

## UVA LAW | Impeachment, Bribery and Corruption

MICAH SCHWARTZMAN: Welcome, everyone. I'm Micah Schwartzman. For those of you who I haven't met, I'm director of the Karsh Center for Law and Democracy. And I want to thank you for being here for the second of our series on the power of impeachment. This is a lunchtime series.

And our thought is to invite some experts on our faculty to talk about some current issues, and to give you a chance to have a conversation with them, and to ask them questions. So today, we have with us Professor Hellman and Professor Gilbert talking about impeachment, bribery, and corruption. Professor Hellman is the David Lurton Masee Junior Professor of Law and the Roy L. and Rosamond Woodruff Professor-- sorry-- Morgan Professor of Law.

Her work focuses on equal protection and anti-discrimination in one strand and in a second, she writes on money and writes on the relationship between money, and rights, and constitutional law. Professor Gilbert is the Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law. His research focuses on issues of constitutional entrenchment, campaign finance law, and appropriately here, corruption.

Both Professor Hellman and Professor Gilbert are members of the Corruption Lab, which is, I think, the full title of is the Lab on Ethics, Accountability, and the Rule of Law. This is part of the Democracy Initiative. I joked earlier that this is a Corruption Lab in the sense of studying corruption as opposed to perpetuating it. And it's Halloween, which is a time for trick or treating.

And I thought, trick or treat. This couldn't be more perfect for talking about quid pro quos. This is the classic quid pro quo today. So thank you all for being here. And I'm going to turn it over to Professor Gilbert and to Professor Hellman. They'll talk for about 10 to 15 minutes. And then we'll open things up for questions. OK.

**MICHAEL**

Great. OK, I'm going first. Thanks, Micah, for the introduction. Thanks everyone for coming.

**GILBERT:**

Happy to see you all here and made it to campus on this rainy day. These are historic times in Washington as you know. Prior to the current episode, we have only had three presidential impeachment processes in the whole history of our country.

President Johnson was impeached by the House of Representatives in 1868. The Senate acquitted him. He served out his term. Richard Nixon resigned under the threat of impeachment in 1974. So we didn't actually get a process there. And then President Clinton was impeached in 1998, but acquitted in the Senate.

So he completed his term. And now, we have this fourth impeachment process involving

President Trump. It's a tense time, an interesting time, controversial time. Lots of questions right at the intersection of law and politics are brewing. And we're going to focus on a related set of questions in that vein-- questions surrounding corruption.

So let me start by explaining the basic narrative that is emerging from the House of Representatives' inquiry. Probably you're familiar with it. I'll keep it brief. It runs like this. Sometime over the summer, President Trump struck a deal with the president of Ukraine.

Here are the terms. President Trump will release something like \$400 million in military assistance to Ukraine if and only if Ukraine will agree in exchange to launch and launch publicly. It was very important that it happened on camera-- an investigation of Joe Biden and his son, Hunter, who was working with an energy company in Ukraine.

I want to be clear. This is the emerging narrative. I don't know if this happened. And you as lawyers in training-- you should be wondering to yourselves if this happened. Most of the proceedings so far have happened behind closed doors. So we've gotten-- it's like analogous loosely to a grand jury.

We've gotten some prepared statements from some of the witnesses who appeared before these House committees. We've gotten some reports from members of Congress who attended these hearings about what they saw. But in my view, we do not yet have anything approaching a complete picture of what exactly did happen and didn't happen.

And in the weeks ahead, especially now, you might have seen it. The House of Representatives formally voted this morning and approved the official launch of an open impeachment inquiry. Many of these witnesses are going to come out in public now. We'll see on camera what they say.

We'll see how they respond to questions. I don't know the truth. The truth is slippery. But that's the narrative that this deal happened. And here's what I want to focus on. Let's suppose that the narrative is correct-- this did in fact transpire. Is this corrupt?

And relatedly, is it an impeachable offense? So before I turn to those questions, let me give you a little bit of background on how the impeachment process works. I say this with trepidation. I've thought quite a lot about corruption. I'm not an expert on impeachment, but I do know the basics.

And here's one slice of it that you may not be familiar with. Now that the House has formally launched the inquiry, a series of public hearings will be held in the weeks ahead. And then at some point, absent a surprise, the House will draft actual formal articles of impeachment.

So these are written charges against the president that are analogous to the charges that a prosecutor might commit in writing when charging a person with a crime. And then after these articles of impeachment are actually drafted, then the House votes on them.

And if a majority votes in favor of any one of them, that constitutes impeachment. And now, there will be a trial on that article in the Senate. Let me just give you a sense of what articles of impeachment might look like. I'm going to read you snippets from one of the articles that was prepared in the '90s against President Clinton. So here's the language.

President Clinton, quote, "has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration." Then the article goes on to explain that perjury and obstruction of justice charges against him-- crimes that he allegedly committed.

And then the article continues. And I quote, "In doing this, President Clinton has undermined the integrity of his office, has brought disrepute on the presidency, has betrayed his trust as president, and has acted in a manner subversive of the rule of law and justice to the manifest injury of the people of the United States."

