

# Written Statement

Michael J. Gerhardt, Burton Craige Distinguished Professor of  
Jurisprudence, University of North Carolina at Chapel Hill

Before the House Oversight and Accountability Committee on

The Basis for an Impeachment Inquiry of

President Joseph R. Biden, Jr.,

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Thank you for the opportunity to appear today before the House Oversight Committee to address the basis for its opening an impeachment inquiry of the President of the United States, Joseph R. Biden, Jr. More than 30 years ago, I launched my career as a law professor with an article on the constitutional limits to impeachment and other mechanisms for holding presidents accountable for misconduct.<sup>1</sup> I have spent decades studying the history of impeachment and written three books on the subject, including a forthcoming book on the law of presidential impeachment.<sup>2</sup> In 1998, I was called as a joint witness-- by Republicans and Democrats-- to testify on

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<sup>1</sup> Michael J. Gerhardt, *The Constitutional Limits to Impeachments and its Alternatives*, 68 *Tex. L. Rev.* 1 (1989).

<sup>2</sup> See Michael J. Gerhardt, *The Federal Impeachment: A Constitutional and Historical Analysis* (3<sup>rd</sup> edition, University of Chicago Press 2019); *Impeachment: What Everyone Needs to Know* (Oxford University Press 2018); *The Law of Presidential Impeachment* (NYU Press forthcoming January 2024).

impeachment, and have since participated in three other impeachment proceedings, including two addressing presidential misconduct. I addressed then-Speaker Newt Gingrich and the entire House of Representatives on the law of impeachment in 1998; and I have been honored to consult with members of both the House and the Senate on constitutional questions related to impeachment. Based on my life's work as a constitutional scholar, I have determined that impeachment is a principal safeguard against tyranny and corruption. The Declaration of Independence was written to free us from a king's tyranny. It consists of 27 articles of impeachment against the King, who was not subject to impeachment or legal action in England. Because of this history, I can think of no more constitutionally consequential endeavor than considering the impeachment of an American president.

In *The Federalist Papers*, Alexander Hamilton warned of the dangers of trivializing impeachment through petty partisanship. He foresaw that impeachment may “agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the relative strength of the parties, than by the demonstrations of innocence or guilt.”<sup>3</sup> In other words, an impeachment proceeding, including the initiation of an impeachment inquiry, must rise above petty partisanship in order to ensure its

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<sup>3</sup> Alexander Hamilton, No. 65, *The Federalist Papers* (1961).

legitimacy. Now is the time to do our best to rise above partisan differences and work together to get the impeachment-related constitutional questions and procedures right. Your oaths demand that, and I am here because my devotion to the Constitution demands that.

There are several safeguards to protect against the danger Hamilton foresaw. The launching of a presidential impeachment inquiry, under the present circumstances, conflicts with each of these.

I

One important safeguard is the Constitution's requirement that there be evidence of "treason, bribery, and other high crimes or misdemeanors" as a basis for presidential

impeachment.<sup>4</sup> The Founders included impeachment in the Constitution to protect our nation from serious abuses of power and breaches of the public trust.<sup>5</sup> To honor their vision and our Constitution, it is vital that, when considering impeachment of a president, the House and the Senate each proceed in a manner that inspires public trust.

In England, at the time of the founding, anyone but the king could be impeached for anything. The framers rejected that practice because, as their own experiences and study of history showed, the British system allowed, indeed invited, political parties to use impeachment to punish their opponents.

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<sup>4</sup> U.S. Const., art. II, section IV.

<sup>5</sup> See generally Michael J. Gerhardt, *The Law of Presidential Impeachment*, Chapter 1 (NYU Press, forthcoming January 2024).

To protect against such partisan overreaching, the Constitution requires credible evidence of “treason, bribery, and other high crimes and misdemeanors.” In every impeachment inquiry of a president beforehand, the House has identified some credible evidence of alleged wrongdoing committed by the targeted President. For example, in 1998, the House relied on specific evidence in the Starr Report to assert that President Bill Clinton lied under oath and obstructed of justice, both of which are serious felonies. When the House opened an impeachment inquiry of then-President Trump in 2019, it relied on evidence the House Intelligence Committee assembled in six weeks of meticulous fact-finding and testimony from dozens of witnesses, many of whom worked for President Trump at the time.

Today this Committee places the cart before the horse.

