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## Impeachment and Its Discontents

Brian C. Kalt

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# Impeachment and Its Discontents

*Brian C. Kalt\**

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## I. INTRODUCTION

What purpose do presidential impeachments serve if the Senate does not convict? Should impeachment be attempted at all if there is no chance of conviction? These questions remind me of the old joke in which someone is asked whether he believes in infant baptism. He replies, “Believe in it? Heck, I’ve actually seen it done.”

I am not a fan of failed or futile presidential impeachments; I do not “believe” in them. Nevertheless, I have seen them done three times now. All of this is, in other words, not the sort of purely theoretical construct in which law professors often traffic. As an actual phenomenon – a tangible political fact, not an abstract legal one – failed and futile impeachments need to be analyzed and not just dismissed out of hand.

This Article will do that: criticizing failed and futile presidential impeachments, but finding defensible principles at their core and suggesting that censure offers a better way to vindicate those principles. Part II will argue that a presidential impeachment resulting in an acquittal might serve some valid purposes. At best, however, these purposes are greatly diminished by a failed impeachment, and, at worst, they might be disserved entirely. Part III will consider what has driven the House of Representatives in recent decades to become so much more willing to pursue presidential impeachments that are unlikely to succeed. Part IV will conclude by suggesting that the House’s impulses are better served by censure than by futile impeachment.

## II. UNSUCCESSFUL IMPEACHMENTS

To answer the question of what purpose unsuccessful impeachments serve, it helps to begin with a more general question: What purpose is *any* impeachment supposed to serve? This general question sat at the heart of the debate over the unusual timing of the second Trump impeachment. To those who believed that it was unconstitutional to try Trump after he had left office, the defining purpose of the impeachment process was removal of the offender from office.<sup>1</sup> The Constitution’s core impeachment provision provides, after all, that “The President, Vice President and all civil Officers of the United States, *shall be removed* from Office on

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<sup>1</sup> See, e.g., Trial Memorandum of Donald J. Trump, 45th President of the United States of America at 18, *In re* Impeachment of Former President Donald J. Trump (U.S. Senate 2021), [https://www.45office.com/images/uploads/Final\\_Trump\\_Trial\\_Memorandum.pdf](https://www.45office.com/images/uploads/Final_Trump_Trial_Memorandum.pdf) [<https://perma.cc/NM83-CBFF>] (making this argument); BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 114 (2012) (collecting examples of opponents of late-impeachment making this argument).

Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>2</sup>

On the other side, those who believe that “late impeachment”<sup>3</sup> is constitutional freely concede that removal is the most important function of the impeachment process in general, but they maintain that removal is not its sole function. There is ample evidence – from text, structure, history, and practice – for the notion that the impeachment process has other purposes too.<sup>4</sup> First and foremost in Trump’s case was disqualification from future office.<sup>5</sup> The Constitution specifies disqualification as the only possible consequence for conviction besides removal,<sup>6</sup> and it was important to the Framers.<sup>7</sup>

Of course, regardless of whether you think impeachment is only about removal or also about disqualification, neither one of those consequences applies when the Senate acquits the defendant. But the impeachment process was designed with still other purposes in mind as well.

One is deterrence. As John Jay wrote in *The Federalist*, “so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.”<sup>8</sup> Only three presidents have been impeached, but the *possibility* of impeachment has hung over every president’s head. As Cass Sunstein put it, analogizing impeachment to the mythical Sword of Damocles, “The value of the sword is not that it falls, but rather, that it

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<sup>2</sup> U.S. CONST. art. II, § 4.

<sup>3</sup> See Brian 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, 17 (2001) (coining the term “late impeachment” for “attempt[s] by Congress to impeach and try a federal official after he has left office”).

<sup>4</sup> See generally Kalt, *supra* note 3.

<sup>5</sup> The House’s impeachment of Trump formally called for both his removal and disqualification, because he was still in office at the time the House passed the resolution. See H.R. Res. 24, 117th Cong. (2021) (enacted) (impeaching President Trump). But because he was gone by the time his trial began, the House Managers focused entirely on disqualification as a remedy. See generally Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump, *In re* Impeachment of President Donald J. Trump (U.S. Senate 2021), [https://judiciary.house.gov/uploadedfiles/house\\_trial\\_brief\\_final.pdf](https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf) [<https://perma.cc/8BR7-77DS>].

<sup>6</sup> U.S. CONST. art. I, § 3, cl. 7.

<sup>7</sup> See Kalt, *supra* note 3, at 73–75.

