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Congressional Access to Information in an Impeachment Investigation

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SUMMARY

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Congressional Access to Information in an Impeachment Investigation

Committee investigations in the House of Representatives can serve several objectives. Most often, an investigation seeks to gather information either to review past legislation or develop future legislation, or to enable a committee to conduct oversight of another branch of government. These inquiries may be called *legislative* investigations because their legal authority derives implicitly from the House's general legislative power. Much more rarely, a House committee may carry out an investigation to determine whether there are grounds to impeach a federal official—a form of inquiry known as an *impeachment* investigation.

While the labels "legislative investigation" and "impeachment investigation" provide some context to the objective or purpose of a House inquiry, an investigation may not always fall neatly into one of these categories. This ambiguity has been a topic of interest to many during the various ongoing House committee investigations concerning President Trump. On September 24, 2019, Speaker Pelosi announced that these investigations constitute an "official impeachment inquiry." Although these committee investigations into allegations of presidential misconduct are proceeding, in the Speaker's words, under the "umbrella of [an] impeachment inquiry," most appear to blend lawmaking, oversight, and impeachment purposes.

However an investigation is labeled, because the Constitution provides the House with the "sole Power of Impeachment," implementation of the impeachment power, including any ancillary investigative powers, would appear textually committed to the discretion of the House. Yet the House has not established a single, uniform approach to starting impeachment investigations. The process has instead evolved, generally tracking changes the House has made to its committee structure and the investigative authorities conferred to its committees. Although impeachment investigations have often been authorized by a House resolution, they have also been conducted without an explicit authorization. There are still other examples where the House provided express authorization only after a committee had engaged in a "preliminary" impeachment investigation.

An impeachment investigation may be more likely—relative to a traditional legislative investigation—to obtain certain categories of information, especially from the executive branch. For example, it is possible that the significance of an exercise of the impeachment power, in conjunction with a resulting increase in political and public pressure, may itself affect the Executive's compliance decisions. But an impeachment investigation may also have legal impacts. If, in the face of a dispute with the executive branch over access to information, the House chose to seek judicial enforcement of an investigative demand, there appear to be at least three potential ways in which the impeachment power could, relative to a legislative investigation, provide the House with a stronger legal position. An impeachment investigation may (1) improve the likelihood of a court authorizing committee access to grand jury materials; (2) relieve any possible limitations imposed by the requirement that a committee act with a "legislative purpose"; and (3) improve the likelihood that a committee will be able to overcome privilege assertions such as executive privilege. In the past, executive noncompliance with an impeachment investigation has also prompted the investigating committee to recommend to the House an article of impeachment for contempt of Congress.

That said, a congressional committee engaged in a legislative investigation could arguably obtain much of the same information as it would during an impeachment inquiry, as both legislative and impeachment investigations constitute an exercise of significant constitutional authority. As a result, while an impeachment investigation may very well increase the House's access to information, House committees may have substantial authority to obtain the information they seek even without reliance on the impeachment power.

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Introduction

Committee investigations in the House of Representatives can serve several objectives. Most often, an investigation seeks to gather information either to review past legislation or develop future legislation, or to enable a committee to conduct oversight of another branch of government.[1] These inquiries may be called *legislative* investigations because their legal authority derives implicitly from the House's general legislative power.[2] Much more rarely, House committee investigations have been carried out to determine whether there are grounds to impeach a federal official—a form of inquiry known as an *impeachment* investigation.[3] An impeachment investigation has typically been one of the House's first steps in the exercise of its constitutional impeachment power, and may conclude with the investigating committee recommending articles of impeachment to the full House.[4]

While the labels "legislative investigation" and "impeachment investigation" provide some context to the objective or purpose of a House inquiry, investigations may not always fall neatly into one of these categories. To the contrary, distinguishing between legislative and impeachment investigations might sometimes be difficult, especially when an investigation focuses on alleged misconduct by an official subject to impeachment by the House.[5] This ambiguity is reflected in the various ongoing House committee investigations concerning President Trump. On September 24, 2019, Speaker Pelosi announced that these investigations constitute an "official impeachment inquiry."[6] While these committee investigations into allegations of presidential misconduct are

[1] For a discussion of purposes that commonly underlie congressional investigations, see CRS Report RL30240, *Congressional Oversight Manual*, by L. Elaine Halchin et al., at 1-4.

[2] McGrain v. Daugherty, 273 U.S. 135, 161 (1927) (recognizing that the power to investigate "has long been treated as an attribute of the power to legislate"); Watkins v. United States, 354 U.S. 178, 187 (1957) (declaring that the investigatory power "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste").

[3] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168, 190 (1881) (acknowledging investigative powers "[w]here the question of [] impeachment is before either body acting in its appropriate sphere on that subject"); Trump v. Mazars USA, LLP, No. 19-5142, 2019 US App Lexis 30475, at *29 (D.C. Cir. Oct. 11, 2019) (describing a legislative investigation as a "non-impeachment" investigation); H.R. REP. NO. 105-795, at 3 (1998) (describing an investigation "intended to be fully co-extensive with the power of the House in an impeachment investigation") [hereinafter *Clinton Impeachment Investigation Report*]. There does not appear to be a legal distinction between an impeachment investigation and an impeachment inquiry, and this report uses the terms interchangeably.

[4] JEFFERSON'S MANUAL § 606 ("The House has always examined the charges by its own committee before it has voted to impeach."). For a discussion of the impeachment process in the House see CRS Report R45769, *The Impeachment Process in the House of Representatives*, by Elizabeth Rybicki and Michael Greene. The House has generally looked to the Judiciary Committee to conduct this "inquest," or information-gathering stage of the impeachment process. CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PRACTICE OF THE HOUSE, ch. 27 § 6, at 615 (2017) [hereinafter HOUSE PRACTICE] ("All impeachments to reach the Senate since 1900 have been based on resolutions reported by the Committee on the Judiciary."). A resolution now before the House Committee on Rules would direct the Judiciary Committee to investigate "whether the House of Representatives should impeach Donald John Trump, President of the United States of America." H.Res. 257, 116th Cong. (2019).

