AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Impeaching and Censuring the President

*Pat A. Cipollone*, **Letter to House Speaker Nancy Pelosi** (2019)[[1]](#footnote-1)

*On July 25, 2019, the day after special counsel Robert Mueller testified before the House Judiciary Committee on Russian interference with the 2016 presidential elections, President Donald Trump had a phone call with the new Ukrainian president Volodymyr Zelensky. In February 2014, the Russian-backed regime in the Ukraine collapsed, and within weeks Russia annexed Crimea, a region of the Ukraine on the border with Russia. The United States provided assistance to Ukraine in its continued military stand-off with Russia over Crimea. In his July 25th phone call, Trump reaffirmed American support for the Ukrainian government but urged Zelensky to speak with his informal advisor, Rudy Giuliani, about corruption investigations in the Ukraine. On September 9th, the inspector general for the foreign intelligence agencies informed the House intelligence committee that he had received a credible whistleblower report alleging that the president had solicited foreign interference in the 2020 election during his July 25th phone call with the Ukrainian president. Several House committees immediately launch investigations of the allegations and of Giuliani’s activities in the Ukraine. On September 24, Democratic House Speaker Nancy Pelosi held a press conference in which she announced that the House was pursuing an impeachment inquiry against the president.*

*On October 31, 2019, the House of Representatives voted to authorize several committees to investigate “whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach.” On December 18, 2019, the House voted to impeach President Donald Trump on two articles of impeachment. The first article charged the president with abuse of power for pressuring Ukrainian president Volodymyr Zelensky to announce a criminal investigation of Hunter Biden, the son of Democratic presidential frontrunner Joe Biden. The second article charged the president with obstruction of Congress for defying House committee subpoenas.*

*On October 8, 2019, the White House counsel Pat Cipollone issued a public letter to the speaker of the House and several House committee chairs informing them that the administration would not be cooperating with any impeachment investigation or complying with the various subpoenas that had been issued to senior administration officials seeking information on American contacts with the Ukraine. Despite the letter, the House continued to issue subpoenas demanding information for its investigation, and some lower level and former executive branch officials did agree to testify before House committees.*

I write on behalf of President Donald J. Trump in response to your numerous, legally unsupported demands made as part of what you have labeled – contrary to the Constitution of the United States and all past bipartisan precedent – as an "impeachment inquiry." As you know, you have designed and implemented your inquiry in a manner that violates fundamental fairness and constitutionally mandated due process.

For example, you have denied the President the right to cross-examine witnesses, to call witnesses, to receive transcripts of testimony, to have access to evidence, to have counsel present, and many other basic rights guaranteed to all Americans. You have conducted your proceedings in secret. You have violated civil liberties and the separation of powers by threatening Executive Branch officials, claiming that you will seek to punish those who exercise fundamental constitutional rights and prerogatives. All of this violates the Constitution, the rule of law, and *every past precedent*. Never before in our history has the House of Representatives – under the control of either political party – taken the American people down the dangerous path you seem determined to pursue.

Put simply, you seek to overturn the results of the 2016 election and deprive the American people of the President they have freely chosen. Many Democrats now apparently view impeachment not only as a means to undo the democratic results of the last election, but as a strategy to influence the *next* election, which is barely more than a year away. As one member of Congress explained, he is "concerned that if we don't impeach the President, he will get reelected." Your highly partisan and unconstitutional effort threatens grave and lasting damage to our democratic institutions, to our system of free elections, and to the American people.

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For these reasons, President Trump and his Administration reject your baseless, unconstitutional efforts to overturn the democratic process. Your unprecedented actions have left the President with no choice. In order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry under these circumstances.

Your inquiry is constitutionally invalid and a violation of due process. In the history of our Nation, the House of Representatives has never attempted to launch an impeachment inquiry against the President without a majority of the House taking political accountability for that decision by voting to authorize such a dramatic constitutional step. Here, House leadership claims to have initiated the gravest inter-branch conflict contemplated under our Constitution by means of nothing more than a press conference at which the Speaker of the House simply announced an "official impeachment inquiry." Your contrived process is unprecedented in the history of the Nation, and lacks the necessary authorization for a valid impeachment proceeding.

The Committees' inquiry also suffers from a separate, fatal defect. Despite Speaker Pelosi's commitment to "treat the President with fairness," the Committees have not established any procedures affording the President even the most basic protections demanded by due process under the Constitution and by fundamental fairness. Chairman Nadler of the House Judiciary Committee has expressly acknowledged, at least when the President was a member of his own party, that "[t]he power of impeachment ... demands a rigorous level of due process," and that in this context "due process mean[s] ... the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel." All of these procedures have been abandoned here.

These due process rights are not a matter of discretion for the Committees to dispense with at will. To the contrary, they are constitutional requirements. The Supreme Court has recognized that due process protections apply to all congressional investigations. *Watkins v. United States* (1957). Indeed, it has been recognized that the Due Process Clause applies to impeachment proceedings. *Hastings v. United States* (D.D.C. 1992). And precedent for the rights to cross-examine witnesses, call witnesses, and present evidence dates back nearly 150 years. Yet the Committees have decided to deny the President these elementary rights and protections that form the basis of the American justice system and are protected by the Constitution. No citizen – including the President – should be treated this unfairly.

