
DUE PROCESS AND THE IMPEACHMENT OF PRESIDENT DONALD TRUMP

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With the conclusion of the Senate’s impeachment trial and the acquittal of President Donald Trump, it is time to consider an impeachment topic that garnered much attention throughout the entire impeachment procedure: due process. Both Democrats and Republicans decried the lack of due process at various times during this procedure.

Essentially, there were three stages of the Trump impeachment. First, there was the initial investigation conducted in the United States House of Representatives. Second, there was the decision whether to issue articles of impeachment concerning President Trump. Third, after the House of Representatives passed articles of impeachment, the proceedings moved to the United States Senate for a trial. It is important to analyze whether President Trump suffered any due process violations during these three stages because any such violations would speak to an unfairness that should not exist, especially within the notion of separation of powers.

Impeachment is a political process, and thus, one can question whether due process is a concept that even applies and if so in what context and how. At a minimum, as impeachment can result in a punishment insofar as an individual is removed from office, “the impeachment process should and does include some of the basic safeguards for the accused that are observed in a criminal process such as fairness, due process, presumption of innocence, and proportionality.”¹ It is definitely not a criminal process, but it is a legal process that is not wholly political.²

Nonetheless, there is some benefit to analyzing the role of due process in the impeachment process by analogizing it to the federal criminal process because many of the impeachment stages are similar to the stages of a criminal

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1. Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL’Y 647, 715 (1999).

2. See generally Charles Tiefer, *The Controversial Transition Process From Investigating the President to Impeaching Him*, 14 ST. JOHN’S J. LEGAL COMMENT. 111 (1999).

prosecution. The first part involving the investigation by the House of Representatives is analogous to a criminal investigation conducted by law enforcement and a prosecution team. The determination to issue articles of impeachment is analogous to the issuance of an indictment by a grand jury. Finally, the trial within the Senate is like a criminal trial. Chief Justice Roberts served as the trial's presiding judge with all one hundred members of the Senate constituting the petit jury.

Based on these analogies, this article will analyze each of these three separate components to the impeachment process to determine what, if any, due process exists. As a preliminary matter, the first section will discuss the constitutional framework for impeachment and due process. The second section will address the House of Representative's investigation into allegations against President Trump. Next, this article will address the presentation of evidence and vote regarding articles of impeachment. Finally, the last section will analyze the Senate trial.

THE CONSTITUTION PROVIDES THE PROCEDURE FOR IMPEACHMENT AS WELL AS DUE PROCESS

The Constitution and Impeachment.

The Constitution discusses impeachment in only a few instances. It provides that “[t]he House of Representatives ... shall have the sole Power of impeachment.”³ Regarding the upper chamber of Congress, it mandates that “[t]he Senate shall have the sole Power to try all Impeachments.”⁴ The Constitution further mandates that in a Senate trial of the President, the Chief Justice must preside and any conviction requires at least two thirds of the Senators to vote for the President's removal.⁵

Finally, a “President ... shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁶ That is essentially all the guidance that the Framers of the Constitution provided regarding impeachment of Presidents. Interpreting Article II's impeachment clause, the Supreme Court explained, “unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people.”⁷

Despite the limited constitutional language concerning impeachment, there are a few court decisions that address Senate impeachment trials and notions of

3. U.S. CONST. art. I, § 2.

4. *Id.* § 3.

5. *Id.* (“When sitting for that Purpose, [Senators] shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”)

6. U.S. CONST. art. II, § 4; see also Joseph Isenbergh, *Impeachment and Presidential Immunity From Judicial Process*, 18 YALE L. & POL'Y REV. 53, 67–71 (1999).

7. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

due process. In *Hastings v. United States*,⁸ a federal trial court considered the issue of an impeachment proceeding in which the Senate trial was before a committee with a record kept by videotape as opposed to the entire Senate. The committee consisted of six Democrats and six Republicans who heard evidence, including 55 witnesses.⁹ Although a majority of Senators voted to convict United States District Judge Alcee Hastings, it is clear that a “majority of the Senators never had any first-hand knowledge of the evidence against Judge Hastings.”¹⁰ Indeed, the committee provided a report to the full Senate, and both sides received two hours to summarize their positions.¹¹ Based on this committee procedural approach, the court concluded that most of the Senators failed to act as a trial court, but instead functioned as a “review tribunal” or like an appellate court.¹² Thus, the court found that the Senate’s conviction of Judge Hastings in his impeachment had to be remanded back to the Senate for a new trial before the entire body consistent with the Constitution.¹³