What will articles of impeachment against President Trump look like? We don't know exactly. But it wouldn't be surprising at all if they followed this basic formula. There are some high minded and powerful language about an injury to the United States. And it's tied not just-- there's a point I want to emphasize.

It's tied not just to a kind of general allegation of problematic conduct. It's tied to a crime. The claim is that you violated a specific provision of law. And that's what I want to spend a couple of minutes talking about now. Positing that the narrative emerging from Washington is correct, you might think it's deeply problematic. Is it actually a crime?

That might be quite important when assessing the process that unfolds in the House. So let's talk about two potential crimes that the president might have committed-- again, positing that that narrative is true. The first one has to do with federal campaign finance law.

So like a good lawyer, I'm just going to read you little snippets of the statute here, but I'll keep it brief. Under campaign finance law, it is illegal to, quote, "solicit a contribution or donation of

money or other thing of value in connection with a federal election from a foreigner."

So there's a number of elements there. I'm sure you have them all in your head. We'll just walk through them briefly. The last thing is easily satisfied. He was talking to a foreigner-- the president of Ukraine. Did he solicit something? Well, if the narrative is correct, yes, he's asking for this.

You have to launch this investigation. That's what I would like you to do. Is it a thing of value? This is tricky, actually, or trickier than you might suppose. If he's soliciting, say, a contribution-- give \$2,000 to my presidential campaign. If you ask a foreigner to do that, that's soliciting a thing of value, and that's clearly illegal.

But that's not what he asked for. He asked for an investigation. I don't know if that's a thing of value. My intuition is yes. But I don't think you're going to find clear precedent on this question. You find some clear precedent or relatively clear guidance from the Federal Election Commission, anyway, that might at least in some sense push the other way.

If you ask for just information, say opposition research for purposes of a campaign, that's usually not thought to be a thing of value. And part of the reason it's not thought to be a thing of value is it raises the specter of any time two political consultants are chatting, they're violating campaign finance law.

So there's an open question about whether it's a thing of value. The argument running the other way is, of course, straightforward. He's trying to undermine the reputation of his principal political rival. That's not only sort of like a campaign contribution, it's better.

There's an argument running the other way. There's one other element in there that I want to talk to you about for just a minute. You have to solicit the thing of value in connection with a federal election. So did this happen in connection with such an election? Is President Trump a candidate yet for re-election in 2020?

You have to take actual steps in individual states to turn yourself into a candidate. And I don't know where he stands in that regard. Forgive me. I just haven't done the background research. Even if he has registered as a candidate, you might wonder if this is sufficiently close to a federal election to satisfy that last element of the offense.

That is to say, anytime you invite anyone to dig up research on, say, something possibly

problematic for any political rival, is that in connection with a federal election? There's got to be some nexus here. And we don't have clarity on what it is. So that's all to say, superficially, there's certainly a case here that he violated federal law in that deal with Ukraine.

Again, positing the narrative is true. But it's not cut and dry. There's some tricky elements here that we need to talk through. Now, let me turn to a second possible crime that the president might have committed in connection with this. He might have violated the main federal bribery statute. So let's run the same exercise. I'll just give you a little language.

This language is more fun. This is straight out of the statute. "Whoever being a public official--" President Trump clearly counts there-- "directly or indirectly corruptly demands, seeks, receives, accepts, or agrees to any of that, anything of value personally in return for being influenced in the performance of an official act has violated the bribery statute."

So I told you some of these elements are simple. He's a public official. And he demanded or sought something. Is it of value personally? Well, on the one hand, you might say no. It's not like he was asking for a bag of cash that he was going to go deposit in a bank somewhere.

He was asking for a kind of favor that might benefit him politically. Is it benefiting him personally? Or is it benefiting his campaign? Is that the same thing? There's some tricky questions to ask here. Remember this other language. It has to be in return for.

You have to have a quid pro quo. So what does that mean? Each side's action has to have induced the other side's action. The only circumstance in which I'll release the money is if you launch the investigation. The only circumstance-- well, that's the side of it that's really important.

Turns out proving a quid pro quo is really hard. Because the president might say something like, of course, I was going to release the aid anyway. And if he was going to release the aid anyway, then you might say it wasn't really a quid pro quo. Was it an official act?

So that's been a tricky question in cases involving Virginia governors, but it's not such a tricky question here. Releasing \$400 million in federal aid would seem pretty straightforwardly to be an official act. Here's the catch. There's one other element to that bribery statute that you might have caught when I read it quickly, and that's really interesting and important.

It's not enough. You don't violate that statute if you just demand a favor in exchange for a official act. You have to corruptly demand a favor. The word corruption-- corruptly appears in

the statute itself. OK, what does that mean? I say this when I teach election law.

You can imagine the legislators in Congress when they initially drafted the bribery statute. Their initial version might have said something like, quid pro quos are illegal. And then they all scratched their heads and said, wait a minute. How about corrupt quid pro quos are illegal?

