

## Why the Senate Shouldn't Hold a Late Impeachment Trial

By Philip Bobbitt    Wednesday, January 27, 2021, 9:01 AM

Donald Trump deserves punishment for the long campaign to discredit the results of the 2020 election that culminated in his inciting the Jan. 6 attack on Congress and the Capitol. Nevertheless, the Senate is making a mistake in holding a trial of the article of impeachment, which is scheduled to begin the week of Feb. 8, after the president leaves office. Doing so subverts the law in an effort to punish someone who subverted the law.

It has sometimes been thought that any definitive construction of the Constitution is hopeless in the absence of a Supreme Court opinion. As one commentator suggested, “[N]o one knows for sure. ... Which means that the Senate can try Trump if it so chooses; it can assert its own good-faith understanding of the Constitution and see if the Supreme Court interferes.” This sort of approach has waned in recent years, however, and it is now widely accepted that analysts outside the courts have the means to weigh constitutional questions whether or not the Supreme Court has spoken. These means are the application of six well-known modalities of constitutional argument: text, structure, ethos, history, precedent and prudence. With these forms of argument in mind, let us review the question of whether a former officer of the United States may be impeached and convicted if he is no longer serving at the time of his trial.

Article II, Section 4 provides the substantive standard of law that governs impeachment. It states that “[t]he 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.”

Article I, Section 2 provides the procedural authority for impeachments. Clause 5 states that “the House of Representatives ... shall have the sole Power of Impeachment.” Clause 6 states that “[t]he Senate shall have the sole Power to try all Impeachments. ... And no Person shall be convicted without the Concurrence of two thirds of the Members present.” Clause 7 limits the penalties that can be levied as a consequence of conviction: “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” and qualifies this limitation by adding, “but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

There is no authority granted to Congress to impeach and convict persons who are not “civil officers of the United States.” It’s as simple as that. But simplicity doesn’t mean unimportance. Limiting Congress to its specified powers is a crucial element in the central idea of the U.S. Constitution: putting the state under law.

Nevertheless, scholars and commentators have recently attempted to use the text of Clause 7 to leverage the grant of power to Congress in Article II. Their reasoning runs this way: If the convicted person cannot be removed from office because he no longer holds an office, he can still be disqualified from future service. Disqualification, it is said, is an alternative punishment to removal, not a supplement—although by this logic a president could be disqualified from holding office without being removed, an obvious absurdity. This argument asserts that, because the Senate could, by a simple majority, disqualify a person impeached and convicted under Article II, it would thwart the operation of Article I, Clause 7’s list of permissible punishments to let the convicted former officer go free. Were it otherwise, an officer could avoid removal and disqualification by simply resigning.

This circular argument assumes the truth of the proposition that a person no longer in office can be impeached in the first place and then infers from this assumption that such a power should not be frustrated. It is not compatible with Article II, which provides the sole constitutional grounds for trial in the Senate on the basis of which impeachment penalties can be imposed: the commission of bribery, treason, or other high crimes and misdemeanors by a civil officer leading to his removal. It relies instead on a tortured

inference from Article I, whose text says nothing about who can be impeached or on what grounds. In an effort to salvage the penalty of disqualification where an official has been impeached while in office but has resigned, advocates for this view would have the Senate convict a person no longer in office, inventing a new basis for conviction beyond that provided in Article II.

Next, consider structure. The interpretation that persons are subject to impeachment and conviction even if they are not civil officers would greatly expand the Senate's ability to prevent future office-holding. The argument for doing so depends on the claim that disqualification is an alternative, stand-alone penalty rather than one supplementary to removal. (Obviously a former officer who is no longer in office cannot be removed.) The paradigm case is one in which an official is impeached while in office but then tried by the Senate after he or she leaves. Nevertheless, under the "alternative penalty" rationale, once removal is irrelevant, any person who was once a civil officer might be impeached and convicted and by this means disqualified from any future office. Is it really compatible with the system of democratic representation to provide for an "alternative" penalty by so greatly expanding the number of persons who can be banned by a majority of senators from holding elective office—including by running against them? There being no statute of limitations on impeachment, would Americans really want a system in which the House, by majority vote, could impeach numbers of serving officials in an executive administration to which it was hostile—and then hold back the referrals to the Senate, perhaps for years, until springing them to prevent the former officials from seeking office?

Now let's turn to ethos. Apart from these considerations, pruning the disqualification penalty away from its basis in removal creates a bill of attainder, a punishment levied by a legislative body without a criminal trial. An impeachable offense, it is well established, does not have to be a statutory crime. Thus disqualification standing alone and not as appurtenant to removal is precisely the sort of attainder envisaged by the Framers. Is it consistent with the American system of laws, to say nothing of the prohibition on attainders in Article I, Section 9, to allow Congress to impose such draconian penalties without a jury trial—in the absence of the removal of the officer by the Senate, which would provide the basis on which further federal service would be inconsistent, thus saving the penalty from being an attainder?

