

# After the storming of the US Capitol

## A second impeachment trial of President Trump?

### SUMMARY

At 13.00 EST on 6 January 2021, the 117th United States Congress and US Vice-President Mike Pence assembled in the Capitol Building, seat of the US Congress in Washington, DC, to tally the electoral votes certified by the 50 states and the District of Columbia, thereby declaring Joe Biden and Kamala Harris, respectively, US President-elect and Vice-President-elect. The ceremony was interrupted when an angry mob, seemingly encouraged by President Donald Trump in a speech earlier that day, broke into the Capitol and forced the Vice-President and Members of Congress to shelter in fear for their lives, while the intruders clashed with Capitol security and vandalised and stole property. Later that day, the combined forces of the police, the Federal Bureau of Investigation and the National Guard were able to evict the protesters and secure the building, allowing the Vice-President and Congress to re-assemble and complete the ceremony.

The invasion of the Capitol, a symbol of US democracy, has had dramatic political consequences. Trump has now been impeached by the House of Representatives for the second time – the only US President in history to be so. Democratic Party leaders had already appealed, the day after the intrusion, to Vice-President Pence to use the Twenty-fifth Amendment to the US Constitution to replace Trump against his will before the end of his term on 20 January. The US Senate appears set to conduct an impeachment trial after Trump leaves office, but it is not certain that it has the authority to do so, or what the trial's legal or political outcome will be.

This Briefing considers some of the options that Congress had to deprive President Trump of power immediately after 6 January, and the options that remain after Joe Biden becomes President on 20 January 2021.



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## Background

The day after the breach of the Capitol, the two leading Congressional Democrats, House Speaker Nancy Pelosi and Senate Minority Leader Chuck Schumer, [appealed](#) to Vice-President Pence to invoke Section 4 of the [Twenty-fifth Amendment](#) to the US Constitution in order to replace President Trump against his will, with immediate effect. That call was formalised in a non-binding [resolution](#) adopted on 12 January by the House of Representatives, still narrowly controlled by the Democratic Party following the 3 November 2020 election. In the days following 6 January 2021, there were [reports](#) that Section 4 had been discussed privately by senior Cabinet officials. However, three of them – Elaine Chao, Betsy DeVos and Chad Wolf – resigned their posts, potentially shrinking the number of Cabinet members who could participate in a Section 4 declaration, and Vice-President Pence ultimately [rejected](#) the idea in a letter to Speaker Pelosi.

On 13 January, the House [voted](#) to impeach Trump for his role in the events, citing Section 3 of the [Fourteenth Amendment](#) to the Constitution, which prohibits any person who has 'engaged in insurrection or rebellion against' the US from 'hold[ing] any office ... under the United States'. President Trump's term expires at noon on 20 January, when Joe Biden and Kamala Harris are sworn into office.

## Twenty-fifth Amendment

The Twenty-fifth Amendment to the US Constitution, ratified in 1967, governs presidential succession and temporary replacement in the event that the President cannot discharge his duties. When President John F. Kennedy was assassinated in 1963 and Vice-President Lyndon B. Johnson became President, there was no constitutional or legislative direction on how to fill the subsequent vice-presidential vacancy, which the Amendment [remedied](#). The Amendment is divided into four sections.

Section 4 is the longest and most detailed, and the only one that has yet to be invoked, and which therefore generates debate among constitutional experts. It deals with instances in which the president is unable or unwilling to declare an inability to discharge the powers and duties of his office. In such cases, the Vice-President may submit a declaration to the President *pro tempore* of the Senate and the House Speaker, co-signed by a majority of the Cabinet (8 of a total of 15 Cabinet 'principal officers') or of 'such other body as Congress may by law provide' (Congress has yet to legislate for such an alternative body). Once transmitted, the Vice-President takes over as Acting President, until the President transmits to the same two Congressional

leaders a declaration to the contrary. If this counter-declaration is not contested by the Vice-President and other Cabinet officials, the President resumes their functions.

