LAWFARE

IMPEACHMENT

Can a Former President Be Impeached and Convicted?

By **Keith E. Whittington** Friday, January 15, 2021, 12:22 PM

I have a great deal of respect for former Judge Michael Luttig, and so one should think twice when one finds oneself in disagreement with him. I have previously argued that former presidents can be subject to House impeachment and a Senate trial. In a recent Twitter thread, now converted into an op-ed, Luttig argues that former presidents are beyond the reach of the impeachment power. I am not persuaded.

It looks like this question will be a live one, because Senate Majority Leader Mitch McConnell is not agreeing to calling the Senate back into session for an impeachment trial before Inauguration Day. Trump's defense team will undoubtedly argue that the Senate does not have jurisdiction over the former president, and they may even attempt to get judicial intervention if the Senate moves ahead despite that objection. Assuming the Senate (and the courts) do not shut down the trial before it gets started, the jurisdictional argument might still matter. It takes only a majority of senators to overrule the motion to dismiss, but it will take two-thirds to convict on the article of impeachment. Some number of Republican senators might latch hold of the jurisdictional argument as a reason to vote against conviction. For this reason, it's worth taking this issue seriously.

I continue to believe that the senators should not let such a jurisdictional argument hold them up, as does Brian Kalt, who has looked into this issue closely. Luttig, however, writes that the "Constitution itself answers this question clearly." He believes that "the Senate's only power under the Constitution is to convict—or not—an *incumbent president*." He points to "purpose, text and structure" in support of this conclusion.

The core of his claim is this argument:

The very concept of constitutional impeachment presupposes the impeachment, conviction and removal of a president who is, *at the time of his impeachment*, an incumbent in the office from which he is removed. Indeed, that was the purpose of the impeachment power, to remove from office a president or other "civil official" before he could further harm the nation from the office he then occupies.

Luttig notes that Article II, Section 4 of the Constitution states, "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." Likewise, the Senate cannot convict and impose the punishment of disqualification from future federal office unless the president has been "constitutionally impeached."

He admits that the Senate proceeded in two cases involving officials who had resigned from office before the trial and that, therefore, the congressional understanding of its impeachment power includes the possibility of trial, if not impeachment, of former officials. But, he says, "only the Supreme Court can answer the question" of the scope of the impeachment power, and he thinks that it is "so clear" that the Senate does not possess such jurisdiction that it is "highly unlikely" that the Supreme Court would accept a Senate trial in Trump's case.

I have to admit that this conclusion is not nearly "so clear" to me. Let's begin with the text. It is notable that the Constitution does not explicitly say who is subject to the jurisdiction of the House in the chamber's exercise of the impeachment power, and it does not explicitly prohibit the impeachment of former officers. Luttig does not explain why he draws the inference he does from the text that he quotes. It is a plausible reading of the text, but it is not necessarily the only or correct reading.

The Constitution gives the House the "sole Power of Impeachment." It gives the Senate the "sole Power to try all Impeachments." The House cannot prosecute its impeachment before some other, more friendly body than the Senate, and the Senate cannot initiate its own impeachment process. The Constitution does not specify the scope of the impeachment power, except to delineate the types of charges that can be the basis for an impeachment, limit the types of punishments the Senate can impose on the convicted, and direct that certain officers "shall be removed from office" upon impeachment and conviction.

So it seems important to know what this "power of impeachment" is that has been vested in the House. The founders borrowed this power from British parliamentary practice and state constitutional practice, which does not suggest that the "power of impeachment" was intrinsically limited to incumbent officers. Quite the contrary, in fact: British practice indicates that the "power of impeachment" is the power to lodge formal allegations that an individual engaged in misconduct while holding a governmental office. Impeachments of former officers were both known and explicitly textually allowed. The framers did not discuss the matter one way or another, but they could easily have understood that the "power of impeachment" implicitly includes a jurisdiction over former officials. The text is at best vague and at worst includes former officers. And if the House can impeach them, then the Senate can try them, because the Senate has the power "to try all impeachments."

Of course, in Trump's case the impeachment is of a current officer, and so the question is whether the Senate loses jurisdiction if the impeached officer resigns or completes his term before the trial. But if the Senate has the power "to try all impeachments," then it would seem that it has the power to try all individuals whom the House has impeached and brought to trial regardless of whether that individual still holds public office. The House has frequently chosen to drop its impeachment efforts when an officer resigns; in those cases, it has generally either not voted on an impeachment resolution, not drafted articles of impeachment or not presented articles of impeachment to the Senate. But the fact that the House frequently concludes that its goals have been accomplished by the officer's resignation does not mean that the House could not have seen the impeachment through all the way to a Senate verdict.

