

# The Impeachment and Trial of a Former President

January 15, 2021

For the second time in just over a year, the House of Representatives has [voted](#) to impeach President Donald J. Trump. The House previously [voted](#) to impeach President Trump on December 18, 2019, and the Senate [voted](#) to acquit the President on February 5, 2020. Because the timing of this second impeachment vote is so close to the end of the Trump Administration, it is possible that any resulting Senate trial may not occur until after President Trump leaves office on January 20, 2021. This possibility has prompted the question of whether the Senate can try a former President for conduct that occurred while he was in office.

## The Constitution’s Impeachment Provisions

The Constitution grants Congress [authority](#) to impeach and [remove](#) the President, Vice President, and other federal “civil Officers” for treason, bribery, or “other high Crimes and Misdemeanors.”

Impeachment is one of the various checks and balances created by the Constitution, and it serves as a powerful [tool](#) for holding government officers accountable.

The impeachment process entails two distinct proceedings carried out by the separate houses of Congress. First, a simple majority of the [House impeaches](#)—or formally approves allegations of wrongdoing amounting to an impeachable offense. The second proceeding is an impeachment *trial* in the [Senate](#). If the Senate votes to convict with a two-thirds majority, the official is removed from office. The Senate also can disqualify an official upon conviction from holding a federal office in the future; according to [Senate practice](#), this vote follows the vote for conviction. The House has [impeached](#) twenty individuals: fifteen federal judges, one Senator, one Cabinet member, and three Presidents. Of these, eight individuals—all federal judges—were convicted by the Senate. President Trump is the first individual that the House has impeached twice. During the first impeachment process, the Senate voted to acquit him following a trial for charges of abuse of power and obstruction of Congress.

## Impeachment of Officials After Leaving Office

The Constitution does not directly address whether Congress may impeach and try a former President for actions taken while in office. Though the text is open to [debate](#), it appears that most scholars who have

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closely examined the question have concluded that Congress has authority to extend the impeachment process to officials who are no longer in office. As an initial matter, a number of scholars have argued that the delegates at the Constitutional Convention appeared to accept that former officials may be impeached for conduct that occurred while in office. This understanding also tracks with certain state constitutions predating the Constitution, which allowed for impeachments of officials after they left office. It also accords with the British impeachment of Warren Hastings two years after his resignation as the governor-general of Bengal. The impeachment occurred during the Convention debates and was noted expressly by the delegates without expressing disapproval of the timing. While the Framers were aware of the British and state practices of impeaching former officials, scholars have noted that they chose not to explicitly rule out impeachment after an official leaves office. But the Framers nonetheless made other highly specific decisions about the impeachment process that departed from the British practice, such as requiring a two-thirds majority in the Senate for a conviction when the British system allowed conviction on a majority vote.

That said, there are textual arguments against Congress's authority to apply impeachment proceedings to former officials. The plain text of the Constitution, which states that "[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment ... and Conviction," could be read to support the requirement that the process only applies to officials who are holding office during impeachment proceedings. Some have argued that the Constitution links the impeachment remedy of disqualification from future office with the remedy of removal from the office that person currently occupies; the former remedy does not apply in situations where the latter is unavailable. In his influential *Commentaries on the Constitution of the United States*, Justice Joseph Story claimed that impeachment is inapplicable to officials who have left their position because removal—a primary remedy that the impeachment process authorizes—is no longer necessary.

But various scholars have taken issue with Justice Story's reasoning, and others have argued that Justice Story's argument was primarily concerned with simply distinguishing the American practice from the British, which allowed for impeachment of private citizens who had not been part of the government, and who could potentially face severe punishments, including in some cases life imprisonment, as a result of impeachment. Some have emphasized that the impeachment provisions of the Constitution provide that the remedies of removal from office and disqualification are distinct components of the remedy for impeachable misconduct. One scholar asserts that the two clauses of removal and disqualification can be thought of as "fixing a minimum and maximum penalty" in cases of conviction in an impeachment trial; consequently, an official's resignation following an initial impeachment by the House but before conviction in the Senate may not "deprive the people of the full measure of the protection afforded them" through the additional remedy of disqualification. Scholars have noted that if impeachment does not extend to officials who are no longer in office, then an important aspect of the impeachment punishment is lost. If impeachment does not apply to former officials, then Congress could never bar an official from holding office in the future as long as that individual resigns first. According to one scholar, it is "essential" for Congress to have authority to impeach and convict former officials in order to apply the punishment of disqualification; otherwise Congress's jurisdiction would depend on the whims of the individual who engaged in misconduct. Another scholar notes that the grave nature of the disqualification punishment indicates that it should apply independently of the need for removal.

