

Impeach Hillary Clinton? A boon for Democrats

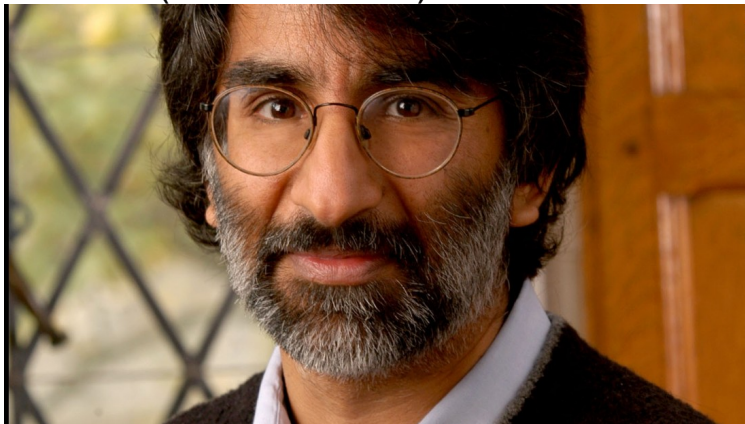
By Akhil Reed Amar

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(CNN) —

Several leading Republicans are suggesting that if Hillary Clinton is elected, she could be impeached sometime after inauguration, perhaps in her first year as president.

Echoing these allies, Donald Trump is arguing that a prospect of impeachment over the Clinton email controversy or any other Clinton misdeed would mire America in a constitutional crisis, and thus he (and he alone) is America's salvation.



Akhil Reed Amar

Savvy Democrats should respond to Trump's hyperkinetic attack with jujitsu, using his own furious momentum to expose yet another example of his constitutional clumsiness.

First, Democrats should smile and coolly point out that there is no need for Republicans to wait until inauguration. Why not start the grand impeachment parade now?

Casual observers can be forgiven for assuming – wrongly, as it turns out – that Clinton can be impeached only for presidential misconduct, and that of course no such misconduct has occurred because she has yet to be president. But in fact, the

Constitution’s Article II makes all “civil officers of the United States” and not just presidents subject to impeachment. True, senators and representatives are not impeachable as such.

Technically, they are not “officers” within the Constitution’s letter and spirit, as illustrated by the language of Article I, Section 6: “No person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

Precisely because senators cannot “hold Office” under this Article I clause, Clinton was constitutionally required to leave the Senate when she became secretary of state in 2009. But as secretary of state she was indeed an “officer” and as such, subject to impeachment. Private citizens as such cannot be impeached, nor can members of Congress as such. But Cabinet officers in their capacity as Cabinet officers are fair game in impeachment.

The punishment

True, Clinton is no longer a Cabinet officer. She is currently a private citizen. But the logic and spirit of Article II make former Cabinet officers fully impeachable, as are other former officers of the US government – ex-presidents, ex-vice presidents, former judges and former justices, for example. Why? Because the punishment for impeachment can extend beyond simple removal from office. Under Article I, Section 3, “judgment in cases of impeachment” may include “disqualification to hold or enjoy any Office of honor, Trust, or Profit under the United States.”



Surely an evil officer should not be allowed to escape disqualification by resigning one minute before the sentencing gavel bangs down at the end of his impeachment trial in the Senate. And what is true of someone who resigns one minute ahead of time must also be true of anyone who leaves office at any earlier point – resigning, perhaps, precisely because the evil officer knows that his misconduct is about to come to light. So Hillary Clinton can indeed be impeached – now, or any time before Inauguration. She can be impeached for any of her allegedly malignant misdeeds as secretary of state – whatever those misdeeds might be, in the eyes of her House Republican critics. And the standard for impeachment and conviction is not that she committed a statute-book felony beyond reasonable doubt – the pro-Clinton standard that FBI Director James Comey propounded back in July when he said that any criminal charges against her would be preposterous (a fact that Trump ignores at every turn). Rather, the standard in impeachment is more intrinsically political. Malicious mischief in office is impeachable

even if no felony ever occurred, and the standard of proof need not, perhaps, be as high as in a criminal courtroom.

All this should be music to the ears of Republican extremists: If convicted after she is impeached, Clinton can be completely disqualified from the presidency itself! Trump supporters would say: Hurray for the Constitution! Hooray for the rule of law! Our republic is safe after all.

First flaw in the GOP argument

But at this point, savvy Democrats should explain two further constitutional points to Trump and to the American public whom Trump is seeking to woo with his glib talk of impeachment.



