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

*Steven A. Engel*, **Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context** (2019)[[1]](#footnote-1)

*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.” The House had already been informally pursuing impeachment inquiries against President Donald Trump, but the White House and the Republican minority in the House had been loudly complaining that the full House had not formally voted to authorize an impeachment investigation Before the House vote, the president had declared that his administration would not cooperate with an “illegal” House investigation. After the House vote, the administration began to shift the grounds for its defense.*

*Pursuant to the House resolution, the House Permanent Select Committee on Intelligence immediately scheduled closed-door depositions of executive branch officials. The committee indicated to those officials that they could not be accompanied into the deposition by lawyers from their respective agencies. The White House counsel sought a legal opinion from the Office of Legal Counsel in the Department of Justice as to whether such orders from the House intelligence committee were valid. The OLC concluded that they were not, on the grounds that the depositions might involve matters that were properly covered by executive privilege and the president’s interest in asserting executive privilege could only be adequately protected if the officials being deposed could be advised by agency counsel. Without adequate protections for executive privilege, executive branch officials should refuse to comply with House committee subpoenas even during a formal impeachment probe.*

. . . .

We have previously advised, in the context of legislative oversight investigations, that Congress may not prohibit agency counsel from accompanying employees called to testify about matters that potentially involve information protected by executive privilege. As we explained, “the exclusion of agency counsel impairs the President’s ability to exercise his constitutional authority to control privileged information of the Executive Branch” and “his constitutional authority to supervise the Executive Branch’s interactions with Congress.” The President has the constitutional authority to protect privileged information from disclosure in response to congressional investigations, and to do so effectively, he must be able to designate a representative to protect this interest at congressional depositions. In addition, the President has the constitutional authority to control the activities of subordinate officials within the Executive Branch, which includes the power to control communications with, and information provided to, Congress on the Executive Branch’s behalf. Adherence to these principles ensures that executive branch employees called to testify before Congress do not improperly disclose privileged information, and that the information provided is consistent with the scope of Congress’s investigative authority.

We believe that these same principles apply to a congressional committee’s effort to compel the testimony of an executive branch official in an impeachment inquiry. Executive privilege protects the confidentiality and integrity of sensitive executive branch information absent a showing of sufficient legislative “need” in the context of an oversight investigation. *Senate Select Committee on Presidential Campaign Activities v. Nixon* (D.C. Cir. 1974). The privilege has also been recognized to protect information in connection with other kinds of proceedings, including criminal trials and grand-jury investigations.

As the Supreme Court recognized in *United States v. Nixon* (1974), executive privilege “is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” While the privilege may yield to the “legitimate needs of the judicial process” in connection with a criminal trial, the Court recognized that “it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.” . . .

We believe that a congressional committee must likewise make a showing of need that is sufficient to overcome the privilege in connection with an impeachment inquiry. Although no judicial decision is directly on point, the D.C. Circuit suggested as much in *Senate Select Committee*, in which it contrasted the Senate committee’s “oversight need” in support of “legislative tasks” with “the responsibility of a grand jury, *or any institution engaged in like functions*.” . . .

While HPSCI may be able to establish an interest justifying its requests for information, the Executive Branch also has legitimate interests in confidentiality, and the resolution of these competing interests requires a careful balancing of each branch’s need in the context of the particular information sought. Although HPSCI is willing to allow witnesses to appear with *personal* counsel, the accommodation process presupposes participation by appropriate representatives of the Executive Branch, which cannot occur when a committee seeks to exclude *agency* counsel from the room. Accordingly, where, as here, a committee deposition is likely to inquire into privileged communications, the committee may not validly prevent an executive branch witness from receiving the assistance of agency counsel.

Because the committee may not bar agency counsel from assisting an executive branch witness without contravening the legitimate prerogatives of the Executive Branch, a HPSCI subpoena requiring such a result would exceed the committee’s lawful authority and thus could not be enforced. . . .

. . . .

1. Excerpt taken from Steven A. Engel, Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context (November 1, 2019). [↑](#footnote-ref-1)