

# Impeachment Investigations: Law and Process

October 2, 2019

Speaker Pelosi [announced](#) last week that the House “is moving forward with an official impeachment inquiry.” Although the Speaker’s statement did not address precisely how the House will proceed, it is noteworthy not only because the House has so [rarely](#) investigated a President for the purpose of impeachment, but also because an impeachment investigation has usually been an [early step](#) in a constitutional process that could ultimately result in the removal of the subject of the inquiry from office.

This Sidebar identifies procedural options for the House as it proceeds with an impeachment investigation. The Sidebar also describes some of the ways in which an impeachment investigation, as compared to a more traditional investigation for legislative or oversight purposes, might bolster the House’s ability to obtain, either voluntarily or through the courts, information from the executive branch. The Sidebar also briefly describes possible future steps that might follow an impeachment inquiry, including possible action by the Senate.

## The Mechanics of House Impeachment Investigations

The House has a number of [options](#) for proceeding with its impeachment investigation, as the manner by which the body chooses to implement its impeachment powers is [textually](#) and historically committed to the House’s own discretion. [It could](#) adopt a resolution that explicitly authorizes the House Judiciary Committee (or another committee) to conduct an investigation to determine whether there are sufficient grounds to impeach the President and, if warranted, report articles of impeachment to the House. Or the House could establish and empower a select investigative committee to handle this duty, perhaps giving the body broad jurisdiction over all relevant aspects of the allegations against the President. In either case, an authorizing resolution typically makes explicit that the investigating committee is acting with the imprimatur of the House and exercising the full panoply of the House’s constitutionally based investigative and impeachment powers. Authorizing resolutions also provide a means for the House to both direct the scope of an impeachment inquiry and, if desired, provide the investigating committee with additional tools to enable a thorough and [expeditious](#) investigation. While [House rules](#) already provide standing committees with several compulsory mechanisms to gather information, authorizing resolutions for impeachment inquiries have generally conferred additional investigatory tools to a committee, such as the authority to compel responses to [interrogatories](#).

Rather than considering a resolution that expressly authorizes an impeachment inquiry of the President, the House might take the position that such an inquiry is already underway, and opt to allow its

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committees to continue their ongoing investigations or begin new inquiries using their existing investigative tools and authorities. It is because those existing investigative tools and authorities have grown over time—and now [include](#) allowing committee chairs to issue subpoenas and committee staff to take depositions—that the practical need for obtaining additional powers from the House may have diminished. Both the Speaker’s initial [statement](#), in which she specified that the House will “direct[] our six committees to proceed with their investigation under that umbrella of impeachment inquiry,” and [subsequent statements](#) suggesting that the Intelligence Committee will continue to focus on recent whistleblower accusations, appear to suggest that the House may follow this type of approach, with an impeachment investigation that encompasses ongoing investigations by various committees.

If the House takes no new action on authorizing the investigation, the Speaker’s statement that the House is launching an “official impeachment inquiry” is unlikely to put to rest the [debate](#) among some inside and outside of Congress about how to properly characterize various committees’ ongoing investigations of possible executive misconduct, including continuing investigations by the House Judiciary and Intelligence Committees. This debate centers on the proper role of the House in initiating impeachment investigations. For example, while Chairman Nadler has [stated](#) that the Judiciary Committee is already in “formal impeachment proceedings” and the Committee has adopted “[procedures](#)” for the “presentation of information in connection with the Committee’s investigation to determine whether to recommend articles of impeachment,” Ranking Member Collins has [asserted](#) that “House precedent requires the full House approve a resolution authorizing the Judiciary Committee to begin an impeachment inquiry.” Nor does it appear that the Speaker’s statement alone will necessarily prevent the Trump Administration from arguing (as it is doing in [pending litigation](#)) that the House has not “expressly endorsed” the Judiciary Committee’s impeachment investigation. The Speaker’s statement might be read to support those in the House who believe authorization for an impeachment investigation has already been provided by prior legislative actions, including, among other things, [referring](#) articles of impeachment to the Judiciary Committee and [authorizing](#) House committees to exercise “any and all necessary authority under Article I of the Constitution” in specified litigation matters.

## Information Access in an Impeachment Investigation

However the House chooses to proceed, invocation of the impeachment power could [strengthen](#) the House’s investigative authorities in a way that may improve the chamber’s ability to obtain information, especially information the Trump Administration is withholding from various congressional committees. As a practical matter, the significance of a possible exercise of the impeachment power, along with a resulting increase in political and perhaps public pressure, may itself affect the Executive’s compliance decisions. During the Nixon impeachment, the Judiciary Committee noted that “not one” subject of nearly 70 prior impeachment investigations “challenged the power of the committee conducting the impeachment investigation to compel the production of evidence it deemed necessary.” President Andrew Johnson, for example, voluntarily provided the Judiciary Committee with sensitive information during that Committee’s impeachment investigation—including confidential communications with advisors and information related to the use of his pardon and veto power. Presidents Nixon and Clinton also pledged cooperation with House impeachment investigations. But an impeachment investigation is not a panacea for access. Both Nixon and [Clinton](#) were later viewed by the Judiciary Committee as withholding relevant evidence, when they either failed to comply with subpoenas or provided the House information believed to be false or misleading.

