AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Impeaching and Censuring the President

**Trial Memorandum of Donald Trump in the Impeachment of the Former President** (2021)[[1]](#footnote-1)

*After weeks of baselessly asserting that the 2020 presidential election had been marred by massive fraud and was stolen by the Democratic Party, President Donald Trump held a rally outside the Capitol Building as his vice president, the House and the Senate met in joint session to perform their duty under the Twelfth Amendment of counting the votes from the presidential electors and formally certifying that Joe Biden was the president-elect. As Congress began its work on the afternoon of January 6, the rally turned violent and a mob of hundreds of the president’s supporters stormed the Capitol building to prevent the votes from being counted and a new president recognized.*

*Five people died during the riot, including a Capitol police officer who was beaten to death by rioters and a Trump supporter who was shot by a Capitol police officer as she attempted to breach the Senate chamber. The vice president and members of Congress were evacuated from the House and Senate chambers and taken to more secure locations within the Capitol building. Bombs were discovered near the Capitol building, and many of the rioters wore tactical gear and carried weapons. At points, the rioters chanted “hang Mike Pence,” and yelled at the overwhelmed police “Tell [Democratic House Speaker Nancy] Pelosi we’re coming for that bitch.” As members of Congress were hiding from the mob in the recesses of the Capitol, the president’s team was continuing to call Republican legislators to urge them to block the electoral count. The president did little, however, to attempt to stop the violence at the Capitol. Hours later, law enforcement, reinforced by the National Guard, were able to retake the Capitol building. That evening, Congress resumed the electoral count and in the early morning hours declared Joe Biden the official president-elect.*

*Nearly a week later, a single article of impeachment was introduced in the House of Representatives. The article charged the president with “incitement of insurrection.” It included the unusual request that Trump be disqualified from holding future federal office. In a largely party-line vote, the House voted to impeach the president for an unprecedented second time. One member of the House Republican leadership, Liz Cheney, the daughter of the former vice president Dick Cheney, joined nine other Republicans in voting to impeach the Republican president. Almost immediately primary challenges were launched against those ten Republicans and Republican House members began a campaign to strip Cheney of her role as Republican Conference Chair.*

*As in the first impeachment of President Trump, the House chose not to immediately deliver the article of impeachment to the Senate. As Joe Biden was inaugurated as president, the Senate still had not been formally notified of the second House impeachment of Donald Trump. As a result, Congress found itself in the unprecedented position of contemplating an impeachment trial in the Senate of a former president. Many Republican senators pointed to this as a factor influencing their vote to acquit the former president. On February 13, 2021, 57 senators voted to convict Trump on the single article of impeachment, short of the two-thirds majority needed to convict. Seven Republicans and all of the Democrats in the Senate voted to convict.*

. . . . One might have been excused for thinking that the Democrats’ fevered hatred for Citizen Trump and their “Trump Derangement Syndrome” would have broken by now, seeing as *he is no longer the President*, and yet for the second time in just over a year the United States Senate is preparing to sit as a Court of Impeachment, but this time over a private citizen who is a former President. In this Country, the Constitution – not a political party and not politicians – reigns supreme. But through this latest Article of Impeachment now before the Senate, Democrat politicians seek to carve out a mechanism by which they can silence a political opponent and a minority party. The Senate must summarily reject this brazen political act.

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As is evident from our Constitution’s plain text, Article II limits impeachment to current officials: “The 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.” As Alexis de Tocqueville wrote, impeachment was designed to deprive a political actor “of the authority he has used to amiss.” In this instance, however, the Senate is being asked to do something patently ridiculous: try a private citizen in a process that is designed to remove him from an office *that he no longer holds*.

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Further textual support on this issue is evidenced by the Founders use of “shall” when identifying the penalty to be imposed, i.e. “. . . *shall*be removed from Office. . . .”

The text then is very clear: Conviction at an impeachment trial requires the possibility of a removal from office. Without that possibility, there cannot be a trial. In the civil law analogue, this case would be summarily dismissed under Federal Rules of Civil Procedure 12(b)(6), for “failure to state a claim upon which relief can be granted.”

The second reason a former President cannot be impeached follows logically from the first. The purpose of impeachment is to remove someone from office, and unequivocally, this impeachment trial is *not* about removing someone from office, as Mr. Trump left office on January 20, 2021. He is now, both factually and legally, a private citizen.

House Managers have no authority to legally redefine “former Presidents” as “Presidents” for some constitutional provisions and not others. Would they accept a former President conducting foreign policy on behalf of the United States? Would they be content to have a “former President” nominate a Justice for a vacant seat on the Supreme Court? Of course not. . . .

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The Founders clearly decided to purposefully limit the power of impeachment in this way. The concept of a “late impeachment” was in use at the time the Constitution was written, with Great Britain specifically allowing impeachment of former officials. In fact, the British Parliament could, and did, impeach private citizens. The Framers could have explicitly included a provision allowing for the impeachment of a former President, but they did not. Instead, the Constitution was written to restrict impeachment to specific public officials: “*the* President, Vice President, and other civil officers."

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The House Managers suggests there is “congressional precedent” for impeaching a former President in the impeachment cases of Senator William Blount and Secretary of War William Belknap. These two cases are actually inapposite and do not provide any binding precedential authority for impeaching a former President.

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Significantly, neither Belknap nor Blount received the required two-thirds majority of the Senate and were acquitted so their proceedings provide no binding precedent establishing the Senate’s jurisdiction to convict former officials of impeachment. . . .

In the past, Congress has acknowledged and exercised its duty to not impeach when an official is no longer in office. In the case involving the impeachment of President Richard M. Nixon, Congress decided not to impeach because he resigned from office. “[A]s a practical matter… the resignation of an official about to be impeached generally puts an end to impeachment proceedings because the primary objective—removal from office—has been accomplished.”

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The Constitution grants Congress only the power to remove a person’s right to run for office when it is part of the process of removal from office. Article II, Section 4, of the Constitution states that the only purpose of an impeachment is whether “the President, Vice president and all civil Officers of the United States, shall be removed from office.” The only purpose of impeachment is to remove the President, Vice-President, and civil officers from office. When a President is no longer in office, the objective of an impeachment ceases.

This impeachment trial is being pursued solely to preclude Mr. Trump, a private citizen, from holding any future office. However, the Constitution does not provide for the impeachment of a private citizen who is not in office. Further, the Constitution only grants the Senate the additional power to remove a person’s right to run for office as *part* of the process of removal from office. When a person ceases to hold an office, he immediately becomes a private citizen, impervious to removal, and therefore to impeachment and trial by the Senate.

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This is a dangerous slippery slope that the Senate should be careful to avoid. Were it otherwise, a future House could impeach former Vice President Biden for his obstruction of justice in setting up the Russia hoax circa 2016. While he could not be removed from the Vice Presidency because his term ended in 2017, he could be barred from holding future office. The same flawed logic the House Managers advance could apply to former Secretary of State Clinton for her violations of 18 U.S.C § 793. Impeachment cannot and should not be allowed to devolve into a political weapon.

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Aside from the fact that it does not constitute a crime, let alone a high crime or misdemeanor, President Trump’s speech at the January 6, 2021 event fell well within the norms of political speech that is protected by the First Amendment, and to try him for that would be to do a grave injustice to the freedom of speech in this country. . . .

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The First Amendment is widely understood as prohibiting Congress from “abridging the freedom of speech; or the right of people peaceably to assemble” in all aspects of state action all three branches of government. Congress may not take action that would “abridge the freedom of speech.” Indeed, Senators take an Oath of Office, which includes an oath to “support and defend the Constitution of the United States . . . .” The Constitution, of course, includes the Bill of Rights, including the First Amendment. This means, inevitably, that Senators cannot do what the House Managers urge: the Senate cannot blithely cast aside the First Amendment and the Supreme Court’s long-established Free Speech jurisprudence when passing judgment on articles of impeachment.

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The position advanced by the House Managers is essentially an impeachment standard without Constitutional guardrails, unmoored to any specific legal test other than the unbridled whims of the House Managers. That distinctly was not what the Framers intended when they expressly limited impeachable offenses to “high crimes and misdemeanors.” The Framers of the Constitution were keenly aware of the danger of any impeachment process that would make the President “the mere creature of the Legislature.”101 Such an arrangement would constitute nothing less than “a violation of the fundamental principle of good Government.”

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The fatal flaw of the House’s arguments is that it seeks to mete out governmental punishment – impeachment—based on political speech that falls squarely within broad protections of the First Amendment. Speech and association for political purposes is the kind of activity to which the First Amendment offers its strongest protection. Restrictions placed on freedom of speech are evaluated “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” . . .

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Throughout this entire process Speaker Pelosi was never acting to apply her understanding of the laws of impeachment in any principled manner. The Speaker did *not* think it was necessary to call for an impeachment so long as she got her way, and twice told the Vice President, and the country, just that. She did *not* really believe that the process was “urgent” and it was *never* actually about whether President Donald Trump would stay in office, because once she brought the impeachment Article to a vote she decided to hold it until after he had finished the remainder of his term. If the Speaker really believed that the President was that much of a danger, then she was being criminally negligent by holding it back. Obviously, as demonstrated by her actions, there was only ever one urgency, to score political points quickly before the harried Members of even her own party could calm down and look at the facts. And there was only ever one motivation; to try and spin this incredibly sad moment in American history, and use it to embarrass the President. Unfortunately for House Democrats, the impeachment of a former United States President, a private citizen, is unconstitutional.

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. . . . [I]ndulging House Democrats hunger for this political theater is a danger to our Republic democracy and the rights that we hold dear. . . .

1. Excerpt taken from Trial Memorandum of Donald J. Trump, 45th President of the United States of America (2021) [↑](#footnote-ref-1)