It is true that Article II, Section 4 does specify what happens to specified officers upon conviction in a Senate impeachment trial. This language generally has been read, quite reasonably, to limit the potential scope of the impeachment power. The named offices are the president, vice president and all civil officers of the federal government. This is understood to mean that federal military officers are not subject to the impeachment power, and neither are state government officials nor private individuals. The Constitution could have been written differently, but this extension of the jurisdictional scope of the impeachment power to other individuals would have departed from inherited practice and could be expected to require an explicit textual delegation. According to Section 4, incumbent officers "shall be removed" upon conviction,which is why the Senate does not take a separate vote on whether to remove—instead, removal is automatic and instantaneous upon conviction. Section 4 says nothing about what happens to former officers. And Article I states that the punishment that the Senate can levy after conviction "shall not extend further" than removal and disqualification. So while the Senate has limited punishments it can impose, Article I says nothing about whether Senate trials or punishments are limited to incumbent officers.

What about the purpose of the constitutional impeachment power? Luttig suggests that the sole purpose of the impeachment power is "to remove from office" an individual "before he could further harm the nation from the office he then occupies."

This phrasing of the claim is, at the very least, awkward. If the whole point of an impeachment is to address the harm that someone can do "from the office he then occupies," then could a current officer be impeached and tried for his misdeeds in a previous office? Precedent suggests the answer is yes: Circuit Judge Robert W. Archbald was impeached, tried and convicted for corruption in office, and the articles of impeachment included his behavior in his previous position of district court judge. It is true that the House was unable to secure the necessary two-thirds majority for conviction on those articles, and at least some senators expressed doubts "as to his impeachability for offenses committed in an office other than that he held at time of impeachment." By contrast, the House argued that "it is indeed anomalous if this Congress is powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure, in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment." Archbald is one of the few federal officers to suffer the penalty of disqualification from future federal office, suggesting that the Senate appreciated the gravity of Archbald's extended history of misconduct.

If the House had been able to uncover corruption only from Archbald's days as a district court judge but not from his then-brief tenure as a circuit court judge, it is easy to imagine that two-thirds of the senators would have voted to convict and remove rather than leave a demonstrably corrupt judge on the bench. Even if the Senate had been convinced that such a judge had reformed

himself and thus was no longer going to "further harm the nation from the office he then occupies," impeachment and removal for the past misdeeds might well have been sensible and sufficient.

But set that scenario aside. Is it the case, as Luttig argues, that the sole purpose of impeachment is to remove an officeholder to prevent further harm by that individual in that particular office? Such a framing ignores the additional punishment available to the Senate after conviction—disqualification from future federal office. Removal is wholly sufficient to prevent the "further harm" an incumbent officeholder might do. Disqualification is necessary to ensure that that individual—such as a serially corrupt judge—has no opportunity to do similar harm in the future.

If the Senate could only remove officeholders, then Luttig would have a point. But the Senate can do more than that. Luttig, however, writes off the additional punishment of disqualification as relevant only for those who have been "constitutionally impeached"—that is, those who have been impeached during their time in office and not after it.

But even under Luttig's own standard, President Trump has been "constitutionally impeached." He is "*at the time of his impeachment*" an incumbent president, and the House has now resolved by majority vote to impeach him. Setting aside the question of whether presentation to the Senate is necessary to complete the House's process of "impeachment," Trump has by our modern reckoning now been "constitutionally impeached." At that point, trial, conviction and disqualification would appear to be on the table, even if removal is not.

But removal and disqualification are not the sole purposes of the impeachment clause. The impeachment process is a "grand inquest" in the sense that it is congressional oversight on steroids. The impeachment power gives the first, most democratic branch of the government the ability to scrutinize the actions of individuals in the other branches of government and call them to account for their actions. The House can impeach—that is, lodge allegations—with no fact finding of its own. It is the Senate trial where facts are unavoidably revealed, with the defendant able to challenge those findings and their interpretation. Of course, Congress now routinely uses other tools to engage in oversight of the executive branch, but this historic purpose of the impeachment power is still important.

What's more, the impeachment process serves as a warning to future officeholders. By clearly and decisively condemning certain actions as intolerable within the American system of government, Congress not only purges the particular malefactor but also attempts to purge the misdeeds from the system and set up a prophylactic to prevent their recurrence. If impeached officials can short-circuit that process of condemnation by resigning—as Secretary of War William Belknap attempted to do in 1876—then the bad actor has it within his power to deprive Congress of the ability to fully make an example of him and send the necessary signals to future officeholders.

