



**REASONS WHY PROCEEDING WITH THIS TRIAL BY
THE UNITED STATES SENATE, SITTING AS A COURT
OF IMPEACHMENT, VIOLATES THE UNITED STATES
CONSTITUTION**

February 8, 2021



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INTRODUCTION

The United States Senate, sitting as a Court of Impeachment, has been asked to attain the unattainable: To try and convict a former president – a private American citizen – who holds no office from which he could actually be removed. As we explain in this Memorandum, such a result would violate the text and structure of the United States Constitution.

I. This Senate Impeachment Trial of a Former President Is Contrary to the United States Constitution.

A. A Threshold Procedural Constitutional Issue

There is an open constitutional question as to whether a former president may ever be tried by the United States Senate sitting as a Court of Impeachment. The question is open in the sense that, in all of American history, it has never before even been attempted.

From a procedural perspective, the first question for consideration is which branch of the United States government should be empowered to make that decision, Congress, or the Courts? In other words, is the question of a “late impeachment” justiciable?

As a preliminary matter, in theory, the justiciability of such a question should be irrelevant. Constitutional obligations need not be enforceable by the judiciary to exist and constrain the political branches. Particularly in the impeachment context,

we have to divest ourselves of the common misconception that constitutionality is discussable or determinable only in the courts, and that anything is constitutional which a court cannot or will not overturn. . . . Congress’s responsibility to preserve the forms and the precepts of the Constitution is greater, rather than less, when the judicial forum is unavailable, as it sometimes must be.¹

A holding that a particular question is a non-justiciable political question leaves that question to the political branches to use “nonjudicial methods of working out their differences”² and does not relieve the legislative branch of its constitutional obligation. Nevertheless, because too many Members of Congress place partisanship above their duty to uphold the Constitution, the question of judicial enforceability is relevant.

While not dispositive, the fact that, according to the Senate Democratic Leader, the Chief Justice of the United States was invited to preside over this trial

¹ Charles L. Black & Philip Bobbitt, *Impeachment: A Handbook, New Edition* 22–23 (2018).

² *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 219 (2012) (*Zivotofsky I*) (Breyer, J., dissenting); see also *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

and yet declined to do so,³ is quite telling. Article I, Section 3, of the United States Constitution requires, “[w]hen the President of the United States is tried, the Chief Justice shall preside.” Apparently, the Chief Justice agrees that the constitutional provisions for impeaching a president do not apply to this trial.

A simple reading of the text of the United States Constitution itself supports the Chief Justice’s decision.

1. Constitutional Text

There are several passages of the United States Constitution that relate to the federal impeachment process, and any ensuing Senate Rules setting forth the parameters of this Trial must remain consistent with the United States Constitution.

We turn to those provisions now.

Article I, Section 2, Clause 5 of the United States Constitution provides:

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I, Section 3, Clauses 6 and 7 provide:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

³ Edmund DeMarche, *Roberts Doesn’t Want to Preside Over Trump’s Second Impeachment Trial: Schumer*, FOX NEWS (Jan. 26, 2020), <https://www.foxnews.com/politics/roberts-doesnt-want-to-preside-over-trumps-second-impeachment-trial-schumer>.

Finally, Article II, Section 4 provides:

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.

It is noteworthy that the House Managers, in their Trial Memorandum filed February 2, 2021, do not begin their constitutional jurisdiction analysis with the text of the Constitution. Instead, they begin with history and non-binding statements made during the debates of the Constitutional Convention,⁴ before they finally (summarily) address the actual text.⁵ This approach is telling because a true textual analysis always begins with the words of the text, and only resorts to legislative history if the meaning of the text is not plain.⁶ As the Supreme Court has emphasized, “[s]tatutory interpretation, as we always say, begins with the text.”⁷ “In interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”⁸ And, “[w]e must enforce plain and unambiguous statutory language according to its terms.”⁹

⁴ See U.S. HOUSE OF REPRESENTATIVES MANAGERS, TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP 48–50 (Feb. 2, 2021) [hereinafter House Managers Trial Memorandum], at 48, 50, 53, 55.

⁵ *Id.* at 59.

⁶ See *NLRB v. Canning*, 573 U.S. 513, 584 (Scalia, J., concurring) (analyzing constitutional “text and structure” before turning to historical practice).

⁷ *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (citing *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251, 130 S. Ct. 2149 (2010)).

⁸ *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (internal citation, quotation and brackets omitted).

⁹ *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010).

2. The Power to Try Impeachments Vested in the Senate is Broad, But Not Without Limits.

At first glance, the Constitution seems to exclude the Courts entirely from deciding any questions related to the impeachment process. To be sure, it expressly grants to the House of Representatives “the sole power of impeachment,” and to the Senate “the sole power to try all impeachments.”¹⁰ Yet, the issue is not quite that simple.

In a 1993 case involving the impeachment of a federal judge, Judge Walter L. Nixon Jr., Judge Nixon challenged his removal by the Senate after only a committee of senators, rather than the whole Senate, heard the evidence against him. The Supreme Court in *Nixon v. United States*, unanimously ruled against Judge Nixon, with Chief Justice Rehnquist explaining in his opinion that the matter was a political question, meaning that it was for the Senate to decide how to conduct its impeachment trials. “The judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments” of judges, Chief Justice Rehnquist wrote for the court.¹¹ The Court supported its conclusion, in part, by explaining that, “[i]n our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature.”¹² As such, it was counterintuitive to conclude

¹⁰ Adam Liptak, *Can Trump Challenge His Impeachment in the Supreme Court?*, SEATTLE TIMES (Nov. 25, 2019, 10:53 AM), <https://www.seattletimes.com/nation-world/can-trump-challenge-his-impeachment-in-the-supreme-court/> (“Those [also happen to be] the only provisions of the entire Constitution that use the [very] pointed [and exclusive] word ‘sole.’”).

¹¹ *Nixon v. United States*, 506 U.S. 224, 234 (1993).

¹² *Id.* at 235.

that the judiciary may oversee the one check placed by the Constitution on the judiciary.¹³

But *Nixon v. United States* did not hold that *all* questions related to impeachment are non-justiciable¹⁴ or that there are no constitutional constraints on impeachment. To the contrary, the Court “agree[d] with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits,” but merely concluded “that the word ‘try’ in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.”¹⁵ Here, of course, a judge has not been impeached and while the *Nixon* decision indicated that its rationale could apply to aspects of the “procedures used by the Senate” in a trial of a president,¹⁶ it does not entirely foreclose a role for the Court were the Senate to violate what Chief Justice Rehnquist

¹³ *Id.* With respect to impeachment, the Constitution does use terms like “judgment,” “cases,” “try” and “tried,” and “convicted.” The Senate is a tribunal doing court-like things. Indeed, this particular proceeding is identified as taking place before the Senate as a Court of Impeachment. Nothing in the Supreme Court’s 1993 *Nixon* opinion changed this court-like nature of Senate impeachment trials. Instead, it simply confirmed that the court-like procedures are reserved by the Constitution to the Senate.

¹⁴ *Id.* at 236–38. In concurrence, Justice Souter explained that some approaches by the Senate might be so extreme that they would merit judicial review under the Impeachment Trial Clause. As he explained: “If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply ‘a bad guy,’ . . . judicial interference might well be appropriate.” *Id.* at 253–54 (Souter, J., concurring in judgment) (quoting *Nixon*, 506 U.S. at 239 (White, J., concurring in judgment)).

¹⁵ *Id.* at 237–38. The *Nixon* opinion did not turn on, and did not address, whether the Due Process Clause constrained the conduct of an impeachment trial in the Senate.

¹⁶ *Id.* at 236. For example, the *Nixon* Court opined that “opening the door of judicial review to the procedures used by the Senate in trying impeachments would expose the political life of the country to months, or perhaps years, of chaos. This lack of finality would manifest itself most dramatically if the President were impeached.” *Id.* at 236 (internal citation and quotations omitted). But even this “finality” rationale does not apply to the current circumstances, as Donald J. Trump is no longer the president, and his predecessor has already taken office.

described as “the three very specific requirements” in the constitutional text — “that the Senate’s members must be under oath or affirmation, that a two-thirds vote is required to convict and that the Chief Justice presides when *the President* is tried. . . .”¹⁷ Because the former president is, undeniably not “*the President*” and is now a private United States citizen, the Senate proceeding against him as if he was “the President” is problematic in exactly the way that could make it justiciable. The *Nixon* opinion declined judicial review over “the procedures used by the Senate in trying impeachments”¹⁸ – but did not rule definitively on whether it possessed the authority (or jurisdiction) to try him in the first place. **At worst, the Senate lacks such a power by dint of the clear constitutional text, and its proceedings as such are *ultra vires*. At best, the case at hand falls squarely in the grey area of whether a former president counts as “the President” for the purposes of an impeachment trial, and the Senate proceeding against him as such is grounded on a dubious constitutional foundation, lacking both precedent and prudence.**

It is enlightening that, when the *Nixon* case was argued before the Court, the Justices were thinking along these same lines, and asked the government’s lawyer, then-Solicitor General Ken Starr, whether violations of those three textual provisions by the Senate could be challenged in court. Starr agreed that they could be.¹⁹ *Specifically, Chief Justice Rehnquist asked whether it was judicially*

¹⁷ *Id.* at 230 (emphasis added).

