AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

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

*Steven A. Engel*, **House Committees’ Authority to Investigate for Impeachment** (2020)[[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.*

*In January 2020, the Office of Legal Counsel provided a legal opinion to the counsel for the president assessing whether subpoenas that had been issued by House committees prior to October 31 were legally valid and whether administration officials should comply with them. The OLC concluded that any subpoenas issued prior to the formal House vote that were for information that was impeachment-related had not been properly authorized and were not compulsory and that the House resolution could not retroactively confer validity to those subpoenas. Although administration officials might choose to voluntarily cooperate with House investigators, the House committees would need to issue new subpoenas under the authority of the October 31 resolution in order for them to be valid and compulsory. The House committees did not generally issue new subpoenas after the passage of the authorizing resolution. On December 18, 2019, the House voted to impeach President Donald Trump on two articles of impeachment. The second article charged the president with obstruction of Congress for defying House committee subpoenas.*

*The OLC’s position had relevance not only for administration’s immediate decision of whether or not to comply with the subpoenas but also for its legal defense in President Trump’s impeachment trial against the second article of impeachments. Since the subpoenas were not valid, the president argued, he could not be guilty of obstruction for refusing to comply with those subpoenas.*

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Faced with continuing objections from the Administration and members of Congress to the validity of the impeachment-related subpoenas, the House decided to take a formal vote to authorize the impeachment inquiry. On October 31, the House adopted a resolution “direct[ing]” several committees “to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America.” . . .

The Constitution vests in the House of Representatives a share of Congress’s legislative power and, separately, “the sole Power of Impeachment.” Both the legislative power and the impeachment power include an implied authority to investigate, including by means of compulsory process. But those investigative powers are not interchangeable. The House has broadly delegated to committees its power to investigate for legislative purposes, but it has held impeachment authority more closely, granting authority to conduct particular impeachment investigations only as the need has arisen. The House has followed that approach from the very first impeachment inquiry through dozens more that have followed over the past 200 years, including every inquiry involving a President.

In so doing, the House has recognized the fundamental difference between a legislative oversight investigation and an impeachment investigation. The House does more than simply pick a label when it “debate[s] and decide[s] when it wishes to shift from legislating to impeaching” and to authorize a committee to take responsibility for “the grave and weighty process of impeachment.” . . . Because a legislative investigation seeks “information respecting the conditions which the legislation is intended to affect or change,” “legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.” By contrast, an impeachment inquiry must evaluate whether a civil officer did, or did not, commit treason, bribery, or another high crime or misdemeanor, and it is more likely than a legislative oversight investigation to call for the reconstruction of past events.

Thus, the House has traditionally marked the shift to an impeachment inquiry by adopting a resolution that authorizes a committee to investigate through court-like procedures differing significantly from those used in routine oversight. . . .

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With respect to both its legislative and its impeachment powers, the House has corresponding powers of investigation, which enable it to collect the information necessary for the exercise of those powers. The Supreme Court has explained that “[t]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” *McGrain v. Daugherty* (1927). Thus, in the legislative context, the House’s investigative power “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” *Watkins v. United States* (1957). . . .

Because the House has different investigative powers, establishing which authority has been delegated has often been necessary in the course of determining the scope of a committee’s authority to compel witnesses and testimony. In addressing the scope of the House’s investigative powers, all three branches of the federal government have recognized the constitutional distinction between a legislative investigation and an impeachment inquiry.

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[T]he D.C. Circuit distinguished the needs of the House Judiciary Committee, which was conducting an impeachment inquiry into the actions of President Nixon, from those of the Senate Select Committee on Presidential Campaign Activities, whose investigation was premised upon legislative oversight. The court recognized that the impeachment investigation was rooted in “an express constitutional source” and that the House committee’s investigative needs differed in kind from the Senate committee’s oversight needs*.* In finding that the Senate committee had not demonstrated that President Nixon’s audiotapes were “critical to the performance of its legislative functions,” the court recognized “a clear difference between Congress’s *legislative* tasks and the responsibility of a grand jury, *or any institution engaged in like functions*,” such as the House Judiciary Committee, which had “begun an inquiry into presidential impeachment.” *Senate Select Committee on Presidential Campaign Activities v. Nixon* (D.C. Cir. 1974).

