

Lena Sophia Mitterutzner\*

## Accusing and Judging the President: A Comparison of Impeachment and Removal Procedures of Presidents in Presidential Systems

*With the accusation and the trial of Republican President Trump in the United States, impeachment was anew in the headlines all over the world. Neither the accusation of President Trump by the House of Representatives, nor his acquittal in the Senate trial were particularly surprising. However, the outcome of the procedure was not predetermined by the strength or weakness of the evidence of presidential wrongdoing, but rather the relative majority of Democrats in the House and Republicans in the Senate. This article firstly compares various constitutional procedures to impeach, or accuse, and judge the president in 13 different (semi-) presidential systems. Secondly, this article engages critically with the arguments that can be made in favor and against these different constitutional approaches, in particular from a United States constitutional law perspective.*

### Table of Contents

A. Introduction .....	98
B. Comparison of Procedures in (Semi-) Presidential Systems.....	99
I. Lower House Accuses, Upper House Judges: Argentina, Paraguay, Philippines, United States.....	99
II. Legislative Body Accuses, Legislature as a Whole Judges: France.....	99
III. Lower House Accuses, Judicial Body Checks, Upper House Makes Final Decision: Indonesia & Russia.....	100
IV. Legislature as a Whole Accuses, Judicial Body Judges: Bolivia, Nicaragua, South Korea, Turkey, Venezuela .....	100
V. Lower House Accuses, Judge Depends on Substantive Grounds: Brazil.....	101
VI. Conclusion: Comparison of Procedures in (Semi-) Presidential Systems.....	101
C. Discussion .....	101

I. Discussion of Arguments in Favor and Against Making the Upper House of Parliament the Judge .....	101
1. Representatives of the People Should Both Accuse and Judge the President.....	101
2. Upper House as Judge Conflicts with the Separation of Powers Doctrine .....	102
II. Discussion of Arguments in Favor and Against Making a Judicial Body the Judge .....	103
1. Two Different Trials Held by the Same Court Removes Double Security of Having Two Trials in Two Different Courts.....	103
2. Judicial Body Lacks “Fortitude”, “Credit” and “Authority” .....	104
3. Judicial Body as Judge Respects the Separation of Powers Principle.....	104
4. Development of Precedent to Guide Future Impeachment and Removal Procedures.....	105
D. Conclusion .....	106

### A. Introduction

Most democratic constitutions contain a clause that allows a public body to initiate a formal proceeding with the aim of resolving in a trial whether a public official, like the president, should be removed from his office or not for some wrongdoing.<sup>1</sup> In December 2019, the United States House of Representatives accused, i.e. impeached, President *Donald J. Trump* for abuse of power and obstruction of Congress.<sup>2</sup> This made *Trump* the third president in American constitutional history, after *Andrew Johnson* and *Bill Clinton*, to be judged in a trial by the Senate with the potential consequence of removal from office.<sup>3</sup>

In spring 2019, President *Trump* warned that he would request the Supreme Court to interfere, if the House of

\* The author is a law student in her seventh semester at Freie Universität Berlin. This article was written in the seminar on Comparative Constitutional Law during the fall semester 2019/20, while the author completed her specialization in International and Comparative Law at the University of California, Hastings College of the Law in San Francisco. The author thanks Professor *Radhika Rao* for her valuable comments and giving encouragement to submit this article for publication. The author was awarded with the CALI Excellence for the Future Award for this article.

<sup>1</sup> *San Juan/Trojanco*, Max Planck Encyclopedia of Comparative Constitutional Law (2016), Impeachment, para. 1, <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e311>, lastly accessed on 16.6.2020.

The full definition of impeachment provided in *San Juan/Trojanco*: “Impeachment is a formal proceeding instituted by a public body (usually the

legislature) for determining through a trial whether a public official – usually although not necessarily high ranking, and who has a fixed term of office or protected tenure – must be either removed from office or held accountable in other ways.”

<sup>2</sup> *Fandos/Shear*, “Trump Impeached for Abuse of Power and Obstruction of Congress”, The New York Times (18.12.2019), <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html>, lastly accessed on 18.6.2020.

<sup>3</sup> *Pasley/Engel/Frias*, “Here are all the US Presidents who have been impeached”, Business Insider (6.2.2020), <https://www.businessinsider.com/list-of-impeached-us-presidents-2019-12>, lastly accessed on 18.6.2020.

Representatives impeaches him.<sup>4</sup> Actually, the United States Constitution does not authorize the involvement of the Supreme Court in the impeachment and removal procedure of the president. The House of Representatives has the “sole power of impeachment”<sup>5</sup> and the Senate has the “sole power to try all impeachments”<sup>6</sup>. In *Nixon v. United States*<sup>7</sup>, the Supreme Court also clarified that the “judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments”. Because the procedure only involves the political branches of government, impeachment is widely considered in the United States to be a political, rather than a judicial, mechanism to remove the president from office.<sup>8</sup> In contrast to the United States Constitution, other presidential systems involve the judicial branch in the impeachment and removal procedure in distinct manners.<sup>9</sup> This raises the question: Should the impeachment and removal procedure of presidents only be assigned to the legislative branch or should it also involve the judicial branch of government?

Part I of this article compares constitutional procedures to accuse and judge the president. Impeachment procedures exist in almost every presidential system. The following presidential systems were chosen to illustrate the different forms that presidential impeachment and removal procedures may take and shall serve as a basis for discussion: Argentina, Bolivia, Brazil, France, Nicaragua, Paraguay, Bolivarian Republic of Venezuela, the Philippines, Indonesia, Korea, Turkey, Russia and the United States. Part II of this article engages critically with the arguments that can be made in favor and against these different constitutional approaches, in particular from a United States constitutional law perspective.

## B. Comparison of Procedures in (Semi-) Presidential Systems

### I. Lower House Accuses, Upper House Judges: Argentina, Paraguay, Philippines, United States

Argentina, Paraguay, the Philippines and the United States all have bicameral legislatures.<sup>10</sup> Under these constitutions, the lower house has the sole power to initiate the removal procedure by accusing the president, i.e. bringing charges.<sup>11</sup> The upper house of the legislature under all four constitutions holds the trial of impeachment.<sup>12</sup> When sitting for the purpose of trying the accused president, the senators of Argentina<sup>13</sup>, the Philippines<sup>14</sup> and the United States<sup>15</sup> shall be on oath or affirmation. The Constitution of Paraguay is silent in this respect.