To comply with the Constitution's demands, appropriate procedures would include – at a minimum – the right to see all evidence, to present evidence, to call witnesses, to have counsel present at all hearings, to cross-examine all witnesses, to make objections relating to the examination of witnesses or the admissibility of testimony and evidence, and to respond to evidence and testimony. Likewise, the Committees must provide for the disclosure of all evidence favorable to the President and all evidence bearing on the credibility of witnesses called to testify in the inquiry. The Committees' current procedures provide *none* of these basic constitutional rights.

In addition, the House has not provided the Committees' Ranking Members with the authority to issue subpoenas. The right of the minority to issue subpoenas – subject to the same rules as the majority – has been the standard, bipartisan practice in all recent resolutions authorizing presidential impeachment inquiries. The House's failure to provide co-equal subpoena power in this case ensures that any inquiry will be nothing more than a one-sided effort by House Democrats to gather information favorable to their views and to selectively release it as only they determine. The House's utter disregard for the established procedural safeguards followed in past impeachment inquiries shows that the current proceedings are nothing more than an unconstitutional exercise in political theater.

As if denying the President basic procedural protections were not enough, the Committees have also resorted to threats and intimidation against potential Executive Branch witnesses. Threats by the Committees against Executive Branch witnesses who assert common and longstanding rights destroy the integrity of the process and brazenly violate fundamental due process. In letters to State Department employees, the Committees have ominously threatened ­– without any legal basis and before the Committees even issued a subpoena – that "[a]ny failure to appear" in response to a mere letter *request* for a deposition "shall constitute evidence of obstruction." Worse, the Committees have broadly threatened that if State Department officials attempt to insist upon the right for the Department to have an agency lawyer present at depositions to protect legitimate Executive Branch confidentiality interests – or apparently if they make any effort to protect those confidentiality interests *at all* – these officials will have their salaries withheld.

The suggestion that it would somehow be problematic for anyone to raise long ­established Executive Branch confidentiality interests and privileges in response to a request for a deposition is legally unfounded. Not surprisingly, the Office of Legal Counsel at the Department of Justice has made clear on multiple occasions that employees of the Executive Branch who have been instructed not to appear or not to provide particular testimony before Congress based on privileges or immunities of the Executive Branch cannot be punished for following such instructions. Current and former State Department officials are duty bound to protect the confidentiality interests of the Executive Branch, and the Office of Legal Counsel has also recognized that it is unconstitutional to exclude agency counsel from participating in congressional depositions. In addition, any attempt to withhold an official's salary for the assertion of such interests would be unprecedented and unconstitutional. The Committees' assertions on these points amount to nothing more than strong-arm tactics designed to rush proceedings without any regard for due process and the rights of individuals and of the Executive Branch. Threats aimed at intimidating individuals who assert these basic rights are attacks on civil liberties that should profoundly concern all Americans.

The effort to impeach President Trump – without regard to any evidence of his actions in office – is a naked political strategy that began the day he was inaugurated, and perhaps even before. In fact, your transparent rush to judgment, lack of democratically accountable authorization, and violation of basic rights in the current proceedings make clear the illegitimate, partisan purpose of this purported "impeachment inquiry." The Founders, however, did not create the extraordinary mechanism of impeachment so it could be used by a political party that feared for its prospects against the sitting President in the next election. The decision as to who will be elected President in 2020 should rest with the people of the United States, exactly where the Constitution places it.

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Given that your inquiry lacks any legitimate constitutional foundation, any pretense of fairness, or even the most elementary due process protections, the Executive Branch cannot be expected to participate in it. Because participating in this inquiry under the current unconstitutional posture would inflict lasting institutional harm on the Executive Branch and lasting damage to the separation of powers, you have left the President no choice. Consistent with the duties of the President of the United States, and in particular his obligation to preserve the rights of future occupants of his office, President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.

Your recent letter to the Acting White House Chief of Staff argues that "[e]ven if an impeachment inquiry were not underway," the Oversight Committee may seek this information as a matter of the established oversight process. Respectfully, the Committees cannot have it both ways. The letter comes from the Chairmen of three different Committees, it transmits a subpoena "[p]ursuant to the House of Representatives' impeachment inquiry," it recites that the documents will "be collected as part of the House's impeachment inquiry," and it asserts that the documents will be "shared among the Committees, as well as with the Committee on the Judiciary as appropriate." The letter is in no way directed at collecting information in aid of legislation, and you simply cannot expect to rely on oversight authority to gather information for an unauthorized impeachment inquiry that conflicts with all historical precedent and rides roughshod over due process and the separation of powers. If the Committees wish to return to the regular order of oversight requests, we stand ready to engage in that process as we have in the past, in a manner consistent with well-established bipartisan constitutional protections and a respect for the separation of powers enshrined in our Constitution.

For the foregoing reasons, the President cannot allow your constitutionally illegitimate proceedings to distract him and those in the Executive Branch from their work on behalf of the American people. The President has a country to lead. The American people elected him to do this job, and he remains focused on fulfilling his promises to the American people. He has important work that he must continue on their behalf, both at home and around the world, including continuing strong economic growth, extending historically low levels of unemployment, negotiating trade deals, fixing our broken immigration system, lowering prescription drug prices, and addressing mass shooting violence. We hope that, in light of the many deficiencies we have identified in your proceedings, you will abandon the current invalid efforts to pursue an impeachment inquiry and join the President in focusing on the many important goals that matter to the American people.

1. Excerpt taken from Pat A. Cipollone, Letter to the Speaker of the House of Representatives (October 8, 2019). [↑](#footnote-ref-1)