



Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

President Trump left office this week, shortly after the House voted to impeach him. On today's episode, I'm joined by two of America's leading constitutional commentators who will debate the question, can the Senate try and convict the president for impeachable offenses after he's left office?

Judge J. Michael Luttig was recently named councilor and special advisor to the Coca-Cola company. He is a former United States circuit judge of the United States Court of Appeals for the fourth circuit and a great friend of We the People. Judge, it is wonderful to have you back on the show.

Judge Luttig: [00:00:59] Well, thank you, Jeff Rosen. I appreciate it.

Jeffrey Rosen: [00:01:03] And Keith Whittington is William Nelson Cromwell professor of politics at Princeton University. He is the author of many books, including "Repugnant laws: judicial review of acts Congress from the fountain to the present." He's also the author of the explainer on the impeachment clause on the Interactive Constitution and blogs at the Volokh Conspiracy. Professor Whittington, thank you so much for joining.

Keith Whittington: [00:01:26] Thanks for having me.

Jeffrey Rosen: [00:01:28] Judge, let's begin with you. You wrote an influential op-ed in the Washington Post arguing that the president cannot be tried by the Senate after he has left office. Please tell us why you've reached that conclusion.

Judge Luttig: [00:01:45] Jeff, well, let me first say that there's no place that I would rather be on this historic day than at the National Constitution Center, with you, and with Professor Whittington. This is a singular moment in American history. Both political history and constitutional history. We've all been witnesses to, we've all been participants in that history over the past month. Never before have so many constitutional events converged into a single moment, raising for our country and the American people so many profound, constitutional issues. I believe we can expect, and we can certainly hope, that never again will we arrive at such a fraught constitutional moment. But the moment has revealed and the moment has borne out with spectacular clarity, the insight, the foresight, and the genius of our founders. The Constitution, and the rule of law that it embodies and charts for the nation, has prevailed in what many believe was its supreme test.

So, Jeff, I suppose that's a long-winded way of saying that it's truly my pleasure to be here with you today. I would only ask rhetorically whether I get counsel to represent me, since Professor Whittington and you, Jeff Rosen, both are thus scholars of constitutional law, have already predetermined the result of this constitutional question. With that, I'll turn to your question. In discussions with Professor Whittington before we came on air, I confessed and admitted to him that I had not begun my thinking about the impeachment clauses and the



impeachment power, much less my writing on that subject until last week. I confess that in response to his telling me that he had been thinking and writing about the impeachment powers for over 30 years.

So, I wanted to reduce expectations by saying that at the outset. I did begin my thinking and my only writing on this subject about a week ago in the Washington Post. What I concluded, and then wrote in the Washington Post, that was that textually, as a matter of constitutional interpretation, was that the impeachment power extends only to incumbents in office, the civil officers and other officials such as the president and vice presidents that are identified in the Constitution as subject to impeachment. I still today, after considering all of the good, good arguments that have been made by Professor Whittington and others, including my good friend Larry Tribe, I am still of the view that there is a matter of constitutional interpretation that the House and the Senate, in this case, the Senate, is without the power to convict a former president under the impeachment clauses.

And then, therefore, as a consequence of that impeachment, disqualify the former president from further future public office. I came to that conclusion, of course, after also considering the history of impeachment, which includes, as Professor Whittington can tell us much better than I, instances in which the Senate and the House and the Senate, both took the view that they could proceed to impeach, convict, and penalize a former officer. In the two instances that I'm referring to in the Washington Post, it was the case of Secretary of War and a Senator. As I said in the Washington Post op-ed, those historical instances of the Congress' conduct are evidence that a Congress, that of course would not be binding on the current Congress, but that a Congress could conclude that it had the authority under the Constitution to impeach a former officer, including the president of United States, but for reasons that we'll discuss as the hour goes on, I am satisfied that is--the constitutional question of whether the Congress can impeach a former officer, is not a question that is committed to the Congress of the United States by the Constitution. But rather, is a constitutional question that only the Supreme Court can decide. Jeff, with that, that's the overview of my thinking.

Jeffrey Rosen: [00:07:24] Thank you very much for that overview. Thank you for outing the fact that I have indeed revealed my views on this matter. I do agree with Professor Whittington, as do, according to the congressional research service, most scholars who have closely examined the questions concluded that Congress does have the authority to extend the impeachment process to officials who are no longer in office. Nevertheless, I am setting aside all my own views in this podcast, and I am nothing more than a pencil but ears. So, from now on, I'm just going to ask you each a to respond to each other. And I will note that Professor Whittington wrote a response to your op-ed in Lawfare, in which he respectfully took issue with your textual and historical conclusions. So, Professor Whittington, tell our listeners why you disagree with Judge Luttig's conclusion.

Keith Whittington: [00:08:23] I appreciate the opportunity to do this. As Judge Luttig mentioned, this is an extraordinary constitutional moment, important for the nation to think these issues through. And as is usually the case with a presidential impeachment, there's going to be lots of high feelings, both from a partisan basis, but more generally, politically.



That's going to affect how Congress approaches its task as well. But I think as best we can we need to try and take the issues themselves as seriously as we can to try to think through the constitutional issues.