### II. Legislative Body Accuses, Legislature as a Whole Judges: France

The French bicameral parliament<sup>16</sup>, established a procedure to remove the president only in 2014 *via* constitutional amendment.<sup>17</sup> Similarly to type one constitutions, the French amendment assigns both the task of accusing and judging the president to the legislative branch. In contrast to the type one constitutions, which assign the impeachment power to the lower house of the legislature alone, the French Constitution allows both the lower and the upper house to initiate the procedure.<sup>18</sup>

Also in contrast to the type one constitutions, which assign the authority to judge the accused president to the upper house alone, the French trial is conducted by parliament as a whole sitting as a “high court”<sup>19</sup>. Although the term “high court” suggests some involvement of the judicial branch, it is actually wholly comprised of members of the legislative branch, i.e. elected politicians. In contrast to the type one constitutions, which assign a member of the judicial branch the duty to preside over the impeachment trial, the French Constitution requires the president of the lower house, i.e.

<sup>4</sup> Liptak, “Can Trump Challenge His Impeachment in the Supreme Court?”, *The New York Times* (17.12.2019), <https://www.nytimes.com/2019/11/25/us/trump-impeachment-supreme-court.html>, lastly accessed on 18.6.2020.

<sup>5</sup> Art. I, § 2, Cl. 5, Constitution of the United States of America.

<sup>6</sup> Art. I, § 3, Cl. 6, Constitution of the United States of America.

<sup>7</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>8</sup> Gerhard, “Impeachment is the law. Saying ‘political process’ only helps Trump’s narrative”, *The Washington Post* (14.12.2019), <https://www.washingtonpost.com/outlook/2019/12/14/impeachment-is-law-saying-political-process-only-helps-trumps-narrative/>, lastly accessed on 18.6.2019.

<sup>9</sup> See Part B.III., B.IV. and B.V. of this article.

<sup>10</sup> Art. 44, Constitution of Argentina; Art. 182, Cl. 1, Constitution of the Republic of Paraguay; Art. VI, § 1, Constitution of the Philippines; Art. I, § 1, Constitution of the United States of America.

<sup>11</sup> The Argentinian Chamber of Deputies has the “right to bring charges against the president.”, Art. 53, Constitution of Argentina; in Paraguay, the “accusation will be formulated by the Chamber of Deputies.”, Art. 225, Cl. 1, Constitution of the Republic of Paraguay; The House of Representatives of the Philippines has the “exclusive power to initiate all cases of impeachment.”, Art. XI, § 3, Cl. 1, Constitution of the

Philippines; the United States “House of Representatives [...] shall have the sole power of impeachment.” (annot. by auth.), Art. I, § 2, Cl. 5, Constitution of the United States of America.

<sup>12</sup> In Argentina, the “Senate is charged with trying in public the person impeached by the Chamber of Deputies”, Art. 59, Constitution of Argentina; in Paraguay, it is the Chamber of Senators that “judge[s] in public trial those accused by the Chamber of Deputies” (annot. By auth.), Art. 225, Cl. 2, Constitution of the Republic of Paraguay; in the Philippines, the Senate has the sole power to try all cases of impeachment, Art. XI, § 3, Cl. 6, Constitution of the Philippines; the United States Senate has the sole power to try all cases of impeachment, Art. I, § 3, Cl. 6, Constitution of the United States of America.

<sup>13</sup> Art. 59, Constitution of Argentina.

<sup>14</sup> Art. XI, § 3, Cl. 6, Constitution of the Philippines.

<sup>15</sup> Art. I, § 3, Cl. 6, Constitution of the United States of America.

<sup>16</sup> Art. 24, Cl. 2, Constitution of France.

<sup>17</sup> *McPartland*, “France gets new power to sack the president”, *The Local* (19.11.2014), <https://www.thelocal.fr/20141119/france-president-sack-impeachment>, lastly accessed on 18.6.2020.

<sup>18</sup> Art. 68, Cl. 2, Constitution of France.

<sup>19</sup> Art. 68, Cl. 1, Constitution of France.

a member of the legislature, to preside over the trial.<sup>20</sup> Similarly to the type one constitutions, the only consequence of presidential conviction by the “*high court*” is removal from office.<sup>21</sup>

### III. Lower House Accuses, Judicial Body Checks, Upper House Makes Final Decision: Indonesia & Russia

Indonesia and Russia both have bicameral legislatures. Similarly to the type one systems, the Indonesian and Russian Constitutions assign the authority to bring charges against the president to the lower house of parliament.<sup>22</sup> Furthermore, both the Russian and the Indonesian Constitution allow a body of the legislative branch to make the final decision as to whether the president should be removed from office or not. Equivalently to type one systems, the final decision in Russia is made by the upper house of parliament alone.<sup>23</sup> In Indonesia, the final decision is made by parliament as a whole, just like in the type two system.<sup>24</sup>

In contrast to both the type one and two systems, the Indonesian and Russian Constitution assign the judicial branch a role in the impeachment and removal procedure. The Indonesian Constitution requires judicial involvement *before* the parliament makes the final decision to convict or to acquit the president. Before the Indonesian lower house can actually submit the proposal for impeachment of the president to the parliament as a whole, it must first request the “*Constitutional Court to investigate, bring a trial, and issue a decision on the opinion*” of the lower house.<sup>25</sup> Only if “*the Constitutional Court decides that the president [...] is proved to have violated the law [...] and/or no longer meets the qualifications to serve as president*” (annot. by auth.) shall the lower house of Indonesia “*hold a plenary session to submit the proposal to impeach the president*” to the parliament as a whole.<sup>26</sup>

Under the Russian Constitution, the judicial branch becomes involved *after* the lower house has brought charges against the president. The Russian Supreme Court is asked to confirm the “*existence of indications of a crime in the actions of the president*”.<sup>27</sup> Further, the Russian

