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 the House of Representatives in the Second Impeachment of Donald Trump** (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.*

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Every President swears an oath to “faithfully execute the Office of the President of the United States” and assumes the constitutional duty to “take Care that the laws be faithfully executed.” Impeachment is a safeguard against Presidents who violate that oath (and betray that duty) by using the powers of their office to advance their own personal political interests at the expense of the Nation. In particular, the Framers of the Constitution feared a President who would corrupt his office by sparing “no efforts or means whatever to get himself re-elected.”

President Trump’s effort to extend his grip on power by fomenting violence against Congress was a profound violation of the oath he swore. If provoking an insurrectionary riot against a Joint Session of Congress after losing an election is not an impeachable offense, it is hard to imagine what would be. The Framers themselves would not have hesitated to convict on these facts. Their worldview was shaped by a study of classical history, as well as a lived experience of resistance and revolution. They were well aware of the danger posed by opportunists who incited mobs to violence for political gain. They drafted the Constitution to avoid such thuggery, which they associated with “the threat of civil disorder and the early assumption of power by a dictator.” . . .

The gravity of President Trump’s offense is magnified by the fact that it arose from a course of conduct aimed at subverting and obstructing the election results. Since President George Washington willingly relinquished his office after serving two terms, our Nation has seen an unbroken chain of peaceful transitions from one presidential administration to the next—that is, until January 6, 2021. President Trump’s incitement of insurrection disrupted the Joint Session of Congress as it performed its duty under the Twelfth Amendment to count the Electoral College votes. Although this assault was put down after several hours, and the Joint Session fulfilled its responsibility later that night, President Trump’s abuse of office threatened and injured our democratic order. Under absolutely no circumstance may a candidate for any position, at any level of government, respond to electoral defeat by provoking armed violence.

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President Trump incited a mob that attacked Congress during the Joint Session. The House’s expeditious response to this attack was both necessary and appropriate. There must be no doubt that Congress will act decisively in the fact of such extraordinary abuse—which threatened not only the peaceful transfer of power, but also the very lives of senior government officials.

Any claim that the House moved too quickly in responding to a violent insurrection that President Trump incited is mistaken. The House serves as a grand jury and prosecutor under the Constitution. The events that form the basis for President Trump’s impeachment occurred in plain view. They are well known to the American people. Many Members of Congress were themselves witnesses to his conduct and its consequences. . . . Accordingly, in this unprecedented circumstance, the House acted squarely within its constitutional responsibilities in swiftly and emphatically approving an article of impeachment. Here, in the Senate, is where the Constitution calls for a trial and where President Trump will have ample opportunity to make his case through procedures that the Senate adopts.

For that reason, any process-based objections to this impeachment are wrong. This case does not involve secretive conduct, or a hidden conspiracy, requiring months or years of investigation. It does not raise complicated legal questions about the definition of a high crime and misdemeanor. And the gravity of the President’s abuse—as well as the continuing nature of the threat it poses to our democracy if left unanswered—demand the clearest of responses from the Legislative Branch. . . .

The Constitution authorizes impeachment and conviction for “high Crimes and Misdemeanors.” As Alexander Hamilton explained in the *Federalist Papers*, impeachable offenses “are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.” Therefore, whether President Trump’s conduct violated the criminal law is a question for prosecutors and courts; “offenses against the Constitution are different than offenses against the criminal code.” The only question here is whether President Trump committed offenses justifying conviction and disqualification from future officeholding. . . .

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Most fundamentally, the First Amendment protects private citizens from the government; it does not protect government officials from accountability for their own abuses in office. Therefore, as scholars from across the political spectrum have recognized, the First Amendment does not apply *at all* to an impeachment proceeding. The question in this case is not whether to inflict liability or punishment on a private citizen; instead, the Senate must decide whether to safeguard the Nation’s constitutional order by disqualifying an official who committed egregious misconduct. As one scholar writes, “the First Amendment does not shrink the scope of the impeachment power or alter what conduct would fall within the terms of high and misdemeanors.”

Indeed, the notion that a President can attack our democracy, provoke violence, and interfere with the Electoral College so long as he does so through statements advocating such lawlessness would have astonished the Framers. They wrote the impeachment provisions of the Constitution to guard against *any* presidential conduct that constitutes a great and dangerous offense against the Nation—no matter the means for carrying out that malfeasance. And here, the House approved an article of impeachment that concerns not solely the President’s incitement, but also his conduct preceding and following his provocation of an armed assault on the Capitol.

