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IMPEACHMENT AS A ‘MADISONIAN DEVICE’
RECONSIDERED

AMANDA HOLLIS-BRUSKY±

ABSTRACT

In this article, Professor Hollis-Brusky revisits the claim, first advanced in a 1999 Duke University Law Review article by Professor Jonathan Turley, that impeachment is best understood as a “Madisonian Device”; that is, as a valuable political process that allows for factional interests and pressures to be resolved within our constitutional system. Drawing on Madison’s Federalist No. 10, Professor Turley argued for the importance of the Senate trial in particular as a means of channeling factional pressures through a set of representatives who would refine and enlarge the public view, lending legitimacy to our system of democratic governance. In this way, Professor Turley argued, impeachment serves a much broader purpose than simply the removal of a President for a set of legalistic, narrowly defined “high crimes and misdemeanors.”

While Professor Hollis-Brusky agrees that impeachment stills serves a broader purpose within our Madisonian system, she argues that forces such as political polarization, party tribalism, the advent of “fake news,” and partisan media have challenged Professor Turley’s analysis of the value of impeachment as a factional pressure release valve and of the Senate trial as a forum for deliberative democracy and legitimacy-building. Instead, Professor Hollis-Brusky argues that impeachment should be understood in light of Madison’s Federalist No 51—as an “auxiliary precaution” that should be deployed to strengthen and fortify the “primary control” available in our system to protect against bad actors and abuses of public trust and power. That “primary control,” according to Madison, is the electoral process—voting and elections. Professor Hollis-Brusky draws from comparative political science to show that the Trump impeachment serves a distinctly Madisonian function by fortifying the democratic process and, when coupled with the upcoming elections, could provide a “hard reboot” for our political system.

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INTRODUCTION

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹

On December 4, 2019 Professor Jonathan Turley appeared before the House Judiciary Committee as the lone witness for the Republican Party in the impeachment hearings against Donald Trump. On page two of his fifty-three page written testimony—in which he argues against impeaching Trump—Turley characterizes himself as a “Madisonian scholar.”² Indeed, of the five law review articles Turley references in his testimony as evidence of his decades-long research on impeachment, two have “Madison” or “Madisonian” in the title.³ One of these articles is of particular interest here, as Turley’s impeachment testimony relied heavily on it: Senate Trials and Factional Disputes: Impeachment as a Madisonian Device.⁴

In this 1999 law review article, James Madison’s Federalist No. 10 emerges as the Rosetta Stone of Professor Turley’s understanding of the overarching purpose of our constitutional system. In summary, Professor Turley argues that the impeachment process is but one of many elements built into our constitutional design to process, diffuse, and refine the pressures of opposing “factions” in our democracy. In the context of his argument, Professor Turley emphasizes the value of the Senate trial as a mechanism of deliberative democracy designed to refine and enlarge the factional pressures and views of the masses in a way that results in increased systemic legitimacy. In doing so, Professor Turley outlines a broad understanding of impeachment as a vital process for resolving factional divides and pressures, rather than a narrow way to hold

². See The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment Before H. Comm. on the Judiciary, 116th Cong. (2019) (written testimony of Professor Jonathan Turley) (“I have spent decades writing about impeachment and presidential powers as an academic and as a legal commentator. My academic work reflects the bias of a Madisonian scholar.”).
³. Id. at 2 n.3 (citing Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 DUKE L.J. 1 (1999) and Jonathan Turley, Reflections on Murder, Misdemeanors, and Madison, 28 HOFSTRA L. REV. 439, 439 (1999)).
officers to account for legalistically defined “crimes.” Part I of this article reviews Professor Turley’s argument in greater detail for how and why impeachment should be understood as a “Madisonian device” and the implications of his analysis for what rises to the threshold of impeachable conduct.

Over the past two decades, a series of powerful forces have combined to undermine the efficacy of the Madisonian system Professor Turley centers in his analysis—a system predicated on the ability to channel, diffuse, and mitigate the “mischiefs of faction.” These forces, as I describe in Part II, include, first, increasing political polarization of partisans in government and in the electorate, which has led to party tribalism and party loyalty at all costs. Second, the democratization and fragmentation of media has led to partisan and polarized media, decreasing levels of trust in information (“fake news”), and the ability to discredit and destabilize expertise and testimony. I show how these developments challenge Professor Turley’s analysis of the value of impeachment as a factional pressure release valve and of the Senate trial as a forum for deliberative democracy and legitimacy-building.