<sup>8</sup> THE FEDERALIST NO. 64, at 396 (John Jay) (Clinton Rossiter ed., 1961).

hangs.”<sup>9</sup> And allowing late impeachment keeps that sword hanging until the very end of the president’s term.<sup>10</sup>

Every president has been restricted in his actions by the possibility of removal. Whatever bad things presidents have done over the centuries, you can surely imagine worse—outrageous things that some would have done had they been guaranteed a full four-year term with no possibility of being held immediately accountable for their conduct.<sup>11</sup>

Through this deterrent effect, even an unsuccessful impeachment can shape norms of behavior.<sup>12</sup> But while Andrew Johnson was chastened by his impeachment ordeal, that was only because conviction was a very real possibility.<sup>13</sup> It was probably only by making concessions to the opposition about the proper role of the president that Johnson avoided conviction.<sup>14</sup>

By contrast, Presidents Clinton and Trump had enough support in the Senate that it became apparent in each of their cases that they would be acquitted by a wide margin. And that is the problem. Knowing that conviction is off the table will dull, or even reverse, any positive norm-shaping. The backlash against the impending and obviously futile impeachment of President Clinton helped his Democratic Party perform unusually well in the 1998 midterms.<sup>15</sup> More recently, President Trump’s first acquittal emboldened him,<sup>16</sup> and his second acquittal left him feeling

<sup>9</sup> CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 53 (2017); see Kalt, *supra* note 3, at 46, 69–73 (presenting originalist and structural arguments for the importance of deterrence).

<sup>10</sup> See KALT, *supra* note 1, at 114.

<sup>11</sup> See KALT, *supra* note 1, at 199 (making this argument). A helpful analogy is the requirement of Senate confirmation for high-ranking presidential appointments: The Senate rarely rejects nominees, but this is because the scrutiny the Senate applies and the possibility of rejection leads presidents to be much more careful about whom they nominate in the first place. It is easy to imagine that President Trump – and any other president – would have staffed some posts with very different people had the Senate gotten no say in the matter. See *id.*

<sup>12</sup> Cf. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 48 (1999) (discussing the shift in norms of judicial behavior prompted by the impeachment of Supreme Court Justice Samuel Chase, notwithstanding his acquittal).

<sup>13</sup> See DAVID O. STEWART, *IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN’S LEGACY* 323 (2009).

<sup>14</sup> See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 506 n.119 (1989).

<sup>15</sup> See Alison Mitchell & Eric Schmitt, *The 1998 Elections: Congress – The Overview*; G.O.P. in Scramble over Blame for Poor Showing at the Polls, *N.Y. TIMES* (Nov. 5, 1998), <https://www.nytimes.com/1998/11/05/us/1998-elections-congress-overview-gop-scramble-over-blame-for-poor-showing-polls.html> [https://perma.cc/9T6D-DHBR].

<sup>16</sup> See, e.g., James Politi & Kadhim Shubber, *Donald Trump Emboldened To Seek Vengeance after Acquittal*, *FINANCIAL TIMES* (Feb. 13, 2020),

defiantly unrepentant.<sup>17</sup> It is only natural for an acquittal to be taken as a victory, if not an outright vindication.

So far, not so good. An acquittal does not serve the key purposes of removal, disqualification, or deterrence. But another main purpose of impeachment remains: investigating and publicizing the president's conduct. Impeachment trials provide a forum, not just a verdict.

The investigative part of this equation, however, has faded. During Watergate, the House Judiciary Committee coordinated a massive probe, employing a large staff to conduct its own investigation alongside those of the Special Prosecutor's office and the Senate.<sup>18</sup> In the Clinton impeachment, the House basically outsourced its investigative functions to Independent Counsel Kenneth Starr.<sup>19</sup> Continuing the trend, the Trump impeachments featured notably thin processes for developing a record.<sup>20</sup> As Philip Bobbitt put it, comparing the present to the 1970s, "[w]e are more inclined to treat impeachment as a political struggle for public opinion, waged in the media, and less like the grand inquest envisioned by the Constitution's Framers."<sup>21</sup>

This shift reflects the fact that regardless of how much investigation is conducted, impeachment trials can publicize a president's conduct in a way that nothing else can. This is both because a Senate trial is harder legally for a president to brush off the way he might brush off other forms of oversight, and because the trial provides a unique spectacle. As such, the proceedings can shine a bright light on the facts and inform the part of the voting public that would not otherwise have been paying attention.

