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December 27, 2019

Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Office Building
Washington, D.C. 20510

Honorable Nancy Pelosi
The Speaker of the House of Representatives
United States Capitol
Washington, D.C. 20515

Dear Majority Leader McConnell and Madame Speaker Pelosi:

We, the undersigned, encourage a bipartisan resolution of the current impasse over procedures for the impeachment trial of President Donald J. Trump. The trial is too important to the Republic to be left to partisan political ambitions.

We propose that the Senate endow the Chief Justice of the United States, John Roberts, who will preside, with authority to prescribe trial procedures, subject to veto by a Senate majority. Among other things, the procedures would govern the admissibility of evidence, claims of privilege, subpoenas to compel testimony, the burden of proof, direct and cross-examination of witnesses, and, jury instructions as to the elements of an impeachable high crime and misdemeanor.

We are convinced that only the Chief Justice can rescue the impeachment trial from the taint of partisanship that would destroy the legitimacy of the outcome. Justice requires the appearance of justice. But both Republican and Democratic Members of Congress have openly proclaimed biases in favor or against President Trump. And citizens generally do not trust Members to be fair. Public confidence in Congress hovers around 10 percent, as opposed to 42 percent for the United States Supreme Court. Many Members of Congress place party loyalty above loyalty to the Constitution and their oaths of office. They crave power, not justice.

Article I, section 3 of the Constitution provides that when sitting as jurors in impeachment trial Senators "shall be on oath or affirmation." And according to the standing rules of Senate impeachment trials, Senators must swear as follows: "I solemnly swear that in all things pertaining to the trial of the impeachment of {Donald J. Trump}, now pending, I will do impartial justice according to the Constitution and laws: So help me God."

But both Republican and Democratic Senators have made statements inconsistent with impartial justice. In an ordinary courtroom, these Senator-jurors would be disqualified for cause. Moreover, most if not all Senator-jurors confront conflicts of political interest that would ordinarily justify disqualification. Republicans incline towards acquittal of Mr. Trump to retain control of the White House in 2020, whereas Democrats incline towards conviction to boost their 2020 presidential prospects.

Impeachment procedures ordained by the Republican majority in the Senate or pressured by the Democratic majority in the House will be perceived by an alarming portion of citizens as illegitimate, i.e., calculated to make justice subservient to party ambitions. In contrast, Chief Justice Roberts has earned respect with judicial temperament and robust defense of the impartiality of federal judiciary: "We do not have Obama judges or Trump judges or Bush judges or Clinton judges."

The Chief Justice, of course, has critics. Many Republicans assail his decisions sustaining President Obama's Affordable Care Act. Many Democrats assail his opinion upholding President Trump's travel ban and invalidating the preclearance provisions of the Voting Rights Act. A plurality of voters, however, belong to neither party. Chief Justice Roberts, in contrast to the Senate Republican majority or House Democratic majority, is the optimal choice to establish independent and credible procedures for the impeachment trial of President Trump to strengthen public confidence in the outcome.

In the impeachment trial of President William Jefferson Clinton, the Senate unanimously determined trial procedures. Such unanimity cannot be expected today with the appalling spike in partisanship. It seems politically plausible with your support, however, that Senate Republicans and Democrats might agree to hand off responsibility for procedures governing Mr. Trump's impeachment trial to Chief Justice Roberts.

The delegation to the Chief Justice passes constitutional muster. His procedures could be vetoed by a simple Senate majority. Ultimate authority is thus retained by the upper chamber. And the Constitution itself makes the Chief Justice the presiding officer, which contemplates power to prescribe procedures. The Federal Rules of Civil Procedure, for instance, are promulgated by the United States Supreme Court under the Rules Enabling Act subject to overruling by Congress.

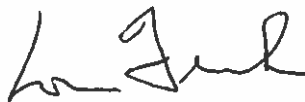
Making the Chief Justice the impresario of the impeachment trial is innovative and imperfect, but markedly less imperfect than every other imaginable option.

We would welcome the opportunity to assist in drafting the proposed rulemaking delegation.

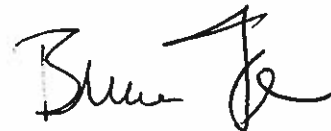
Sincerely,



Ralph Nader



Louis Fisher



Bruce Fein