While the government was appealing the remand to the Senate for a new impeachment trial in *Hastings*, another federal judge was challenging his removal from the bench after impeachment and conviction by the Senate. United States District Judge Walter Nixon challenged the same Senate committee procedure that the Senate used to hear evidence and testimony for Judge Hastings’ conviction.¹⁴ During the course of the trial before the Senate committee, ten witnesses testified.¹⁵ The Supreme Court determined that the exact impeachment procedures to be implemented are a decision for Congress to make.¹⁶ In *Nixon*, the Court did not address due process.¹⁷ After the Supreme Court decided *Nixon*, the United States Court of Appeals for the District of Columbia Circuit vacated the favorable ruling for Judge Hastings in light of *Nixon*.¹⁸

The Supreme Court has determined that impeachment and removal is a constitutional remedy for misconduct by the President.¹⁹ Moreover, this impeachment process is the manner by which a President is disciplined for improper official acts as opposed to private actions for monetary damages.²⁰ However, as

8. 802 F. Supp. 490, 492–93 (D.D.C. 1992).

9. *The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Apr. 9, 2020) [hereinafter *Impeachment of Alcee L. Hastings*].

10. *Hastings*, 802 F. Supp. at 502.

11. *See Impeachment of Alcee L. Hastings*, supra note 9.

12. *Hastings*, 802 F. Supp. at 502.

13. *Id.* at 505.

14. *Nixon v. United States*, 506 U.S. 224, 226–28 (1993).

15. *Id.* at 227.

16. *Id.* at 237–38 (holding that the Senate had the sole discretion to select its impeachment procedures in trying a federal judge); *see also* Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 536–37 (2018) (describing scholar Charles Black’s argument that the Senate’s sole power to try encompasses its “power to try impeachments including the nonreviewable discretion to determine how to conduct its trials.”).

17. Justice Stevens did briefly mention due process in his opinion. *See Nixon*, 506 U.S. at 247.

18. *Hastings v. United States*, 988 F.2d 1280, 1993 WL 81273 (D.C. Cir. Mar. 2, 1993) (unpublished).

19. *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

20. *Clinton v. Jones*, 520 U.S. 681, 696 (1997).

the *Nixon* Court indicated, Congress has significant room to create whatever procedures it deems appropriate.

The Constitution and Due Process

The Framers did not mention “due process” in the original Constitution that was ratified on September 17, 1787. Consequently, they did not contemplate it, at least originally, in the context of impeachment. The first mention of due process did not occur until the enactment of the Bill of Rights in 1791. The Fifth Amendment mandates that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.”²¹ The next establishment of due process occurred after the Civil War and the Reconstruction Amendments in 1868. Similar to the Fifth Amendment, the Fourteenth Amendment serves as a constraint on action by states: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”²² Because the due process clause comes after the enactment of any of the clauses regarding impeachment, it applies to impeachment.²³ Congress is a federal governmental actor, thus, the Fifth Amendment pertains to its actions.

The right to due process is not easily defined, but at its core, the right of due process is about fundamental fairness.²⁴ Individuals undergoing impeachment have previously argued that the procedures violate procedural due process. For example, a former United States District Judge asserted “that the Senate [] violat[ed] his due process rights to a fair trial by trying him in the first place and by subjecting him to the committee process in the second.”²⁵

An Impeachment Inquiry by the House of Representatives Provides an Analogy to a Police Investigation

The impeachment of President Trump began as many criminal investigations begin, with an individual complaining that someone is engaged in wrongdoing. In a criminal context, the police would launch an investigation into some alleged wrongdoing by an individual. In the impeachment context, a House committee began gathering information.

On August 12, 2019, a member of the American intelligence community sent an anonymous whistleblower complaint to Michael Atkinson, the inspector

21. U.S. CONST. amend. V.

22. U.S. CONST. amend XIV. Although the due process clause in the Fourteenth Amendment is not binding on the federal government, any analysis of how due process protects would be applicable to how the Fifth Amendment applies.

23. *Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992).

24. *See, e.g., Lassiter v. Dep’t of Soc. Servs. of Durham Cty, N.C.*, 452 U.S. 18, 24–25 (1981); *accord State v. Davis*, 898 N.E.2d 281, 287 (Ind. 2008).