This is where a gap might open between "acquittal" and "vindication." To take one example, a malfeasant president could – like Clinton – be acquitted because enough senators think that his bad acts were done in his personal capacity and that impeachment should be limited to official misconduct. In such a case, though, the president's misconduct

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<https://www.ft.com/content/8ac4aeba-4dea-11ea-95a0-43d18ec715f5>  
[<https://perma.cc/2R8U-ZH4T>].

<sup>17</sup> See, e.g., Lisa Kashinsky, *Full Text of Trump's Statement on Impeachment Acquittal*, BOSTON HERALD (Feb. 13, 2021, 4:11 PM), <https://www.bostonherald.com/2021/02/13/full-text-of-trumps-statement-on-impeachment-acquittal> [<https://perma.cc/CRM9-WMJW>].

<sup>18</sup> See JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 183–248 (1978) (describing House Judiciary Committee's activities).

<sup>19</sup> See Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 335 n.116 (1999).

<sup>20</sup> See Jonathan Turley, *Senate Faces Difficult Burden with Issue of the Second Impeachment*, THE HILL (Jan. 27, 2021, 10:00 AM), <https://thehill.com/opinion/judiciary/536026-senate-faces-difficult-burden-with-issue-of-the-second-impeachment> [<https://perma.cc/8T42-7TAN>] (criticizing the relative lack of process).

<sup>21</sup> Philip Bobbitt, *Part II*, in *IMPEACHMENT: A HANDBOOK*, NEW EDITION 63, 66 (2018).

would still be exposed in a very high-profile way. Similarly, a president might – like Johnson – be acquitted because enough senators think that his misconduct is not serious enough to warrant immediate removal, but enough members of the public at the margins might be taken aback by the revelations that the president is weakened politically—unable to effectuate his agenda or win the next election.

But in our current mode of hyper-polarized partisan politics, this publicization is a double-edged sword. While impeachment can expose a president’s misdeeds, it also provides him with an equal-time platform, from which he and his team can broadcast their counternarratives and rally supporters. As I wrote after President Trump’s first impeachment, “[i]f the President’s supporters find his conduct unobjectionable, the impeachment effort will not hurt him and may help him. Impeachment proponents might find this unfathomable, but their incredulity will not move the political needle.”<sup>22</sup> Polarization means that rallying the opposition against the president will come at the cost of simultaneously rallying the president’s supporters against the opposition. Donald Trump is one of only three presidents to be impeached and the only one to be impeached twice. He is the first president in twenty-eight years to be defeated for reelection. But more than a year after leaving office, he is still unquestionably the most powerful figure in the Republican Party.

In sum, then, impeachment serves only a limited purpose when the target is acquitted: publicizing the president’s misconduct, rendering him infamous.<sup>23</sup> Because acquittal requires retaining the strong support of his own party, moreover, a failed impeachment might not serve even that limited purpose successfully. Indeed, it could conceivably cause a net gain in the president’s popularity, if it enhances his standing among his supporters by more than it lowers his standing among his opponents.

### III. FUTILE IMPEACHMENTS

Of course, it is not always clear at the outset of an impeachment that the target will be acquitted. In the heat of the shocking assault on the Capitol, Democrats could have been forgiven for believing that enough Republicans would join them in voting to convict Trump and remove him

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<sup>22</sup> See Brian C. Kalt, *Presidential Impeachment and Removal: From the Two-Party System to the Two-Reality System*, 27 *GEO. MASON L. REV.* 1, 23 (2019).

<sup>23</sup> Some people theorized during the Trump impeachment episodes that the president’s pardon power would be limited by his having been impeached, even if he was acquitted. For my explanation of why one such view is incorrect, see Brian C. Kalt, *Regrettably, President Trump Does Have the Power to Commute Roger Stone’s Sentence*, TAKE CARE (July 7, 2020), <https://takecareblog.com/blog/regrettably-president-trump-does-have-the-power-to-commute-roger-stone-s-sentence> [<https://perma.cc/B3H6-QUPR>].

from office.<sup>24</sup> But Democrats pressed on even after Trump's term expired, and even after it became clear that he would be acquitted.<sup>25</sup>

This takes us to our second question: Should a president's opponents ever pursue an impeachment that they know will not yield a conviction? The discussion above explored one reason they might want to proceed in such a case: broadcasting the president's misconduct and trumpeting their condemnation of it to the world.<sup>26</sup> But this also comes at the cost of broadcasting the president's side of the story and trumpeting his defense to the world too. So why do this if one cannot win a conviction? If one thinks that the president has committed so grave an offense that he deserves to be removed and disqualified, why pursue a course of action that not only will fail to remove or disqualify him, but will succeed in rallying his half of the electorate and hand them a victory? The obvious answer is that one should *not* pursue such an impeachment, and that such a futile impeachment serves no good purpose.

