The US House of Representatives is set to vote this week on impeaching President Donald Trump, and the impeachment vote is expected to pass. This will set the stage for the next step in the impeachment process; the third-ever Senate impeachment trial.

We thought this would be a good time to recap the steps in the impeachment process to better understand, procedurally, how the impeachment case against President Trump reached this point, and what is expected next. Also, we wanted to dig into some of the issues which have been brought up as problematic by the Republican minority in the House related to the impeachment process and the structure of the House hearings.

Jeffrey S. Robbins, a litigation partner at the Boston offices of Saul Ewing Arnstein & Lehr LLP, served as Chief Counsel for the Minority (the Democrats) for the United States Senate Permanent Subcommittee on Investigations, and Deputy Chief Counsel for the Minority for the Senate Governmental Affairs Committee during its 1997 investigation into allegations of fundraising improprieties by the Clinton-Gore Administration during the 1996 presidential campaign. Mr. Robbins was kind enough
to share his expertise on past congressional investigations to help sort through some of the procedural issues raised and help us understand if the process, so far, has proceeded in a usual manner.

**NLR: Impeachment is a three-step process, beginning with an investigation in the house and then a vote on articles of impeachment, then a trial in the Senate. What kind of evidence is the House looking for during the investigation stage prior to voting on articles of impeachment?**

Robbins: *The House committees are looking for the strongest quantum of evidence possible that the President engaged in conduct which amounts to an identifiable “crime,” since a conservative reading of the Constitution holds that some form of crime, at least, is necessary for impeachment.*

House Republicans have complained about the limited access to closed-door House impeachment investigation and depositions leading up to the House’s impeachment vote should all be public and the transcripts should be released. Access to the House’s investigative hearings has been limited to members of the three House committees involved—Foreign Affairs, Intelligence and Oversight, and Reform which have a majority of Democratic House Members but Republican committee members can participate in the investigation and question the parties being deposed. Intelligence Committee Chairman Adam Schiff, D-Calif., said private sessions are needed to prevent witnesses from hearing each other, the same protocol used by prosecutors in criminal investigations. House Minority Leader Kevin McCarthy, R-Calif., called Schiff a liar and a partisan leading a witch hunt and that the venerable Intelligence Committee has become the partisan Impeachment Committee.

**NLR: How much of the House's investigation needs to be in the form of public hearings?**

Robbins: *There is no Constitutional requirement that impeachment hearings be public or private, but as a practical and a political matter, it is obvious that impeachment hearings need to be conducted in public; after all, building public support for impeachment is a sine qua non (an essential condition) of a vote to impeach, let alone a vote to convict. On the other hand, there is nothing remotely nefarious about what the Minority refers to as “closed door” depositions; Congressional investigations routinely utilize depositions, by definition closed to the public, as a device to ascertain which witnesses have relevant evidence and what that relevant evidence is, in order to assess the strength of a “case” and to more effectively organize any public hearings associated with the investigation.*

Intelligence Committee Chairman Adam Schiff said private sessions are needed to prevent witnesses from hearing each other. House and Minority Leader Kevin McCarthy said “I can’t even go down there and read the transcript,” alleging that Republicans have not been allowed to cross-examine the hearing witnesses, which is not accurate.

The reality is that Republicans have participated in each deposition, but their role is
limited by the Democratic committee majority. Both Republicans and the Democrats get equal time to ask questions. Forty-seven Republicans from the Intelligence, Foreign Affairs, and Oversight Committees have been allowed to attend and participate in the depositions.

**NLR: What actually goes on in Congressional hearings? What is the timeline between the hearings and the public testimony?**

Robbins: *From personal experience, I can tell you that the preparation to question witnesses in a Congressional investigation is an intense process, made all the more intense by the volume of material that has to be consumed in order to question effectively and by the shortage of time within which to consume it. Here, for example, there is a steady drumbeat of witnesses being called for deposition on only a few days’ notice to all concerned, and then only a week or so between the deposition and the public hearing. The process is made more intense by the fact that there are other staff lawyers, and Members, and communications experts, all of whom quite properly want to weigh in on the thrust of the questioning, the messaging of the questioning, and the like.*

In the hearings, according to the Wall Street Journal, Adam Schiff opens with remarks and then invites a Republican counterpart to do the same. Each party receives a block of time to ask questions, and a timekeeper keeps track and moves the proceedings along. Rep. Mark Meadows (R., N.C.), told the Wall Street Journal that each party gets equal time. “There is a clock, with a timekeeper,” he said. Other Republicans, including Reps. Jim Jordan of Ohio and Scott Perry of Pennsylvania have been attending the hearings regularly. Besides Mr. Schiff, Reps. Jamie Raskin of Maryland, Sean Patrick Maloney of New York, Eric Swalwell of California and Gerry Connolly of Virginia have been attending for the Democrats. Eventually, the committee voted down party lines to advance the impeachment proceedings.