And these four are terrific opportunities to try to think them through and hopefully educate the public, and while I know Judge Luttig mentioned that we're prejudged here, since it's two out of three on this particular issue, it's ultimately the audience that matters those of us who are listening to the podcast can certainly make up their own mind. And at the end of the day, it's going to be the senators who have to make up their mind as to how to approach these issues. I am skeptical of the argument. I don't think it's an easy question, as to whether or not you can try former officials.

I think it's even less easy about whether or not the House can impeach former officials, although the thing in front of us most directly is of course, whether or not we'll have a trial of a former president. Certainly, I think the intuitive answer is the one that Judge Luttig reached in his Washington Post op-ed, in imagining that the general purpose of the impeachment power is to deal with officers who are currently exercising power and you don't think can be trusted to continue to exercise that power. And as a consequence, you think they need to be removed quite quickly. That certainly was what motivated the founders. When they were first thinking about the impeachment power, they were particularly concerned, in particular with the president of United States, and the possibility you're going to give an individual a very powerful office, for a very long period of time, you needed some kind of mechanism to remove him if things went really badly. And so that's front and center in what they're thinking. The question is, is that sort of exemplary case that they most have in mind the full scope of the impeachment power? And I think it's not.

Just to focus on the text itself and we can certainly dive into the history more, and we do have some history of how Congress has approached this question in the past. But the text itself, I think, is not as well written as we might like. This is an instance, I think, when the framers could have been clearer about what they were doing, some of the state constitutions are clearer about the nature of the impeachment power that they include compared to the federal constitution.

But I think the really notable feature of the federal constitution, one is of course, it doesn't rule out, it doesn't explicitly deal with one way or another how we ought to think about former officials either to say they're definitely included are they're definitely excluded. So, we're left reading the tea leaves of what's remaining in the text of the Constitution.

And I think the very starting point, the point of where the Constitution talks about impeachment power, it is what it says about the House of Representatives and then what it says about the Senate. And it says the House of Representatives shall have the sole power of impeachment and the Senate shall have the sole power to try all impeachments.

So, one initial question is what's embodied in this power of impeachment that the framers gave to the House of Representatives and then follow through with the Senate being able to try those impeachments. And of course, that's not a term they made up. They were familiar with an impeachment power before. That's a power that existed in the British Parliament



and existed through British parliamentary practice. Moreover, it existed in the American colonies and it existed in the American state constitutions before the federal constitution of 1787 was ratified. So, this is, for them, a preexisting power they're familiar with, they're familiar with its contours.

And so, when they're handing this power to the House of Representatives and to the Senate, they have something in mind as to what they're handing them. And notably, all that history includes the possibility of impeaching and trying former officials. The British Parliament had done it. The state constitutions, in many cases, explicitly allowed it, in some cases required that the impeachment occur after the official had left office.

And there are references in the Constitutional Convention that's just, they're familiar with that practice and understand the contours of it. And again, like we said before, intuitively of course, we think about current officers as being the most important thing that we might want to deal with through the impeachment power. And that's what they had in mind as well. And it's the removal power as part of what they're interested in. But they also recognize that the impeachment power had been used as a way of uncovering bad conduct by government officials when they were occupying office and had engaged in misconduct in those offices, to expose it to the light of day and then condemn those officials for having engaged in it.

The British Parliament used it that way, state legislatures had used it that way. And there's reason to think, I think that the framers, in thinking about the Philadelphia constitution also have that in mind and they certainly don't rule it out in the text of the Constitution.

Jeffrey Rosen: [00:13:14] Thank you so much for that. Judge, so, we've talked about the text and you're both debating whether or not the requirement of removal and disqualification means you have to be removable before you can disqualify. And now Professor Whittington has introduced an argument about original understanding and others have supported his claim that the framers understood the impeachment power to allow for the impeachment of former officers. And Jed Sugarman has written a case on the Shugrblog an originalist case for impeaching ex-presidents, quoting the framers, George Mason, Edmund Randolph, and Gouverneur Morris on behalf of the proposition that "guilt, wherever found, ought to be punished" that Randolph said in supporting the idea of impeachment and conviction after leaving office. What is your response to that originalist history?

Judge Luttig: [00:14:08] Well, first let me add Jeff that I did eventually conclude that the text of the Constitution was clear that a former officer could not be impeached, and as per that textual argument at this point, I would just say that I don't believe anyone would ever argue that at the very least, the primary purpose of the Constitution impeachment power is to impeach an individual who's incumbent in office at the time of impeachment. So, the only question that's being teed up textually or otherwise is whether the text of the Constitution can be read to authorize the impeachment of a former officer. Professor Whittington and others, Professor Whittington in his article for Lawfare, reasons that the Constitution is silent on the question. And that the founders quote, would easily have understood the impeachment power implicitly includes jurisdiction over former officials. And, for that



observation, he cites the British practice, which I want to of course, take his word for, you know, establishes that that former officials could be impeached. But for me, I would today, to be provocative, I would rely upon Professor Whittington's reasoning, as he lays out in his Lawfare piece to establish the constitutional fact, in my view, that the Congress cannot impeach a former official.

That is, Professor Whittington, who can agree the Constitution as well, if not better than I do, says that it's silent on the question and the founders could easily have understood the impeachment power implicitly to include jurisdiction over a former official. Yes, I would say, they most certainly could have.

The question is, did they? And there's no evidence that I've seen to confirm that they in fact understood the impeachment power in that way, implicitly or otherwise.

