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Impeachment and Trial After Officials Leave Office

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I. INTRODUCTION

The second impeachment of President Donald J. Trump raised an important and unresolved question: May Presidents and other federal officers be impeached or tried on impeachments after they have left office? Most Democrats argued that former officers can be both impeached and tried; most Republicans argued that former officers can neither be impeached nor tried. Trump himself was impeached while still in office and tried – and acquitted – after he left office. This is the sort of question that could easily arise again, in connection with presidents and other officers of either party, and it needs an answer that does not shift with every gust of partisan wind. As Alexander Hamilton warned in *The Federalist*, No. 65, impeachment proceedings "will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused," and thus there is "always the greatest danger, that the decision will be regulated more by the comparative strengths of parties" than the merits of the case.[1] It is not wise to wait until the heat of the moment to think about these things, or allow structural issues of this sort to be resolved on the basis of case-by-case judgments, which will be heavily influenced by the very passions Hamilton warned against.[2]

The Trump impeachment is not the only time these questions have arisen in recent decades. In the final hours of his second term, President William J. Clinton issued a series of presidential pardons that, to many observers of both political parties, were highly problematic if not out-and-out corrupt.[3] Senator Arlen Specter, a liberal Republican from Pennsylvania who had voted against convicting Clinton on his prior impeachment – and who later switched parties and became a Democrat –

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[1] THE FEDERALIST, NO. 65, at 396–97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[2] By far the most comprehensive and insightful academic analysis is Professor Brian Kalt's 2001 article, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. of L. & Pol. 13 (2001). A shorter version appears in Chapter 5 of his book, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES (Yale Univ. Press 2012). This article relies heavily on Kalt's research and analysis, though ultimately disagreeing with his conclusion about late impeachment. Other sources that discuss impeachment of former officers include MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 81–83 (3rd ed. 2019); Arthur Bestor, *Impeachment*, 49 WASH. L. REV. 255, 277 (1973); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 714–18 (1988).

[3] *See Pardons Granted By President William J. Clinton* (1993–2001), THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/pardon/pardons-granted-president-william-j-clinton-1993-2001 [https://perma.cc/U7B4-6RTC].

suggested impeaching the ex-President.[4] There also were rumblings about a post-presidential impeachment of President George W. Bush for alleged wrongdoing in connection with the treatment of enemy combatants.[5] The issue does not often arise because there is usually little appetite for impeachment after an officer no longer wields power. Richard Nixon avoided impeachment by a timely resignation, but a different Congress might have made the opposite decision: to continue the impeachment process as a deterrent to future presidential misconduct. We cannot assume that the issue will never arise.

In this Article I will argue that both sides in the debate over the Trump impeachment were half right: Only sitting officers may be impeached, but the Senate may try any procedurally proper impeachment even if the officer has left office in the interval between impeachment and trial. Donald Trump's second impeachment trial was therefore entirely legitimate in this respect, because the House passed its Resolution of Impeachment on January 13, 2021, six days before the end of his term,[6] though his trial in the Senate did not begin until February 9.

There is no persuasive argument that the Senate lacks power to try a timely impeachment after the person impeached has left office. Article I states plainly that the Senate has power to try "all impeachments," and there is no textual basis for an exception in the case of former officers. Although an ex-officer can no longer suffer the mandatory punishment of removal, conviction may still bring the discretionary punishment of disqualification from future office; thus, the trial and conviction of an ex-officer carries meaningful consequence. Congressional practice in the centuries since adoption of the Constitution is entirely consistent with this plain meaning interpretation. Although the Senate usually declines to proceed with a removal proceeding after an officer has resigned, it has made clear this is a matter of discretion and not lack of authority. The arguments proffered by then-former President Trump's lawyers and

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[4] *See* Carl Hulse and Adam Nagourney, *Specter Switches Parties; More Heft for Democrats*, N.Y. Times (April 28, 2009), https://www.nytimes.com/2009/04/29/us/politics/29specter.html [https://perma.cc/HE5N-USAD]; *see also Arlen Specter Votes 'Not Proved'*, AP News (Feb. 12, 1999), https://apnews.com/article/dcb0cc63a679b323b206845b40703baf [https://perma.cc/5J8P-3MAV].

[5] *See* H.R.J Res. 1258, 110th Cong. (2008) (Articles of impeachment introduced and sponsored by Congressman Dennis Kucinich and Robert Wexler against Bush. The House of Representatives 251 to 166 to refer the impeachment resolution to the Judiciary Committee on June 11, 2008, where no further action was taken on it.).

[6] Some have argued that the decisive date for impeachment is not passage of the impeachment resolution, but official transmission of the articles of impeachment to the Senate, which occurred after Mr. Trump left office. *See* Jeremy Herb and Manu Raju, Manu, *House delivers impeachment article to Senate*, CNN Politics (January 25, 2021, 8:24 PM), https://www.cnn.com/2021/01/25/politics/impeachment-article-senate-house/index.html [https://perma.cc/7FSK-KN9S]. This argument will be further considered at *infra* Part II.

supporters in 2021 were based on the impropriety of *impeachments* years after the officer had departed from public life, not *trials* of persons impeached while still in office.

The argument against impeachment of former officers is a slightly closer question, but it also finds a clear answer in the constitutional text. Article II provides for impeachment of "the President, the Vice President, and other civil officers." To read this provision as allowing impeachment of ex-officers requires either that we interpret the term "civil officers" as embracing former officers, which is not what those words ordinarily mean, or that we treat the list of impeachable persons as non-exclusive, which would have extraordinary consequences inconsistent with both the drafting history and the weight of subsequent practice.

To be sure, supporters of late impeachment offer a powerful functionalist justification: that late impeachment is necessary to deter misconduct in the final days and hours of a presidency. But opponents of late impeachment have a similarly powerful functionalist counterpoint: that former officers should not be subject to the political harassment of impeachment for the rest of their lives. When functionalist arguments cut both ways, as they often do, it is best to interpret the Constitution according to its text, structure, and history. The question, we should remember, is not what we think would be a good system but what the Constitution actually means. One value of a written Constitution is that it provides a rulebook for resolution of issues that would likely provoke partisan division if decided on the basis of intuitions about good constitutional policy in a particular case.

There is an especially strong functionalist argument for allowing an impeachment proceeding to continue when, like Richard Nixon, the officer resigns to prevent impeachment from taking place. On one occasion in 1876, discussed in greater detail below, the Senate conducted a trial on an impeachment of a cabinet secretary under just those circumstances.[7] That case involved a cabinet officer, Secretary of War Belknap, who resigned just hours before the House voted to impeach him, specifically to avoid the embarrassment. In the Senate, Belknap's defense was based almost entirely on the fact that he was no longer an officer at the time of impeachment. There were two votes on the issue. At the beginning of trial, there was a motion to dismiss, which required a majority vote and was defeated. At the close of trial Belknap was acquitted for lack of a two-thirds vote, largely on the ground that impeachment of an ex-officer is not authorized by the Constitution. In any event, post-resignation impeachment is an arguably special case. A principle of equity holds that a party to a legal proceeding cannot defeat jurisdiction by his own

[7] The details are discussed below at *infra* Part III.C. Some commentators regard the impeachment of Senator William Blount as a late impeachment, but that is not accurate. That case is also discussed below at *infra* Part III.C.

unilateral actions, such as mooting the case. Especially given its ambiguous outcome, this single incident of a post-resignation impeachment is insufficient to warrant a general rule that former officers are impeachable after they have left office.

