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# Racism and Impeachment Power

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# Racism and impeachment power



**JOHN GREABE**

Constitutional Connections

Many commentators have denounced President Donald Trump as a racist following the vulgar and derogatory comments he reportedly made about Haiti, El Salvador, Africa and immigrants from these places. In fact, some have gone so far as to say that the president's perceived racism should lead Congress to remove him from office.

Are they correct? Does racism constitute a legitimate basis for removing a president? More generally, what is

the scope of Congress's removal power?

In all but the most extraordinary circumstances, the remedy for incompetent political leadership – indeed, even abhorrent political leadership – lies in the next election. But the Constitution does provide Congress with tools to remove certain federal officeholders between elections.

As explained in a recent column (“Sexual misconduct, abuse of power

SEE CONSTITUTION D3



# Impeachment is a tool of last resort, so when should it be used?

## CONSTITUTION FROM D1

and congressional self-governance," *Sunday Monitor Forum*, Nov. 26), the Constitution authorizes each house of Congress to "expel a Member" with "the Concurrence of two thirds" of its other members (Article I, section 5, clause 2). Thus, Congress holds the power to remove its own members who engage in malfeasance.

The Constitution also authorizes Congress to appoint the vice president to serve as acting president "by two-thirds vote of both Houses" if the vice president and a majority of the Cabinet transmit to Congress a written declaration that the president "is unable to discharge the powers and duties of his office" (Amendment 25, section 4).

Then there is the impeachment power. The Constitution provides that "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" (Article II, section 4). This provision also has

been interpreted to apply to federal judges, who do not face electoral recall but rather "hold their Offices during good Behavior" (Article III, section 1).

In terms of mechanics, the Constitution vests the House of Representatives with the "sole Power of impeachment" (Article I, section 2, clause 5). As with nearly all of its other powers, the House may vote to impeach by a simple majority vote. The Constitution then vests the Senate with the "sole Power to try all impeachments," and further provides that "no Person shall be convicted without the Concurrence of two thirds of the Members present" (Article I, section 3, clause 6).

So what are the "high Crimes and Misdemeanors" that can ground an article of impeachment? The Constitution does not say and the federal judiciary – mindful that impeachment is Congress's prerogative and the principal check it holds over federal judges – has long treated impeachment-related matters as non-justiciable "political" questions. Thus, there is a wide range of perspectives on

the issue.

At one end of the spectrum is the belief that only criminal acts that seriously threaten our political order should trigger impeachment. At the other end is the view, expressed by former President Gerald Ford when he was a member of Congress, that "an impeachable offense is whatever a majority of the House of Representatives considers (it) to be."

Between these positions, there is fairly widespread agreement that impeachment should be reserved for conduct that undermines our established constitutional order, subverts foundational norms, and cannot readily be addressed through ordinary political or judicial processes.

Thus, impeachment should not be used for mere political disagreements, no matter how deeply felt. Moreover, not all criminal acts by federal office-holders subject to impeachment actually should lead to impeachment. And yet, actions that are *not* criminal can properly serve as a basis for impeachment if they threaten basic government functioning.

Under these principles, should a conscientious member of Congress seriously consider voting to impeach a president believed to be a racist?

To do so in good faith, the member must focus on the president's official *conduct*. The member should ask whether the president's racism is causing him to exercise his vast discretion to interpret and enforce federal law in a manner that is, 1) inconsistent with constitutional norms, and 2) not easily counteracted through ordinary politics or litigation.

If a conscientious member of Congress were to conclude that the president's racism is affecting federal policy, these two criteria could be satisfied.

First, the Constitution's promise of "equal protection of the laws" makes the consideration of race, religion, ethnicity or national origin in executing or enforcing federal law unconstitutional in all but the rarest of circumstances. At the cost of immense human suffering, we have established as a basic norm that government should not use any of these characteristics

as proxies for merit.

Second, the administration can easily insulate policy decisions affected by such considerations from effective challenge by presenting and justifying them in non-discriminatory language.

Consider, as one of many possible examples, the administration's recent decision to scale back Justice Department efforts to engage in "collaborative reform" of local police departments – and to improve police-community relations – in the aftermath of recent police shootings of black men.

The administration justified its decision in terms of a need for greater federal respect for local police morale and safety. Certainly, these are non-discriminatory and important policy considerations. Moreover, the decision is squarely within the president's law-enforcement power and discretion. Consequently, even if a conscientious member of Congress were convinced that the president's racial views also affected the decision, there is little that she could do within ordinary political or legal processes to

counteract it.

In such circumstances, a conscientious member of Congress could consider impeachment – particularly if she were to conclude that the example was not isolated but rather was a part of a broader pattern of racially discriminatory administrative policy-making.

Impeachment is strong medicine. Most understand that routinely deploying it as part of partisan politics would endanger the republic. And there seems to be little likelihood that today's calls for impeachment will go anywhere while the president's party holds the balance of power in Congress.

But given that lawmakers have placed impeachment on the table, it is essential that we have a serious public discussion of when this tool of last resort ought to be used.

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