Though the Committee has released material including memos about bank records and two transcripts of witness interviews, the Committee insists it must still conduct a fishing expedition for misconduct they have yet to identify, specify, or prove.

I doubt it was a coincidence, as then-President Trump faced the prospect of impeachment in 2019 and Joe Biden as his chief rival in the 2020 presidential election, that President Biden's son, Hunter, suddenly became the focus of Mr. Trump's fiercest defenders' ire and speculation. As Mr. Trump's own impeachment and legal troubles worsened, the chorus proclaiming as corrupt Hunter Biden – and, by mere association, his father – became louder. It became louder still through the 2020 presidential election and the first three of President Biden's term. Yet, in this country, we do not visit the sins of the sons on their fathers (nor those of the father on their



children). To do so makes mockery of fundamental fairness and the seriousness of an impeachment inquiry.

## II

Indeed, a second safeguard may be the Fifth Amendment Due Process Clause, which provides that “No person shall . . . be deprived of life, liberty, or property, without the due process of law.” The minimal requirements of procedural due process are notice and a hearing. But President Biden has not had any notice of specific misconduct for which he is being made the target of an impeachment inquiry. It could be anything. An impeachment inquiry should not be a fishing expedition. It seems some House members have already made up their minds about impeaching the President – before even conducting a fishing expedition for direct or probative evidence. That is not

how impeachment is supposed to work.

In his 2019 defense of then-President Trump, then-Ranking Member Douglas Collins of the House Judiciary Committee declared, “At the end of the day, if people don’t believe what you are doing is fair, then it doesn’t matter.” He thought that, in the impeachment proceedings against then-President Trump, “you have to prove your innocence . . . that’s just not how our system works.” Those comments even more aptly describe the position in which President Biden finds himself – having to prove his innocence while facing the prospect of a fishing expedition in search of evidence that even those clamoring for his impeachment have no idea whether it exists or not.

For example, a claim Mr. Trump has made against Mr. Biden, beginning in 2019, is that he pushed for the firing of

Ukraine's top prosecutor, Victor Shokin, because Shokin was supposedly investigating Burisma when Hunter Biden sat on its board. The claim, in other words, has been Mr. Biden was trying to protect his son in urging Shokin's removal. There is no evidence supporting that claim. Instead, there is plenty of evidence showing Mr. Biden pushed for Shokin's firing because Shokin was *not* investigating corruption. Mr. Biden was implementing American foreign policy in urging Shokin be replaced by someone committed to rooting out corruption in Ukraine.

### III

A third safeguard against the abuse of the impeachment

is judicial review. In 2020, the Supreme Court in *Trump v. Mazars*<sup>6</sup> reviewed the conditions under which the House may seek or subpoena a president's personal records being held by third parties. While acknowledging that each "House has the power 'to secure needed information' to legislate," the Supreme Court ruled that "a congressional subpoena is valid only if it is related to, or in furtherance of, a legitimate task of Congress." Of course, a fishing expedition is not a "legitimate task of Congress." Indeed, the Supreme Court stressed that the House, or any Committee, must "satisfy a demonstrated, specific need" for a president's personal information that is "demonstrably critical" to a valid legislative purpose. The Court stressed further that issuing a subpoena to a third party

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<sup>6</sup> 591 U.S. \_\_ (2020).

maintaining presidential records raises serious separation of powers concerns. As the Court explained, the “specificity of the subpoena’s request ‘serves as an important safeguard against unnecessary intrusions into the operation of the Office of the President.’”

No doubt, many Republican House members would have agreed with the Court’s raising the level of scrutiny when reviewing House subpoenas seeking personal financial and other information third parties held for Mr. Trump while he was president. It stands to reason that subpoenas directed at the President himself face at least the same kinds of hurdles.

Since 2020, the most pertinent thing to have changed is that Mr. Biden is now President of the United States. The “safeguard” the Court said should protect the President’s ability

to do his job, without unnecessary or partisan interference, is not lessened because Mr. Biden, rather than Mr. Trump, is the President of the United States. If that bar is now being lowered because Mr. Biden, not Mr. Trump, is the focus of this Committee's scrutiny, then it is because Mr. Biden is a Democrat and stands in the way of Mr. Trump's return to the White House.