II. MAY THE SENATE TRY AN EX-OFFICER ON AN IMPEACHMENT THAT WAS RENDERED WHILE THE OFFICER WAS STILL IN OFFICE?

Forty-five senators voted to dismiss the second Trump impeachment before trial, on a point of order.[8] The point of order, raised by Senator Rand Paul, was worded as follows: "that this proceeding, which would try a private citizen and not a President, a Vice President, or civil officer, violates the Constitution and is not in order."[9] Quoting Article II, Section 4 and the second sentence of Article I, Section 3, Clause 6, Senator Paul explained the basis for his motion: "As of noon last Wednesday, Donald Trump holds none of the positions listed in the Constitution. He is a private citizen. The Presiding Officer is not the Chief Justice, nor does he claim to be. His presence in the Chief Justice's absence demonstrates that this is not a trial of the President but of a private citizen."[10]

The problem with Senator Paul's argument is that it confuses impeachment with trial. It may very well be that the House of Representatives can only impeach the officers listed in Article II, Section 4, namely the President, Vice President, and other civil officers—and not private citizens, including ex-Presidents. But on January 13, 2021, the day the House voted to impeach him, Donald Trump was President of the United States, and fully subject to impeachment. There is no doubt, therefore, that the impeachment itself was timely. The question was whether the Senate could try the impeachment. The answer to that question is found in the first sentence of Article I, Section 3, Clause 6, which Senator Paul omitted to quote. That sentence reads: "The Senate shall have the sole power to try all Impeachments." As that sentence makes clear, the Senate has power to try not just some impeachments but "all" impeachments—presumably meaning all jurisdictionally proper impeachments, which the Trump impeachment was. Article I contains no hint of an implied limitation to cases where the officer is still in office at the time of trial. True, if the January 13 impeachment had been jurisdictionally improper, it would be reasonable for senators to say that it was not truly an "impeachment" within the meaning of the Constitution,

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[8] David Smith, *Boost for Trump as 45 Republican senators vote to dismiss impeachment*, THE GUARDIAN (Jan. 26, 2021, 4:38 PM), https://www.theguardian.com/us-news/2021/jan/26/trump-impeachment-republicans-senate-vote-to-dismiss [https://perma.cc/Z558-WNQQ].

[9] 167 Cong. Rec. 142 (2021).

[10] *Id.*

and therefore that it should be dismissed. But given that the January 13 impeachment was procedurally impeccable – at least with respect to the late impeachment issue – it is inescapable that the Senate had power to try it. The relevant constitutional text is unambiguous.

That Chief Justice Roberts did not preside is beside the point. The trial was not a trial of "the President," but as Senator Paul said, of a private citizen. But since the impeachment was of a sitting President and the Senate's jurisdiction extends to all jurisdictionally proper impeachments, the private status of Mr. Trump at the time of trial affected nothing other than who would preside.

Some may argue that Article I, Section 3, Clause 6 is worded as it is ("sole power" to try "all impeachments") solely to make clear that no body other than the Senate has the power to try any impeachment. But even so, it is baffling why anyone would interpret the words of the Clause as barring senatorial action on a procedurally proper House impeachment. Since the Senate has "sole power" to try all impeachments, surely it has "power" to try all impeachments. Any limitation on the Senate's express power to try "all impeachments" must come from somewhere. It does not come from the constitutional text.

Senator Paul may have been suggesting that trial of an ex-officer is unconstitutional because such a person could not be removed from office, making a trial pointless. Majority Leader Charles Schumer responded to that argument, quoting Article I, Section 3, Clause 7, which permits the Senate to disqualify a person convicted on impeachment from future office. He drew the conclusion: "If the Framers intended impeachment to merely be a vehicle to remove sitting officials from their office, they would not have included that additional provision: disqualification from future office."[11] To be sure, sitting officers convicted on impeachment *must* be removed, but any person convicted on impeachment *may* be disqualified from future office. There is no textual or logical reason to assume that only a person who can be removed can be tried and convicted.

As a matter of constitutional interpretation, therefore, Senator Paul's point of order was not meritorious. The Senate has power to try "all impeachments," and the Trump impeachment had taken place, properly, while he was still in office. While he could no longer be removed, he could be disqualified from future office, which would be a serious and consequential sanction.

To be sure, the senators' vote on the issue was final. Because the Senate has the "sole Power to try all Impeachments,"[12] no power in heaven or on earth could have overruled the Senate if a majority had voted to dismiss for lack of jurisdiction, however erroneous such a decision might seem. Moreover, the vote would presumably have established a precedent,

[11] *Id.*

[12] U.S. CONST. art I, § 3, cl. 6.

which would guide future cases to the extent that legislative precedents ever do so. But senators are "on Oath or Affirmation" when trying an impeachment,[13] and thus on the highest possible obligation to put aside partisan considerations. It is difficult to see any sound legal basis for an affirmative vote on the point of order.

There is a wrinkle, however. The Trump lawyers argued that an impeachment, technically, occurs not when the House passes its resolution of impeachment but when House managers deliver the impeachment to the Senate.[14] They based this argument on a historical practice that ceased some 110 years ago.[15] Both in Britain and in Congress prior to 1912, the lower house would typically enact a resolution stating that the named officer "be impeached" and authorizing its managers to go to the upper house and "impeach" the officer before the bar of the Senate. Only later would the House adopt specific articles of impeachment.[16] Under this practice, it may be argued that the impeachment technically did not occur when the House voted the resolution but when the managers appeared before the Senate. In the Trump case, for reasons unknown, the House managers did not convey the impeachment to the Senate until January 25, five days after Mr. Trump left office.[17] The Trump lawyers thus argued that "Mr. Trump was no longer President at the time the House filed the Article of Impeachment in the Senate."[18] Whatever the merits of this argument under past practice, however, the modern practice has changed. On January 13, consistent with House impeachment practice since 1912, the House passed a resolution stating unequivocally "[t]hat Donald John Trump, President of the United States, is impeached for high crimes and misdemeanors."[19] Not that House managers should go to the Senate at some point in the future and "impeach" him there—but that he "is"

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[13] *Id*.

[14] TRIAL MEMORANDUM OF DONALD J. TRUMP, 45TH PRESIDENT OF THE UNITED STATES OF AMERICA, S. DOC. NO.117–2, at 141–46 (1st Sess. 2021) [hereinafter TRUMP TRIAL MEMORANDUM].