Well, that's the language of the statute. And if you're familiar with statutory interpretation, we're not really authorized to just ignore that word corruptly. If it's in there, it has to be in there for a reason. It means something. So now, we have this open question. There's a kind of normative dimension to this.

It's not enough to have a quid pro quo. You might need it to be especially bad or problematic quid pro quo. And in just a minute, Debbie's going to talk to you a little bit about what that might mean. So let me just say a couple of other questions, by the way, of wrapping up my piece and setting the table for Debbie.

It's not clear, even if the narrative is correct, that he has violated federal law. If the clearer it is, the stronger the case for impeachment, I think most people would say. What if he hasn't violated a law? Well, we can't in some sense prove it. It doesn't mean that the House can't impeach him. And it doesn't mean the Senate can't convict him.

So the actual language of the impeachment clause authorizes impeachment for treason, bribery, or other high crimes and misdemeanors. I don't think there's any question of treason here. There's a question of bribery, although that's tricky, too. Debbie will talk about this. Other high crimes and misdemeanors. Does that mean it has to be a crime as defined in federal statutes?

Or does that mean it just has to be a crime as how the House of Representatives and the Senate understand some activity to be bad enough to be equivalent to a crime? The answer is probably the latter. And that's in part because of institutional considerations. Can you imagine a court-- I think [INAUDIBLE] two weeks ago talked about this issue, so I'll keep it brief.

Can you imagine the House of Representatives impeaching a president and then the president goes to a federal court and says, what I did was not a high crime or misdemeanor? And so the Constitution doesn't actually authorize this impeachment. Can you imagine a federal court, then, stepping into that mess and saying, oh, you're right?

They will dodge that dispute. I feel quite comfortable saying that. So as a matter of practice and maybe theory, too, the actual meaning of the Constitution-- you don't need a crime in the formal sense. The House of Representatives and the Senate just have to think it's bad enough that impeachment is justified. And I think I'll wrap it up there, Debbie, and turn it over.

**DEBORAH  
HELLMAN:**

Great. Thank you. OK, so before-- so welcome, everyone. So glad you're here. Before I start talking about my part, I just want to announce one event. As Professor Schwartzman said, Mike Gilbert and I are both part of the Corruption Lab, which is part of the Democracy Initiative at the university.

And the Corruption Lab is having its launching event, which is titled Corruption and Institutional Decay. It's going to be hosted over at the Miller Center, which is a short walk from here if you haven't been there. And it's on November 19 from 10:00 to 1:00.

The keynote speaker is Bill Browder and should be great. The only catch is you actually have to register for this event to go. You're absolutely welcome, but you have to register. And if you want to get in, you probably should register before Wednesday of next week.

Because then they'll open it up to the Miller Center Listserv, and it will feel like that. The way to register is to go to the Corruption Labs website, which is [clearlab.virginia.edu](http://clearlab.virginia.edu). OK? So I guess that's right. Does that sound right? [clearlab@virginia.edu](mailto:clearlab@virginia.edu)-- must be. I have dot there.

At any rate, that's the website. Have any trouble-- come find me afterward. OK, so I want to talk about two things. One of them is the question that Professor Gilbert kind of left open for me, which is how to unpack the idea of corruptly-- what corruptly means in the federal bribery statute, which is the offense-- the question he just set up.

And the other is-- the second issue he said a little bit about, but I want to say more about, which is how we should think about the "idea" of-- or other high crimes and misdemeanors in the impeachment clause. The impeachment clause provides that you can impeach for treason, bribery, or other high crimes and misdemeanors.

So I want to say a little bit about various possibilities about how we might think about that. So I want to start by talking about what we might-- what we think corruptly might mean when we think that bribery-- if you are focused on the federal crime of bribery, which says that you have to corruptly do the various things that Professor Gilbert suggested, what is it to corruptly do those things?

So the three possibilities I wanted to talk about is one which he mentioned as already in the statute. That is the quid pro quo. So I'll cash it out as with the intention to secure the quid pro quo. So you could think that to corruptly do something is to do it with the intention to secure the quid pro quo.

Another possibility is that you're corruptly doing the rest of the stuff if you're doing it in a way that's in violation of professional or positional duty, that there are certain duties that go with whatever the office is that's at issue. In this case, the Office of the President. And those duties require loyalty to the country or loyalty to your constituents.

And if you act in a way that's in violation of those duties of loyalty, that's to corruptly do the rest of the stuff. Another possibility would be to say that you're corruptly engaging in the exchange when the things that are exchanged are of different types, that one is something that's of public value.

And the other is something that's of personal value or just a more generic idea of them being of different types. Now, this one sounds a little bit bizarre, maybe. So let me give you a kind of everyday example that makes it seem more plausible. Suppose a parent had some teenagers that weren't very good students.

And I don't in any way want to impugn my children. Because they're quite good students, but was disturbed that their teenagers were not getting good grades and so decided to offer them money in exchange for getting good grades. And their grades improved.