[5] U.S. CONST. art II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[6] *See* Press Release, Nancy Pelosi, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019) https://www.speaker.gov/newsroom/92419-0.

proceeding, in the words of the Speaker, under the "umbrella of [an] impeachment inquiry," most appear to blend legislation, oversight, and impeachment purposes.[7]

However labeled,[8] many of the House investigations have been hindered by refusals to comply with committee subpoenas for documents or testimony.[9] Various legal explanations have been provided for these refusals, including that federal law prohibits the disclosure of grand jury materials to Congress, that the relevant committee subpoenas lack a required legislative purpose, and that the information sought is protected by executive privilege.[10]

[7] Following recent whistleblower allegations relating to President Trump's communications with the Ukrainian President, Speaker Pelosi announced that the House is "moving forward with an official impeachment inquiry." *Id*. Although the Speaker did not address precisely how the House will proceed, she did state that six House committees are currently investigating the President "under that umbrella of impeachment inquiry." *Id*. *See also* Complaint at 30, Comm. on the Judiciary v. McGahn, (D.D.C. 2019) (No 1:19-cv-2379) (noting that the Judiciary Committee is "conducting oversight and hearings, including assessing whether to exercise its Article I power to recommend articles of impeachment against the President, including those articles already referred to the Judiciary Committee, and considering significant remedial legislation and amendments to existing laws"). In addition to the Judiciary Committee, other House committees have also asserted that they are exercising investigative powers "pursuant to the … impeachment inquiry." *See* Press Release, Committee on Foreign Affairs, U.S. House of Representatives, Secretary Perry Subpoenaed in House Impeachment Inquiry, (Oct. 10, 2019), https://foreignaffairs.house.gov/2019/10/secretary-perry-subpoenaed-in-house-impeachment-inquiry. For a partial list of ongoing investigations into President Trump by House committees, see Alex Moe, *House Investigations of Trump and His Administration: The Full List*, NBC News, May 27, 2019.

[8] There is some dispute over the proper characterization of the House investigations, with much of the dispute focusing on the role of the Judiciary Committee. *See* Rep. Doug Collins, *Democrats' Impeachment Bumblings are Damaging Congress' Strongest Check on the President*, L.A. TIMES, Aug. 11, 2019 (asserting that the Judiciary Committee is not in an impeachment investigation because "House precedent requires the full House approve a resolution authorizing the Judiciary Committee to begin an impeachment inquiry"). Chairman Jerrold Nadler has stated that the Judiciary Committee is in "formal impeachment proceedings." *See, e.g.*, Rachel Frazin, *Nadler: "This is formal impeachment proceedings*," THE HILL, Aug. 8, 2019. A Judiciary Committee resolution adopted consistent with the Chairman's statement establishes "procedures" for the "presentation of information in connection with the Committee's investigation to determine whether to recommend articles of impeachment with respect to President Donald J. Trump." Resolution for Investigative Procedures Offered by Chairman Jerrold Nadler, H. Comm. on the Judiciary, 116th Cong. 4 (Sept. 12, 2019). On June 11, 2019, the House, though not explicitly addressing impeachment, adopted a resolution providing that "in connection with any judicial proceeding … the chair of any standing or permanent select committee exercising authority thereunder has any and all necessary authority under Article I of the Constitution." H.Res. 430, 116th Cong. (2019). The accompanying Rules Committee report cites the Judiciary Committee's investigation into whether to recommend articles of impeachment to the House as an "example of a Committee being able to use 'all necessary authority under Article I of the Constitution.'" H.R. Rep. No. 116-108, at 21 (2019). The Judiciary Committee and the House General Counsel's office have also asserted in litigation that the Committee is engaged in an "investigation regarding impeachment" in order "to determine whether to recommend articles of impeachment." Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, (D.D.C. July 26, 2019) 30-31. Similar disputes may arise in the other committees engaged in the ongoing House investigation. *See, e.g*., Letter from Jim Jordan, Ranking Member, Committee on Oversight and Reform, et al, to Adam Schiff, Chairman, House Permanent Select Committee on Intelligence (Oct. 23, 2019) (referring to the House's "so-called impeachment inquiry"). Resolutions have been introduced in both the House and the Senate objecting to the initiation of an impeachment inquiry without a vote of the House. *See, e.g.*, H.Res. 603, 116th Cong. (2019); S.Res. 378, 116th Cong. (2019).

[9] *See* Matthew Callahan, et al, *Where the Trump Administration is Thwarting House Oversight*, WASH. POST, Oct. 13, 2019; Morgan Chalfant and Cristina Marcos, *Pompeo Rejects Dem Demands for Officials' Testimony*, THE HILL, Oct. 1, 2019.

[10] *See, e.g.*, CRS Legal Sidebar LSB10271, *The Special Counsel's Report: Can Congress Get It?*, by Michael A. Foster and Todd Garvey; CRS Legal Sidebar LSB10301, *Legislative Purpose and Adviser Immunity in Congressional Investigations*, by Todd Garvey.

These interbranch disputes over information access have raised interest in whether invocation of the impeachment power will improve the House's ability to acquire withheld information.[11] This report addresses that question, with a focus on presidential impeachment investigations. Specifically, the report considers whether the impeachment power may strengthen the House's investigative authorities in a manner that would improve the chamber's ability to obtain information, especially through the courts. Compared to a typical legislative investigation, an impeachment investigation may be more likely to acquire certain categories of information, including grand jury materials, documents and testimony related to either the President's exercise of his exclusive constitutional powers or his conduct occurring prior to taking office, and communications covered by executive privilege.[12] But Congress's right of access to relevant information in a more typical legislative investigation is also substantial.[13] Thus, partly because the line between legislative and impeachment investigations is sometimes blurred, but primarily because both impeachment and legislative investigations constitute an exercise of significant constitutional power, House committees may have adequate authority and tools to obtain much of the information they seek regardless of whether they are engaged in a legislative investigation or one relying on the impeachment power.

What Is an Impeachment Investigation?

The Constitution provides the House with the "sole Power of Impeachment," but neither that document, federal statutes, nor House Rules define impeachment investigations.[14] Nor have the courts asserted "any role" in addressing the impeachment power generally or impeachment investigations specifically.[15] In fact, the Rules of Proceeding[16] and Speech or Debate Clauses of

[11] *See e.g.*, Madeleine Carlisle and Mahita Gajanan, *225 Members of the House of Representatives Support an Impeachment Inquiry Into President Donald Trump*, TIME, Oct. 3, 2019 (reporting that "[a]t least 225 of the 435 members of the House of Representatives have said they support an impeachment inquiry of President Donald Trump"); Ella Nilsen, *The Number of Democrats Who Want an Impeachment Inquiry is Growing. Pelosi Isn't Among Them*, VOX, May 21, 2019 (noting that some believe an impeachment investigation "would help Congress gather more facts, using the law around impeachment to compel Trump to comply with subpoena requests"). For further analysis of how an impeachment investigation might augment the investigatory powers of Congress, see, *e.g.*, Michael Stern, *How Impeachment Proceedings Would Strengthen Congress's Investigatory Powers*, JUST SECURITY, May 28, 2019; Molly E. Reynolds and Margaret Taylor, *What Powers Does a Formal Impeachment Inquiry Give the House?*, LAWFARE, May 21, 2019; Charlie Savage and Nicholas Fandos, *How Impeachment Works and What You Need to Know About It*, N.Y. TIMES, May 30, 2019.

[12] *See* "Potential Investigative Advantages of an Impeachment Investigation" *infra*.

[13] *See* Watkins v. United States, 354 U.S. 178, 187 (1957) (stating that the "power of the Congress to conduct investigations … is broad."); Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938) ("A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress.") (citing *McGrain*, 273 U.S. 135).