[15] *See generally* Mary L. Volcansek, *British Antecedents for U.S. Impeachment Practices: Continuity and Change*, 14 THE JUST. SYS. J. 40 (1990).

[16] *Id.*; The procedure is described by JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 805 (1833). *See, e.g.*, Journal of the House of Representatives, 5th Cong., 1st Sess. 72–73 (July 7, 1797). The form of impeachment was a resolution that "A member go to the Senate, and at the bar of that House, impeach [name of officer], in the name of this House and of the people of the United States; and to inform them that they will, in due time, exhibit articles of impeachment against him, and make good the same." It appears that the function of this form of resolution was to enable the Senate to take steps to secure the presence of the accused. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 805 (1833).

[17] *See* Herb, *supra* note 6; *see also* H.R.J Res. 24, 177th Cong. (2021).

[18] TRUMP TRIAL MEMORANDUM , *supra* note 14, at 141.

[19] H.R.J Res. 24, 117th Cong. (2021).

impeached as of passage of the resolution. This manner of proceeding gives no legal significance to the timing of the managers' presentation of the articles of impeachment to the Senate.

There is no reason to think that the old practice, which was not constitutionally mandated, truncates the current powers of the House of Representatives to decide when and how to carry out its impeachment function. Each house of Congress has control over its own procedures,[20] and the House of Representatives determined that Mr. Trump "is impeached" as of January 13. That seems conclusive. Moreover, it is far from clear that even the old practice would have led to a different conclusion as to the operative legal date of impeachment. Article II, Section 2, Clause 5 states that the "House of Representatives . . . shall have the sole Power of Impeachment," indicating that impeachment must be an act of the House, and of no one else.[21] An impeachment resolution is passed by the whole House; presentation of the impeachment to the Senate is done by the House managers. It would be odd to say that impeachment takes place when the managers act, rather than when the House acts. In any event, since 1912, the date of delivery of the Article of Impeachment to the Senate has had no constitutional significance, if it ever did.

The constitutional text thus does not limit the trial of an impeachment to current officeholders. Nor can such a limitation be derived from history, practice or precedent. The drafting and ratification history contain no hints one way or the other. As will be seen below, prior history under British and early state practice allowed impeachment (not just trial) of officers after they left office; that history lends no support to the claim that the Senate's power to try an impeachment ends when the officer leaves office.

On the few occasions when the issue has arisen in practice, the Senate has concluded that it had power to try a timely impeachment, even after the officer resigned or otherwise left office. The clearest instance was the impeachment of Judge George English in 1926 for a variety of judicial misdeeds.[22] After his impeachment by the House, but six days before his trial by the Senate, Judge English resigned.[23] The House managers

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[20] *See* N.L.R.B. v. Noel Canning, 573 U.S. 513, 550 (2014) (relying on the "broad delegation of authority" to each House to determine the nature of its proceedings); Nixon v. United States, 506 U.S. 224, 229 (1993) (relying on the words "sole authority" to hold that the courts may not interfere with the Senate's chosen procedure in cases of impeachment).

[21] The leading legal dictionary of the day defined the term "impeachment" as the "Accusation and Prosecution of a Person for Treason, or other Crimes and Misdemeanors." G. JACOB, A NEW LAW DICTIONARY (London 1729). This implies that the House is constitutionally vested not only with the power to initiate the proceedings but also to conduct the prosecution before the bar of the Senate.

[22] U.S. SENATE, PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF GEORGE W. ENGLISH, S. DOC. No. 69–177 (1926).

[23] *Id.* at 78.

recommended termination of the proceedings but informed the Senate 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" the case.[24] Senators then voted to dismiss the case, 70-9, but all those who spoke up expressed the view that the body retained jurisdiction.[25] In the 1796 Blount impeachment, discussed in the next section, the Senate dismissed an impeachment where the target, a Senator, had been expelled from office after impeachment but before the House had adopted specific articles of impeachment, and before the Senate began the trial.[26] However, no discernible precedent was set on the question of the triability of former officers, because the principal issue at stake in the dismissal motion was that members of Congress are not "civil Officers of the United States" within the meaning of Article II, Section 4 and thus could not be impeached in the first place.[27] Moreover, although the House manager correctly distinguished between late *impeachments* and the trial of cases after the official was no longer in office, Blount's representatives in the Senate debate discussed the case as if it involved a late impeachment,[28] which it was not, as did some of the senators. Late impeachments and trials of timely impeachments after the target has left officer are different issues.[29]

There are no serious functionalist arguments against the trial of an ex-officer on a timely impeachment. The Trump lawyers' brief argued that this would set a bad precedent, but they did not distinguish between trials of impeachments and impeachments themselves. Their brief called late impeachments "a dangerous slippery slope that the Senate should be careful to avoid," suggesting that "a future House could impeach former Vice President Biden for his obstruction of justice in setting up the Russia hoax circa 2016" or "former Secretary of State Clinton for her violations of 18 U.S.C. § 793."[30] But these examples were hypothetical late impeachments, not trials of timely impeachments. If the impeachment power is limited to current officers, there will be no possibility of reaching back to long-out-of-office targets.

Maybe the motion to dismiss the Trump impeachment was an exercise of the Senate's discretion not to spend time on the matter—analogous to the Supreme Court's discretionary power to deny certiorari, or to dismiss as improvidently granted. Article I, Section 8, Clause 6 gives

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[24] 68 CONG. REC. 297 (1926) (report submitted by Rep. Michener).

[25] S. DOC. NO. 69–177, at 92–93; For facts and citations regarding the English impeachment, *see* Kalt, *supra* note 2, at 104–05.

[26] *See infra* Part III.C.

[27] *See* Kalt, *supra* note 2, at 89.

[28] *See id.* at 88.

[29] For facts and citations regarding the Blount impeachment, *see id.* at 86–89.

[30] TRUMP TRIAL MEMORANDUM, *supra* note 14, at 144.

the Senate "sole power" to try impeachments but does not impose a duty on the upper house to act.[31] This would explain how forty-five senators, under oath, could vote not to exercise jurisdiction.[32] That is not, however, what the motion on which they voted said. The motion declared that the proceeding before the Senate "violates the Constitution and is not in order." The Trump lawyers' brief said clearly that the Senate "lacks jurisdiction"[33]—not that the Senate has discretion to duck. No senator made the discretion argument during floor debate, but one Senator, Ted Cruz of Texas, did so in an op-ed.[34]

III. MAY THE HOUSE OF REPRESENTATIVES IMPEACH FORMER OFFICERS AFTER THEY HAVE LEFT OFFICE?

The second question raised by the 2021 Trump impeachment is more difficult: Does the House of Representatives have power to impeach former officers after they are no longer in office? As it happens, this question had no application to the Trump impeachment itself, because he was impeached six days before the end of his term. But the question was much discussed in connection with his trial and was the focus of the Trial Memorandum of the House managers as well as the "Replication" (or legal response) of Mr. Trump's lawyers in the Senate. Almost every Republican senator who voted against conviction relied on this argument rather than attempting to justify or excuse Mr. Trump's actions in the aftermath of the election of 2020.[35]

Scholars who have written on the question all seem to conclude that former officials are impeachable,[36] but I maintain that the better

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[31] U.S. CONST. art. I, § 3, cl. 6. I do not mean to imply that it would be appropriate for the Senate to decline to act on a procedurally proper impeachment. At the very least, this would indicate a lack of comity toward the other branch. My point is just that the Senate has no constitutional duty to try impeachments under the text of Article I.

