiming it was the judge's Mexican heritage that caused his losses.³⁰¹ In fact, a professional reading of the litigation history shows evidence of a sustained pattern of deception by President Trump, which provided an ample record upon which the U.S. District Court for the Southern District of California justifiably denied President Trump's motion for summary judgment.³⁰² From this attack on the racial heritage of a sitting federal judge, Congress could reasonably conclude that this attack on the racial heritage of a sitting federal judge created a distraction that obfuscated the ability of the public to clearly internalize the gravity of President Trump's alleged deceptions. Perhaps if President Trump had apologized and accepted responsibility for his alleged fraud and racketeering, then the argument that the election served as an effective referendum on the appropriateness of impeachment would be more persuasive.

Instead the Trump campaign attempted to deflect blame and tarnish the reputations of individuals involved in the cases brought against him. President Trump's deception on this point bears some comparison to the House Judiciary Committee's vote to impeach President Nixon, in part, because of his false public statements regarding the scope of an investigation into illegal activity.³⁰³ As it stands, President Trump's own representations regarding the case may have distorted the public view of whether President Trump committed fraud or racketeering. Similar to the confirmation process fraud of Judge Porteous and the campaign expenditure disclosure violations of Governor Sulzer, President Trump misrepresented his alleged crimes in a way that helped him acquire his office. This is to say, President Trump obtained his office, in some measure, through deceiving the public about his involvement with Trump University. Under these circumstances, members of Congress could reasonably argue that President Trump should be estopped from claiming that the election precludes his impeachment because his misrepresentations interfered with the public's opportunity to determine whether his fraud and racketeering was disqualifying.

³⁰¹ Jia Tolentino, *Trump and the Truth: The "Mexican" Judge*, NEW YORKER (Sept. 20, 2016), <http://www.newyorker.com/news/news-desk/trump-and-the-truth-the-mexican-judge>.

³⁰² *Makaeff v. Trump Univ., LLC*, 145 F. Supp. 3d 962, 980–81 (S.D. Cal. 2015).

³⁰³ The House Judiciary committee specifically recommended impeachment for "making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct. . . ." H.R. REP. NO. 93-1305, *supra* note 214, at 2, art. I, § 8.

Fourth, Congress could reasonably conclude that President Trump's delay tactics in the Trump University litigation justify an exception allowing impeachment for preincumbency conduct. The Trump University cases were pending for over six years. In the months before the election, President Trump's legal team explicitly advocated to delay his trial in *Low v. Trump University* until after the election.³⁰⁴ This strategy succeeded in depriving the public of the benefit of the judicial system's clear view on whether President Trump engaged in fraud and racketeering.

Now, it is unfair to allow delay tactics to prevent *both* the public *and* Congress from having the opportunity to definitively resolve the fraud and racketeering allegations. Akin to laches, Congress could conclude that impeachment proceedings for preincumbency conduct are justified in this unusual instance because President Trump's lack of diligence in the timely defense of himself prejudiced voters by denying them relevant fact finding at the time when it would have made a difference.³⁰⁵ Congress could conclude that through his own litigation strategy, President Trump has placed Congress—rather than the courts or the public—in an adjudicative role. What should be constitutionally unacceptable is an outcome where neither the public nor the Congress have a full opportunity to determine whether President Trump's alleged crimes are disqualifying. Members of Congress could reasonably conclude that President Trump should not be allowed to procedurally foreclose impeachment simply because he successfully delayed judicial resolution of his alleged fraud and racketeering until after the election.

Finally, President Trump's loss of the popular vote blunts the claim that the election should preclude impeachment of President Trump. President Trump won the election by amassing 304 out of 538 electoral college votes.³⁰⁶ By winning 56.88% of the available electoral college

³⁰⁴ See Transcript of Final Pretrial Conference Before the Honorable Gonzalo P. Curiel United States District Judge at 9–11, *Low v. Trump Univ., LLC*, No. 3:10-cv-00940-GPC-WVG (S.D. Cal. May 6, 2016), ECF No. 512-2 (President Trump's counsel arguing: "I don't believe there is any compelling reason, given that the case is already six years old, why it has to be tried now, particularly given the effects that it could have on the election process.").

³⁰⁵ The equitable doctrine of laches generally requires "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) (quoting *Kansas v. Colorado* 514 U.S. 673, 687 (1995)).

