

The expert witnesses the Senate needs: Call America’s four other living ex-presidents to testify against Trump

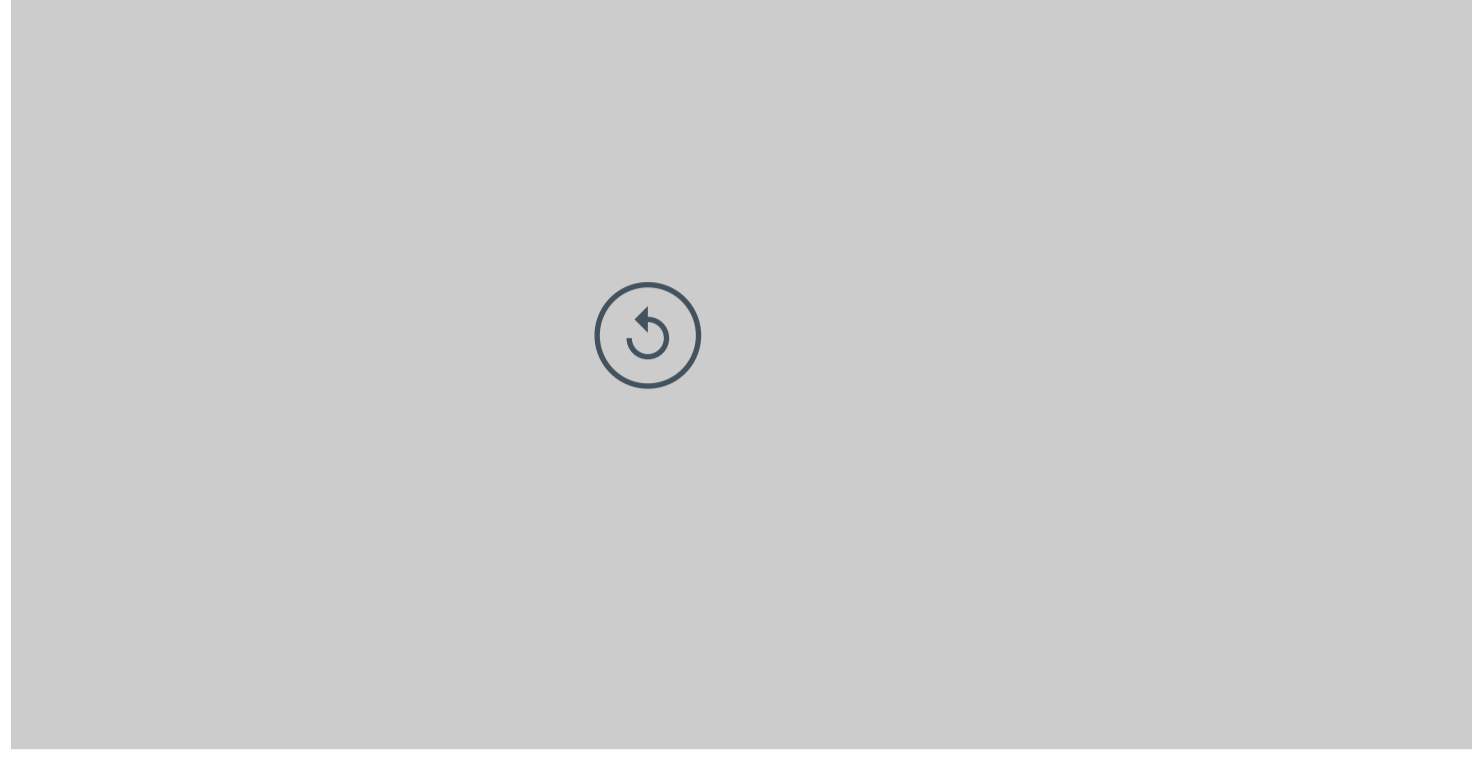
By AKHIL REED AMAR and ANDY LIPKA
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Former US Presidents Barack Obama, George W Bush, Jimmy Carter and Bill Clinton. (Getty/AFP via Getty Images)

Ex-president Donald Trump has declined the Senate’s invitation to testify at his impeachment trial. But the Senate should invite the four other living ex-presidents to testify as expert witnesses.