And yet they happen. To be sure, the second Trump impeachment is not the best example of this phenomenon. As mentioned above, Democrats had reason to think that they might be able to get a conviction,

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<sup>24</sup> In the immediate run-up to the House's impeachment vote, Senate Majority Leader Mitch McConnell was reported to be favorably disposed toward impeaching Trump. Jonathan Martin et al., *McConnell Privately Backs Impeachment as House Moves to Charge Trump*, N.Y. TIMES (Jan. 12, 2021, updated Feb. 12, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mcconnell-backs-trump-impeachment.html> [<https://perma.cc/MSE2-J8WG>]. This report may or may not have been accurate, and regardless eighty-six percent of Republican senators (including McConnell) eventually backed Trump's acquittal. *Guilty or Not Guilty H. Res. 24*, GOVTRACK, <https://www.govtrack.us/congress/votes/117-2021/s59> [<https://perma.cc/3B2X-LQUV>]. But the seven Republican senators who voted to convict Trump made history. When Presidents Johnson and Clinton were tried, zero members of their parties voted to convict them. *To Determine the Guilt of the President of the United States Under the Third Article*, GOVTRACK, <https://www.govtrack.us/congress/votes/40-2/s360> [<https://perma.cc/4MZ9-Y5VZ>] (showing no Democrats voting to convict Johnson); *Guilty or Not Guilty (Art II, Articles of Impeachment v. President W. J. Clinton)*, GOVTRACK, <https://www.govtrack.us/congress/votes/106-1999/s18> [<https://perma.cc/DM7K-368G>] (showing no Democrats voting to convict Clinton). In Trump's first trial, Mitt Romney was the sole Republican to vote against Trump. *Guilty or Not Guilty H. Res. 755*, GOVTRACK, <https://www.govtrack.us/congress/votes/116-2020/s33> [<https://perma.cc/3S85-27VW>].

<sup>25</sup> While prospects for conviction seemed dim from the beginning of the trial, the remaining chances dissipated rather thoroughly on February 9, 2021, when the Senate voted on whether Trump, by that point only an ex-president, was subject to trial. Although the fifty-six to forty-four vote was enough to allow the trial to continue, it signaled strongly that there would be well under the sixty-seven votes needed to convict. *On the Motion (Is Former President Donald John Trump Subject to a Court of Impeachment for Acts Committed While President?)*, GOVTRACK, <https://www.govtrack.us/congress/votes/117-2021/s57> [<https://perma.cc/ZBL5-6YN5>].

<sup>26</sup> See *supra* text accompanying notes 20–22.



and by the time it became clear that they would not, they had probably come too far to simply give up.<sup>27</sup> But President Clinton's impeachment was more obviously doomed from the start, as was the first Trump impeachment. And the leaders pushing those impeachments thought that they were accomplishing something—a good purpose from their political perspective. As elected officials it is they, not random law professors, who decide what should or should not be done regarding impeachment. This underscores the political half of the law-and-politics hybrid that is impeachment.

The political character of impeachment has changed over the centuries.<sup>28</sup> However much the Framers intended impeachment to be used, the two-thirds majority requirement for conviction made consensus the defining feature of presidential impeachment, and this made impeachment episodes rare. President Andrew Johnson faced the only Senate in American history in which the opposition had a two-thirds majority – indeed, it held eighty percent – so it is not surprising that there was a strong enough consensus in favor of impeaching him and nearly one in favor of removing him.<sup>29</sup> President Nixon resigned when he saw the bipartisan impeachment handwriting on the wall; his offenses were so grievous that enough of his own party's senators were poised to vote against him to guarantee his removal.<sup>30</sup> These two moments of adequate consensus were as rare as they were necessary.

The upsurge in partisan polarization in recent decades has substantially changed that calculus. In Nixon's day, and for some time before that, there was an ideological “middle” in Congress. While one party was on the left and the other on the right, both parties had some members on the other side, and there were many members occupying a bipartisan middle.<sup>31</sup> Now, by contrast, there is literally nobody in the middle.<sup>32</sup> In all but the most evenly divided of Houses, the dominant party can attain a simple majority – and thus impeach a president – without having to compromise with ideological moderates.

