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CAN PRESIDENT TRUMP BE IMPEACHED AS MR. TRUMP?
EXPLORING THE TEMPORAL DIMENSION OF
IMPEACHMENTS

HAROLD J. KRENT*

INTRODUCTION

President Trump is only the fourth executive branch officer in the nation's history to be impeached by the House of Representatives, not one of whom has been removed by the Senate. Not surprisingly, many constitutional questions about the House and Senate's roles in the impeachment process remain unanswered: for what conduct can an officer be impeached; must the impeachable conduct be undertaken while serving as an officer; does an impeached officer have the right to introduce witnesses of his or her choice, and so on.

Temporal aspects of impeachment have never been resolved as well. Consider whether a Democratic Congress down the road can impeach and convict President Trump after he leaves office. The House, of course, did not take a vote after President Nixon's resignation, but that omission may have been out of political prudence as opposed to want of constitutional power. Most academics considering the issue have concluded that the removal of an executive branch officer or judge from office does not defeat Congress's jurisdiction to impeach and try the officer.¹ They reason that, even when an

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1. For a representative sampling, see MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 81–83 (3d ed. 2019); 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. REV. L. & POL.* 13, 18 (2001–2002); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 *U. CHI. L. REV.* 1083, 1152 (2009); Edwin Brown Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 *Duke L. J.* 1023, 1101 (1975); Arthur Bestor, *Impeachment*, 49 *WASH. L. REV.* 255, 277–78 (1973) (book review); see also Salvador Rizzo, *Can Former Presidents be Impeached?*, *WASH. POST* (Dec. 6, 2019, 2:00 AM), <https://www.washingtonpost.com/politics/2019/12/06/can-former-presidents-be-impeached/> [<https://perma.cc/BSY4-VYAR>] (reporting that Professors Akhil Amar and Keith Whittington support a continuous power of impeachment). The leading commentary *against* a continuous power was articulated by Justice Story in *JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 405 (vol. 3 1833) (“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 impeachment.”), but few have followed his lead.

officer is no longer in “office,” the House may still impeach and the Senate convict in order to disqualify the individual from serving in office in the future. Indeed, members of Congress tried to galvanize support to impeach President Clinton after he left office.²

Although neither the constitutional language nor sparse history is clear, I argue below, based on a structural understanding of our system of separated powers, that Congress can only initiate impeachment when an officer is in office. Impeachment is about preserving the system of checks and balances at a given time, not punishing the individual.

In Part I, I briefly summarize the scant history of impeachment of executive branch officials that led up to ratification of our Constitution. In Part II, I focus on the impeachment clauses in Article I and II of the Constitution, which support, to a limited extent, a reading that the House can only trigger impeachment for individuals currently in office. In Part III, I examine the few precedents that have arisen after ratification of the Constitution in which Congress has considered whether to impeach an officer who does not at that time occupy the office. Finally, in Part IV, I argue that Congress’s impeachment authority is best understood as a weapon to remove officers from positions of public power, and that the concomitant power to disqualify an officer from future offices of public trust does not transform the impeachment remedy into a potential Sword of Damocles hanging over the heads of officers for the rest of their lives. Otherwise, the impeachment power would resemble a Bill of Attainder and could be used as a tool to punish opponents of a sitting Congress as well as disqualify leading opposition party candidates who previously had served in offices of public trust from participating in federal politics in the future.³

PART I

As a matter of history, there is considerable support for a continuing power of impeachment even after the officer has left office. The British parliament exercised such power, a number of the state legislatures after 1776 did as well, and the Framers in enacting the impeachment clauses did not directly reject that tradition.

2. See, e.g., Kalt, *supra* note 1, at 125.

3. For an informative summary of the arguments pro and con, see also BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES, 106–32 (2012).

Parliament's impeachment authority included the power to impeach former officers, and indeed, private parties.⁴ For instance, the House of Commons impeached and the House of Lords convicted Lord Chancellor Macclesfield in 1725 after he left office.⁵ The House of Commons also impeached the first Governor-General of India, Warren Hastings, after he left office in 1786, although the House of Lords ultimately acquitted him.⁶ On the other hand, given that Parliament enjoyed the power to impeach private citizens as well as officers, the fact that it could impeach and convict former officers is not that surprising.