[32] 167 CONG. REC. S142–43 (daily ed. Jan. 26, 2021).

[33] TRUMP TRIAL MEMORANDUM, *supra* note 14, at 183.

[34] Sen. Ted Cruz, *Should the Senate exercise jurisdiction over Trump's impeachment trial? Why the answer matters*, FOX NEWS (Feb. 9, 2021, 10:30 PM), https://www.foxnews.com/opinion/ted-cruz-senate-jurisdiction-trump-impeachment-trial [https://perma.cc/JF4K-8TYF].

[35] *See* Levine & Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, THE GUARDIAN (Feb. 13, 2021, 7:12 PM), https://www.theguardian.com/us-news/2021/feb/13/donaldtrump-acquitted-impeachment-trial [https://perma.cc/U7GH-VVMJ] ("[F]ew [Republican Senators] defended his actions during the trial. Instead, they relied on a technical argument . . . that the proceedings were unconstitutional because Trump was no longer in office.").

[36] GERHARDT, *supra* note 2, at 82; Bestor, *supra* note 2; Rotunda, *supra* note 2; Kalt, *supra* note 2. To be sure, Gerhardt, Bestor, and Rotunda focus especially on

interpretation of the Constitution's provisions for impeachment is to the contrary. I base this conclusion primarily on textual and structural grounds. The contrary interpretation is usually based primarily on the functionalist argument that late impeachment may be necessary to deter misconduct during a President's final weeks in office. It also claims support from pre-constitutional practice in Britain and the early states, and an ambiguous impeachment in the late nineteenth century. In my view, the functionalist argument is cancelled out by an equal-but-opposite functionalist argument that the House should not be able to engage in political harassment of prior officers when the partisan winds shift. Text and structure, informed by history, provide a consistent rule for all cases.

A. Text and Structure

The Constitution's four clauses bearing on impeachment are divided logically between Articles I and II. Article II, which governs the executive branch, sets forth how the President and other civil officers are chosen and how they may be removed—including by impeachment. Section 4 contains a list of impeachable persons and the offenses for which they may be impeached, and mandates removal of officers after conviction. At the Philadelphia Convention, the precursor to Article II, Section 4, was first introduced and always discussed in connection with the presidential term of office. Because they were contemplating what seemed to them a long term – four years or maybe longer – the delegates concluded that there had to be a means of removing a president for malfeasance in office. For much of the summer, the draft constitution specified the grounds for impeachment but was silent about the procedures, and impeachment applied only to the President.[37] Article I, which governs the legislative branch, addresses the congressional role in impeachment and trial. It assigns the "sole Power of Impeachment" to the House of Representatives and the "sole Power to try all Impeachments" to the Senate. These provisions follow the British parliamentary model under which the House of Commons had the power of impeachment and the House of Lords had the power to try all impeachments. In a departure from the British model, Article I, Section 3, Clause 7 makes clear that the Senate may not impose punishments other than "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." This clause was originally located among the provisions of what is now Article III, governing the federal judiciary, and was moved to Article I,

impeachability after the officer has a resigned, but their textual/structural arguments are not so limited.

[37] The impeachment provision was added very early in the Convention, on June 2. It read, in its entirety, that the executive was to be "removable on impeachment & conviction of mal-practice or neglect of duty." 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 78 (journal), 88 (Madison's notes).

Section 3 when the power to try impeachments was shifted from the Supreme Court to the Senate.[38]

Article II, Section 4 is the only part of the Constitution that speaks to who may be impeached, or the proper grounds for impeachment. It provides 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."[39] The provision does not, by its words, extend to persons who are not serving as officers. The United States has only one "President" and one "Vice President" at a time. Ex-presidents do not count. After January 20, 2020, Donald J. Trump was no longer the President of the United States. He was a private citizen.

The context strongly indicates that the lists of impeachable officers and offenses in Article II, Section 4 are exclusive—that the President, Vice President, and civil officers are the *only* persons subject to impeachment, and that treason, bribery, and high crimes and misdemeanors are the *only* charges under which impeachment may be brought. For most of the Constitutional Convention, only the President was subject to impeachment. Just a week before the end of the Convention, the delegates voted to make "the vice-President and other civil Officers of the U.S." also subject to impeachment and removal.[40] It seems clear that, without this amendment, these officers would not have been impeachable. It follows that after the amendment, no one other than these officers and the President could be impeached—thus excluding private persons, military officers, members of Congress, and state government officials. The entire discussion proceeded on the implicit assumption that to render a party subject to impeachment by the House and trial by the Senate, that party must be listed in what is now Article II, Section 4. Similarly, the term "high Crimes and Misdemeanors" was added to Article II, Section 4 in the final week of the Convention for the explicit reason that treason and bribery would otherwise be the only bases for impeachment and removal.[41]

In both respects, these were departures from the British model. The House of Commons could impeach anyone (other than a Royal), including former officers and private persons, and it was not limited as to the charges it could bring (except that private persons could be impeached only for public offenses, not private wrongs). In 1681, the House of Commons resolved: "That it is the undoubted right of the Commons, in parliament

[38] U.S. CONST. art. II, § 4; *id.* art. I, § 2, cl. 5; *id.* art. II, § 4, cl. 6; *id.* art. II, § 3, cl. 7; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 180 (Comm. of Detail draft) (Max Farrand ed., 1911).

[39] U.S. CONST. art. II, § 4.

[40] 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 546 (journal), 552 (Madison's notes).

[41] *Id.* at 550.

assembled, to impeach before the Lords in Parliament, any peer or Commoner for treason or any other crime or misdemeanor."[42] History provides numerous examples. In a notorious case surely known to the framers, Parliament impeached, convicted, and punished Dr. Henry Sacheverell, a flamboyant preacher, for a seditious sermon.[43] The House of Commons also impeached the former Governor General of Bengal, Warren Hastings, an instance mentioned during the Convention,[44] and several of Queen Anne's former ministers after her death and a change in government. In the latter instance, the impeachable conduct was the negotiation of a bad treaty.[45] Other ministers were impeached for giving pernicious advice to the monarch.[46] The framers evidently did not want to subject private citizens to impeachment; nor did they wish to create an open-ended set of impeachable offenses, which would effectively make the President serve "at the pleasure of the Senate."[47] Gouverneur Morris, a leading delegate and principal author of the final constitutional text, stated explicitly that "corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined."[48]

The possibility that former Presidents might be impeachable after leaving office was never raised or debated at the Philadelphia Convention. To the contrary, the only relevant debate was over the dangers and benefits of impeaching and removing a President "whilst in office." Some delegates opposed this because it would make the executive "dependent on those who are to impeach," which would "effectually destroy his independence." A larger number insisted it was "indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate" and that the need to face the public periodically for reelection "was not a sufficient

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[42] 8 STATE TRIALS 223, 236-37 (Howell 1681). *See also* J. Selden, OF THE JUDICATURE IN PARLIAMENTS 6 (1690); 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *259.