The parent's really happy. And another parent comes up and says, how did you do that? How did you turn around your kid's behavior? The first parent might say, I bribed my kids to get good grades. Why does the parent say she bribes her kids, rather than that she paid them?

If she described it as a bribe, it suggests that she thinks those two types of things ought not to be exchanged, that the exchange of something that's kind of academic value, if you will, for something of monetary value, that there's something corrupting about that kind of exchange.

And so maybe what corruption means in the federal bribery statute or corruptly doing something is that the types of things that are exchanged belong in different domains. OK, so those are three possibilities. One is that you're intending a quid pro quo.

The second is that you're violating a duty of loyalty that goes with your office. And the third is



that you're corruptly exchanging when the things are of different types of value. So let me just suggest why I think the intention to engage in a quid pro quo exchange is likely insufficient, that we're going to have to go with one of the other two alternatives.

We can all imagine-- so I want to contrast two potential presidents-- one who says to a foreign leader, I'll release the aid that Congress has appropriated, so long as you make some commitments to improve the human rights record in your country. Or I'll release the aid that Congress has appropriated, so long as you buy more American goods or something like that.

OK, that's clearly exchanging those two things with an intention to secure a quid pro quo. I think most of us think-- whatever you think about that, I think it doesn't seem like it's bribery, right? And so that suggests the merely intending a quid pro quo exchange is going to be insufficient, that we're going to want to go with one of the other two ideas.

And that that exchange seems quite different-- it feels quite different from the second president, the one that Professor Gilbert suggested is the narrative that I'll release the aid that Congress has appropriated, so long as you investigate my political rival, right? That feels quite different.

And I think that each of the two alternatives-- the two and three that I had before can give us an account of why they're both plausible ideas. So it suggests that the fact of the quid pro quo exchange isn't sufficient. You need something else that you're doing it for the wrong kind of reason, a sort of subjective motivation focused account.

That's the one that tracks the idea of professional or positional duty. You're acting. Rather than out of a duty of loyalty, you're acting out of some other motivation. So the president who says, I'll release the aid as long as you buy more American goods, presumably is acting out of a duty of loyalty to America.

Getting that exchange-- that's different versus the political rival one. Or the idea that you're exchanging goods of different types. Buying more American goods is good for America. So those are both kind of political value or of social value, versus investigating my political rival.

That's a different kind of good. OK, so those two accounts are two plausible accounts of what might flesh out the idea of corruptly. They're different. They're both, I think, plausible accounts. And they're both ones that are found in the kind of scholarly literature on bribery and corruption.

OK, so I'm going to leave that discussion hanging for a second. And I'll turn to the other high crimes and misdemeanors. And then I'll kind of circle back to the first thing at the end. OK, so how might we unpack the idea that an impeachable offense is treason, bribery, or other high crimes and misdemeanors?

So there are a number of debates out there about how to interpret what that clause might mean. Professor Gilbert has kind of tapped on a few of them. I want to say a little bit more and perhaps disagree a little bit with one thing he said. OK, so the first is the question of, do we need a crime? Right?

And so you might say, well, treason and bribery are both crimes. And then the clause goes on - and other high crimes and misdemeanors. So that suggests we need a crime of some kind there. But there are examples of things that people-- you may disagree, but people think sound like impeachable offenses, which are not crimes.

So one example-- and I didn't bring it, but Professor Schwartzman lent me this fabulous book, which I recommend to you, which is called *A Handbook* on impeachment with a discussion by Charles Black and then one by Professor Bobbitt that suggests-- that offers the following example.

So this is not my example, that suppose a president were to say, I'm only going to appoint people to my cabinet who are professed Christians. OK, that's obviously not a crime. He has discretion who to appoint to the cabinet. And there's no crime for doing it that way.

But it's in violation of another clause of the Constitution, which says there should be no religious tests for office. That seems like an impeachable offense. It feels like an impeachable offense and yet, it isn't a crime at all. If you think that is an impeachable offense, that suggests that there is no crime requirement.

And many people point out also that the federal bribery statute like most-- like a lot of federal criminal law wasn't around at the time of the drafting of the Constitution. So why would we get so hung up on particular federal crimes anyway? The example-- so one question is, does it need to be a crime? I think I tried to suggest arguments.

You might think it does. Arguments-- you might think it doesn't. If you're persuaded by the religious test example, that kind of bleeds into another theory that's out there, that while impeachable offenses are things that are anti-constitutional that go against the foundation of

what it is to be a Constitution-- that conflicts with our Constitution. Sorry, I said that in the wrong way.

That certainly captures the example-- the religious test examples. But it's troubling as a theory in the sense that why single out treason and bribery then? Right? If you wanted to capture anti-constitutional offenses, it's a little odd to say treason and bribery as your two kind of foundational examples of things that are anti-constitutional.

So I think that's troubling for that. Some people also point out the idea that anti-constitutional is so open ended as an idea. It's so vague. And maybe that's a problem, which gets me, actually, to the third idea, which is the one that I think Professor Gilbert was discussing or gesturing toward, which is the idea that, well, it's whatever the House and Senate decides, right?

