

**U.S. HOUSE COMMITTEE ON THE JUDICIARY
THE IMPEACHMENT INQUIRY INTO PRESIDENT DONALD J. TRUMP
STATEMENT OF PROFESSOR RANDY E. BARNETT
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The Due Process of Law Clauses in the Fifth and Fourteenth Amendments requires a judicial process in which adequate proof that a person violated a valid legal command exists before that person can be deprived of life, liberty or property. It inserts certain protections between an individual citizen and the coercive power of a legislature and executive branch officials. The due process of law is not, however, limited to proceedings in an Article III federal court. It uncontroversially applies, for example, to actions of a judicial nature in the executive branch.

When exercising its impeachment power, Congress is not acting in its legislative capacity. Instead, by singling out a single person for the sanction of removal from office, it is acting in a judicial capacity. The interests a president has in his office, his salary and his reputation are all “property” protected by the Clause even where his life or liberty is not at stake. By acting to deprive him of those interests in its judicial rather than a legislative capacity, therefore, Congress is subject to the constraint of the Due Process of Law Clause of the Fifth Amendment.

But one need not agree that the Fifth Amendment literally applies to impeachment proceedings—or to the House proceedings that precede an impeachment trial in the Senate¹—to acknowledge that the traditional principle of “due process of law” to which the text refers is a fundamental norm that applies beyond the context of the enforcement of criminal and civil laws. The due process of law is a fundamental moral injunction that no person should be sanctioned without (1) adequate proof that (2) he or she violated a preexisting and valid norm. This injunction serves at least two functions. The first is *personal*: a concern for the personal welfare of an individual being sanctioned as well as the welfare of other persons who might one day be falsely accused. It is wrong to sanction an innocent person, and requiring the due process of law for *all* who are accused—*whether guilty or innocent*—helps protect the innocent.

A second function is *social*: third parties who lack personal knowledge of the events for which a person is being sanctioned—which describes nearly everyone but the parties involved—need assurance that a person being accused of wrongdoing is actually guilty of wrongdoing. Otherwise they would be concerned that the sanction being imposed is unjustified. Lacking personal knowledge of the facts upon which such charges are based, third parties must rely on the fairness of the fact-finding process being used to ascertain guilt or innocence. For it is only if a fact-finding process is perceived to be fair by third parties that the conclusions it reaches can be accepted as likely just. In the absence of due process, third parties are likely to be concerned that an injustice has taken place and warranted in their concerns.

The impeachment process in both the House and the Senate is no exception to this norm. Congress is ordinarily limited to its legislative power: enacting general rules for future conduct that must be enforced by another branch—the executive—with the further check of a judicial process to protect the innocent individual. Impeachment is an exceptional proceeding in which Congress sits in judgement on an individual person. Persons who are innocent of wrongdoing should not be removed from office, deprived of their salary, and their reputation. And the general public—including supporters of the person being removed—who necessarily lack personal

¹ *Compare* Application of the Committee on The Judiciary, U.S. House of Representatives, For an Order Authorizing the Release of Certain Grand Jury Materials 27-30 (2019) (an investigation regarding impeachment is preliminary to a “judicial proceeding”).

knowledge of the relevant events, requires assurance that anyone removed from office is indeed guilty of wrongdoing and has not wrongfully been removed from office.

The latter function is especially true when the person threatened with removal is an elected president who is member of one political party, whose removal is being advocated by members of the other political party. When this is happening, members of the public who voted for that president will justifiably be suspicious that the president is being removed for partisan political reasons rather than for good and sufficient cause.

If removal happens in the absence of due process, those suspicions will deepen. Indeed, the lack of due process will become a separate grievance that is independent of the alleged wrongdoing itself. This is why you hear more from Democrats about Judge Merrick Garland being denied a hearing in the Senate Judiciary Committee than you hear about the conceded power of the Senate to deny him a confirmation. Democrats are still angry about this alleged denial of due process—notwithstanding the fact that Senate Republicans announced before any nomination was made, their intent to postpone consideration of *any* nominee until after the election, which made a hearing into his particular qualifications immaterial.

A removal of an elected president without the perception of a fair process can cause serious rifts in the body politic, which can have serious unanticipated consequences. This is especially true if these partisan rifts preexisted the allegations of wrongdoing and the charges themselves can be viewed as motivated by such partisan rifts. For all these reasons—and more—it is vital that the procedures adopted by the House and Senate be perceived by the general public to be fair.