Regardless, even if the First Amendment were applicable here, private citizens and government officials stand on *very* different footing when it comes to being held responsible for their statements. As the leader of the Nation, the President occupies a position of unique power. And the Supreme Court has made clear that the First Amendment does not shield public officials who occupy sensitive policymaking positions from adverse actions when their speech undermines important government interests. Thus, just as a President may legitimately demand the resignation of a Cabinet Secretary who publicly disagrees with him on a matter of policy (which President Trump did repeatedly), the public’s elected representatives may disqualify the President from federal office when they recognize that his public statements constitute a violation of his oath of office and a high crime against the constitutional order. No one would seriously suggest that a President should be immunized from impeachment if he publicly championed the adoption of totalitarian government, swore an oath of eternal loyalty to a foreign power, or advocated that states secede from and overthrow the Union—even though private citizens could be protected by the First Amendment for such speech. By its own terms, and in light of its fundamentally democratic purposes, the First Amendment does not constrain Congress from removing an official whose expression makes him unfit to hold or ever again occupy federal office.

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Given the overwhelming strength of the case against him, we expect President Trump will seek to escape any reckoning for his constitutional offenses by asserting that the Senate lacks jurisdiction over him as a former official. That argument is wrong. It is also dangerous. The period in which we hold elections and accomplish the peaceful transfer of power is a source of great pride in our nation. But the transition between administrations is also a precarious, fragile time for any democracy—ours’ included. The Framers anticipated these risks and emphasized that presidential abuse aimed at our democratic process itself was the single most urgent basis for impeachment. It is unthinkable that those same Framers left us virtually defenseless against a president’s treachery in his final days, allowing him to misuse power, violate his Oath, and incite insurrection against Congress and our electoral institutions simply because he is a lame duck. There is no “January Exception” to impeachment or any other provision of the Constitution. A president must answer comprehensively for his conduct in office from his first day in office through his last. Former President John Quincy Adams thus declared, “I hold myself, so long as I have the breath of life in my body, amenable to impeachment by [the] House for everything I did during the time I held any public office.”

As the Senate itself concluded in the trial of Secretary of War William Belknap, and as nearly every legal expert has affirmed, President Adams had the right idea. The Constitution does not allow officials to escape responsibility for committing impeachable offenses by resigning when caught, or by waiting until the end of their term to abuse power, or by concealing misconduct until their service concludes. Experts from across the ideological spectrum, including a co-founder of the Federalist Society and Ronald Reagan’s Solicitor General, agree that “[t]he Constitution’s text and structure, history, and precedent make clear that Congress’s impeachment power permits it to impeach, try, convict, and disqualify former officers, including former presidents.” . . .

It is particularly obvious that the Senate has jurisdiction here because President Trump was in office at the time he was impeached. There can be no doubt that the House had authority to impeach him at that point. So the question is not whether a former official can ever be impeached by the House. . . . The only issue actually presented is whether the Senate has jurisdiction to conduct a trial of *this* impeachment. And Article I, Section 3, Clause 6 provides a straightforward answer to that question: “The Senate shall have the sole Power to try *all* Impeachments” (emphasis added). . . .

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When the Framers gathered in Philadelphia in 1787, they did not invent the impeachment power from scratch. As Alexander Hamilton explained in Federalist No. 65, they looked to English history, which provided “the model from which the idea of this institution has been borrowed.” The Framers were also influenced by “several of the State constitutions.” And it was firmly established in both England and the early states that former officials were subject to impeachment for abuses in office. This was not a remotely controversial view. It was widely accepted. By vesting Congress with the power of “impeachment,” the Framers incorporated that history and meaning.

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Constitutional history, text, and structure, as well as prior Congressional practice, all confirm that the Senate has jurisdiction to try President Trump. So does common sense. While sworn to faithfully execute the laws—and to preserve, protect, and defend the Constitution—President Trump incited insurrection against the United States government. His conduct endangered the life of every single Member of Congress, jeopardized the peaceful transition of power and line of succession, and compromised our national security. This is *precisely* the sort of constitutional offense that warrants disqualification from federal office. President Trump has proven his willingness to break and brutalize the law in his quest for power. The Senate must establish beyond doubt, for all time, and for officials of all political parties that President Trump’s behavior was intolerable.

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1. Excerpt taken from Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump (2021) [↑](#footnote-ref-1)