That being said, I argue in Part III of this article that impeachment can and should still be understood as a “Madisonian device,” but with a different emphasis. I draw on American history and contemporary comparative political science to show that impeachments in general—and the Trump impeachment in particular—can be understood as an “auxiliary precaution” deployed in service of strengthening and fortifying what Madison described as the “primary check” on bad actors and abuses of power in our constitutional system—voting and the democratic process. In other words, if we center Madison’s Federalist No. 51 instead of Madison’s Federalist No. 10, we extract a slightly different core principle from our constitutional architecture. As measured against this Madisonian principle, the impeachment of Donald Trump still holds value and meaning and should still be properly understood as a “Madisonian device.”

I. IMPEACHMENT AS A MADISONIAN DEVICE CIRCA 1999

A. Impeachment as a Madisonian Device

Professor Turley’s 1999 Duke University Law Review article provides a lengthy and detailed history of impeachment hearings and Senate trials, reviewing impeachments from the early English and colonial periods all the
way through the Clinton impeachment hearings.\footnote{Id. at 110.} Interestingly, much of this history appeared in Professor Turley’s written testimony for the House Judiciary Committee in the impeachment hearings of Donald Trump.\footnote{See The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment Before H. Comm. on the Judiciary, 116th Cong. (2019) (written testimony of Professor Jonathan Turley).} In the law review article, unlike in his most recent congressional testimony, these episodes are all then processed, digested, and analyzed through the lens of James Madison’s Federalist No. 10.\footnote{See THE FEDERALIST No. 10, at 71–79 (James Madison) (Clinton Rossiter ed., 1999).}

Like the other essays that collectively comprise what we now refer to as \textit{The Federalist Papers}, Madison’s Federalist No. 10 was written anonymously in 1787 under the pseudonym, “Publius,” in the hopes of persuading the people of New York to adopt the new Constitution. In a nutshell, Federalist No. 10 explains how the revised constitutional design improves upon older models of democratic government that were vulnerable to what Madison termed the “mischiefs of faction.”\footnote{Id. at 72.}

Madison defines a “faction” as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”\footnote{Id. at 73.} Factions, as Madison explains, tend to wreak havoc on democracies, especially when there are large, permanent factions that seek to oppress and limit political opportunities of minority factions. Because, Madison observes, the causes of faction—liberty and freedom of conscience—are “sown in the nature of man” and cannot be removed without extinguishing individuality of thought, the new constitutional republic would focus instead on controlling and redirecting the effects of factions.\footnote{Id. at 76.}

Essentially, Madison argues, this is done in three ways: (1) by dividing power vertically and horizontally to make it difficult for a single majority faction to gain power and representation; (2) by encouraging the existence of lots of factions or interest groups to promote fluidity of factional allegiances and cross-cutting coalitions; and (3) by electing representatives, especially in the Senate, who would “refine and enlarge” the factional views of the more passionate, less deliberate democratic masses.\footnote{Id. at 76.}
Professor Turley summarizes how these three elements built into the Madisonian system effectively “destabilize[e] the effects of factional disputes” and “transform factional interests” that might otherwise boil up and boil over in our democracy:

In crafting the American legislative process, Madison sought to address the destabilizing effects of factional disputes within democratic systems. Madison believed that leaving such disputes unaddressed would create intrigue and instability within a political system. For that reason, the Madisonian process does not seek to suppress, but to transform factional interests. This emphasis on resolving factional disputes gives the system the ability to withstand crushing pressures during periods of enormous social, political, and economic turmoil.12

Professor Turley is not the first scholar to emphasize the centrality of Federalist No. 10 to our constitutional and political architecture. Political scientists, in particular Robert Dahl, have centered this essay prominently in discussions of “pluralism” and democracy since the 1950s.13 However, Professor Turley does seem to be the first scholar to apply these Madisonian insights squarely to the impeachment clauses of the United States Constitution.14

Professor Turley argues that if we situate the impeachment power within the architecture of Madison’s Federalist No. 10 and apply that essay’s preoccupation with channeling and refining factional tensions and pressures to the impeachment clauses, then these clauses necessarily demand a broader understanding than the narrower, legalistic interpretation advanced by other scholars. In this vein, Professor Turley argues that his Madisonian reading of impeachment cuts against arguments that “tend to elevate removal as the

12. Turley, Impeachment as a Madisonian Device, supra note 4, at 4.
14. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment”); U.S. CONST. art. I, § 3, cl. 6–7 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two-thirds of the Members present. 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.”); U.S. CONST. art. II, § 4 (“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.”).
primary purpose of impeachment in a narrow band of cases” and that advocates of this narrow understanding “would radically reduce the role of impeachment in addressing the factional disputes and legitimacy questions” that are often at the core of impeachment proceedings.15