On the Senate side, though, this polarization has had the opposite effect. Because conviction requires a two-thirds majority, it requires winning the support of a significant number of senators from the president's party. The opposition's fervent partisan warriors therefore

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<sup>27</sup> See *supra* note 24 and accompanying text.

<sup>28</sup> See generally Kalt, *supra* note 22.

<sup>29</sup> See STEWART, *supra* note 13, at 69.

<sup>30</sup> Kalt, *supra* note 22, at 14–15.

<sup>31</sup> See Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RES. CTR. (June 12, 2014), <https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since> [<https://perma.cc/6HMJ-P3PD>].

<sup>32</sup> See *id.*

must leap over the empty middle and attract a significant number of the equally fervent warriors all the way over on the other partisan pole.

In an age where our two-party system has come to resemble something more like a two-reality system,<sup>33</sup> the Constitution's very high bar for conviction has been raised even higher. Before, getting a two-thirds majority in the Senate required convincing sufficient numbers of the president's own party that the president's offenses warranted a conviction. The two-reality system, however, erects a formidable barrier before even getting to that point: there must be enough senators in the president's own party willing to agree publicly that the president's offenses even happened. But at the same time, the two-reality system makes it harder for impeachment proponents to see the other side of the case accurately. This, in turn, might make it take longer for them to fathom that their case is doomed.

As a result, it has become much easier to find a House willing to impeach at the exact same time it has become much harder to find a Senate willing to convict.<sup>34</sup> The result is our current Era of Futile Impeachment. In our first 204 years and forty-one presidencies, there were just two meaningful impeachment efforts: Johnson's, which failed by one vote; and Nixon's, which would have succeeded had the House and Senate had a chance to vote on it.<sup>35</sup> In the succeeding twenty-eight years and four presidencies, there have been three impeachments, all of them falling well short of conviction. This is a remarkable transformation, and one that offers no apparent sign of abating.

So what is the payoff for those who pursue doomed impeachments? First, bear in mind that proponents might not grasp that they are going to lose. It can be very hard to admit you are going to lose a righteous cause, and it is even harder to give up when you think that the very fate of the Republic is at stake. Impeachment proponents will want to take the strongest action that Congress can against a president, declaring his conduct to be unacceptable and rendering it infamous.

But again, the simple fact is that an acquittal means the president is *not* held accountable and suffers *no* legal consequences. This was certainly true in the second Trump impeachment. Rather than unite the country against Trump, the impeachment solidified the deep divisions currently cleaving the country. When push came to shove, most

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<sup>33</sup> See Kalt, *supra* note 22, at 22.

<sup>34</sup> Brian C. Kalt, *Impeachment and the Imperial Presidency* (June 17, 2020), EXTENSIONS, <https://extensionsscac.com/news/impeachment-and-the-imperial-presidency> [https://perma.cc/JT49-4ZQG].

<sup>35</sup> Brian C. Kalt, *Impeachment vs. Censure: Constitutional Law, Politics, and the Art of the Possible*, THE CONSTITUTIONALIST (Jan. 19, 2021), <https://theconstitutionalist.org/2021/01/19/impeachment-vs-censure-constitutional-law-politics-and-the-art-of-the-possible> [https://perma.cc/VB2D-4DL3].

Republicans rallied around Trump—and those few that stood against him have suffered for it politically.<sup>36</sup>

#### IV. CENSURE

In contrast to the futility of a failed impeachment, censure beckons as a superior and precedented option.<sup>37</sup> That is not to say that it is a popular one. Speaker Nancy Pelosi, in particular, expressed disdain at the possibility. When asked about censure after Trump’s second acquittal, Pelosi called censure “a slap in the face of the Constitution” because “it lets everybody off the hook” and would only be “a little slap on the wrist.”<sup>38</sup>

An obvious retort to Speaker Pelosi’s assessment of censure as toothless is to note that Trump’s acquittal did, in fact, “let him off the hook” without even so much as “a little slap on the wrist.” Censure is clearly an inferior remedy to *conviction*, but conviction was not on the table. The point is that compared to an *acquittal* censure can be a much better option.

Indeed, Trump’s acquittal was even less detrimental to Trump than censure would have been. Acquittal was a win for Trump; a successful concurrent resolution of censure would have been a loss. And while censure would have had no legal effect – if it had any legal effect that probably would have made it unconstitutional<sup>39</sup> – it could have had a profound political effect.