Jeffrey Rosen: [00:17:10] Thank you so much for that. Professor Whittington, let us talk about what seems to be agreed on as the most relevant historical precedent, and that is the Belknap impeachment. According to the congressional research service report, the principal precedent is the 1876 impeachment of Secretary of War William Belknap. I'll ask you to tell the story and why was it that after the Senate decided that it did indeed have the power to try a Secretary of War who resigned before his trial, the House managers concluded a great goodwill will accrue from the impeachment at trial of the defendant that has been settled, thereby the persons who held civil office under the United States are impeachable. Hence, the Senate has jurisdiction to try them, although years may elapse before the discovery of the offense or offenses, subjecting them to impeachment. Tell us about the Belknap precedent and why you think it supports your case?

Keith Whittington: [00:18:12] So, William Belknap was the Secretary of War in the Grant Administration. So just after the Civil War during Reconstruction. As many know, this is a period in which federal government increasingly was struggling with corruption, a problem that continued through many years of the late 19th century and the period after the Civil War. Belknap was accused of corruption and was under investigation by the House, for being corrupt while performing his duties in the office of Secretary of War. He resigned in order to try to avoid the continuation of the impeachment process. And then at last the House and Senate decided to move ahead, despite his resignation. The Belknap case is interesting for all kinds of reasons. It's the one time we've actually impeached a cabinet member, extraordinarily rare in American history, although they clearly are covered by the impeachment power, but generally speaking, when cabinet officials find themselves in this kind of political hot water, they either resign or are fired such that it's not necessary to attempt to remove them.

And likewise, in Belknap's case, he resigned rather than require the Senate to actually convict and remove him. But as you noted, nonetheless they moved forward and proceeded with a Senate trial. His defense attorneys made a motion to have the case dismissed in the Senate trial because the Senate no longer had jurisdiction as a consequence of his resignation. That motion was defeated. But ultimately Belknap was acquitted and he was



acquitted in part because some of the senators still were not convinced that they had a jurisdiction in the trial.

I think that's the real quandary for the House managers in the Trump case as well, that they may be able to get past the initial motion to dismiss, because that only requires a majority of the centers to be persuaded. But in order to convict, you need two-thirds of the senators and any kind of doubt that might creep in for a significant number of senators, makes it really difficult to win a conviction. It also complicates our reading about how should we think about these precedents, right? So, on the one hand, the House proceeded in the trial. The House on its own grounds for it, as its own precedent, thinks it has authority to proceed in these cases.

It survived a motion of dismissal. So, a majority of the Senate in the Senate trial in Belknap's case agreed that they had jurisdiction. But of course, Belknap was not convicted and there were all kinds of reasons why he was not convicted. Some doubted the evidence, some doubted whether or not he actually violated the law in terms of the corruption charges, and then some down to these jurisdictional issues. So how should we think about that from a precedential perspective? And it is part of the awkwardness of impeachments that we have these dual decision rules that are occurring, that muddy the waters.

The other case that's worth thinking about a little bit though is also Robert Archibald, who was a judge in the early 20th century, also charged by the House with corruption. In Archibald's case, part of what's interesting about that case for this purpose is that he had served as a district court judge and then had been elevated to a circuit court judge and the House found corruption in both cases, both with you as serving as a district court judge, and then 10 years later as a circuit court judge and they brought impeachment charges against him for both. And so, in his case, he did not resign. So, he was still a circuit court judge at the time of his Senate trial. But one thing his lawyers argued in the Senate trial was I cannot be impeached, and you cannot put me on trial for the things I might have done as a district court judge, because that's not the office I hold anymore.

And if you're going to impeach me and try me for charges, they have to be for my current office, not the past office. Again, this survived a motion to dismiss. Those charges went all the way to verdict. But again, the House could not muster two-thirds majority to actually convict Archibald on those charges arising from his district court service, although they did convict on the charges arising from his circuit court service. And so, he was removed, and in fact, disqualified from holding future office as a consequence.

So again, we have another instance where they send it, allowed it to proceed to verdict. They held a trial on the basis of those charges. But again, it becomes very hard to actually win the two-thirds necessary to convict simply because some senators are going to still have doubts about the constitutionality of proceeding that far.

Jeffrey Rosen: [00:22:18] Thanks so much for that. Judge Luttig, as Professor Whittington concedes, it's hard to read the Belknap and other precedents because different senators have different reasons for voting the way they did. And indeed, the scholar Cass Sunstein



has read the Belknap precedent for the unexpected conclusion that ex-presidents cannot be impeached by the House but can be convicted by the Senate.

So, different scholars are reading these precedents in different ways. How do you read the Belknap precedent? And what's your response to the congressional research service's conclusion that it stands for the proposition that former officials can be convicted and tried in the Senate?

Judge Luttig: [00:22:55] Let me take that high inside fastball first. I don't... but elegantly, I don't think that we scholars of the Constitution, should be much concerned about what the congressional research says and what constitutional propositions they draw from the historical events. But let me go back to what is important. Professor Whittington suggested that that varied permutations in the examples, historic examples, complicate the constitutional question.

I don't think so at all. I think that all of the examples, including those that he mentioned and others that he did not. They all stand for the proposition, if you will, that the Congress can decide that it has the constitutional authority to impeach a former official, and even in one case, to disqualify that impeached former official from holding future public office.