³⁰⁶ Ed O'Keefe, *With Electoral College Vote, Trump's Win is Official*, WASH. POST (Dec. 19, 2016), https://www.washingtonpost.com/politics/the-electoral-college-is-poised-to-pick-trump-despite-push-to-dump-him/2016/12/19/75265c16-c58f-11e6-85b5-76616a33048d_story.html?utm_term=.4b7fbd13e77e.

votes, President Trump's margin of victory ranks in the bottom quarter of all electoral college margins in American History—below Martin Van Buren, James Garfield, and Harry Truman.³⁰⁷ President Trump's leading opponent received nearly three million more votes than President Trump.³⁰⁸ While the Constitution uses the Electoral College system to legally select a president, nothing prevents Congress from considering the strength of the President's popular mandate in exercising its impeachment discretion.³⁰⁹ It is a central tenant of our Constitution that consent of the public is a constitutionally meaningful value.³¹⁰ Indeed, it was a foundational insight of the American republic that governments “deriv[e] their just powers from the consent of the governed.”³¹¹ As Madison explained during the Constitutional Convention, “[t]he people [are] in fact, the fountain of all power.”³¹²

Thus, although not dispositive, it is nonetheless persuasive that more of “[w]e the people” voted for a different candidate than voted for President Trump.³¹³ If all people “are created equal,” then the President's popular vote loss is meaningful.³¹⁴ A larger number of our equally-created citizens voted against the President than for him. In normal presidencies, presidential impeachment is exceptionally difficult because “[t]o remove a president is, in effect, to declare that the voters made a bad choice in electing him, and that is not an easy message for other elected politicians to convey.”³¹⁵ This message is easier to convey when a large majority of the voters did not actually choose to elect him. Congress could reasonably conclude that this fact

³⁰⁷ Louis Jacobson, *Donald Trump's Electoral College Victory Was Not a 'Massive Landslide,'* POLITIFACT (Dec. 12, 2016, 4:41 PM), <http://www.politifact.com/truth-o-meter/statements/2016/dec/12/donald-trump/donald-trumps-electoral-college-victory-was-not-ma/>.

³⁰⁸ *Presidential Results*, CNN, <http://www.cnn.com/election/results/president> (last visited Oct. 18, 2017). President Trump has repeatedly asserted, without evidence, that three to five million illegal immigrants voted in the election. This is false. See Michael D. Shear & Emmarie Huetteman, *Meeting With Top Lawmakers, Trump Repeats an Election Lie*, N.Y. TIMES, Jan. 24, 2017, at A1; Nicholas Fandos, *Truth Behind a Lie on Voting Fraud*, N.Y. TIMES, Jan. 25, 2017, at A13.

³⁰⁹ U.S. CONST. amends. XIII, XXIII.

³¹⁰ Cf. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458–59 (1994) (arguing that the consent of the government principle would justify constitutional amendments on the basis of bare national majority).

³¹¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³¹² FEDERAL CONVENTION, *supra* note 161, at 475.

³¹³ U.S. CONST. pmb1.

³¹⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³¹⁵ LABOVITZ, *supra* note 209, at 257.

is constitutionally relevant to consider in the exercise of its impeachment discretion.

Of course our system relies primarily on fixed, periodic elections to resolve political differences. In all but the most extraordinary cases, bad behavior by a president has a four-year shelf life. Our founders never intended for impeachment to be a tool used to remove officers or judges with whom Congress simply has policy disagreements. Nevertheless, the founders also did not establish an impeachment standard either so high or so procedurally picayune that destructive or corrupt executives could not be removed from office in times of great necessity. By electing a president that faced unresolved, triable accusations of fraud and racketeering, the public voted for a short-leashed president. That is, the best combined reading of the Constitution's electoral college and impeachment provisions is that—in 2016—the public narrowly voted for a congressionally revocable presidency.

IV

THE CONGRESSIONAL DUTY OF OVERSIGHT: TOWARD AN IMPEACHMENT INQUIRY

The Trump administration and its supporters have raised a number of political and legal responses to the possibility of impeachment. Among these arguments, the administration and its supporters have pointed to the need for the country to rally together and unify around its democratically elected leader in order to solve pressing problems.³¹⁶ Talk of impeachment in this view ignores the will and judgment of millions of Americans that believe in President Trump's campaign promise to "make America great again." From their perspective, looking backward at the President's troubled wealth seminars would be counterproductive and unhelpful in moving forward with the President's national agenda.