In the newly independent states, legislatures also impeached state officials after they were no longer in office. Although not widely remembered, the Virginia legislature briefly considered impeaching Thomas Jefferson after he left the governorship for abandoning his duties as governor during the War for Independence.⁷ Virginia's Constitution explicitly addressed the timing issue, providing that impeachment could only proceed against "[t]he Governor, when he is out of office."⁸ The Vermont Constitution also covered the timing question, providing that "Every officer of State, whether judicial or executive, shall be liable to be impeached by the General Assembly, either when in office, or after his resignation, or removal for maladministration."⁹ The Vermont legislature impeached former assemblyman Jonathan Fassett for leading rioters bent on closing down county courts to frustrate debt collection.¹⁰ Some of the other state constitutions as well explicitly or implicitly sanctioned impeachment after the officeholder left office, while others did not specify.¹¹

Nor did the question of the timing of impeachments loom large at the Constitutional Convention. Several members cited the ongoing impeachment of Governor Hastings in the House of Lords, but they did not specifically debate the question whether the impeachment power continued *after* an individual left office.¹²

4. The following is condensed from exposition in Kalt, *supra* note 1, at 22-28, and GERHARDT, *supra* note 1, at 49-54.

5. See sources cited *supra* note 4.

6. *Id.*

7. Michael McDonnell, *Thomas Jefferson as Governor of Virginia*, ENCYCLOPEDIA VA. HUMAN. (Nov. 21, 2016), https://www.encyclopediavirginia.org/Jefferson_Thomas_as_Governor_of_Virginia#start_entry [https://perma.cc/FZR3-LMUV].

8. VA. CONST. of 1776, art. XVI.

9. VT. CONST. of 1777, ch. II, § XX.

10. See *Background and History of Impeachment: Hearing Before the House Subcomm. On the Constitution of the Judiciary Comm.*, 105th Cong. 226 (1998).

11. See generally Kalt, *supra* note 1, at 29-33.

12. *Id.*

The Framers narrowed Parliament's impeachment power in several critical ways. The remedy was confined to removal from office or disqualification from future office (as opposed to the full range of criminal penalties); only "officers" as opposed to private parties could be impeached; and conviction was only possible based on a two-thirds vote.¹³ But, the history of the impeachment clauses does not shed much light on the timing of impeachments one way or the other. The Framers were aware that, in England and in some states, the legislature enjoyed a continuous power to impeach officers, and yet failed to address the issue in the Constitution explicitly, even when removing the legislature's power to impeach private citizens.¹⁴

PART II

Squaring a continuous power of impeachment with the constitutional language, however, is far from simple. Article II provides that all officers impeached "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high crimes and Misdemeanors."¹⁵ The Clause in Article II does not address the timing issue explicitly, yet appears to limit impeachment of "officers" only when "removal" is possible, i.e., when the officer is still serving.

Supporters of the continuous impeachment thesis principally rely on the impeachment clause in Article I, which admittedly leaves more wiggle room on the timing issue.¹⁶ That Clause provides that judgment in impeachment cases "shall not extend further than to removal from Office, and disqualification to hold and enjoy any [federal] Office."¹⁷ Those supporting a continuous power therefore read the Article I provision as implicitly conferring on Congress the choice of whether to pursue disqualification from office as the remedy even when removal is no longer relevant. They harmonize the two impeachment provisions by concluding that removal from office is required when an officer is still sitting, but disqualification is possible irrespective of whether an officer still serves.¹⁸

13. See CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZENS GUIDE* 34–53 (2017).

14. See GERHARDT, *supra* note 1, at 82.

15. U.S. CONST. art. II, § 4.

16. Some have construed the constitutional language instead to identify not whom can be impeached but for what conduct. They link the "officer" language to the "high crimes and Misdemeanors" phrase to conclude that only misconduct committed while in Office is subject to impeachment, and that the Constitution left the question of timing of impeachment in Congress's hands. Kalt, *supra* note 1, at 64. That reading, however, suffers from the same difficulties addressed, *infra*. Moreover, the President then could not be impeached for fraud during an election, and other officers as well would be immune for misconduct before assuming office.

17. U.S. CONST. art. I, § 3, cl. 6.

18. See, e.g., GERHARDT, *supra* note 1, at 81.

The above reading of the Constitution strikes me as strained for three reasons. First, the Framers provided that all “officers” “shall be removed from office on Impeachment.”¹⁹ The more likely reading of that provision is that “officers” describe those who have an “office,” as opposed to those who had an office previously. As a matter of grammar, the Clause seemingly applies to current officeholders, as opposed to those who may have served during the prior month or even years previously.