Complicating the evidence-gathering process is the lack of cooperation from the White House, including Trump administration officials defying subpoenas. Per Adam Schiff, the White House isn’t cooperating and is defying several subpoenas, which Schiff predicted would be considered obstruction and additional evidence “of the wrongfulness of the President’s underlying misconduct.” When the House Leadership unveiled the articles of impeachment on December 10, 2019, they first focused on the Trump’s pressuring of Ukraine to investigate Joe Biden before the 2020 election by delaying a White House meeting and $400 million in US Security Aid, but the second focused on the obstruction related to the investigation into his misconduct.

**NLR: What are the consequences if a witness refuses to testify at a hearing, or otherwise ignores a subpoena?**

Robbins: *Under law, there are to be consequences to refusal to testify or disobedience of a subpoena to produce documents, in particular, contempt findings that are appropriately enforced by federal courts.*

Mr. Schiff, accused by House minority Whip Steve Scalise of “…trying to impeach a
president of the United States... behind closed doors,” pointed out that the
president’s former attorney, Michael Cohen, pled guilty to lying to Congress out of
loyalty to the president, and was recently sentenced to three years in prison as a
result. Still, the White House has consistently refused to cooperate with the inquiry,
citing executive privilege as justification to keep those subpoenaed from actually
appearing under oath. Citing executive privilege is a not-uncommon tactic to prevent
disclosure of goings-on at the top end of the executive branch, but it doesn’t always
work well for those using it, and the privilege itself remains a cloudy legal concept.

NLR: What privileges, if any, can a witness assert?

Robbins: With respect to privileges, there are, of course, the “Big Three”: the attorney-
client privilege, the Executive Privilege, and the Fifth Amendment. When those
privileges are invoked, as a practical matter they are beyond being challenged, except
in extreme circumstances, and for the purpose of this impeachment proceeding, where
the time constraints are what they are, if they are invoked their invocation will
effectively block disclosure of evidence.

There have been many examples of witnesses invoking their Fifth Amendment rights
to avoid answering questions in Congressional hearings. One prominent example is
the case of Lt. Colonel Oliver North in the hearings around the Iran-Contra affair
during Ronald Reagan’s presidency.

NLR: If the House votes to ratify the articles of impeachment, the Senate will hold a trial. Who acts as a prosecutor in this
instance, and who acts for the defense? How is that determined?

Robbins: Since the House is the indicting authority, it will choose who presents the case
for removal to the Senate. It will in all likelihood be one or more members of the House.

By way of reference, for President Andrew Johnson’s impeachment trial in 1868, an
impeachment committee was made up of seven members of Congress, led by
Thaddeus Stevens. President Bill Clinton’s impeachment featured a team of thirteen
House Republicans from the Judiciary Committee.

NLR: Why does the Supreme Court get involved in impeachment proceedings, and what is their role?

Robbins: As for the role of the Supreme Court, it is the Chief Justice who presides over
the trial, per the Constitution, and it is he who will be involved in those proceedings, and
not the full Court—at least this has not occurred in our limited experience with
impeachment.

While it may seem plain that the Supreme Court would have a larger role in the
impeachment proceedings, that’s not truly the case. The chief justice is, of course,
given the power to preside of the Senate trial by the Constitution as a part of the
doctrine of separation of powers - as Justice Joseph Story argued - removing the Vice
President from Senate leadership to uphold the trial’s impartiality. Should there be a
conviction in the Senate, and the convicted president were to try and engage the highest court, SCOTUS has already found that the Senate’s impeachment procedures are nonjusticiable, because of Article I’s designation of the Senate as the “sole power to try all impeachments” (Nixon v United States, 1993).

Many thanks to Mr. Robbins for his time and for helping break down these complex issues during a complicated time.

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