With Madison’s Federalist No. 10 as his touchstone, Professor Turley argues that the impeachment process should be understood as a “tool of factional resolution.”16 This is especially so, he insists controversially, in cases where the actual removal of a President is “unlikely due to [the lack of] bipartisan consensus”—so in cases where it is least likely to succeed by traditional metrics. It is during these times, when “large factional groups are in dispute over questions of legitimacy,” Professor Turley insists, that impeachment “can play its most valuable and transformative role.”17

B. Senate Trials and Factional Disputes

In making his somewhat counterintuitive case for impeachment especially when removal is unlikely, Professor Turley emphasizes the importance and value of the Senate trial as a critical forum for factional dispute resolution (or at least transformation):

The factional disputes raised by allegations of misconduct by a President or judge demand resolution in a public forum. The Senate trial supplies a forum that would not be possible in any other branch. In the Senate trial of a President, representatives of all three branches are present in a proceeding in which all factional views can be openly expressed and debated. This is vitally important to the integrity of the system, as it has often changed the views of both senators and the public regarding the basis of impeachment allegations.18

Not just any Senate trial will do, however. Drawing on lessons learned from history and from his reading of Madison’s Federalist No. 10, Professor Turley argues that the Senate must allow “a full presentation of evidence” and must not limit witnesses in order to serve as a forum for deliberative democracy and to facilitate trust and integrity in the process, especially when “a partisan block promises to prevent conviction.”19

It is only through the open presentation of evidence and witnesses, Professor Turley insists, that the Senate trial can serve to, in Madisonian parable, “refine and enlarge” the public’s views and transform factional (or in

15. Turley, Impeachment as a Madisonian Device, supra note 4, at 34.
16. Id. at 8.
17. Id. at 84.
18. Id. at 42–43.
19. Id. at 107.
today’s parlance, partisan) allegiances. However, if the Senate trial is perceived as a foregone conclusion, as driven by clearly identifiable factional interests, the process could be damaging “to the public trust.” Specifically, Professor Turley warns that “an acquittal based on tailored evidence is as dangerous as a conviction secured on such a basis” because it will lead to the persistence of factional divides, as there will always be questions about the “legitimacy of the process.”

In concluding his analysis—an analysis, as several observers have pointed out, which seems to be at odds with his position against impeaching President Donald Trump—Professor Turley defends the impeachment of President William Jefferson Clinton as legitimate within this Madisonian understanding and as consistent with history and past practice. In doing so, Professor Turley once again emphasizes that impeachment is a political, not legal, process, that it was never intended to be limited to a narrow range of legalistically defined “high crimes and misdemeanors” (as the Trump legal defense team argued in their 110 page legal brief), and that it was especially concerned with perceived abuses of the public trust, abuse of power, and other non-criminal behaviors for which a public trial and account would be beneficial and important.

20. Id.
21. Id. at 133.
II. WRENCHES IN THE MADISONIAN MACHINE—POLITICAL POLARIZATION, PARTY TRIBALISM, AND “ALTERNATIVE FACTS”

A. Political Polarization and Party Tribalism

Madison’s insights in The Federalist No. 10 have been key to how American legal scholars and political scientists have theorized about constitutional structure, political process, and participation—especially since the mid-twentieth century. To wit, in his book *Law’s Allure*, political scientist Gordon Silverstein refers to our constitutional design as the “Madisonian machine.”24 The so-called Madisonian machine functions best, political scientists have noted, under two conditions: (1) when there are many smaller, fluid factions (or interest groups) vying for power in our democracy; and (2) when the Senate functions in a truly deliberative manner, “refine[ing] and enlarg[e]” (to borrow Madisonian language) these narrow factional interests in service of the broader interests of the country.25 As I describe below, each of these elements of the Madisonian machine has broken down over the past two decades—and these breakdowns have been especially visible and acute in the impeachment and removal effort against Donald Trump.

Political scientists have tended to operationalize Madison’s Federalist No. 10 under the theory of “pluralism.”26 In general, healthy pluralism is when citizens belong to multiple different factions and have cross-cutting alliances that ensure present conflict on one issue does not compromise future cooperation on a different issue. For example, a citizen could be a free-market fiscal conservative while being vehemently anti-war and pro-LGBTQ rights. Under our current partisan issue alignment, this would mean that she would more closely align with the Republican Party on the role of government in regulating the economy but with the Democratic Party on foreign affairs and queer rights. This kind of pluralism ensures continued engagement and cooperation with both major political parties, with the ability to move fluidly between them depending on the issue.