Constitutional Court must confirm that the “*established procedure for bringing charges has been observed*”.<sup>28</sup>

### IV. Legislature as a Whole Accuses, Judicial Body Judges: Bolivia, Nicaragua, South Korea, Turkey, Venezuela

In contrast to the bicameral legislatures established by type one, two and three constitutions, the legislative branches of Nicaragua, South Korea, Turkey and Venezuela are unicameral. The only exception is Bolivia with a bicameral parliament. At the first stage, the procedure established under these constitutions is somewhat similar to the one followed in type one, two and three constitutions. Both the South Korean<sup>29</sup> and Turkish<sup>30</sup> legislature as a whole may accuse the president. Although Bolivia has two distinct legislative chambers, the Bolivian parliament as a whole may authorize the trial of the president.<sup>31</sup> In addition to the authorization by the Bolivian parliament the trial also requires the request “*supported by the Prosecutor or the Attorney General of the State, who shall formulate the accusation if he believes that the investigation provides the basis for trial*”.<sup>32</sup> Nicaragua stands out among the type four constitutions for allowing its parliament to initiate the impeachment and removal procedure by passing a resolution to deprive the president of his immunity.<sup>33</sup> The Constitution of Venezuela is silent with respect to the initiation of the procedure.

The difference to the type one, two and three constitutions becomes evident at the second stage of the procedure. The body that tries the president does not originate from the legislative, but from the judicial branch. The president is acquitted or convicted by the Constitutional Court in South Korea,<sup>34</sup> the Supreme Court in Turkey,<sup>35</sup> the Supreme Court of Justice in Bolivia,<sup>36</sup> the Supreme Court of Justice in Nicaragua<sup>37</sup> and the Supreme Tribunal of Justice in Venezuela<sup>38</sup>. Similarly to the procedures described under I. and II., the only consequence of presidential conviction by the South Korean Constitutional Court is removal from office. The removed president still remains liable for criminal or civil offenses.<sup>39</sup> The remaining type four constitutions are silent in this respect.

<sup>20</sup> Art. 68, Cl. 3, Constitution of France.

<sup>21</sup> Art. 68, Cl. 1, Constitution of France.

<sup>22</sup> The Indonesian lower house may adopt the “*proposal for the dismissal of the president*”, Chapter III, Art. 7B, Cl. 1, Constitution of the Republic of Indonesia; Art. 93, Cl. 2, Constitution of the Russian Federation.

<sup>23</sup> Art. 93, Cl. 2, Constitution of the Russian Federation.

<sup>24</sup> Chapter III, Art. 7B, Cl. 6-7, Constitution of the Republic of Indonesia.

<sup>25</sup> Chapter III, Art. 7B, Cl. 1, Constitution of the Republic of Indonesia.

<sup>26</sup> Chapter III, Art. 7B, Cl. 5, Constitution of the Republic of Indonesia.

<sup>27</sup> Art. 93, Cl. 1, Constitution of the Russian Federation.

<sup>28</sup> Art. 93, Cl. 1, Constitution of the Russian Federation.

<sup>29</sup> The South Korean National Assembly may pass motions for impeachment of the president, Art. 65, Cl. 1, Constitution of the Republic of Korea.

<sup>30</sup> The Turkish Grand National Assembly may pass motions for impeachment of the president, Art. 105, Cl. 1-3, Constitution of the Republic of Turkey.

<sup>31</sup> Art. 184, Cl. 4, Constitution of Bolivia.

<sup>32</sup> Art. 184, Cl. 4, Constitution of Bolivia.

<sup>33</sup> Art. 130, Cl. 1, Constitution of Nicaragua.

<sup>34</sup> Art. 111, Cl. 1, Nr. 2, Constitution of the Republic of Korea.

<sup>35</sup> Art. 105, Cl. 3 and Cl. 5, Constitution of the Republic of Turkey.

<sup>36</sup> Art. 184, Cl. 4, Constitution of Bolivia.

<sup>37</sup> Art. 130, Cl. 2, Constitution of Nicaragua.

<sup>38</sup> Art. 266, Cl. 2, Constitution of the Bolivarian Republic of Venezuela.

<sup>39</sup> Art. 65, Cl. 4, Constitution of the Republic of Korea.

## V. Lower House Accuses, Judge Depends on Substantive Grounds: Brazil

The legislature of Brazil is bicameral.<sup>40</sup> Similarly to all the systems outlined *supra*, the lower house of Brazil has the power to accuse the president<sup>41</sup>. However, whether the trial is held by the legislative or the judicial branch depends on the substantive grounds of the accusation. If the president is accused of committing an “impeachable offenses”, the trial is assigned to the upper house of parliament.<sup>42</sup> In this case, the procedure is equivalent to the one described under I. However, if the president is accused of committing “*common criminal offenses*”, then the trial is held by the Supreme Federal Tribunal.<sup>43</sup> In this case, the procedure followed under the Brazilian Constitution is identical to the one described under IV.

## VI. Conclusion: Comparison of Procedures in (Semi-) Presidential Systems

Under all of the constitutions examined, the procedure to remove a president must follow at least two common steps. At the first stage, these procedures all look very similar: a body, which is part of the legislative branch of government, passes a bill that serves the purpose of an indictment. At the second, final stage of the procedure, another body makes a decision on whether the president should be convicted and consequently removed from office. At this second stage, the procedures under examination actually differ from each other. In Argentina, Paraguay, the Philippines, the United States, Indonesia and Russia, the upper house of the legislative branch makes the final decision as to whether the president should be removed from office or not. The French Constitution assigns this task to the parliament as a whole. In Bolivia, Nicaragua, South Korea, Turkey and Venezuela, a judicial body decides whether the president should be removed from office or not. Under the Brazilian Constitution, depending on the substantive grounds, the final decision can be made by either a legislative or a judicial body. While the final decision is made by the upper house of the legislative branch in Indonesia and Russia, both constitutions assign the judicial branch a distinct role in the impeachment and removal procedure of the president.