Indeed, the term “Officer” used elsewhere in Article II lends support to the argument that impeachment can only proceed against sitting office holders. The Succession Clause, also in Article II, provides that:

In Case of the Removal of the President from Office, . . . the Powers and Duties of the said Office, the same shall devolve on the Vice President, and [if the Vice President is incapacitated] Congress may by Law . . . declar[e] what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.²⁰

Given the context, it makes little sense to construe “officer” to include former officeholders.²¹ The Framers presumably used “officers” in the same sense in companion clauses in Article II.²² And, given that the Framers were aware that some states had championed a continuous power of impeachment explicitly, their decision to specify that impeachments take place when individuals could “be removed from office” seems telling.

Second, a continuous power of impeachment generates a series of thorny problems. For example, can a House impeach a former officer even if the House debated the issue while the officer was in office and at that time declined to impeach? Or, can a Senate convict a former officer after a prior Senate has acquitted? Moreover, we know that the Senate must muster a two-thirds vote to convict a *sitting* officer, but does that safeguard still exist when all that is at stake is disqualification? Probably, but for the last 100 years, the Senate has maintained that it can disqualify an impeached official from holding office based on a majority vote, and it has done so three times.²³

19. U.S. Const. art II, § 4.

20. U.S. CONST. art. II, § 1.

21. U.S. CONST. art. I, § 6 also provides that no member of the House or Senate can simultaneously serve as a civil officer, which bolsters the understanding that the Framers deployed the term to refer to those holding office contemporaneously.

22. See Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a New Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz’s Impeachment & Assassination*, 61 CLEV. ST. L. REV. 285, 290 (2013).

23. See GERHARDT, *supra* note 1, at 80. I address some of these problems, *infra*.

Third, although the Impeachment Clause in Article I states that the penalty for impeachment shall not extend beyond removal and disqualification from office, that clause reads as a limit on what type of punishment can be meted rather than addressing “when.” The Framers presumably were signaling the change from the British practice under which additional penalties were possible. There is no language in the Clauses suggesting that the impeachment authority is continuous.

PART III

To this point, I have relayed that legislatures enjoyed the power in England and to a lesser extent in the newly independent states to impeach officers after they left office but that, for whatever reason, the Framers did not clarify that power in the Constitution. I then argued that the constitutional language itself militates somewhat against the prospect of impeaching an officer who is no longer in office. The post-enactment history, however, suggests that many still believed in a legislative power to impeach officers after they were no longer in office. For instance, decades after stepping down as President, John Quincy Adams declared as a member of the House: “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.”²⁴

On two occasions in our history, Congress considered impeaching and/or convicting officers who were no longer in office.²⁵ The first federal impeachment case centered on Senator William Blount, who evidently lent his services to a treasonous plot to help Great Britain.²⁶ The House impeached him on July 7, 1797, and the next day the Senate expelled him.²⁷ After the expulsion the Senate convened a trial to determine whether to convict him upon the House’s vote to impeach.²⁸ Although Blount principally argued that he, as a Senator, did not fall within the impeachment clause’s category of “civil officer,” he also argued that he could not be removed from office because the Senate had already expelled him *after* the House impeachment.²⁹ The Senate voted not to reach the merits of the House’s impeachment

24. CONG. GLOBE, 29th Cong., 1st Sess. 641 (1846). Adams spoke in support of the House’s power to impeach Daniel Webster for conduct he previously committed as Secretary of State. Kalt, *supra* note 1, at 91.

25. See Kalt, *supra* note 1, at 84-97.

26. *Id.* at 86.

27. *Id.*

28. *Id.*

29. *Id.* at 86-87.

charges, but the reasons for the decision to drop the case were not spelled out.³⁰

The impeachment of Secretary of War William Belknap in 1876 poses a more relevant precedent. The House investigated Belknap for financial fraud, and Belknap resigned prior to any resolution.³¹ The House decided that it could continue with the investigation and voted shortly thereafter to impeach Belknap.³² After much discussion, the Senate voted 37–29 that it maintained jurisdiction over Belknap, despite his resignation. Ultimately, the Senate acquitted Belknap,³³ and this precedent, therefore, represents a limited factor weighing in favor of the House’s authority to remove an officer who has left office (and the Senate’s authority to disqualify that officer), even though impeachment proceedings in his case had started when he was in office.³⁴

PART IV

Although the historical precedents cannot be overlooked, impeachment as understood within our framework of separated powers should reach only those still holding office. Within our system of checks and balances, impeachment provides Congress a means to counteract misconduct in the coordinate branches. If a secretary of state or judge abuses constitutional authority, Congress can ensure his or her ouster and thereby protect the public.³⁵ Congress cannot directly participate in law execution or judicial decision-making, but it can ensure that those who exercise law execution functions and judging have not committed high crimes or misdemeanors.

