

January 27, 2020

**Invoking in your own case the conduct of the Chief Justice in the Senate
impeachment trial and his determination of motions in accordance with
“traditional notions of fair play and substantial justice” rather than Senate rules**

A. What is here not advocated; advocated; and the advocacy's basis

1. This article[†] does not advocate the position of either party to the impeachment trial of President Donald Trump in the Senate, i.e., the House of Representatives' managers prosecuting the impeachment articles or the President's legal team that seeks to exonerate him from all charges therein.
2. This article advocates “Equal Justice Under Law”. That is the principle inscribed on the frieze of the Supreme Court building. Its inscription there signifies that it is the principle that guides the justices' administration of justice by applying the law equally to all persons. It is the corollary of another principle that expresses the essence of ‘a government, not of men and women, but by the rule of law’(*>OL:5⁶), which has been heard so frequently of late: Nobody is Above the Law.



Equal Justice Under Law; <https://www.supremecourt.gov/>

3. The article advocates^{*} such equality in practical terms: It shows how parties, whether represented by lawyers or appearing pro se, can argue that what the Chief Justice of the Supreme Court has done, approved, or condoned while presiding over the impeachment trial illustrates the conduct that his associate justices and the other federal and state judges whom they supervise can engage in when presiding over all other cases. This is similar to relying on the federal rules of procedure and evidence, which have been incorporated almost word by word into all state laws. Their applica-

tion by federal judges, in general, and the Court, in particular, establishes how due process ensures trial by the rule of law; and equal protection guarantees that Everybody is Equal Before the Law.

B. The Chief's conduct establishes what is fair and just for all other trials

4. If parties cannot invoke as precedent the conduct of the Chief Justice at the impeachment trial, then he has failed to “do impartial justice” to the President, which is what he swore the senators to do in the oath that he administered to them at the start of the trial. If the Chief has treated him as being either above or ‘beneath’ the law, he has violated his own oath of office at 28 U.S. Code §453[the Code of federal laws only(*>[jur:53⁹⁰](http://Judicial-Discipline-Reform.org/OL/DrRCordero-Honest_Jud_Advocates.pdf)), whereby he swore, as judicial officers must do, “to administer equal right to the poor [in knowledge, intelligence, and money] and to the rich [in prominence, judicial colleagues, and connections to VIPs outside the court]”.

5. The Chief has the duty to apply that oath, for the Constitution, Section 3, 5th Clause, provides thus:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they 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. This Clause identifies the proceeding over which the Chief is presiding as a trial. The fact that the entity empowered to conduct it is the Senate does not defeat the principle that was intended to be safeguarded by the adoption of the Constitution, namely, the rule of law and its equal application to all, by contrast to the will of the King of England expressed arbitrarily by fiat on a case by case basis even after the fact, except as curbed by the Magna Carta and British legal tradition.

7. The provision that “when the President...is tried, the Chief Justice shall preside” introduces the head of another ‘Power’, i.e., the Judiciary. The Constitution does not subject the Chief to the rules adopted for the trial by the Senate. The latter can adopt binding rules when it tries impeached officers other than the president, in which case the Constitution does not provide for any judge to be brought in to preside over the trial; yet, even those rules must comport with the rule of law.

8. When the Chief Justice is brought in to preside over the trial of an impeached President, he does not come in empty-handed to sit and watch the trial as merely a symbolic figure. Far from it, he comes in with something pertaining to the ‘Power’ that he represents, the Judiciary, and that he must apply to ensure the institutional protection of all courts as well as the equal treatment of all parties: “traditional notions of fair play and substantial justice”; cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Those notions extend far beyond the single issue of the exercise by a court of personal jurisdiction over a non-resident corporation. Rather, they reach all aspects of a trial that affect the trial’s very purpose: to apply due process to ensure equal justice under law.

C. Raising motions for the Chief Justice to decide unbound by Senate rules

9. In any court, a party can raise a motion of any nature requesting any relief; no rule requires that it first obtain the opposing party’s permission to do so. The opposing party’s remedy is to object to the motion and move for its dismissal; or object to the relief requested and move for its denial.
10. Likewise, during the impeachment trial, either party can submit to the Chief Justice any motion. In determining it, he is not bound by the rules adopted by the Senate for this trial. This accords with the principle that agreements between the parties to a trial are not binding on the court. The justification for this is that an agreement may have been extracted from the weaker party by the party with stronger bargaining power or superior knowledge. The court must not allow itself to be

turned into the stronger party's enforcer. A plea agreement reached by the prosecutor and the defendant or a settlement between civil parties does not bind the judge, who can reject or modify it in order to ensure that it comports with "traditional notions of fair play and substantial justice".

