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Why law of evidence supports the verdict that the president is guilty

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BY EDWARD PURCELL, OPINION CONTRIBUTOR — 01/07/20 05:00 PM EST
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The Constitution defines impeachment as a civil proceeding before the Senate. Its noncriminal nature means the principles of evidence that will govern federal civil trials offer a number of wise and appropriate guides for evaluating evidentiary issues, even though they do not necessarily apply to impeachment trials or control Senate decisions. They provide several established principles for reaching sound judgments about the truth as they are based on common understandings of human behavior.

Those principles reflect two such basic understandings. First, innocent people accused of wrongdoing generally make every effort to produce evidence to refute the charges against them. Second, guilty people who possess evidence of their guilt generally make every effort, whether legal or illegal, to withhold that evidence. To deal with the latter behavior, the law has developed a series of fair and founded evidentiary presumptions.

One deals with refusal to testify. In civil trials, unlike criminal trials, the law allows juries to infer that a person refusing to testify means his testimony would undercut or contradict his own position. The Fifth Amendment, the Supreme Court has decided, “does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” Given the evidence in the record, much of which comes from the public statements of President Trump himself, his failure to testify would allow such unfavorable inferences to be made.

Three other principles mean that if Trump did choose to testify, the law would allow his repeated lies to be used against him. First, one federal rule of evidence allows a witness to be questioned about his prior lies. Second, the same rule also provides that other witnesses may testify on the untruthfulness or reputation for untruthfulness of a witness. A third principle holds that, if a jury finds that a witness intentionally lied about any material fact, then it may reject

all his testimony on the grounds that he is so untrustworthy that he must not be believed on any relevant fact.

Thus, among other sources, the information behind the Washington Post report published last month, which shows that Trump himself has made more than 15,400 "false or misleading claims" as president for an average of 15 such claims a day, could inspire a devastating cross examination and also allow compelling testimony from others impugning his truthfulness. Furthermore, these principles establish that the law would allow a jury to disbelieve virtually everything he says. No wonder he dares not testify.

Three more principles allow inferences against parties that block access to the evidence, as Trump has repeatedly done. First, if a party possesses relevant evidence and refuses to produce it, the law allows a jury to draw an unfavorable inference from the refusal. Second, if a party blocks key witnesses from testifying in a trial, the law allows a jury to infer that their testimony would damage the argument of the party. Third, if one or more witnesses are "missing" and under the "control" of a party that prevents their appearance at trial, many courts will allow juries to presume that the blocked testimony would contradict the position of the controlling party. All these rules justify the inference that Trump stands guilty as charged.

Another principle addresses the interpretation of documents and holds that the meaning of an incomplete or ambiguous document needs to be construed strictly against its drafter. Instead of releasing the full transcript of his call with the Ukrainian president, Trump produced an incomplete summary. Testimony confirmed that the summary is not only incomplete but inaccurate as well. The summary supports the impeachment charges because it confirms that Trump had requested a favor from the Ukrainian president, while other evidence reveals he contemporaneously directed that the appropriated funds for Ukraine be withheld. This principle means the admission in the summary that Trump had requested a favor during the call should properly be construed as attempted extortion or bribery.

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Finally, the principle behind the best evidence rule means the summary should not be used when a full transcript exists. We already know that there is such a transcript from the White House, that it is locked away under control of Trump, and that he refuses to produce it. The logical inference is that the parts of the call excluded from the summary would add likely more decisive evidence of his guilt, so his refusal to produce the transcript would then allow a jury to draw that damaging inference.

The law has remedies for the methodical efforts of the president to hide the truth, and it lies in long honored principles designed to protect the integrity of the civil processes of the law. Those very rules seek to ensure either that the truth comes out or that, if a party attempts to prevent it, the jury is allowed to draw the logical inference. All point to the same conclusion and can support a verdict that Trump is guilty as charged.

Edward Purcell Jr. is a distinguished professor with New York Law School and is the author of "Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon" set to be published this winter.