25. *Hastings v. U.S. Senate, Impeachment Trial Comm.*, 716 F. Supp. 38, 39 (D.D.C. 1989); *see also* Buckner F. Melton, Jr., *Federal Impeachment and Due Process: the Framers’ Intent*, 52 MD. L. REV. 437, 438 (1993) (“Every impeachment defendant has either expressly or impliedly asserted that he was entitled to due process or other criminal procedural rights, and that the Senate actions denied him those rights.”).

general for this community.²⁶ Specifically, the complaint alleged that President Trump in a July 25, 2019 telephone call with the recently elected Ukrainian President Volodymyr Zelensky sought to pressure him to open an investigation into former Vice President Joe Biden and his son Hunter Biden.²⁷ If there was no investigation, President Trump would decline to release military aid to Ukraine.²⁸

On August 26, Atkinson provided the complaint to Joseph Maguire, who was the acting director of national intelligence.²⁹ Maguire sought legal advice from the Department of Justice as to whether he should provide the complaint to congressional intelligence committees.³⁰ He followed advice that he should not provide it.³¹ However, on September 5, the Washington Post reported the details of the whistleblower's complaint.³²

On September 9, Atkinson informed the congressional intelligence committees about the existence of this complaint.³³ The next day, Adam Schiff, in his role as chairman of the House Intelligence Committee, requested a copy of this complaint.³⁴ When this request was denied four days later, Schiff issued a subpoena for a copy of the complaint.³⁵ Maguire refused to comply with this subpoena.³⁶

26. Julian E. Barnes et al., *Whistle-Blower Complaint is Said to Involve Trump and Ukraine*, N.Y. TIMES, (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/us/politics/intelligence-whistle-blower-complaint-trump.html>.

27. Kevin Breuninger, *Trump Asked Ukraine President in Phone Call 'if You Can Look Into' Biden and His Son*, CNBC, (Sept. 25, 2019, 10:00 AM), <https://www.cnbc.com/2019/09/25/trump-asked-ukraine-president-if-you-can-look-into-biden-and-his-son-in-phone-call.html>; Marshall Cohen & Will Houp, *What Happened on July 25, the Most Important Day in the Impeachment Scandal*, CNN (Dec. 3, 2019), <https://www.cnn.com/interactive/2019/12/politics/july-25-timeline/>.

28. Cohen & Houp, *supra* note 27.

29. Mary Clare Jalonick, *A look at Controversy Over Intelligence Whistleblower Law*, AP (Sept. 20, 2019), <https://apnews.com/cffbe8af1d8440ee9c3b7f3ce37c19e8>.

30. Vera Bergengruen, *Trump's Top Intelligence Official Defends Handling of 'Unprecedented' Whistleblower Complaint*, TIME (Sept. 26, 2019, 8:34 AM), <https://time.com/5686687/joseph-maguire-house-intelligence-testimony/>.

31. Jalonick, *supra* note 29.

32. Washington Post Editorial Board, *Trump Tries to Force Ukraine to Meddle in the 2020 Election*, WASH. POST (Sept. 5, 2019, 6:31 PM), https://www.washingtonpost.com/opinions/global-opinions/is-trump-strong-arming-ukraines-new-president-for-political-gain/2019/09/05/4eb239b0-cffa-11e9-8c1c-7c8ec785b855_story.html.

33. Jalonick, *supra* note 29.

34. Press Release, U.S. House of Representatives Permanent Select Committee on Intelligence, Chairman Schiff Issues Subpoena for Whistleblower Complaint Being Unlawfully Withheld by Acting DNI from Intelligence Committees (Sept. 13, 2019), <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=688>.

35. Jalonick, *supra* note 29.

36. Zachary Cohen & Alex Marquardt, *Acting Spy Chief Refuses to Comply with House Intel Panel Subpoena*, CNN (Sept. 17, 2019, 9:34 PM), <https://www.cnn.com/2019/09/17/politics/adam-schiff-dni-joseph-maguire-whistleblower-complaint-response/index.html>.

Although Atkinson met with the House Intelligence Committee on September 19, he could not speak about the complaint.³⁷ About that time, House Speaker Nancy Pelosi called on Maguire to release the complaint to the committee.³⁸ On September 24, she indicated that the House of Representatives would begin an impeachment inquiry, *i.e.*, an investigation into whether it should consider drafting and voting on articles of impeachment.³⁹ Specifically, six different House Committees began reviewing whether there was a basis for impeaching President Trump.⁴⁰ Ultimately, three Committees—Foreign Affairs, Intelligence, and Oversight—gathered information, including deposing executive branch officials.⁴¹ This information essentially supported the claim that President Trump sought to withhold American military aid to Ukraine until Ukrainian President Zelensky at least agreed to announce an investigation into former Vice President Joe Biden and his son Hunter Biden for the latter's role on the board of a Ukrainian natural gas company.⁴²

On October 8, White House counsel Pat Cipollone wrote Speaker Pelosi, informing her that the White House would not cooperate in the House impeachment inquiry.⁴³ In part, he wrote that this refusal was based on the fact that the full House of Representatives had not voted on the inquiry and that the witness interviews did not occur in public.⁴⁴ Moreover, he asserted that the inquiry violated due process.⁴⁵

On October 17, then acting White House chief of staff Mick Mulvaney acknowledged that there was a quid pro quo with Ukraine in which American military aid was being delayed until there was an investigation into the Bidens.⁴⁶ That same day, however, Mulvaney tried to minimize these comments and argue that the request involved investigating corruption.⁴⁷

37. Associated Press, *Intelligence Watchdog Refuses to Tell Congress About Whistleblower's Complaint*, L.A. TIMES (Sept. 19, 2019, 11:08 AM), <https://www.latimes.com/politics/story/2019-09-19/trump-whistleblower-complaint-hearing>.