11. In the Senate, there is always a party with superior power either because of its greater number of senators or because it can count with the tie-breaking vote of the vice-president of the U.S. in his capacity as president of the Senate. As a result, it falls to the Chief Justice presiding over an impeachment trial to ensure that the rules adopted for the trial by the Senate are fair and just, rather than the result of unequal bargaining power and partisanship; and that the rules do not offend against those "traditional notions" developed by the Judiciary and applied to all its proceedings to ensure due process and guarantee equal protection of the law. The Chief must ensure this not only on motions raised by a party, but also on his own motion.
12. Since the Chief Justice is presiding at a trial, as a justice of the Supreme Court, and before a national audience, what he does and how he does it establishes a precedent for any party to invoke and for any court to take into consideration in its rulings.
13. Even if any Senate rule or voting provided that no subpoenas calling for witnesses or documents would issue, the Chief could apply those "traditional notions" to order their appearance or production so as to enable "equal justice to be done" not only *by* the senators, but also *to* the parties so as to enable each to present its case fairly and unhampered by overpowering partisanship. The Senate majority could not afford to overturn every motion decision by the Chief, lest it appear ensuring a predetermined trial result.
14. If a party made an en banc appeal to the Supreme Court, it would be for the Chief to decide whether the appeal lay, and if so, whether it would be interlocutory, with or without suspensive effect on the trial, or at the end of it. While these are uncharted waters, those "notions" provide the compass to arrive at answers to questions of first impression.

D. Claims of executive privilege made by the President

15. A claim of executive privilege issued by the head of the Executive branch will be incapable of preventing the production of witnesses or documents ordered by the Chief Justice, the head of a co-equal branch, the Judiciary, which has inherent powers for the conduct of its business.
16. The power of judges is so much stronger that one single district judge can hold unconstitutional a law that was researched, debated, and adopted by 535 members of Congress and enacted by the President. One district judge, J. James Robart, suspended *nationwide* the Muslim travel ban of the President, though he had campaigned on issuing it and received the votes of over 62.5 million people. Three circuit judges upheld the suspension *nationwide*. If one judge can do so, the Chief can order witnesses and documents to be produced; and order federal marshals to take custody of that person or documents and bring them to the Senate, for "he who can do the most can do the lesser".
17. If the President instructed the Executive not to comply with any Senate subpoena or any order of the Chief, he would lend credence to the impeachment article of obstruction of Congress and even render himself liable to the charge of contempt of court, cf. 'obstruction of the Judiciary'. Such wholesale non-compliance would be fraught with dire consequences. Not even President Nixon dare do that after the Supreme Court unanimously ordered him on July 24, 1974, to turn over the tapes that he had secretly recorded in the White House, which turned out to hold information incriminating him in the Watergate scandal. Nixon complied. The House began drafting articles of impeachment. The Senate was likely to convict and remove him. So Nixon resigned on August 8.

1. Judges' closing ranks and retaliating out of their gang mentality

18. Defiance of all Chief Justice's orders would be even more offensive than simply berating a federal judge: President Trump berated not only Judge Robart, but also U.S.D.J. Gonzalo Curiel, who was presiding over the Trump University case. That prompted a most revealing comment by Then-Judge Neil Gorsuch as he made courtesy visits with the senators who had to confirm his nomination to the Supreme Court, even though thereupon the President could have withdrawn his nomination. Judge Gorsuch reportedly said, "An attack on one of our brothers and sisters of the robe is an attack on all of us"(>OL2:546¶1). That comment reveals the gang mentality that drives judges to defend each other rather than a concern for determining impartially and objectively whether the judge's conduct in question was legally or ethically right or respectful of the injunction in Canon 2 of the Code of Conduct of U.S. Judges to "avoid even the appearance of impropriety"(*>jur:68^{123a}). No judge is going to defy the gang, which can ostracize him or her as a treacherous pariah.
19. If the President defied or berated the Chief Justice, judges would close ranks behind their Chief and retaliate against the President in the pending cases that are very important to his administration or him personally. Their retaliation(*>Lsch:17§C) may provoke(>OL2:1029¶1, §§C,D) the President to escalate his berating and even launch directly or indirectly an investigation of their self-enrichment through abuse of power and unaccountability that Sen. E. Warren has dare denounced (OL2:998) and other forms of abuse(1039¶19). An institutional crisis between the Judiciary and the Executive would ensue and aggravate the ongoing one between the Executive and Congress.

2. The Rules allow a witch hunt subject to admissibility of the witch

20. Since the President is the defendant at the trial for his removal from office, he faces a conflict of interests if he claims to issue the order of non-compliance as president. To allow him as party to decide what can be produced at his trial would set a precedent that any other party could invoke: To begin with, Federal Rule of Civil Procedure (FRCP) 26(b) on "Discovery Scope and Limits" provides under "(1) Scope in General...Information within this scope of discovery need not be admissible in evidence to be discoverable". This provision authorizes an evidentiary hunt which is known to have no courtroom accessible to its evidentiary catch. In the same vein, a representation to the court is proper under FRCP 11 if "(b)(3) the factual contentions...will likely have evidentiary support after a reasonable opportunity for further investigation or discovery".
21. In principle, everything is huntable, including the witch. The rules of procedure allow a disclosure and discovery fishing expedition; whether the catch of information becomes admissible evidence is determined later on, e.g., on a motion in limine before trial. Compliance with the rules will become optional if the Chief Justice and the Senate uphold the President's refusal to produce anything.