[14] U.S. CONST. art I., § 2, cl. 5. Although the House has always engaged in some form of investigation prior to approving articles of impeachment, *see supra* note 4, it does not appear that the Constitution's impeachment provisions either require such an investigation or establish specific procedural requirements for how that investigation is to be conducted. Other constitutional and legal principles, however, may impose certain limitations or requirements on such investigations. *See infra* notes 117-19.

[15] *See* Nixon v. United States, 506 U.S. 224, 234 (1993) (noting that "the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments"); *Mazars*, 2019 U.S. App. Lexis 30475, at *72 ("Throughout history, the Constitution has left to Congress the judgment whether to commence the impeachment process.").

[16] U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings …"); United States v. Smith, 286 U.S. 6, 33 (1932) ("[T]he Court must give great weight to [the House's or Senate's] … construction of its own rules"); United States v. Ballin, 144 U.S. 1, 5 (1892) (declaring that the House's rulemaking authority "is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the (continued...)

the Constitution,[17] along with political question doctrine,[18] all generally prevent the courts from "questioning Congress about actions taken in the impeachment process."[19] The manner by which the House chooses to implement its impeachment powers appears therefore to be textually and historically committed to the discretion of the House.[20]

The House, however, has adopted no explicit definition of what constitutes an impeachment investigation. Left with gleaning a definition from the various constitutional provisions governing impeachment and the House's historical practice—which includes 19 impeachments (15 of which were federal judges) arising from over 90 past impeachment investigations[21]—an impeachment investigation may be defined as an investigation carried out to aid the House in its "constitutional responsibility" of determining whether "sufficient grounds" exist to charge an impeachable official ("[t]he President, Vice President and all civil Officers of the United States"[22]) with an impeachable offense ("[t]reason, Bribery, or other high Crimes and Misdemeanors"[23]).[24]

Nor has the House established a single, uniform approach to starting impeachment investigations.[25] Instead, the process has evolved, generally along with changes to the House's committee structure and the investigative authorities with which those committees have been

(...continued)

challenge of any other body or tribunal").

[17] U.S. CONST. art. I, § 6, cl. 1.

[18] *See Nixon*, 506 U.S. at 238 (dismissing a challenge to the Senate's impeachment role as a political question). *Id.* at 231 (stating that "[i]f the courts may review the actions of the Senate" in its impeachment role, "it is difficult to see how the Senate would be 'functioning … independently and without assistance or interference.'"). At least for purposes of limiting judicial review of the Senate's "sole Power" to try impeachments, the Supreme Court has stated that the "word 'sole' is of considerable significance." *Id. at* 230. Judicial interpretations of the phrase "sole Power" in the Senate trial provision would appear to inform interpretations of the House impeachment provision that uses the same phrase.

[19] In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1446 (11th Cir. 1987).

[20] United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."); *McGrain*, 273 U.S. at 174 ("[W]hen [Congress's] practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful."); *Watkins*, 354 U.S. at 205 ("It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected."); In re *Grand Jury*, 669 F. Supp. at 1078 ("The doctrine of the separation of powers … denies a court the power to dictate how the impeachment proceedings shall be conducted."); H.R. REP. NO. 93-1305, at 211 (1974) ("The impeachment power is explicitly vested in the House of Representatives by the Constitution; its use necessarily involves the exercise of discretion by the House.") [hereinafter *Nixon Impeachment Report*]; II HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §1596 (1907) (noting that in exercising its impeachment power "the House might proceed in any way it might consider proper, either according to the precedent … or according to other forms").

[21] *See* H. DOC. NO. 109-153, 109th Cong. (2007) at 115 (noting that as of 2007 "[t]here have been approximately 94 identifiable impeachment-related inquiries conducted by Congress").

[22] U.S. CONST. art II, § 4.

[23] *Id.*

[24] *Clinton Impeachment Investigation Report, supra* note 3, at 3.

[25] HOUSE PRACTICE ch. 27 § 6 (noting that "various events have been credited with setting an impeachment in motion"). For a thorough historical review of the initiation of impeachment inquiries in the House, see CRS Congressional Distribution Memorandum, *Description of the Initiation of Impeachment Inquiries in the House of Representatives, 1813-2009*, by Elizabeth Rybicki, Michael Greene, and Jennifer E. Manning (Oct. 10, 2019).

vested.[26] Although impeachment investigations have often been authorized by a resolution of the House,[27] there have also been impeachment investigations conducted (and articles of impeachment recommended by the Judiciary Committee and approved by the House) without an explicit authorization.[28] For example, the House explicitly directed the Judiciary Committee to "investigate fully and completely whether sufficient grounds exist for the House" to impeach President Clinton,[29] but in the1980s provided no authorization for investigations into allegations of impeachable conduct against Judges Walter Nixon, Alcee Hastings, and Harry E. Claiborne, who were ultimately impeached by the House.[30] There are still other examples in which a resolution of authorization was provided only after a committee had engaged in a "preliminary" impeachment investigation.[31] For example, although the House eventually authorized the impeachment investigation of President Nixon, the Judiciary Committee began the "preliminary phases of an inquiry into possible impeachment" months earlier.[32]

The somewhat inconsistent House practice on the use of authorizing resolutions may be due to any number of practical, procedural, or political 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 period before standing committees existed an investigating committee needed to be created and authorized. Even after standing committees were established, the House typically still needed to provide the committee with both investigative jurisdiction and compulsory investigative tools such as the power to issue

[26] Rybicki and Greene, *supra* note 4, at 4.

[27] HOUSE PRACTICE ch. 27 § 6 ("[A]n impeachment is normally instituted by the House by the adopting of a resolution calling for a committee investigation of charges against the officer in question."). These authorizations have been provided on an ad hoc, individualized, and time-limited basis.

[28] *See* Rybicki and Greene, *supra* note 4, at 4; Rybicki et al., *supra* note 25, at 2.

[29] After a referral from Independent Counsel Ken Starr relating to President Clinton, the House first authorized the House Judiciary Committee to review the referral "to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced." H.Res. 525, 105th Cong. (1998). Three days later the House approved H.Res. 581, explicitly authorizing the Committee to "investigate fully and completely whether sufficient grounds exist for the House" to impeach President Clinton and to "report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper." H.Res. 581, 105th Cong. (1998).

[30] *See* Rybicki and Greene, *supra* note 4, at 4. *See Lessons from the Mueller Report, Part III: "Constitutional Processes for Addressing Presidential Misconduct:" Hearing before the H. Comm. On the Judiciary*, 116th Cong. (2019) (statement of Michael J. Gerhardt) (describing instances in which House committees have engaged in impeachment inquiries without House authorization and asserting that "[t]here has been no tradition, rising to the level of a constitutional command, that requires impeachment resolutions to be approved by the House to authorize this Committee to initiate an impeachment inquiry—or to proceed in any particular way").

[31] Rybicki and Green, *supra* note 4, at 4. As part of an investigation into President Jackson and possible corruption in the executive branch, a select committee viewed its investigation as "a preliminary measure to ascertain whether there was sufficient grounds to justify a process of impeachment." Cong. Debates, 24th Cong., 2d Sess., vol. 13, part 2, at 189; LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 56 (2004).