If the Vice-President does contest the President's counter-declaration, they have four days to transmit to the two Congressional leaders a further declaration to that effect, the validity of which is decided by Congress. If Congress, within 21 days of receipt of the Vice-President's second declaration (if not in session, it must assemble within 48 hours, and vote within 21 days of assembling), determines it to be valid by a two-thirds majority vote in both its houses, the Vice-

List of Cabinet officials eligible to co-sign a Section 4, Twenty-fifth Amendment declaration by the Vice-President, in order of post's date of establishment

- Secretary of State
- Secretary of the Treasury
- Secretary of Defense
- Attorney General
- Secretary of the Interior
- Secretary of Agriculture
- Secretary of Commerce
- Secretary of Labor
- Secretary of Health and Human Services
- Secretary of Housing and Urban Development
- Secretary of Transportation
- Secretary of Energy
- Secretary of Education
- Secretary of Veterans Affairs
- Secretary of Homeland Security

President 'shall continue to discharge' the role of Acting President; 'otherwise, the President shall resume the powers and duties of his office'.

Section 4 provides for a scenario in which the Vice-President and President disagree about the latter's ability to discharge their duties. In requiring Congress to decide, by a two-thirds majority in both of its houses, whether the President should effectively be deprived of their powers against their will, there are parallels to the Constitution's provisions governing impeachment (see below) – though in the latter case the threshold is lower: while a vote to convict and remove an impeached president similarly requires a two-thirds majority vote by the Senate, the impeachment resolution itself requires only a simple majority vote in the House.

Section 4 [was not drafted](#) for the purpose of removing a disgraced or destructive President. A scenario of contested 'inability' could lead to an acute political and constitutional crisis at the top of the US government. The wording of the Amendment implies that even if the President declared themselves ready to resume their functions, the Vice-President would remain Acting President until the deciding vote by Congress – unless the Vice-President and Cabinet did not declare anew the President's inability within four days. However, the prospect of a President re-assuming their powers following a contested scenario would be a powerful deterrent against the Vice-President moving against them.

If required to vote on a contested disability, Congress would have a theoretical maximum of 23 days to vote. After the 6 January invasion of the Capitol, only 14 days remained until the end of Trump's term, and it is not clear what would have happened if Congress had failed to vote within that period.

## Impeachment

The House has adopted 'Articles of [Impeachment](#)' against President Trump for the second time.<sup>1</sup> The Constitution provides for a two-step impeachment process, with impeachment by the House amounting to charges brought against the President, to be followed by a trial in the Senate. [Article II, Section 4](#) of the US Constitution states 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'. There is no legal consensus on what counts as a high crime or misdemeanour, but some experts [argue](#) that the freedom of the House majority of the day to define it as it sees fit means an impeachment resolution amounts to no more than a political statement of censure.

Articles of Impeachment adopted by the House are presented to the Senate, which the Constitution grants the sole authority to conduct an impeachment trial.<sup>2</sup> Members of the House of Representatives are appointed to make the case against the President, who may in turn appoint defence lawyers. [Article 1](#), Section 3 of the Constitution states that 'When the President of the United States is tried, the Chief Justice [of the Supreme Court] shall preside'. Members of the Senate act as jury, and conviction requires the vote of two thirds of participating senators.<sup>3</sup> The Senate's current [rules](#) on impeachment trials state that if convicted, a serving President is thereby removed from office. However, the Senate may then proceed to an additional vote, this time by simple majority, on whether to disqualify a convicted President from holding any 'office of honor, trust or profit under the United States'.

A number of points about a prospective [trial of a former President](#) remain contentious or unclear. First, there is debate about whether the Constitution allows a President to be tried by the Senate after their term has expired. On the other hand, it is also unknown whether the Supreme Court would act to prevent a Senate majority from conducting a trial, having in the past [refrained](#) from expressing a view on actions by Congress that concern its own rules and procedures. Moreover, the outgoing Senate Majority Leader, Mitch McConnell, has [reportedly](#) circulated to his Senate colleagues a proposed timetable for a trial to begin after the Senate came back into session on 19 January, and which could not conclude before Biden's inauguration on 20 January.