## C. Discussion

### I. Discussion of Arguments in Favor and Against Making the Upper House of Parliament the Judge

#### 1. Representatives of the People Should Both Accuse and Judge the President

The United States Constitution, adopted in 1787, was the first written constitution. It influenced the content of many constitutions that were adopted later in the world and it continues to serve as a source of inspiration to constitutional designers today.<sup>44</sup> It is thus of interest to understand why the founding fathers of the United States decided to authorize the upper house of the legislature to judge the accused president.<sup>45</sup> In Federalist Paper No. 65, the founding father *Alexander Hamilton* only made one main argument in support of this decision. The court of impeachment has the jurisdiction to try “*offenses which proceed from the misconduct of public men, or, in other words, from the abuse of violation of some public trust*”. The substantive grounds that lead to impeachment are “*injuries done immediately to society itself*”. They are thus “*political*” in nature. Designed “*as a method of national inquest into the conduct of public men*”, *Hamilton* concluded that the “*inquisitors for the nation*” should be the “*representatives of the nation themselves*”.<sup>46</sup> Judicial bodies are not directly elected by the people and thus not representatives of the people.<sup>47</sup> This is probably the strongest and only argument that can be made in favor of making the upper house of the legislature sit as court of impeachment.

However, underlying the argument seem to rest some questionable assumptions, namely that the people prefer their direct representatives to judge the president and that the public opinion will favor conviction if the lower house decides to accuse the president. People might actually prefer a judicial over a political body to hold the trial of the president. Also, empirical evidence from past impeachment efforts indicates that the opinion of the majority of the public on whether the president should be removed or not, does not always match the opinion of their direct representatives. In South Korea, for instance, seven out of ten Koreans opposed the decision to accuse President *Roh-Moo-hyun* at the first stage and preferred his acquittal at the second stage.<sup>48</sup> Similarly, the majority of the American population disliked the decision of the House of Representatives to

<sup>40</sup> Art. 44, Constitution of Brazil.

<sup>41</sup> Art. 86, Cl. 1, Constitution of Brazil.

<sup>42</sup> Art. 86, Cl. 1, Constitution of Brazil.

<sup>43</sup> Art. 86, Cl. 1, Constitution of Brazil.

<sup>44</sup> *Blaustein*, The U.S. Constitution: America’s Most Important Export 2004, <https://usa.usembassy.de/etexts/gov/constexport.pdf>, p. 1, lastly accessed on 23.6.2020.

<sup>45</sup> Federalist Paper No. 65, “The Powers of the Senate continued” (7.3.1788).

<sup>46</sup> Federalist Paper No. 65, “The Powers of the Senate continued” (7.3.1788).

<sup>47</sup> The president of the United States has the power to nominate by and with the Advice and Consent of the Senate and to appoint the Judges of the Supreme Court, Art. II, § 2, Cl. 2, Constitution of the United States of America.

<sup>48</sup> *Len*, “President’s Impeachment Stirs Angry Protests in South Korea”, The New York Times (13.3.2004), <https://www.nytimes.com/2004/03/13/world/president-s-impeachment-stirs-angry-protests-in-south-korea.html>, lastly accessed on 18.6.2020.

accuse President *Clinton* and wanted him to remain in office.<sup>49</sup>

## 2. Upper House as Judge Conflicts with the Separation of Powers Doctrine

### a) Conflict with the Separation of Powers between Legislature and Executive

The framers of the United States Constitution conceived the idea of involving solely the legislature in the procedure to accuse and judge the president from Great Britain.<sup>50</sup> There, the mechanism of impeachment first emerged in the mid-14th century during the conflict between the British monarch and Parliament. At that time, the king held a vast amount of power,<sup>51</sup> while the legislative and judicial branch only had very restricted means of scrutinizing the executive branch of government.<sup>52</sup> The British Parliament established the impeachment procedure in order to grant itself some sovereign power. As the Monarch was indisputably “above the law”<sup>53</sup>, the only possibility the parliament had, was to target the immunity of the crown’s ministers. This means, the impeachment and removal procedure was first created in a monarchy for the very purpose of providing the legislative branch with a “political weapon” and the ability to restrain the monarch by checking his appointees.<sup>54</sup>

The contemporary political setting in Great Britain is fundamentally different from the context, in which the impeachment and removal procedure first emerged. Today, the British view impeachment as an archaic and outdated procedure that does not fit into the modern British parliamentary system.<sup>55</sup> Symptomatic of the constitutions of parliamentary systems, such as the United Kingdom or Germany, is that the separation of powers between the executive and the legislative branch of government is not strictly respected.<sup>56</sup> Typically, the head of the executive is elected by and accountable to the legislature.<sup>57</sup> The legislatures are allowed to remove the head of the executive for political reasons through a simple vote of no confidence.<sup>58</sup> This also explains, why the rather lengthy impeachment and removal procedure of heads of the executive is considered obsolete in Great Britain today.

In contrast, the constitutions of presidential systems, like the one of the United States and each of the countries examined in the first part of this article, follow the separation of powers between the legislative, executive and judicial branch of government very strictly. Characteristically for this stern separation of powers is the president, as the head of the executive, elected by and accountable only to the people, not to the legislature. Hence, only the electorate can remove the president for political reasons. The legislature is not authorized to remove the head of the executive for political reasons through a vote of no confidence. The legislatures may only remove the president for wrongdoing in office through the impeachment and removal procedure laid down in the constitution.<sup>59</sup>

However, empirical evidence of the impeachment and removal procedure practice of the United States legislature suggests that the strongest predictor of how individual legislators are going to vote is not the strength of the evidence of presidential wrongdoing collected, but rather party membership of the legislators.