[32] It was not until the second session of the 93rd Congress and the adoption of H.Res. 803 on February 6, 1974, that the House directed and explicitly authorized the Judiciary Committee to engage in an impeachment investigation of President Nixon. Yet the Judiciary Committee clearly viewed itself as engaged in an impeachment investigation well before approval of H.Res. 803. During consideration of a resolution to authorize funds for the Committee's investigative activities on November 15, 1973, the Committee's Chairman stated that "[t]he Judiciary Committee has already moved forward in assuming the awesome responsibility of investigating charges that the President of the United States should be impeached." 119 CONG. REC. H 37145 (Nov. 15, 1973) (statement of Mr. Rodino). In addition, the Committee's 1974 Activities Report stated that because the committee had before it numerous resolutions calling for the impeachment of the President, "the Committee began during the final months of the [first] session the preliminary phases of an inquiry into possible impeachment." H. COMM. ON THE JUDICIARY, 93RD CONG., SUMMARY OF ACTIVITIES OF THE COMMITTEE ON THE JUDICIARY: NINETY-THIRD CONGRESS, FIRST SESSION 2 (Comm. print 1974).

a subpoena to force the disclosure of information.[33] 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 standing investigative and subpoena powers under House Rules.[34] Even after 1975, there was still practical value in authorizing resolutions, which typically provided the investigating committee with additional investigative tools beyond what the committee may have otherwise possessed, such as the ability to conduct staff depositions or issue written interrogatories.[35] Thus, for a good portion of the House's history, authorizing resolutions were generally needed to give a committee the tools necessary to carry out an effective and expeditious investigation.[36] Use of an authorizing resolution has also provided the House with the opportunity to assert control over the scope, direction, and conduct of a committee's impeachment investigation.[37]

The House, Its Committees, and the Delegation of Investigative Powers

Along with the practical explanations discussed above, it is also possible that the different approaches to initiating impeachment investigations reflect different conceptions of the House's impeachment power and the derivative authority that may be conferred to its committees to carry out investigations ancillary to that power.

The nature of this power is perhaps best explored in relation to the House's well-established authority to conduct legislative investigations. These investigations are carried out under the House's implied constitutional authority to investigate in "aid of the legislative function."[38] While there are various "legislative functions" that an investigation may fulfill, the prototypical legislative investigation of the executive branch is carried out so that Congress can either inform itself for purposes of lawmaking or conduct oversight of those charged with the "faithful" execution of the law.[39] This familiar exercise of investigative power, though not explicitly

[33] *See* Rybicki and Green, *supra* note 4, at 4 ("The Rules of the House since 1975 have granted committees the power to subpoena witnesses and materials, administer oaths, and meet at any time within the United States—powers that were previously granted through resolutions providing blanket investigatory authorities that were agreed to at the start of a Congress or through authorizing resolutions for each impeachment investigation.").

[34] *Jefferson's Manual*, H. DOC. NO. 93-416 (1975) at 435-36.

[35] *See* H.Res. 581, 105th Cong. (1998) (providing the House Judiciary Committee with investigative tools including depositions and interrogatories).

[36] *See* Complaint at 9, Comm. on the Judiciary v. McGahn, (D.D.C. 2019) (No 1:19-cv-2379) (describing authorizations as a mechanism by which the House may "choose to direct a particular manner for investigating grounds for impeachment").

[37] For example, at the time of the Clinton impeachment investigation, the Judiciary Committee had standing authority under House Rules to conduct legislative investigations within its delegated jurisdiction. Nevertheless, unlike the Nixon impeachment inquiry, the House chose to assert immediate control over the Committee's actions once the impeachment process was triggered by a referral from Independent Counsel Ken Starr. *See supra* note 29.

[38] *See* McGrain, 273 U.S. at 175.

[39] U.S. CONST. art. II, § 3. In addition to informing itself, the Supreme Court has suggested that Congress can generally seek "to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Watkins*, 354 U.S. at 200 n.33 (noting that "[t]he public is, of course, entitled to be informed concerning the workings of its government" and that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature.") *But see* Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) (declaring that for purposes of the Speech or Debate Clause "informing those outside the legislative forum" is not "part of the legislative function or the deliberations that make up the legislative process").

enumerated in the Constitution, is so essential to the functioning of a legislature as to be implicit in the "legislative powers" vested in Congress by Article I, §1 of the Constitution.[40] These investigations play a vital role in the constitutional system, as they are intimately and directly tied to Congress's power to legislate.[41] Because "a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," impairment of Congress's authority to gather information leads to the impairment of Congress's core function of legislating.[42]

The necessity and importance of legislative investigations are also reflected in the statutory requirement that all committees "exercise continuous watchfulness"[43] over the executive branch's implementation of law and the directive under House Rule X that standing committees "review and study on a continuing basis" the administration of law, the operation of agencies, and "any conditions or circumstances that may indicate the necessity or desirability of" new legislation.[44] House Rules further provide that committees have "general oversight responsibilities" that are generally to be used "to assist the House in its" legislative tasks.[45]

To carry out these requirements, the House has extensively delegated investigative powers and tools to its committees to aid the chamber in its traditional legislative functions. Under House Rules, a standing House committee may conduct "such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities"; hold hearings; take staff depositions; and "require, by subpoena … the attendance and testimony of such witnesses and the production of such … records … as it considers necessary."[46] But by the terms of the delegation, and because committees are creatures of their parent chamber,[47] use of the provided compulsory investigative tools extends only to "subjects within the jurisdiction of a committee" and "for the purposes of carrying" out any of its enumerated "functions and duties."[48]

The precise constitutional source (or sources) for impeachment investigations, and the subsequent delegation of investigatory impeachment authority to House committees, is less clear. It would appear that the legal basis for these investigations could be viewed in various ways—with each interpretation leading to slightly different roles for both the House and any investigating committee. First, impeachment investigations could be seen as another form of the traditional legislative investigation. Rather than assisting the House for the purpose of lawmaking or oversight, the investigation is made to "aid" the House in a different "legislative function"[49]—

[40] *McGrain*, 273 U.S. at 174 ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[41] *Id.*

[42] *Id.* at 175; Quinn v. United States, 349 U.S. 155 (1955) ("Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.") (citations omitted).

[43] Legislative Reorganization Act of 1946, 60 Stat. at 830-31.

[44] House Rule X(2)(b).

[45] House Rule X(2).

[46] House Rule XI(1)(b); House Rule XI(2)(m); H.Res. 6, 116th Cong. § 103 (2019).

[47] Exxon Corp. v. Fed. Trade Com., 589 F.2d 582, 592 (D.C. Cir. 1978) ("To issue a valid subpoena, however, a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers …").

[48] House Rule X(2)(b); House Rule XI(2)(m)(1). *Watkins*, 354 U.S. at 206 ("Plainly these committees are restricted to the missions delegated to them…. No witness can be compelled to make disclosures on matters outside that area."). The Supreme Court referred to this principle as "a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority." *Id*. *See also*, *Mazars*, 2019 U.S. App. Lexis 30475, at *81-85.