A feature common to President Clinton’s trial and both of President Trump’s was numerous senators of the president’s party saying some version of, “What the president did was wrong, but . . . .”<sup>40</sup> In Trump’s

<sup>36</sup> See, e.g., Jonathan Weisman & Luke Broadwater, *They Voted to Impeach. It’s Still Costing Them*, N.Y. TIMES, Jan. 6, 2022, at A1.

<sup>37</sup> In addition to the high-profile and much-discussed censure of President Jackson, three other presidents were the targets of congressional resolutions that reprimanded them – though none of the other three used the word “censure.” See JANE A. HUDIBURG & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R45087, RESOLUTIONS TO CENSURE THE PRESIDENT: PROCEDURE AND HISTORY 5–7 (2021), <https://sgp.fas.org/crs/misc/R45087.pdf> [<https://perma.cc/VM8E-BSCB>] (discussing Buchanan, Lincoln, and Taft rebukes).

<sup>38</sup> Scott Wong, *Pelosi Rules Out Censure After Trump Acquittal*, THE HILL (Feb. 13, 2021, 6:14 PM), <https://thehill.com/homenews/house/538781-pelosi-rules-out-censure-after-trump-acquittal> [<https://perma.cc/C8QC-HTRF>].

<sup>39</sup> See Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 35 (1999). To be sure, there are some scholars who believe that censuring a president is unconstitutional regardless of its lack of legal consequences. See *id.* at 33 n.1 (citing survey of nineteen constitutional scholars and historians, five of whom responded that censuring a president would not be constitutional).

<sup>40</sup> Notably, for the purposes of the present discussion, twenty-nine Democratic senators – none of whom had voted to convict President Clinton – signed on to an

second trial, the list of “buts” mainly included the Senate’s lack of jurisdiction over a former president,<sup>41</sup> but included other arguments as well.<sup>42</sup> This allowed many Republican senators to thread a needle: voting to acquit Trump without having to defend his actual conduct.

Censure would have removed that option. The only question before Congress in a censure debate would have been whether Trump’s actions warranted official condemnation. Some Republicans would have condemned Trump, some would have condoned him, but all would have been announcing to the electorate their “clear, binary choice.”<sup>43</sup>

By dispensing with the need for a formal trial, and by allowing both chambers to proceed at the same time, censure also would have been much quicker than impeachment. Allowing a more immediate vote would have infused the proceedings with the raw emotions of January 6th’s immediate aftermath, instead of the political business-as-usual sensibility that had reasserted itself by February.

Most importantly, to the extent that censure would have attracted more Republican support than conviction did, Republican leaders themselves were pushing a censure resolution, as an alternative to impeachment.<sup>44</sup> And Democrats could have harnessed that impulse—it would have produced a much clearer and more potent bipartisan expression of condemnation than Trump’s acquittal ended up doing.

## V. CONCLUSION

So when Congress is faced with a president who has done things condemned by bicameral majorities, but not by two-thirds of the Senate, what should Congress do to the president? There are two choices: nothing or something. An impeachment that leads inexorably to an acquittal does

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(unsuccessful) censure resolution that criticized Clinton’s misconduct as “shameful, reckless, and indefensible” and concluded that he “gave false or misleading testimony and his actions have had the effect of impeding discovery of evidence in judicial proceedings.” S. Res. 44, 106th Cong. (1999); see Eric Schmitt, *In the End, Senate Passes No Harsh Judgment on Clinton*, N.Y. TIMES, Feb. 13, 1999, at A8 (tallying party identifications of the resolution’s sponsors).

<sup>41</sup> See Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SECURITY (Feb. 15, 2021), <https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial> [<https://perma.cc/4SE9-MZ4V>] (counting thirteen senators criticizing Trump but questioning the Senate’s jurisdiction).

<sup>42</sup> See *id.* (noting arguments to acquit based on the First Amendment and due process made by senators who also criticized Trump).

<sup>43</sup> Kalt, *supra* note 36.

<sup>44</sup> See 167 CONG. REC. H172 (daily ed. Jan. 13, 2021) (statement of Rep. McCarthy, House Minority Leader). Democrats had done the same during the Clinton impeachment. See *supra* note 41.

nothing to the president. But a bicameral censure of the president is a worthy substitute: it is something. Reproaching the president with official condemnation from the Congress of the United States – not from just one House, not from just the opposition, but from Congress itself – matters.

This issue is sure to arise again in the years to come. When it does, Congress will ideally pick a more fruitful path, and will resist the lure of futile impeachments.