That said, an impeachment investigation does provide the House with a unique tool of leverage in information-access disputes with the Executive. For example, whereas the options available to a committee to seek enforcement of a demand made to the executive branch in a traditional investigation [can sometimes be limited](#), in an impeachment investigation, a committee might more easily recommend an article of impeachment for failure to comply with a committee subpoena. The Judiciary Committee did

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just that during both the Nixon and Clinton impeachment investigations, when both Presidents either refused to comply with Committee subpoenas or provided incomplete or “false and misleading” information.

## Impeachment Investigation in the Courts: Executive Privilege

It is also possible that an impeachment investigation may, relative to a traditional oversight investigation, provide the House with a stronger legal position in litigation to obtain information from the executive branch. For example, an impeachment investigation may improve the likelihood of a court authorizing committee access to grand jury materials. Investigating for purposes of impeachment may also relieve or satisfy any possible limitations imposed by the requirement that a committee act with a “legislative purpose.” But perhaps most significant, especially for purposes of the House’s current investigations, an impeachment investigation may improve the likelihood that a committee will be able to overcome executive privilege assertions made in response to congressional subpoenas.

Congress has long viewed itself as possessing broad authority to obtain information in furtherance of its impeachment power. Indeed, during the Nixon impeachment investigation the Judiciary Committee argued that an assertion of executive privilege “cannot be permitted to prevail over the fundamental need to obtain all the relevant facts in the impeachment process.” As stated by the Committee:

Whatever the limits of legislative power in other contexts—and whatever need may otherwise exist for preserving the confidentiality of Presidential conversations—in the context of an impeachment proceeding the balance was struck in favor of the power of inquiry when the impeachment provision was written into the Constitution.

But the Supreme Court has never addressed executive privilege’s application in either a traditional oversight investigation or an impeachment investigation. In fact, because courts have a limited role in adjudicating information-access disputes between the branches and arguably no role in adjudicating impeachment matters, the federal courts as a whole have said very little about executive privilege in traditional investigations and almost nothing about executive privilege in impeachment investigations.

It is clear, however, that executive privilege, even if found to cover subpoenaed information, does not present an absolute bar to congressional access. Instead, courts must balance the Executive’s interest in confidentiality against Congress’s need for (and, perhaps, the public interest in) disclosure of the information. Perhaps the most significant judicial insight into this balancing approach comes from the decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Senate Select Committee v. Nixon*. That case involved an effort by the Senate Watergate Committee to enforce a subpoena issued to President Nixon for recordings of specific conversations he had with presidential advisors in the Oval Office, thus squarely implicating aspects of executive privilege, but not in the context of an impeachment investigation.

The court ultimately sided with the President, at least partly because the President had publicly released transcripts of some of the tapes and the House Judiciary Committee had already obtained others. But in non-binding dicta, the court also seemed to suggest that its analysis might have been different if the subpoena had been part of the Judiciary Committee’s separate but “overlap[ing]” impeachment investigation of the President, as that investigation “has an express constitutional source.” The Supreme Court made a similar suggestion nearly a century earlier in *Kilbourn v. Thompson*, reasoning again in dicta that while the House in that case lacked a valid legislative purpose to compel testimony, if an investigatory purpose “had been avowed to impeach . . . , the whole aspect of the case would have been changed.”

While these general statements suggest that courts might treat impeachment investigations differently from traditional legislative investigations, they do not elaborate on how or why. Although not directly articulated by the courts, there appear to be a variety of reasons a court may balance an impeachment



investigation against an invocation of executive privilege in a manner that is more favorable to congressional access.

For one, it might be argued that the importance of the impeachment function's [constitutional role](#) in addressing misconduct by federal officials and preserving the separation of powers requires that impeachment investigations be afforded the utmost deference when weighed against executive branch confidentiality interests. And the courts have suggested that the frequency with which forced disclosures may occur in a particular context is an important factor in any executive privilege balancing. In short, the [courts](#) have stated that when a given context is likely to provide only "*infrequent occasions*" of forced disclosure, that fact "militate[s] against any substantial fear that the candor of Presidential advisers will be imperiled" or the privilege seriously undermined. This line of reasoning suggests that a court may be more willing to order disclosure to a committee engaged in a historically rare impeachment investigation than it would to a committee in a much more common legislative investigation. Finally, the need for specific factual evidence may be greater in an impeachment investigation than in a traditional investigation. Whereas information gathered by Congress in carrying out its traditional legislative functions, such as assessing whether legislation is required or whether an agency is carrying out its mission appropriately, may be somewhat general in scope, impeachment investigations may necessitate a more exacting factual record for more specific inquiries about the conduct of a particular official.