[49] *See McGrain*, 273 U.S. at 175 (discussing Congress's implied constitutional authority to investigate "in aid of the legislative function").

impeachment.[50] Under this conception, the House holds one broad-based power of inquiry, and if any distinction between legislative and impeachment investigations exists, it is not one of constitutional source of authority, but one based on purpose.[51]

If impeachment investigations are an extension of the House's traditional power of inquiry, and therefore derive from the same source as legislative investigations, it would appear that a committee would be free to use its existing investigative authorities, within the jurisdiction delegated to the committee, to assist the House in carrying out the function of impeachment. Under this view, no additional authorization or delegation from the House would be necessary to conduct an impeachment investigation (though it may be desirable if the House wished to either guide the investigation in a specific direction or provide a committee with additional authorities).[52]

But it could also be argued that impeachment investigations derive their authority not from the general legislative power, but directly and independently from the House's "sole Power of Impeachment" in Article I, § 2 of the Constitution.[53] The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), for example, has suggested in dicta that the Impeachment Clause is the "express constitutional source" for the "investigative authority" of an "inquiry into presidential impeachment."[54] Although investigations are not explicitly mentioned in Article I, § 2, or any of the other impeachment-related clauses,[55] the power to impeach must by necessity include the power to investigate allegations of impeachable conduct.[56] Under this conception, the

[50] *Watkins*, 354 U.S. at 187 (holding that the investigative power "must be related to, and in furtherance of, a legitimate task of the Congress").

[51] *See* H.R. REP. NO. 27-271, at 13 (1843) (stating that "the right of the House to information in possession of the Executive, if it exists at all, is an original right, and not acquired by asserting that it is about to resolve itself into a court of impeachment" and is "not an incident of some particular duty"). Even then, the House has asserted that it need not announce that purpose, as it "cannot be that any great constitutional right is acquired or lost by the mere from of words in which it is asserted." *Id*. at 12-13 (noting that "the purpose for which [documents] are demanded need not be stated"). The Supreme Court has held that a committee is not required to "declare in advance" the purpose of an inquiry or its ultimate goal. In re Chapman, 166 U.S. 661, 670 (1897). *See also*, *Eastland*, 421 U.S. at 509 ("The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.").

[52] The House appears to have adopted some variation of this position in litigation seeking access to grand jury materials. Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, (D.D.C. July 26, 2019) at 32 (concluding that a resolution from the House "is not a necessary predicate to consideration of articles of impeachment. Article I of the Constitution states no such requirement. Where, as here, a Member has introduced articles of impeachment and those articles have been referred to the Committee, the Committee is fully empowered to conduct an investigation and exercise any other of its standing authorities").

[53] *See e.g.*, *Nixon Impeachment Report*, *supra* note 20, at 206 ("Throughout our history this power of inquiry has been recognized as essential to the impeachment power."); In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1440 (11th Cir. 1987) (stating that the House "holds investigative powers that are ancillary to its impeachment power"); In re Grand Jury No. 81-1 Miami, 669 F.Supp. 1072, 1075 (S.D. Fla. 1987) (stating that "the power to impeach includes the power to obtain evidence").

[54] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974).

[55] U.S. CONST. art. I, § 2; *id*. art. II, § 4 (making the "President, Vice President and all civil Officers of the United States" subject to impeachment and removal for "Treason, Bribery, or other high Crimes and Misdemeanors"); U.S. CONST. art. I, § 3 (describing the Senate role in impeachment).

[56] *Nixon Impeachment Report*, *supra* note 20, at 206; H.R. REP. NO. 27-271, at 4-6 ("If the House possesses the power to impeach, it must likewise possess all the incidents of that power-the power to compel attendance of all witnesses and the production of all such papers as may be considered necessary to prove the charges on which the impeachment is founded."); 5 ANNALS OF CONGRESS 601 (1796) (statement of Rep. William Lyman) (stating that the power of impeachment "certainly implied a right to inspect every paper and transaction in any department, otherwise the power (continued...)

authority to investigate for impeachment is either implicit in the impeachment power itself, or "necessary and proper to carrying into execution" that power,[57] but in either case is a power that is constitutionally independent of Congress's general power to conduct legislative investigations.

If impeachment investigations derive their authority not from the general legislative power, but independently from the House's exclusive impeachment power, it has been argued that some form of additional authorization or delegation may then generally be necessary to transfer that power from the House to its committees since current House Rules are "silent on the issue of impeachment."[58] Committees are "representatives of the parent assembly" and have only the power to inquire into matters that are within the scope of the authority delegated to them by the House.[59] It is that delegation, whether in the form of a free-standing resolution or under House Rules, that is "the controlling charter of the committee's powers."[60] Thus, under the independent power conception, it could be argued that if a committee is going to exercise impeachment powers provided "sole[ly]" to the House, including the "investigative powers that are ancillary"[61] to impeachment, it needs to do so with some adequate authorization or delegation from the House—a delegation that the current House Rules have not explicitly made.[62] The argument does

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of impeachment could never be exercised with any effect").

[57] U.S. CONST. art. I, § 8 cl. 3; In re Grand Jury, 669 F. Supp. at 1074-75 ("The Constitution specifies that the 'House of Representatives shall … have the sole Power of Impeachment' and that the 'Senate shall have the sole Power to try all Impeachments.' The Necessary and Proper Clause gives Congress the right to employ the means necessary to implement these powers.") (citations omitted).

[58] Brief for Ranking Member Doug Collins as Amici Curiae in Support of Denial, In re Application of the Comm. on Judiciary (No. 1: 19-GJ-00048-BAH) at 8. Ranking Member Collins appears to have adopted some variation of this interpretation in an amicus brief filed in connection to the Judiciary Committee's attempts to obtain grand jury materials. *Id*. at 2 ("The House has not delegated to any of the standing committees its 'sole Power of Impeachment.'"), as has the Department of Justice. *See* Dep't of Justice Response, In re Application of the Comm. on Judiciary (No. 1: 19-GJ-00048-BAH) at 29. House Rules make no explicit reference to the powers of impeachment or to impeachment investigations. However, impeachment must implicitly be within the Judiciary Committee's legislative jurisdiction, as impeachment resolutions are referred to the Committee. *See* 165 Cong. Rec. H211 (daily ed. Jan. 3, 2019); Complaint at 9, Comm. on the Judiciary v. McGahn, (D.D.C. 2019) (No 1:19-cv-2379) ("The Judiciary Committee's jurisdiction includes impeachment."). There may, however, be a distinction to be made between legislative jurisdiction to consider a bill and investigative jurisdiction to conduct an inquiry. *See infra* note 68.

[59] *See Watkins*, 354 U.S. at 200 ("The 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.... Plainly these committees are restricted to the missions delegated to them.").

[60] *Rumely*, 345 U.S. at 43-4 (holding that a court must determine "whether the committee was authorized to exact the information which the witness withheld" and "construe[] the scope of the authority which the House of Representatives gave to the Select Committee").