Normal legislative procedures are not appropriate to ensure this fairness. Normal legislative procedures are premised on the fundamental principle that, ordinarily, the majority should have its way. This means that legislative processes—for example, the composition of committees—give more power to the party holding the majority. In a republic like ours, additional checks on bare legislative majorities exist—like the need to obtain the majority of two legislative bodies and the assent of the president. And such majoritarian will is additionally checked by an independent judiciary to safeguard the rights of individuals who compose the ultimate sovereign. Still, legislative procedures are devised primarily to give effect to majority rule—although in certain instances, a super-majority may be required to take into account the views of the minority.

Because the exercise of majority will, rather than the ascertainment of truth, is the object of legislative procedures, such legislative procedures are not appropriate when Congress is performing a judicial function. In such a case, procedures should more closely resemble age-old judicial procedures designed to ensure that the general public can rest easy that the guilt of the accused has been fairly determined. Such procedures include rules of evidence, burdens of production and proof, the opportunity to call witnesses and cross examine witnesses, a public trial governed by a neutral judge, etc.

Above all, no preferential treatment should be given the majority party. Members of the majority and minority should have an equal chance to subpoena documents and witnesses and to call and question witnesses. And neither party should be able to control the legal theory of the other. Given that the judgment of what constitutes a high crime and misdemeanor will ultimately rest in the House and Senate, rather than in the courts, defenders of the president in both houses are entitled to make their case in public as to why the alleged acts, if proven, do not constitute an impeachable offence. Neither side can rule the theory of the other side out of order. Whether a particular theory is “in order” or not will ultimately be up to the electorate.

When assessing the fairness of the impeachment process, in recent months it has become fashionable to analogize the House proceedings to a criminal grand jury investigation, and the

Senate proceedings to a civil or criminal trial. But this analogy is far too facile—especially when applied to the House. A grand jury is not—or was not originally supposed to be—a creature of the prosecution, to be checked only by a future petit jury. Consider some of the differences:

- A grand jury is administered by the judicial branch, usually by the presiding judge of the relevant court who can make ultimate rulings on objections to its procedures; a committee of the House is entirely controlled by the majority party—under rules approved by a partisan majority of the House—not an independent judge.
- A grand jury is composed of individual impartial citizens, who must vote to approve a “true bill” of indictment; the House committee is composed of partisan members, more akin to fellow prosecutors, a majority of whom vote on its findings and recommendations—there are no impartial “grand jurors” on House committees.
- A grand jury does not make the law but enforces preexisting statutes with legal elements each of which need to be proved to the grand jury; a majority of a House committee—and eventually a majority of the House—votes on what constitutes an offense in addition to whether the “offense” has been committed.
- A grand jury proceeding is conducted in secret and it is a criminal offence to improperly disclose its testimony to protect the reputation of the innocent; in this current impeachment proceeding, secret House committee testimony was routinely and selectively leaked to the press by members of the majority party.
- The entirety of the grand jury proceedings is presented to the grand jurors who are ordinarily required to be present; here, unlike grand jurors, the House members who will be voting on articles of impeachment will not be privy to the entirety of the testimony elicited in secret by the Intelligence Committee, but only to reports by the majority and minority.
- The entirety of grand jury proceedings is also disclosed to the defendant’s attorneys; In this proceeding, the secret deliberations of the House Intelligence Committee has been—and I assume will continue to be—kept secret.

In this proceeding, a partisan majority of the House authorized multiple committees controlled by partisan chairs and majorities to investigate the president of another party in a manner in which the chairs and committee members of the majority served as prosecutor, judge, and grand jury members—all without the need to identify in advance the offenses being investigated. The scope of their questioning was also curtailed by rulings from the partisan chair, not an independent judge. Moreover, unlike a preliminary hearing, which in many jurisdictions substitutes for a grand jury, the minority has not been permitted to call any fact witnesses it deemed appropriate.

The power of impeachment, like all powers, can be exercised in bad faith. Indeed, exercising his powers in bad faith is exactly what the President is being accused of. In the case of the impeachment power, it would be bad faith to remove a duly-elected president from office because one disagrees with that president’s policies, or because one despises that president or believes him to be of low character. Impeachment is not a parliamentary vote of no confidence.

Consider this hypothetical: Imagine a president who, even before he takes office, is the subject of widespread impeachment talk by members of the opposing party in the media. Imagine House members of the opposing party run in the mid-term election on the platform of impeaching that president. Imagine several articles of impeachment on various charges are filed in the House by members of the opposing party. Imagine all this happening before any knowledge of the particular wrongdoing now being alleged occurs. Imagine further that

questions are raised about the source of these new allegations and his or her relationship with the chair and staff of one of the investigating committees.

Would the findings of such a hypothetical process be tainted by unfairness? Would a reasonable citizen who is of the president's party, or who considers themselves unaffiliated with a political party, have any reason to be confident in the fairness of such an outcome so dominated by partisanship? If the president is removed, should they have any reason for confidence that his removal was truly justified? Or would they be reasonable in concluding that the impeachment power had been exercised in bad faith for purposes of reversing the result of the previous election? Have they been given any reason to believe otherwise?