I argue, first, that the power to impeach a former officeholder is not critical as a deterrence measure; second, that based upon surrounding provisions limiting congressional authority to punish offenders, impeachment should be used to address contemporaneous misconduct, not that in the past; and, finally, that use of an impeachment tool twenty years after the fact would not only raise questions of intergenerational power, it would be vindictive, in tension with the Bills of Attainder so roundly feared by the Framers.

30. *Id.* at 126–27.

31. *Id.* at 94.

32. *Id.* at 94–96.

33. *Id.* at 127–29.

34. Precedents from state impeachment proceedings are mixed. *See id.* at 108–21.

35. The need to protect the public, of course, wanes after the officer has left office.

A. Deterrence

Supporters of a continuing power of impeachment have argued that, if impeachment is tied to holding office, there would be little to deter a President or other officeholder from misconduct in the final days in office.³⁶ Impeachment, in part, serves to ensure that officers conduct their duties conscientiously. Some members of Congress advocated for impeachment of President Clinton after he left office due to his eleventh-hour pardons. Indeed, if officers could escape impeachment through a last-minute resignation, as with President Nixon, they could retain the ability to serve in a public post in the future—no disqualification would attach.

Under our constitutional scheme, however, ample political checks remain even if offenders can escape disqualification. First, Presidents and other executive branch officers may be deterred from wrongdoing, if not by the impeachment remedy, then by history. They know that wrongdoing at the end of a term may tarnish their historical record. Congress has publicized executive branch wrongdoing after the fact, as with the use of torture after 9/11³⁷ and domestic surveillance³⁸ and, on several occasions, Congress has directed resolutions of censure at executive branch officials.³⁹

Second, existing political process safeguards should minimize the risk of lawless behavior. If Presidents choose to run for reelection after resigning, they face electoral disapproval. And, there were no term limits at the Founding. Although the public might not be as concerned with the wrongdoing as is Congress, the voters likely will take that challenged conduct into account (and the fact of resignation), even if no impeachment process unfolded.

If a President does not run for reelection, which would likely be the case, he or she may well be concerned about how his or her party will fare at

36. See, e.g., Kalt, *supra* note 1, at 69–72. Future Supreme Court Justice James Iredell at the Convention stated that impeachment “will be not only the means of punishing misconduct, but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty . . .” 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 32 (Jonathan Elliot ed., 2d ed. 1836). Of course, the deterrence argument does not apply to judges who serve for life. Ironically, there have been more impeachments of Article III judges by far than of executive branch officials.

37. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), <https://govinfo.library.unt.edu/911-report/911Report.pdf> [<https://perma.cc/5YFM-H7RC>].

38. See Jenna McLaughlin, *Congressional Hearings on Surveillance Programs to Kick Off—in Secret*, THE INTERCEPT (Jan. 28, 2016, 7:14 AM), <https://theintercept.com/2016/01/28/congressional-hearings-on-surveillance-programs-to-kick-off-in-secret/> [<https://perma.cc/CRR2-DBYW>].

39. See Ed Kilgore, *If Congress Doesn't Impeach and Remove Trump, It Could Still Censure Him*, INTELLIGENCER (Nov. 21, 2019), <https://nymag.com/intelligencer/2019/11/barring-impeachment-democrats-could-still-censure-trump.html> [<https://perma.cc/7WTF-KQPN>].

the polls, so the constraint of electoral accountability exists.⁴⁰ With respect to an executive branch officer who resigns amidst controversy, there is little chance of subsequent reappointment by a different President. The Senate, of course, must ratify all such appointments.

Finally, the criminal law remains as a deterrent to most impeachable conduct. Although Congress has leeway to determine what constitutes a High Crime and Misdemeanor, the bribery and treason examples used in the Constitution can be punished criminally, as can many other offenses, including the obstruction charges that lay at the heart of the Clinton and Trump impeachments. Thus, the deterrence argument for a continuing power of impeachment is not overwhelming.

B. Allowing Congresses to Look Backwards for Impeachment

A continuous power of impeachment would remove the constraint of contemporaneity. Future Congresses would judge the conduct of Presidents and other civil officers from the perspective of a different political and social milieu. From the vantage point of subsequent Congresses, President Clinton may have had a #MeToo problem; President Lyndon Johnson evidently spoke disparagingly about race; President George W. Bush lied to the public about domestic surveillance, and so on. And, although historical judgment may, at times, be healthy, the power of impeachment comes with tangible penalties.