[61] In re *Request for Access to Grand Jury Materials*, 833 F.2d at 1445.

[62] During consideration of the resolution to authorize the Clinton impeachment investigation, the Judiciary Committee's report stated that "[b]ecause the issue of impeachment is of such overwhelming importance, the committee decided that it *must* receive authorization from the full House before proceeding on any further course of action." *Clinton Impeachment Investigation Report*, *supra* note 3, at 24 (emphasis added). The report also quoted Committee Chairman Rodino's statement during the Nixon investigation that authorization was a "necessary step if we are to meet our obligations," and stated that the Chair of the Rules Committee took the position that "the House would have to act to authorize an impeachment investigation." *Id*. at 24-25. However, the report also contains language that suggests the Committee may have sought the resolution for normative rather than legal reasons. *Id*. at 24 (stating that "[b]ecause impeachment is delegated solely to the House of Representatives by the Constitution, the full House of Representatives *should* be involved in critical decision making regarding various stages of impeachment") (emphasis added). For a discussion of the considerations relevant to authorizing the Judiciary Committee's impeachment investigation of President Nixon, see JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 180-84 (1978). An explicit delegation from the House would not need to be provided on an individualized basis, but rather could be granted more permanently to the House Judiciary Committee or another committee.

not appear to be that the Constitution's impeachment provisions directly require authorization of an impeachment investigation, but rather that as a matter of House Rules and the established relationship between the House and its committees, a House committee can exercise the investigative powers of impeachment only if that authority has been delegated to it by the parent body.[63]

Whatever the merits of this interpretation, it would appear to be in tension with those House precedents in which impeachment investigations were undertaken without House authorization, and in conflict with the House General Counsel's current litigating position in multiple cases.[64]

In sum, there is neither a clear definition in law or House Rules of what constitutes an impeachment investigation, nor a clearly established House process for how such an investigation is to be initiated. As a result, it would appear that the House has many choices in how it executes an impeachment investigation. House leadership appears to take the view that a specific authorization of an impeachment inquiry is not constitutionally necessary for committees to engage in an impeachment investigation of the President.[65] On the other hand, some might argue that adopting an authorizing resolution is required[66] or—even if not legally necessary—useful because it provides the House with the opportunity to empower and direct a committee's impeachment investigation, while also providing a clear and forceful imprimatur of the House's support for that inquiry.[67]

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[63] Accordingly, any limitation is on committee action rather than House action. The D.C Circuit recently alluded to this distinction between the House's constitutional authority and a committee's delegated authority in the subpoena context. *Mazars*, 2019 U.S. App. Lexis 30475, at *26 ("[I]t matters not whether the Constitution would give Congress authority to issue a subpoena if Congress has given the issuing committee no such authority."). One additional potential impact resulting from a conclusion that an impeachment investigation can be initiated unilaterally by a committee could be that "all that would ever be required" to reduce or possibly remove constitutional limitations on a committee's investigative authority such as executive privilege and legislative purpose, see discussion *infra*, "would be to convince a majority" of the committee that it should begin an impeachment investigation in which those constitutional constraints might be less significant. *See* Labovitz, *supra* note 62, at 182.

[64] *See* Reply of the Comm. on the Judiciary, In re Application of the Comm. on the Judiciary, U.S. House of Representatives, For an Order Authorizing the Release of Certain Grand Jury Materials, at 15 ("DOJ cites no authority for the proposition that the House must vote to authorize the Committee to investigate impeachment. There is no such authority: none in the Constitution, which entrusts to the House the "sole Power of Impeachment," and none in the House Rules, which the Constitution likewise empowers the House alone to establish …") (citations omitted). *See* Complaint at 9, Comm. on the Judiciary v. McGahn, (D.D.C. 2019) (No 1:19-cv-2379). Moreover, the House's delegation of investigative authority to its committees, including the subpoena power, are written broadly enough that they arguably could be interpreted to include impeachment. For example, House Rule XI provides standing committees with the power to investigate and issue subpoenas to implement the "functions and duties under this rule and rule X." House Rule XI(2)(m)(1). Rule X, which provides each committee with its delegated jurisdiction, provides committees with "general oversight responsibilities … in order to assist the House in … its analysis, appraisal, and evaluation of … conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation." House Rule X(2). If an impeachment resolution is considered "legislation" for purposes of House Rules, then an investigation conducted pursuant to the House's consideration of such a resolution may be within a committee's existing authority.

[65] *See* John Bresnahan, et al., *Pelosi Holds Off on Vote to Authorize Trump Impeachment Inquiry*, POLITICO (Oct. 15, 2019) (quoting the Speaker as stating that "[t]here's no requirement that we have a vote, and at this time, we will not have a vote").

[66] *See* Brief for Ranking Member Doug Collins as Amici Curiae in Support of Denial, In re Application of the Comm. on Judiciary (No. 1: 19-GJ-00048-BAH) at 8.

[67] *See* Labovitz, *supra* note 62, at 183 (arguing that during the Nixon impeachment investigation, and therefore not in a context governed by current House Rules, "there was much to be said—on the basis of precedent, principle, and policy—for requiring the House to invoke its impeachment power explicitly and directly" and that despite the existence of arguments that the Judiciary Committee had "all the investigative authority it needed, it was far preferable for the House to confer the authority expressly").

The Question of Authorization in the Current House Impeachment Inquiry

In the House's ongoing investigations of President Trump, no committee has received the type of explicit and direct authorization ultimately provided in the Clinton and Nixon investigations.[68] Nevertheless, even if one were to accept for purposes of argument that authorization is a prerequisite to a committee engaging in an impeachment investigation, it could be argued that the House recently provided this authorization, at least for wielding the powers of impeachment in court. In June, the House adopted H.Res. 430, which provides that "in connection with any judicial proceeding … the chair of any standing or permanent select committee exercising authority thereunder has any and all necessary authority under Article I of the Constitution."[69] The accompanying Rules Committee report cites the Judiciary Committee's investigation into whether to recommend articles of impeachment to the House as an "example of a Committee being able to use 'all necessary authority under Article I of the Constitution.'"[70]

The White House, however, asserts that House committees are not currently engaged in an impeachment investigation absent a formal authorizing resolution from the House.[71] But there would likely be significant challenges to pursuing this argument in litigation, particularly given the courts' historical reluctance to scrutinize the House's implementation of its own internal powers.[72] Indeed, whether a committee is engaged in an impeachment investigation represents the unique convergence of various areas in which courts are generally reluctant to second-guess the position of the House and its committees, including the House's implementation of its "sole Power of impeachment";[73] the House's exclusive authority to set and interpret its own rules;[74] and

