

Legal Issues in Impeachment Investigations, Part I: Authorization

September 29, 2023

Speaker of the House Kevin McCarthy [announced](#) on September 12, 2023, that he was directing various House committees to “open a formal impeachment inquiry” into President Joe Biden. The Speaker’s statement did not address precisely how the House will proceed, but it [appears](#) that the inquiry will be “led” by the Committee on Oversight and Accountability “in coordination with” the Judiciary Committee and the Committee on Ways and Means. Although there is no clear definition of what constitutes an impeachment investigation, it may be characterized as an inquiry carried out to aid the House in determining whether sufficient grounds exist to charge an impeachable official (“[t]he President, Vice President and all civil Officers of the United States”) with an impeachable offense (“[t]reason, Bribery, or other high Crimes and Misdemeanors”). The first [hearing](#) in this impeachment inquiry was held on September 28, 2023.

The initiation of this inquiry marks an early step in a constitutional process that could lead to the nation’s third presidential impeachment in just the last four years. It also may bolster the committees’ authority to obtain information, as there is reason to believe that transitioning from a more traditional legislative investigation—undertaken with a legislative purpose and within a committee’s delegated jurisdiction—to an impeachment investigation [may improve a committee’s legal and constitutional claims to access certain types of evidence](#), including grand jury materials, privileged testimony and documents, and possibly other personal information that a committee may otherwise have difficulty obtaining.

This is the first in a two-part Sidebar series addressing a pair of interrelated issues prompted by the Speaker’s announcement. This Sidebar considers whether, as a legal matter, House committees can engage in an impeachment investigation without explicit approval from the House (i.e., without passage of a resolution expressly delegating the authority to conduct an impeachment investigation to a committee or committees). As an internal House matter, it appears that a committee may do so, but whether the executive branch and the courts agree with this view is likely to impact whether a committee can realize the potential information access benefits associated with the impeachment power. Part II of this Sidebar series will address the possible benefits of invoking the label of “impeachment inquiry,” including the extent to which transitioning to an impeachment investigation may improve the House’s ability to obtain relevant information, either voluntarily or through the courts.

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The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address



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Initiating a House Impeachment Investigation

The manner by which the House chooses to implement its “sole Power of Impeachment” is largely entrusted, through both [constitutional text and historical practice](#), to the House’s own discretion. In light of this discretion, the House’s view of its own authority—and, specifically, whether it views authorization as a necessary predicate to the initiation of an impeachment inquiry—would appear to carry great weight in interpreting the scope of that authority. The other branches’ interpretations, however, may also play a role in any dispute—presumably arising in the context of a subpoena for information—over whether a committee is properly investigating for purposes of impeachment. The executive branch’s interpretation will likely govern its compliance with a congressional demand for information: when faced with such a demand, the executive branch typically makes an initial determination of whether the demand is within the requesting committee’s authority. If the executive branch (or a private entity) refuses to comply, a court may be asked to resolve the disagreement, in which case the judicial interpretation might control. If, for example, the full House does not take further action to ratify the current impeachment inquiry and litigation over a committee’s authority to access certain information ensues, a judge may be faced with the threshold question of whether an investigating House committee may invoke the impeachment power without an explicit authorization from the House.

The House’s View

The House has not established a single, uniform [approach](#) to starting impeachment investigations, but the existing historical practice suggests that the chamber does not view an authorizing resolution as a necessary precondition to initiating an impeachment investigation.

Although the House has often passed resolutions to authorize impeachment investigations, it has also conducted impeachment investigations (and approved articles of impeachment recommended by the Judiciary Committee) without an explicit authorization. For example, the House explicitly [directed](#) the Judiciary Committee to “investigate fully and completely whether sufficient grounds exist for the House” to impeach President Bill Clinton, but in the 1980s, it provided no authorization for investigations into allegations of impeachable conduct against [three judges](#) who were ultimately impeached.