¹⁸ *Id.* at 236.

¹⁹ *See, e.g., Walter L. Nixon v. United States Oral Argument*, C-SPAN (Oct. 14, 1992), at 40:55, <https://www.c-span.org/video/?101868-1/walter-l-nixon-v-united-states-oral-argument> (exchange between Starr and Justice O’Connor regarding the importance of the 2/3 requirement, Starr: “that

*reviewable if, in an impeachment trial of a president, the Chief Justice did not preside. Starr agreed that it would be.*²⁰ This result makes sense, and is also supported by a 1974 United States Department of Justice Memo on the legal aspects of impeachment, which noted that there may be a role for the courts “in certain limited circumstances . . . raising both jurisdictional and Due Process questions.”²¹

If the president is impeached, the unambiguous text of the Constitution commands that the Chief Justice of the United States shall preside. The Chief Justice is disinterested and nonpartisan. His presence brings dignity and solemnity to such an important proceeding. In the past weeks, however, we have learned that the Chief Justice will not preside over this impeachment trial, and Senate Democrats have announced that the Senate President *Pro Tempore* will preside, instead. In their

two-thirds majority requirement is very important”; O’Connor: “In your view, that might be justiciable. Starr: “Yes.”); *id.* at 43:04 (Starr, “There are three procedures that are enumerated, violation of one of those enumerated procedures brings us, in our view, into the domain contemplated by this Court in *Powell v. McCormick*. We have not challenged *Powell v. McCormick*. If there is a violation of one of those procedures, it seems to us that is a justiciable claim, but the claim here is a very limited one.”).

²⁰ *Id.* at 52:36 (Rehnquist: “Supposing that during an impeachment trial of the Senate the chief justice dies, and the Senate says well, there’s by statute created the office of vice chief justice. We’re going to let him preside, because it would just be catastrophic to wait for the appointment of a chief justice while this impeachment is pending.” Starr: “This is the impeachment of the President.” Rehnquist: “The impeachment of the President. Can the Senate not do that because of the specific language the chief justice shall preside? Would that action by the Senate followed by the presiding by the vice chief justice be judicially reviewable? Starr: “I have to admit that if the Chief Justice, whoever it be, he or she, the acting Chief Justice, is not in the Chair, then that is judicially reviewable.”).

²¹ DEP’T OF JUST., OFF. OF LEGAL COUNSEL, LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW 45 (1974), <https://perma.cc/X4HU-WVWS>. Even while the Constitution vests the Senate with the authority to determine how an impeachment trial shall proceed, the threshold question of jurisdiction – whether the tribunal even possesses the power to try and then remove by conviction the person on trial – is reviewable. Where else could such a jurisdictional question arise if not in a Senate trial of a nonremovable non-president? Further, concerning Due Process, an accused facing deprivation of liberty interests is entitled to Due Process. Courts in the United States are tasked with ensuring that whatever process is due under the circumstances of the case is provided. This is hardly a controversial proposition.

view, this is permitted by the Constitution because the subject of the trial is “a non-president.”²² As such, it is conceded (as it must be) that for the constitutional purposes of the trial, the accused is a non-President. The role of the Senate, though, is to decide whether or not to convict and thereby trigger the application of Article II, Section 4: “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.” From which office shall a “non-President” be removed if convicted?²³

The House Managers contend that the Chief Justice’s refusal to preside does not impact the constitutional validity of this trial.²⁴ Notably, they devote only a single paragraph of their Trial Memorandum to a development so significant, it prompted multiple Senators to declare the entire proceedings suspect,²⁵ with one going so far as to say that it “crystalized” the unconstitutional nature of this proceeding.²⁶ And, the single paragraph that the House Managers do devote to the issue is entirely unpersuasive on the merits.

²² Press Release, Senator Patrick Leahy, Comment on Presiding Over the Impeachment Trial of President Donald Trump (Jan. 25, 2021), <https://www.leahy.senate.gov/press/comment-on-presiding-over-the-impeachment-trial-of-president-donald-trump>.

²³ As we explain below, a valid impeachment conviction requires removal. In other words, to convict is to remove. A conviction without removal is no conviction at all.

²⁴ House Managers Trial Memorandum, *supra* note 4, at 70.

²⁵ Alexander Bolton & Jordain Carney, *Leahy, Not Roberts, to Preside Over Impeachment Trial*, THE HILL (Jan. 25, 2021), <https://thehill.com/homenews/senate/535700-leahy-roberts-to-preside-over-impeachment-trial>.

²⁶ See Alexander Bolton, *Paul Says Roberts’s Absence ‘Crystalized’ Argument Against Trump Impeachment*, HILL (Jan. 29, 2021, 6:01 AM), <https://thehill.com/homenews/senate/536424-paul-says-robertss-absence-crystalized-argument-against-trump-impeachment>.

B. The House Managers' Position is Both Legally and Logically Flawed.

The House Managers' position, with its strained reading of the constitutional text, ignores traditional statutory canons of interpretation. It is well established that “[a] term appearing in several places in a statutory text is generally read the same way each time it appears.”²⁷ This presumption is “at its most vigorous when a term is repeated within a given sentence.”²⁸ Additionally, the Court in at least one instance referred to a broader “established canon” that similar language contained within the same section of a statute be accorded a consistent meaning.²⁹ If the text, “the President of the United States,”³⁰ in the constitutional provision requiring the Chief Justice to preside can refer only to the sitting president, and not to former presidents, then the textual identification of “[t]he President” contained in Article II, Section 4, which makes the President amenable to impeachment in the first place, also excludes anyone other than the sitting President. In full, that sentence 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.” This is the substantive phrase of the Constitution vesting the conviction and removal power in the Senate and it contains

²⁷ *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). See also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995); and *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214, 225 (1992).

²⁸ *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000). Cf. *Roberts v. United States*, 572 U.S. ___, No. 12-9012, slip op. (May 5, 2014).

²⁹ *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501(1998).

³⁰ U.S. Const. Article I, Section 3.

a clear jurisdictional limitation. The House Managers do understand what the word President means for the purposes of other constitutional provisions, and so they should understand this limitation as well.

Only a sitting president is referred to as President of the United States in the Constitution. And only a sitting President may be impeached, convicted and removed upon a trial in the Senate. “The President” in Article II, Section 4 and “the President” in Article I, Section 3 identify the same person. *If the accused is not “the President” in one, he is not “the President” in the other.* No sound principle of textual interpretation permits a contrary reading. In the words of the Supreme Court, it is a “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”³¹ Unwittingly or unwillingly as it may be, Senate Democrats, in their announcement that Senator Leahy will preside, have already taken their position on this matter. The accused is not *the* President. The text of the United States Constitution therefore does not vest the Senate with the power to try a private citizen and remove him (a factual nullity) or disqualify him (a legal nullity) as if he was “the President.”

The House Managers contend that the Senate has jurisdiction over this impeachment because despite the fact that he is no longer the President, the conduct

³¹ *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal quotations and citations omitted). This canon is applied in tribunals of all types. “[S]uch phrase, word, or clause, repeatedly used in a statute, will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is a different meaning intended, such as a difference in subject-matter which might raise a different presumption.” *St. Luke’s Magic Valley Reg’l Med. Ctr., Ltd. v. Bd. of Cnty. Comm’rs of Gooding Cty.*, 149 Idaho 584, 589 (2010). See also *Kerley v. Wetherell*, 61 Idaho 31 (1939); *Sprouse v. Magee*, 46 Idaho 622 (1928).

that the former President is charged with occurred while he was still in office.³² This argument does not in any way alter the Constitution’s clear textual identification of “the President.”

The House Managers justify their labored argument by noting that, “The Constitution’s impeachment provisions are properly understood by reference to the overarching constitutional plan.”³³ But with that very justification in mind, their argument once again fails. In an impeachment, it is the accused’s office that permits the impeachment. Ceasing to hold the office terminates the possibility and the purpose of impeachment. Consider an analogy to civil litigation, where it has been held that “[a] claim against a person ‘in his former official capacity’ has no meaning.”³⁴ This rationale led one federal court to conclude “that a suit against an individual in his or her ‘former official capacity’ is nonsensical.”³⁵ Part of this rationale is that, “[i]f the claimant seeks to hold the offender personally responsible, the claim is against the person in his individual capacity.”³⁶ In *Kmetz*, the “Plaintiff argue[d] that it would be difficult to hold public officials and institutions accountable for their actions if they could avoid equitable relief by having the guilty party leave office.”³⁷ “However,” the court reasoned, “this concern is unfounded because a suit against an offender in his or her official capacity is treated as a claim

³² House Managers Trial Memorandum, *supra* note 4, at 60.

³³ *Id.*

³⁴ *Mathie v. Fries*, 121 F.3d 808, 818 (2d Cir. 1997).