To see why, we must first understand what the trial should and should not be.



The most important issue the Senate must decide is not whether Trump should be disqualified from future office-holding. Rather, the key question is how outrageous — or not — was Trump’s post-election misconduct?

True, disqualification is one possible sentence were Trump to be convicted. And this is one reason — but only one — why ex-officers are subject to House impeachment and Senate trial. An officer guilty of outrageous misconduct should not be allowed, when caught red-handed, to resign 15 seconds before impeachment and thereby escape disqualification.

Yet Trump’s main defense would allow just this sort of evasion. His lawyers claim that the Constitution mandates that an impeachment conviction effectuate an officer’s removal from office. An ex-officer cannot be removed. Thus (they say) ex-officers lie beyond the Senate’s jurisdiction.

This argument fails miserably. Trump has already been impeached by the House, and he was impeached while still in office. Article I says — with no ifs, ands or buts — that the Senate has the power “to try all Impeachments.” There is simply no argument that Trump’s mid-January impeachment was somehow not an impeachment.



But let’s imagine that a president’s misconduct only comes to light after he has left. Even then, the House may impeach, and the Senate may try and pronounce judgment. So says longstanding and consistent Senate impeachment precedent, with roots in the Founding era and impressive reinforcement from John Quincy Adams, who surely knew a thing or two about the presidency. Common sense supports precedent. No president should have carte blanche to tyrannize at the end of his term or escape judgment by an early cover-up.

Most fundamentally, Trump’s claim of immunity violates a central purpose of the impeachment process: to render solemn judgment on a presidential miscreant and define standards for future presidents.

Presidents must be persons of honor. Though ultimately judged by history, they are also subject to the judgment of the high court of the Senate. The Senate must determine what a president has done, and whether these deeds are utterly unacceptable. The trial is ultimately centered on judgment — judgment of fact and of law — branding, excusing or exonerating the defendant and in the process laying down a marker for future presidents.

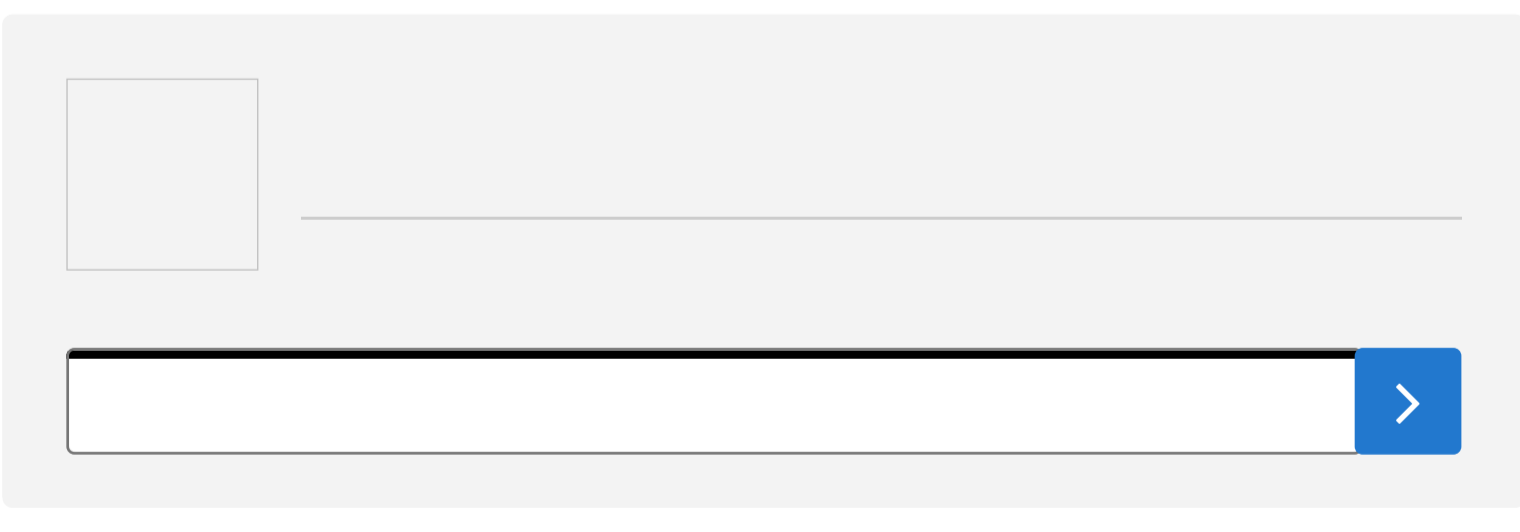
All of this is prior to, and independent of, the disqualification decision. Disqualification is a mere matter of sentencing. Removal is a mere contingency. The key is the judgment: the conviction or acquittal. In a conviction, the pronouncement of guilt is itself the most important punishment.