[43] The Sacheverell impeachment was widely seen as an abuse of power by the Whig government, and led to riots and a victory for the Tory party in the next election. *See generally* GEOFFREY HOLMES, THE TRIAL OF DOCTOR SACHEVERELL (Eyre Methuen 1973).

[44] *See* MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY 1-44 (Oxford Univ. Press 2010); *see* FARRAND, *supra* note 40, at 550.

[45] *See* FRANK O. BOWMAN, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 38 (Cambridge Univ. Press 2019).

[46] *See* Raoul Berger, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 71 & n.91 (1973) (giving six examples).

[47] S*ee* FARRAND, *supra* note 40, at 550.

[48] *Id.* at 65.

security."[49] Some scholars invoke this debate as proof that "most members took it for granted that the President would be impeachable after he left office,"[50] but this interpretation is unwarranted. The member who opposed impeachability of the President "whilst in office" moved to "strike out" the impeachment clause altogether. Apparently, it did not occur to any participant in the debate that after-office impeachment was a plausible option.

To interpret Article II, Section 4 as allowing impeachment of former officers requires us to interpret the clause as non-exclusive. And indeed, that is how most scholars supporting the impeachability of past officers read the clause. They point out that the literal language of Article II, Section 4 does nothing more than make mandatory the penalty of removal from office in a certain category of cases. As Professor Michael Gerhardt, a respected scholar and author of one of the leading books on impeachment, explains: "Although Article II refers to 'all civil officers of the United States,' this reference could mean only that those who are still civil officers at the time of conviction must be removed."[51] According to this interpretation, the House of Representatives is free to impeach whomever it wishes, so long as the Senate complies with its Article II duty to remove any sitting civil officer convicted for treason, bribery, or other high crimes and misdemeanors.[52]

While not linguistically impossible, this "mandatory penalties only" interpretation of Article II, Section 4 is highly implausible for a number of reasons. First, this is not the way we ordinarily read lists of included items, like the list of impeachable officers in Article II. The canon of construction called *expressio unius est exclusio alterius* – to include one thing is to exclude others – is commonly observed in constitutional interpretation.[53] When that canon applies, unlisted items similar in nature to those on the list are excluded by negative implication. For example, if the dean of a law school announces that second- and third-year law students are eligible for a particular award, she is also saying that first-year students are not. When the Constitution lists certain officers as subject to impeachment and removal, this strongly suggests that other persons are

[49] *Id.* at 64–69 (Madison's Notes).

[50] Bestor, *supra* note 2, endorsed by GERHARDT, *supra* note 2, at 82 n. 27.

[51] GERHARDT, *supra* note 2, at 82; *accord*, Bestor, supra *note* 2; Rotunda, *supra* note 2. To be sure, all three scholars are focused primarily on post-resignation impeachments, which may present a special case, but their literal reading of Article II, Section 4 is not limited to that special case.

[52] Professor Gerhardt concedes that "it is clear and well settled that the impeachment power does not extend to private persons," but points to nothing in the constitutional text that protects against that eventuality. GERHARDT, *supra* note 2, at 83.

[53] *See, e.g.*, *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821); *Powell v. McCormack*, 395 U.S. 486, 550 (1969).

not. While Article II, Section 4 *could* mean only that sitting officers are subject to mandatory removal as well as the possibility of disqualification, while other persons, if impeached and convicted, are subject merely to disqualification, this is an odd way to put the point.[54]

Second, the interpretation would have implications far beyond the impeachability of officers after they leave office, some of which are highly unsettling. Under British Parliamentary practice, the House of Commons could impeach even private citizens, if they committed offenses of a public nature, such as sedition or bribery. The Constitution contains no other clause that even arguably delimits the House of Representatives' seemingly plenary power of impeachment. What is to keep the House from impeaching whomever it wishes—understanding that, under Article II, Section 4, removal from office would not be mandatory except for Presidents, Vice Presidents, and other civil officers?[55] If the non-exclusive interpretation is correct, there is nothing in the Constitution to prevent the House from impeaching private citizens (in violation of the due process principles),[56] military officers (undermining their right of court martial),

[54] Professor Kalt agrees that the list of impeachable persons in Section 4 is exclusive, but suggests that the provision focuses on the time of the misconduct, not the time of impeachment or trial, as if Section 4 read: "The President, Vice President, and all civil officers shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors committed during their term of office." *See* Kalt, *supra* note 2, at 58–60, 64–66. That is a reasonable position from a pragmatic point of view, but it would be an awkward reading of the text. If accepted, moreover, that view would preclude impeachment for conduct that took place before the officer assumed office. Perhaps that is a reasonable limitation, but history is against it. In 1879, a House committee reported articles of impeachment against George Seward, the Minister to China, on account of alleged theft of public funds in his former capacity as consul-general to Shanghai. 8 Cong. Rec. H2350–51 (Mar. 3, 1879). Although Seward ultimately was not impeached, the fact that his misconduct preceded his office was not seen as an issue. The question of impeachment for past misconduct became a lively subject of controversy when Republicans considered impeaching President Clinton in connection with the Whitewater scandal, which preceded his presidency. Less controversially, Vice President Agnew's acceptance of bribes as Governor of Maryland would likely have been regarded as impeachable even if he had not continued to receive payments while Vice President. Kalt's best argument for this reading is the interpretation that has been given of Art. I, Section 5, Cl. 2, under which two former members of Congress have been punished for misbehavior while in office. *Id*. at 66. It is not clear, however that that interpretation is correct or that it should be extended to other clauses.

[55] Professor Kalt suggests, plausibly, that the term "impeachment" imparts some limits. Kalt, *supra* note 2, at 65, But pre-constitutional Parliamentary practice allowed "impeachment" of private citizens, and for a wide array of offenses.

[56] It might be argued that impeachment and trial of private citizens would violate the Bill of Attainder Clause, Article I, Section 9, Clause 3. But attainders and impeachments are not the same thing. A bill of attainder is a legislative act, which must be passed by both Houses of Congresses and presented to the President. Impeachment is the act of the House of Representatives alone, and the trial of an

members of Congress (despite other provisions addressing their discipline), or state officials (to the detriment of federalism). All of these results are contrary to consistent American practice. The list of impeachable persons in Article II is thus better understood as a deliberate rejection of the British practice, and a limitation of the "grand inquest of the nation" to persons holding federal civil office.