#### IV

The fourth safeguard is that impeachment was designed to be based on principle, not partisanship. Yet, most people, other than the most rabid partisans, following these hearings – and the years-long campaign to besmirch Mr. Biden through his son Hunter – are bound to think this impeachment inquiry is not based on any neutral principle. Most Americans likely see these

hearings as partisan retaliation against Mr. Biden rather than a genuine quest for truth and justice. To put this another way, partisanship, not principle, better explains today's hearing and the impeachment inquiry launched against President Biden than does a neutral principle followed by both parties.

In 2019, President Trump declared that Mr. Biden engaged in misconduct to divert attention from claims that Mr. Trump committed impeachable misconduct when he asked President Volodymyr Zelenskyy for the "favor" of announcing the opening an investigation into criminal misconduct by Mr. Biden. The point of the "favor" was to get the announcement (rather than any investigation) in the hopes that it would harm Mr. Biden as Mr. Trump's chief rival for the presidency in 2020.

The road that this Committee seeks to take the country down is fraught with constitutional damage and danger. The framers did not vest this institution with the “sole power of impeachment” to replicate British practice in which people could be punished for partisan reasons. If this committee wishes to honor the Constitutional vision of our founders, it should ensure there are **legitimate, non-partisan** grounds for proceeding. The surest way to ensure such legitimacy is not to drum up some process whose outcome seems predetermined but instead to abandon the fishing expedition and to identify credible evidence of presidential misconduct that even members of the opposition party find credible and impossible to ignore.

The casualties of a purely partisan presidential impeachment effort will be much greater than the integrity of



this Committee and this House. The rule of law, which requires credible proof of impeachable misconduct, will be sacrificed. The Constitution will be damaged because it will be ignored in exchange for a partisan vendetta. That is not why the framers established an impeachment process within the American Constitution; they did so to provide a check against tyrannical, despotic, and corrupt leaders. To place impeachment in service of the desire to do harm to Mr. Biden in his reelection campaign requires abandoning any pretense of legitimacy.

## V

A fifth safeguard is the need for the House itself to authorize an impeachment inquiry. In 2019, Speaker McCarthy insisted that the proper way to authorize such proceedings was for the full House to vote to do so. More recently, the Speaker

has reiterated the need for the full House to do this, but there was no such vote prior to the Speaker's asking three House Committees to initiate impeachment inquiries of President Biden. In fact, the full House authorized impeachment inquiries of Presidents Nixon, Clinton, and Trump.

Near the end of Donald Trump's presidency, the Office of Legal Counsel of the Justice Department issued an opinion declaring that the "only" proper way to authorize an impeachment inquiry was for the full House to do so. That opinion does not bind the Committee or the House, but it is persuasive authority that, in its rush to conduct further investigations of Hunter Biden and President Biden, the House has not authorized the inquiries underway in three different committees. As Stephen Engel, the Justice Department lawyer who authorized the Office of Legal Counsel Opinion, said, "no

committee may undertake the momentous move from legislative oversight to impeachment without the delegation by the full House of such authority.”<sup>7</sup>

### *Conclusion*

Nearly fifty years ago, Barbara Jordan, the great congresswoman from Texas, declared, in the first presidential impeachment inquiry in more than a century, that, “My faith in the Constitution is whole, it is complete, it is total. I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.” She noted “those are impeachable ‘who behave amiss or betray their

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<sup>7</sup> Office of Legal Counsel Opinion, On House Committees’ Authority to Investigate Impeachments,” January 19, 2020.

public trust” (quoting from the North Carolina ratification convention).<sup>8</sup>

How do we ensure that we are faithful to the same ideals?

It is by following Congresswoman Jordan’s example and demanding more from our-self and our government than partisan tit-for-tat. At the very least that means conducting an inquiry that will not “betray” the “public trust.” We should not cheapen our Constitution and the rule of law central to our Republic just to play to a partisan base. Today, the truth is crying out to be heard – that initiating an impeachment inquiry against President Biden manifests the danger of partisan

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<sup>8</sup> Barbara Jordan, “My Faith in the Constitution Is Whole; It is Complete; It is Total,” House Judiciary Committee Hearing, July 24, 1974, <https://millercenter.org/the-presidency/impeachment/my-faith-constitution-whole-it-complete-it-total>. |

warfare that Hamilton warned we should avoid. An impeachment inquiry should be based on evidence that everyone, not just partisans, find compelling. It is your solemn job to preserve, not cheapen for partisan purposes, the Constitution's most important mechanism for holding presidents accountable for their misconduct.