Article I, Section 3 of the Constitution states that 'When the President of the United States is tried, the Chief Justice shall preside', however, it is unclear that Trump will still count as 'President' after he has left office. There is [speculation](#) that the role could fall to the 'presiding officer of the Senate' – potentially, incoming Vice-President Kamala Harris in her role as President of the Senate, or Patrick Leahy (Democrat, Vermont), the current longest-serving member of the Senate. Finally, while Senate precedents allow a two-thirds vote to convict to be followed by a simple majority vote to bar Trump from ever holding office again in future, it is unclear whether a ban that narrowly passed the Senate would be seen as legitimate.

## Fourteenth Amendment

The Articles of Impeachment adopted by the House on 13 January cite the [Fourteenth Amendment](#) to the Constitution, which was ratified in 1868 during the 'Reconstruction' period that followed the US Civil War. The House impeachment resolution refers to Section 3 of the Amendment, which states that 'no person shall ... hold any office, civil or military, under the United States' who has 'engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof'.

Section 5 of the Amendment gives Congress the power to enforce, 'by appropriate legislation', the Amendment's other provisions, and there is [debate](#) about whether this provision would allow Congress to simply pass a law banning Trump from holding office again, subject to the ordinary legislative procedure of simple majority vote by both houses of Congress and signature by President Biden. As with a narrow, Democratic-only Senate majority vote to disqualify following impeachment, a Fourteenth Amendment law against Trump passed solely by Democratic Party politicians might be politically contentious.

## What happens next?

The Senate re-convened on 19 January 2021. Republican Senator Mitch McConnell, who remains Senate Majority Leader at least until Vice-President-elect Harris is sworn in and two new Democratic senators from the state of Georgia [take their seats](#), has confirmed that no impeachment trial will take place before Trump leaves office, while the presumptive incoming Democratic Senate Majority Leader, Chuck Schumer, has [said](#) he aims to conduct a trial 'immediately'.

Once Harris and then Georgia's US Senators-elect Raphael Warnock and Jon Ossoff are sworn in, the Democrats will hold a razor-thin majority of 50 Senate seats (including two Independents who routinely vote with them), enabled by the tie-breaking vote of the Vice-President in her role as President of the Senate. From that point on, the Democrats will control both the executive and, very narrowly, the legislature. The apex of the third branch of US government, the Supreme Court, now consists of a conservative majority of justices appointed by Republican Presidents, including three appointed by Trump himself. It is possible that any action taken by a Democratic Congress could be adjudicated by the Court's conservative majority, posing grave questions about the health of the American republic in the wake of a bitterly contested election.

## MAIN REFERENCES

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Lazarou, E., [Impeachment of the United States President](#), European Parliamentary Research Service, October 2019.

Neale, T. H. [Presidential disability under the Twenty-Fifth Amendment: Constitutional provisions and perspectives for Congress](#), Congressional Research Service, 5 November 2018.

## ENDNOTES

- <sup>1</sup> There has been some [speculation](#) about whether President Trump could use his remaining time in office to pardon himself for federal crimes, but Article II, Section 2 of the Constitution precludes the use of [presidential pardons](#) for presidential impeachment.
- <sup>2</sup> It is uncertain whether the Senate is actually required to hold a trial. In the lead-up to President Trump's first impeachment in December 2019, Senate Majority Leader Mitch McConnell declared he would have '[no choice](#)' but to proceed with a trial under the Senate's own rules, but other Republican Party officials pointed out that those rules could be changed by a simple majority vote.
- <sup>3</sup> Assuming all 100 Senators take part, any fewer than 67 votes in favour would result in the President's acquittal.

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