³⁵ *Kmetz v. State Hist. Soc’y*, 300 F. Supp. 2d 780, 786 (W.D. Wis. 2003).

³⁶ *Mathie*, 121 F.3d at 818.

³⁷ *Kmetz*, 300 F. Supp. 2d at 786 (internal citation and quotations omitted).

against the entity that employs that officer. A public official that leaves office may still be liable for money damages in his or her personal capacity.”³⁸ But in the context of impeachment, **private persons may not be impeached:**

the Constitution does not make private citizens subject to impeachment. The founders rejected the British model that allowed Parliament to impeach anyone, except for the King, and so they limited impeachment to certain public officials, including presidents. . . . (Indeed, the Constitution itself applies only to governmental not private action.)³⁹

The primary and, in fact, the only *required* remedy of a conviction is removal.⁴⁰ Justice Scalia put it thusly during the oral argument of the Judge Nixon case: “I assume the removal is automatic. The Senate doesn’t do the removal. *It occurs by virtue of the Constitution.*”⁴¹ Solicitor General Kenneth Starr agreed: “I think that is right, because *the judgment is what removes.*”⁴² If removal is automatic, by virtue of the Constitution itself, a trial where that removal cannot occur is not a trial grounded in the Constitutional framework. The House Managers admit the automatic requirement of removal: “Article II, Section 4 states a straightforward rule: whenever a civil officer is impeached and convicted for high crimes and misdemeanors, they ‘shall be removed.’”⁴³ It is undeniable that in this instance

³⁸ *Id.*

³⁹ Michael J. Gerhardt, *The Constitution’s Option for Impeachment After a President Leaves Office*, JUST SECURITY (Jan. 8, 2021), <https://www.justsecurity.org/74107/the-constitutions-option-for-impeachment-after-a-president-leaves-office/>.

⁴⁰ Removal is the first of two conjunctive judgments identified by the Constitution upon which secondary and optional disqualification judgment depends.

⁴¹ *Walter L. Nixon v. United States Oral Argument*, at 35:21, C-SPAN (Oct. 14, 1992), <https://www.c-span.org/video/?101868-1/walter-l-nixon-v-united-states-oral-argument> (emphasis added).

⁴² *Id.* at 35:25 (emphasis added).

⁴³ House Managers Trial Memorandum, *supra* note 4, at 68.

removal is moot in every possible regard. Removal is a factual, legal and – to the extent this Trial is categorized as political in nature – political impossibility. This is one reason why impeachment proceedings are different than ordinary trials, and why the Constitution pointedly separates the two. In ordinary criminal jurisprudence, a person convicted of public crimes committed while he or she was in office may still be punished even though they no longer hold that office. Not so with impeachment. In a Senate impeachment trial, conviction *means* and *requires*⁴⁴ removal, and conviction without a removal is no conviction at all. Only upon a valid conviction and its requisite, enforceable removal may the additional judgment of disqualification even plausibly be entertained.

Presidents are impeachable because presidents are removable. Former presidents are not, because they cannot be removed. The Constitution is clear; trial by the Senate sitting as a court of impeachment is reserved for *the* President of the United States, not a private citizen who used to be the President of the United States. Just as clear, the judgment *required* upon conviction is removal from office, and a former president can no longer be removed from office. “The purpose, text and structure of the Constitution’s Impeachment Clauses confirm this intuitive and common-sense understanding.”⁴⁵ A recent congressional research report observed similarly that

⁴⁴ U.S. Const. Art. II sec. 4 (“[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.” (emphasis added)).

⁴⁵J. Michael Luttig, *Opinion: Once Trump Leaves Office, the Senate Can’t Hold an Impeachment Trial*, WASH. POST (Jan. 12, 2021, 5:42 PM),

there are textual arguments against Congress’s authority to apply impeachment proceedings to former officials. The plain text of the Constitution, which states that ‘[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment . . . and Conviction,’ could be read to support the requirement that the process only applies to officials who are holding office during impeachment proceedings.⁴⁶

History bears this out as well. Even President Richard Nixon, who resigned while an impeachment investigation and proceeding was underway, and who did so at least in part to avoid an impending impeachment, was not impeached and no Senate Impeachment trial commenced. This proceeding, laid by the House Impeachment Managers before the Senate *twelve days* after the Article of Impeachment passed in the House after a mere two hours of debate and no committee hearings, is beneath the dignity of the United States Senate. Beyond the precedential gravity and danger to the general welfare such political maneuvering entails, it is the first time the United States Senate has ever been asked to apply the Constitution’s textual identification of “the President” in the impeachment provisions to anyone other than the sitting President of the United States.

Assuming, *arguendo*, that the Senate retains jurisdiction over an impeachment trial so long as the accused is charged with conduct taken while president, then every protection – procedural, structural, or substantive – that would

<https://www.washingtonpost.com/opinions/2021/01/12/once-trump-leaves-office-senate-cant-hold-an-impeachment-trial/>.

⁴⁶ CONG. RSCH. SERV., THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT 2 (Jan. 15, 2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10565> (emphasis added) (alteration original) (The authors of this particular CRS Report acknowledged that arguments exist on both sides of this issue, noting that the issue is open to debate, and their conclusion that “most scholars” hold the position that late impeachment is permissible.).

be available to a sitting president should also be made available. He is either to be treated as the president, or he is not. The problem is that even though the House voted to impeach the accused while he was still president (and setting aside the fact that the House impeachment procedure lacked *any* due process, rendering its product defective on its face),⁴⁷ the particular constitutional dilemma at hand is the fault of House leadership and was entirely avoidable. Inexplicably, from H. Res. 24's passage in the House on January 13, 2021, to its transmittal to and receipt in the Senate on January 25, 2021, twelve (12) days elapsed. In that time, the accused ceased holding office at the natural expiration of his term. With that, he lost the protection afforded by the Constitution to have the Chief Justice, as opposed to a partisan juror, preside over the trial. A former president should not be held hostage in this manner as the House waits until his due process protections are removed.

C. Arguments Based on Resignation Hypotheticals Are Meritless.

The weakness of the House Managers' case is further demonstrated by their reliance on the unproven assertion that if former President Trump is not impeached, future officers who are impeached will try and evade removal by resigning before either impeachment or Senate trial.⁴⁸ For example, they contend (citing various law professors,) that “[a]ny official who betrayed the public trust and was impeached

⁴⁷ See Section II, *infra*.

⁴⁸ See House Managers Trial Memorandum, *supra* note 4. at 48, 54, 63–64, 68, 69.

could avoid accountability simply by resigning one minute before the Senate’s final conviction vote.”⁴⁹

First, this argument does nothing to empower a different reading of the Constitution’s plain text (i.e., one that reads the “the President” in one provision to include former presidents but reads “the President” in the other provision to mean only the sitting president). Second, this red herring of an argument also fails because the former president did *not* resign, even amid calls by his opponents demanding that he do so. As a result, the Senate need not decide whether it possesses the power, or jurisdiction, to try and convict a former president who resigned, or how it might best proceed to effectuate justice in such a case. *That is not this case*, and the Senate does not need to venture into the academic weeds of law professor hypotheticals. The plain meaning of the Constitution’s text, faithfully and consistently applied, should govern whether the United States Senate is vested by the Constitution with the power to convict a private citizen of the United States. It is not.

And finally, if the Senate’s decision is to be driven by a result-oriented hypothetical parade of horrors, it is equally likely that if this trial is allowed to proceed, any political party facing a former one-term president's possible run for a second term could decide to retroactively impeach the former president for the purpose of disqualifying him from office and eliminating a political threat.

⁴⁹ *Id.* at 63–64 (internal quotations and citation omitted).

D. A Valid Impeachment Conviction Requires Removal: The Threat of Disqualification Alone is Insufficient.

The House Managers posit in their Trial Memorandum that despite the fact that the primary and only necessary remedy upon conviction is a legal nullity, this late impeachment trial is appropriate because the other, secondary, optional remedy⁵⁰ (one that the Senate is not even required to consider and which only takes effect upon a later, separate vote) – disqualification from future office – can still theoretically be applied to a former president. The Managers contend that “Article II, Section 4 states a straightforward rule: whenever a civil officer is impeached and convicted for high crimes and misdemeanors, they ‘shall be removed.’ Absolutely nothing about this rule implies, let alone requires, that former officials—who can still face disqualification—are immune from impeachment and conviction.”⁵¹

In other words, so the argument goes, a president no longer holding office does not moot the entirety of remedies afforded by impeachment. This however, also flies in the face of both the plain meaning of the text and the canons of statutory interpretation.

First, the Managers once again simply choose to ignore the text. Even in the passage that the Managers cite, the word “shall” *does*, to put it mildly, imply a *requirement*, an imperative such that an impeachment in which removal would be impossible is invalid. “**‘Shall’ means shall.** The Supreme Court . . . ha[s] made

⁵⁰ *Id.* at 62 (“Consistent with that understanding, ‘of the eight officers the Senate has ever voted to remove, it subsequently voted to disqualify only three of them—reinforcing that removal and disqualification are separate inquiries.’”).