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[68] For example, with respect to the delegation of jurisdiction discussed above, the House Rules do not explicitly provide any committee with jurisdiction over impeachment. But it could be argued that impeachment must implicitly be within the Judiciary Committee's legislative jurisdiction (i.e., for purposes of considering legislation) as impeachment resolutions are referred to the Committee. For example, H.Res. 13, a resolution impeaching the President, is currently before the committee. House Rule XII(2). H.Res. 13, 116th Cong. (2019). Although legislative jurisdiction does not necessarily equate to investigative jurisdiction and the use of compulsory investigative tools, Rule XI specifically authorizes the use of subpoenas for matters within a committee's jurisdiction "including any matters referred to it under Clause 2 of Rule XII." House Rule XI(2)(m)(1). Thus, at least for the Judiciary Committee, the referral of an impeachment resolution could be interpreted as triggering the committee's authority to investigate the allegations included within the resolution. H.Res. 13, however, was introduced in January 2019 and relates primarily to the President's decision to fire the Director of the Federal Bureau of Investigation. Finally, the Judiciary Committee's historical involvement in impeachment questions and investigations is also likely to be instructive in interpreting the Committee's authority under House Rules. *See* Barenblatt v. United States, 360 U.S. 109, 117-18 (1959) ("[T]he proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions. The Rule comes to us with 'persuasive gloss of legislative history.'"). These arguments do not appear to apply to other House committees.

[69] H.Res. 430, 116th Cong. (2019).

[70] H.R. Rep. No. 116-108, at 21 (2019).

[71] *See* Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019), https://www.nytimes.com/interactive/2019/10/08/us/politics/white-house-letter-impeachment.html (asserting that the President will not cooperate with the House impeachment inquiry). As stated by the Judiciary Committee, how to properly characterize a committee investigation "is not for the Executive Branch to say." Reply, at 13.

[72] *Mazars*, 2019 U.S. App. Lexis 30475, at *72 ("Throughout history, the Constitution has left to Congress the judgment whether to commence the impeachment process.") *Id*. at *88 ("The Rules, which establish a mechanism for exercising the House's subpoena power, thus deal exclusively with the allocation of authority within the legislative branch …").

[73] *See* In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1446 (11th Cir. 1987).

[74] *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings …"); United States v. Smith, 286 U.S. 6, 33 (1932) ("[T]he Court must give great weight to [the House or Senate's] construction of its own rules"); United States v. Ballin, 144 U.S. 1, 5 (1892) (holding that, with certain exceptions, "all matters of method are (continued...)

a committee's role in articulating the purpose of an investigation.[75] According to at least one commentator, it seems likely that to obtain judicial recognition of an impeachment investigation the House need only present enough evidence to "persuade the court that its current investigation is sufficiently tied to the impeachment process."[76]

While this deferential approach to actions of the House and its committees is not absolute—for example, courts sometimes have exercised their judicial powers to ensure that the committee is acting within the scope of the authority delegated to it by the parent chamber[77]—it may be reinforced in the current situation because the House General Counsel (HGC) has asserted that there is "no authority for the proposition that the House must vote to authorize the Committee to investigate impeachment."[78] The HGC's position is important because it is overseen by the Bipartisan Legal Advocacy Group, which "articulates the institutional position of the House in all litigation matters."[79] The D.C. Circuit has suggested that when the HGC voices an interpretation of internal House matters it must be "given great weight."[80] That said, an explicit authorization from the House could remove any ambiguity as to the appropriate characterization of the committee investigations.[81]

But in many ways, the current focus on whether the House must authorize an impeachment investigation may lead to the misimpression that an impeachment inquiry is the only means by which Congress may investigate and acquire information concerning allegations of executive branch wrongdoing. A committee can investigate executive branch misconduct in an impeachment investigation, a legislative investigation, or some combination of both.[82]

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open to the determination of the House").

[75] *See McGrain*, 273 U.S. at 178. Chairman Jerrold Nadler has stated that the Judiciary Committee is already in "formal impeachment proceedings" and the Committee has adopted a resolution establishing "procedures" for the "presentation of information in connection with the Committee's investigation to determine whether to recommend articles of impeachment with respect to President Donald J. Trump." Resolution for Investigative Procedures Offered by Chairman Jerrold Nadler, H. Comm. on the Judiciary, 116th Cong. (Sept. 12, 2009). Other House Chairmen have made similar statements about the purpose of their inquiry. *See* Letter from Rep. Adam B. Schiff, Chairman, H. Perm. Select Comm. on Intelligence et al., to Rudolph Giuliani (Sept. 30, 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/20190930%20-%20Giuliani%20HPSCI%20Subpoena%20Letter.pdf (identifying a subpoena as issued "[p]ursuant to the House of Representatives' impeachment inquiry").

[76] Michael Stern, *I'll Take My Grand Jury Materials with a Hint of Impeachment*, POINT OF ORDER, July 30, 2019.

[77] *Rumely*, 345 U.S. at 48 (holding that a House select committee exceeded its delegated authority).

[78] Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, (D.D.C. July 26, 2019) 30-31.

[79] House Rule 2(8)(b). *See also*, H.Res. 430 (providing in a different context that "a vote of the Bipartisan Legal Advisory Group to authorize litigation and to articulate the institutional position of the House in that litigation is the equivalent of a vote of the full House of Representatives").

[80] *See* Barker v. Conroy, 921 F.3d 1118, 1124 (D.C. Cir. 2019) (accepting House General Counsel's interpretation of the rules as the "House's interpretation"). *Id*. at 1130 ("The Rulemaking Clause of Article I, Section 5 of the Constitution 'clearly reserves to each House of the Congress the authority to make its own rules,' and as we have explained, interpreting a congressional rule 'differently than would the Congress itself' is tantamount to 'making the Rules—a power that the Rulemaking Clause reserves to each House alone.'") (citations omitted).

[81] For example, during oral arguments in the Judiciary Committee's application for grand jury materials the district court judge reportedly "said she agreed that a House vote to authorize impeachment proceedings would 'make my life very much easier.'" Darren Samuelsohn, *Judge Signals Dems May Get to See Mueller's Secrets*, POLITICO (Oct. 8, 2019). Nevertheless, "[t]he wisdom of congressional approach or methodology is not open to judicial veto." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975).

[82] *Mazars*, 2019 U.S. App. Lexis 30475, at *2 (holding that a congressional committee can investigate presidential (continued...)

Investigations conducted pursuant to the impeachment power may, as discussed below, provide the House with some access advantages, perhaps most significantly if executive privilege is invoked as a justification to deny congressional access to information.[83] But an executive official, including the President, may also be the subject of a legislative investigation, and Congress's ability to access information from the executive branch in these investigations is oftentimes substantial.[84] Accordingly, the degree to which Congress may obtain information through an impeachment inquiry that it cannot acquire in a traditional legislative investigation may not always be as significant as might first appear.