In the impeachment procedure of former Democratic President *Clinton*, the House of Representatives passed two articles of impeachment. The first of these two articles was adopted by a 228-206 vote. All, except for five, Democrats plus five Republicans voted against impeachment of the Democratic president. The other article passed by a vote of 221-212. Similarly to the first article, all Democrats, except for five, plus five Republicans voted against impeachment.<sup>60</sup> At the Senate trial, a two-thirds-majority, i.e. 67 “guilty” votes, are necessary to convict the president.<sup>61</sup> The Senate did not find President *Clinton* guilty on either of the two articles passed by the House. On the first article, 45 Republicans voted “guilty”, while 45 Democratic plus ten Republican senators voted “not guilty”. On the second article, 50 Republican senators voted to convict, while 45 Democrats plus five Republicans voted to acquit.<sup>62</sup>

The impeachment of Republican President *Trump* shows a very similar picture. The House of Representatives passed two articles of impeachment. The first article was adopted by a 230-197 vote. All, except for four, Democrats and no Republican voted in favor of the impeachment of the

<sup>49</sup> Riley, “Bill Clinton: Domestic Affairs”, Miller Public Center of Public Affairs, University of Virginia, <https://millercenter.org/president/clinton/domestic-affairs>, lastly accessed on 18.6.2020.

<sup>50</sup> Federalist Paper No. 65, “The Powers of the Senate continued” (7.3.1788).

<sup>51</sup> Walthall, *New England Law Review* (N. Eng. Law Rev.) 9 (1974), 257 (258).

<sup>52</sup> Caird, Commons Briefing Paper Number CBP7612 on “Impeachment”, House of Commons Library (6.6.2016), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7612>, p. 7, lastly accessed 19.6.2020.

<sup>53</sup> Walthall, *N. Eng. Law Rev.* 9 (1974), 257 (259).

<sup>54</sup> Walthall, *N. Eng. Law Rev.* 9 (1974), 257 (259).

<sup>55</sup> Caird, Commons Briefing Paper Number CBP7612 on “Impeachment”, p. 7, House of Commons Library (6.6.2016),

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7612>, lastly accessed on 19.6.2020; Joint Committee on Parliamentary Privileges Report, HL 43-I / HC 214-I (1999), para. 16.

<sup>56</sup> For a good description of the differences between the parliamentary and the presidential system see Szucs, *George Washington International Law Review* (Geo. Wash. Int’l L. Rev.) 46 (2014), 409 (421, 422).

<sup>57</sup> E.g. Art. 63, the Basic Law for the Federal Republic of Germany.

<sup>58</sup> E.g. Art. 67, the Basic Law for the Federal Republic of Germany.

<sup>59</sup> Szucs, *Geo. Wash. Int’l L. Rev.* 46 (2014), 409 (421, 422).

<sup>60</sup> Chemerinsky, *Constitutional Law*, Sixth ed. 2019, p. 417.

<sup>61</sup> Art. I, § 3, Cl. 6, Constitution of the United States of America.

<sup>62</sup> Riley, “Bill Clinton: Domestic Affairs”, Miller Public Center of Public Affairs, University of Virginia, <https://millercenter.org/president/clinton/domestic-affairs>, lastly accessed on 18.6.2020.

Republican president. The second article was adopted by a 229-198 vote. All Democrats, except for five, and no Republican voted in favor of impeachment on the second article. One of the two Democrats who voted “no” on both articles of impeachment had previously announced his intent to switch parties<sup>63</sup> and officially became a Republican at the beginning of January 2020<sup>64</sup>. In the Senate trial of Republican President *Trump*, all Democratic senators voted in favor of *Trump*’s conviction under both articles. Except for Senator *Mitt Romney*, all Republican senators voted in favor of *Trump*’s acquittal on both articles.<sup>65</sup>

This empirical evidence from the United States suggests that legislatures tend to abuse their impeachment and removal authority to remove the head of the executive for political reasons, rather than actual proof of wrongdoing in office. This practice amounts to something comparable to a vote of no confidence symptomatic of parliamentary systems, that clashes with the separation of powers principle between the legislature and the executive fundamental to presidential systems.<sup>66</sup>

*Alexander Hamilton* did not foresee that the impeachment and removal procedure would in practice serve as a “political weapon” to the legislature against the president. Rather, he assumed that dividing the authority to accuse and judge between the two houses of the legislature would suffice to protect the president from political removals.<sup>67</sup> This false prediction could probably be explained as follows. Firstly, *Hamilton* did not think of senators as directly elected politicians. Under the United States Constitution adopted in 1788, senators are elected by state legislatures.<sup>68</sup> Popular elections for senators were only introduced later with the adoption of the 17th amendment.<sup>69</sup>

Secondly, *Hamilton* did probably not foresee the development of the modern-day two-party system. In his *Federalist Papers*, he actually expressed extreme hostility to the idea of political party formation in general.<sup>70</sup> In light of this, it was reasonable for *Hamilton* not to anticipate that the outcome of the impeachment and removal procedure would be dictated more by comparative strength of either the

Democratic or the Republican Party, rather than actual evidence of presidential wrongdoing.

#### b) *Conflict with the Separation of Powers between Legislature and Judiciary*

Under the separation of powers principle, the capacities of the government are divided among the three branches of government, namely the executive, legislative and judicial branch. Each of the three branches has distinct responsibilities and is typically not permitted to exercise the responsibilities of another governmental branch.<sup>71</sup> The court of impeachment has the responsibility to compel the production of evidence and testimony in a trial in order to make a reasoned judgement as to whether the actions of the accused president constitute the substantive grounds for removal provided under the constitution. In essence, the court of impeachment has the duty to apply the law of the constitution to the facts of the case. This is a task typically reserved for the judicial, not the legislative branch.<sup>72</sup> Hence, granting the upper house of the legislature the authority to sit as court of impeachment confuses legislative and judicial powers in the same body. This conflicts with the separation of powers doctrine, more specifically between the legislative and the judicial branch of government.<sup>73</sup> Why the founding father of the United States Constitution thought the upper house must sit as court of impeachment nevertheless will be explained below.

## II. Discussion of Arguments in Favor and Against Making a Judicial Body the Judge

### 1. Two Different Trials Held by the Same Court Removes Double Security of Having Two Trials in Two Different Courts

The only consequence of a presidential conviction at trial is removal from office. As outlined *supra*, the president still remains liable and subject to trial and punishment according to the law.<sup>74</sup> *Hamilton* anticipated that the Supreme Court would be assigned with the duty to hold this second criminal trial of the president. This disqualifies the Supreme Court from also sitting as a court of impeachment.

<sup>63</sup> *Cai et al.*, “Impeachment Results: How Democrats and Republicans Voted”, *The New York Times* (18.12.2019), <https://www.nytimes.com/interactive/2019/12/18/us/politics/trump-impeachment-vote.html>, lastly accessed on 18.6.2020.