38. Mike Lillis, *Pelosi: DNI 'Broke the Law' in Withholding Whistleblower Complaint*, THE HILL (Sept. 26, 2019, 12:31 PM), <https://thehill.com/homenews/house/463211-pelosi-dni-broke-the-law-in-withholding-whistleblower-complaint>.

39. Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html>.

40. George Petras, *Constitution Spells out how Trump Can Be Impeached, but it's Really up to a Partisan Congress*, USA TODAY (Feb. 5, 2019), <https://www.usatoday.com/in-depth/news/politics/2019/11/04/how-trump-impeachment-process-works-house-articles-of-impeachment/2483700001/>.

41. *Id.*

42. Kenneth P. Vogel, *Beyond the Partisan Fight, a Wealth of Evidence About Trump and Ukraine*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2020/02/05/us/politics/trump-ukraine-evidence.html>.

43. *Letter from White House counsel Pat Cipollone to House leaders*, WASH. POST (Oct 8, 2019, 4:40 PM), <https://www.washingtonpost.com/context/letter-from-white-house-counsel-pat-cipollone-to-house-leaders/0e1845e5-5c19-4e7a-ab4b-9d591a5fda7b/>.

44. *Id.*

45. *Id.*

46. Jeremy Diamond, Kevin Liptak & Katelyn Polantz, *Mulvaney Brashly Admits Quid Pro Quo Over Ukraine Aid as Key Details Emerge—and Then Denies Doing So*, CNN (Oct. 17, 2019, 9:00 PM), <https://www.cnn.com/2019/10/17/politics/mick-mulvaney-quid-pro-quo-donald-trump-ukraine-aid/index.html>.

47. *Id.*

On October 29, Representative Jim McGovern proposed a resolution that would authorize public hearings of the witnesses as well as release of deposition transcripts.⁴⁸ This resolution passed, leading to a number of witnesses testifying publicly before the House Intelligence Committee in November.⁴⁹ In response to this resolution, the White House Press Secretary decried the impeachment inquiry procedures: “Speaker Pelosi and the Democrats have done nothing more than enshrine unacceptable violations of due process into House rules. . . . The Democrats want to render a verdict without giving the administration a chance to mount a defense. That is unfair, unconstitutional, and fundamentally un-American.”⁵⁰ It is unclear how this resolution authorizing public testimony by the witnesses is inconsistent with the request by White House counsel three weeks earlier.

In many respects, the activity in November constituted the lion’s share of the investigation into the allegations against President Trump. As a general rule, criminal defendants do not have a right to participate in the criminal investigation. Nonetheless, Senator Lindsay Graham introduced a resolution condemning the House of Representatives for interviewing impeachment witnesses behind closed doors.⁵¹ Among other characterizations of the inquiry, he asserted that “[t]he House of Representatives is abandoning more than a century’s worth of precedent and tradition in impeachment proceedings and denying President Trump basic fairness and due process accorded [to] every American.”⁵²

Within a criminal investigation, defendants have some rights. For example, the Fourth Amendment serves as a check on overzealous law enforcement: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁵³

In the context of the Fourth Amendment, a criminal defendant has the right to be free of unreasonable searches.⁵⁴ Moreover, law enforcement typically need

48. Grace Segers, Kathryn Watson & Stefan Becket, *House Approves Impeachment Rules, Ushering in New Phase of Inquiry*, CBS NEWS (Oct. 31, 2019, 4:53 PM), <https://www.cbsnews.com/live-news/trump-impeachment-house-resolution-vote-democrats-voted-no-trump-impeachment-rules/>.

49. *Id.*

50. John Wagner, Felicia Sonmez & Reis Thebault, *White House Lashes out at Democrats After Passage of Impeachment Inquiry Resolution*, WASH. POST (Oct. 31, 2019, 5:02 PM), https://www.washingtonpost.com/politics/trump-impeachment-inquiry-live-updates/2019/10/31/b4b87544-fb56-11e9-8906-ab6b60de9124_story.html.

