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BY EDWARD PURCELL, OPINION CONTRIBUTOR — 12/27/19 10:00 AM EST  
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The question of impeaching President Trump presented House Democrats with a seemingly unsolvable dilemma. On the one hand, they were faced with a compelling constitutional duty. On the other hand, they confronted an insurmountable political reality. Overwhelming evidence pushed them to consider articles of impeachment, but equally overwhelming evidence also suggested that Senate Republicans would never convict in the trial.

Speaker Nancy Pelosi came up with an effective solution. Understanding both political context and congressional power, she decided to press an impeachment vote in the House but refused to deliver the two adopted articles of impeachment to the Senate. She has succeeded in meeting the constitutional duty of the House while avoiding the reality of Republican intransigence in the Senate. The impeachment process as it stands can continue only when she passes its control to the Senate. At the moment, Pelosi has every right to maintain that procedural control in the House.

The Constitution undergirds the House right to withhold the articles of impeachment from the Senate. It is wholly silent on the issue of timing. It provides that the House has the “sole power of impeachment” and that the Senate has the “sole power to try all impeachments.” Other provisions, however, give no direction as to when or even whether the House must deliver its articles of impeachment to the Senate. Moreover, it specifically provides that each chamber “may determine the rules of its proceedings.” Thus, the Constitution expressly authorizes the House to move forward with the impeachment on its own timetable and at its own discretion.

Confirming the House right, the Senate has already invoked and acted on that very same principle. Only three years ago, the Republican majority had applied it to the Senate procedures for considering judicial nominees. When Supreme Court Justice Antonin Scalia died in early 2016, President Obama exercised his right to name a replacement. But Majority Leader Mitch McConnell refused to

act. The Republicans stonewalled, and even denied a hearing for the Obama nominee. They insisted that the Senate had no constitutional duty to act within any time limit or even act at all.

In fact, they never did act on the nomination. The principle behind the McConnell rule applies equally to the House in impeachment cases. It establishes that the House must act only if and when it chooses. Pelosi has exceptionally good reasons for withholding the articles. While the Republican action exploited the McConnell rule for purposes that were solely partisan in barring the judicial nominee of Obama, hers does not in the impeachment of Trump. Though it does serve Democratic interests, it rests on two convincing legal grounds that transcend mere partisanship.

First, the actions taken by Pelosi are designed to compel the Senate to meet its own constitutional duty to honestly try the president. McConnell and other Republicans have boasted that they will not be impartial and will not convict. Their declaration announces that they plan to betray their sworn duty. The Constitution requires senators to take a special oath that they to be fair and impartial in impeachment trials, and the Senate rules specify exactly that. Until all Republicans can affirm that they will honor that requirement, there is no guarantee that the Senate will conduct the kind of fair and impartial trial that the Constitution commands. Pelosi has every right to prevent the betrayal of the oath of the senators, and she must also ensure they do not make the House complicit in that betrayal.

Second, more articles of impeachment may well be forthcoming. Several House committees, United States attorneys, and public interest groups are continuing investigations that seem to produce on a daily basis more evidence of wrongdoing by the president. That means the House may find it necessary to consider and to adopt additional articles of impeachment. That means it would be wholly inadvisable at this particular time to hold a Senate trial on simply the two articles that the House has so far adopted.

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There is no reason to have multiple impeachment trials in the Senate. The national interest lies in securing all the relevant evidence, conserving the valuable time of the Senate, ensuring transparency with a comprehensive public record, and guaranteeing a trial that is truly fair and impartial. This national interest means that current and future articles of impeachment should be consolidated in a single Senate trial. In seeking to prevent the impeachment process from leading to potentially duplicative trials, the actions taken thus far by Pelosi serve the paramount national interest.

Therefore, at this present time, the House does have sound reasons for withholding its impeachment articles from the Senate. It should continue to do so until two conditions are met. Republicans must agree to compel production of all relevant witnesses who have not yet been heard and all relevant documents that have not yet been produced in the investigation and, above all, guarantee that they will conduct a fair and impartial trial.

*Edward Purcell Jr. is a constitutional scholar and a distinguished professor of law at New York Law School. He is the author of several books including "Originalism, Federalism, and the American Constitutional Enterprise."*

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