The citizen I described above—the one envisioned by James Madison in Federalist No. 10 and observed in the mid-twentieth century by political scientists theorizing American democratic pluralism—is of an increasingly rare, endangered species. The culprit? Political polarization and partisan sorting. Three political scientists describe political polarization—that is, the movement of the two major political parties towards their own ideological

poles and away from the middle—in the following way: “In the middle of
the twentieth century, the Democrats and the Republicans danced almost
cheek to cheek in their courtship of the political middle. Over the past thirty
years, the parties have deserted the center of the floor in favor of the
wings.”

The effects of political polarization on the functioning of the Madisonian machine have been well-documented by political scientists and gov-
ernment scholars. In Congress, for example, we have witnessed
unprecedented gridlock, shutdowns of government, a competitive “team”
mentality that has encouraged parties to use (or abuse) procedural rules to
their advantage, a weakened committee structure, more power shifted to
party leaders, and an all but eliminated representation of moderates in the
electorate.

The deleterious effects of polarization extend beyond Congress and our
elected representatives. Partisan identities now exert a powerful influence on
how Americans vote, how they think, and even with whom they choose to
affiliate. So-called “affective polarization” pulls Americans away from
other citizens with whom they might have ideological overlap and policy
agreement because they identify with the other party. Leading political sci-
entists and scholars explain the origins and impacts of this particular brand
of polarization:

While previously polarization was primarily seen only in issue-based
terms, a new type of division has emerged in the mass public in recent
years: Ordinary Americans increasingly dislike and distrust those from the
other party. Democrats and Republicans both say that the other party’s
members are hypocritical, selfish, and closed-minded, and they are unwill-
ing to socialize across party lines.

This is the antithesis of the Madisonian ideal of fluidity, movement, and
multi-dimensionality articulated in Federalist No. 10. When partisan

27. Nolan McCarty et al., Polarized America: The Dance of Ideology and Unequal
Riches 1 (2008).
28. Kathryn Pearson, Rising Partisan Polarization in the US Congress, in Parchment Barriers:
Political Polarization and the Limits of Constitutional Order 35–57 (2018). See generally
Thomas E. Mann & Norman J. Ornstein, It’s Even Worse Than It Looks: How the American
Constitutional System Collided with the New Politics of Extremism (2012); Frances E. Lee,
Insecure Majorities: Congress and the Perpetual Campaign (2016); Samara Klan & Yanna
Krupnikov, Independent Politics: How American Disdain for Parties Leads to Political
Inaction (2016).
29. See generally Liliana Mason, Uncivil Agreement: How Politics Became Our Identity
(2018).
30. See James N. Druckman & Matthew S. Levendusky, What do We Measure When we Measure
Affective Polarization?, 83 PUB. OPINION Q. 114 (2019).
31. Shanto Iyengar et al., The Origins and Consequences of Affective Polarization in the United
identities harden allegiances and drive political behavior, the result is more rigidity on issues, fewer cross-cutting coalitions that facilitate cooperation across “factions,” and more tribalism which resists engaging with the other side, reinforcing the growing ideological divides between the two major parties.

B. Fragmented Media, Fake News and Alternative Facts

So-called affective polarization has been an enabler of and exacerbated by the well-documented fragmentation of the media and the rise of partisan news. In the mid-twentieth century, during the height of cross-cutting coalitions, cooperation, and moderate parties that, to recall the language above, “danced cheek to cheek,” there were three major network news channels where 70% of Americans received their news or political information. As Thomas Mann and Norman Ornstein explain, with the “telecommunications revolution” and the advent of the internet, the “plethora of channels, websites and other information options has fragmented audiences and radically changed media business models.” With more competition for eyeballs, clicks, and revenue, cable news stations, network news stations, and for-profit internet sites have, as Mann and Ornstein characterize it, promoted “sensationalism” and conflict over “sensible centrism.”

American citizens as consumers have bought in to this new media landscape, self-selecting into their own media silos populated by members of their own “teams” (that is, political parties). This echo-chamber effect has only been exacerbated by the rise of social media and Facebook. Citizens can self-select into certain news sources and block or unfriend anyone with whom they disagree. Even more unsettling, recent work in media and politics shows that when American citizens are actually confronted with political

32. McCARTY ET AL., supra note 27.
33. MANN & ORNSTEIN, supra note 28 at 58.
34. Id. at 62.
35. Id. at 62.
36. For a thorough and harrowing account of the impact of conservative talk radio on the Republican party and partisanship, see BRIAN ROSENWALD, TALK RADIO’S AMERICA: HOW AN INDUSTRY TOOK OVER A POLITICAL PARTY THAT TOOK OVER THE UNITED STATES (2019).
shows and programming and news with which they disagree, this has the effect of intensifying their own partisan preferences rather than changing their minds.\footnote{See generally \textsc{Kevin Arceneaux \& Martin Johnson, Changing Minds or Changing Channels?: Partisan News in an Age of Choice} (2013); \textsc{Diana C. Mutz, In-Your-Face Politics: The Consequences of Uncivil Media} (2015).}