So if you're worried about anti-constitutional being vague, maybe let's go full on vague and say it's whatever the House or Senate decides. And I think Professor Prakash in the last Karsh lunch actually endorsed this view or at least seemed to suggest that he did. And it's certainly true. This is the part that I'm slightly going to disagree with Professor Gilbert about.

Professor Gilbert noted the fact that if the Senate-- If the House were to impeach for an offense and the Senate convict for something that plausibly didn't fall within treason, bribery, and other high crimes and misdemeanors, it's unlikely that a court would say that-- would overturn that decision.

So it must be, therefore, whatever the House and Senate decide is an impeachable offense. I think that's to fuse in a way that I would disagree with two questions-- justiciability and what are the constitutional norms. I certainly agree that the question is non-justiciable and that a court will find it to be non-justiciable.

That is if the House impeaches and the Senate convicts, a court is not going to say that whatever standards they used were inappropriate. That question is going to be held to be one that is left to a different branch of government, and that is to Congress. So the question is non-justiciable.

But still, that doesn't mean that it's whatever the House and Senate decide in the sense that the House has to decide, as then later the Senate does, what are impeachable offenses. And it's unhelpful to tell them, well, it's whatever you decide. They have to look at the idea of treason, bribery, and other high crimes and misdemeanors.

That constitutional text provides them with some law on the basis of which to ground their decision. And so I think looking at that, the members of the House and members of the Senate still have to use that law to think about what-- to guide their decision about what is an impeachable offense, even if the question is ultimately non-justiciable.

So let me turn to my last possibility, which is this is one that Professor Schauer emphasized in the last Karsh lunch, the idea that when the text says treason, bribery, or other high crimes and misdemeanors, we use the idea of treason and bribery as guides to interpreting what the other high crimes and misdemeanors are.

And he noted the [INAUDIBLE] interpretation-- ejusdem generis, which is that you interpret the general term in light of the more particular. I forget if this was Schauer's example or if I read it in the impeachment book. But at any rate, here's a good example.

If I said to you, get me some ice cream, or some cake, or something else good, it would be kind of weird for you to bring me a really good essay you wrote, right? It's something else good, but it's not good of the right type. We're looking for another kind of sweet dessert or something like that, right? It's got to be good in the same way that ice cream and cake are good.

So if the text says treason, bribery, or other high crimes and misdemeanors, we're looking for things that are like treason and bribery in some way. Therefore, setting up the question, what unites treason and bribery in the way that ice cream and cake are united or have in common that they are sweet desserts?

So you might say-- now, this is the way I'm circling back to the first part of the discussion. They're both offenses involving disloyalty-- treason and bribery. Or they're both violations of duties of office-- treason and bribery. Or they both involve privileging the personal rather than over society or the state.

Or most broadly, they're both corruption related offenses, right? So that takes us back to the questions that we were interrogating when we were thinking about what it means to "corruptly" blah, blah, blah in the federal bribery statute. And if you might recall, we had the two possibilities that we should think about that question in terms of subjective motivation.

Or we should think about that question in terms of the nature of the things that exchanged. I want to offer one last thought, kind of more broad brush about corruption, and then I will stop.

So when you think about the idea of corruption, because I said treason and bribery are both corruption related offenses.

So you might say, well, what is it to be a corruption related offense? And I think that the term corruption is kind of unhelpfully-- vague is the wrong word. But the term I'd like to use is it's a derivative concept, by which I mean it's just the flip side of whatever is the good of the institution or thing at issue.

So that was a little weirdly vague, so let me give you a few examples. So if I said the water supply is corrupted, the meaning of corruption there has something to do with what it means to be a good or healthy water supply for the water supply to be corrupted.

Or another example I like to use is if I was chairman of the-- chair of the Faculty Appointments Committee and I decided to hire my brother-in-law as a law professor, despite the fact that he's neither a good-- I don't mean to be impugning my two wonderful brothers-in-law. But despite the fact that he's neither a good teacher nor a good scholar.

But if I hire him because he is my brother-in-law, that seems like a classic case of corruption. We might call that nepotism. But if I invite my brother-in-law to Thanksgiving dinner, despite the fact that he's not a very good conversationalist, that doesn't seem like it's corruption, right? That seems like a good thing to do. Why?

Because the institutions of the family and the university have different internal values, right? So what's corrupting of the institution of Thanksgiving dinner or something and making my invitations based on family connectedness seems exactly what you ought to do in that context, whereas in the contexts of deciding who to hire as a law professor, that's a classic case.

That's in fact the classic case of corruption to hire someone because he's my brother-in-law. So what's corrupting of one in one context and what's corrupting in another context depends on what the good of the institution is. When we think about that, we realize that what's corruption related offense in the context of the impeachment inquiry depends on what we think the internal values of a democracy are, or of the institution of the president.

