



# Trump lawyer claims lack of due process in House impeachment. 3 reasons the law doesn't back him up

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In the letter to Democratic House leaders that laid out why President Donald Trump would not cooperate with an impeachment investigation, White House counsel Pat Cipollone argued that the House had "designed and implemented your inquiry in a manner that violates fundamental fairness and constitutionally mandated due process."

Cipollone's first point focused on the rights of the accused.

"You have denied the President the right to cross-examine witnesses, to call witnesses, to receive transcripts of testimony, to have access to evidence, to have counsel present, and many other basic rights guaranteed to all Americans," Cipollone wrote.

Constitutional scholars say that complaint lacks any legal grounding.

"There is nothing that requires Congress to give the president any of the opportunities he describes," said Vanderbilt University law professor Suzanna Sherry.

There are several reasons for this, so let's unpack them.

## **The House impeaches, the Senate holds the trial**

If the rights in the letter apply at all, they come during the trial phase. The constitution says that takes place in the Senate. It is the job of the House to decide whether there's enough evidence to show that the president committed an impeachable offense.

"The impeachment investigation is analogous to a criminal investigation or inquiry by the police, prosecutor, or grand jury — and the accused has none of the rights listed by the president during that investigation or inquiry," Sherry said. "In particular, neither the accused nor his or her lawyer are present at a grand jury hearing, nor is the accused permitted to present witnesses or other evidence or see a transcript."

Former federal prosecutor and Stanford law professor David Sklansky said a due process claim right now is "not a good argument."

"It is only after charges have been filed and the case has reached the trial stage that criminal defendants have the right to cross-examine witnesses, call witnesses, have access to evidence, and have counsel present," Sklansky said. "The role of the House of Representatives in an impeachment proceeding is to investigate and charge, not to try. The trial comes later, in the Senate. So the suggestion that the president is being denied 'basic rights guaranteed to all Americans' at this point makes no sense."

## **What's at stake is removal from office**

The ultimate sanction through impeachment is to be stripped of the presidency.

On that front, the core reason for due process protections doesn't apply to impeachment.

"The constitutional requirement of 'due process' cited by Cipollone applies to situations where an individual stands to lose her 'life, liberty, or property,' none of which is at risk here," Ilya Somin, a law professor at George Mason University and an adjunct scholar at the libertarian Cato Institute, wrote for Reason on Oct. 9.

Thousands of people are indicted every day, and they have no right to call or confront witnesses.

"To suggest that due process requires that a president facing only loss of office get more rights at the accusatory stage than a criminal defendant facing loss of liberty or even life is not only constitutionally unsupportable, but ludicrous," said University of Missouri law professor Frank Bowman.

## **The Constitution lets the House set the rules**

The Constitution mentions impeachment seven times. It doesn't get more specific about the process than saying the House indicts and the Senate holds the trial.

"It grants the House 'sole power to impeach' and vests it with authority to 'determine' their own internal procedures for governance," said Michael Gerhardt, law professor at the University of North Carolina. "All that matters for legitimacy for the House proceedings is to follow the rules of the House as they currently stand and the Constitution."

The U.S. Supreme Court has taken a hands-off approach. In the only case where due process issues were raised — a 1993 ruling on the Senate impeachment trial of Judge Walter Nixon — the court found that the process in the Senate was "nonjusticiable."

"In other words, a matter not to be resolved by the courts," Bowman said.

And the court decision made it clear that the use of the word "sole" for both the House and Senate's impeachment powers meant each chamber sets its own rules, as it sees fit.

As the House moves forward, it could decide to give Trump's lawyers some opportunities to participate.

"Nixon's lawyer was allowed to question witnesses called by the committee and to recommend, but only to recommend, other witnesses to be called," Sklansky said. "Clinton's lawyers were allowed to call witnesses, and to question at least some, if not all, of the witnesses called by the committee."

At the end of the day, the Constitution gives the House the right to decide how to proceed.