<sup>64</sup> Biographical Directory of the United States Congress, “Biography of Jefferson Van Drew”, <https://bioguideretro.congress.gov/Home/MemberDetails>, lastly accessed on 16.6.2020.

<sup>65</sup> *Cai et al.*, “Trump Impeachment Results: How Democrats and Republicans Voted”, *The New York Times* (5.2.2020), <https://www.nytimes.com/interactive/2020/02/05/us/politics/impeachment-vote-results.html>, lastly accessed on 16.6.2020.

<sup>66</sup> *Ginsburg et al.* argue that the power of the legislature to impeach and remove the head of the executive “violates the usually structural independence” of the two branches of government in presidential systems. *Ginsburg et al.* seem not to differentiate in this regard based on the (political) motivations of the legislators. See *Ginsburg/Huq/Landau*, *University of Chicago Law Review* (Forthcoming) (2020), 1 (47).

<sup>67</sup> *Federalist Paper No. 66*, “Objections to the Power of the Senate to sit as a Court of Impeachments further considered” (11.3.1788).

<sup>68</sup> Art. III, § 3, Cl. 1, Constitution of the United States of America.

<sup>69</sup> Amendment XVII, Constitution of the United States of America.

<sup>70</sup> *Federalist Paper No. 10*, “The Same Topic Continued, The Union as a Safeguard Against Domestic Faction and Insurrection”, (23.11.1787).

<sup>71</sup> Legal Information Institute – Cornell University, Separation of Powers, [https://www.law.cornell.edu/wex/separation\\_of\\_powers](https://www.law.cornell.edu/wex/separation_of_powers), lastly accessed on 19.6.2020.

<sup>72</sup> For a description of the typical tasks assigned to the judiciary in the United States presidential system of government see The White House, The Judicial Branch, <https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/>, lastly accessed on 19.6.2020.

<sup>73</sup> *Federalist Paper No. 66*, “Objections to the Power of the Senate to sit as a Court of Impeachments further considered” (11.3.1788).

<sup>74</sup> Art. 1, § 3, Cl. 7, Constitution of the United States of America.

If an error is made in the impeachment trial or the decision is biased, then it is very likely that this error or this bias will also occur in the second criminal procedure. According to *Hamilton*, making the Senate sit as the court to try the first impeachment trial and the Supreme Court sit as the court to try the second criminal trial provides the advantage of double security.<sup>75</sup>

However, the text of the United States Constitution and Supreme Court practice do not support *Hamilton*'s conclusion that the Supreme Court would actually have the duty to hold this second criminal trial. In general, the Supreme Court has appellate jurisdiction<sup>76</sup> and does not hold trials.<sup>77</sup> Only in "cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be a party" does the Supreme Court have original jurisdiction.<sup>78</sup> Neither an incumbent president, who has been acquitted in the first trial by the Senate, nor a president who is convicted and thus removed from office by the Senate falls under one of the enumerated cases in which the Supreme Court has original jurisdiction under the United States Constitution. Consequently, allowing the Supreme Court to sit as court of impeachment would not remove the double security of having the two trials in two different courts.<sup>79</sup>

## 2. Judicial Body Lacks "Fortitude", "Credit" and "Authority"

*Alexander Hamilton* predicted that individual Supreme Court justices would not have the necessary "fortitude" to try the president and the Supreme Court as a whole would not have the required "credit and authority" among the people to sit as court of impeachment.<sup>80</sup> In general, *Hamilton* expected the judicial branch to be the weakest among the three branches of government, because it has "no influence over either the sword or the purse" and it has "neither force nor will, but merely judgement".<sup>81</sup>

This perception of the judicial branch as the least powerful among the three branches of government seems inadequate today. In the context of the global trend often referred to as the "judicialization of politics", judicial bodies have significantly enlarged their clout in the political field over the past decades.<sup>82</sup> Justices became increasingly bolder in making decisions that span into the fields of politics.<sup>83</sup> Moreover, judicial bodies have gained authority in making

such political judgements. The *Bush v. Gore*<sup>84</sup> judgment, in which the Supreme Court determined the outcome of a presidential election, is probably the most outstanding United States example of this global phenomenon.<sup>85</sup> Before this background it is very unlikely that the judgement of a judicial body as to whether the president should be removed from his office or not would have less legitimacy than the one rendered by a body of the legislative branch.

## 3. Judicial Body as Judge Respects the Separation of Powers Principle

Allowing a judicial body to make the final decision as to whether the president should be removed from his office or not respects the separation of powers principle. Firstly, the duties of the court of impeachment are duties typically assigned to the judicial, not the legislative branch of government.<sup>86</sup> Hence, the issue of confusing legislative and judicial functions in the same body by making the upper house of the legislature the court of impeachment could be avoided by assigning this task to a judicial body.

Secondly, allowing a judicial body to sit as court of impeachment could prevent presidential removals by the legislature for purely political reasons, amounting to a clash with the separation of powers between the legislature and the executive. In contrast to members of the legislature, Supreme Court Justices are not popularly elected politicians, who run their election campaigns as members of either the Democratic or the Republican Party.<sup>87</sup> Consequently, they are more likely to base their judgement in an impeachment trial on actual evidence of innocence or guilt rather than their party membership. The judicial body could thus exercise a check on the decision of the legislative body to accuse the president and protect the president from removal for purely political reasons. The impeachment of President *Wahid* in Indonesia and President *Roh-Moo-hyun* in South Korea, described in detail below, serve as an illustration to show how judicial involvement in the impeachment and removal procedure can help enforce the separation of powers doctrine between the legislature and the executive.

### a) Impeachment of Indonesian President *Wahid* (2001)

In 2001, the first democratically elected President of Indonesia, *Wahid*, was accused of not making a \$2 million

<sup>75</sup> Federalist Paper No. 65, "The Powers of the Senate continued" (7.3.1788).

<sup>76</sup> Art. III, § 2, Cl. 2, Constitution of the United States of America.