Indeed, the Constitution does not otherwise welcome judgments based on evolutionary standards of conduct. Through the Ex Post Facto Clause, the Framers expressed their conviction that individuals should be judged based on previously articulated standards of conduct, not those that might arise in the future.⁴¹ Reading the Constitution to permit impeachment twenty years after the fact would allow subsequent Congresses to penalize prior officeholders even as understandings of High Crimes and Misdemeanors evolve. In other words, the Ex Post Facto Clause evinces the Framers' concern that punishment be based only upon previously established norms of misconduct. Impeachment should be seen as a narrow exception to the ex post facto norm in that the conduct warranting impeachment need not first be spelled out. A continuous power of impeachment would gouge a much greater hole into the ex post facto ideal. Confining impeachment to sitting officers ensures that

40. The Framers themselves did not anticipate the rise of political parties. See, e.g., James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 667–68 (2000).

41. The Supreme Court's early rejection of the British tradition of recognizing a common law of crimes is to the same effect. Conduct had to be spelled out in advance of criminal prosecution. See *United States v. Hudson and Goodwin*, 11 U.S. 32, 34 (1812).

presidents and civil officers will be judged by contemporaries, despite the offer of John Quincy Adams.⁴²

At the same time, the continuous power could tempt majorities in the House and Senate to seize current political advantage by visiting impeachment upon former Presidents and civil officers of the other party. The majority party could threaten to impeach former officeholders of the minority party unless support is forthcoming on a particular appropriations or other bill. In other words, the ongoing threat of impeachment might distort law-making.⁴³ In short, a continuous power is difficult to reconcile with ex post facto principles and, as a functional matter, might interfere with the balance of powers otherwise prescribed in the Constitution.

C. Punishment

To the former officer targeted, a continuing power of impeachment raises many of the same problems as does the constitutionally-banned Bill of Attainder. In *Fletcher v. Peck*, Chief Justice Marshall famously wrote that “the framers of the [C]onstitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment,” and thereby restricted the power of Congress and state legislatures to pass Bills of Attainder and ex post facto laws.⁴⁴ The Founders enacted the Bill of Attainder prohibition to prevent the legislature from singling out individuals for punishment—criminal punishment can only be meted consistent with the safeguards of the judicial process.⁴⁵ Yet, a continuous power would eliminate any notion of a statute of limitations and subject civil officers to a perpetual threat of impeachment, even as memories and evidence fade.

42. See *supra* note 24 and accompanying text.

43. Moreover, a power of continuing impeachment could invite party loyalists to game the system. Assume that one party holds a majority of the House and a supermajority in the Senate. Congress then could dredge up misconduct by former executive branch officers of the opposite party who are potential candidates in the upcoming election.

44. 10 U.S. 87, 137–38 (1810).

45. Another risk exists. Although the Senate must reach a two-thirds supermajority before removing an officer under Senatorial precedent, Senators vote for disqualification separately from removal merely upon a majority vote. Should that precedent hold, then a bare majority of the Senate, after impeachment by the House, could convict a civil officer. The extraordinary two-thirds level inserted in the Constitution would be evaded.

Supporters of a continuous impeachment power might argue that a two-thirds vote for disqualification would be needed if there had been no prior two-thirds vote for removal. The answer may be that the Senate precedent is just wrong—that the Senate should either automatically disqualify all convicted officers from holding office in the future or disqualify based on the same two-thirds vote required to remove an officer from office. But, the Senate’s practice does suggest the danger in separating the removal and disqualification remedies—once removal is no longer relevant. Both remedies should be determined contemporaneously.

Moreover, the Supreme Court has construed the Bill of Attainder Clause to reach punitive action short of incarceration. In *Cummings v. Missouri*, for example, the Supreme Court struck down a provision of Missouri's constitution that precluded all who had sympathized with the South from holding a number of jobs within the state.⁴⁶ The Court reasoned that “[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment.”⁴⁷ And, in *Ex parte Garland*, decided the same day, the Court similarly held that “exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.”⁴⁸ More recently, in *United States v. Lovett*, the Court held that an appropriation act prohibiting any federal agency from paying further compensation to three specified individuals because of their Communist sympathies similarly was a Bill of Attainder.⁴⁹

One might argue that disqualification from office is more of a preventative measure than one of punishment. After all, the officer's misconduct in the past arguably has made him or her unfit to hold any office of trust in the future. The Supreme Court has rejected the salience of that rationale in yet another Bill of Attainder case, *United States v. Brown*.⁵⁰ At stake was disqualification of anyone who had been a member of the Communist Party within the past five years from being an officer or employee of a labor union. To the Court, however, “[p]unishment serves several purposes; retributive, rehabilitative, deterrent—and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”⁵¹ Disqualification plainly falls into the type of legislative action that falls within the scope of the Bill of Attainder provision.