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The Executive Branch similarly has long distinguished between investigations for legislative and for impeachment purposes. In 1796, the House “[r]esolved” that President Washington “be requested to lay before th[e] House a copy of the instructions” given to John Jay in preparation for his negotiation of a peace settlement with Great Britain. Washington refused to comply because the Constitution contemplates that only the Senate, not the House, must consent to a treaty. “It d[id] not occur” to Washington “that the inspection of the papers asked for, c[ould] be relative to any purpose under the cognizance of the House of Representatives, *except that of an impeachment*.” Because the House’s “resolution ha[d] not expressed” any purpose of pursuing impeachment, Washington concluded that “a just regard to the constitution . . . forb[ade] a compliance with [the House’s] request” for documents.

In 1832, President Jackson drew the same line. . . .

In 1846, another House select committee requested that President Polk account for diplomatic expenditures made in previous administrations by Secretary of State Daniel Webster. Polk refused to disclose information but “cheerfully admitted” that the House may have been entitled to such information if it had “institute[d] an [impeachment] inquiry into the matter.” . . .

House members, too, have consistently recognized the difference between a legislative oversight investigation and an impeachment investigation. . . .

For instance, in 1793, when debating the House’s jurisdiction to investigate Secretary of the Treasury Alexander Hamilton, some members argued that the House could not adopt a resolution of investigation into Hamilton’s conduct without adopting the “solemnities and guards” of an impeachment inquiry. . . .

Similarly, in 1846, a House select committee agreed with President Polk’s decision not to turn over requested information regarding State Department expenditures where the House did not act “with a view to an impeachment.” . . .

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As the Supreme Court has explained in the context of legislative oversight, “[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose” and, in such circumstances, committees “are endowed with the full power of the Congress to compel testimony.” The same is true for impeachment investigations. Thus, Hamilton recognized, the impeachment power involves a trust of such “delicacy and magnitude” that it “deeply concerns the political reputation and existence of every man engaged in the administration of public affairs.” The Founders foresaw that an impeachment effort would “[i]n many cases . . . connect itself with the preexisting factions” and “inlist all their animosities, partialities, influence and interest on one side, or on the other.” As a result, they placed the solemn authority to initiate an impeachment in “the representatives of the nation themselves.” In order to entrust one of its committees to investigate for purposes of impeachment, the full House must “spell out that group’s jurisdiction and purpose.” Otherwise, a House committee controlled by such a faction could launch open-ended and untethered investigations without the sanction of a majority of the House.

Because a committee may exercise the House’s investigative powers only when authorized, the committee’s actions must be within the scope of a resolution delegating authority from the House to the committee. As the D.C. Circuit recently explained, “it matters not whether the Constitution would give Congress authority to issue a subpoena if Congress has given the issuing committee no such authority.” . . . While a committee may study some matters without exercising the investigative powers of the House, a committee’s authority to compel the production of documents and testimony depends entirely upon the jurisdiction provided by the terms of the House’s delegation.

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Historical practice confirms that the House must authorize an impeachment inquiry. . . . The House has expressly authorized every impeachment investigation of a President, including by identifying the investigative committee and authorizing the use of compulsory process. The same thing has been true for nearly all impeachment investigations of other executive officials and judges. While committees have sometimes studied a proposed impeachment resolution or reviewed available information without conducting a formal investigation, in nearly every case in which the committee resorted to compulsory process, the House expressly authorized the impeachment investigation. That practice was foreseen as early as 1796. When Washington asked his Cabinet for opinions about how to respond to the House’s request for the papers associated with the Jay Treaty, the Secretary of the Treasury, Oliver Wolcott Jr., explained that “the House of Representatives has no right to demand papers” outside its legislative function “[e]xcept when an Impeachment is proposed *& a formal enquiry instituted*.”