⁵¹ *Id.* at 68.

clear that when a statute uses the word ‘shall,’ Congress has imposed a mandatory duty upon the subject of the command.”⁵² Indeed, “the mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”⁵³ **And, “[w]herever the Constitution commands, discretion terminates.”**⁵⁴

Second, the Managers also ignore the critically relevant language in Article I, Section 3, which states that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, **and** disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States. “Ordinarily, as in everyday English, use of the conjunctive ‘and’ in a list means that all of the listed requirements must be satisfied, while use of the disjunctive ‘or’ means that only one of the listed requirements need be satisfied.”⁵⁵ As J. Michael Luttig, who served as a judge for

⁵² *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1998) (citing four Supreme Court or 10th Circuit cases).

⁵³ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)); see *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) (“the word ‘shall’ usually creates a mandate, not a liberty,” and “the verb phrase ‘shall be applied’ identifies “some nondiscretionary duty”); *Miller v. French*, 530 U.S. 327, 337 (2000) (referring to the “mandatory term ‘shall’”); *Ass’n of Civilization Technicians, Mont. Air Chapter No. 29 v. Fed. Lab. Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.”); *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 17 (1st Cir. 2020) (“the statute uses the word ‘shall,’ which generally signals that compliance is mandatory.”); *South Carolina v. United States*, 907 F.3d 742, 758 (4th Cir. 2018) (“as in most circumstances, ‘shall’ means ‘shall.’”); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 41 (D.D.C. 1999) (“Shall means shall.”); *Frye v. Levy*, 440 S.W.3d 405, 408 (Missouri 2014) (“‘Shall’ means ‘shall.’ It unambiguously indicates a command or mandate. To suggest any other meaning is to ignore the plain language of the statute.”).

⁵⁴ *Marshall v. Balt. & Ohio R. Co.*, 57 U.S. 314 (1854) (Daniel, J., dissenting); see *In re Simmons*, 206 N.Y. 577, 580 (1912) (“[W]hen the Constitution commands even the legislature must obey.”).

⁵⁵ CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 9 (Sept. 24, 2014), https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf (citing *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D. N. Mex. 1996); *Zorich v. Long Beach Fire & Ambulance Serv.*, 118 F.3d 682, 684 (9th Cir. 1997); *United States v. O’Driscoll*, 761 F.2d 589, 597-98 (10th Cir. 1985)).

the U.S. Court of Appeals for the 4th Circuit from 1991 to 2006, recently argued, “the Constitution links the impeachment remedy of disqualification from future office with the remedy of removal from the office that person currently occupies; the former remedy does not apply in situations where the latter is unavailable.”⁵⁶ Conviction and removal are inextricably entwined.

Judge Luttig’s view is consistent with that of Justice Joseph Story’s discussion in his famous *Commentaries on the Constitution of the United States*, wherein Story analyzed “that impeachment is inapplicable to officials who have left their position because removal—a primary remedy that the impeachment process authorizes—is no longer necessary.”⁵⁷ According to Story’s *Commentaries* regarding impeachment:

§ 799. Another inquiry, growing out of this subject, is, whether, under the constitution, any acts are impeachable, except such, as are committed under colour of office; **and whether the party can be impeached therefor, after he has ceased to hold office.** A learned commentator [identified as William Rawle⁵⁸] seems to have taken it for granted, that the liability to impeachment extends to all, who have been, as well as to all, who are in public office. . . .

⁵⁶ CONG. RSCH. SERV., THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT, *supra* note 46, at 2 (citing Luttig, *Opinion: Once Trump Leaves Office, the Senate Can’t Hold an Impeachment Trial*).

⁵⁷ *Id.* (citing Joseph Story, *Commentaries on the Constitution of the United States* (1833)).

⁵⁸ William Rawle, who also authored a commentary on the Constitution, was the “learned scholar” referenced by Justice Story. All that Rawle had to say (and likely why Story says Rawle “seems to have taken it for granted”) on the subject was that, “[I]t is obvious, that the only persons liable to impeachment, are those who are *or have been* in public office.” Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. L. REV. L. & POL. 16, 122 (2001–2002), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1022&context=facpubs#page=11> (emphasis added). So, again, we have a scholar’s statement of subjective opinion lacking in a source of authority.

§ 800. It does not appear that either of these points has been judicially settled by the court having, properly, cognizance of them. In the case of William Blount, the plea of the defendant expressly put both of them, as exceptions to the jurisdiction, alleging, that, at the time of the impeachment, he, Blount, was not a senator, (though he was at the time of the charges laid against him,) and that he was not charged by the articles of impeachment with having committed any crime, or misdemeanour, in the execution of any civil office held under the United States; nor with any malconduct in a civil office, or abuse of any public trust in the execution thereof. The decision, however, turned upon another point, viz., that a senator was not an impeachable officer.

§ 801. As it is declared in one clause of the constitution, that "judgment, in cases of impeachment, shall not extend further, than a removal from office, and disqualification to hold any office of honour, trust, or profit, under the United States;" and in another clause, that "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 or misdemeanours;" it would seem to follow, that the senate, on the conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification. If, then, there must be a judgment of removal from office, it would seem to follow, that the constitution contemplated, that the party was still in office at the time of the impeachment. If he was not, his offence was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most important object, for which the remedy was given, was no longer necessary, or attainable. And although a judgment of disqualification might still be pronounced, the language of the constitution may create some doubt, whether it can be pronounced without being coupled with a removal from office. There is also much force in the remark, that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity.⁵⁹

⁵⁹ But while Story's analysis seems to support the argument against Senate jurisdiction over a former president, he caveated his discussion as follows:

Professor Jonathan Turley agrees: “Disqualification [] is an optional penalty that follows a conviction and removal. It may be added to the primary purpose of removal referenced in the Constitution. [This] trial would convert this supplemental punishment into the primary purpose of the trial.”⁶⁰

E. This Late Impeachment Amounts to an Unconstitutional Bill of Attainder.

The use of the conjunctive ‘and’ between removal and disqualification is also important for another reason. It demonstrates the Framers’ intent that impeachment serve as a political check and not simply vindictive retribution imposed upon a private person. “Impeachment is for removal – not for the purpose of punishing a man who is no longer in office. Permitting a legislature, as opposed to a court of law, to prosecute a citizen was a British habit that the American revolutionaries and framers of the Constitution chose to repudiate.”⁶¹ The U.S. Constitution explicitly forbids legislative harassment—that is, punishment that causes direct harm or even reputational harm—such as a punitive impeachment of an ex-president. Such an impeachment also qualifies as an unconstitutional bill of attainder.

It is not intended to express any opinion in these commentaries, as to which is the true exposition of the constitution on the points above stated. They are brought before the learned reader, as matters still *sub judice*, the final decision of which may be reasonably left to the high tribunal, constituting the court of impeachment, when the occasion shall arise.

Commentaries § 803.

⁶⁰ Jonathan Turley, *Trump’s Post-Presidential Impeachment Punishment May End Up Before the Supreme Court*, USA TODAY (Jan. 14, 2021, 10:08 AM), <https://www.usatoday.com/story/opinion/2021/01/14/trump-impeachment-trial-constitutional-mess-column/4157285001/>.

⁶¹ Christopher Silvester, *Beware the Bill of Attainder*, CRITIC (Jan. 29, 2021), <https://thecritic.co.uk/beware-the-bill-of-attainder/>.

Article I, Section 9 of the U.S. Constitution states that “[n]o bill of attainder...shall be passed.” Like attainders of old, the only purpose of the House’s late impeachment here, without any possible chance of removal, is to punish, taint, and stain the person. English jurist William Blackstone described “attainder” as any legislative harm, taint, stains, or blackening. When the constitution was written there were several states that did allow for the impeachment of public officials after they left office. The fact that the Constitution does not expressly allow this can be taken as evidence of the Framers rejection of this notion. What the framers did expressly include was a specific prohibition against Congress passing any “bill of attainder,” i.e., an act punishing a specifically named individual. Courts have held that the type of punishment referred to in Article I includes disqualification from holding office.⁶² From the drafting the Article of Impeachment,, it would seem that the charge of ‘insurrection’ is meant to trigger certain provisions in the 14th Amendment which carve out an implicit exception for insurrectionists and rebels from the bill of attainder prohibition. However;

Chief Justice Salmon Chase rejected that argument in an 1869 case involving a challenge to a sentence handed down by an ex-Confederate judge. “[I]t is a necessary presumption,” Chief Justice Chase wrote, that amendments “seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.”⁶³ He suggested that Congress could establish mechanisms to ascertain whether particular individuals had participated in insurrection or rebellion, but that these mechanisms should respect the Constitution’s

⁶² See *U.S. v Brown*, 381 U.S. 437 (1965).