I grant that and I'm utterly convinced that that's true and how I dealt with that in my original thinking with the Washington Post op-ed was, as I laid out, there's no question that Congress can decide that it has the power, but we know from constitutional interpretation doctrines that when you have a dispute among, or between the branches of government, as to the power that exists, that question is decided by the Supreme Court of the United States, but more importantly, at the moment, my point is constitutional interpretation, doctrine of interpretation, constitutional interpretation, tells us that in that event, the federal courts up to, and including the Supreme Court, consider a view of the coordinate branch's view of its own authority, a weighty consideration. But we also know in the end, that it's not conclusive as to whether that coordinate branch has the ability that there's a service.

Jeffrey Rosen: [00:25:38] Thanks so much for that. Before we turn squarely to the question of whether the Supreme Court would review this case and what it would hold, I'd want to ask you, Professor Whittington to say more about the conclusion and your response to Judge Luttig in Lawfare that the sole purpose of impeachment is not to remove an office holder to prevent future harm in that particular office, as Judge Luttig argues. Instead, you argue that the impeachment process can serve as a warning to future office holders by quickly and decisively condemning certain actions as intolerable. Congress not only purges the particular malefactor, but also attempts to purge the misdeeds in the system and set-up prophylactic to prevent their occurrence, and you give the examples of the trials of Justice Samuel Chase and President Andrew Johnson were not removed, but both the trial and the impeachment were important vehicles to Congress to deliberate on and construct new constitutional understanding. Tell us more about that argument.

Keith Whittington: [00:26:43] So I think it's, as I noted before, I think it's clearly the case that the primary thing the framers are thinking about when they're including the impeachment power in the U.S. Constitution, and I think the primary way we've historically thought about



the impeachment power, is for the possibility of removing government officials who are incumbent officials who are misusing powers in various ways. I don't think that's necessarily the only reason why we have the impeachment power.

And once we take more account of the other things, we also have done that the impeachment power, the more it makes sense as to why it is you might want to impeach a former official, and certainly have a trial of a former official as well. So of course, on the one hand disqualification is also on the table.

The framers only allow for two possible punishments that the Senate can impose on those for convicted and impeachment trial. That's a significant reduction of the range of possible punishments that the British Parliament imposed on people when they convicted people in a trial. So, it's an important alteration of the constitutional power of impeachment and where it can go.

But notably only one of those is removable. The other option that the Senate has in addition to removal after conviction is to impose the punishment of disqualification from holding a future federal office. And disqualification is still relevant. Even when we're thinking about former officials, the House very rarely asks for disqualification from future office, the Senate has very rarely applied that punishment to those that it has convicted. But it is part of the impeachment power built right into the text. And so, I don't think we want to lose sight of it completely. The other reason, I think that impeachments have been important over the course of American history is to try to buttress a set of constitutional norms and sometimes to clarify what the norms ought to be going forward. They are partially about dealing with a particular individual who's holding office right then, and his particular misdeeds.

But in part they're also about trying to send a signal to the larger body politic about what is tolerable and intolerable behavior from government officials moving forward. In most instances, that's not very relevant. Everyone already knows that judges should not be corrupt. And so what you're confronting is a district court judge who is taking bribes under the table, for example, it's enough to get that person out of office and if that person has to be impeached and removed in order to do it, that's great. If the person is willing to resign before the impeachment is carried out, that's great too. It accomplishes what we have in mind. But especially in high-profile impeachments, that's often not just the only question at stake. Often the norms involved are less clear or they've been violated in particularly egregious ways and such that it becomes important for Congress to be able to convey the fact that we don't want any government official in the future to do this.

We might imagine that that's the case with the Trump impeachment, now. We're part of what Congress wants to accomplish is to condemn this kind of behavior, such that it doesn't get repeated. But that was also true, I think of the Chase impeachment, Justice Samuel Chase, who was the only Supreme Court justice to ever be impeached. He was impeached early in nation's history by the Jeffersonians. And President Andrew Johnson, who was impeached during Reconstruction by the Republican Congress. In both cases, those individuals were not convicted by the Senate, although they narrowly escaped a conviction in both those cases.



And as a consequence, they're often read as failed impeachment efforts. Precisely because those officers were removed from their positions. Part of what got me interested in impeachments in the first place is I thought that judgment was mostly wrong, that it missed what those impeachments did manage to accomplish which was to send important signals about how presidents and how justice ought to behave in the future.

And so, part of what Chase was impeached for was being too partisan, to be too clearly involved in Federalist politics while he was serving as Supreme Court justice. And one thing that justices and judges learned after that was you should not be partisan while serving as a federal judge.

And you should change your behavior so that you do not act the way that Chase did that led to him being impeached and the Jeffersonians were extraordinarily successful in establishing that norm about what the judiciary ought to look like going forward. And likewise, that was true about Andrew Johnson. Well, Andrew Johnson had engaged in some quite innovative norm-breaking acts in the context of his time. And one thing that Congress wanted to do was insist the presidents should not do those kinds of things going forward. And presidents didn't for several decades, presidents avoided the kinds of activities that Johnson engaged in.

And so, in that sense, I think, again, it was a successful impeachment in terms of clarifying for the political system, how we expect office holders to behave even if it was not successful in the sense of actually removing a particular government official. And that messaging aspect of impeachment, I think becomes particularly relevant when we're thinking about a high-profile former officer, like an ex-president Trump for example.