The historical context also argues against the mandatory-penalties-only interpretation. Prior to the last week of the Constitutional Convention, the only person subject to impeachment was the President. On September 8, the delegates voted unanimously to expand the universe of who may be impeached to include the Vice President and all other civil officers. No delegate suggested that these other officers were already impeachable, and the context of the debate makes that highly unlikely. Certainly there was no hint that the only significance of Section 4 was to make the removal penalty mandatory in a subset of cases rather than to specify who may be impeached.

Moreover, if the list of impeachable officers in Section 4 is not exclusive, it would follow that the list of impeachable offenses is not exclusive, either. The argument would be that Article II, Section 4 makes the penalty of removal mandatory in cases of treason, bribery, and other high crimes and misdemeanors, but otherwise does not limit the plenary authority of the House to impeach its targets for whatever offenses it wishes.[57] This would make all our arguments over the meaning of "high Crimes and Misdemeanors" pointless. Moreover, the history here is explicit. In the days up to September 8, the relevant article allowed impeachment only for treason and bribery. George Mason moved to add "high Crimes and Misdemeanors" precisely because he did not wish impeachment and removal to be "restrained" to those two grounds.[58] Thus, we know that the framers regarded the list of offenses in Article II, Section 4 as exclusive. There is no reason to read the list of impeachable persons any differently.

Fifth, the exclusive interpretation of Article II, Section 4 best comports with the general structure of the Constitution, under which congressional, powers are enumerated, with all other powers left to the states. As James Madison wrote in *The Federalist*, No. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined."[59] No authority is given to the House, anywhere in the Constitution, to impeach former officers. Because the framers explicitly

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impeachment is an act of the Senate alone. It would not be precise to describe the acts of single house as bills.

[57] This is not a straw man. *See* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 29 YALE L. & POL. REV. 53, 62–77 (1999).

[58] S*ee* FARRAND, *supra* note 40, at 550.

[59] THE FEDERALIST, NO. 45, at 292 (James Madison).

gave the House power to impeach the President and other civil officers, it would be odd to assume that the House already had power to impeach former presidents and former officials, derived from a catch-all source of power like Article I, Section 2, Clause 5.

Finally, it bears mention that Madison, writing in *The Federalist*, No. 39, stated: "The President of the United States is impeachable at any time during his continuance in office."[60] Madison did not suggest that the President might also be amenable to impeachment after his term had ended and he returned to private life.[61]

I am not persuaded by one other textual argument against impeaching former officers. Former President Trump's lawyers argued in their 2021 legal brief that only sitting officers may be impeached, because only sitting officers can be removed.[62] Ah, but former officers convicted on impeachment may suffer the punishment of disqualification from future office. They may be disqualified from appointment to the courts (as former President Taft was), from serving in Congress (as former Presidents John Quincy Adams and Andrew Johnson were),[63] or from serving in the cabinet (as has not yet happened, but could). The Constitution carefully declares that sitting officers *must* be removed, but it leaves open the possibility of conviction followed by disqualification from future office.

B. Pre-Constitutional and Drafting History

Pre-constitutional British practice was replete with impeachment and conviction of former officers. Indeed, at the very time the Constitution was being written and ratified, Edmund Burke – beloved of the Americans

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[60] THE FEDERALIST, NO. 65, at 242 (James Madison).

[61] Later, in the House of Representatives, Madison stated, "Where the people are disposed to give so great an elevation to one of their fellow citizens, I own that I am not afraid to place my confidence in him; especially when I know he is impeachable for any crime or misdemeanor, before the senate, *at all times*; and that at all events he is impeachable before the community at large every four years, and liable to be displaced if his conduct shall have given umbrage during the time he has been in office." CONG. REC., 1st Cong. 458 (emphasis added). It has been suggested that the italicized words "at all times" mean that the President could be impeached after leaving office, but there is no reason to think that was Madison's point. I am grateful to Professor Seth Barrett Tillman for bringing this statement to my attention.

[62] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 283 (1833).

[63] The question is beyond the scope of this Article, but Article II, Section 3, Clause 7 may not extend to disqualification from Congress. There is a plausible argument that "Offices of honor, trust or profit under the United States" comprise only appointed, not elected, offices. *See* Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. OF AM. LEGAL STUD. 95 (2016).

for his support during the struggle for independence – was engaged in prosecuting the impeachment of Warren Hastings, the former Governor General of Bengal (British India) for abuses of power he committed in that capacity.[64] The Hastings impeachment was specifically cited during the Constitutional Convention—though on the issue of proper grounds for impeachment, not on the issue of late impeachments.[65]

Pre-constitutional British practice is usually an important source for constitutional understanding,[66] but not when there is evidence that the framers departed from the British model. Here, the framers evidently did so. If we followed British practice, impeachment would extend to all citizens (with the possible exception of members of Congress, whose punishment is dealt with separately), the grounds for impeachment and conviction would be broader, and the punishment upon conviction would be criminal in character. Our system has rejected all of that. There is no logical reason to pluck out one aspect of British practice – late impeachment – and give it weight, when we have rejected most of the rest.

The evidence from early state constitutions is intriguing, but ultimately inconclusive. Eleven of the thirteen states, plus Vermont, had enacted state constitutions as of the federal convention in 1787.[67] Ten of these had provisions for impeachment:

- Six states authorized impeachment of "officers of the state" (using a variety of terms).[68] The most natural reading of these provisions is that they applied only to current officials. Former officers are not "officers"; they are private citizens. Unlike Article II, Section 4, these provisions are not susceptible to the mandatory-penalties-only interpretation. Moreover, there is no evidence that these states ever impeached officials after they left office.

- Two states, Virginia and Delaware, permitted impeaching the governor *only* after "he is out of office."[69] The most famous application of this provision was the 1781 impeachment inquiry into the conduct of former Governor Thomas Jefferson in

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[64] Conor Cruise O'Brien, THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE (1992).

[65] S*ee* FARRAND, *supra* note 40, at 550.

[66] In the first impeachment, members of Congress treated Parliamentary practice as authoritative where the Constitution did not depart. *See* Journal of the House of Representatives, 5th Cong., 1st. Sess. History of Congress 459–460 (July 7, 1797).

[67] *See State Constitutions*, PBS, https://www.pbs.org/ktca/liberty/popup_stateconst.html [https://perma.cc/YA54-CNHD] (last visited May 26, 2020).

[68] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, (Max Farrand eds., Yale University Press, vol. 2, 1911).

[69] *See The First Virginia Constitution*, US History.org: The Declaration of Independence, https://www.ushistory.org/declaration/related/vaconst.html [https://perma.cc/YY7P-4RTT] (last visited May 25, 2022).

connection with his conduct of the war. (Jefferson was cleared of wrongdoing). Both states authorized the infliction of "pains and penalties," *i.e.*, criminal punishment, against a convicted offender in addition to dismissal from office.[70]

- Delaware provided that any impeachment of the governor had to be within eighteen months of his departure from office.[71] That statute of limitations preserved the purpose of late impeachment, namely deterrence of wrongdoing in the late days of an administration, while avoiding the principal danger of late impeachments, which is politically-motivated harassment of former officials when the political tides have turned. It may have been the best solution to the problem of late-in-office misconduct, but it was not imitated by any other state or by the framers of the Constitution.