<sup>77</sup> The White House, The Judicial Branch, available at: <https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/>, lastly accessed on 28.7.2019.

<sup>78</sup> Art. III, § 2, Cl. 2, Constitution of the United States of America.

<sup>79</sup> I would like to thank Professor *Matthew Coles* for discussing this issue with me and guiding me to this answer.

<sup>80</sup> Federalist Paper No. 65, "The Powers of the Senate continued" (7.3.1788).

<sup>81</sup> Federalist Paper No. 78, "The Judiciary Department" (28.5.1788).

<sup>82</sup> *Hirschl*, in: The Oxford Handbook of Political Science (2011), 253.

<sup>83</sup> *Lin*, UCLA Journal of International Law and Foreign Affairs (JILFA) 20 (2016), 275 (277).

<sup>84</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>85</sup> *Hunt*, The Judicialization of Politics in Canada and the United States, <https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1040&context=honorsprojects>, p. 20, lastly accessed on 19.6.2020.

<sup>86</sup> See Part B.I.2.b of this article.

<sup>87</sup> The president of the United States has the power to nominate by and with the Advice and Consent of the Senate and to appoint the Judges of the Supreme Court, Art. II, § 2, Cl. 2, Constitution of the United States of America.

donation public and of stealing \$4.1 million from a public agency.<sup>88</sup> No evidence was found to support these accusations,<sup>89</sup> leading the Indonesian Attorney General to the conclusion that there was no presidential wrongdoing.<sup>90</sup> The Indonesian Parliament at the time disliked President *Wahid* for what is often referred to as his “erratic behavior”<sup>91</sup> and his failure to properly address economic issues of the country<sup>92</sup>. The legislature thus recognized an opportunity in the corruption scandal<sup>93</sup> and removed him from office<sup>94</sup>, despite the lack of actual evidence of wrongdoing. Effectively, the Indonesian Parliament abused the impeachment procedure to remove the president for political reasons. This amounts to something equivalent to a vote of no confidence peculiar to parliamentary systems, which violates the separation of powers principle between the executive and the legislature intrinsic to presidential systems.

At the time, the Indonesian impeachment procedure used to be designed in a similar manner to the type one constitutions, authorizing the upper house to make the final decision on whether the president should be removed from office or not.<sup>95</sup> The Indonesian judiciary did not have a role in the impeachment and removal procedure. The removal of President *Wahid* for political reasons could have been avoided by allowing a judicial body to sit as court of impeachment and to conclude that there is not enough evidence to remove him from office. In fact, after the highly controversial impeachment of President *Wahid*, Indonesian legislators recognized the need to protect prospective presidents from politically motivated removals.<sup>96</sup> The establishment of the Indonesian Constitutional Court in 2001 with the power to review presidential impeachments was regarded as the means to achieve this end.<sup>97</sup>

#### b) *Impeachment of South Korean President Roh-Moo-hyun (2004)*

In March 2004, the opposition of incumbent President *Roh-Moo-hyun* had control over the South Korean National Assembly.<sup>98</sup> The Korean Parliament impeached him for a minor election law violation.<sup>99</sup> This motion was widely regarded as a political move, taken by the opposition for the purpose of putting an end to *Roh*’s political agenda, including rapprochement with North Korea.<sup>100</sup> Under type one constitutions, the Korean Parliament would have effectively had the possibility to remove the president for purely political motivations, amounting to something equivalent to a vote of no confidence peculiar to parliamentary systems. However, the South Korean Constitution avoids the danger of the violation of the separation of powers between the executive and the legislature by allowing the Constitutional Court to judicially check the decision of the parliament. Two months after the impeachment motion was filed by the Korean Parliament, the Constitutional Court rejected the impeachment.<sup>101</sup> The Court found that President *Roh* did in fact violate Korean law, but that these violations were not of sufficient gravity to justify removal from office.<sup>102</sup>

#### 4. Development of Precedent to Guide Future Impeachment and Removal Procedures

*Alexander Hamilton* anticipated the problem that the court of impeachment will inevitably have very much discretion.<sup>103</sup> This prediction has proved to be true. In the context of President *Clinton*’s impeachment procedure, senators clashed over what presidential conduct actually provides grounds for removal from office and whether *Clinton*’s

<sup>88</sup> *Chandrasekaran*, “Indonesian President Censured Wahid May Face Impeachment Vote over Corruption”, *The Tech* (1.5.2001), <http://tech.mit.edu/V121/N22/Indonesia-22.22w.html>, lastly accessed on 18.6.2020.

<sup>89</sup> *Chandrasekaran*, “Indonesian President Censured Wahid May Face Impeachment Vote over Corruption”, *The Tech* (1.5.2001), <http://tech.mit.edu/V121/N22/Indonesia-22.22w.html>, lastly accessed on 18.6.2020.

<sup>90</sup> CNN, “Timeline: Indonesia’s Road to Crisis”, (23.7.2001), <https://www.cnn.com/2001/WORLD/asiacpf/southeast/07/22/indonesia.timeline/index.html>, lastly accessed on 18.6.2020; even Indonesian party officials have admitted, that no wrongdoing of the president was actually proved, *Landler*, “Indonesian Parliament Approves Motion to Impeach President”, *The New York Times* (30.5.2001), <https://www.nytimes.com/2001/05/30/world/indonesian-parliament-approves-motion-to-impeach-president.html>, lastly accessed on 18.6.2020.

<sup>91</sup> *Budiman*, in: *Southeast Asian Affairs*, 2001, p. 145.

<sup>92</sup> *Chandrasekaran*, “Indonesian President Censured Wahid May Face Impeachment Vote over Corruption”, *The Tech* (1.5.2001), <http://tech.mit.edu/V121/N22/Indonesia-22.22w.html>, lastly accessed on 18.6.2020.

<sup>93</sup> CNN, “Timeline: Indonesia’s Road to Crisis”, (23.7.2001), <https://www.cnn.com/2001/WORLD/asiacpf/southeast/07/22/indonesia.timeline/index.html>, lastly accessed on 18.6.2020.

<sup>94</sup> *Schuman/Mapes*, “Indonesia’s Megawati to Replace Wahid as President, Assembly Chairman Says”, *The Wall Street Journal* (23.7.2001), <https://www.wsj.com/articles/SB995798136911339684>, lastly accessed on 18.6.2020.