On the other hand, in the American constitutional system, Congress has an obligation to carefully consider allegations of unlawful or unconstitutional conduct by a president. Under normal circumstances, the executive branch of government enforces American law, drawing on the judicial branch to interpret the law and adjudicate disputes. But the constitution provides a special law enforcement role for Congress

³¹⁶ David Jackson, *Trump's Aim in His Inaugural Address: National Unity*, USA TODAY (Jan. 17, 2017, 12:34 PM), <https://www.usatoday.com/story/news/politics/elections/2017/01/17/donald-trump-inaugural-address/96643974/>.

when individuals in the executive branch or the judiciary itself have violated laws that rise to the level of impeachable offenses.³¹⁷ Although rare, the Constitution gives Congress this law enforcement duty as a safeguard against the abuse of power. Hamilton called this “partial intermixture” of the normal separation of powers “necessary to the mutual defense of the several members of the government against each other.”³¹⁸ With respect to impeachable offenses committed by federal officers, including federal judges, the vice president, and especially the president, the House of Representatives takes on the role of national law enforcement agency and the Senate a judicial role. Thus,

The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches.³¹⁹

Like prosecutors in the executive branch, when plausible allegations of impeachable offenses committed by the president arise, the United States House of Representatives, and following past practices the House Judiciary Committee in particular, has a constitutional duty to investigate.³²⁰ The text of the Constitution is phrased in the imperative, requiring that “The President . . . *shall* be removed from Office on Impeachment for, and Conviction of . . . other high Crimes and Misdemeanors.”³²¹ Noting this, Professor Stephen Presser has explained, “[t]he oath each member of Congress takes to uphold the Constitution requires him or her to make that determination for him or herself, because the maintenance of the quality of the executive that the constitutional structure demands is part of his or her job.”³²² The House of Representatives has a crucial “accusatory function” in providing a

³¹⁷ Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 778 (1999).

³¹⁸ THE FEDERALIST NO. 66 (Alexander Hamilton).

³¹⁹ *Id.*

³²⁰ See, e.g., 144 CONG. REC. H24,685 (1998) (statement of Representative Chabot arguing in favor of investigating President Clinton’s alleged deception relating to a marital affair, “I would urge my colleagues on both sides of the aisle to rise above the partisan fires that too often burn in our Nation’s capital. Consider the facts at hand and fulfill our constitutional responsibilities by moving forward with a fair and thorough investigation of this important matter.”).

³²¹ U.S. CONST. art. II, § 4 (emphasis added).

³²² Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 676 (1999) (emphasis omitted).

check against executive crime.³²³ For the House Judiciary Committee to not hold hearings or issue subpoenas, and otherwise neglect to gather any evidence at all when a federal judge has already found triable allegations that the President committed fraud and racketeering, risks straining the credibility of the House as a law enforcement body with respect to its impeachment duties. Under our most basic law, the House Judiciary Committee, or perhaps an alternative select committee, is obliged to set aside partisanship and conduct a credible factual and legal inquiry into impeachable offenses.³²⁴

Throughout the history of federal impeachment, the House of Representatives has typically drawn up impeachment articles that identify multiple offenses, often arising out of distinct and separate wrongdoings. While the Constitution only requires one offense of bribery, treason, or another high crime or misdemeanor for removal, as a practical matter Congress has been more likely to act when it identifies patterns of offenses. For example, although the House Judiciary Committee ultimately voted against recommending the impeachment of President Nixon for concealing the war in Cambodia, this scandal likely helped build momentum and pave the way for later congressional action.³²⁵ Similarly, in the impeachment and removal of Judge Porteous, it was a combination of his preincumbency deception, his receipt of cash from lawyers with pending cases, and his use of a false name to elude, that created what his articles of impeachment called a “pattern of conduct inconsistent with the trust and confidence placed in him”³²⁶

In this respect, Congress and the public should view the alleged Trump University fraud and racketeering in the context of a pattern of other serious allegations. While exploring each of these ongoing controversies in detail is beyond the scope of this Article, the Trump University fraud and racketeering allegations can only be understood alongside at least five other alleged impeachable offenses. First, sixteen federal intelligence agencies have concluded that the Russian government hacked the computer files of the Democratic National

³²³ Turley, *supra* note 317.

³²⁴ In early impeachments, the House often appointed a select committee. The Judiciary committee has handled impeachment proceedings since its establishment as a permanent standing committee in 1813. See Firmage & Mangrum, *supra* note 221, at 1037.

³²⁵ H.R. REP. NO. 93-1305, *supra* note 214, at 38–39.

³²⁶ H.R. REP. NO. 111-427, at 3 (2010).

