



Legal scholars, including at Federalist Society, say Trump can be convicted

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Former President Donald Trump can be convicted in an impeachment trial for his role in inciting the Capitol insurrection on Jan. 6 even though he is no longer in office, a bipartisan group of constitutional law scholars wrote in a letter Thursday.

“We differ from one another in our politics, and we also differ from one another on issues of constitutional interpretation,” wrote the signatories, which include the co-founder and other members of the conservative Federalist Society legal group. “But despite our differences, our carefully considered views of the law lead all of us to agree that the Constitution permits the impeachment, conviction, and disqualification of former officers, including presidents.”

More than 150 legal scholars signed on to the letter, which was obtained by POLITICO. They include Steven Calabresi, the co-founder of the Federalist Society; Charles Fried, who served as solicitor general under Ronald Reagan and is now an adviser to the Harvard chapter of the Federalist Society; Ilya Somin, a law professor at George Mason University and adjunct scholar at the libertarian Cato Institute; and Brian Kalt, a law professor at Michigan State University and leading scholar on the specific question of whether former officials can be impeached.

The House impeached Trump last week, for the second time, in a 232-197 vote for “incitement of insurrection” following the attack on the Capitol by a pro-Trump mob that left five people dead. As the impeachment process moves into its next phase in the Senate, the signatories of the letter are seeking to counter an argument that has been gaining steam among some Republican senators: that it would be unconstitutional for the Senate to hold an impeachment trial for Trump now that he is a private citizen.

“The Senate lacks constitutional authority to conduct impeachment proceedings against a former president,” Sen. Tom Cotton (R-Ark.) said in a statement last week. “The Founders designed the impeachment process as a way to remove officeholders from public office—not an inquest against private citizens.”

Many Republicans have taken a cue from the conservative former federal appeals Judge J. Michael Luttig, who argued in the Washington Post earlier this month that “once Trump’s term ends on Jan. 20, Congress loses its constitutional authority to continue impeachment proceedings against him — even if the House has already approved articles of impeachment.”

The constitutional scholars who signed on to the letter disagree with that assessment, arguing that because the Constitution’s impeachment power has two aspects — removal from office and disqualification from holding office again in the future — it must also be extended to former officials who could try to run for reelection.

“Impeachment is the exclusive constitutional means for removing a president (or other officer) before his or her term expires,” they wrote. “But nothing in the provision authorizing impeachment-for-removal limits impeachment to situations where it accomplishes removal from office. Indeed, such a reading would thwart and potentially nullify a vital aspect of the impeachment power: the power of the Senate to impose disqualification from future office as a penalty for conviction.”

Trump had signaled before leaving office that he might try to run for president again in 2024, and has reportedly mulled forming his own political party. But if the Senate were to hold an impeachment trial and convict him, he would be barred from holding public office ever again. That provision of the impeachment power, the legal scholars wrote, “is an important deterrent against future misconduct.”

"If an official could only be disqualified while he or she still held office, then an official who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate’s final conviction vote,” they noted. “The Framers did not design the Constitution’s checks and balances to be so easily undermined.”