- Pennsylvania and Vermont allowed impeachment of the chief executive "either when in office, or after his resignation, or removal for mal-administration."[72] They did not allow impeachment of officers after they had served out their terms.[73] This allowed impeachment to proceed in the circumstances where the governor's conduct likely precipitated his termination but forbade the impeachment of former governors in the normal case. This, too, was an attractive solution—but, like the Delaware solution, was not imitated by other states or the framers.

- All four states that expressly allowed impeachment of former officers also allowed impeachment of private persons who committed offenses against the state, such as treason or bribery, but not private crimes such as theft of private property or assault on a private person.[74]

From the existence of these conflicting provisions, we know that the question of impeachment of former officers was on the minds of the drafters of the state constitutions and that there was no consensus about

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[70] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 68.

[71] *See Constitution of Delaware; 1776*, YALE L. SCHOOL: THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/de02.asp [https://perma.cc/9JV3-N97P] (last visited May 25, 2022).

[72] *See Pennsylvania Constitution of 1776*, PENN. HISTORICAL & MUSEUM COMM'N, http://www.phmc.state.pa.us/portal/communities/documents/1776-1865/pennsylvania-constitution-1776.html [https://perma.cc/53UX-JX6S] (last visited May 26, 2022).

[73] *See id.*

[74] *See Art. II.S4.4.2 Historical Background*, CONST. ANN., https://constitution.congress.gov/browse/essay/artII-S4-2-2/ALDE_00000699/ [https://perma.cc/C49S-MGFK] (last visited May 26, 2022).

the answer. The provisions also suggest a pattern. Roughly speaking, the states divided into two camps. Six saw impeachment as a means of removing "the Governor and other Officers offending against the State, by violating any Part of this Constitution" (in the words of the North Carolina constitution).[75] These applied impeachment to sitting officers. Four saw impeachment as the vehicle for punishment of anyone who offended against the state, whether they were in public office or not.[76] These extended impeachment to former officers.

At the Philadelphia Convention, there was a hint of the same divide. Charles Pinckney opposed impeachment of the president "whilst in office," on the ground that this would destroy the president's independence from the legislative branch—which was one of the structural fundamentals of the Constitution.[77] Other delegates insisted on the "necessity of making the Executive impeachable while in office," especially in light of the long term being contemplated, relative to state governors, most of whom served for one-year terms.[78] This consideration caused one influential delegate, Gouverneur Morris, who had initially opposed impeachment of the president for reasons similar to Pinckney's, to change his position.[79] In the end, the framers opted for removal and forbade any punishments other than removal and disqualification. In *The Federalist*, No. 39, Madison called attention to the difference between the federal provision and that of Virginia and Delaware,

> "[i]n several of the States, however, no explicit provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office."[80]

The pre-constitutional history is thus mildly supportive of the position that former officers cannot be impeached. In British practice, former officers *could* be impeached—but so could private citizens. There is no reason to think the framers accepted one feature of British impeachment practice and rejected most of the rest. The practice in the

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[75] *See Constitution of North Carolina: December 18, 1776*, YALE L. SCHOOL LILLIAN GOLDMAN L. LIB., https://avalon.law.yale.edu/18th_century/nc07.asp [https://perma.cc/CX8Z-HZ6J] (last visited May 26, 2022).

[76] *See Art. II.S4.4.2 Historical Background*, *supra* note 74.

[77] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 *supra* note 68, at 64–65.

[78] *Id*.

[79] All quotes in this paragraph are from 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 64–65; *see also* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 57–59 (Princeton Univ. Press 2020).

[80] THE FEDERALIST, NO. 39, at 242 (James Madison).

states was mixed, but the pattern was that those states that allowed impeachment of former officials also allowed impeachment of private persons for public offenses, while those that disallowed impeachment of private persons also limited impeachment of former officials. The Constitution most closely resembles the latter practice.

C. Congressional Practice Since 1787

Longstanding and consistent congressional practice can resolve ambiguities in constitutional meaning,[81] but congressional practice in connection with late impeachments is far too scant to undermine the textual and historical arguments outlined in the preceding subsections. Prior to the second Trump impeachment, the question of impeachment of a former officer came up only twice.

In 1797, Tennessee Senator William Blount, who had been a North Carolina delegate to the Constitutional Convention, was accused of plotting with the British to take over parts of the Spanish domains in North America.[82] The House of Representatives impeached him on July 7, 1797,[83] and the Senate expelled him the next day[84] under its Article I, Section 5, Clause 2 power to discipline and expel its own members.[85] In those days, it was common for the House to vote impeachment but not to adopt specific articles of impeachment until later. The House voted articles of impeachment in January 1798,[86] and the Senate opened a trial on the impeachment in December 1798.[87] Blount's representatives moved to dismiss on two grounds: (1) that senators are not civil officers subject to impeachment, and (2) that Blount was no longer in office when the House adopted the articles of impeachment.[88] The Senate dismissed the case for want of jurisdiction by a vote of 14-11; the motion to dismiss did not distinguish between the two grounds.[89] The late impeachment

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[81] *E.g.*, *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014).

[82] Kalt, *supra* note 2, at 86.

[83] 3 J. OF THE HOUSE OF REP, 5th Cong., 1st Sess. 72–73 (July 7, 1797). Specifically, the House "resolved" that Blount "be impeached of high crimes and misdemeanors," and "ordered" that a House member "do go to the Senate, and, at the bar thereof, in the name of the House of Representatives, and the people of the United States, impeach William Blount, a Senator of the United States, of high crimes and misdemeanors." That member, Rep. Sitgreaves, reported that same day that he had "been to the Senate" and "had impeached" Blount.

[84] 7 ANNALS OF CONG. 44 (July 8, 1787).

[85] Kalt, *supra* note 2, at 66, 86.

[86] *Id.* at 86, 87; 3 J. OF THE HOUSE OF REP, 5th Cong., 1st Sess. 153–154 (Jan. 29, 1798).

[87] 8 ANNALS OF CONG. 2194 (Dec. 13, 1798).

[88] Kalt, *supra* note 2, at 86–87.

[89] *Id.* at 86, 88.

argument was not well founded. Although there was much discussion of late impeachments, Blount was still a senator when he was impeached on July 7, 1797.[90] As the House manager argued, there is no impediment to trying a former officer if he was impeached while still in office.[91] It seems clear from the language of the House resolutions that Blount was "impeached" on July 7, 1797, the day before he was expelled; the vote on January 29, 1798 was merely to "exhibit" articles of impeachment to the Senate. In any event, the question of timing was so intertwined with the question of whether a member of Congress may be impeached that it is not possible to be sure exactly what precedent the Senate set, if it set any precedent at all.