Jeffrey Rosen: [00:31:29] Thanks so much for that. Judge Luttig, what do you make of Professor Whittington's argument that the purpose of the impeachment clause is not only to prevent future harm to the nation by removing an officer, but also to send a message about norm-breaking? One could imagine a Republican Congress impeaching and convicting President Obama and disqualifying him from serving on the Supreme Court. Is there a danger that if we broaden the meaning of the impeachment clause and in the way Professor Whittington suggests, then there's more of a likelihood of partisan impeachment?

Judge Luttig: [00:32:14] Well, on that question, Jeff unquestionably but on your first question, of course, Professor Whittington is correct. There are any number of constitutional policy reasons for impeachment. But if you believe as I do that the Constitution only permits an impeachment of an incumbent officer, then there are only two constitutional remedies, and therefore, only two possible constitutional purposes. I'm drawing the distinction, obviously, between policy purposes for impeachment and the constitutional purposes of impeachment. If you believe the Constitution provides, as I do. So, if the Constitution doesn't permit Congress to impeach a former official, then we know from the text that the primary purpose is we're removal from office. Now, as Professor Whittington, and other of those who believe that you can impeach a former official point out, but there is also a second remedy in the Constitution, and that is disqualification from future public office.



Those who believe that the Constitution permits a former officer to be impeached, believe or reason from the existence of that second remedy of disqualification that the Constitution must therefore authorize impeachment of a former official. I think that that's just wrong because of that optional remedy, it's optional only to removal from office and if you, and as I said, in my view, you must have a constitutional trial and conviction in order for the Congress to avail itself of the optional remedy--additional remedy, I should say, of disqualification. I don't think that you can reason from the mere existence of that additional remedy that the Constitution permits impeachment of a former officer, because it is an available remedy or available remedy, I should say, for the removal of an incumbent official. So, we have to find evidence if we are to agree with Professor Whittington and others, find evidence that proves that the founders intended to empower Congress to impeach a formal official, the mere existence of that additional remedy is not proved because it is proof itself of the limited, more limited, power to impeach only an incumbent officer. Well, that was less eloquent than I prefer to be. But the idea is there.

Jeffrey Rosen: [00:35:57] Thanks so much for that. Professor Whittington, I'll ask you to sum up your substantive arguments for why you think that the Senate does have the power to try a former officer. And one of the important ones that you and others have made, is that an official shouldn't be able to avoid the penalty of disqualification from holding future offices simply by resigning moments before an impeachment over for the trial.

Keith Whittington: [00:36:24] It's certainly a difficulty that you could potentially leave the congressional process in the hands of the individual who we think is engaged in misconduct, that they can short circuit that process and bring it to a quick conclusion by simply resigning office. And as a consequence, denying the Senate, and maybe even the House, jurisdiction over their actions. You can imagine the Constitution is actually designed that way.

And maybe that would be the case. Certainly. I think it becomes an even more difficult question, if disqualification was not included as a possible penalty associated with the impeachment power. If the Constitution only mentioned removal or said, for example, that the power of the Senate to post punishment on the convicted and impeachment trial could extend no further than removal.

And then, in particular, we would have to start worrying about okay, what would be the point of engaging impeachments that can only result in removal for when we're talking about a former officer, one answer, I think that would still be on the table, even in that context, is the public condemnation of the behavior.

And one rationale that legislatures have traditionally pursued for impeaching and one reason why we wanted the impeachment power, and it was understood that it exists was an order to expose wrongdoing by particular government officials. So, imagine, for example, as was the case in the early state constitutions when many government officials only held office for a year and often the legislature wasn't even in session for a good chunk of the time that for example, a governor might hold a term office.

One of those constitutions were designed to do is allow for the possibility for legislature to look back on the conduct of that kind of official when they were holding office and expose



the misconduct they had engaged in and condemn it as unacceptable, both in terms of sending the message to the larger system, but also in order to condemn that individual, for having engaged in bad behavior while they were conducting a high office. So, I think there are circumstances in which we might think it's particularly important to provide Congress that opportunity to be able to review what happened and condemn it. Now, of course, in our modern context, we think about all kinds of tools that Congress might have to do those things.

We accept resolutions of censure as being available for Congress to expose, although something that early Americans argued about whether or not Congress had a power to do that. Congress routinely holds oversight hearings in order to try to expose bad behavior. But nonetheless, the impeachment context is a particularly significant and high-profile and enigmatic way of trying to address wrongdoing when it occurs.

I would just also note that one piece of further historical information about this is the impeachment of Warren Hastings that occurred in England. That was contemporaneous with the founders meeting in Philadelphia to draft the Constitution. Hastings had been the governor of India but was accused of corruption and misbehavior when he had been conducting his duties in India.

But at the time of his impeachment, by the House of Commons, he was no longer a government official. He had resigned and left office as well. And the founders were aware of the Hastings impeachment. They referenced the Hastings impeachment in the convention debates and more of them reference it positively.