There are other examples in which the House passed a resolution of authorization after a committee had engaged in a “preliminary” impeachment investigation. The Judiciary Committee, for example, began the “preliminary phases of an inquiry into [the] possible impeachment” of President Richard Nixon months before receiving [authorization](#) from the House in 1974. The House took a similar approach in 2019, when, pursuant to an [announcement](#) from Speaker Nancy Pelosi, various committees conducted an “official impeachment inquiry” into allegations of misconduct by President Donald Trump approximately a month before the House adopted a [resolution](#) authorizing six 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” President Trump.

The House took yet another approach in the most recent presidential impeachment: the second impeachment of President Trump following the events of January 6, 2021. No formalized investigation preceded that impeachment, though the majority staff of the Judiciary Committee presented the House with a [report containing evidentiary](#) support for the impeachment. These brief historical examples appear to suggest that the House views a specific authorization as unnecessary for committees to initiate an impeachment investigation, though the House has eventually authorized most presidential impeachment investigations.

The somewhat inconsistent House practice on the use of authorizing resolutions may be due to any number of practical, procedural, political, or historical factors. For example, at least until the second half of the 20th century, an authorizing resolution from the House was often a practical necessity for an

effective impeachment investigation. This is because, in the era before standing committees existed, the House needed to create and authorize an investigating committee. Even after the establishment of standing committees, the House typically still needed to provide a committee with both investigative jurisdiction and compulsory investigative tools, such as the power to issue a subpoena to force the disclosure of information. Indeed, although the House often adopted resolutions providing individual committees with limited subpoena powers following the [Legislative Reorganization Act of 1946](#), it was not until 1975 that the House granted its committees permanent investigative and subpoena powers under House Rules. Thus, for a good portion of the House’s history, authorizing resolutions were generally needed to provide a committee the tools necessary to carry out an effective and expeditious investigation.

As the House standing committees’ investigative tools and authorities have grown over time, the practical need to delegate additional powers for impeachment investigations has diminished. House committees today have [significant existing investigative powers](#), including the authority to issue subpoenas for documents, testimony, and staff depositions, generally at the discretion of the committee chair. Committees can use these tools to investigate executive branch misconduct without relying on the impeachment power.

The Supreme Court has made clear that traditional legislative investigations—that is, investigations undertaken with a legislative purpose and within a committee’s delegated jurisdiction—[can include](#) “probes into departments of the Federal Government to expose corruption, inefficiency or waste.” These traditional investigations [may](#) “inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government” so long as the inquiry serves a “valid legislative purpose” and “concerns a subject on which legislation ‘could be had.’” Thus, the line between an impeachment investigation and a legislative investigation into official misconduct may be significantly blurred and, in some instances, may be unnecessary to draw given the substantial tools and authority available to committees to conduct legislative investigations into executive branch misconduct. The House Judiciary Committee’s [largely successful](#) attempts to obtain testimony from former White House Counsel Don McGahn following the release of Special Counsel Robert Mueller’s report highlighted this point: the Committee made clear that it was acting pursuant to a [combination](#) of legislative, oversight, and impeachment purposes.

Although committees wield substantial authority in legislative investigations, an impeachment authorizing resolution may provide still more investigative tools to an investigating committee. The resolutions authorizing the investigations into Presidents [Clinton](#) and [Trump](#), for example, granted committees the power to obtain information through interrogatories. Authorizing resolutions can also provide the subject of the investigation greater procedural protections; clarify that a committee is acting with the full support of the House and pursuant to its full panoply of constitutional powers; provide a means for the House to direct the scope of an impeachment inquiry; structure and consolidate an otherwise sprawling investigation; and consolidate ongoing inquiries under the auspices of a single committee.

The Executive Branch View

In contrast to the House’s view, the executive branch has argued that the House *must* vote to authorize and explicitly delegate the impeachment power to a committee before any committee can engage in an impeachment investigation. In 2019, after then-Speaker Pelosi announced an impeachment inquiry into President Trump without the adoption of an authorizing resolution (an approach reflected in Speaker McCarthy’s recent announcement), the White House Counsel took the [position](#) that the Speaker had no authority, absent approval from the full House, to launch such an investigation. A few months later, the Department of Justice Office of Legal Counsel issued an [opinion](#) reasoning that, because the Constitution grants the “sole Power of Impeachment” to the House, “the House itself must authorize an impeachment inquiry.” Although committees may freely investigate “matters within their legislative jurisdiction,” the opinion continued, “no committee may undertake the momentous move from legislative oversight to

impeachment without a delegation by the full house of such authority.” The Biden Administration has neither affirmed nor withdrawn the 2019 opinion and has not otherwise taken a position on the authorization question.