51. Jordain Carney, *Senate GOP Introduces Resolution Condemning House Impeachment Inquiry*, THE HILL (Oct. 24, 2019, 3:18 PM), <https://thehill.com/homenews/senate/467338-senate-gop-introduces-resolution-condemning-house-impeachment-inquiry>.

52. S. Res. 378, 116th Cong. (2019) (enacted); David Morgan, Richard Cowan & Patricia Zengerle, *Senate Republicans Push Resolution Assailing Trump Impeachment Process*, REUTERS (Oct. 24, 2019, 11:13 AM), <https://www.reuters.com/article/us-usa-trump-whistleblower/senate-republicans-push-resolution-assailing-trump-impeachment-process-idUSKBN1X324S>.

53. U.S. CONST. amend. IV.

54. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (enunciating a two-prong standard to determine an individual’s reasonable expectation of privacy: first, a person must demonstrate an

to have a warrant to conduct a search,⁵⁵ barring some exigent circumstances.⁵⁶ Any warrant must describe with particularity the place to be searched or the objects sought.⁵⁷ A valid warrant must be signed by a neutral judicial officer.⁵⁸ Finally, anyone seeking a search warrant must establish to the magistrate judge that probable cause exists to conduct the search.⁵⁹

There are other constitutional rights that are available to a criminal defendant during the investigatory stages by law enforcement. For example, anyone who has watched *Law and Order* knows that defendants have *Miranda* rights: 1) the right to remain silent; 2) if you talk, it can be used against you; 3) the right to have an attorney with you during questioning; and 4) the right to an attorney even if you cannot afford one.⁶⁰ However, for *Miranda* to apply, one must be in custody⁶¹ and subject to interrogation.⁶² In the impeachment inquiry context, however, *Miranda* is not a significant concern for President Trump given his awareness of the investigation and his access to legal counsel. Indeed, he was never in custody or interrogated. Moreover, all of his tweets are voluntary statements made during the investigation.⁶³

Notwithstanding the proposed resolution by Senator Graham decrying the lack of due process in the impeachment inquiry, there does not seem to be any constitutional basis for allowing President Trump to participate in the investigation. As someone with a criminal law background, it is my opinion that President Trump should not have expected that law enforcement would include a suspect in its criminal investigation. Ultimately, there do not appear to be any due process violations in the impeachment inquiry, especially when analogizing it to a criminal investigation. Generally, criminal investigations are done without defendants knowing that the investigation targets them. For example, investigators obtain documents based on subpoenas or search warrants unbeknownst to the target unless the person subjected to the warrant or subpoena informs the target.

actual expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable); *see also* *Smith v. Maryland*, 442 U.S. 735, 739–41 (1979) (adopting the reasonable expectation of privacy standard from Justice Harlan’s concurrence).

55. *See generally* FED. R. CRIM. P. 41.

56. *See generally* *Kentucky v. King*, 563 U.S. 452 (2011); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

57. *See generally* *Groh v. Ramirez*, 540 U.S. 551 (2004) (holding that a warrant is invalid if it does not meet the Fourth Amendment’s particularity requirement by adequately describing the persons or things to be seized).

58. *See* *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (determining that a warrant was deemed invalid because it was not issued by a “neutral and detached magistrate”) (citations omitted); *see also* FED. R. CRIM. P. 41(d).

59. *See* *Illinois v. Gates*, 462 U.S. 213, 230–35 (1983) (establishing the totality of the circumstances test to determine whether probable cause exists).

60. *See* *Miranda v. Arizona*, 384 U.S. 426, 470–72 (1966).

61. *See* *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (noting that one must be in custody for *Miranda*’s rights to be applicable).

62. *See* *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (explaining that *Miranda* safeguards apply “whenever a person in custody is subjected to either express questioning or its functional equivalent.”).

63. *See generally* *Colorado v. Connelly*, 479 U.S. 157 (1986) (noting that defendants are protected only from state action that coerces them to give up their Fifth Amendment rights).

A Decision to Impeach by the House of Representatives Provides an Analogy to the Grand Jury Process

On December 3, the House Intelligence Committee voted to issue a final report regarding the impeachment inquiry. The report concluded that President Trump withheld military aid to Ukraine in order to seek an investigation of former Vice President Joe Biden, who was viewed as a political rival in the 2020 election:

[T]he impeachment inquiry has found that President Trump, personally and acting through agents within and outside of the U.S. government, solicited the interference of a foreign government, Ukraine, to benefit his reelection. In furtherance of this scheme, President Trump conditioned official acts on a public announcement by the new Ukrainian President, Volodymyr Zelensky, of politically-motivated investigations, including one into President Trump's domestic political opponent. In pressuring President Zelensky to carry out his demand, President Trump withheld a White House meeting desperately sought by the Ukrainian President, and critical U.S. military assistance to fight Russian aggression in eastern Ukraine.⁶⁴

The report was sent to the House Judiciary Committee for consideration.

