



## What the Democrats Left Out

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Today the House Judiciary Committee announced two articles of impeachment. The first article alleges that President Donald Trump abused his power by asking Ukrainian President Volodymyr Zelensky to publicly announce investigations into one of his political opponents, Joe Biden, and into a “discredited theory” that Ukraine, not Russia, had interfered in the most recent presidential election. The second article charges that President Trump obstructed Congress by refusing to comply with impeachment-related subpoenas. In opting for these two offenses—and in excluding three others that had all been plausible—House Democrats have narrowed their charges to the allegations that are the easiest to see, if you see the world, and this presidency, as they do.

What didn’t make the cut? First, Congress chose not to include articles of impeachment based on the foreign and domestic emoluments clauses. Democratic members of Congress have long alleged that President Trump is illegally profiting from his business entities that cater to foreign and state governments. Indeed, more than 200 members of Congress have sued the president in federal court, arguing that his conduct is unconstitutional. (I have filed a series of amicus briefs arguing that Trump’s conduct amounts to poor policy, but is lawful.) Yet, the House has not even held a hearing on these once obscure provisions of the Constitution. It would have been very difficult to make the case for impeachment based on a nonexistent record.

Second, Congress chose not to include articles of impeachment based on allegations in the Mueller report. For nearly two years, the special counsel titillated the Beltway with the prospect of potentially impeachable conduct. Robert Mueller’s voluminous report dispelled allegations of Russian collusion, but strongly hinted that President Trump engaged in obstruction of justice—that the President used his official power to stymie the investigation. Attorney General Bill Barr disagreed, and independently concluded that there was no criminal activity worth charging.

Of course, the House could have picked up the mantle and charged the president with obstructing justice. Indeed, Mueller’s report provided what many dubbed a “road map” for impeachment. But an article on impeachment based on obstruction of justice was not included. Why? I suspect the House realized that the president had a legitimate constitutional defense. Many of the alleged obstructive acts, such as firing FBI Director James Comey, are authorized by Article II of the Constitution. No, that provision does not give Trump the “right to do whatever” he wants. But it does allow him to supervise and control his administration. Most articles of impeachment based

on obstruction of justice would have gotten bogged down in very difficult constitutional questions. (I wrote a [four-part series discussing these issues](#).) I think at least one of the claims, in which President Trump [asked his White House counsel to prepare a false record](#), could have been viable. Yet, the House left obstruction of justice, and its messy separation of powers issues, on the cutting-room floor.

Third, Congress chose not to include articles of impeachment based on bribery. The Constitution specifically lists bribery, as well as treason, as grounds for impeachment. Three of the four law professors who testified before the committee agreed that President Trump solicited a bribe: the benefit from the proposed investigations by Ukraine into the family of presidential candidate Joe Biden would be personally valuable to the president. As the Maynooth University law professor Seth Barrett Tillman and I have written, such an article would be [tough to prove](#); the technical elements of bribery have not been satisfied. The University of Michigan law professor [Barbara McQuade](#), who supports impeachment, recommended dropping the bribery charge. She wrote that the House should avoid “trying to satisfy technical statutory requirements such as ‘quid pro quo,’ and allowing Republicans to quibble over legal definitions.” Once again, the House Judiciary Committee took the path of least resistance, and excluded an article based on bribery.

Why did the House choose to include only abuse of power and obstruction of Congress? These two articles, in theory at least, are very easy to prove. Instead of settling on charges that relate to statutory crimes, with clear, concrete criteria, the Democrats have instead settled on articles in which the misconduct exists largely in the eye of the beholder.

Let’s start with abuse of power. Here, the Committee asserts that the president asked a foreign government to investigate his political rival. Chairman Jerry Nadler [explained](#), “The first article is for Abuse of Power. It is an impeachable offense for the President to exercise the powers of his public office to obtain an improper personal benefit, while ignoring or injuring the national interest.” What exactly is an abuse of power? The term is not defined in the Constitution, and indeed it resists a simple definition. This is a crime that exists in a person’s subjective judgment: One person’s abuse of power is another’s diplomacy. Now, the Democrats’ articles of impeachment insist, is not the time to argue about the specific contours of Trump’s conduct; there is plenty of time for that debate. But the deliberations over whether Trump committed an amorphous, malleable offense will not get bogged down in difficult constitutional or factual questions, as obstruction of justice would. The inquiry is fairly straightforward and streamlined, exactly as the House wants it.

The second article of impeachment, in the abstract, is also very easy to prove. The House issued subpoenas to the Trump administration to assist its impeachment inquiry. In turn, the Trump administration categorically refused to comply with all of those subpoenas. The House of Representatives then asked the courts to enforce those subpoenas. And the Trump administration asserted various privileges in court to block those subpoenas. That litigation proceeds separately. But now the House contends that Trump’s refusal to comply with the subpoenas is itself an impeachable act. Is that theory correct? Trump will likely counter that asserting a privilege in court is a well-worn executive practice, not grounds for removal. Who is right? The Senate will decide. But like with abuse of power, the factual issues will not be in dispute. All that is left to decide is whether doing so is sufficient for impeachment.

The Senate is heading into uncharted territory. Once articles of impeachment are completely decoupled from any clearly articulated offenses, the burden of charging a president with “abuse

of power” is significantly reduced. Moreover, any president who refuses to comply with what he sees as an improper investigation can be charged with “obstruction of Congress.” This one-two punch can be drafted with far greater ease than were the articles of impeachment presented against Presidents Andrew Johnson, Richard Nixon, or Bill Clinton.

Without question, Congress can convict a president for conduct that is not criminal. This process is not bound by the strictures of the United States code. Moreover, Congress can begin impeachment proceedings for conduct that is inconsistent with the president’s duty to faithfully execute the laws. This inquiry, though subjective, is a necessary feature of the American constitutional order. But the predicates of the Trump articles will set a dangerous precedent, as impeachment might become—regrettably—a common, quadrennial feature of our polity.

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