

# John Roberts Won't Let Mitch McConnell Derail a Trump Impeachment Trial

By BRUCE ACKERMAN

*Slate*

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On Wednesday, the Washington Post reported on a closed-door session among Senate Republicans discussing the way they should conduct a trial if President Donald Trump is impeached by the House. According to at least one senator, Senate Majority Leader Mitch McConnell indicated that he is aiming for a rapid process that might start around Thanksgiving and end by Christmas. There are many reasons, though, to think that such a rush to judgment will fail.

The Constitution explicitly states that the chief justice, in this case John Roberts, “shall preside” over presidential impeachment trials. The rules of the Senate, moreover, require McConnell to take this command seriously. In order to prevent the vice president, who formally presides over the Senate, from refusing to allow the chief justice to play his constitutional role, the Senate rules governing impeachment require the vice president to swear in the chief justice immediately after the House’s charges are announced on the floor. The rules then explicitly empower the chief justice to “direct all the forms of proceedings” during the trial. The Senate, in contrast, is granted the “power to enforce obedience” to all these rulings.

This separation of powers between the chief justice and the Senate was at the center of public attention as the country prepared itself for the impeachment trial of President Andrew Johnson, which began on March 4, 1868. At that time, the Senate approved the rules that were later codified and remain in force today. As the New York Times reported on March 3, 1868, Sen. George Williams of Oregon argued “that the intention of the Constitution was to empower the Chief Justice to decide questions . . . as he would in any court as its presiding officer. To do otherwise would be to act with a sort of jealousy and make him a sort of figure head.” Sen. John Sherman of Ohio agreed that “the usage of all bodies [is] to submit such questions to the presiding officer.”

The Williams-Sherman accord was significant. Williams was a leader of the moderate wing of the Republican Party while Sherman was a leading Radical. If there was any chance of convicting Johnson, both wings of the Republican Party had to agree on the rules regulating its unprecedented exercise of the impeachment power. (Johnson was ultimately acquitted by a single vote.)

The current rules are not written in stone. The existing Senate could change them before the trial begins. But it is unlikely, to say the least, that McConnell could gain the majority support required for a revision. Because all Democrats would oppose this move, only three Republican defections would stop the majority leader in his tracks. From his public statements, it's already clear that Sen. Mitt Romney would never go along. Similarly, Sen. Susan Collins has already said that senators should refuse to voice any opinions on the current battle between the House and the president "since they will be jurors" during the trial. On Friday, Sen. Lisa Murkowski also expressed disapproval of some of the president's reported actions. Given these positions, it is implausible to suppose that these three senators would support any rule change that, in Williams' words, would make the chief justice into a "figurehead" for blatant partisan politics.

There are ways of circumventing these basic rules of the road. One provision authorizes a majority of the Senate vote to overturn a ruling of the presiding officer on evidentiary matters. Yet it seems highly unlikely that McConnell could persuade one of the three skeptics to join the rest of the Republican caucus in rebuking the Republican-appointed chief justice in such a humiliating fashion. The Senate rules also allow a majority to "make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice." Some commentators have suggested that McConnell could invoke this provision to require a final Senate vote by a specific date. Again, it seems almost certain that at least three Republican senators would defect to prevent such a partisan power play.

Given his deep commitment to professionalism, John Roberts can be counted on to deflect any behind-the-scenes pressures for speed. These

inclinations would be reinforced, moreover, by the recent controversy surrounding the appointment of Brett Kavanaugh. Everybody remembers McConnell ramming the nomination through without a full investigation of multiple allegations of misconduct; Roberts cannot allow the same hardball tactics to repeat themselves. Moreover, the reconstituted Roberts court is giving every indication that it will be beginning an assault this term on *Roe v. Wade* and other fundamental precedents of the past half-century. Given the heated controversies that will be generated by these decisions, the chief justice will be even more reluctant to waste his political capital by enabling a partisan rush to judgment on Trump.

The trial itself would necessarily be a multistage affair. Impeachment managers for the House, acting essentially as prosecutors, would present their case to the Senate and the nation in an organized fashion over a couple of weeks. The chief justice would then provide White House defense counsel with an equal opportunity to rebut the charges; the House managers would respond; the president's lawyers would then reply; and the Senate would vote after another pause for serious deliberation.

All of this means that the country will be facing a moment of truth when the time comes for a final Senate vote. We have no idea yet how compelling the evidence emerging from the Ukraine investigation will turn out to be or what other "high crimes and misdemeanors" will ultimately gain House support. Given the length and complexity of the potential charges, the entire process, including preparation time, could last for months. Bill Clinton's trial lasted four weeks; Andrew Johnson's lasted 10. How long will Donald Trump's take?

Your guess as good as mine. Perhaps public opinion will swing decisively against the president after a series of dramatic presentations between House managers and presidential defenders, leading many staunch Republicans to abandon Trump and provide the two-thirds majority required for conviction. This is clearly the scenario leading McConnell to his rush to judgment.

If, however, McConnell succeeds in persuading enough Republicans to stand behind their president and keep him in office, a lengthy trial may well turn out to be in his long-term partisan interest. If the process is comprehensive and fair, and Trump is acquitted in the end, the Senate's verdict of not guilty will serve to energize the president and his followers as they head into the 2020 campaign season.

Only time will tell, then, if the Democrats' impeachment campaign will rally the American people to uphold well-established constitutional principles or if it might be a critical factor in enabling Trump to win a second term and escalate his assault on our system of government.