⁶³ *Griffin’s Case*, 11 F. Cas. 7, 26, 1 Chase 364 (Circuit Ct., Virginia, 1869).

existing procedural guarantees against targeted legislative punishment.⁶⁴

Consistent with his earlier statements to the Justices that certain aspects of impeachment are in fact justiciable, Kenneth Starr has noted: “Even if the Senate does vote to bar Trump from public office, it is unlikely to be an end to the matter. . . . The President will then be able to file an action in the appropriate federal court saying essentially what the Congress did, what the Senate did by imposing this punishment, was to create . . . a bill of attainder.”⁶⁵ The House Managers’ fleeting assurance in their Trial Memorandum that there is no bill of attainder concern is not convincing, and is certainly not the final say on this issue.⁶⁶

It is also false (and unconvincing) to pretend that a person no longer in office has therefore somehow escaped culpability and placed themselves above the law. As the Constitution itself says, once a person is no longer in office, they may still be indicted and prosecuted as a private citizen. U.S. Const. art 1. Sec. 3 (“shall be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law”).

F. Arguments from Historical Precedent

While it is true that the Senate has never conducted an impeachment trial of a former president, there are a few cases where the Senate conducted a trial of an

⁶⁴ *Using the 14th Amendment to Bar Trump From Office Could Take Years*, WASH. POST (Jan. 12, 2021), <https://www.washingtonpost.com/outlook/2021/01/12/14th-amendment-insurrection-trump-removal-problems/>.

⁶⁵ Silvester, *supra* note 61.

⁶⁶ See House Managers Trial Memorandum, *supra* note 4, at 70.

office holder, other than the president, who had resigned or had been expelled from office.

“In two cases - those of William Blount and William Belknap - the Senate debated late impeachment at length. Unfortunately for our purposes, it did not reach a decisive result in either case.”⁶⁷ Some have argued that, “official House precedent, citing the Blount and Belknap cases, indicates that the “[a]ccused may be tried after resignation.”⁶⁸ But even if there is strong precedent for the late impeachment of officers other than the president, or members of a different branch of government, that would provide no sound basis for diluting the standards for *presidential* impeachment.⁶⁹ The president’s unique role in the constitutional structure sets him apart and warrants more rigorous standards for impeachment. As then-Senator Joseph R. Biden recognized: “The constitutional scholarship overwhelmingly recognizes that the fundamental structural commitment to a separation of powers requires [the Senate] to view the President as different than a Federal judge.”⁷⁰ Or,

⁶⁷ Kalt, *supra* note 58, at 84.

⁶⁸ *Id.* at 85 (quoting 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 307 (1907) (describing “nature of impeachment”).

⁶⁹ For example, as it relates to judges, the Constitution’s Good Behavior Clause alters the standard for the impeachment of judges. U.S. Const. art. III, § 1. *See also* John R. Labovitz, *Presidential Impeachment* 92–93 (1978) (noting that the Good Behavior Clause “could be interpreted as a separate standard for the impeachment of judges or it could be interpreted as an aid in applying the term ‘high crimes and misdemeanors’ to judges. Whichever interpretation was adopted, it was clear that the clause made a difference in judicial impeachments, confounding the application of these cases to presidential impeachment.”) *See also Proceedings of the U.S. Senate in the Impeachment Trial of President William Jefferson Clinton*, 106th Cong. Vol. IV at 2692 (statement of Sen. Max Cleland) [hereinafter *Clinton Senate Trial*] (citing the “Good Behaviour” clause and explaining “that there is indeed a different legal standard for impeachment of Presidents and Federal judges”).

⁷⁰ *Clinton Senate Trial*, *supra* note 69, at 2575 (statement of Sen. Joseph R. Biden, Jr.). Numerous other Senators distinguished the lower standard for judicial impeachments. *See, e.g.,*

for that matter, any other official. Indeed, “our history establishes that, as applied, the constitutional standard for impeaching the President has been distinctive, and properly so.”⁷¹

Regardless, as the following sections will demonstrate, the precedent is anything but clear.

1. The Impeachment of Senator Blount

The first federal impeachment case, that of Senator William Blount, was a late impeachment and ended up being dismissed by the Senate for lack of jurisdiction. This lack of jurisdiction did not, however, arise only from the fact that Blount had already left office.

By way of background, Blount was a delegate to the federal Constitutional Convention from North Carolina, served as governor of the Southwest territory for six years, and was one of Tennessee’s first United States Senators. Blount apparently became involved in a British plot to take Florida and Louisiana from Spain, a United States ally. After hearing the charges against Blount, forwarded by President Adams, the House of Representatives impeached him on July 7, 1797. The

id. at 2692 (statement of Sen. Max Cleland) (“After review of the record, historical precedents, and consideration of the different roles of Presidents and Federal judges, I have concluded that there is indeed a different legal standard for impeachment of Presidents and Federal judges.”); *id.* at 2811 (statement of Sen. Edward M. Kennedy) (“Removal of the President of the United States and removal of a Federal judge are vastly different.”).

⁷¹ Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 300 (1998); *see also* Clinton Judiciary Committee, *supra* note 114, at 350 (statement of Professors Frank O. Bowman, III, Stephen L. Sepinuck, Gonzaga University School of Law) (“[C]omparative analysis suggests that Congress has applied a discernibly different standard to the removal of judges.”).

next day, the Senate expelled Blount for his "high misdemeanor" by a vote of twenty-five to one and then adjourned until November.⁷²

Among other arguments, Blount's representatives claimed that Senators were not subject to impeachment as they were not "civil officers", and that even if they were, Blount was no longer a Senator, i.e., the late impeachment issue.⁷³ Ultimately, the Senate voted on two resolutions by votes of 14-11, the first rejecting that Blount was a civil officer and thus liable for impeachment, and the second accepting "that Blount's plea was sufficient and that the Senate had no jurisdiction, by the same vote, and the case was dismissed."⁷⁴ So while Blount's case is often cited for the proposition that Senators are not civil officers, the Senate in Blount's case also arguably rejected the idea that it retained jurisdiction over someone who no longer holds office. Interestingly, scholars arguing for impeachment of former offices distinguish this away by asserting that the Senate only dismissed for lack of jurisdiction because Senators were not civil officers. For example, as summarized by one legal scholar in a 1973 article:

The argument that a person out of office could not be impeached for high crimes and misdemeanors committed while in office was one of several contentions put forward in 1797-99 by the defense in the case of Senator William Blount, who had been expelled before impeachment proceedings began. The Senate decided not to proceed, but for a different reason.⁷⁵

⁷² Kalt, *supra* note 58, at 13.

⁷³ *Id.*

⁷⁴ *Id.* at 89.

⁷⁵ Arthur Bestor, *Impeachment*, 49 WASH. L. R. 255, 279-80 (1973), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2032&context=wlr#page=26>.

Unsurprisingly, the House Managers make the same argument in their Trial Memorandum, glossing over the inconvenient fact that Blount’s plea, accepted by the Senate in its dismissal for lack of jurisdiction, *included* the argument of late impeachment. Instead they assert with misplaced certainty that “the Senate did not dismiss on that basis.”⁷⁶ In any event, the Blount case is not decisive precedent for either side of the current debate. It does, however, once again demonstrate that the House’s vote to impeach does not mean that the Senate must agree with its procedural decisions, and that the Senate should properly consider its jurisdiction prior to proceeding to an impeachment trial.

2. The Impeachment of Secretary Belknap

One scholar who is a proponent of late impeachments, and who is often cited by the House Managers in their Trial Memorandum, believes that “[t]he 1876 case of Secretary of War William Belknap is the single most important precedent in the realm of late impeachment.”⁷⁷ But there is more to that story than the House Managers tell.

Secretary Belknap was connected to a lucrative kickback scheme involving western trading posts.⁷⁸ When the House Committee on Expenditures discovered the entire arrangement six years later, Belknap learned that he was about to be impeached and realized that there was one thing he might do to prevent it. “After a

⁷⁶ House Managers Trial Memorandum, *supra* note 4, at 72.

⁷⁷ Kalt, *supra* note 58, at 94.

⁷⁸ *Id.* at 94–95.

discussion with House leader Hiester Clymer, Belknap apparently concluded that if he resigned, he might avoid the unpleasant experience of a national inquest, additional publicity about his embarrassing conduct, and disqualification from office.”⁷⁹

According to Professor Brian C. Kalt’s account of this case:

The House impeached Belknap a few hours after he resigned, and the Senate tried him. The House unanimously voted, and the Senate ruled specifically, that resignation could not terminate the congressional impeachment process.⁸⁰

Once before the Senate, “Belknap’s lawyers moved to dismiss the case for lack of jurisdiction; before reaching the merits, they wanted to litigate the late impeachment issue.”⁸¹ After more than two weeks of arguments on this issue, “[i]n the end, on May 29, the Senate voted thirty-seven to twenty-nine that it had jurisdiction over the late impeachment.”⁸² But the argument was *not* over.

Unfortunately for those seeking clarity, the Senate jurisdictional vote passed by a simple majority. The minority members who lost felt strongly enough about their position that most voted to acquit Belknap on this issue alone. Enough did so to prevent the Senate from obtaining the two-thirds vote necessary for conviction.⁸³

Professor Kalt also describes how:

Among those voting against jurisdiction, the most popular argument was that a reading of Article II, Section 4 implied a restriction on the timing of trials in its use of the term “officers” and the prominent role of removal. Given the majority’s limited reading of this article and section, some opponents also raised the concern that if impeachment

⁷⁹ *Id.*

⁸⁰ *Id.* at 94.

