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# ‘Criminal-like’ Charges and Evidence Abound in Impeachment Proceedings

**There has been much talk in the Senate trial to the effect that no crimes or crime-like behavior have been charged or proven. To the contrary, the articles of impeachment sound a lot like an indictment on several federal crimes, backed up by a lot of testimony at trial.**

BY **STUART GASNER AND NICHOLAS GREEN**

The Republicans’ defense of the president has focused, in part, on the argument that neither the articles of impeachment nor the evidence presented at the trial has shown any crimes, or, in the words of Harvard Law professor Alan Dershowitz, any “criminal-like conduct.” I am no constitutional scholar and cannot speak to the appropriate standards, but as a former federal prosecutor and longtime criminal defense lawyer, I can look at a charging document and a set of facts and see the federal criminal charges implicated. Leveraging this experience, and from what I’ve seen thus far in the trial, any prosecutor worth his or her salt could make a clear case that the president and others engaged in illegal activities, including conspiracy, bribery and obstruction of Congress.

**The Illegal Conspiracy to Violate Election Laws**

Conspiracy, of course, is a distinct federal crime designed to address the evils of joint action toward criminal ends, whether or not those ends are achieved. Prosecutors love to charge conspiracies because the law allows a wealth of evidence to be admitted under the co-conspirator exception to the hearsay rule and because it doesn’t take much to become a member of a conspiracy. All it takes is for the conspirators to have agreed on the essential nature of a plan with a criminal objective—not necessarily on the details of their criminal scheme—and for one member of the conspiracy to have committed an overt act. It would not take much to convert the lengthy narrative established in the House testimony into a conspiracy indictment.

The illegal objects of the conspiracy, first and foremost, would be a violation of the criminal provisions of the Federal Election Campaign Act, which make it unlawful for a person to solicit election contributions, including “any thing of value,” from the government of a foreign country. The Federal Election Commission has long interpreted “anything of value” broadly. Getting Ukraine to announce an investigation of the Bidens was plainly of value to the president, given the extreme efforts he and others went to try to obtain it. Many people have gone to prison for lesser election law violations.


**Laura Albinson protesting in favor of the Senate hearing witnesses during the Impeachment trial against President Donald Trump, in Washington, D.C., on Jan. 16, 2020.**

Article I of the articles of impeachment says pretty much the same thing: “Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election. He did so through a

scheme or course of conduct that included soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection." Sure, the title of the article is "Abuse of Power," and it doesn't have all the bells and whistles and boilerplate of a federal conspiracy indictment, but the accusation is clear.

### The Accusation and Evidence of Bribery

Many prosecutors would also be inclined, on the facts revealed in the House investigation, to charge a conspiracy to solicit bribery, or the stand-alone crime of soliciting a bribe. The standard jury instruction for the federal bribery statute requires merely that the defendant demanded or sought something of value, while a public official, with the corrupt intent to be influenced in the performance of an official act. Conditioning a White House meeting or the release of hundreds of millions of dollars in military aid on opening an investigation into a political rival would seem to qualify. There would be a fight over the president's "corrupt" intent, of course, but many prosecutors would welcome the chance to prove the president's intent by disproving the administration's shifting explanations—a classic prosecutor's strategy at trial.

What does Article I of the articles of impeachment say? "With the same corrupt motives, President Trump—acting both directly and through his agents within and outside the United States Government—conditioned two official acts on the public announcements that he had requested," that is, the $391 million in military aid to Ukraine and the White House meeting. Pretty close to what a federal bribery indictment would say. Again, no statutory cites and boilerplate recitation of the elements of the offense, but interestingly that kind of verbiage was not in the articles of impeachment against either Presidents Richard Nixon or Bill Clinton.

### Obstruction of Congress

Article II of the articles of impeachment is devoted entirely to obstruction of Congress, laying out the president's directions to the White House, executive branch agencies and several enumerated individuals not to produce documents or testify. Similarly, much of the Nixon impeachment articles approved by the House were directed at Nixon's failure to comply with subpoenas. Here, the evidence has shown that the administration has stonewalled far more extensively than Nixon, including blanket directives to witnesses not to testify.

Prosecutors typically throw the criminal statute book at defendants who get in the way of an investigation or trial, so calling these accusations criminal or "criminal-like" is not a stretch. Indeed, telling witnesses not to cooperate with an investigation is usually the third rail for defendants, and even worse are overt threats—here there is ample evidence that both have happened. The fact that they happened in public is no defense. The federal witness tampering statute, 18 U.S.C. § 1512, is extremely broad and easy to charge, encompassing tampering by violence, threats, intimidation, harassment, persuasion, deception, or the destruction of evidence. The federal obstruction of proceedings statute, 18 U.S.C. § 1505, makes it a crime to use a "threatening letter or communication" to obstruct or impede a congressional investigation.

While the president's defenders have pointed to alleged privileges and immunities to excuse compliance, there has been extensive testimony that those arguments don't exist, don't apply, have been waived or are frivolous. It strains the imagination to think that these arguments would justify a stonewall as extensive as that erected by the president.

There has been much talk in the Senate trial to the effect that no crimes or crimelike behavior have been charged or proven. To the contrary, the articles of impeachment sound a lot like an indictment on several federal crimes, backed up by a lot of testimony at trial.

These are just a few of the most obvious criminal theories that come to mind. Many more are plausible. It is beyond the scope of this article to discuss the constitutional issues, but if one is focused on the conduct that is alleged in the articles and that has emerged at the trial, it is hard to say that it is not at least "criminal-like."

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