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Against this weighty historical record, which involves nearly 100 authorized impeachment investigations, the outliers are few and far between. In 1879, it appears that a House committee, which was expressly authorized to conduct an oversight investigation into the administration of the U.S. consulate in Shanghai, ultimately investigated and recommended that the former consul-general and former vice consul-general be impeached. In addition, between 1986 and 1989, the Judiciary Committee considered the impeachment of three federal judges who had been criminally prosecuted (two of whom had been convicted). The Judiciary Committee pursued impeachment before there had been any House vote, and issued subpoenas in two of those inquiries. Since then, however, the Judiciary Committee reaffirmed during the impeachment of President Clinton that, in order to conduct an impeachment investigation, it needed an express delegation of investigative authority from the House. And in all subsequent cases the House has hewed to the well-established practice of authorizing each impeachment investigation.

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While many Presidents have been the subject of less-formal demands for impeachment, at least eleven have faced resolutions introduced in the House for the purpose of initiating impeachment proceedings. In some cases, the House formally voted to reject opening a presidential impeachment investigation. . . . In many other cases, the House simply referred impeachment resolutions to the Judiciary Committee, which took no further action before the end of the Congress. But, in three instances before President Trump, the House moved forward with investigating the impeachment of a President. Each of those presidential impeachments advanced to the investigative stage only after the House adopted a resolution expressly authorizing a committee to conduct the investigation. In no case did the committee use compulsory process until the House had expressly authorized the impeachment investigation.

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The House has historically followed these same procedures in considering impeachment resolutions against executive branch officers other than the President. In many cases, an initial resolution laying out charges of impeachment or authorizing an investigation was referred to a select or standing committee. Following such a referral, the designated committee reviewed the matter and considered whether to pursue a formal impeachment inquiry—it did not treat the referral as stand-alone authorization to conduct an investigation. When a committee concluded that the charges warranted investigation, it reported to the full House, which then considered whether to adopt a resolution to authorize a formal investigation.

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The House has followed the same practice in connection with nearly all impeachment investigations involving federal judges. Committees sometimes studied initial referrals, but they waited for authorization from the full House before conducting any formal impeachment investigation. Three cases from the late 1980s departed from that pattern, but the House has returned during the past three decades to the historical baseline, repeatedly ensuring that the Judiciary Committee had a proper delegation for each impeachment investigation.

The practice of having the House authorize each specific impeachment inquiry is reflected in the earliest impeachment investigations involving judges. In 1804, the House considered proposals to impeach two judges: Samuel Chase, an associate justice of the Supreme Court, and Richard Peters, a district judge. There was a “lengthy debate” about whether the evidence was appropriate to warrant the institution of an inquiry. The House then adopted a resolution appointing a select committee “to inquire into the official conduct” of Chase and Peters “and to report” the committee’s “opinion whether” either of the judges had “so acted, in their judicial capacity, as to require the interposition of the constitutional power of this House.” A few days later, another resolution “authorized” the committee “to send for persons, papers, and records.” . . .

Over the course of more than two centuries thereafter, members of the House introduced resolutions to impeach, or to investigate for potential impeachment, dozens more federal judges, and the House continued, virtually without exception, to provide an express authorization before any committee proceeded to exercise investigative powers. . . .

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Rule XI of the Rules of the House affirmatively authorizes committees to issue subpoenas, but only for matters within their legislative jurisdiction. The provision has been a part of the House Rules since 1975. . . .

Rule X does not provide any committee with jurisdiction over impeachment. Rule X establishes the “standing committees” of the House and vests them with “their legislative jurisdictions.” . . .

The text of Rule X confirms that it addresses the *legislative* jurisdiction of the standing committees. After defining each standing committee’s subject-matter jurisdiction, the Rule provides that “[t]he various standing committees shall have general oversight responsibilities” to assist the House in its analysis of “the application, administration, execution, and effectiveness of Federal laws” and of the “conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation,” as well as to assist the House in its “formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate.” . . .

