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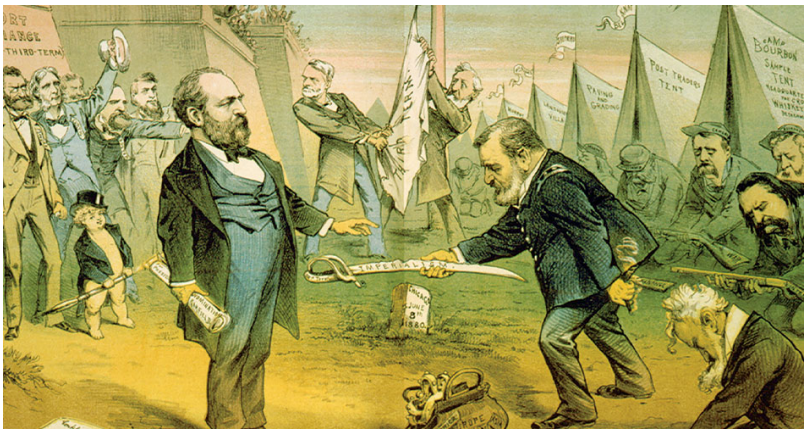
Belknap Trial Was a Precedent Against Second Trump Trial



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Going against the text of the Constitution, precedent, and logic, the House of Representatives — no doubt fueled by the hate of now-former President Donald Trump — including House Speaker Nancy Pelosi and other members of the Democratic Party leadership, decided to rush through a "snap" impeachment of Trump in the aftermath of the storming of the Capitol on January 6.

Despite the fact that Trump's term was going to end on January 20, the House voted to impeach him, ignoring any opportunity for Trump to mount a proper defense to the charges. As the impeachment occurred too late for the Senate to conduct a trial before the end of Trump's term, the logical thing for the Senate to have done was to consider the whole sham a moot point.

After all, the whole purpose of an impeachment trial under the Constitution is to consider the removal of a federal officer — in this case, the president — from office *before* the end of his term. Searching for a precedent to go ahead and try Trump anyway, the Democrats in Congress and in the media latched on to an obscure 19th-century case in which a secretary of war was impeached and tried *after* his resignation.

The Case of Secretary Belknap

The case involved Secretary of War William Belknap, who resigned in 1876 over a kickback scheme just hours before an impeachment vote was scheduled in the House of Representatives. While Belknap was impeached by the House, he was acquitted in the Senate trial. But the fact that he was even tried in the Senate was held up as "precedent" by angry opponents of Trump.

But a closer examination of the Belknap case, the Constitution of the United States, and other cases leads the honest observer to a far different conclusion — that instead of being a precedent to have a Senate trial, it is a precedent to *not* have a Senate trial.

First of all, while Trump's guilt in inciting the storming of the Capitol on January 6 is very much in dispute, Belknap's actions that led to his resignation are not. Belknap ordered soldiers at Fort Sill in Indian Territory (now Oklahoma) and other military forts to purchase supplies only through vendors authorized by him. Belknap even sold breech-loading and repeating rifles to hostile American Indians.

Belknap had persuaded Congress to give him the sole power to select and license agents, known as sutlers, to provide goods at army posts. This included sales to soldiers, who really had no other option

than to buy from Belknap's licensed agents, often leaving many of these low-paid soldiers economically destitute.

A panel of the House investigated Belknap after questions were raised as to how he was living lavishly on a salary of $8,000 per year. It found that Belknap had selected an associate of Caleb Marsh to run the Army's trading post. Beginning in 1870, and continuing for several more years, money was passed to Marsh, who in turn gave money to Belknap, eventually totaling more than $20,000.

When it became apparent that Belknap was going to be impeached, he handed his resignation to President Ulysses S. Grant. (While Grant's presidency was tainted by the corruption of his underlings, most historians believe that Grant was personally honest.) Rather than allow that to end the matter — at least as far as Congress was concerned — the House proceeded to impeach Belknap, even though he was now just a private citizen, and Congress has no constitutional authority to try private citizens.

Congressman George Hoar of Massachusetts objected to the hasty impeachment vote in the House, considering that there was the important question of whether an officer could still be impeached after resignation.

The Constitution specifically prohibits Congress from issuing a bill of attainder — the exercise of a judicial role in which they try, convict, and punish private citizens. And as a private citizen, Belknap could be tried in the regular courts if he had indeed committed any crimes.

The Case Against a Second Trump Trial

In the case of President Trump, the House of Representatives charged that he had incited the riot that led to the storming of the Capitol on January 6. Incitement to riot is a crime, but it is difficult to see how Trump could be charged with that, considering that the invasion began before Trump had even finished his speech almost two miles away — a speech in which he urged peaceful protest.

When the articles of impeachment against Belknap reached the Senate, the major disagreement was over jurisdiction. His lawyers argued that the Senate lacked jurisdiction, as Belknap was now a private citizen. Despite this, the Senate voted 37-29 to assume jurisdiction. The 35-25 vote to convict Belknap fell well short of the two-thirds majority that the Constitution requires for conviction on an impeachment charge.