That is to say, there's an insistence that we need to be able to get to situations like Hastings with this impeachment power. And what they're primarily arguing about in context, when they make that claim, is they're worried about high crimes and misdemeanors, what the kinds of crimes are that can lead to impeachment, need to be broad enough in scope to address the Hastings situation that they saw occurring in England. But no one suggested well look, Hastings is going to be a problem for us because Hastings is a former official and we shouldn't do it. And notably, the prior impeachment that the House had engaged in and Parliament which occurred earlier in that century, was also a former government official. So, all of the examples they had in hand of thinking about how's this impeachment power used in England, for example, all the recent examples are in fact, of former officials. And so I think, again, it just would have been the most natural thing in the world for them to think that when those people engage in misconduct, even if they've already left office, it should be possible for the legislature to expose the fact that they engaged in that misconduct and condemn them for it in a formal proceeding in which the office holder or former office holder, as the case may be, has the opportunity to defend themselves as is the case in the context of the Senate trial.

Jeffrey Rosen: [00:40:40] Thanks so much for that. Judge Luttig, please respond to any of those points you think are necessary. And then let's turn squarely to the jurisdictional question. And in particular, whether the Supreme Court is likely to weigh in. In your op-ed piece, you argue that in the end, 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. It is highly unlikely the Supreme Court would yield to Congress's view that it has the power to impeach a president who is no longer in office when the Constitution itself is so clear that it does not. Tell us why you reached that conclusion.

Judge Luttig: [00:41:15] Yes, Jeff, first in response to that invitation, I would just say this about the Hastings case and the similar cases from British experience and redounding that Professor Whittington has recited cited and knows far more about it than I do.

I would, in interpreting the Constitution itself, I would draw the negative inference from the fact of these impeachments and the fact that the founders knew of them and did not provide explicitly for impeachment of a former officer that the Constitution does not allow for such. And turning to the justiciability question that you raised next.

I don't have any doubt at all. And in fact, Supreme Court case law and other federal court statement case law establishes such, that much, if not all, questions surrounding the impeachment process are committed to the Congress of the United States and thus nonjusticiable political questions.

But I am convinced that the single exception to that is the overarching constitutional question of whether the Congress and impeach a former officer. I don't have any doubt about this in the world. Not that that makes it, so I'm just saying I've thought a great deal about it, and I'm convinced of it.

And Professor Whittington found himself tempted to come to the same conclusion but didn't draw the final conclusion. So, to his great credit, though, he raised the issue and that's the way I present it to the National Constitution Center. Professor Whittington, towards the end of his good piece in Lawfare, raised the distinction that I, in fact, rely upon. He, in discussing the Walter Nixon case, there, Professor Whittington said, you know, I wonder, you know, if you could not distinguish the current case with President Trump from cases like the Walter Nixon case on the grounds that in those other cases, the courts were concerned only with the impeachment process. In the Nixon case, the Walter Nixon case, the question was whether or not there was, or had been, or would be a Senate trial within the meaning of the Constitution. Had I been sitting on the federal court, without much thought at all, I would have held that that is a political question committed to the discretion and prerogative of the Senate of the United States and thus nonjusticiable. And there are several other cases that are along the same lines and that I would confidently distinguish on the ground that I did previously, which is those questions are all about the impeachment process. That's not a question for the courts to concern themselves with.

In contrast, the high constitutional question of whether Congress can impeach a former official or rather whether they are empowered only to impeach an incumbent in office, that I am utterly convinced is a question that only the Supreme Court can decide, Jeff.

Jeffrey Rosen: [00:45:46] Thank you very much for that. Professor Whittington, you reach the opposite conclusion on the jurisdictional question and said you read the Walter Nixon case differently and concluded that this is not a matter of for judicial resolution. Tell us what



the Walter Nixon case said and why you concluded that the Court's sweeping conclusion in that case, that parties do not offer evidence of a single word in the history of the constitutional convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers, you say that that sweeping conclusion is not very promising, for the justiciability for this issue.

Keith Whittington: [00:46:43] So the Walter Nixon case is really the only time when the Supreme Court has weighed in on the impeachment issue at all. It involved the case of a federal judge who was impeached and put-on Senate trial and ultimately convicted. And the question there was how the Senate conducted its trial. So, the Senate adopted a new process for how the Senate had done it before in holding a trial, which is, they primarily delegated most of the trial activities to committee to actually hear witnesses and pursue the evidence.

And then the full Senate voted on the trial record basically assembled in the committee. And the question for the court was, does this count as a trial as the Constitution commands the Senate to hold a trial in the context of impeachments? And the court concluded that this is a political question entrusted entirely to Congress. And as a consequence, this court shouldn't weigh in one way or another as to whether or not this meets the standard of trial. I think it's quite evident that the court would take a similar view to all kinds of other impeachment related questions.

So, Alan Dershowitz during the first Trump impeachment strongly argued that the court ought to review and would review what counts as high crimes and misdemeanors, such that if you have impeached or convicted an officer for something that was not truly a high crime misdemeanor according to the Constitution and that the court would in fact intervene to set that verdict aside.

And I thought that was also mistaken as an analysis of what the court likely do, especially given what it's said in the Nixon case. It does have its very sweeping claim in the Nixon case that the entire impeachment power is entrusted to Congress. And as a consequence, is a question for a different body to resolve.

There's not a lot of reference, for example, to we don't have manageable standards here, which is also one of the ways in which the court deals with political questions, just to say, this is not something that provides enough guidance for courts to become involved. And we might think that's true about high crimes and misdemeanor, for example. I do wonder if this jurisdictional question wouldn't open the door a little bit to additional intervention despite that kind of broad claims. So, you can imagine the Court thinking, well, when we said the impeachment power, broadly, we didn't really mean this question about jurisdiction and whether or not you can hold trials of former officers.