⁸¹ *Id.* at 96.

⁸² *Id.* at 97.

⁸³ *Id.* at 94

were not limited to current civil officers, any private citizen could be subjected to impeachment.⁸⁴

The case of Secretary Belknap is an interesting one, no doubt. But it does not establish with any kind of clarity that the Senate, as a body, possesses the jurisdiction to try former presidents.

3. Daniel Webster

Another relevant historical case is that of Daniel Webster. As recounted by one legal scholar:

The great Whig leader had served as Secretary of State under President Tyler. Now, three years after he had left that post (and four years before he returned to it), Webster found himself accused of improperly using secret funds. The accusations were scurrilous and unfounded, but they were made on the floor of the House of Representatives and received significant attention over the following months." Some House members, including at least one Webster proponent, surmised that pursuing impeachment was a possible avenue to resolve the issue-an interpretation that his attackers were all too happy to support...Not all of Webster's defenders welcomed impeachment. One argued strenuously that late impeachment was not possible. [e.g., statement of Rep. Bayly) ("I would like to know how you can impeach an officer when he is no longer an officer?"] **It was in this context that Representative and ex-President John Quincy Adams made his famous comments defending Webster but upholding late impeachability. On the latter, he said:**

I take occasion to say that I differ with the . . . gentlemen who have stated that the day of impeachment has passed . . . I hold no such doctrine. I hold myself, so long as I have the breath of life in my body, amenable to impeachment by this House for everything I did during the time I held any public office.⁸⁵

⁸⁴ *Id.* at 98.

⁸⁵ *Id.* at 91.

The House Managers support their jurisdictional argument with John Quincy Adams' quote.⁸⁶ But importantly, "Adams's statement was not universally accepted. One colleague mused aloud that removal was the only purpose of impeachment, and so late impeachment made no sense."⁸⁷ In the end, though, Adams' personal view, while interesting, is not the view that was accepted and adopted into the Constitution's text (while it *was* adopted into the constitutions of some states, making it once again clear that this was a rejection and not an oversight). Further, Adams' views on the *House's* authority to impeach does not address *the Senate's* textual authority to *try* such an impeachment. Even in expressing his expansive view on this question, he limited it to what he believed *the House* had the power to do, not the Senate.

Ultimately, "Webster was never impeached. He did not seem particularly anxious to try the impeachment process as a method of clearing his name, and he was able to end the controversy by releasing documents that clarified his role."⁸⁸ The issue of Webster's potential impeachment is only relevant primarily in that it shows the issue of late impeachment has been debated for quite some time, and because it was in this case that John Quincy Adams made his oft quoted remarks indicating his support for late impeachment. Ultimately, his comments are of

⁸⁶ House Managers Trial Memorandum, *supra* note 4, at 48 (quoting Adams in this section's opening paragraph).

⁸⁷ Kalt, *supra* note 58, at 91–92.

⁸⁸ *Id.* at 92.

historical interest but not at all controlling, inasmuch as Webster himself was ultimately not even impeached.

In yet another historical overreach, the House Managers' contend in their Trial Memorandum that,

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.⁸⁹

Apparently, the contention is that because early states expressly provided for impeachment of former officials, this is what the Framers intended the national Constitution to do: "Early American states followed English practice in this respect. The impeachment of former officials was thus 'known and accepted' under early state constitutions."⁹⁰ But the fact that early states *did* expressly provide for late impeachment and the fact that the national Constitution *did not* actually supports the very opposite conclusion. The Framers *were* aware of the practice and, unlike the states that expressly allowed it, they chose *not* to accept late impeachment. And as to British history, the founders explicitly rejected the British model that allowed Parliament to impeach anyone, even private citizens, except for the King, and so they limited impeachment to certain public officials, including presidents. Subjecting a president to impeachment after he has returned to his private life would

⁸⁹ House Managers Trial Memorandum, *supra* note 4, at 51.

⁹⁰ *Id.*

violate this basic constitutional principle.⁹¹ In *contrast* to certain early state constitutions as well as the British practice, the impeachment power only applies to current office holders.

As Alan Dershowitz explained, “The Constitution specifically says the president shall be removed from office upon impeachment,” noting that it does not say “the former president.”⁹² Therefore, he argued, the Senate’s jurisdiction is limited to a sitting president.” Fellow Harvard law professor Cass Sunstein, author of *Impeachment: A Citizen’s Guide*, agreed, saying “I tend to believe it is only for current officeholders.”⁹³ Despite what House Managers would argue, constitutional history and text both bear this out.

II. The Impeachment Proceedings in the House Violated All Notions of Due Process and Fundamental Fairness, Even More Blatantly Than the First Impeachment Attempt.

The House Managers are correct that “[t]he House serves as a grand jury and prosecutor under the Constitution.”⁹⁴ And therein lies the problem with what the House leadership did. “One should not diminish the significance of impeachment’s legal aspects, particularly as they relate to the formalities of the criminal justice

⁹¹ Gerhardt, *supra* note 39.

⁹² Ron Blitzer, *Dershowitz Calls Trump Impeachment a ‘Loaded Weapon’ That Would Be ‘So Dangerous to the Constitution’*, FOX NEWS (Jan. 10, 2021), <https://www.foxnews.com/politics/dershowitz-trump-impeachment-loaded-weapon-dangerous-constitution>.

⁹³ Pete Williams, *Can Trump Be Tried in the Senate on Impeachment Charges Even After He Leaves Office? Some Experts Say Yes.*, NBC NEWS (Jan. 8, 2021, 4:25), <https://www.nbcnews.com/politics/donald-trump/can-trump-be-tried-senate-impeachment-charges-even-after-he-n1253544>.

⁹⁴ House Managers Trial Memorandum, *supra* note 4, at 42.

process. It is a hybrid of the political and the legal, a political process moderated by legal formalities”⁹⁵

The Fifth Amendment to the United States Constitution provides, in relevant part that: “No person shall be . . . deprived of life, liberty or property, without due process of law.”⁹⁶ “[D]ue process’, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”⁹⁷ At its core, it is about fundamental fairness.⁹⁸ “The impeachment process should and does include some of the basic safeguards for the accused that are observed in a criminal process such as fairness, due process, presumption of innocence, and proportionality.”⁹⁹ The Supreme Court has recognized that due process protections apply to all congressional investigations.¹⁰⁰

The Supreme Court has also made clear that independent constitutional constraints limit otherwise plenary powers committed to one of the political branches. For example, even though “[t]he [C]onstitution empowers each house to determine its rules of proceedings,” each House “may not by its rules ignore constitutional restraints or violate fundamental rights.”¹⁰¹

⁹⁵ OFFICE OF WHITE HOUSE COUNSEL, TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, IN PROCEEDINGS BEFORE THE UNITED STATES SENATE (Jan. 20, 2020) [hereinafter TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP], at 4 n.383 (quoting J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment as Politics*, 68 CASE W. RESV. L. REV. 275, 289 (2017)).

⁹⁶ U.S. Const. amend. V.

⁹⁷ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁹⁸ *See, e.g., Lassiter v. Dep’t of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18, 24–25 (1981).

⁹⁹ Brian L. Owsley, *Due Process and the Impeachment of President Donald Trump*, 2020 UNIV. ILL. L. REV. ONLINE 67 (2020).

¹⁰⁰ *See, e.g., Watkins v. United States*, 354 U.S. 178, 188 (1957); *Quinn v. United States*, 349 U.S. 155, 161 (1955).

¹⁰¹ TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, supra note 95, at 61 (citing to *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929); *Morgan v. United States*, 801 F.2d 445, 451 (D.C. Cir. 1986) (Scalia, J.)); *see also e.g., INS v. Chadha*, 462 U.S. 919, 940–41 (1983); *Buckley v. Valeo*, 424 U.S. 1, 132

A. Due Process Applies During Impeachment Proceedings.

In *Hastings v. United States*, the sole case to ever address the question was clear that the Due Process Clause applies to impeachment proceedings,¹⁰² and that it imposes an independent constitutional constraint on how the Senate exercises its “sole Power to try all Impeachments.”¹⁰³ As the court noted,

[i]mpeachment is an extraordinary remedy. As an essential element of our constitutional system of checks and balances, impeachment must be invoked and carried out with solemn respect and scrupulous attention to fairness. Fairness and due process must be the watchword whenever a branch of the United States government conducts a trial, whether it be in a criminal case, a civil case or a case of impeachment.¹⁰⁴

A 1974 Department of Justice Memo suggested the same view, opining that “[w]hether or not capable of judicial enforcement, due process standards would seem to be relevant to the manner of conducting an impeachment proceeding.”¹⁰⁵

More specifically, as the *Hastings* court described it:

The major constitutional directive on procedure appears in the Fifth Amendment This clause makes no reference to any specific

(1976), *superseded on other grounds by statute as stated in McConnell v. FEC*, 540 U.S. 93 (2003).