One might also argue that impeachment and trial of a former official is essentially impeachment of a private citizen in contravention of the constitutional limits to impeachment. As noted earlier, under the British model, Parliament could impeach anyone except the Crown, including private citizens. But the Framers restricted the reach of impeachment in the American system to specific public officials: the President, Vice President, and other civil officers. It may be argued that under the American system, impeachment serves as a means to remove these officials from the machinations of government when they engage in misconduct; upon leaving office, accountability for such misconduct would come through the same mechanisms used to punish private citizens for misdeeds, including criminal prosecution.

But others [dispute](#) the suggestion that an individual's departure from government establishes a clean break from the remedy of impeachment. They [contend](#) that the impeachment process may extend after an official resigns or leaves office in order to promote accountability for government officials. The Constitution [established](#) an impeachment mechanism to ensure that Congress has a means by which to [hold](#) public officials [accountable](#) for their actions. The impeachment remedies, it has been argued, help "[protect the republic](#)" from grave abuses of public office that may occur if an impeached official returns to power, a purpose that would be foiled if officials can escape punishment by leaving office before the impeachment process is completed. An impeachment trial for a former official for conduct that occurred while the official was in office would appear consistent with that impeachment's purpose—a remedy for the abuse of *governmental* power by a *governmental* official. This view was apparently [held](#) by then-Congressman and former President John Quincy Adams, who, during debate on the House's authority to impeach Daniel Webster for conduct that occurred while he had been Secretary of State, said in relation to his own acts as President: "I hold myself, so long as I have the breath of life in my body, amenable to impeachment by this House for everything I did during the time I held any public office."

According to at least one [scholar](#), the possibility of impeachment and disqualification from office for former officials promotes accountability by deterring improper conduct the entire time they remain in office. If the impeachment process becomes unavailable immediately after an official leaves his or her position, there is an [incentive](#) for officials to conceal wrongdoing, and then resign as soon as misconduct comes to light. Likewise, there would be no method of holding officials accountable for misconduct that occurs late in an official's term, no matter how egregious. This reasoning would seem to apply to situations where an official resigns or otherwise leaves office in the midst of impeachment proceedings. In the [words](#) of former President John Quincy Adams, the impeachment stigma "clings to a man as long as he lives." An official could avoid this stigma and possibility of being barred from future office by departing from office before the Senate votes to convict.

Further, it is not always the case that a former official can be held accountable for impeachable misconduct through the criminal justice system upon leaving office. Impeachment pertains to a [broader](#) scope of conduct than traditional criminal behavior. Alexander Hamilton [noted](#) that impeachable offenses were "political, as they relate chiefly to injuries done immediately to the society itself." For example, Congress has [impeached](#) federal judges for misconduct and corruption that was not necessarily criminal. One scholar [notes](#) that impeachment after an official leaves office is important because it "reaches offenses and provides punishment that the criminal process" does not.

More broadly, the Framers did not [delineate](#) with specificity the complete range of behavior that would merit impeachment, as the scope of possible "[offenses](#) committed by federal officers are myriad and unpredictable." According to one [scholar](#), impeachments are sometimes about much more than whether a particular individual should remain in office. Instead, the process is "aimed at articulating, establishing, preserving, and protecting constitutional norms." At times, impeachment might be used to reinforce an existing norm, indicating that certain behavior continues to constitute grounds for removal; in others, it may be used to establish a new norm, setting a marker that signifies what practices are impeachable for the future. In these [cases](#), the "fate of the individual being impeached is less important than the message being sent." In similar fashion, other scholars have [argued](#) (in the context of impeachment following a resignation) that the purpose of impeachment "extends beyond the scope of any particular case to its effect on the constitutional structure of the state"; Congress's power to convict following impeachment can "have the effect of setting powerful precedential limitation on presidential conduct." In other words, even if an official is no longer in office, an impeachment conviction [may](#) still be viewed as necessary by Congress to clearly delineate the outer bounds of acceptable conduct in office for the future.

## Historical Practice: The Belknap Impeachment

While much of constitutional law is developed through courts analyzing the text of the Constitution and applying prior judicial precedents, the Constitution's meaning is also shaped by the other branches of government through their decisions and practices. The [Supreme Court](#) has noted not only that "each branch of the Government must initially interpret the Constitution" when performing their "assigned constitutional duties," but also that once one branch develops a construction of its own powers, that interpretation "is due great respect from the others." This principle of developing constitutional meaning outside of the courts is especially applicable in the context of impeachment, where the manner by which the House and Senate exercise their powers has been largely immune from [judicial review](#). As such, the process of attempting to resolve ambiguity that exists in the text of the Constitution's impeachment provisions may be pursued, though perhaps not always resolved, by recourse to congressional practice and precedent. Although the relative rarity of impeachments of former officials means that it is difficult to establish any "[long settled and established](#)" practice, both chambers appear to have previously viewed a former official, at least one who has resigned, as [subject to impeachment](#) proceedings for conduct that occurred while in office.