The executive branch’s position on House authorization is important not because it binds Congress or the courts but because it reflects how the executive branch will likely treat requests it receives from House committees investigating for purposes of impeachment. For example, after taking the position that an impeachment investigation is valid only when authorized by the House, White House Counsel Pat Cipollone in 2019 [asserted](#) that neither President Trump nor members of his Administration would cooperate in what the executive branch viewed as the House’s “unconstitutional inquiry.”

In this sense, whether a committee has received authorization from the House for an impeachment investigation may have a significant impact on the executive branch’s initial willingness to disclose information to that committee, thereby possibly impeding congressional access to information. However, if a dispute over the validity of an impeachment investigation were to make it into court, the executive branch’s position may not prevail, particularly given the judiciary’s [historical reluctance](#) to scrutinize the House’s implementation of its own internal powers.

The Judicial View

The judicial branch has generally been [reluctant](#) to interfere with how the House or Senate choose to exercise their impeachment powers. Whether a committee is engaged in an impeachment investigation arguably represents the unique convergence of various areas in which courts generally will not second-guess the position of the House and its committees, including (1) the House’s [implementation](#) of its “sole Power of Impeachment”; (2) the House’s exclusive authority to set and interpret its own [rules](#); and (3) a committee’s role in [articulating](#) the purpose of an investigation.

This judicial restraint was apparent in what is perhaps the only judicial decision to directly consider the role authorization plays in a House impeachment investigation. In the case *In re Application of the Committee on the Judiciary*—an opinion issued *after* Speaker Pelosi announced the initiation of an official impeachment inquiry into President Trump but *before* the House formally authorized that investigation—a federal district court considered whether the House Judiciary Committee could, as part of its impeachment inquiry, obtain grand jury materials associated with Special Counsel Robert Mueller’s investigation of President Trump. In holding that a committee investigating for purposes of impeachment was entitled to access under the [Federal Rules of Criminal Procedure](#), the court explicitly rejected the argument that the Judiciary Committee could not be engaged in an impeachment investigation because it had not received authorization from the House. “Even in cases of presidential impeachment,” the court [reasoned](#), “a House resolution has never, in fact, been required to begin an impeachment inquiry.” Imposing an authorization requirement on the House, the court [concluded](#), “would be an impermissible intrusion on the House’s constitutional authority both to” determine its own rules “and to exercise ‘the sole power of Impeachment’ under the Impeachment Clause.” In its opinion, the district court also referenced the fact that the House, though not at that point explicitly authorizing the impeachment inquiry, had delegated the Judiciary Committee “any and all necessary authority under Article I of the Constitution.” Whether the court would have come to the same conclusion absent this vague but broad delegation is not clear.

The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed the district court opinion, though the House had at that point passed its authorizing resolution. Still, the D.C. Circuit [reiterated](#) the general principle that “[t]he courts cannot tell the House how to conduct its impeachment investigation.”

The value of these decisions was significantly diminished, however, when the Supreme Court [vacated the opinions](#) after the case became moot while pending before the Court.

Conclusion

The three branches of government differ in their interpretations of the role authorization plays in an impeachment investigation. House practice suggests that committees may begin an impeachment investigation without a specific authorization, though in most presidential impeachment investigations, it has eventually provided some form of authorization. The executive branch, in contrast, has taken the position that explicit House authorization is necessary for any committee to engage in an impeachment investigation. The courts have not considered the question in any sustained manner, but the few decisions that have touched on the issue suggest a degree of deference to the House in determining how it chooses to implement its impeachment powers. As such, while the executive branch may disagree with the House view, if a conflict over authorization arises and the issue is litigated, a reviewing court may be reluctant to second-guess a House committee's own view that it is investigating for purposes of impeachment. The possible benefits of investigating under the mantle of impeachment, rather than or in conjunction with a committee's legislative powers, will be discussed in Part II of this series.

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