¹⁰² *Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated and remanded on other grounds by Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993) (per curium).

¹⁰³ *Id.*; U.S. Const. art. I, § 3, cl. 6.

¹⁰⁴ *Hastings v. United States*, 802 F. Supp. 490, 492 (D.D.C. 1992), *vacated*, 988 F.2d 1280 (D.C. Cir. 1993). While the decision in *Hastings* was vacated and the case remanded for reconsideration in light of the Circuit’s decision in *Nixon* (which was later affirmed by the Supreme Court in *Nixon v. United States*, 506 U.S. 224 (1993)), another case concerning the impeachment of a judge, the *Hastings* Court’s analysis on the logical and constitutional application of Due Process protections in impeachment trials remains insightful. The *Nixon* cases did not reject Due Process in impeachments, but held only that the particulars of impeachment presented a nonjusticiable political question.

¹⁰⁵ DEP’T OF JUST., OFF. OF LEGAL COUNSEL, LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW 45 (1974), <https://perma.cc/X4HU-WVWS>.

branch of government. It simply states one of the key principles that lies at the heart of our constitutional democracy: fairness. An enormous body of law has developed around the concept of due process as it applies across American government. There is no question but that due process protections apply to congressional activities. . . . This Court believes that due process also applies to impeachment trials. . . . The language of the Constitution committing the impeachment process to Congress speaks in terms of trials and convictions, oaths and affirmations. The Constitution distinguishes impeachments from indictments, but presumably does so because the similarity is so great that there is a risk of confusion. The Founding Fathers clearly anticipated that an impeachment proceeding would strongly resemble a judicial proceeding. . . . Impeachment trials are unique, and are entitled to be carried out using procedures that befit their special nature. However, they must be conducted in keeping with the basic principles of due process that have been enunciated by the courts and, ironically, by the Congress itself.¹⁰⁶

While it is true that “[t]he exact contours of the procedural protections required during an impeachment investigation must, of course, be adapted to the nature of that proceeding,” the “procedures must reflect, at a minimum, basic protections that are essential for ensuring a fair process that is designed to get at the truth.”¹⁰⁷ The Supreme Court’s “precedents establish the general rule that individuals must receive notice and an opportunity to be heard *before* the Government deprives them” of a constitutionally protected interest.¹⁰⁸ It is also true that, “[i]n any proceeding that may lead to deprivation of a protected interest, it requires fair procedures commensurate with the interests at stake.”¹⁰⁹ Impeachment

¹⁰⁶ *Hastings*, 802 F. Supp. at 504–05 (citing *Quinn v. U.S.*, 349 U.S. 155 (1955); *Watkins v. U.S.*, 354 U.S. 178, 188 (1957)) (Bill of Rights applies to congressional investigations).

¹⁰⁷ TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* note 95 at 66.

¹⁰⁸ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (emphasis added).

¹⁰⁹ *See, e.g., Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 (1985) (“[T]he processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under

proceedings plainly involve deprivations of property and liberty interests protected by the Due Process Clause.¹¹⁰ Even an impeachment investigation against a former president potentially seeks to strip the former president of his eligibility to “hold and enjoy any Office of honor, Trust or Profit under the United States,”¹¹¹ including to be re-elected as president.¹¹² Given the due process requirement:

That means, at a minimum, that the evidence must be disclosed to the accused, and the accused must be permitted an opportunity to test and respond to the evidence—particularly through “[t]he rights to confront and cross-examine witnesses,” which “have long been recognized as essential to due process.” . . . “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” It is unthinkable that the Framers, steeped in the history of Anglo-American jurisprudence, would create a system that would allow the Chief Executive and Commander-in-Chief of the armed forces to be impeached based on a process that developed evidence without providing any of the elementary procedures that the common

which the deprivation may occur.”); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“Due process is flexible and calls for such procedural protections as the particular situation demands.”) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹¹⁰ See generally *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972) (“The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“Although the Court has not assumed to define ‘liberty’ with any great precision, that term is not confined to mere freedom from bodily restraint.”).

¹¹¹ U.S. Const. art. I, § 3, cl. 7.

¹¹² See U.S. Const. art. II, § 1, cl. 5. See also TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* note 95, at 58–59:

[I]t is settled law that even the lowest level “public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process.” . . . The Constitution also explicitly gives the President (and every qualified individual) a protected liberty interest in eligibility for election to the Office of President Finally, every person has a protected liberty interest in his reputation that would be directly impaired by impeachment charges. Impeachment by the House alone has an impact warranting the protections of due process. The House’s efforts to deprive the President of [additional] constitutionally protected property and liberty interests necessarily implicate the Due Process Clause It would be incompatible with the Framers’ understanding . . . to think that they envisioned a system in which the House was free to devise any arbitrary or unfair mechanism it wished for impeaching individuals.

law developed over centuries for ensuring the proper testing of evidence in an adversarial process.¹¹³

Current members of the House and Senate leadership are themselves on the record repeatedly confirming these procedural due process requirements.¹¹⁴ In practice the due process rights consistently afforded to the accused during impeachment proceedings for the past 150 years have generally included 1) the right to appear and/or to be represented by counsel at all hearings; 2) to have access to, as well as opportunity to object and/or respond to, all the evidence and testimony received against them, including on issues of admissibility; 3) to submit their own counter-evidence and/or testimony; 4) to question witnesses, and 5) to make opening statements and closing arguments.¹¹⁵ As the *Hastings* Court reasoned,

[t]he Fifth Amendment was passed after the entire Constitution came into force. Therefore, it applies to all aspects of the Constitution. It is inconceivable to think that violent criminals, prisoners seeking parole, civil litigants with the smallest complaints, and witnesses who appear before Congress have due process rights but that judges, who have

¹¹³ TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* note 95, at 66–67 (quoting *Chambers v. Miss.*, 410 U.S. 284, 294 (1973); *see also, e.g., Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).

¹¹⁴ *See, e.g., Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H.R. Comm. on the Judiciary*, 105th Cong. 17 (1998) (statement of Rep. Jerrold Nadler) [hereinafter *Clinton Judiciary Committee*] (in the context of a House impeachment investigation, “due process mean[s] . . . the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel”); *Hearing Pursuant to H.R. Res. 581 Before the H.R. Comm. on the Judiciary: Appearance of Independent Counsel*, 105th Cong. 6 (Nov. 19, 1998) (statement of Rep. Jerrold Nadler) (“[t]he Constitution guarantees the right of anyone who is accused of any wrongdoing, and fundamental fairness guarantees the right of anyone, to have the right to confront the witness against him”); H.R. Rep. No. 111-427, 111th Cong. 11–12 (2010); H.R. Rep. No. 111-159, 111th Cong. 14 (2009); H.R. Rep. No. 105-830, at 265–66, 105th Cong. 143 (1998) (“[I]mpeachment not only mandates due process, but [] ‘due process quadrupled.’”). *See also Impeachment Articles Referred on John Koskinen (Part III): Hearing Before the H.R. Comm. on the Judiciary*, 114th Cong. 30 (2016) (statement of Rep. Hank Johnson).

¹¹⁵ *See generally* TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* note 95, at 64–65 nn. 443-454 and accompanying texts.

been appointed by the President and confirmed by the Senate do not when they face impeachment.¹¹⁶

Congress has no discretion to dispense with these due process rights which are constitutionally mandated. In addition, as the House was reminded in last year’s impeachment proceedings, historical practice and “precedent for the rights to cross-examine witnesses, call witnesses, and present evidence dates back nearly 150 years.”¹¹⁷ In fact,

“By at least the 1870s . . . the House Judiciary Committee concluded that an opportunity for the “accused by himself and his counsel [to] be heard” had “become the *established practice* of the [Judiciary Committee] in cases of impeachment” and thus “deemed it *due to the accused* that he should have” due process.¹¹⁸

Further, “[t]he House’s Parliamentarian acknowledges that . . . the practice dating to the 1870s ‘is to permit the accused to testify, present witnesses, cross-examine witnesses, and be represented by counsel.’”¹¹⁹ The significance of, and historically recognized requirements for, due process in impeachment proceedings is not seriously debatable.

¹¹⁶ *Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992).

¹¹⁷ Letter from Pat Cipollone, Counsel to the President, to Honorable Nancy Pelosi, Speaker of the House of Representatives, et al., at 3 (Oct. 8, 2019), [hereinafter Cipollone Letter] <https://assets.documentcloud.org/documents/6459967/PAC-Letter-10-08-2019.pdf> (citing III Hinds’ Precedents, § 2445).

¹¹⁸ TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* note 95, at 63–64 (citing Cong. Globe, 42d Cong., 3d Sess. 2122 (1873) (emphasis added); III Hinds’ Precedents § 2506, at 1011 (noting, in Judge Durrell’s impeachment in 1873, that “[i]t has been the practice of the Committee on the Judiciary to hear the accused in matters of impeachment whenever thereto requested, by witnesses or by counsel, or by both”).