Because they might think the text is clear, here. And so, as a consequence, there's a firmer standard that they can rely on. They might think that that jurisdictional question is part of the boundary line of determining what exactly has been entrusted to a different branch and as a consequence, the courts opt to patrol that boundary line to make sure that they weren't going outside it.



So, imagine an instance in which, for example, the House impeached a private citizen, who's never held government office at all. It's universally regarded in the American context that those people cannot be impeached. The House cannot impeach me, for example, no matter how much they might dislike me and would like to publicly condemn me and perhaps even disqualify me from holding future office. It's universally regarded that private citizens are out of bounds from the impeachment power. But imagine the House did it nonetheless, and the Senate even held a trial and convicted somebody. It would surely be extraordinarily tempting for the court to want to weigh in on that and say, ah, that's out of bounds, a violation of the Constitution and can't be allowed.

There's also practical issues the court raises in the Nixon case, I think are less pressing in this kind of context. Which is, one of the things the Nixon case raised was this possibility of, well, imagine as Alan Dershowitz encouraged us to imagine, imagine the House impeaches a sitting president and the Senate convicts and removes the sitting president, and then the sitting president, or that president who just has been convicted and removed, now appeals to the courts to intervene and order to deny that he has been constitutionally removed from office and the court takes up that question and schedules a hearing and is eventually going to issue an opinion, in which case we'd have a period of time in which two different people were simultaneously claiming to be the president of United States. And that's clearly a disastrous situation.

And so, the court suggested really, we ought to stay out of these things in order to provide greater clarity for what happens in this process as well. But with a former official that's much less of a prudential issue that we ought to necessarily worry about. So, at the end of the day, I'm particularly inclined to think the part of what's important about the impeachment power is that it is a firm marker of the supremacy of Congress within the constitutional system.

Our system has moved a great deal towards judicial supremacy, in which judges are convinced that they have the final say about any and all constitutional questions and the space of thinking about constitutional questions that should not be resolved by judges is shrinking every term practically, but the impeachment power is given to Congress for a reason. It is the first branch of the government; it is the most democratic branch of the government. And only Congress has the authority to remove the members of the other two branches from power when the Congress believes that they've misbehaved. And in this sense, I think the Senate really is the final court of appeal, when it comes to impeachment. That's not to say the Senate might not be abuse its power. That's not say the Senate is always going to get it right. The Senate might well make mistakes. But that's true about the U.S. Supreme Court, too. And as we sometimes say about the U.S. Supreme Court is not final because it's always right. It's right, because it's final. And that's true about the Senate too, I think in the impeachment context. It is the final and ultimate court in resolving these questions. And even if the Senate makes a mistake, they get the last word on that mistake and they ought to because they are the most democratic branch in this context to resolve these questions, and as a consequence, this is the one place where they have the highest authority to speak to what the meaning of the Constitution is and what the issues are that brought the impeachment forward in the first place.



Jeffrey Rosen: [00:52:23] Thanks so much for that. Judge, your response? Professor Whittington has argued to get to your result the Supreme Court would run the risk of upending the constitutional system by claiming judicial supremacy over one component of the most awesome delegate authority granted to Congress, you acknowledge the question is open, but you say you were confident about the right answer and how the court would hold. Share with our listeners your reasoning and if you were writing the Supreme Court opinion, arguing that the Senate had no power to try a former official, what would that look like?

Judge Luttig: [00:52:56] Well the Constitution itself commits to the Supreme Court of the United States the supremacy to determine this question. By way of a footnote, I would never have thought the argument that the Court should decide the high crimes and misdemeanors question that Professor Dershowitz presented, I would never--I would've bought that as a classic political question doctrine. My point is I see a vast difference in distinction between the high crimes and misdemeanors question, the Walter Nixon, you know, definition of a Senate trial question and the question that may be posed for decision in the coming weeks of whether the Congress can impeach a former officer of the United States. And then my final comment, unless you request another, is that we are likely to get a very powerful signal.

On this justiciability question, in the weeks ahead if the Chief Justice of the United States is asked to preside over the Senate trial and either agrees to preside or agrees not to preside, the latter event of which would send a very strong signal that he understands that the trial will be challenged by the president's lawyers and that he must decide at some point whether or not that Senate trial is constitutional or not to impeach a former officer of the United States.

Jeffrey Rosen: Thanks so much for that. Professor Whittington, what do you think of [Judge Luttig's] suggestion that Chief Justice Roberts' decision to preside or not over the impeachment trial could tip the Supreme court's hand on the justiciability question?

And what are your final thoughts about why, if asked, the Court would conclude that the question, the timing of the trial is not justiciable?

Keith Whittington: It's a very interesting suggestion. I have to admit, I had not thought about whether or not the Chief Justice's willingness to preside would be a signal about how he at least is thinking about the Court's future involvement.

I do think it's a genuinely open question and not all clear to me as to whether or not the chief justice ought to or is required to preside over the trial of a former president. As you say, the Constitution requires the Chief Justice preside over the trial of the president.

And so, one way to read that, of course, is that if you're impeaching a former president and are having a trial of a former president in this case, the president has already been impeached while he's still incumbent. But if you're having a trial of a former president, what you're having trial is of an individual held an office and the office is the president.



And as a consequence of that the Chief Justice ought to be there presiding. I don't know yet if that necessarily follows. And you can imagine both the Senate and the Chief Justice taking a different view about whether or not his presence is necessary in this context of a former officer.

I think the other very interesting signal that could arise is that the Chief Justice agrees to appear as the presiding officer, he's sitting as the presiding officer. And then the first thing we get is a motion to dismiss the case on the grounds that the Senate doesn't have jurisdiction to try and impeachment of a former officer. Roberts, I think correctly in the first impeachment trial of President Trump, generally took the view that he's simply there to follow the Senate rules.

And it's the Senate majority that makes decisions about what those rules are. He should not be an activist presiding officer influencing the context, but it'd be an interesting moment for whether or not the Chief Justice tips his hand on how he thinks about that question if he was sitting as presiding officer when that motion was made.

It will be an interesting question. I think the Court will be very tempted to involve itself just because the Court's always tempted to involve itself in constitutional questions these days. And so, I would never be against the Court intervening, and this, and this does seem like an issue that you could imagine happening in ways I really do find quite unimaginable in some other impeachment related contexts.

Jeffrey Rosen: Thank you so much for that. Well, it is time for closing arguments in this very substantive and illuminating debate. And Judge, the first is to you. Please sum up for our wonderful We the People listeners why you believe the Constitution is not authorized to try a former president who's been impeached and why, if the Senate decides to go ahead with the trial, you believe the Supreme Court will intervene?

Judge Luttig: Jeff, I'm convinced that the Constitution textually provides for the impeachment only of one who was at the time of impeachment incumbent in office. All the arguments to the contrary, they concede that there is nothing on the face of the constitutional text and there's nothing in the history, the Constitutional history of the founding or before that confirms that the Constitution allows the impeachment of a former officer. They argue from history. Not just American history, but British history, that as Professor Whittington points out in his piece the framers were aware of the concept of impeachment of a former officer, but they offer no evidence and they can't find any evidence yet--and if they could, I'd be willing to listen to it--that the framers themselves, having understood the concept of the impeachment of a former officer, nonetheless put that in the constitutional text. So, that is my argument. It is a matter of political indifference to me. That's just the conclusion I come to as a matter of constitutional interpretation of the impeachment clauses.

Jeffrey Rosen: Thank you so much for that. Professor Whittington, the last word is to you. Please tell our great We the People listeners why you believe that the Constitution authorizes the Senate to try a former official who has been impeached and why, if the



Senate decides to hold the trial and convict the president, the Supreme Court should not, and likely will not, intervene?

Keith Whittington: I think the impeachment trials of former officials, including former presidents, is consistent with both the text and the purpose of the Constitution. It's also consistent with the history of our constitutional practice and of the constitutional practice the framers were drawing on when they included the impeachment power in the federal constitution. The provision allowing the House to impeach simply gives them the sole power of impeachment. And the Senate has the sole power to try all impeachments. I don't think anyone argues that the impeachment that the House has now concluded of the sitting president is not a valid impeachment. In which case the Senate would seem to have the authority to hear a trial on the basis of that constitutionally valid impeachment.

The text of the Constitution also specifies what happens to sitting officers when they are convicted, which is that the Constitution specifies that they are immediately removed from office. And then also it gets the Senate, the option of disqualifying those individuals from future office, if they have been convicted. But I think it's reading an awful lot into that provision about removal to reason backwards from that that because officers are immediately removed if they're convicted, that therefore only officers sitting, incumbent officers, can in fact be convicted or be put on a trial by the Senate.

I think that's a thin read in the federal constitutional text to bear that burden. And I think it's inconsistent with the larger purposes that we're trying to use the impeachment power for, which includes exposing and condemning wrongdoing by those who have held office and discouraging that kind of behavior from being done in the future by future office holders.

And as I noted that it's inconsistent with our history. It's inconsistent with our own history in which we have had trials of former officers. And that those trials have proceeded despite motions to dismiss because of lack of jurisdiction. It's consistent with our prior history, prior to the U.S. Constitution, that state constitutions allowed for these proceedings and everybody recognized that was true as part of what was included in the power of impeachment. And British history included this as part of what they understood the power of impeachment to include. And again, the framers of the U.S. Constitution were familiar with that practice and understood that that was part of what it meant to give the House and the Senate the power to conduct an impeachment process.

I think that the much more logical reading is that they did not want to allow those things to continue and they could have easily excluded them from the constitutional text and they chose not to. And so despite the fact they made other decisions that did limit the impeachment power, so by limiting, for example, what kind of punishments the Senate can impose, they're specifically trying to reject part of the British practice where additional punishments can be imposed far beyond removal and disqualification. So when they knew that they wanted to modify the impeachment power and shrink it relative to the preexisting practice, they knew how to do that.

And I don't think there's any evidence in the text of the Constitution that they were trying to take that step or that they did take that step. And there's no discussion surrounding the



drafting, ratification of the Constitution that suggests that that's what they were trying to do either.

Jeffrey Rosen: Thank you so much, Judge J, Michael Luttig and Professor Keith Whittington for a civil, substantive, and illuminating discussion about the impeachment power. You provided a model of civil constitutional dialogue both for We the People listeners and for the senators of the United States, as they pick up their solemn constitutional duties in the weeks ahead. Judge Luttig, Professor Whittington, thank you so much for joining us.

Keith Whittington: Thanks very much.

Judge Luttig: Thank you, Jeff Rosen. Appreciate it.