Committee.³²⁷ Intelligence agency leaks, email correspondence by the President's closest aides, as well as one of President Trump's own campaign speeches, have raised troubling suspicion that President Trump colluded with the Russian government to interfere in the 2016 presidential election.³²⁸ If true, Congress could reasonably draw an analogy to President Nixon's participation in, and cover up of, the burglary of the Democratic National Committee's files at the Watergate Hotel,³²⁹ as well as the 1789 impeachment proceedings against Senator William Blount for conspiracy to aid a foreign power.³³⁰ Second, former White House ethics lawyers have argued that President Trump is also violating the foreign emoluments clause by allowing his business interests to profit from foreign governments seeking to curry favor with the administration.³³¹ Third, President Trump's refusal to divest his business interests appears to be facilitating additional compensation to him from the U.S. Treasury in a potential violation of

³²⁷ Eugene Kiely, *Trump, Russia and the U.S. Election*, FACTCHECK.ORG (Dec. 8, 2016), <http://www.factcheck.org/2016/12/trump-russia-u-s-election/>.

³²⁸ Michael S. Schmidt, Mark Mazzetti & Matt Apuzzo, *Trump Aides Had Contact with Russian Intelligence*, N.Y. TIMES, Feb. 15, 2017, at A1; Matt Apuzzo et al., *Trump's Son Heard of Link to Moscow Before Meeting*, N.Y. TIMES, July 11, 2017, at A1; see also Michael Crowley & Tyler Pager, *Trump Urges Russia to Hack Clinton's Email*, POLITICO (July 27, 2016, 5:17 PM), <http://www.politico.com/story/2016/07/trump-putin-no-relationship-226282> ("I will tell you this, Russia: If you're listening, I hope you're able to find the 30,000 emails that are missing . . . I think you will probably be rewarded mightily by our press.").

³²⁹ H.R. REP. NO. 93-1305, *supra* note 214, at 2.

³³⁰ Facing personal financial problems, Senator William Blount of Tennessee joined with British officers in a conspiracy to assist Great Britain's plans to conquer parts of Spanish, Florida, and Louisiana. BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* 89–103 (1998). When a letter detailing the conspiracy came to light, the House of Representatives voted to impeach Senator Blount in its earliest impeachment proceeding. See *id.* at 116–126. In a Senate trial an extensive debate ensued over whether Senators were subject to impeachment proceedings. Ultimately the Senate concluded it did not have jurisdiction over its own members, but voted to expel Blount from the Senate by a two-thirds majority. Firmage & Mangum, *supra* note 221, at 1090. In the Constitutional Convention Madison argued one of the principal reasons for impeachment was to guard against the possibility that the President "might betray his trust to foreign powers." FEDERAL CONVENTION, *supra* note 161, at 66.

³³¹ NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 22 (Brookings 2016), <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/> (arguing Congress has "a plainly valid basis under the Constitution for concluding [President Trump] cannot serve in office—both as a matter of first principles and given evidence that at least one prominent leader in the ratification process saw violations of this Clause as grounds for impeachment.").

the domestic emoluments clause.³³² Congress could reasonably conclude that violations of both the foreign and domestic emoluments clauses constitute impeachable high misdemeanors.³³³

Fourth, unlike any president in recent memory, President Trump has refused to release his tax returns despite the largest White House petition drive in American history.³³⁴ This refusal, in the face of the public's persistent demands, raises a suspicion of illegal tax evasion. Tax fraud has been one of the most common offenses in past impeachment proceedings, including the impeachment and removal of Judge Halstad Ritter in 1936 and Judge Harry E. Claiborne in 1986,³³⁵ as well as the Vice President Agnew's resignation in 1973.³³⁶ And fifth, President Trump was recorded boasting about a pattern of past sexual assaults.³³⁷ The President's own taped admission of "grabbing" a woman is corroborated by at least seventeen women who have publicly accused him of unwanted sexual assault, groping, or harassment.³³⁸ As a result of the 2009 impeachment of Judge Samuel Kent, the House of Representatives already determined that sexual

³³² U.S. Const. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.").

³³³ During the Constitutional Convention, John F. Mercer from Maryland explained the policy of the constitutional emoluments prohibitions:

It is a first principle in political science, that whenever the rights of property are secured, an aristocracy will grow out of it. Elective Governments also necessarily become aristocratic, because the rulers being few can & will draw emoluments for themselves from the many. The Governments of America will become aristocracies. They are so already. The public measures are calculated for the benefit of the Governors, not of the people. The people are dissatisfied & complain. They change their rulers, and the public measures are changed, but it is only a change of one scheme of emolument to the rulers, for another. The people gain nothing by it

FEDERAL CONVENTION, *supra* note 161, at 284; *see also* EISEN, PAINTER & TRIBE, *supra* note 331, at 5 (discussing ratifying convention statements of Edmund Jennings Randolph describing emoluments violations as subject to impeachment).

³³⁴ Max Greenwood, *Petition for Trump's Tax Returns gets Record Number of Signatures*, THE HILL (Jan. 26, 2017, 4:49 PM), <http://thehill.com/blogs/blog-briefing-room/news/316382-petition-demanding-trumps-tax-returns-gets-record-number-of>.

³³⁵ *See supra* Table 1.

³³⁶ KYVIG, *supra* note 200, at 139.

³³⁷ *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

³³⁸ Libby Nelson & Sarah Frostenson, *A Brief Guide to the 17 Women Trump has Allegedly Assaulted, Groped or Harassed*, VOX (Oct. 20, 2016, 3:14 PM), <http://www.vox.com/2016/10/13/13269448/trump-sexual-assault-allegations>.

groping—strikingly similar to the type President Trump himself said he has engaged in—constitutes a high crime or misdemeanor.³³⁹

While each of these allegations raises troubling questions, President Trump's actions in connection with Trump University are distinct in an important respect—a federal judge appointed under Article III of the Constitution has already held that the evidence of fraud and racketeering in the Trump University cases are sufficiently credible to merit a full jury trial in a court of law. The President agreed to pay \$25 million dollars to avoid these jury trials. For Congress to ignore these serious indicia of potentially criminal activity sends an unacceptable message of indifference to the alleged victims of Trump University.

Politics aside, the Trump University students are real families with stories of suffering, loss, and frustration. Individually, these families, as well as the State of New York, have accused the President of conducting a nationwide, fraudulent marketing campaign for a personal coaching scam. Congress must acknowledge them, listen to their stories, and consider the legal implications of these alleged crimes or it will fail to carry out its constitutional duty.

For his part, President Trump and his advisors should follow the lead of Vice Presidents John C. Calhoun and Shuyler Colfax, both of whom formally requested impeachment inquiries by the House of Representatives in an effort to exonerate themselves.³⁴⁰ If President Trump believes that he is innocent of the allegations against him, then he should welcome a congressional investigation. He expressed a similar point after reaching a settlement agreement in the Trump

³³⁹ *Compare Transcript: Donald Trump's Taped Comments About Women*, *supra* note 337 (“I did try and fuck her. She was married. . . . I moved on her very heavily. . . . I moved on her like a bitch. . . . I better use some Tic Tacs just in case I start kissing her. You know, I’m automatically attracted to beautiful—I just start kissing them. It’s like a magnet. Just kiss. I don’t even wait. And when you’re a star, they let you do it. You can do anything. . . . Grab ‘em by the pussy. You can do anything.”), with H.R. REP. NO. 111-159, at 2 (2009) (“Samuel B. Kent has engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge, as follows On one or more occasions between 2003 and 2007, Judge Kent sexually assaulted Cathy McBroom, by touching her private areas directly and through her clothing against her will and by attempting to cause her to engage in a sexual act with him. Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.”). Judge Kent tendered a resignation letter from prison just as his Senate trial was set to begin. See Lise Olsen, *Embattled Kent Resigns*, *Effective Tuesday*, HOUS. CHRON. (June 25, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Embattled-Kent-resigns-effective-Tuesday-1731302.php>.

³⁴⁰ COLE & GARVEY, *supra* note 228, at 16 n.137.

University civil litigation, noting his disappointment that the agreement would deny him the opportunity to vindicate himself in a jury trial.³⁴¹

If the House fails to investigate the allegations of impeachable offenses against President Trump it will further deprive the President of the opportunity to present his side of the story in not only the Trump University case, but the other allegations against him as well. In particular, an investigation by the House of Representatives into alleged Trump University fraud and racketeering would provide an alternative to the trial President Trump indicated that he wanted. Supporters of the President should also consider welcoming an impeachment inquiry early in the President's administration. So long as the cloud of impeachment hangs over the administration, trust and legitimacy issues will continue to face the President and will impede his ability to build coalitions necessary for healthy and vibrant governance. President Trump should send a formal request for an impeachment inquiry in an effort to restore his reputation and exonerate himself.