¹¹⁹ *Id.* at 64–65 (quoting Charles W. Johnson et al., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, 115th Cong., 1st Sess., ch. 27, § 7, at 616 (2017), <https://perma.cc/RB2S-Q965> (*House Practice*) (citing, as support for this “modern practice,” the 1876 impeachment investigation of William Belknap in III Hinds’ Precedents § 2445, at 904)).

B. House Leadership Ignored Law and Precedent in Their Rush to Judgment.

In spite of all the above, and with no regard for the criticism they endured during the last impeachment for the hurried *three-month* process, House leadership once again defied all norms and denied the then-President all of his basic and constitutionally protected rights¹²⁰ -- this time in an even more brazen manner than ever before.¹²¹ This time the House impeachment procedure lacked *any* semblance of due process whatsoever. It simply cannot be credibly argued to the contrary.

What minimal “record” there is shows that there was no testing of any evidence or indeed even an opportunity for any meaningful evidence to be presented at all. It is well established that “[t]he House impeachment process generally proceeds in three phases: (1) initiation of the impeachment process; (2) Judiciary Committee investigation, hearings, and markup of articles of impeachment; and, (3) full House consideration of the articles of impeachment.”¹²² An objective review of the House record reveals that the Speaker streamlined the Impeachment Article, H.

¹²⁰ See Cipollone Letter, *supra* note 117 at 4 (“To comply with the Constitution’s demands, appropriate procedures would include—at a minimum—the right to see all evidence, to present evidence, to call witnesses, to have counsel present at all hearings, to cross-examine all witnesses, to make objections relating to the examination of witnesses or the admissibility of testimony and evidence, and to respond to evidence and testimony. Likewise, the Committees must provide for the disclosure of all evidence favorable to the President and all evidence bearing on the credibility of witnesses called to testify in the inquiry.”).

¹²¹ Hugh Hewitt, *Opinion: A Fast-Track Impeachment Would Not Be Justice. It Would Be Pointless Revenge.*, WASH. POST (Jan. 8, 2021, 5:32 PM), <https://www.washingtonpost.com/opinions/2021/01/08/fast-track-trump-impeachment-pointless-revenge/>.

¹²² ELIZABETH RYBICKI & MICHAEL GREENE, CONG. RSCH. SERV., THE IMPEACHMENT PROCESS IN THE HOUSE OF REPRESENTATIVES (Nov. 14, 2019), <https://fas.org/sgp/crs/misc/R45769.pdf>.

Res. 24, to go straight to the floor for a two-hour debate and a vote, without the ability for amendments. The House record reflects no committee hearing, no witnesses, no presentation or cross-examination of evidence, and no opportunity for the accused to respond or even have counsel present to object.¹²³ As *The New York Times* recently reported: “there were no witness interviews, no hearings, no committee debates, and no real additional fact finding.”¹²⁴ Honorable prosecutors want to see and test all the evidence. Beyond an interest in effecting justice, the process enables a prudent decision maker time to reflect on whether proceeding against an accused even merits the time and resources of the prosecutor, along with the broader impact that such a decision might have, especially in potentially controversial and high profile cases.

The House Managers claim the need for impeachment was so urgent that they *had* to rush the proceedings, with no time to spare for a more thorough investigation (or really, any investigation at all).¹²⁵ Yet, the House leadership did not immediately, upon passage of H.Res. 24, send the articles to the Senate. Instead, it waited another *twelve days* to do so. This inexplicable delay belies the House Managers’ claim of

¹²³ See *H.Res.24 - Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors: All Actions*, CONGRESS.GOV <https://www.congress.gov/bill/117th-congress/house-resolution/24/all-actions?s=3&r=48&overview=closed#tabs> (last accessed Feb. 4, 2021) (“Rule provides for consideration of H. Res. 24 with 2 hours of general debate. Previous question shall be considered as ordered without intervening motions. Measure will be considered read. Bill is closed to amendments.”).

¹²⁴ Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html>.

¹²⁵ See House Managers Trial Memorandum, *supra* note 4, at 34 (“In light of the crisis that President Trump created and the overwhelming public evidence of his guilt, the House acted quickly to impeach him.”); *id.* at 43 (“There is no reason for Congress to delay in holding accountable the President. . .”).

urgency, or any claim that that House lacked the time to conduct a proper impeachment inquiry. The delay also led to yet another egregious denial of due process in that had the House sent over the Articles while he was still president, Mr. Trump would have had the right to have the Chief Justice of the United States preside over his trial, instead of one of the most partisan Senators in the Senate. If the House believed that the president needed to be impeached and tried, they did not have the right to then delay the trial past the expiration of the president's term, so that he would then be denied an impartial arbiter. The Democratic Leadership in the House violated due process by maneuvering and forum shopping so that, instead of the Chief Justice, they could have their counterparts in the Senate install Senator Leahy – a man with a history of personal animus towards the person on trial- in the position of a partisan Judge/Juror hybrid. Especially now, given the 50/50 split in the Senate composition, the requirement for there to be a neutral arbiter to serve as the tiebreaker is of enormous import. It strains credulity to contend that it is fair for a Senator who has already twice voted to convict the accused of impeachable offenses to preside over that person's Senate trial.

While most procedural aspects of a Senate impeachment trial may be nonjusticiable political questions, that is *not* an excuse to ignore what law and precedent clearly require. The United States Senate ought to honor and give full force to the American constitutional priority of due process on its own accord. The Senate cannot rely on one-sided record-less constitutionally deficient proceedings

to support a conviction in the case of an impeachment, nor is it the Senate’s role to remedy the House’s errors by opening a new case in the Senate:

In the courts, comparable fundamental errors underpinning the foundations of a case would require throwing the case out. The denial of “basic protections” of due process “necessarily render[s]” a proceeding “fundamentally unfair,” precluding it from “reliably serv[ing] its function as a vehicle for determination of guilt or innocence.” A “proceeding infected with fundamental procedural error, like a void judicial judgment, is a legal nullity.” That is why, for example, criminal indictments may not proceed to trial when they result from “fundamental” errors that cause “the structural protections of the grand jury [to] have been so compromised as to render the proceedings fundamentally unfair.” The same principles should apply in the impeachment trial context. The Senate cannot rely on a record developed in a hopelessly defective House proceeding to convict the President.¹²⁶

As such, the Senate should immediately dismiss the charges for lack of due process in the House’s preparation.

CONCLUSION

As Judge J. Michael Luttig succinctly argued in *The Washington Post*,¹⁵⁴ addressing the question of whether a former president can be put on trial by the Senate, “The Constitution itself answers this question clearly: No, he cannot be. Once Trump’s term ends on Jan. 20, Congress loses its constitutional authority to continue impeachment proceedings against him — even if the House has already approved articles of impeachment.”¹²⁷ He explained further that;

¹²⁶ TRIAL MEMORANDUM OF PRESIDENT DONALD J. TRUMP, *supra* n. 95, at 75 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986); *Winterberger v. Gen. Teamsters Auto Truck Drivers & Helpers Local Union 162*, 558 F.2d 923, 925 (9th Cir. 1977); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)).

¹²⁷ Luttig, *supra* note 45.

The reason for this is found in the Constitution itself. Trump would no longer be incumbent in the Office of the President at the time of the delayed Senate proceeding and would no longer be subject to “impeachment conviction” by the Senate, under the Constitution’s Impeachment Clauses. Which is to say that the Senate’s only power under the Constitution is to convict — or not — an incumbent president.”¹²⁸ “The purpose, text and structure of the Constitution’s Impeachment Clauses confirm this intuitive and common-sense understanding.”¹²⁹

Others have weighed in as well, noting that even a conviction in the Senate would not be the final word on that matter: George Washington University law professor Jonathan Turley argued that a former president would have standing to challenge an impeachment trial in court if it began after he exits the office. As a result, even a ruling on ‘disqualification’ would not necessarily stand. Judge Luttig also predicted a challenge to the unconstitutional proceedings in court, as well as the arguments that Congress would raise:

Congress’s understanding of its constitutional powers would be a weighty consideration in the ultimate determination whether the Congress does possess such authority. When and if the former president goes to court to challenge his impeachment trial as unconstitutional, Congress is sure to make its argument based on these congressional precedents, as well as others, a case that would almost certainly make its way to the Supreme Court. In the end, though, only the Supreme Court can answer the question of whether Congress can impeach a president who has left office prior to its attempted impeachment of him.¹³⁰

In sum, the Senate lacks personal and subject matter jurisdiction over the person of the former president. He is not *the* President as the Constitution clearly

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

requires. Nor was he the president when the charge was laid before the Senate. The Senate only has jurisdiction over the sitting President, and then only to address questions of potential removal and disqualification, remedies which only apply to a current officeholder. The fact that the Senate lacks the constitutional jurisdiction to try this impeachment against a private United States citizen is further evidenced by the very fact that the Chief Justice of the United States has refused to preside. The maneuvering that occurred in the House was unprecedented and unconstitutional. It defied all notions of due process and lacked any semblance of fairness.

For all of the reasons addressed herein the Article of Impeachment as presented by the House is constitutionally deficient, and we hereby urge the Senate to reject it without delay.

February 8, 2021

For the American Center for Law and Justice: