

## DISCUSSION GUIDE

# UNDERSTANDING IMPEACHMENT

### Background

Article II, Section IV of the U.S. Constitution states “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>1</sup> Included by the Framers [to ensure accountability](#) for serious public harms, impeachment is designed as a two-step process: (1) impeachment by a majority in the U.S. House of Representatives, and (2) conviction by a two-thirds majority in the U.S. Senate.

Our country has witnessed [19 impeachments](#) pursuant to which eight officials have been removed from office and two have been disqualified from holding future office. Almost all impeachments have been against federal judges. However, two impeachments have been against U.S. presidents. On February 24, 1868, President Andrew Johnson became the first U.S. President to be impeached after the House passed articles [charging him with](#) “violating the Tenure in Office Act by removing Secretary of War Edwin Stanton from office.” Despite indications that Johnson would be easily convicted (since Republican senators greatly outnumbered Democrats), he was acquitted by one vote.<sup>2</sup>

More recently, President Bill Clinton was impeached on December 19, 1998 on [charges of](#) “lying under oath to a federal grand jury and obstruction of justice.” “The Clinton impeachment [turned on](#) a salacious scandal that featured the President caught in a lie about his extramarital affair with an intern at the White House.” The affair was uncovered by independent counsel Kenneth Starr, whose investigation of Clinton originally began as an inquiry into a land deal that President Clinton had concluded before taking office. On the recommendation of independent counsel Starr’s report, the House impeached Clinton for perjury and obstruction of justice with five Democrats joining most congressional Republicans voting to impeach. The Senate trial lasted six weeks and was [widely considered](#) to be a

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<sup>1</sup> U.S. CONST. art. II, § IV.

<sup>2</sup> Johnson, who succeeded to the presidency following the assassination of President Abraham Lincoln, was a southern Democrat who remained loyal to the Union during the Civil War. He clashed repeatedly with Congress on the question of Reconstruction – making it easier for Southern states to reenter the Union, pardoning the Vice President of the Confederacy, and blocking efforts to help Southern blacks “find their footing” following emancipation. The animosity between Johnson and Congress led Congress to pass the Tenure of Office Act, which was “essentially an impeachment trap” that Johnson walked right into. After the House voted to impeach, the attorney general stepped down to represent Johnson during the Senate’s three-month long trial. The attorney general led “a defense that centered on raising questions about Johnson’s intent in violating the Tenure in Office Act and whether the offenses were actually criminal.” Zachary B. Wolf, [How Post-Civil War Republicans Set An Impeachment Trap for Andrew Johnson](#), CNN (Dec. 17, 2019).

“spectacle,” featuring videotape testimony as well as live witnesses. The Senate acquitted Clinton of both charges, with ten Republicans voting “not guilty” on the obstruction of justice charge and five voting “not guilty” on the perjury charge.

On December 18, 2019, the U.S. House of Representatives approved [two articles](#) of impeachment against President Donald J. Trump, making him the third president in United States history to be impeached. Now, the proceedings move to the Senate. Both articles of impeachment accuse President Trump of committing “high Crimes and Misdemeanors”. The first article [alleges](#) “abuse of power” and states that President Trump “abused the powers of the Presidency” when he “solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election” by conditioning official acts on the public announcement that Ukraine would investigate his political rival, former Vice President Joseph Biden. The second article of impeachment [alleges](#) “obstruction of Congress” and states that by “direct[ing] the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its ‘sole Power of Impeachment,’” President Trump has “abused the powers of his office.”

It is now the U.S. Senate’s constitutional responsibility to consider the articles of impeachment, pronounce President Trump’s guilt or innocence, and determine whether he should be disqualified from holding future public office.

### **The Constitutional Text**

The Impeachment Clause states: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” However, the Impeachment Clause isn’t the only constitutional provision governing impeachment. Five additional constitutional provisions also govern impeachment: Article I, Section II, Clause 5; Article I, Section III, Clause 6; Article I, Section III, Clause 7; Article II, Section I, Clause 6; and Article III, Section II, Clause 3. Together, these clauses assign the “sole Power of impeachment”<sup>3</sup> to the U.S. House of Representatives by majority vote and the “sole Power to try all Impeachments”<sup>4</sup> to the Senate by a two-thirds majority vote. Additionally, the Constitution mandates that the Chief Justice “shall preside” in the event of a presidential impeachment and that all senator-jurors swear an oath or affirmation when deciding whether to convict a federal official.<sup>5</sup> The Constitution also limits punishment to removal from office and disqualification from holding future office.<sup>6</sup> Outside of these limited provisions, however, the Constitution is silent.

Initially, there was disagreement among the Framers as to whether impeachment should be included in the Constitution at all, particularly for the president. James Madison saw the Impeachment Clause as “indispensable” and Benjamin Franklin is [said to have stated](#) that “impeachment was preferable to the more traditional way of removing a monarch in Europe – by death.” Eventually, resistance to including

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<sup>3</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>4</sup> *Id.* art. I, § 3, cl. 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* art. I, § 3, cl. 7.

impeachment faded and 8 out of the 10 delegations voting approved the Impeachment Clause's inclusion in the draft constitution.

The phrase "high crimes and misdemeanors" is "vague and open-ended" and [controversial](#). Early drafts of the Constitution [in fact didn't include](#) the phrase "high crimes and misdemeanors" at all, but instead gave Congress the power to impeach and remove officers for "maladministration." Concerned that the term was so vague that it would be "equivalent to a tenure during the pleasure of the Senate," James Madison objected to its inclusion. It was [deleted and replaced](#) with the phrase "high crimes and misdemeanors," reflecting the Framers' determination to "limit the grounds on which an officer could be impeached in order to safeguard another constitutional principle: the separation of powers."

"The Founders [meant for the phrase](#) 'high crimes and misdemeanors' to signify only conduct that seriously harms the public and seriously compromises the officer's ability to continue" in office. Importantly, this conduct does not necessarily [need to be criminal](#) – "[f]or our founders, the touchstone of presidential unfitness to serve was always abuse of the public trust." Today, the majority view is that a president can legally be impeached for "intentional evil deeds" that "drastically subvert the Constitution and involve an unforgivable abuse of the presidency" – even if those deeds don't violate any criminal laws.<sup>7</sup>

### **House Impeachment Procedure**

The U.S. Constitution [is silent about](#) the House of Representatives' impeachment procedures, so House rules and traditions govern and provide for three phases: (1) initiation of impeachment; (2) investigation, hearing, and mark-up of articles of impeachment; and (3) voting on the articles of impeachment. Impeachment is initiated in the same manner that all House resolutions are submitted: a Member [can either](#) submit a resolution through the hopper or offer an impeachment resolution on the floor as a "Question of the Privileges of the House". Either way, the resolution is referred to committee for consideration and investigation. Historically, impeachment resolutions [have been referred](#) to the Judiciary Committee, but the House rules leave open the possibility of referral to another committee instead.

Committee [consideration of impeachment](#) is "governed by the standing rules of the House that govern all committee investigations, the terms of the resolution authorizing the investigation, and perhaps additional rules adopted by the committee specifically for the inquiry." Historically, impeachment investigations have varied greatly. The investigating committee [has all of its traditional investigatory tools](#) at its disposal during impeachment, including subpoenas, depositions, and public hearings. Although during the Nixon impeachment the House engaged in an extensive months-long investigation that employed 44 lawyers, in recent decades, the House has generally [relied on information](#) from an outside investigation. If at the [conclusion of the investigation](#) "the committee determines that impeachment is warranted, it will mark up articles of impeachment using the same procedures followed for the markup of other legislation."

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<sup>7</sup> LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT (2018).

If a House committee passes a resolution impeaching a federal officer, that resolution is then considered by the full House. If a majority of the members of the House approve an impeachment resolution, the federal officer is impeached. The House then [appoints managers](#) to “present and argue its case against the federal officer in front of the Senate.” The selection of House managers [can be done by](#) House vote or by resolution authorizing the Speaker to name them.

### **Senate Impeachment Procedure**

The U.S. Constitution grants the Senate the “sole power to try all impeachments,”<sup>8</sup> but its text neither specifically requires a trial [nor does it define](#) what constitutes a trial outside of the Chief Justice presiding. The Senate rules, however, are [written in mandatory terms](#), compelling a Senate impeachment trial once the House has appointed managers to deliver the articles of impeachment to the Senate.

The Senate [impeachment rules are](#) “weirdly detailed, specifying speeches and oaths that different actors must recite and the specific times of day when things must happen.” For instance, the mandated timelines require the trial to begin at 1pm the day after the House informs the Senate that they have appointed managers to “carry” articles of impeachment to the Senate. A [Senate trial](#) “functions largely in the manner of any ordinary trial, with lawyers on both sides making opening statements, presenting evidence, questioning witnesses, making motions and objections (ruled on by the Chief Justice), and making closing statements.” Prior to the House managers’ presentation of the articles of impeachment, the Senate Sergeant at Arms mandates silence from the senator-jurors, [proclaiming](#): “All persons are commanded to keep silence, on the pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against” President Donald J. Trump.

“After both sides [make their closing statements](#), the question of conviction is presented to the Senate.” The Senate rules [require that](#) “the doors shall be closed for deliberation,” meaning that the Senators will meet in closed session for their deliberations. Voting, however, is done publicly. The presiding officer will call each senator by name, and they must respond by saying “guilty” or “not guilty.” No other response [is permitted](#), and no speech is permitted during the voting. If two-thirds of the senators present find the officer guilty, they are removed from office. Once convicted, the Constitution permits the imposition of an additional punishment: “disqualification to hold and enjoy any office of honor, trust, or profit under the United States.”<sup>9</sup> That punishment [may be approved](#) by a simple majority vote.