More to the point was the 1876 impeachment of Secretary of War William Belknap.[92] Shortly after evidence implicated Belknap in a kickback scheme involving western trading posts, the House of Representatives initiated impeachment proceedings.[93] Hoping to avoid the embarrassment, Belknap tendered his resignation to President Ulysses S. Grant, which Grant promptly accepted.[94] After a brief debate over the permissibility of impeaching an officer after his resignation, the House unanimously voted to impeach Belknap.[95] The Senate conducted an extraordinary four-week debate over its power to try Belknap after his resignation. A majority voted against dismissal.[96] After a two-month trial in which his guilt was amply established, but during which his supporters continued to press the late impeachment jurisdictional issue, Belknap was acquitted.[97] The vote, 37 to convict and 25 to acquit, was five votes shy of the necessary two-thirds. Only three of the senators voting to acquit indicated that they thought he was innocent on the merits, while the remaining twenty-two announced they voted not guilty because they believed the Senate had no jurisdiction.[98]

Whether this episode should be seen as a precedent in favor of the impeachability of former officials depends in part on whether we focus on the motion to dismiss, which required a majority, or on the vote to acquit or convict, which required two-thirds. More importantly, it hinges on the special circumstance of a resignation made for the specific purpose of

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[90] *Id*. at 89.

[91] *Id*. at 86–89. These facts about the Blount affair are recounted in Kalt, *supra* note 2, though Kalt draws different legal conclusions.

[92] *Id*. at 94.

[93] WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY 432–33 (W. W. Norton & Company 1981).

[94] *Id*.

[95] 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2444 902–03 (1907).

[96] *See id*. § 2459 933–34.

[97] *See id*. § 2467 945–46.

[98] *Id*.

derailing the impeachment proceeding. A plausible argument can be made that the target of an impeachment, who is a civil officer at the time the impeachment inquiry begins, should not be able to unilaterally terminate the case by resigning.[99] Equity often carves out an exception to a general rule when a party to wrongdoing seeks to terminate jurisdiction by his own acts. It would not be implausible to apply a similar equitable rule to the late impeachment question. A similar issue had arisen in connection with the Blount impeachment in 1797-98, where the loss of office came from Blount's expulsion rather than his resignation. Even on the dubious assumption that the Blount impeachment was late, the House manager argued that "no subsequent event, grounded on the willful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding."[100] The arguments in these two cases will recall the provisions of two States, Pennsylvania and Vermont, which barred late impeachments in ordinary cases but allowed them in the cases of resignation or removal.[101]

In the author's view, the closely-divided vote in the Belknap matter is insufficient to resolve the question of late impeachments for all time. For one thing, it is evident that a large majority of the senators were voting on the basis of partisan loyalties, as they almost always do in the context of presidential impeachments. It is hard to see why partisan outcomes should be given much interpretive weight. Second, although most of the argumentation in 1876 was about late impeachments, at least some of the votes were likely affected by the narrower question of what to do when an officer resigns in the midst of the impeachment proceeding. Finally, the history shows no consistent congressional course of conduct with respect to late impeachments, only a single episode. The Senate's vote not to dismiss the Belknap impeachment counts as evidence in favor of late impeachments, but it is not enough to overcome the arguments based on text, structure, and founding-era history.

Professor Kalt reports that in every case other than Belknap, the House "opted not to proceed" when the target of an impeachment resigned before the impeachment vote.[102] This is sensible because the principal purpose of impeachment in most cases is to remove an unfit officer. Resignation removes the need for the proceeding. The most famous such instance was that of President Richard M. Nixon, who almost certainly would have been impeached, and probably convicted and removed, if he

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[99] An analogy may be drawn to the doctrine of equitable tolling of a statute of limitations. *See e.g.*, *Holland v. Florida*, 560 U.S. 631 (2010).

[100] FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS: WITH REFERENCES, HISTORICAL AND PROFESSIONAL, AND PRELIMINARY NOTES ON THE POLITICS OF THE TIMES 271 (Philadelphia, Carey & Hart 1849).

[101] *See supra* Part III.C.

[102] Kalt, *supra* note 2, at 106.

had not resigned. The House's practice of abandoning such impeachments does not count as proof against the *power* of the House to impeach after a resignation, however, because it could reflect an exercise of discretion.

Looking beyond actual impeachment proceedings, two eminent nineteenth century statesmen-commentators took positions on the impeachment of officers who were no longer in office. John Quincy Adams, then a congressman, supported impeachment whenever the misdeeds took place during the individual's official service.[103] Joseph Story, in his Commentaries on the United States Constitution, argued against the impeachability of former officials on the ground that they are mere private citizens, and private citizens are not subject to impeachment.[104]

Federal courts have not had occasion to consider whether former officers may be impeached, but two state supreme courts have interpreted state constitutional provisions similar to Article II, Section 4, as disallowing the impeachment of former officials.[105] One decision reached the same conclusion as this Article, namely that the lower house could not initiate impeachment against an officer once out of office, but the upper house has authority to try such an officer if he or she had been validly impeached.[106] Moreover, a small bit of corroborating interpretation comes from Article I, Section 3, Clause 6, which provides that the Chief Justice will preside "[w]hen the President of the United States is tried." Chief Justice John Roberts declined to preside at Mr. Trump's February 2021 Senate trial, on the ground that the former president is not "the President." Assuming the Chief Justice was correct, it would seem to follow that a former president also would not qualify for impeachment under the terms of Article II, Section 4.

IV. CONCLUSION

In the last six days of his term, President Donald J. Trump was impeached for his acts resisting the results of the 2020 presidential election. He was tried by the Senate the next month, after he left office and was a mere private citizen. Most of the forty-three Republican senators who voted to acquit stated that they did so on procedural grounds rather than the merits, namely, that officers cannot be impeached and tried

[103] CONG. GLOBE, 29th Cong., 1st Sess. 641 (1846).

[104] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 283 (1833).

[105] *State v. Hill*, 55 N.W. 794, 798 (Neb. 1893); *Smith v. Brantley*, 400 So. 2d 443, 451 (Fla. 1981).

[106] *Id*.

after they are no longer in office.[107] Whatever the tactical political advantages of that position, it was wrong as a matter of constitutional law. True, former officers very likely cannot be impeached, because they are no longer "civil Officers of the United States." But if properly impeached by the House during their term of office, they can be tried by the Senate even if they ceased to hold office in the meantime. This is because Article I, Section 3, Clause 6 gives the Senate power to "try all Impeachments." Because Mr. Trump was impeached while he still was President, there is no merit to the claim that he could not be tried. The senators who voted to acquit on this ground confused the power to impeach, which is limited to civil officers, with the power to try impeachments, which extends to "all" impeachments properly voted by the House.

[107] Levine & Gambino, *supra* note 35 ("[F]ew [Republican Senators] defended his actions during the trial. Instead, they relied on a technical argument . . . that the proceedings were unconstitutional because Trump was no longer in office.").