The House has never impeached, nor has the Senate ever tried, a former President. However, both chambers have previously determined that they retain power to proceed against an executive branch official that has resigned from office. The principal precedent is the 1876 impeachment of Secretary of War [William Belknap](#). After receiving allegations that Secretary Belknap had received payments in return for appointing an individual to maintain a trading post in Indian territory, the House authorized a committee impeachment investigation that quickly found "[unquestioned evidence of malfeasance](#)." The committee provided that evidence to the House, and though aware that Secretary Belknap had resigned hours before, nevertheless recommended that he be impeached.

The subsequent [debate](#) by the full House included discussion of the chamber's authority to impeach an official that had previously resigned his office. Those arguing in support of the House's authority focused primarily on impeachment practice in England, where it was clear that former officials were subject to impeachment. Those opposed asserted that English practice was of limited value since (as previously noted), unlike the American system, the English system permitted impeachment of not only government officials, but also private citizens. Ultimately, the House [approved](#) (without objection) the resolution impeaching Secretary Belknap, establishing the House's position that it may impeach an official who does not currently hold office.

The impeachment then moved to the Senate for trial, where Secretary Belknap [asserted](#) through counsel that because he was now a private citizen and no longer an officer of the federal government, the Senate lacked the authority to bring him to trial. The House managers [asserted](#) otherwise, arguing that because Belknap was Secretary of War "at the time all the acts charged in said articles of impeachment were done and committed ... the House of Representatives had power to prefer the articles of impeachment, and the Senate have full and the sole power to try the same."

The Senate resolved to settle this threshold question of jurisdiction before proceeding further in the trial. The chamber heard [three days](#) of arguments from both sides and deliberated in secret for more than two weeks, after which it determined by a [vote](#) of 37 to 29 that Secretary Belknap was "amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached." The presiding officer then deemed the articles of impeachment against Belknap "sufficient in law." Much like the importance of the House vote to impeach Secretary Belknap, this vote established the Senate's view that impeached former officials can be subject to trial in the Senate.

Following the trial, a majority of Senators voted to [convict](#) Belknap, but no article mustered the two-thirds majority necessary for conviction. Notably, a number of Senators voting to acquit indicated that they did so because of their belief that the Senate lacked jurisdiction over an individual no longer in

office. In the eyes of the [House managers](#), these votes reflected the fact that a “minority of the Senate refused to be governed by the deliberate judgment of the majority, that it had jurisdiction” and as a result, “prevented the conviction of the defendant” by the required two-thirds vote. The House managers also reflected on the legacy of the Belknap impeachment, concluding that notwithstanding Belknap’s acquittal:

[T]he managers believe that great good will accrue from the impeachment and trial of the defendant. It has been settled thereby that persons who have held civil office under the United States are impeachable, and that the Senate has jurisdiction to try them, although years may elapse before the discovery of the offense or offenses subjecting them to impeachment.... To settle this principle, so vitally important in securing the rectitude of the class of officers referred to, is worth infinitely more than all the time, labor, and expense of the protracted trial closed by the verdict of yesterday.

In more recent history, both the House and the Senate have generally decided not to proceed with the impeachment of an official who has resigned their office. At times, it appears that this decision is based on a judgment that removal is often the primary, if not the sole goal of an impeachment trial. For example, following dismissal of the trial of Judge Samuel B. Kent in 2009, the then-Senate majority leader [stated](#) that “[a]ll are in agreement that, with the resignation of Judge Kent, the purposes of the House’s prosecution of the Articles of Impeachment against Judge Kent have been achieved.... It is agreed that no useful purpose would now be accomplished by proceeding further with the impeachment proceedings.” But it may be that such decisions were prudential judgments about the efficacy of continuing proceedings rather than constitutional determinations that the House or Senate lacked the authority to impeach, convict, and disqualify a former official. In perhaps the highest-profile example, no impeachment vote was taken following President [Richard Nixon’s resignation](#), which came on the heels of the House Judiciary Committee reporting articles of impeachment to the House. It is not clear how seriously Members considered the possibility of proceeding with the impeachment despite the resignation, but Nixon had already served two terms as President, so there was no possibility that he could return to that office in the future. Senate impeachment proceedings against various judges have also been terminated following resignations. In one, after impeached Judge John English resigned prior to the Senate commencing his trial, the House [instructed its managers](#) to communicate to the Senate that “in consideration of the fact that [Judge English] is no longer a civil officer of the United States ... the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate.” But that House action occurred only after the House managers made clear their [position](#) that “the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine said impeachment charges.”

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