On December 5, Speaker Pelosi requested that the House Judiciary Committee draft articles of impeachment against President Trump. Ultimately, the Committee indicated that it would issue two articles of impeachment. Specifically, a resolution sought impeachment for “(1) abuse of power by soliciting the interference of Ukraine in the 2020 U.S. presidential election, and (2) obstruction of Congress by directing defiance of certain subpoenas issued by the House of Representatives.”⁶⁵ On December 16, the House Judiciary Committee issued a 658-page report regarding the proposed articles of impeachment.⁶⁶

On December 18, the House of Representatives voted to approve both articles of impeachment. In response to the articles of impeachment, President Trump lashed out at Speaker Pelosi, including the assertion that the impeachment process violated due process: “Crazy Nancy wants to dictate terms on the Impeachment Hoax to the Republican Majority Senate, but striped [sic] away all

64. H.R. REP. NO. 116-335, at 8 (2019).

65. H.R. RES. 755, 116th Cong. (2019).

66. H.R. REP. NO. 116-335.

Due Process, no lawyers or witnesses, on the Democrat Majority House.”⁶⁷ On Christmas day, President Trump again attacked Speaker Pelosi regarding due process: “Why should Crazy Nancy Pelosi, just because she has a slight majority in the House, be allowed to Impeach the President of the United States? Got ZERO Republican votes, there was no crime, the call with Ukraine was perfect, with ‘no pressure.’”⁶⁸ President Trump further tweeted, “She said it must be ‘bi-partisan & overwhelming,’ but this Scam Impeachment was neither. Also, very unfair with no Due Process, proper representation, or witnesses.”⁶⁹ Thus, President Trump decried the lack of due process afforded to him without addressing any specific legal deficiencies based on a denial of fundamental fairness to him.

The formal impeachment process is analogous to the federal criminal grand jury process insofar as they both define the parameters of the charges against an individual. In analogizing to a grand jury, there are also protections available to President Trump in the impeachment process. The grand jury is an institution designed to provide fairness in the criminal charging process that was incorporated from England by colonists and then enshrined in the Constitution by the Framers.⁷⁰ In *United States v. Calandra*,⁷¹ the Supreme Court discussed the grand jury’s broad powers:

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.⁷²

Unlike a trial, which is predicated on the adversarial process designed to determine whether a criminal defendant is guilty or not, a grand jury “is an *ex parte* investigation to determine whether a crime has been committed and

67. John Wagner & Michael Brice-Saddler, *McConnell, Pelosi Dig in on Impasse over Trump’s Senate Trial*, WASH. POST (Dec. 23, 2019, 6:37 PM), https://www.washingtonpost.com/politics/trump-impeachment-live-updates/2019/12/23/a01735bc-2572-11ea-b2ca-2e72667c1741_story.html.

68. Adam K. Raymond, *Trump Rips ‘Crazy Nancy’ Hours After His Christmas-Morning Call for Unity*, INTELLIGENCER (Dec. 26, 2019), <https://nymag.com/intelligencer/2019/12/trump-rips-crazy-nancy-just-after-christmas-call-for-unity.html>.

69. *Id.*

70. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”); see also *Costello v. United States*, 350 U.S. 359, 362 (1956).

71. 414 U.S. 338 (1974).

72. *Id.* at 343; see also *In re Oliver*, 333 U.S. 257, 264–65 (1948) (discussing grand jury secrecy); FED R. CRIM. P. 6(e)(2).

whether criminal proceedings should be instituted against any person.”⁷³ Thus, criminal defendants, with a few exceptions, do not participate in the proceedings before the grand jury.

Any witnesses to the grand jury must appear without counsel inside the grand jury room.⁷⁴ A grand jury may issue a subpoena to call a target of a criminal investigation to appear before it.⁷⁵ Although a potential defendant can be called to testify, that individual does not have a right to appear before the grand jury to provide either testimony or evidence.⁷⁶ Moreover, just as with any witness, such a potential defendant may not appear with counsel inside the grand jury room. Thus, the analog of the grand jury does not provide much in terms of additional rights to President Trump regarding the impeachment proceedings.⁷⁷

After Speaker Pelosi determined that the House of Representatives would proceed with drafting and voting on articles of impeachment following the inquiry, she offered President Trump the opportunity to have his counsel represent him at the impeachment hearings.⁷⁸ In a letter to House Judiciary Chairman Jerrold Nadler, White House counsel Cipollone rejected the offer, asserting that the impeachment inquiry was “completely baseless and has violated basic principles of due process and fundamental fairness.”⁷⁹

Although Cipollone complains about due process violations in the impeachment inquiry, his allegations do not provide any details. As with criminal investigations and a potential criminal defendant, a potential impeachment subject does not have a due process right to be involved in any nascent investigations. Moreover, there is no basis for claiming a due process right to present evidence or testimony at the impeachment hearings. Nonetheless, President Trump received such an offer from Speaker Pelosi. Having rejected a chance to participate in the impeachment proceedings, it is difficult to then assert that the impeachment proceedings lacked due process.