## Possible Steps Following an Impeachment Inquiry

An impeachment investigation is just one of many stages of the constitutional process of impeachment and removal—a process filled with numerous substantive and procedural hurdles. If an investigating committee finds that there are adequate grounds to believe that the President or another impeachable official has in fact committed an impeachable offense, specific articles of impeachment can be drafted for consideration first by the committee and, if reported out of the committee, by the House. Although only requiring majority support, proposed articles do not always receive approval, and are subject to amendment or rejection during committee deliberations and in any subsequent consideration by the House. For example, during the Clinton impeachment, the [Judiciary Committee](#) considered four separate articles of impeachment. When originally considered by the Committee, Article IV, entitled "abuse of power," charged the President with willfully misleading the public, "frivolously and corruptly" asserting executive privilege during the Independent Counsel investigation, and providing false and misleading statements to Congress. The Judiciary Committee amended that article to remove the charges relating to misleading the public and improperly asserting executive privilege. The paired down Article IV, though approved by the Committee, then moved to the House where it [ultimately failed](#).

## What Must the Senate Do in Response to an Impeachment by the House?

Another question that might arise in a potential impeachment concerns the Senate's role in the process. The Constitution bestows on the [House](#) the power to impeach government officers, but grants the [Senate](#) "the sole power to try all impeachments." But that text does not in explicit terms *require* the Senate to conduct a trial, nor does it define precisely what constitutes a trial in the first place.

Exactly what the Senate must do following an impeachment by the House is thus a subject of debate. Relying on past historical practice, one might argue that, at least in the case of a presidential impeachment, the Senate must conduct a trial and do so in a fashion similar to how it has done so in the past. To date there have been two presidential impeachments (of Presidents Andrew Johnson and Bill Clinton), and in [both](#) the Senate conducted a trial and ultimately voted to acquit the President. One might also argue that, at least in certain circumstances, failure to conduct a trial would be an abdication of the Senate's duty in the impeachment process. But just as the Constitution bestows the "sole power" of impeachment on the House, it similarly grants the "sole power" to conduct a trial with the Senate. The

House, of course, thus enjoys discretion over *whether* to impeach in the first place; likewise, one might argue that the Constitution also grants the Senate discretion over whether to conduct a trial.

But separate from any debate over whether the Senate is constitutionally required to conduct a trial of an official impeached by the House, the current Senate impeachment [rules](#) are phrased in mandatory and detailed terms. For example, once the Senate receives notice from the House that the managers have been appointed to argue the case for impeachment in the Senate, “the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment.” Once the articles are presented to the Senate, “the Senate shall at 1 o’clock afternoon of the day (Sunday excepted) following such presentation, or sooner if ordered by the Senate, proceed to the consideration of such articles and shall continue in session . . . after the trial shall commence (unless otherwise ordered by the Senate) until final judgment.” Perhaps for this reason, Senate Majority Leader Mitch McConnell recently stated that if the House impeached the President, the Senate would have “[no choice but to take it up](#)” under current Senate rules. On the other hand, the Senate may waive or alter these provisions.

A further complication in examining the Senate’s duty in response to an impeachment is the substantial discretion the Senate may have in determining what features an impeachment “trial” must include. Just as the Constitution does not require the House to exercise its impeachment powers in any particular manner, it similarly does not explicitly mandate that an impeachment trial encompass specific aspects beyond mandating that the Chief Justice preside at trials of the President, Senators take an oath or affirmation when sitting for the trial, and that a two-thirds vote is required to convict. In the [impeachment trial](#) of Andrew Johnson, for instance, in which the Senate voted to acquit on three articles, the Senate did not vote at all on various remaining articles. And in [dismissing](#) a challenge to how the Senate held a previous impeachment trial of a federal judge, the Supreme Court has found the Constitution’s grant of a “sole power” to conduct a trial “of considerable significance,” reasoning that its “commonsense meaning” suggests that “the Senate alone shall have authority to determine whether an individual should be acquitted or convicted” and do so “independently and without assistance or interference.” In the case in question, the [Court](#) ultimately dismissed the challenge as presenting a nonjusticiable political question. Consequently, at least as a practical matter, it appears that the Senate has considerable flexibility in choosing how to structure an impeachment trial.

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