Given this fragmentated and hyper-polarized media landscape, we can understand the effectiveness of Trump-era appeals to “alternative facts”\footnote{See, e.g., Eric Bradner, Conway: Trump White House offered ‘alternative facts’ on crowd size, \textsc{CNN Pol.} (Jan. 23, 2017, 12:38 PM), https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html [https://perma.cc/P3QC-U95D]; see also Hannah Jackson, ‘Sharpiegate’: What Trump said and why the controversy is continuing, \textsc{Global News} (Sept. 10, 2019, 12:24 PM), https://globalnews.ca/news/5881701/trump-sharpiegate-roundup/ [https://perma.cc/HR5C-RU3Z].} and allegations of “fake news.”\footnote{For an example of President Trump calling something “fake news” see his response on Twitter to an official Getty White House photograph featuring his hair blowing in the wind and his orange-tinted “tan” line visible, “More Fake News. This was photoshopped, obviously, but the wind was strong and the hair looks good? Anything to demean!” Donald J. Trump (@realDonaldTrump), \textsc{Twitter} (Feb. 8, 2020, 11:13 AM), https://twitter.com/realDonaldTrump/status/1226226540190351420?ref_src=twsrc%5Etfw%7Ctwcamp%7Ctwroom%7Cembed%7Ctweet.} These tropes are simply extensions of the partisan dynamics that have become increasingly salient for Americans over the past three decades. They prevent legislators, politicians, and citizens alike from hearing and processing political information outside the filter of their partisan priors.

These dynamics are especially pernicious for the idealized functioning of the United States Senate, compromising the role Madison envisioned for that body as a deliberative refinery—a pressure valve for the release and transformation of factional pressures and passions. Though a bit more removed from the electorate than their counterparts in the House of Representatives, U.S. Senators are not immune from the effects of political and affective polarization. In fact, the current Senate is more polarized—as measured by the ideological distance between Democrats and Republicans—than it has been at any point in history for which we have data (essentially, beginning in 1880).\footnote{See \textsc{Jeff Lewis, Polarization in Congress}, \textsc{Voteview.Com} (Aug. 14, 2019), https://voteview.com/articles/party_polarization [https://perma.cc/T7PP-TC7L].}

The American people watched these tribal partisan dynamics play out right before their eyes during the Senate trial of Donald Trump. Before the Senate trial had even started, prominent Republicans, including the Senate majority leader Mitch McConnell and Senator Lindsey Graham, went on the record saying they had already made up their minds and that no evidence...
would change their determination to acquit President Trump. As Graham said at a forum in Qatar a month before the Senate trial, “I am trying to give a pretty clear signal I have made up my mind . . . I’m not trying to pretend to be a fair juror here.” McConnell even went so far as to say (on Fox News) that he was coordinating with the White House during the Senate trial: “Everything I do during this, I’m coordinating with White House counsel . . . there will be no difference between the [P]resident’s position and our position.”

Predictably, McConnell and the Senate Republicans voted along party lines to block testimony from witnesses and to not introduce any new evidence at the trial, even after news leaked that former national security advisor John Bolton had evidence corroborating the allegations against Donald Trump that he had knowingly directed aid be withheld from Ukraine in exchange for their assistance in his own political reelection campaign. This behavior is the very definition of party tribalism. It was also reflected (a) in the media coverage of impeachment— with conservative outlets criticizing the process as a “witch hunt” that was seeking to overturn the 2016 election results and liberal-leaning outlets expressing outrage at the Republicans running a “sham trial” and betraying their oaths to the United States constitution—and (b) in public opinion—with 84% of Democrats supporting impeachment joined only by 9% of Republicans. Moreover, there was almost no movement among these blocs during the entire process. In the end, only one Republican, Senator Mitt Romney (R-UT), broke ranks to vote in
favor of conviction on the charge of abuse of power while Democrats voted as a partisan bloc to convict.

Given what we know now about political behavior in this era of hyperpolarization and partisanship, both the impeachment and the acquittal of Donald Trump are completely unsurprising. When we apply these insights to Professor Turley’s analysis of the critical role of the Senate in impeachment, the consequences of this are clear. The impeachment and removal power provided for in the United States Constitution can no longer be understood to function as a Madisonian tool of factional resolution a la Federalist No. 10. Political polarization and party tribalism prevented the full and fair airing of facts, hearing of witnesses, and presentation of evidence in the case against Donald Trump. The deliberative capacities of the United States Senate and, perhaps most importantly, of the American constituents have been handicapped by affective polarization—that is, the inability to hear and process political information without the filter of a partisan lens.