The rule that "no man is above the law" is also part of the American constitutional ethos. But there are other means of showing that a former president is not above the law. He can, unlike a sitting president, be indicted and prosecuted in the state and federal courts for any crimes he may have committed. As Justice Joseph Story concluded, "If then there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of the impeachment. If he was not, his offense was still liable to be tried and punished in the ordinary tribunals of justice."

What about history? There is little discussion in the historical record surrounding the framing and ratification of the Constitution that treats the precise question of whether a person no longer a civil officer can be impeached—and in light of the clarity of the text, this is hardly surprising. There is one early impeachment case that might be of some help, however—in particular because special attention is traditionally given to the interpretations of the Constitution by the first few administrations and Congresses, as these were composed largely of Framers and ratifiers of the Constitution.

William Blount was a Tennessee senator who conspired in a scheme to employ Native Americans and frontiersmen to attack Spanish-controlled Florida with the aim of delivering this territory to Britain. An incriminating letter found its way to President John Adams, who forwarded the letter to the House and Senate and charged that Blount should be impeached. The Senate expelled Blount and the House then proceeded to impeach him. In a close vote, the Senate defeated a resolution asserting the Blount was an impeachable civil officer. But the debate around this vote, and the text of the resolution, do not make clear whether the resolution was rejected because it was felt that a senator was not "a civil officer" or whether, having been expelled, Blount ceased to be impeachable.

And what about other precedent? Much is sometimes made of the impeachment of William Belknap, President Grant's secretary of war. In 1876, the Senate adopted a preliminary motion agreeing to try Belknap even though he had resigned recently following his impeachment by the House. Nevertheless, the force of this precedent is weakened considerably by the fact that Belknap was then acquitted. Acquittals make poor precedents because it is usually hard to tell the basis for a refusal to convict—but in the Belknap case, enough senators to acquit were already on record as believing that his resignation put Belknap beyond the reach of a lawful Senate trial. (The vote on the preliminary motion had required only a simple majority; an impeachment conviction required a two-thirds vote.) That this case has been relied on so heavily by advocates for dispensing with the requirement that the defendant must be a civil officer speaks volumes about the light weight of precedent in favor of continuing proceedings after a resignation.

Moreover, there are far more recent precedents, in 1926 and 2009, in which judges resigned having been impeached, after which the House then petitioned the Senate to withdraw the indictment.

But by far the most relevant precedent is the impeachment of Richard Nixon, who resigned on the verge of being impeached and was subsequently pardoned by President Ford. That is significant because impeachment is expressly excepted from the president's pardon power, meaning that the greatly inflamed members of Congress who wanted to prosecute Nixon could well have proceeded with impeachment after his resignation if they thought that constitutionally possible.

Yet no one—not Rep. Peter Rodino, the chair of the House Judiciary Committee; not Sen. Sam Ervin, who chaired the Senate Watergate Committee; and not even the lawyers for the various congressional committees—ever seems to have suggested doing so, despite the fact that Rodino met with the House leadership before the resignation and discussed the disqualification penalty. The 22nd Amendment would have barred Nixon from seeking the presidency again, but it is by no means clear that further administrations couldn't have appointed him to some federal office. Presumably, the Democrats who controlled Congress might have wanted to prevent this.

A memo from the Office of Legal Counsel at the time concluded that, “[a]s a practical matter, if the President should resign, this would probably result in termination of impeachment proceedings.” And indeed, it may be that sheer exhaustion among members of Congress accounts for the refusal to pursue Nixon further. To my ear, it sounds like a case of the dog that didn't bark—but I may be wrong, and the Nixon precedent, though relevant, may not be decisive. But surely it bears more attention than the even more cloudy Belknap example.

Finally, it is worth considering the question of prudence. I am not a politician and I hesitate to assert definitively what might be the political consequences of ignoring such a plain constitutional rule to get at a demagogue. But I would make this one observation to those who are anxious to bar Trump from seeking further office. Donald Trump lost the Republican majority in the House in 2018; he lost the Republican majority in the Senate in 2020; and he lost the presidency decisively. Isn't the better part of wisdom to trust the American public to deliver the verdict on Trump's future electoral service?

It would be the ultimate achievement of Trump's contempt for law if he were able to provoke Americans into running roughshod over the Constitution in order to rebuke him.

Although it will be familiar to most readers, I think it is appropriate to recall the famous passage in “A Man for All Seasons” in which Sir Thomas More confronts his future son-in-law about the pitfalls in cutting legal corners to pursue wickedness:

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William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

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**Topics: Impeachment**

Philip Bobbitt is the Herbert Wechsler Professor of Jurisprudence and Director of the Center on National Security at Columbia Law School and Distinguished Senior Lecturer at the University of Texas. He is a Fellow of the American Academy of Arts & Sciences and a former trustee of Princeton University. He has served in all three branches of government, during seven administrations, most recently as a member of the External Advisory Board of the CIA. He has published ten books, chiefly on U.S. constitutional law, nuclear strategy, and the history and evolution of the

State. His most recent work is *Impeachment: A Handbook* (with Black, New Edition) (2018).