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## Remove the President? Read This First.



By [Jerry H. Goldfeder](#)

**F**our months into President Donald Trump's term, his presidency appears in jeopardy. Calls for his removal abound. But whatever one thinks of a president's policies, temperament or competence, removing him from office before the next election is an extraordinary act. In our 230-year electoral history, no president has ever been ousted except at the ballot box. And now that a special prosecutor with impeccable credentials has been appointed, and an independent investigatory commission is perhaps on the way, it is time to take a deep breath. The jury is still out as to what facts will actually surface.

That said, the process of removal should be understood. There are two ways to do it.

### **Impeachment**

First, there is the impeachment process, imported by our Founders from the centuries-old practice in England. A majority of the House of Representatives votes to impeach, a process similar to an indictment. If the House impeaches, the Senate acts as a jury, and a two-thirds vote is required to remove the president (or other civil officer) from office. The rules of evidence are unlike those in civil or criminal trials, and there is no requirement that members of Congress be impartial. There is also no appeal process. As imperfect as this might sound, impeachment nevertheless is a constitutional safety-valve, to protect the American people

from a chief executive who is seen as undermining our democratic republic. In the words of Alexander Hamilton in *Federalist No. 65*, impeachment is meant to remedy an “abuse or violation of some public trust.”

To impeach a president, the House must find that he committed “treason, bribery or other high crimes and misdemeanors.” Treason and bribery are defined in relatively easy-to-understand penal statutes. But what is meant by “high crimes and misdemeanors”? Gerald Ford, then-Republican leader of the House of Representatives, glibly pronounced: “An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” While Ford’s definition is useless, it underscores the opaqueness of its meaning.

History and scholarship do provide some guidance, however. Despite the language of the provision, a president can be removed for conduct that is not necessarily criminal. Even if no crime could be proven beyond a reasonable doubt, removal by impeachment might be appropriate. On the other hand, if President Trump’s yet-unknown actions were found to constitute sufficient elements of a crime, they might not warrant impeachment. The process was meant to be based upon the good faith judgment of Congress.<sup>1</sup>

Of the three presidential impeachment proceedings to date, two were a misapplication of the process. President Andrew Johnson was charged with disobeying a congressional act, but he was actually set up by his opponents over post-Civil War political differences. President Bill Clinton, though he obviously acted improperly regarding testimony in a sexual assault case, did not abuse the powers of his office. Only Richard Nixon appropriately faced impeachment after he misused the FBI, CIA and IRS, and clearly obstructed justice in a criminal investigation. As we know, he escaped almost-certain removal by resigning.

## **25th Amendment**

The second way to remove a president is also fraught with ambiguity. The 25th Amendment to the constitution, ratified in 1967, permits a vice president and majority of the cabinet to temporarily remove a president if he is “unable to discharge the powers and duties of his office,” permitting the vice president to assume the role of Acting President. If this occurs and

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<sup>1</sup> A fuller discussion of the procedures involved in the impeachment process can be found in the 1974 report by the Committee on Federal Legislation of the New York City Bar Association, [http://www2.nycbar.org/Publications/reports/show\\_html\\_new.php?rid=33](http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=33).

the president balks, Congress acts as the final arbiter. Except in fictionalized accounts such as *West Wing*, this constitutional provision has never been used.<sup>2</sup>

Like the impeachment provision, this removal procedure lacks a clear standard. What does it mean for a president to be “unable” to discharge his duties? Does it refer to a physical or medical condition? Or perhaps an emotional or mental disposition? Congressional debates during ratification provide only a clue: unpopularity, incompetence, poor judgment or laziness is not enough. So even assuming that Vice President Pence and the cabinet wanted to consider removing President Trump under the 25th Amendment, on what basis would they determine that it was appropriate to do so?

I am no fan of the President or his policies. I check the news constantly with trepidation, and am worried about the strength and endurance of our constitutional democracy. But I am also concerned about using our Constitution to prematurely remove a president from office. To paraphrase Sergeant Friday from the 1950s television show *Dragnet*, let’s give the investigators time to uncover all the facts, and just the facts. Only then should a judgment be made about removal.

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*Jerry H. Goldfeder, special counsel at Stroock & Stroock & Lavan, teaches Election Law at Fordham Law School and the University of Pennsylvania Law School. He co-authors the New York Law Journal’s regular column, Government and Election Law.*

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<sup>2</sup> A more comprehensive presentation of the removal process under the 25th Amendment can be found in J. Goldfeder and M. Pérez, “President Trump and the 25th Amendment,” N.Y.L.J., April 28, 2017.