In recognition of our current American reality, there is reason to believe—as one political scientist has put it—that impeachment simply does not work.49 However, as I illustrate in the next section, this assessment might be only half-correct. Evidence from comparative politics scholars suggests that impeachment, when followed closely by a new election, can provide a “hard reset” for democratic norms and a political system. That being the case, the impeachment and removal trial of President Donald Trump can be understood through the lens of Madison’s Federalist No. 51 as an “auxiliary precaution” that might serve to safeguard the “primary control” on abuse of power—that is, the electoral process.

III.IMPEACHMENT AS A MADISONIAN DEVICE RECONSIDERED—AN “AUXILIARY PRECAUTION” TO SAFEGUARD THE “PRIMARY CONTROL”

A. Federalist No. 51 as an Alternative Touchstone for Understanding Impeachment

When polarization and strong partisanship become the gears that drive political behavior and partisan media, the mechanism of transmission of our political information, key parts of the so-called “Madisonian machine,” break down. Given the dynamics driving this breakdown, which were on full display during the impeachment hearings and trial of Donald Trump, it is no longer useful or accurate to characterize impeachment, as Professor Turley

has, as a tool of factional resolution and a mechanism of deliberative democracy a la Federalist No. 10.

This does not mean that the impeachment power can no longer be understood as Madisonian at all or that the process of impeachment has been rendered entirely vestigial by partisanship and polarization. If we ground our understanding of the impeachment power and process in Madison’s other most famous essay in The Federalist Papers, we glean a slightly different perspective on the scope and potential of impeachment:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.50

Federalist No. 51 gets to the very crux of the constitutional enterprise Madison and his contemporaries were undertaking. It articulates “the great difficulty” of framing a government that would be powerful enough to govern but not so powerful that it would become tyrannical. Madison and his colleagues had experienced firsthand the so-charged “absolute tyranny” 51 of King George and had then overcorrected by designing a government that turned out to be too weak and decentralized to be effective—the Articles of Confederation.52 The new United States Constitution would be an exercise in striking the proper balance between power and control.

Impeachment is a mechanism of control—one of many “constitutional means” and “auxiliary precautions” Madison identified in the structure of the Constitution that would serve to mitigate or prevent the accumulation and abuse of power by public officials.53 Indeed, Martin Diamond referred to

50. THE FEDERALIST NO. 51, supra note 1, at 318–319 (James Madison).
these “auxiliary precautions” as a vital part of “the restraining spirit” of the Constitution, while Joseph Kobylka and Bradley Kent Carter noted that these were built in as “defenses against the dark side of human nature.” The view of impeachment as an “auxiliary precaution” or additional safeguard against tyranny aligns with how most scholars and legal historians have characterized the animating spirit of the power. As Michael Gerhardt notes in his exhaustive review of the history and meaning of impeachment, there is “relatively widespread recognition of the paradigmatic case for impeachment as being based on the abuse of power.”

Alexander Hamilton’s characterization of impeachable offenses in Federalist No. 65 provides additional evidence that the clause was meant to guard against “the misconduct of public men” and to provide a mechanism of redress for society for “the abuse or violation of some public trust.” James Madison himself, speaking at the ratification convention for the new constitution in Virginia, assuaged fears about the breadth of the presidential pardon power and its potential to “establish tyranny” by pointing to the impeachment clause as the “one security” against such abuse of power. Impeachment can thus be understood as one of many mechanisms built into the Madisonian machine to, in the parlance of Federalist No. 51, “oblige [the government] to control itself.”

However, the “primary control” on tyranny and abuse of power, Madison reminds us in the same breath, is a “dependence on the people.” In political science, we refer to this dependence on the people as the “electoral connection.” In more colloquial parlance, it is often said that if we do not like what our public officials are doing we can “vote the bums out.”
Regardless of what we call it, the vitality of this first-order check on tyranny and tyrannical behavior depends entirely on a free, functioning, and accessible electoral system.

This, I argue, is where impeachment can play its most important role as a Madisonian “auxiliary precaution.” First, it can be deployed to address abuses of power and betrayal of public trust in between election cycles. Second, it can and should be deployed in cases where a public official is attempting to influence and manipulate the “primary control” itself. That is, from a Madisonian perspective, it is especially appropriate to initiate impeachment proceedings against a public official who is attempting to influence or manipulate an upcoming election.