And so I want to come back to say that actually at the end of the day, I find the "anti-constitutional" idea actually quite persuasive. Because in order to know what is a corruption related offense-- so treason and bribery are corruption related offenses, so we need another corruption related offense.

But what's corrupting of the institution of the president depends on what the good of the presidency is or what the internal values of our society or our democracy are, which is another way of cashing that idea out is to say, those corruption related offenses are things that are anti-constitutional. That doesn't answer the question. It merely in a way sets up the question. OK, I'll stop there.

**MICAH** We have a couple microphones. And I'll just open the floor for questions if you have them. But  
**SCHWARTZMAN:** if you would wait until you get a microphone, because that'll make sure we can hear you and also that people can hear you who might be watching later. Is there any questions?

**AUDIENCE:** So it seems as though if hypothetically the House of Representatives were to draft and adopt an article of impeachment that said "just because" or no reason and the Senate were then to convict on that, it would be not reviewable and would presumably be valid.

And the president would presumably be removed from office. If that is, in fact, the case, what legal work, if any, is any of this doing? Or is it mostly just providing guidance for how the House of Representatives and the Senate ought to present what they do?

**DEBORAH** OK, well, two thoughts about that. One is I don't know if you went to the last Karsh lunch, but in  
**HELLMAN:** it, Professor Schauer talked about the case of the impeachment of the Judge Nixon. Walter-- is that his first name? And that was a case where they said that what counts as "trying" an impeachment was a non-justiciable political question.

And Justice Souter, I think, raised the issue. Really? What if they flipped a coin? So what they did there was they had a committee of the Senate actually hear the evidence. And the court said, we're not going to look. We're going to not consider whether that counts as trying an impeachment. Because the Senate has the sole power of trying impeachment.

But you have to wonder. Had they done something super extreme like flipped a coin, would the court really have said that? So one idea hanging out there is if they did something so crazy as, say, "just because," would we get the same result? And nobody knows for sure.

And there is a way in which you think maybe the court-- despite the fact that they said it was non-justiciable when what was done was within the bounds of reasonable, if they did something outside of the bounds of reasonable, that certainly would put pressure on the idea of justiciability, which is what your question is getting at.

So we don't know the answer, but it's a great question. The other thing I would say is I'd just push on the idea what legal work. So legal work happens not just in the courts, but outside the court. So I would emphasize that I think that legal work is done by this text, even if it never enters a courtroom.

**MICHAEL**

**GILBERT:**

I'll just add one quick addendum to Professor Hellman's first point. Here's another example of this. The US Constitution has the Republican Guarantee Clause, which guarantees to the states a Republican form of government. And the court has said that clause is non-justiciable. But suppose the state of Virginia eliminated its legislature and appointed a monarch. I'm not sure it would remain non-justiciable.

**AUDIENCE:**

I had a question going back to the campaign finance issue of it being a crime when it's tied to an election. At what point is that line crossed? So the president filed with the FEC the day of his inauguration for the 2020 election. Is that enough? Is it state by state? Or is it more like you're now raising money and reporting? And then on the other side, obviously, Joe Biden is registered in the primaries.

**MICHAEL**

**GILBERT:**

So as far as I know, everything you said is relevant to the question, but in what proportions and what's controlling-- we're not sure about. There isn't clear case law here answering all of this. I'll give you an example from a slightly different context where this came up.

So you have to go back in time a few years, not that long temporally, but it feels very different politically. Remember when Jeb Bush was the presumptive nominee of the Republican Party in the 2016 election? So you might remember this controversy. In 2014 and certainly 2015, Jeb Bush was traveling the country with some people who were running a Super PAC.

And he was appearing right next-- that supported him. And he was appearing right next to the people who were running the Super PAC. And he was saying, you people in the audience should give money to the Super PAC, which when the election season rolls around is going to help me.

Now, that is clearly a violation of federal law if he's a candidate. His trick was-- what his clever lawyers figured out was he's not yet a candidate, because he has, among other things, not yet filed with the FEC to set up a committee. So here, it's a slightly different setting. But it's a high-profile example of why this kind of question turns out to be so central.

Is this actually in connection with an election? Are you actually a candidate? And his lawyer

sort of-- it was a little risky, but they found a way around this. They concluded he's not a candidate until he files with the FEC. And he waited until the last possible moment to do this.

You might remember this. He's asking for money for the Super PAC. And people say, hey, Mr. Bush or Governor Bush, are you running for president? He says no comment. So long way of saying we don't know the specific answer, but the things you raise are all relevant.

**AUDIENCE:**

So I feel like so far, we've all implicitly been focused on one person. This one person can't affect-- this one individual in particular-- although they may have initiated this impeachable offense, there may be other political actors who are also impeachable, who may act in furtherance of this event. How does that sort of trickle down-- impeachable offense stuff work when we're not just looking at the person who started this all, allegedly?

**DEBORAH  
HELLMAN:**

So one thing I'll-- sorry. Did you want to go? One thing I'll say is I think your intuition that the standards are going to vary with the office at issue-- the impeachments that have led to conviction that we have are all judges.

