Disqualification From Office

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A new constitutional crisis has emerged with a question as to whether the President of the United States may be convicted by the Senate after being impeached by the House of Representatives subsequent to the President no longer holding office. The question is not directly addressed in the Constitution, nor in the Federalist Papers, which are often used to interpret the Original Intent of the draftsmen of the Constitution. History gives us a glimpse of an answer to the question, but not a definitive answer since it has never been tested in the courts.

We do know that conviction has been sought for federal officers who have been impeached, other than the President of the United States, after they no longer occupied the office that they held. Perhaps the best-known example of Congressional ire, leading to conviction of an impeachment charge after an officeholder vacated his position was that of Senator William Blount in 1797, and the impeachment of Secretary of War William Belknap in 1876. Tennessee, when it entered the union in 1796, chose Blount as one of the state's first two United States Senators. He had served in the Revolutionary Army and the Continental Congress, as well as attending the Constitutional Convention. He was present at the birth of the nation. His land speculation caused him tremendous financial stress. Blount thought that he could increase the value of his properties by convincing Indians and Frontiersmen to attack Spanish Florida and Louisiana. Those territories would then be transferred to Great Britain and this, in Blount's view, would stabilize or greatly enhance his property values. Unfortunately for Blount, a letter he wrote describing the treasonous plan fell into the hands of Federalist President John Adams. The rest is history. Blount was impeached by the House. Thereafter, the Senate declared him guilty and voted to expel him from the Senate. Blount's impeachment trial began *in absentia* on December 17, 1798. The Senate defeated the resolution that asserted William Blount was an Impeachable Officer. Was the Senate's reason for this that Blount could not be impeached because he was a Senator or because he no longer held office? Incidentally, Blount later won a seat in the state Senate and became speaker of that body in Tennessee, serving until his death in 1800.

William Belknap was War Secretary during the administration of President Ulysses Grant. He took bribes. Just before the House of Representatives was scheduled to vote on articles of impeachment, Belknap resigned his office, reportedly bursting into tears in the presence of President Grant. Nevertheless, the next day the House voted to send the Senate five Articles of Impeachment. The Senate believed that it retained impeachment jurisdiction over former government officials. Belknap was acquitted!

These remarkable stories teach us that impeachment occurs much more easily than conviction in the Senate. Even a treasonous federal officer and a crook skated past actual impeachment. Therefore, whether one could be convicted of Articles of Impeachment after leaving office has never been tested in the courts.

The Constitution is foggy on the question, and the answer may depend upon an understanding of grammatical structure extant in 1789. Article II, Section 4 of the United States Constitution states, in its entirety, as follows:

> 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.

The Article clearly speaks of removal from office, presupposing that the person holds office at the time of conviction by the Senate. In other words, one cannot be impeached and convicted unless they are holding office by the plain language of the Constitution.

The battle over grammar can be found in Article I, Section 3, Clause 7, which states:

> 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.

This wording is a limitation on the power of the Senate as a result of the words “shall not extend further”. The drafters of the Constitution were parsimonious with their words and utilized formula that were well known in Common Law. In other words, the only action the Senate could take upon Articles of Impeachment delivered from the House of Representatives was removal from office and disqualification to hold office. The question comes down to whether the word “and” is intended in the disjunctive or the conjunctive, sometimes referred to as “copulative conjunctions”. Aside from the 18th Century sensitivity to sexual suggestion, the issue, simply stated, is whether “and” in the clause is intended to require that both “removal from Office” and “disqualification to hold” are linked in marriage or whether they are separate alternatives upon Senate conviction on Articles of Impeachment.

The history and use of grammar in the 17th Century would suggest that a Senate conviction may only consist of removal from office which necessarily would include disqualification to hold office in the future. Not only is this interpretation supported by “shall not extend further”, which is a limitation, but also by the language which follows. Notwithstanding the limitation on what the Senate could do, the Party convicted is liable and subject to criminal trials in the court of law for whatever offense was committed which resulted in the removal from office.

Therefore, while the Senate has no power to convict the President on the Articles of Impeachment once he leaves office, the civil authorities could charge what will be former President Trump with the criminal crime of inciting the riot or whatever other offense may have been committed in the District of Columbia.

From a practical political point of view, those who seek conviction on Articles of Impeachment of the President of the United States after he no longer holds office do not want to see the President face a jury in criminal court after he leaves office. In that forum, the former President would have those rights pertaining to ordinary criminal proceedings, which may leave the President's accusers embarrassed. The President's detractors have made a calculated decision that they stand a better chance of securing a conviction on Articles of Impeachment in the Senate over what might happen in a criminal court proceeding after the President is no longer in office.

Federalist Paper No. 65 was addressed by Alexander Hamilton to the people of the State of New York. He was trying to convince the state legislature to ratify the Constitution. Hamilton, an architect of the Constitution, wrote, on March 7, 1788, that he understood the argument of many that Articles of Impeachment should be tried in a court of law and not the Senate. An elected body, mused Hamilton, consist of people who may "be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." The Senate, Hamilton noted, would "connect itself with pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."

Hamilton argued, nevertheless, that the Convention decided that the Senate would be the most fit depository of the important trust of trying the official who is impeached by the House. In Great Britain, Hamilton reminded his readers, it is the House of Lords who decide upon conviction of an impeached officeholder. Several state constitutions have followed the same example.

Hamilton saw impeachment as a "bridle" upon the executive servants of government, rather than a *post hoc* punishment. Hamilton ultimately decided notwithstanding the risks, the Senate of the United States would be the best place to offer a "dignified" and "sufficiently independent" judgment on Articles of Impeachment. Hamilton argued against the Supreme Court or the court system in general, deciding upon Articles of Impeachment delivered by the House of Representatives. Hamilton had this to say concerning the consequences of conviction on Articles of Impeachment:

> After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

It is because the officeholder will be subject to a trial in the Senate and possibly in the criminal courts as well after the Senate conviction that Hamilton thought the process of removal from office should take place in a tribunal separate from the criminal court system. Hamilton then said, "The loss of life in a state would often be virtually included in the sentence which, in its terms, imported nothing more than dismission from a present, and disqualification for a future, office."

Hamilton, along with his cofounders, clearly contemplated that the Senate action was to disqualify the convicted individual from future office as part and parcel of the conviction and not as an after-thought punishment.

What of the argument that Senate conviction, after an individual no longer occupies office, is crucial in order to prevent the offender from being selected by the people for yet another opportunity to wreak havoc as a future officeholder? It is quite clear that Hamilton and the other Founders kicked that can down the road, preferring to trust the electorate and the criminal court system in connection with disqualification from future office.

Although not impossible, it is difficult to interpret the United States Constitution and its history as providing for a separate procedure concerning disqualification from office, once the impeached individual no longer holds that position. Whether we want to stretch the Constitution in that way, subjecting it to heated passions of the moment, is a question that ultimately will be answered by those with whom we trust to address the most important business of the people.

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