To wit, the discovery of a coordinated operation to meddle with and influence an upcoming election (Watergate)\(^{63}\) is precisely what motivated the impeachment process that led to the resignation of Richard Nixon—a case that is widely accepted to be the “paradigmatic case” for impeachment in American history.\(^{64}\) As Philip Kurland describes, the real “crisis” of Watergate was the evidence of a slow but steady trend towards “the spectre of totalitarianism” and the lack of real checks against it.\(^{65}\) The Watergate Scandal, to recall, involved a burglary of the Democratic National Committee headquarters by CREEP (the Committee to Reelect the President). The investigation and the initiation of impeachment hearings revealed other related illegal campaign practices, targeting and harassment of political “enemies,” and other so-called “dirty tricks” coordinated by Richard Nixon and his supporters to ensure his reelection.\(^{66}\) And then, of course, there was the attempted cover-up and obstruction of justice.\(^{67}\)


\(^{63}\) For a comprehensive and detailed account of the Watergate scandal as it related to President Nixon’s reelection efforts, see generally FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (Simon & Schuster, 1st ed. 1995).

\(^{64}\) See Gerhardt, supra note 56, at 604.


\(^{66}\) See Michael Schudson, Notes on Scandal and the Watergate Legacy, 47 AM. BEHAV. SCIENTIST 1231, 1232 (2004).

\(^{67}\) See id. at 1231–38.
Congress, Trump was found guilty of “Abuse of Power” (Article I) for pressuring Ukraine to announce an investigation into political rival Joe Biden, “while withholding military aid and dangling a head-of-state meeting, thereby corrupting the integrity of U.S. elections.” Trump was also found guilty of “Obstruction of Congress” (Article II) for withholding documents and preventing witnesses from testifying.

In Madisonian terms, the House found that Trump abused his powers to manipulate “the primary control” our system has for controlling tyranny—elections. Additionally, Trump and his administration compromised an “auxiliary precaution”—congressional oversight—by shielding information and hampering their ability to investigate him for wrongdoing. Indeed, from a Madisonian perspective, we might say that the Trump case—rather than the Nixon case—is in fact the paradigmatic case for impeachment. Without mentioning Madison here, Professor Pamela Karlan underscored this point during her testimony at the House impeachment hearing:

But the Framers of our Constitution realized that elections alone could not guarantee that the United States would remain a republic. One of the key reasons for including an impeachment power was the risk that unscrupulous officials might try to rig the election process. At the Constitutional Convention, William Davie warned that unless the Constitution contained an impeachment provision, a president might “spare no efforts or means whatever to get himself re-elected.”

By abusing the powers and privileges of the office of the presidency, sparing “no means whatever” to get oneself “re-elected” and to “rig the election process,” this abuse of power and public trust gets to the very heart of why Madison and his contemporaries put the impeachment clause in the Constitution in the first place.

B. Impeachment + Elections = “Hard Reboot” of the Political System

As I reviewed in Part II, the same forces that have conspired to weaken political accountability across the board—polarization, party tribalism, and “fake news”—have conspired to weaken the ability of this check to be effective in removing an impeached President from power. But recent work by

69. Id.
comparative political scientists on impeachment gives us reason to believe that the impeachment process could have important downstream effects for the American political system.

New research from Tom Ginsburg, Aziz Hug, and David Landau examines the dynamics of impeachment from a global perspective and provides, in their words, “the first comprehensive analysis of how constitutions globally have addressed removals, and what the consequences of different design choices are likely to be.”71 Combining a large-n data set of impeachment and removal globally with more granular cases studies of South Korea, Brazil, Paraguay, South Africa and the United States, these scholars find that, far from being a vestigial constitutional tail, “presidential impeachment in practice is about far more than removing criminals or other bad actors; it often serves as an exit from the deep structural crises that presidential (and semipresidential) systems of government sometimes undergo.”72

This “exit” from crisis is especially possible, as these scholars note, when the design of impeachment calls for holding new elections after a head of state is impeached. They point to South Korea’s design, which calls for new elections sixty days after the impeachment process has concluded, while noting that many other countries also call for new elections on the heels of impeachment.73 Holding new elections after an impeachment, in their assessment, allows “the constitutional order to hit the ‘reset button’” which, they argue, “seems to us like a useful tool.”74 The United States does not have “new elections” built into their constitutional impeachment design. We do, however, fortuitously, have new elections coming up at the end of this year. If we believe that the experience of other countries is instructive, these elections have the potential for Americans to initiate a “hard reboot” of our political system—to hit control-alt-delete and start again.