E. How to invoke the impeachment trial in your own case

22. Up to now, the President has only issued a blanket order instructing all members of the Executive not to cooperate with the House impeachment inquiry by appearing to testify or producing requested documents. However, he has not formally invoked executive privilege. But after the start of the impeachment trial, he tweeted that if the Senate issued subpoenas for witnesses and documents, he would claim executive privilege to prevent their appearance or production.
23. The Constitution does not expressly provide any executive privilege. Rather, it provides for three branches that exercise checks and balances on each other to prevent anyone from overpowering another, for instance, by frustrating Congress's duty of oversight of the Executive. Its provision for impeaching and trying officers implies 'all means' "necessary and proper for its Execution"

(Art 1, Sec. 8), e.g., finding facts through the issuance of subpoenas and orders of production.

24. If in spite of these features, the Chief Justice allows a Senate subpoena or his order of production to be defied by the President just as if the Chief denies a motion for such order, the Chief will establish a damaging precedent that any party will be entitled on equal protection grounds to invoke it in its own case. Any party will attempt to defeat any subpoena by asserting a boundless spousal, attorney/client, and priest/penitent privilege; and even craft its own privilege: A corporate chief executive could claim that her communications with her aides was privileged to ensure that they gave her candid advice without the chilling effect of the possibility of being forced to disclose it. Even more broadly, it would suffice to defeat a subpoena for its target to self-servingly characterize the investigation underlying it as “a hoax”, “a witch hunt”, or “abuse of process”.
25. A party that moves to have a privilege so extended or such characterization upheld can claim to be proceeding in good faith and to be shielded from sanctions under FRCP 11 –or state law, e.g., 22 NYCRR 130-1.1-: Its “(2) claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”. Its motion will be “reasonable under the circumstances” since it will be based on what the Chief Justice did, approved, or condoned over the objection of the majority of members of Congress. The fact that the trial was nationally televised compels the reasonable expectation that his conduct will set a precedent for every party to invoke and every judge to follow on equal protection grounds. A judge confronted with such a motion would either have to grant it; allow an interlocutory appeal; or certify a question to an appellate court, including the Supreme Court.

F. Presentation on judicial abuse exposure, compensation, and reform

26. I offer to present this article via video conference or in person to you and your guests. You may use the contact information below to reach me and discuss the presentation's terms and conditions and its scheduling. To decide whether to organize such presentation, you may review the slides ([OL2:957](#)) and the video, which you can share and post together with this article widely.

G. Pursuing Equal Justice Under Law by exposing judges' abuse of power

27. The judges of the Federal Judiciary, the only ones with a life appointment and national jurisdiction, as well as state judges, in general, have enormous power over *We the People's* property, liberty, and all the rights and duties that frame our lives and shape our identities. Since they are held unaccountable by themselves([†][OL2:918, 792](#)) and the politicians that put them on the bench, they risklessly abuse their power, as stated by Sen. Elizabeth Warren in her daring denunciation of their self-enrichment, for which she “has a plan too”([OL2:998](#)); and their convenience([OL2:1015¶12](#)).
28. Judicial Discipline Reform pursues “Equal Justice” through the exposure of unaccountable judges' abuse of power. Its main means are its study*[†] of judges and their judiciaries ([supra ¶3a](#)); its website at <http://www.Judicial-Discipline-Reform.org>, which has attracted numberless visitors and motivated 30,078+([OL2:Appendix 3](#)) to subscribe to it; and its presentations([supra ¶26](#)).
29. To advance its pursuit it has developed its out-of-court inform and outrage strategy to inform the public about, and so outrage it at, judges' abuse as to stir it up to demand that politicians hold judges accountable for their performance and liable to compensate their victims([OL2:952¶5](#)). The strategy is implemented through concrete, reasonable, and feasible actions([OL2:978§E](#)). Relying on the precedents of the Tea Party and the *MeToo!* movement, it promotes the formation of a national civic single-issue movement for judicial abuse exposure, compensation of abusees, and reform.

Dare trigger history!([†][OL2:1003](#))[‡]...and you may enter it.

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**Exposing
Judges' Unaccountability
and
Consequent Riskless Abuse of Power

Pioneering
the news and publishing field
of
judicial unaccountability reporting**

A study of judges and their judiciaries, who held unaccountable by themselves through their self-exemption from complaints and by politicians, have turned abuse of power into their institutionalized way of doing business; and their exposure by applying a strategy that out of court informs of, and outrages at, judges' abuse the only entity capable of forcing reform and holding them liable:
We the People, the masters of all public servants, including judicial public servants

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