The only fact that would provide a check on the process described in this hypothetical is if the Senate happens to be held in the hands of the president's party. But if the entire case for the fundamental fairness of the process as a whole depends on the Senate being held by a different party than that which holds the House, this highlights the lack of due process inside the House's own deliberation. And if, in the future, the Senate is held by the same party as the House, and the Senate majority adopts rules similar to those adopted by the House, then the entire process would rightly be dismissed as a sham or show trial, rather than a good faith search for the truth.

But this hypothetical gives rise to two additional and difficult questions. After so partisan and contentious a history between this hypothetical president and the opposing party, what is the opposing party in the House to do when confronted with actual evidence of serious wrongdoing that it sincerely believes would merit the removal of any president regardless of party? And how should they proceed in the face of implacable support of the president from members of his own party?

Given such a rancorous history, and in the face of partisan support, the opposing party in the House really has but one option: to bend over backwards to adopt unquestionably fair procedures rather than partisan ones. Such fairness is vitally needed both to negate their own previous partisanship as well as to reveal the partisanship of the president's supporters, so those Americans who are caught between the two parties can assess whether the proceeding has been fair.

Let me take as an example the Judiciary Committee hearing of last week. Unlike others, I think it was wise of the Committee to begin with the testimony of constitutional experts. I am not troubled in the slightest that they are not "fact witnesses." I believe the House has its own independent duty to comply with the requirements of the Constitution even—indeed especially—when their actions will not be reviewed by the courts. So hearing from independent scholars of impeachment on the original meaning of the Impeachment Clause was the right thing to do.

But a fair hearing would not have consisted of three witnesses designated by the majority and one by the minority. It would have been limited to scholars with an expertise on impeachment and its history that was demonstrated before this event and indeed this presidency. And the Committee should have exercised utmost care to limit witnesses to those who were not also political partisans—excluding, for example, any who had made campaign contributions to the President's opponent.

While some of the witnesses called met some of these qualifications, enough of them did not to taint the hearings as predetermined and partisan in nature—especially given that they were stacked three to one. Finally, while I endorse the decision to begin hearings with a panel of impeachment scholars, I cannot imagine *limiting* the Judiciary Committee's deliberations to those witnesses—or to a report of witnesses that were heard in the public hearings of the Intelligence Committee. The hearings are not concluded, but the fact the minority members, the White House, and the public are not privy to what is yet to happen is part of the lack of due process in this proceeding.

I come to this affair with no personal knowledge of the relevant events. Nor am I an expert on the history of impeachment and its original meaning. I have been following these events in the news more or less closely as my other commitments allow. So I write as a citizen, a member of the general public, a former prosecutor, and constitutional scholar who is concerned with the preservation of our constitutional order, including the peaceful transfer of power by elections. Because of the absence of due process, I am deeply troubled by the proceedings I have witnessed. Given the procedures that have been followed, I have no reason to believe that the final vote on articles of impeachment was not determined before a single witness was sworn.

What is the remedy? At this point, the only remedy in the House is for Members of both parties to vote against any articles of impeachment on the ground that they are a product of a thoroughly tainted process. Every Member takes an oath to the Constitution. Regardless of whether they believe the president committed the actions for which he was charged, they should not legitimate a procedure so devoid in due process by a vote in favor of whatever articles that are produced in this way. And, if articles of impeachment that result from so tainted a process are approved by the House in this case, the impeachment power itself will be tainted in the future as merely a political weapon, even if a future House adopts fair rule.

I will close by heartily endorsing the view expressed by House Majority Whip James Clyburne on CNN:

This is a vote of conscience. I do believe that when it comes to something as divisive as impeachment, we have to leave members up to their own consciences, their own constituents, and what they think is in the best interest of their love for country. And so, I think it would be a bit unseemly for us to go out whipping up a vote on something like this. This is too serious, this is too much about preserving this great Republic, and I think we ought to leave it up to each member to decide how he or she would like to vote.

To the extent the House is like a grand jury, individual House members are the jurors in their individual representative capacity and not members of their respective parties. This is exactly the appropriate stance by which to approach a decision to remove the president. My regret is that the House has not conducted its impeachment proceedings in this same spirit, rather than in the spirit of party. House members voting their consciences should ground their vote, at least in part, on the failure of this impeachment proceeding to conform with the due process of law.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Barnett". The signature is fluid and cursive, with a large initial "R" and "B".

Randy E. Barnett

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*Affiliation for identification purposes only. The views expressed here do not reflect those of Georgetown University or the Georgetown Center for the Constitution.