<sup>95</sup> *Lin*, *JILFA* 20 (2016), 275 (292).

<sup>96</sup> *Lin*, *JILFA* 20 (2016), 275 (292).

<sup>97</sup> *Lin*, *JILFA* 20 (2016), 275 (292).

<sup>98</sup> *Len*, “South Korea Parliament Votes to Strip President of Powers”, *The New York Times* (12.3.2004), <https://www.nytimes.com/2004/03/12/world/south-korea-parliament-votes-to-strip-president-of-powers.html>, lastly accessed on 18.6.2020.

<sup>99</sup> *Brooke*, “Constitutional Court Reinstates South Korea’s Impeached President”, *The New York Times* (14.5.2004), <https://www.nytimes.com/2004/05/14/world/constitutional-court-reinstates-south-korea-s-impeached-president.html>, lastly accessed on 18.6.2020.

<sup>100</sup> *Faiola*, “Court rejects South Korean President’s Impeachment”, *The Washington Post* (14.5.2014), <https://www.washingtonpost.com/archive/politics/2004/05/14/court-rejects-s-korean-presidents-impeachment/917ed896-e2a3-4b62-ae16-b41d3d232f7f/?fbclid=IwAR2MkHKH14sJVlUHQ2Q2zV-9BMZQ0GZb7LRJHb26EFZMXMPjIEJQ1Uw1vc>, lastly accessed on 18.6.2020.

<sup>101</sup> *Brooke*, “Constitutional Court Reinstates South Korea’s Impeached President”, *The New York Times* (14.5.2004), <https://www.nytimes.com/2004/05/14/world/constitutional-court-reinstates-south-korea-s-impeached-president.html>, lastly accessed on 18.6.2020.

<sup>102</sup> *Lee*, *The American Journal of Comparative Law* (Am. J. Comp. L.) 53 (2005), 403 (415).

<sup>103</sup> *Federalist Paper No. 65*, “The Powers of the Senate continued” (7.3.1788).

actions do so.<sup>104</sup> The majority of the senators concluded that his action did not meet the constitutional standard for removal<sup>105</sup> without issuing any official document explaining the reasons for *Clinton's* acquittal.<sup>106</sup> And even if the Senate did issue such an explanation, it would not have any legally binding effect for prospective Senates.<sup>107</sup> Arguably, what constitutes an impeachable offense is just as unclear today as it was before the first presidential impeachment took place.<sup>108</sup>

This level of uncertainty could be reduced by making a judicial body sit as court of impeachment and thus allowing for the development of precedent to guide future impeachment and removal decisions. The decision of the South Korean Constitutional Court regarding the impeached President *Roh-Moo-hyun* supports this argument. President *Roh-Moo-hyun* was the first president ever to be impeached under the South Korean Constitution.<sup>109</sup> The South Korean Constitution only states that the president can be impeached on the basis of a violation of the constitution or other “acts in the performance of official duties”.<sup>110</sup> The Constitutional Court acquitted President *Roh-Moo-hyun* and issued a binding decision specifying the grounds on which a president can be impeached under the South Korean Constitution, namely for: “violations of law”, “conduct only while in office”, and “only when the damage he has inflicted on the free and democratic basic order is so grave that only his removal from office can repair the damage”.<sup>111</sup> Future Korean parliaments have less discretion in determining for what types of offenses a president can be impeached, because the legislature will be legally obliged

to take these standards, developed by the Constitutional Court, into account.<sup>112</sup>

#### D. Conclusion

Allowing a judicial body to make the final decision on whether the president should be removed from his office or not is the better approach. Making the upper house sit as court of impeachment conflicts with the separation of powers principle, which is intrinsic to presidential systems, in two ways: firstly, this approach allows the legislature in practice to remove the head of the executive for political reasons; secondly, this approach confuses legislative and judicial functions in the same body. The arguments that convinced the framers of the United States Constitution to make the upper house of the legislature, not a judicial body, the court of impeachment are weak and in part implausible from a modern-day perspective. In contrast, very strong arguments can be made contemporarily to assign the authority to make the final decision to a judicial body. This approach respects the separation of powers principle, by allowing a judicial body to exercise a function typically reserved for the judiciary as well as to exert a check on the decision of the legislature to accuse the president and in this way protect presidents from being removed for purely political reasons. Furthermore, granting a judicial body the authority to hold the impeachment trial of the president allows for the development of binding precedent to guide future proceedings, which helps reduce the degree of uncertainty related to this rarely used constitutional mechanism.

<sup>104</sup> *Cole/Garvey*, Impeachment and the Constitution, Congressional Research Service (20.11.2019), <https://crsreports.congress.gov/product/pdf/R/R46013>, p. 30, lastly accessed on 19.6.2020.

<sup>105</sup> *Riley*, “Bill Clinton: Domestic Affairs”, Miller Public Center of Public Affairs, University of Virginia, <https://millercenter.org/president/clinton/domestic-affairs>, lastly accessed on 18.6.2020.

<sup>106</sup> *Lee*, *Am. J. Comp. L.* 53 (2005), 403 (420).

<sup>107</sup> *Walthall*, *N. Eng. Law Rev.* 9 (1974), 257.

<sup>108</sup> *Chemerinsky*, Fn. 60, p. 417 states that “it is unclear what lesson is to be learned from any of these” past uses of the impeachment procedure in

the United States concerning what constitutes the substantial grounds for impeachment, namely “high crimes and misdemeanors”.

<sup>109</sup> *Sang-Hun*, “South Korea’s Impeachment Process, Explained”, *The New York Times* (27.11.2016), <https://www.nytimes.com/2016/11/27/world/asia/impeaching-south-korea-president.html>, lastly accessed on 18.6.2020.

<sup>110</sup> Art. 65, Cl. 1, Constitution of the Republic of Korea.

<sup>111</sup> *Lee*, *Am. J. Comp. L.* 53 (2005), 403 (421).

<sup>112</sup> *Lee*, *Am. J. Comp. L.* 53 (2005), 403 (421).