Constitutional Law Scholars on Impeaching Former Officers

Now that President Trump has left office, may the Senate take up an article of impeachment, and try, convict, and disqualify President Trump from holding future office? We, the undersigned constitutional law scholars, conclude it can.

We take no position on whether the Senate *should* convict President Trump on the article of impeachment[1] soon to be transmitted by the House of Representatives.

We differ from one another in our politics, and we also differ from one another on issues of constitutional interpretation. But despite our differences, our carefully considered views of the law lead all of us to agree that the Constitution permits the impeachment, conviction, and disqualification of former officers, including presidents.

Our shared conclusion is supported by the text and structure of the Constitution, the history of its drafting, and relevant precedent. The Constitution allocates the "sole Power of Impeachment" to the House of Representatives, and the "sole Power to try all Impeachments" to the Senate.[2] It provides that 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."[3] It further specifies that "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."[4]

In other words, the Constitution's impeachment power has two aspects. The first is removal from office, which occurs automatically upon the conviction of a current officer. The second is disqualification from holding future office, which occurs in those cases where the Senate deems disqualification appropriate in light of the conduct for which the impeached person was convicted. The impeachment power must be read so as to give full effect to both aspects of this power.

Impeachment is the exclusive constitutional means for removing a president (or other officer) before his or her term expires. But nothing in the provision authorizing impeachment-for-removal limits impeachment to situations where it accomplishes removal from office. Indeed, such a reading would thwart and potentially nullify a vital aspect of the impeachment power: the power of the Senate to impose disqualification from future office as a penalty for conviction. In order to give full effect to both Article I's and Article II's language with respect to impeachment,

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[1] H.R. Res. 24, 117th Cong. (2021).
[2] U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.
[3] *Id.* art. II, § 4.
[4] *Id.* art. I, § 3, cl. 7.

therefore, the correct conclusion is that former officers remain subject to the impeachment power after leaving office, for purposes of permitting imposition of the punishment of disqualification.

If impeachment were only a device for removing officials from office, then perhaps only current officers could be impeached. But disqualification is a consequence that might need to be imposed on prior officeholders as well as current ones. In keeping with that rationale, nothing in the text of the Constitution bars Congress from impeaching, convicting, and disqualifying *former* officials from holding future office. Indeed, the ability to try, convict, and disqualify former officials is an important deterrent against future misconduct. If an official could only be disqualified while he or she still held office, then an official who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate's final conviction vote. The Framers did not design the Constitution's checks and balances to be so easily undermined.

History supports a reading of the Constitution that allows Congress to impeach, try, convict, and disqualify former officers. In drafting the Constitution's impeachment provisions, the Framers drew upon the models of impeachment in Great Britain and state constitutions.[5] In 1787, English impeachment was understood to allow for the impeachment, trial, and conviction of former officials; likewise, the law of several states made clear that waiting to impeach officials until they were out of office was preferred or even required, and no state barred the impeachment of former officials.[6]

More broadly, a singular concern of the Framers in devising our constitutional system was the danger of a power-seeking populist of the type they referred to as a "demagogue" rising to the highest office and overthrowing republican government. The Framers further understood that the source of such a person's power does not expire if he or she is expelled from office; so long as such a person retains the loyalty of his or her supporters, he or she might return to power. The Framers devised the disqualification power to guard against that possibility, and would surely disagree that a person who sought to overthrow our democracy could not be disqualified from holding a future office of the United States because the plot reached its crescendo too close to the end of his or her term.[7]

Precedent also buttresses our conclusion that Congress may try, convict, and disqualify former officers: Congress has done it in the past. In 1876, Secretary of War William Belknap tried to avoid impeachment and its consequences by resigning minutes before the House voted on his impeachment. The House impeached him anyway, and the Senate concluded that it had the

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[5] THE FEDERALIST No. 65 (Alexander Hamilton).

[6] Brain C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 22–39 (2001).

[7] Frank O. Bowman, III, *What the Founders Would Have Done with Trump*, Wash. Monthly (Jan. 18, 2021), https://washingtonmonthly.com/2021/01/18/what-the-founders-would-have-done-with-trump/.

power to try, convict, and disqualify former officers.[8] Even in cases when impeachment proceedings were dismissed after the subject resigned, Congress has indicated that it was choosing to drop the case rather than being required to.[9] Belknap was not a president, but there is no reason why the same rule would not apply to presidents—after all, the Constitution's impeachment provisions apply to presidents, vice presidents, and civil officers alike.

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In sum, the Constitution's text and structure, history, and precedent make clear that Congress's impeachment power permits it to impeach, try, convict, and disqualify former officers, including former presidents. The Senate may take up the House's article of impeachment against former President Donald J. Trump, conduct a trial, convict him, and disqualify him from holding a future office of the United States.

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[8] 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives § 2001, 307 & n.3 (1907); *see id.* § 2007, at 310–21 (discussing Belknap case), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-26 htm.

[9] *See* VI Cannon's Precedents of the House of Representatives § 547 (1935), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/html/GPO-HPREC-CANNONS-V6-55.htm; H.R. Res. 661, 111th Cong. (2009); 155 Cong. Rec. S7832–33 (daily ed. July 22, 2009).

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