The possibility of vindictiveness goes beyond disqualification from future office. Consider that Congress could pass a statute stripping all officers who have been impeached of their federal pensions.⁵² In this age of partisanship, one can readily imagine use of the impeachment remedy to strip pensions from leaders of the opposing party who formerly held office, even years after their service. To construe impeachment to allow such a backdoor

46. 71 U.S. 277, 320, 322 (1866).

47. *Id.* at 320.

48. 71 U.S. 333, 377 (1866).

49. 328 U.S. 303, 316 (1946).

50. 381 U.S. 437, 458 (1965).

51. *Id.*

52. Congress has enacted a provision stripping pensions from a President who has been removed from office during his or her term. 3 U.S.C. § 102 (2011). Congress readily could extend the statute to any President impeached even after his or her departure from office.

into Bills of Attainder runs counter to the constitutional design. Separating disqualification from future office from removal from current office transforms the impeachment remedy into a punishment.

Of course, in a sense, the Bill of Attainder argument proves too much, because impeachment is a constitutionally recognized exception to the proscription on Bills of Attainder. The argument here, rather—parallel to reasoning about the ex post facto norm—is that the greater the temporal reach of the impeachment authority, the greater the tension with surrounding constitutional provisions. Given the Framers' insistence that Congress's power be limited by prohibiting Bills of Attainder, Congress's power of impeachment should be confined to contemporaneous concerns.

CONCLUSION

The temporal dimension of impeachments may never become a contentious issue in the future. Yet, focus on the language in the two impeachment clauses as well as on the structure of the Constitution as a whole lends strong support to the argument that impeachment should be confined to those occupying an office, and departure from that office deprives Congress of jurisdiction. The deterrence argument for a continuing power of impeachment is overstated, and for Congress to be able to impeach and disqualify an officer years after the conduct in question (and possibly by a majority vote in the Senate) would resemble too closely a Bill of Attainder.

To be sure, it may seem discordant that an officer can escape future disqualification by resigning before the House can finish debating impeachment and certainly before the Senate has voted on whether to convict. But, the Belknap scenario can be addressed without recognizing a continuous power. It does little violence to the constitutional text to reason that, as long as an officer served in office at the time formal impeachment proceedings started, then the House and Senate retain jurisdiction to continue the process because the officer was "in office" at the commencement of the proceedings.

Indeed, examples of this dynamic in our jurisprudence are many. For one example, consider diversity jurisdiction. If the parties are diverse at the time the proceeding is initiated, the federal courts long have maintained jurisdiction even if one of the parties thereafter moves and diversity no longer exists.⁵³

53. As Chief Justice Marshall stated in *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824), "[i]t is quite clear, that the jurisdiction of the Court depends on the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events"; see also *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) ("jurisdiction, once attached, is not impaired by a party later changing domicile.").

For another example, an Article III case or controversy can continue even if developments after initiation of the suit seemingly moot the controversy. Of greatest relevance here, voluntary action of the parties, like a resignation in the impeachment context, rarely moots the controversy because the harm can be renewed—in this case resumption of public office.⁵⁴ Just as with courts' jurisdiction over controversies, Congress's jurisdiction over impeachment can be ascertained at the formal start of impeachment, not at the end, and in that way, the importance of the disqualification remedy is preserved.

On the other hand, if the officer serves out his term or resigns (or is fired) before the House commences proceedings, no jurisdiction to proceed should exist. President Clinton's eleventh-hour pardons may be criticized by history and may have hurt his party, but should not be subject to an official impeachment inquiry. Once President Trump leaves office, he should not be called to account for his conduct by future Congresses bent on impeachment. The Framers designed the impeachment remedy to protect the public by removing an officer, not to punish the offender.

54. See, e.g., *Friends of the Earth v. Laidlaw Env'tl Servs.*, 528 U.S. 167, 191 (2000); *United States v. Or. State Medical Soc'y*, 343 U.S. 326, 333 (1952).