CONCLUSION

At the very core of President Trump's 2016 presidential campaign was his simple insight that Americans feel they are "being ripped off by everyone."³⁴² President Trump's message resonated with millions who felt, and continue to feel, that the government, Wall Street, and even cultural leaders are not acting in the best interests of ordinary, working families. His campaign themes of "draining the swamp" in our nation's capital and "making America great again" were, in effect, a campaign promise to systemically renegotiate a new deal on behalf of the public.

However, President Trump's track record with respect to Trump University is deeply in tension with this promise. If Americans are being ripped off by everyone, then some of them were especially ripped off by Donald Trump's Trump University. The evidence assembled through over six years of litigation could lead reasonable people to

³⁴¹ Doug Stanglin, *Trump Tweets He Settled \$25M Fraud Case Because He's Too Busy*, USA TODAY (Nov. 19, 2016, 1:53 PM), <http://www.usatoday.com/story/news/2016/11/19/president-elect-hints-he-might-not-have-settled-if-he-werent-get-ready-for-his-inauguration/94123452/>.

³⁴² Greg Sargent, Opinion, *Donald Trump Explains American Politics in a Single Sentence*, WASH. POST (Feb. 10, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/02/10/donald-trump-explains-american-politics-in-a-single-sentence/?utm_term=.a4248d0771f3 (quoting Donald J. Trump television interview).

believe that the President and his band of traveling salesmen engaged in a nationwide fraudulent marketing campaign to push a personal coaching scam on vulnerable people who trusted him and his unlicensed, mislabeled seminars. President Trump promised that his hand-picked instructors would teach consumers his personal real estate secrets and mentor them on how to get rich quickly. However, the evidence suggests that these promises were actually all lies. Judges who looked at that evidence decided that reasonable jurors could conclude that the President committed fraud and racketeering. Even more concerning, the President of the United States agreed to pay \$25 million to prevent a jury from potentially reaching just that conclusion.

Just as these jurors could have concluded that President Trump committed fraud or racketeering, Congress could still reasonably conclude that the President's actions constituted "high crimes or misdemeanors" under the impeachment clause. Although the attorneys in these civil lawsuits are working to resolve a settlement agreement with the President, any settlement agreement cannot legally effect Congress' "sole" right to impeach and remove the president.³⁴³ Moreover, the Constitution's plain text, the framers' intentions, and the past impeachment precedent strongly indicate that a president may be impeached for high crimes or misdemeanors committed prior to assuming office. Impeachment is, in this sense, a separate constitutional procedure that is, although more rare, coequal to the Electoral College. By casting votes for a president facing outstanding, triable accusations of criminal conduct, in this election, the public has effectively voted for a short-leashed, congressionally-revocable presidency.

Nevertheless, the claims made in this Article are limited. This Article has not predicted that President Trump will be impeached, nor does it even argue that he should be impeached. The claim in this article is a more modest, but still deeply important, constitutional insight that President Trump legally *could* be impeached. This insight suggests that the House of Representatives should conduct an impeachment inquiry to settle the questions of (1) whether President Trump's alleged fraud and racketeering in connection with Trump University did, in fact, occur; and (2), if so, whether his actions rise to the level of impeachable high crimes or misdemeanors. Indeed, President Trump himself should follow the lead of Vice Presidents Calhoun and Colfax and request that

³⁴³ U.S. CONST. art. I, §§ 2–3.

the House Judiciary Committee conduct an impeachment inquiry in the hope that it will exonerate him and restore his reputation.

It is true that impeachment proceedings would inevitably divert the nation's leadership and attention away from addressing the public's business. And yet, failing to consider impeachment of officers or judges that may have engaged in fraud or racketeering is a caustic precedent of hypocrisy and corruption. This risk is especially great in the case of the President. A firm Congressional insistence that allegations of presidential crime must be investigated is not the greatest risk to our republic. As the very first Federalist paper explained:

[A] dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people, than under the forbidding appearances of zeal for the firmness and efficiency of government. History will teach us, that the former has been found a much more certain road to the introduction of despotism, than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career, by paying an obsequious court to the people . . . commencing demagogues, and ending tyrants.³⁴⁴

One hopes that President Trump's promise to stop Americans from being ripped off is not just such a specious mask of zeal. Nonetheless, the gravity of the allegations against him have already pitted two of the Republic's most treasured values against each other. On the one hand Americans have always believed in our electoral process. And yet, on the other hand, Americans have also always held the view that no one is above the law. Today, the Trump presidency forces Congress to choose between the two. In the future, the republic would be well advised to avoid presidential candidates with pending allegations of criminal activity.

³⁴⁴ THE FEDERALIST NO. 1 (Alexander Hamilton).