Indeed, disqualification raises troubling issues. It punishes the defendant, but also in effect disenfranchises his future supporters. Many may balk at this. But anxiety about one possible sentence is not an argument against the jurisdiction of the Senate, or against its responsibility to find the facts and draw the legal line.

Not all ex-presidents are impeachable at all times. Today, we should allow Richard Nixon to rest in peace; he is not alive to defend himself. Trump is. It was thus apt to invite Trump to testify.

It would also be wise to invite other ex-presidents to testify. A presidential impeachment trial must determine the law for all presidents. What is proper, what is beyond the pale? This judgment involves a mixture of law and politics, and thus the Constitution empowers politicians — senators — to be the judges and jurors.

Many senators today doubtless want to be president, but none has actually been one. No mere senator can fully understand — nor can ordinary Americans watching the trial — the unbearable pressures and complexities of actually being president. But ex-presidents can offer useful instruction.



The trial should not focus solely on Trump’s Jan. 6 speech and whether it incited insurrection. The key witnesses should not be fact witnesses like, say, the self-proclaimed QAnon Shaman. Rather, the trial must assess Trump’s much broader assault on the Constitution in his persistent efforts, even before Election Day, to delegitimize the election and his persistent efforts thereafter to defy it.

A worthy trial should not be a Shaman-focused circus, but an expert-focused seminar. True, Trump pushed very hard — far, far too hard. But this will emerge most clearly when other men who themselves have pushed hard, and won, testify about why Trump’s actions went infinitely beyond what they ever did or ever imagined doing. Perhaps all presidents prevaricate in some ways; but ex-presidents can explain better than anyone else the difference between ordinary presidential fudges and Trump’s Big Lie.

It might seem that this group is rigged against Trump. He in effect ran against ex-President Obama in 2016; he formally ran against ex-President Clinton’s wife in that year’s general election; in the primaries that year he formally ran against ex-President Bush’s brother; and he has consistently badmouthed ex-President Carter. But senators, like jurors in ordinary cases, can weigh the witnesses’ biases. In fact many ex-presidents have in history been rather gentle to other presidents and ex-presidents, even their former rivals.

Also, every ex-president who testifies that Trump deserves to be convicted is setting a marker by which he as an ex-president can and should be judged. Every ex-president, while alive, is himself impeachable.

One of us (Akhil) is a constitutional expert; the other (Andy) is an eye surgeon. In a hypothetical malpractice case involving allegations of botched eye surgery, if Akhil were on the jury, he would surely benefit from Andy’s testimony as an expert witness. Similarly, senators would benefit from the expert testimony of ex-presidents. This is especially clear when we understand the central purpose of the trial ahead: not to remove Trump (that has already been done), not to disqualify Trump (that might be a mistake), but to judge Trump and in the process to determine what is and what is not gross presidential malpractice.

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