And I think that what counts as an-- or what is likely to be judged to be an impeachable offense for a judge is going to be different. So the intuition that drives your question is it's going to vary with the official. And I think that's what precedent shows. And that's what I think our intuitions tell us. I don't know what else we can say.

**MICHAEL  
GILBERT:**

To the extent some other officials who might be complicit and impeachable serve at the pleasure of the president and be effective impeaching the president will be to also push them out of office. And so some of the trickle-down effect takes care of itself.

**AUDIENCE:**

Thanks for that. I think the idea of professional or positional duty as a measuring stick is really important. And it ties together a lot of the threads of this conversation. It reflects the importance of a lot of norms that are not necessarily codified in law.

And they really are crucial to a lot of the way that government functions. And for myself and for friends of mine who've also served in the executive branch, the crumbling of institutional norms, a kind of relentless assault by this administration, or ignoring of them, or erosion of them is a key feature.

So I hope that that becomes an element here. And I think that also explains part of the issue that was first raised. Well, if the courts aren't going to overrule it, does this really count for anything legally? In fact, as you pointed out, the interior view.



It's not the exterior view-- who on the outside will control it. For the members who are making decision or for individual executive branch officers who are making decisions, there has been a tradition and a norm of consulting the law, even if you think it's in an area where the courts are not going to handle it.

And you may be dissatisfied with that. So I hope that we will find a way to work through this whole process in a way that helps to reinforce those norms and maybe more of an idea about that, either in understanding the word corruptly or in understanding high crimes and misdemeanors. To re-emphasize the role of norms-- I hope would be very important.

And I think that does offer-- there is more solidity there. But in things that are based on norms, that may not be enforced by courts. But the stakes are pretty high out of this particular controversy as to whether or not we can help to reinforce that and point out the importance of that and the violative character as a result of those sorts of actions.

**DEBORAH  
HELLMAN:**

I feel like I've jumped in each time. So you want to jump in first?

**MICHAEL  
GILBERT:**

I'm not sure that I have much to say by way of response, Dave, other than I agree with you.

This is not a direct response, but a general observation that I think is consistent with the kinds of points you're making. You don't have to watch too closely the functioning of government institutions around the world to be left with a very strong sense that this is hard.

And institutions often fail. And a democracy that on paper should be functional in practice is anything but. So then we have to look in the mirror and ask, are we so different? Right? Or another way to put it is, is whatever we do here-- of course, it's not perfect, but by comparison, we have many advantages.

Lots of things have worked well. Is whatever the thing we do here so durable that we don't have to worry about one president coming along for four and eight years and engaging in activities that many people quite rightly think undermines institutional reform and might-- or institutional norms?

And my view is no. It's a fragile equilibrium, and we don't know what holds it all together. But we know once it falls apart, getting it back is really difficult. And we should all be gravely worried about this, whatever your views on left/right policy issues are.

**AUDIENCE:** Just a procedural question that I'm curious about. Could the Supreme Court or lower courts decide something less important than what counts as a high crime? And if so, like something more preliminary in the impeachment process? And if so, would that at all create difficulty for Chief Justice Roberts, who would presumably be the judge in the eventual Senate trial?

**DEBORAH HELLMAN:** So, actually, one thought that's a little-- not an answer to your question first. The Nixon case where the court said that the Senate has the sole power to try impeachments-- the word sole meant that the question of what counts as trying an impeachment was non-justiciable. They put a lot of weight on the word sole there.

So you might think maybe the court would be-- I don't think they really will. But you could make the argument that they might be more willing to get in on what counts as an impeachable offense, because there's no similar word sole in the-- that that's at play there in the clause that says what are the impeachable offenses.

But I guess Professor Schauer talked a little bit about the procedure, and how at the last Karsh lunch that there will be evidentiary questions raised, and what will happen with those, and said that the Senate-- so this is in the Senate in the trying of the impeachment that the Senate's rules-- he described what the Senate's rules were.

And I would imagine that the court for the same reason that they wouldn't get into what counts as trying an impeachment wouldn't get into what counts as an appropriate evidentiary ruling, et cetera. Professor Prakash talked a little bit about the subpoena power and whether the House's ability to subpoena witnesses who refuse to come-- whether that would be decided by a court.

I mean, I think we're already seeing that process beginning. There's a timeliness aspect of it, which is that even if they are willing to, will it happen in a way that can be relevant to what really occurs? I don't know. Can you think of other things that they might be willing to get into?

**MICHAEL** I can't. They're going to steer clear.

**GILBERT:**

**AUDIENCE:** So sort of along those same lines, treason is defined elsewhere in the Constitution. But bribery and obviously other high crimes and misdemeanors aren't. So then it comes down to a question of constitutional interpretation, which is within the purview of the judiciary. So why is it that the framers gave that power to the legislative branch?