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In modern practice, the Speaker has referred proposed resolutions calling for the impeachment of a civil officer to the Judiciary Committee. . . . House committees have regularly received referrals and conducted preliminary inquiries, without compulsory process, for the purpose of determining whether to recommend that the House open a formal impeachment investigation. Should a committee determine that a formal inquiry is warranted, then the committee recommends that the House adopt a resolution that authorizes such an investigation, confers subpoena power, and provides special process to the target of the investigation. The Judiciary Committee followed precisely that procedure in connection with the impeachment investigations of Presidents Nixon and Clinton, among many others. By referring an impeachment resolution to the House Judiciary Committee, the Speaker did not expand that committee’s subpoena authority to cover a formal impeachment investigation. In any event, no impeachment resolution was ever referred to the Foreign Affairs Committee, HPSCI, or the Committee on Oversight and Reform. Rule XII thus could not provide any authority to those committees in support of the impeachment-related subpoenas issued before October 31.

Accordingly, when those subpoenas were issued, the House Rules did not provide authority to any of those committees to issue subpoenas in connection with potential impeachment. In reaching this conclusion, we do not question the broad authority of the House of Representatives to determine how and when to conduct its business. . . . The question, however, is not “what rules Congress may establish for its own governance,” but “rather what rules the House has established and whether they have been followed.” . . . Statements by the Speaker or by committee chairmen are not statements of the House itself. . . . Our conclusion here turned upon nothing more, and nothing less, than the rules and resolutions that had been adopted by a majority vote of the full House.

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Here, the committee chairmen made clear upon issuing the subpoenas that the committees were interested in the requested materials to support an investigation into the potential impeachment of the President, not to uncover information necessary for potential legislation within their respective areas of legislative jurisdiction. In marked contrast with routine oversight, each of the subpoenas was accompanied by a letter signed by the chairs of three different committees, who transmitted a subpoena “[p]ursuant to the House of Representatives’ impeachment inquiry” and recited that the documents would “be collected as part of the House’s impeachment inquiry,” and that they would be “shared among the Committees, as well as with the Committee on the Judiciary as appropriate.” . . .

In reaching this conclusion, we do not foreclose the possibility that the Foreign Affairs Committee or the other committees could have issued similar subpoenas in the bona fide exercise of their legislative oversight jurisdiction, in which event the requests would have been evaluated consistent with the long-standing confidentiality interests of the Executive Branch. . . . Should the Foreign Affairs Committee, or another committee, articulate a legitimate oversight purpose for a future information request, the Executive Branch would assess that request as part of the constitutionally required accommodation process. But the Executive Branch was not confronted with that situation. The committee chairmen unequivocally attempted to conduct an impeachment inquiry into the President’s actions, without the House, which has the “sole Power of Impeachment,” having authorized such an investigation. Absent such an authorization, the committee chairs’ passing mention of “oversight and legislative jurisdiction” did not cure that fundamental defect.

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. . . . The resolution directs certain committees to “continue” investigations, and it specifies procedures to govern future hearings, but nothing in the resolution looks backward to actions previously taken. Accordingly, Resolution 660 did not ratify or otherwise authorize the impeachment-related subpoenas issued before October 31, which therefore still had no compulsory effect on their recipients.

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. . . . In connection with this investigation, the House committees took the unprecedented steps of investigating the impeachment of a President without any authorization from the full House; without the procedural protections provided to Presidents Nixon and Clinton; and with express threats of obstruction charges and unconstitutional demands that officials appear and provide closed-door testimony about privileged matters without the assistance of executive branch counsel. Absent any effort by the House committees to accommodate the Executive Branch’s legitimate concerns with the unprecedented nature of the committees’ actions, it was reasonable for executive branch officials to decline to comply with the subpoenas addressed to them.

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1. Excerpt taken from Steven A. Engel, House Committees’ Authority to Investigate for Impeachment (January 19, 2020). [↑](#footnote-ref-1)