### **The Role of the Chief Justice**

The U.S. Constitution requires that the Chief Justice preside when the President is impeached.<sup>10</sup> However, outside of mandating certain administrative tasks, the rules are silent as to his or her role. Experience from the impeachment trials of Presidents Andrew Johnson and Bill Clinton may be instructive.

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<sup>8</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>9</sup> *Id.* art. I, § 3, cl. 7.

<sup>10</sup> *Id.* art. I, § 3, cl. 5.

Chief Justice Salmon Chase presided during the impeachment trial of President Andrew Johnson. Chief Justice Chase was [actively involved](#) in the trial, ruling on the admissibility of evidence and the reliability of witnesses. However, individual Senators [could call for a vote](#) on any of the Chief Justice's rulings. On two occasions, [Chief Justice Chase cast a tie-breaking vote](#) on procedural questions – a motion to prevent the Chief Justice from doing so was defeated. By contrast, when Chief Justice William Rehnquist presided over President Bill Clinton's impeachment trial, he took a "approach" and, according to the book *The Breach: Inside the Impeachment and Trial of William Jefferson Clinton* by journalist Peter Baker, he brought Supreme Court work and playing cards to occupy him during the trial.<sup>11</sup> Chief Justice Rehnquist was [praised by analysts on both sides of the aisle](#) for taking "an even-handed approach" and, in his first ruling, ruled against the Republican House managers who prosecuted the case against President Clinton.

## Discussion Questions

### *On the Constitutional Text*

- The Founders disagreed over whether an impeachment trial should occur in the Senate or the Supreme Court. Alexander Hamilton argued that because the nature of impeachment crimes will be predominately political, their prosecution should occur before the Senate. Do you agree?
- Why do you think the Founders decided that the Chief Justice should preside over presidential impeachment trials, and what are the implications of the Chief Justice's having that role?
- An officer who is impeached is not necessarily disqualified from holding future office, and the Constitution is silent about the criteria for determining future disqualification. What should be the criteria? Would you have made disqualification automatic if you drafted the Constitution?
- By placing impeachment trials in the Senate, the Framers made Senators jurors. Should Senators remain publicly impartial during the impeachment process? What should be the remedy when a [Senator announces that they are not impartial](#)? Does the Constitution provide any guidance?
- In Federalist 65, Alexander Hamilton recognized that impeachment would likely politicize and divide the community and may not accurately pronounce someone's innocence or guilt.<sup>12</sup> Are there ways to depoliticize impeachment?

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<sup>11</sup> PETER BAKER, *THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* (2012).

<sup>12</sup> Hamilton wrote: "They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt." *THE FEDERALIST NO. 65* (Alexander Hamilton).

### *On House Impeachment Procedure*

- The Framers did not specify what procedures should govern impeachment in the House of Representatives. Why do you think they were silent? Was that a mistake?
- [According to Professor Neil Kinkopf](#), “[t]here is longstanding concern with [using House managers to] prosecut[e] impeachments as the lawyering skills of House members are often not on par with the skills of the professional counsel retained to defend the subject of the impeachment.” Although House managers could retain outside counsel to make oral arguments instead, members are predictably reluctant to do so. What do you think of using House managers to prosecute impeachments? Should outside counsel be hired instead?

### *On Senate Impeachment Procedure*

- The requirement of a Senate impeachment trial stems from the Senate rules, not the Constitution. Those rules are adopted by a majority vote at the beginning of a new Congress but require two-thirds approval to amend otherwise. Can the Senate change their rules to avoid a trial?
- The Senate rules are incredibly detailed in terms of specifying speeches, timing of oaths, etc. but they are silent on rules of evidence or standards of proof. Why do you think that is?
- Why do you think the Senate rules specify that deliberations should be done behind closed doors? Do you think voting should also be done privately?
- Given the lack of rules related to evidence, standards or proof, etc. several good government groups have called for trial procedures to be established before the trial commences. Do you agree with this approach? Why or why not? What procedures would you set out?
- Each Senator is required to take an oath to “do impartial justice” and to “support and defend the Constitution.” What does that oath mean? If a Senator has previously indicated their views on impeachment, are they “impartial”? If not, what should be the remedy?
- Nothing in the rules compels the accused to appear before the Senate and, in fact, President Andrew Johnson did not appear during his impeachment trial. Should the rules be changed to compel attendance of the accused?

### *On the Role of the Chief Justice*

- Chief Justice Chase and Chief Justice Rehnquist had different approaches when they presided over presidential impeachments. Do you anticipate Chief Justice Roberts to follow one of their leads or to chart a different path entirely? Do you think he will follow Chief Justice Chase’s precedent and cast tie-breaking votes should the situation arise?
- The Supreme Court famously lacks cameras. Chief Justice Rehnquist is said to have gone through “culture shock” when he entered the Senate and was surrounded by cameras. How do you think Chief Justice Roberts will respond to this notoriety?
- Several high-profile witnesses refused to comply with subpoenas to appear before the House Intelligence Committee, and litigation has resulted. Those cases are currently working their way through the courts. How do you think the Chief Justice will respond to an attempt to have those witnesses testify during a Senate impeachment trial?

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