Twenty-two of the no votes came from senators who expressed agreement that Belknap was guilty of the charges, but they voted against conviction, arguing that they lacked jurisdiction to try a private citizen. One more senator refused to even vote.

In the Trump case, Senator Rand Paul of Kentucky attempted to persuade the Senate to drop the case against Trump on grounds that the Senate lacked jurisdiction, but his effort was defeated 45-55. The 55 votes came from the 50 Democrats in the Senate (including two Independents who caucus with the Democrats), plus a few additional Republicans who have expressed personal animus against Trump in the past.

Senator James Lankford of Oklahoma explained his stance against even having a Senate trial. "You cannot vote to remove someone from office who is not even in office. This is nonsense and sets a terrible precedent for the future." Lankford added that it was impossible to remove someone from office "when he is already gone. This impeachment trial is clearly unconstitutional."

Lankford's fellow senator from Oklahoma, Jim Inhofe, expressed similar sentiments, citing what he called his "plain reading of Article II, Section IV of the Constitution," which led him to believe that the Founders "did not intend for us to impeach and try former federal officeholders."

Some might argue that Lankford and Inhofe are both Republicans from the heavily Republican state of Oklahoma, and might be just offering a partisan assessment. But *Democratic* law professors Jonathan Turley and Alan Dershowitz agree that the Senate trial is unconstitutional. It is also reasonable to presume that John Roberts, the chief justice of the United States, likewise considers the trial unconstitutional. After all, the Constitution provides that whenever the president of the United States is on trial in the Senate, the chief justice *shall* preside over the trial. The conclusion is obvious — Roberts believes that the Constitution requires his service at a trial of a president, but not a former president.

The famous 19th-century Supreme Court justice Joseph Story, in his influential *Commentaries on the Constitution of the United States*, opined that impeachment does not apply to former public officers because removal — the very reason for the impeachment — is no longer necessary. In the Belknap case, Congressman Hoar specifically cited Story's view against impeaching former officers of the government.

House Speaker Nancy Pelosi spoke to the media after the Senate failed to convict former President Donald Trump on impeachment charges brought by the Democrat-controlled House of Representatives. *(Photo credit: AP Images)*

One can search the notes that Madison took at the constitutional convention in vain looking for any discussion of impeaching a former public official.

It certainly is not provided for in the actual text of the Constitution, which 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." (Emphasis added.)

Professor Turley wrote, "For my part, I am admittedly fixated on the fact that impeachment refers to the removal of 'the President' and other officials in office." He added, "At the second Trump impeachment trial, the president shall be Joe Biden, not Donald Trump. So the Senate will hold a rather curious vote to decide whether to remove a president who has already gone.… The question is who is being tried. Is he a president? Obviously not. Is he a civil officer? No, he is a private citizen. A private citizen is being called to the Senate to be tried for removal from an office he does not hold."

Furthermore, Turley disagrees with the argument that the purpose of the second Trump Senate trial to consider disqualification from *future* office by Trump was a legitimate use of the impeachment proc-ess. "The Senate may, in its discretion, add disqualification after a president has been removed. The second optional penalty language was expressed as a limitation on the authority of the Senate and again references removal.… It is obvious that the Senate could not simply hold disqualification trials under this language. Its authority to disqualify is not triggered until after 'the President' has been removed from office."

Framers Did Not Intend Impeachment as Political Weapon

Turley argued that the Framers did not intend the use of impeachment for political purposes. "What they did not discuss was a lifetime eligibility for [an] impeachment trial for anyone who serves in federal office."

While the Belknap case is cited by proponents of trying Trump on an impeachment charge, despite his now being a private citizen, it is actually a precedent *not* to try someone after the person has left office. After all, the only reason that Belknap was acquitted at all was because so many senators who believed him guilty voted not guilty simply because they believed they lacked jurisdiction to try a private citizen.

Moreover, over the years, several judges have resigned as a result of an impeachment inquiry, according to a 1974 article in the *Duke Law Journal*, all of which ended the impeachment proceedings. However, the most famous and relevant case for the present Trump "trial" was the impending impeachment of President Richard Nixon in 1974 in the Watergate Scandal, which caused him to resign. Once Nixon resigned, all impeachment procedures terminated, without any significant public discussion.

As the *Duke Law Journal* noted, "Resignation need not represent the defeat of the impeachment process, but instead may be just one aspect of its successful operation," meaning resignations could be deemed a successful resolution of impeachment proceedings.

If one is looking at precedent to determine the constitutionality of the Trump Senate trial, the record seems quite clear. But, essentially speaking, it is the Constitution, not precedent, that should determine the correct course of action, and the Constitution seems quite clear on the matter. Writing in *Impeachment: The Constitutional Problems*, the late famous law professor Raoul Berger took a dim view of overreliance upon precedent, arguing that precedents do not make law. Citing Chief Justice Nathaniel Chipman of Vermont, who in turn cited British judge Lord Mansfield, "The law of England would be an absurd science indeed, were it decided upon precedents only. Precedents serve to illustrate principles.… The law of England depends upon principles."

The principles that American law should rest upon are those found in the supreme law of the country, which is the Constitution. And one can search it in vain for any mention of trying former office holders or any other private citizen in the Senate.

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