73. *United States v. Calandra*, 414 U.S. 338, 343–44 (1974).

74. FED R. CRIM. P. 6(d)(1); James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 547–49 (2006).

75. Holderman & Redfern, *supra* note 74, at 551.

76. *United States v. Williams*, 504 U.S. 36, 52 (1992) (“neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify . . .”).

77. Alternatively, the House of Representative’s decision to impeach provides an analogy to a federal preliminary hearing. In such a hearing, “the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired.” FED. R. CRIM. P. 5.1(e). Consistent with this analogy, counsel for the president would be permitted to cross-examine any witnesses testifying at the impeachment proceeding. More important for President Trump, this analogy would enable him to call his own witnesses and present other evidence to argue against impeachment. Although White House counsel and President Trump refused to participate in the House impeachment proceedings, this analog may provide a basis for calling witnesses of his choosing.

78. Ayesha Rascoe, *White House Rules Out Participating In House Impeachment Inquiry Process*, NPR (Dec. 6, 2019, 5:18 PM), <https://www.npr.org/2019/12/06/785681527/trump-declines-to-take-part-in-baseless-house-impeachment-inquiry>; see also Jeremy Herb & Jim Acosta, *White House Says it won’t Participate in Impeachment Hearing*, CNN (Dec. 6, 2019, 9:50 PM), <https://www.cnn.com/2019/12/06/politics/white-house-response-judiciary-letter/index.html>.

79. Rascoe, *supra* note 78; Herb & Acosta, *supra* note 78.

The proceedings along with the subsequent vote were based on public records and sworn statements. Moreover, they were carried on live broadcast for the nation to watch. It is hard to see how there were any due process violations, especially given President Trump declined to participate when provided the opportunity to do so.

The Impeachment Trial by the Senate Provides an Analogy to a Criminal Trial.

On January 15, 2020, members of the House of Representatives formally delivered the articles of impeachment to the Senate. The Senate trial was problematic before the Senators even received the articles of impeachment. Senator Lindsey Graham indicated that his mind was made up to acquit President Trump before the House even voted.⁸⁰ Even more significantly, Senate Majority Leader Mitch McConnell indicated that he would not be an impartial juror while coordinating with the White House as to the procedures to implement at the Senate trial.⁸¹ The actions by both Senators Graham and McConnell bolster the notion that the Senate impeachment process is a political one as opposed to an actual trial in which jurors must be impartial and fairly weigh the evidence. In their approach, due process is inapplicable given its political nature.

On January 21, Senators voted to forgo the introduction of new evidence or witnesses. The House managers made opening statements and presented evidence for the next three days. On January 25, counsel for President Trump presented its defense. On January 31, the Senate voted against issuing subpoenas for new witnesses or documents. On February 5, the Senate voted to acquit President Trump.

The Constitution's Framers expected that an impeachment proceeding would look similar to a judicial proceeding.⁸² Historically, impeachment defendants have claimed that the Senate trial denied them their due process rights.⁸³ Here, President Trump did not argue about due process concerns at the Senate trial. Moreover, he did not promote his previous position about the necessity of calling witnesses to present evidence.

Federal criminal defendants have a number of rights regarding their right to a trial, which includes the assistance of counsel.⁸⁴ As a general rule, consistent with the Sixth Amendment,⁸⁵ criminal trials are open to the public: "The central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases

80. Rebecca Klar, *Graham on the Impeachment Inquiry: 'I Made My Mind Up. There's Nothing There'*, THE HILL (Nov. 10, 2019, 12:09 PM), <https://thehill.com/homenews/senate/469804-graham-on-the-impeachment-inquiry-i-made-my-mind-up-theres-nothing-there>.

81. Alison Durkee, *'I'm Not An Impartial Juror': Mitch McConnell Doesn't Even Pretend to Be Fair on Impeachment*, VANITY FAIR (Dec. 18, 2019), <https://www.vanityfair.com/news/2019/12/mitch-mcconnell-impeachment-senate-trial-not-impartial-juror>.

82. *Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992).

83. Melton, Jr., *supra* note 25, at 438.

84. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.")

85. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.”⁸⁶ It would be difficult to argue that the Senate trial was not public with the level of live media coverage during it.

The Confrontation Clause guarantees criminal defendants the right to confront the witnesses adverse to them.⁸⁷ However, the Clause does not mandate that a criminal defendant be allowed to engage in cross-examination that is irrelevant to the issues before the court.⁸⁸ Finally, the Clause along with principles of due process guarantees the defendant the right to be present during the trial.⁸⁹ Coterminous with the Confrontation Clause is the Compulsory Process Clause,⁹⁰ which ensures that criminal defendants can call witnesses in their defense at trial.⁹¹

Here, it does not appear that President Trump suffered any constitutional violations in his trial. Putting aside the favorable result of acquittal, he was able to have counsel represent him during the entire process. His attorneys had equal time for both opening statements and closing arguments. There were no witnesses so they did not have to attempt any cross examinations. Furthermore, President Trump, through his counsel, did not seek to call any witnesses. It is difficult to see how there were any due process violations against President Trump during his Senate impeachment trial.

While it is axiomatic that a criminal defendant would have the right to call witnesses and introduce evidence at trial, it would be an odd trial that has no witness testimony or introduction of evidence. At one of the first significant Senate impeachments—for Supreme Court Justice Samuel Chase—the Senate trial “took ten full days” with over fifty witnesses testifying for three articles of impeachment.⁹² Similarly, when the Senate tried President Andrew Johnson, it heard testimony and received evidence for five weeks regarding eleven interrelated articles of impeachment.⁹³ Most recently, the Senate tried President William Clinton based on articles of impeachment. Initially, there were no witnesses, but ultimately the depositions of three witnesses were taken after the trial began.⁹⁴ The Senate concluded that presenting these excerpted depositions during the Senate trial was sufficient and that live witnesses such as Monica Lewinsky were not necessary.⁹⁵

86. *Waller v. Georgia*, 467 U.S. 46, 39 (1984) (citation omitted).

87. *See Maryland v. Craig*, 497 U.S. 836, 846 (1990) (“[F]ace-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person.”).

88. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (holding no violation of the Confrontation Clause when defendant is prohibited from cross-examination of a witness on irrelevant matters).

89. *See Kentucky v. Stincer*, 482 U.S. 730, 740 n.17 (1987).

90. *See U.S. CONST.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor . . .”).

91. *See Washington v. Texas*, 388 U.S. 14, 16–23 (1967).

92. William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 N.W. U. L. REV. 903, 908 (1991).

93. *Id.* at 916.

94. Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 L. & CONTEMP. PROBS. 143, 156 n.64 (2000); Miller, *supra* note 1, at 649 n.5.

95. Bloch, *supra* note 94, at 156 n.64; Miller, *supra* note 1, at 649 n.5.

In other words, previous historically significant impeachment trials, including the two previous presidential impeachment trials, had witnesses in some fashion. It is harder to envision that the House managers litigating the impeachment in the Senate have a right to due process. However, if a judge were to preside over a trial and preclude any witnesses from testifying or evidence being introduced and instead simply permitted an opening statement and a closing argument, that would be considered an absurd approach. Indeed, it would be inconsistent with the rights generally established in the Sixth Amendment.⁹⁶ It is hard to envision a trial without witnesses because such a trial would be a sham.

V. CONCLUSION

In *Nixon*, the Supreme Court alluded to the notion that impeachment is a political process.⁹⁷ It is not that clear. The impeachments of Justice Chase and President Johnson were very political.⁹⁸ One scholar described impeachment as becoming more or less a political tool or weapon during various periods of American political history.⁹⁹ Another scholar characterized the Senate impeachment trial of President Clinton as “political-legal.”¹⁰⁰

In assessing whether due process was adequate in the entire impeachment process, one assesses whether it was essentially fair. Indeed, even if due process is inapplicable to impeachment procedures, one can still question whether the process was fair. Based on my previous analysis, overall, this seems to have been a fair process. It would have been fairer, however, if relevant witnesses were allowed to testify even if President Trump and the White House counsel backed away from this demand. In drafting the impeachment clauses, the Framers intended to favor acquittal in any presidential impeachment.¹⁰¹ Therefore, it is unlikely witnesses here would have changed the outcome.

96. See generally U.S. CONST. amend. VI; See also sources cited *supra* notes 83–90.

97. *Nixon v. United States*, 506 U.S. 224, 236 (1993).

98. Bobbitt, *supra* note 16, at 556.

99. See generally Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161 (2007).

100. Charles Tiefer, *The Senate Impeachment Trial for President Clinton*, 28 HOFSTRA L. REV. 407, 408 (1999).

101. Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 771 (1999).