**DEBORAH** You want to go first?

**HELLMAN:**

**MICHAEL** You first. I'll follow up.

**GILBERT:**

**DEBORAH** So, I mean, in the question-- so it's emphatically the province and duty of the judicial  
**HELLMAN:** department to say what the law is. But what they say-- what the court says in engaging in constitutional interpretation when they hold something to be non-justiciable is they interpret the Constitution.

They engage in the constitutional interpretation. And they interpret the Constitution as delegating that leap-- that constitutional interpretation question to another branch of government. So you're right that there is an inherent tension in the idea of non-justiciability, right? Not just for this particular clause.

But as Professor Gilbert mentioned, for the Republican Guarantee Clause or any time that the court thinks that an issue is non-justiciable, there is a tension between the idea of non-justiciability and the idea that the judiciary says what the law is, right? And that tension remains. How they make the determination-- like the "law" of non-justiciability includes both a textual component.

Is the decision textually committed to another branch of government? Which is what the court relied on heavily in the case of saying that deciding what counts as trying an impeachment was textually committed to the Senate. But there's also a prudential strand to that determination, which has come up in the Republican Guarantee Clause line of cases.

And that's the idea that if there isn't-- and the court has used it in the gerrymandering cases, right? If there isn't a clear legal standard that comes from the Constitution-- I have to smile in saying that because that doesn't impede them in many other contexts, right?

But if there isn't a judicially manageable standard-- and it's going to be too hot and difficult, and get us into too many fights with other branches of government, and possibly erode the legitimacy of the court. Then we're not going near it.

**MICHAEL** So you said what I would have said, but I would have said it less elegantly. I won't pile on to  
**GILBERT:** that. But I'll just pick up with one thread of the question, which is that there is some language

elsewhere in the Constitution about what treason as used in the impeachment clause means, whereas I suppose you could search and search.

But as far as I know, there's no language anywhere in the Constitution that gives you clues as to-- or straightforward clues as to what they might have meant by bribery or high crimes and misdemeanors. And this raises, among other things, the following interpretive question.

It could be that when the Constitution was enacted, what counts as treason for purposes of the impeachment clause was fixed at the time of enactment. See the Constitution where it talks about the meaning of treason, whereas bribery is a kind of broader term at least broader in the sense that there's nothing in the Constitution that gives it context. And so now, you have this interpretive question.

Does bribery in the impeachment clause mean what the framers understood bribery to mean when they enacted the Constitution? Or did they mean something more dynamic and evolutive? Bribery-- the impeachment clause authorizes impeachment for bribery in accordance with whatever prevailing standards at the time of impeachment direct you to.

So maybe just to kind of follow on to this-- and this connects to some of Professor Hellman's comments on the deep challenges of understanding what exactly the word corruptly means. I just want to tell you about a survey that I love, because it demonstrates the problem. It was a survey conducted in Eastern Europe. And it was about-- it's 15 years old now.

And it was about people's perceptions of corruption. And the survey doesn't define the term corruption. It just presents scenarios and then asks people if you understand this to be corrupt or not. And the scenarios begin with things like, suppose a government official uses a government car to take a beach vacation with family.

Is that corruption? And 90%, 95% of respondents say, yes, that's corruption. And then the next question is something like, suppose that a government official-- when you go to the relevant department and request a copy of your kid's birth certificate, suppose the government official says, I'll give it to you if you pay me some money.

And that money is not a fee authorized by law. They're just personally asking for money. Is that corrupt? And of course, 90, 95% of respondents say that's corrupt. And then there's another question in the survey which runs like this. Suppose that your neighborhood flower shop during the holiday season, when demand is high, raises the price of flowers.

Is that corrupt? 90%-- yes. It's corrupt. So to most Americans, you might think-- I don't know. Maybe you think it's unfair. This is going to depend on your views of market economies and supply and demand. But I don't think most Americans would say that's corrupt. You might think it's otherwise problematic.

There's normative content of corruption. It's partially just semantic. What do you mean by the term? But it's also subjective, right? It depends on context. It depends on background norms. And it's the recognition of that. I think it's the inability to deny that, that makes pinning down a meaning of corruption really difficult.

**DEBORAH  
HELLMAN:**

Can I just say one last thing about that, that piggybacks on something that Dave Martin said, that maybe that means there's the Constitution in the text. But there's the small c constitution, which are our norms and values that really support the way we do things.

Because the text is, after all, only a little piece of paper. Maybe occasions when we as a country engage in an impeachment inquiry are times in which we flesh that out, which is, I think, your point about setting the norms for how we hope things will go.

**MICAH  
SCHWARTZMAN:**

I think we have time for nearly one more question. Well, if not, let me make one brief announcement. And then I'll thank our speakers. So the [INAUDIBLE] announcement is that we have a third session in this series, which is a week from today on Thursday, November 7. It'll be here with Professor [INAUDIBLE].

And Professor John Harrison will be talking about impeachment as it relates to national security. So you have other questions or questions that weren't addressed in the first or in this session, you can bring them next week. We will continue our conversation. I just want to say thanks for coming and thanks for our speakers. I appreciate it. Thanks.