Such a thing would not be unprecedented. The so-called “Watergate Babies,”75 or less controversially but more uncommonly referred to as the “Class of ’74”76 elected in the wake of Richard Nixon’s impeachment proceedings and resignation, ran and won on an anti-corruption platform. This class of Democratic congressmen, as described by one journalist, were

71. Ginsburg, supra note 58, at 5.
72. Id. at 58.
73. Id.
74. Id. at 54–55.
“young, idealistic liberals who had been swept into office on a promise to clean up government, end the war in Vietnam, and rid the nation’s capital of the kind of corruption and dirty politics the Nixon White House had wrought.” As other observers have noted, the resignation and disgrace of Richard Nixon opened up a rare window for bipartisan cooperation on anti-corruption legislation that would seek to prevent future Watergate-type scenarios. Campaign finance legislation, the Ethics in Government Act, and amendments to the Freedom of Information Act and to the Budget Impoundment Act were representative of the post-Watergate congressional effort to “institutionalize” instruments “of self-purification” in government, to quote Republican Senator Jacob Javits.

To be sure, there is good reason to be skeptical that the diverse, energized, SQUAD-led group of freshman elected in 2018 combined with a projected “blue wave” in 2020 would lead to the same kind of bipartisan cooperation that we saw in the wake of Watergate. Part II details the seismic shifts in partisanship and hyper-polarization pushing against that possibility. That being said, there is at least one encouraging sign that independent-minded Republicans might be willing to collaborate with Democrats on anti-corruption and reigning in presidential power. Republican and former CIA operations officer Evan McMullin, who has been one of the strongest critics of Trump, has founded a reform-centric non-profit “Stand Up Republic,” and has partnered with an organization led by former Obama administration lawyers to develop what they call a “Blueprint for the Day After.” Described as “an ambitious set of proposals for quick legislative action at whatever point Trump leaves office,” the blueprint focuses on the following:

1. restoring the integrity of elections,
2. shoring up limits on executive power, including restoring the Constitutional check on the President’s war powers,
3. ensuring that government works for the people, not the personal interests of the President and his allies,
4. protecting inclusive and fact-based democratic participation,
5. rebuilding faith in the project of American government.

78. Silverstein, supra note 24, at 181.
81. Clift, supra note 75.
82. Id.
Again, the parallels here to the Watergate Babies’ congressional agenda—an agenda that, if it did not provide a “hard reset” to the political system, at the very least installed some anti-malware virus detection software onto it—are noteworthy. Both agendas are responding to what Philip Kurland called in his analysis “the spectre of totalitarianism” and both seek to shore up the checks—both primary (elections and democratic participation) and auxiliary (checks and balances) against the perceived prospect of tyranny. In other words, to circle back to the driving point of this article, both agendas are distinctly Madisonian a la Federalist No. 51.

CONCLUSION

With the benefit of hindsight—and the impeachment hearings and Senate removal trial of Donald Trump now behind us—it is clear that Professor Jonathan Turley’s idealized conception of the impeachment process functioning as a tool for factional resolution and deliberative democracy is now defunct. Political science predicted this outcome perfectly. As Part II details, the forces that now dominate our political landscape—polarization, party tribalism, fragmented news and alternative facts—have conspired to turn the impeachment clauses into something of a constitutional vestigial tail. That being said, while the impeachment process (predictably) failed to remove Trump as President of the United States, I argue that the process could still have meaningful downstream effects.

Relying on recent research by comparative political scientists, there is reason to believe that this process, because it is followed closely by a general election, could help provide a “hard reboot” of our political system—a system that, by almost any conceivable metric, is in crisis. After all, some version of a reboot is precisely what happened in the wake of Watergate. A Democratic Congress and President could pass anti-corruption reforms for the post-Trump era; reforms that would strengthen and protect the “primary control” against tyranny—elections—and shore up some of the “auxiliary” checks that have been weakened if not altogether destroyed since the 1970s. It would be a moment to say, as House impeachment manager and California Congressman Adam Schiff did in his closing argument to the Senate asking his Republican colleagues to convict Trump, “Truth matters to you. Right matters to you. You are decent. He is not who you are.”

83. See Kurland, supra note 65.
A reset election in November would be the moment for Americans to say, definitively, “[Trump] is not who [we] are.” Or maybe the election goes the other way. The “primary control” against tyranny and against the ever-more-visible “spectre of totalitarianism” fails.85 And we will be forced to concede that yet another part of the so-called “Madisonian machine” has broken down under the weight of hyper-polarization, partisanship, and “alternative facts.” In that case, we would need to concede that Trump is “who we are.” But the machinery the Republicans are building around Trump is not the Madisonian machine. It is the machinery of absolute tyranny.

As political scientists are all-too-fond of reminding everyone, and as President Barack Obama reportedly said to Republican leadership in the wake of the last “blue wave,” “elections have consequences.”86

85. See Kurland, supra note 65.