And finally, the impeachment process establishes, shores up and preserves important constitutional norms. Impeachments are not the only vehicle for defending constitutional norms, but the impeachment power can be an important and effective vehicle for doing so. There are few constitutional norms so important as respect for the democratic transition of power—and few actions that Congress can take to so emphatically reaffirm that norm as to impeach and convict a political leader who has so flagrantly violated it. Even when an officer is not removed—as Justice Samuel Chase and President Andrew Johnson were not, for example—the House impeachment and the Senate trial were important vehicles for Congress to deliberate on and construct new constitutional understandings. Understanding the impeachment power as focused only on the fate of the political career of a single individual risks erasing this historical experience and setting aside an important tool in the constitutional toolkit.

Luttig concludes his argument by contending that this is a matter for judicial resolution. Perhaps. In the Walter Nixon case, the U.S. Supreme Court emphasized that the "parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers." The Constitution entrusts the interpretation of the impeachment power to Congress alone. The Senate, not the Supreme Court, was the final court of appeal for this political question. That sweeping conclusion is not very promising for the justiciability of this issue.

There might be a bit of daylight here, though hardly enough that it should give Luttig the degree of confidence he claims. In *Nixon*, the Supreme Court emphasized that "the impeachment powers" were exclusively entrusted to Congress with no role for judicial review. The court there was focused on the question of whether the court could review what the Senate understood to be a trial. Similarly, the meaning of "high crimes and misdemeanors" seems firmly entrusted to Congress, and there is no manageable judicial standard by which a court could reasonably second-guess Congress. Arguably, the jurisdiction of the impeachment process raises

more judicially manageable questions. The Supreme Court noted that in the context of the qualifications for a seat in Congress, the Constitution provides a fixed standard in a "separate provision" that Congress could not alter. Perhaps the court would take a similar approach and share Luttig's view that Article II, Section 4 likewise provides a fixed standard outside the scope of what is entrusted specifically to the House and Senate to arbitrate.

Moreover, the Supreme Court might take the view that the jurisdictional question in the Trump case does not raise the kind of finality questions that worried the court in *Nixon*. What if, the court asked, a Senate convicted and purportedly removed a president and the "president" filed motions in court seeking to have that verdict overturned? The prospect of judicial review could create the risk of a constitutional crisis in which the country did not know who was properly exercising the powers of the president.

In Trump's particular case, there is no such risk. If the Supreme Court reviewed the results of a Senate trial of a former president, there would be no risk of casting doubt on the chain of command in the executive branch. If the House and Senate were to purport to impeach, convict and disqualify a private citizen who had never held political office, the justices might well think that Congress was operating outside the bounds of any credible reading of the constitutional impeachment power and that judicial intervention would pose no real risk of undercutting the core uses of that power and the operation of the constitutional system of checks and balances. But even opening the door to judicial review of jurisdictional decisions by the Senate would run afoul of the American constitutional experience at the federal level and could invite even more challenges to the workings of the impeachment process.

The claim that the Senate can hold an impeachment trial for a former president is not obviously wrong. It is at most a difficult question, and one that has historical precedent behind it. Nonetheless, Luttig asserts that "only the Supreme Court can answer the question of whether Congress can impeach a president who has left office prior to its attempted impeachment of him."

Setting aside the apparent confusion of impeachment by the House with a Senate trial on impeachment charges in the Senate, it is not at all evident why "only the Supreme Court" can answer such a question. Traditionally, it was the Senate as the constitutionally designated court of impeachment that has had the final say over constitutional questions regarding the impeachment power. To get to Luttig's result, the Supreme Court would have to conclude that, even on close constitutional questions relating to the impeachment power, the Senate as the constitutional court of impeachment is an inferior tribunal to the Supreme Court. The court would run the risk of upending the constitutional system by claiming judicial supremacy over one component of the most awesome and delicate authority granted to Congress. As I've written elsewhere:

The impeachment power, like any other constitutional power, can be abused. The Senate sits in judgment of whether the House has misused its sole power to impeach federal officers. The people sit in judgment of whether the House and the Senate together have properly wielded this most formidable constitutional weapon. I know no safe depository of the ultimate powers of the society but the people themselves.

Judge Luttig is perhaps the most prominent voice giving support to the view that a former president cannot be put on trial in the Senate for high crimes and misdemeanors. His voice will carry weight with the senators. It might not be enough to persuade a majority of senators to dismiss the case outright, but it might well be enough to prevent the necessary two-thirds majority for conviction—and history suggests that this is a real risk. I do not believe his argument can bear that weight.

Topics: Impeachment, Jan. 6, 2021 Violence in the Capitol

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