First, impeachment by the House is an empty gesture unless the Senate follows up with a conviction – or at least with a trial in which conviction is a realistic possibility – and scenarios in which the Senate would follow up are altogether fanciful.

Partisan impeachments by the House of Representatives are indeed allowed under the strict letter of the Constitution. The

House needs only the barest of majorities to impeach – in effect, indict – a sitting or former officer. But nothing horrible really happens to the impeached officer – no removal from office, and no disqualification from future office-holding – unless the Senate convicts, and the Constitution requires a two-thirds vote for conviction.

Given that Republicans are now and will for the foreseeable future be more than a dozen votes shy of two-thirds, Clinton would only be imperiled if Democrats turn against her. But current Republican extremists are of course solidifying Democratic solidarity behind her. Democrats are, almost to a person, “with her,” as the slogan goes – and with her all the more because extremist Republicans are so intently and unfairly against her.

Hillary Clinton’s option

And here is the second, even bigger, constitutional flaw in Trump’s argument. Should future Republican extremists be so heavy-handed as to try to impeach her, a future President Hillary Clinton could call their bluff by stepping down, temporarily, under the provisions of the 25th Amendment to the Constitution. That amendment, adopted after President John F. Kennedy’s assassination, allows a sitting president to step aside temporarily at any time and for virtually any reason he or she deems proper – a planned surgery, a family crisis, a political row. Formally, the impeachment process in this scenario would stay precisely on track, unimpaired by this temporary step-aside – just as if Clinton had not stepped aside on the one hand or had resigned on the other.



By stepping down, temporarily, under this amendment, Clinton would make her loyal running mate, Tim Kaine, the acting president of the United States. Republicans have nothing on Kaine, and by taking over the reins for a while, he would actually improve his chances of being elected president in his own right in 2020 or beyond.

So by giving Clinton a good excuse to boost Kaine, Republicans would be making their own prospects that much harder in future presidential elections, and doubly so – by looking (and being) themselves extreme and partisan and by making Kaine look (and be) all the more presidential. Kaine is after all, in some ways a superior version of Clinton – younger and with less baggage, but utterly loyal to the general Clinton policy agenda. And nothing would stop acting President Kaine from consulting the vacationing Clinton at every turn.

Indeed, if Clinton truly wanted to stick it to her critics and make them eat crow, she could smilingly step aside, temporarily, and make it clear that she will formally resume power and take back

the reins under the 25th Amendment only if her critics themselves formally recant and ask her – beg her! – to put Kaine back in the second slot. (Kaine himself reacted to the impeachment talk by pointing out that Republicans who engage in it are suggesting it's likely their candidate will lose to Clinton.)

Once we understand how a clever President Clinton would and should react to overheated Republican extremists, we see how Trump and his allies are – as they so often are – mistaken in their bullheaded constitutional claims. No crisis need ensue should Clinton be impeached or should serious impeachment rumblings ever occur. Clinton herself has ensured this by picking a sound, steady and policy-compatible running mate fully capable of being president at any moment – possessing precisely the sober presidential temperament, extensive training and cool judgment that Trump himself obviously lacks, as evidenced by his latest rampage.

Wielding power by giving it up

Sometimes, the best way to wield power is, at first, to give it up. Caesar at first pushed away the diadem and George Washington immortalized himself with brilliantly executed resignations (first from the Continental Army, later from the presidency itself). Back when Bill Clinton was impeached in 1998, I argued in the New Republic that he should publicly step aside under the 25th Amendment and let Al Gore take over for a while. Many readers thought I was being cutesy, but I was in dead earnest.

Such a move, I argued back then, could have helped both Clinton and Gore. Indeed I claimed in early 1999 that a Clinton-to-Gore handoff under the 25th Amendment could improve Gore's chances to be elected in his own right in 2000. With the benefit of hindsight, I think I called it right. (I tell the back story in my new book.)

The last president Clinton, when impeached, declined my free advice. (He was acquitted by the Senate, saw his approval ratings go up and served out his full term.) The next president Clinton, should she too be impeached, should do what her husband didn't: step aside, temporarily, and boost the veep. But for now, my most important piece of advice is to my fellow citizens who will soon head to the polls: Pay no attention to Trump's latest sales pitch that because she might be impeached, we must instead vote for him. Here as on many other topics, Trump has not thought things through and does not know what he is talking about.