Even without invocation of the impeachment power, House committees retain existing authority to investigate allegations of executive branch misconduct, including criminal activity as part of a *legislative* investigation.[85] Courts have generally recognized that the power to conduct legislative investigations includes the authority to inquire into and investigate the conduct of government officials,[86] especially when a committee is considering possible remedial legislation.[87] As one district court recently stated, even absent any claim that an investigation is being undertaken for purposes of impeachment, committee investigations into misconduct by executive branch officials generally fit "comfortably within the broad scope of Congress's investigative powers" so long as the investigation is within the committee's jurisdiction and is carried out for a legislative purpose.[88] Opinions of the Supreme Court reinforce this notion by holding that Congress's implied investigative power, wholly apart from impeachment, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste," and includes the authority to "inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government."[89] Thus, the line between an *impeachment* investigation and a *legislative* investigation into official misconduct may not only be significantly blurred, but in some instances, may also be unnecessary to draw given the tools and authority available to committees to conduct legislative investigations into executive branch misconduct.[90] This

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misconduct as part of a legislative investigation). *But see, Id*. (Rao, J., dissenting) (asserting that a congressional committee may investigate presidential misconduct only in an impeachment investigation).

[83] *See* "Overcoming Claims of Executive Privilege" *infra*.

[84] *Mazars*, 2019 U.S. App. Lexis 30475, at *22 (noting that "Presidents, too, have often been the subjects of Congress's legislative investigations").

[85] *Mazars*, 2019 U.S. App. Lexis 30475, at *41 ("[A]an interest in past illegality can be wholly consistent with an intent to enact remedial legislation.") As explained by the D.C. Circuit in *Mazars*, nothing "compels Congress to abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process." *Id*. at *68. The House Manual provides some context to the sometimes elusive task of classifying investigations by stating that after charges of impeachment have been made in one form or another "the House has at times ordered an investigation at once. At other times it has refrained from ordering investigation *until the charges had been examined by a committee*." *Jefferson's Manual*, H. DOC. NO 114-192 § 605 (2017) (emphasis added). In many instances, such an "examination" could be conducted as a traditional legislative investigation made pursuant to a committee's standing investigative authority.

[86] *See McGrain*, 273 U.S. at 177 (approving an investigation into "whether the Attorney General and his assistants were performing or neglecting their duties"); II HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §1596 (1907) ("The Conduct of the President is always subject to the constitutional supervision and judgment of Congress.").

[87] *Mazars*, 2019 U.S. App. Lexis 30475, at *45-6 ("The lesson of *McGrain* is that an investigation may properly focus on one individual if that individual's conduct offers a valid point of departure for remedial legislation.").

[88] Trump v. Comm. on Oversight & Reform, 380 F. Supp. 3d 76, 95 (D.D.C. 2019).

[89] *Watkins*, 354 U.S. at 187, 200 n. 33.

[90] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (concluding that the " investigative objectives" of the Senate Watergate Committee and House Judiciary Committee "substantially overlap: both are apparently seeking to determine, among other things, the extent, if any, of presidential (continued...)

authority includes not only the use of compulsory investigative tools like the subpoena, but also other forms of legislative leverage generally available to the House, its committees, and even individual Members.[91]

Impeachment Investigations: Scope of Access to Information

Addressing the scope of the House's access to information during an impeachment inquiry requires some brief comparison of impeachment and legislative investigations. To begin, the two types of investigations have much in common: both represent exercises of the House's constitutional power;[92] both act as essential checks on executive overreach and help ensure preservation of the separation of powers;[93] and both are unique and consequential powers characterized by their mix of judicial, legislative, and political features.[94] In addition, whether engaged in an impeachment or legislative investigation, the tools used to gather information are now mostly the same, especially given recent changes to the House Rules that provide committees with authority to carry out investigations in an increasingly prompt manner and without the full participation of the committee.[95] In any investigation, a committee would likely obtain most information through requests for information, voluntary interviews, hearings, subpoenas for documents or testimony, and depositions.[96]

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involvement in the Watergate 'break-in' and alleged 'cover-up'"); *See* Ryan Goodman and John T. Nelson, *How Congress Can Access the Legal Powers of Impeachment Without a Formal Inquiry*, JUST SECURITY (July 26, 2019) (arguing that "the impeachment power is not triggered by an on-off switch of opening an impeachment inquiry," but rather "is a continuum, and in some cases the House may be even more clearly along that continuum").

[91] For a discussion of tools available to Congress to influence executive branch behavior, see CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

[92] U.S. CONST. art. I, § 1 (endowing Congress with "all legislative Powers herein granted"); McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (holding that "the constitutional provisions which commit the legislative function to the two houses" include the "power of inquiry"); U.S. CONST. art. I, § 2 cl. 5 ("The House of Representatives … shall have the sole Power of Impeachment.").

[93] *See, e.g.*, *Nixon Impeachment Report*, *supra* note 20, at 208 ("The very purpose of such an inquiry is to permit the legislative branch, acting on behalf of the people, to curb the excesses of another branch...."); THE FEDERALIST NO. 66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (reasoning that "the powers relating to impeachments are … an essential check … upon the encroachments of the executive"); William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 782 (2004) (arguing that "Congress's power to investigate may be one of the few effective checks against executive branch dominance or abuse").

[94] *See, e.g.*, In re Lindsey, 158 F.3d 1263, 1277 (D.C. Cir. 1998) (characterizing impeachment as "fundamentally a political exercise"); In re Grand Jury No. 81-1 Miami, 669 F. Supp. 1072, 1076 (S.D. Fla. 1987) ("It is apparent from the text of the Constitution that the framers considered impeachment to be judicial in nature."); James Hamilton, Robert F. Muse, and Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1117 (2007) (describing congressional investigations as a "procedural hybrid").

[95] For example, most standing committees may now issue subpoenas based on the unilateral decision of the Chair, House Rule XI(2)(m) (providing that the "power to authorize and issue subpoenas … may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe"); conduct staff depositions without a Member present, H.Res. 6, 116th Cong. (2019) § 103 (granting staff deposition authority to most standing committees); and initiate subpoena enforcement lawsuits with the approval of the Bipartisan Legal Advocacy Group, H.Res. 430, 116th Cong. (2019) (stating that "the chair of each standing and permanent select committee, when authorized by the Bipartisan Legal Advisory Group, retains the ability to initiate" a subpoena enforcement lawsuit).

[96] It is clear that the House can (and has repeatedly) provided committees engaged in impeachment investigations with additional tools "intended to permit the Committee to conduct a thorough investigation under as expeditious a schedule (continued...)

But the two investigations arguably contrast in a few notable ways. For example, the frequency with which each is exercised differs greatly. While the House has conducted myriad legislative investigations of the executive branch, there have been comparatively few impeachment investigations of executive branch officials.[97] In addition, the House has previously granted the subject of an impeachment investigation certain procedural rights that are not seen in legislative investigations.[98] For example, during both the Nixon and Clinton impeachment investigations, the House Judiciary Committee adopted resolutions affording the President and his counsel the right to respond to evidence gathered by the committee, raise objections to testimony, and cross-examine witnesses, among others.[99]

In another distinguishing feature, the Judiciary Committee's power to issue subpoenas in impeachment investigations has previously been altered in an effort to encourage "a fair, impartial and bipartisan" investigation.[100] In both the Nixon and Clinton investigations, the power to subpoena was provided to "the chairman and the ranking minority member acting jointly, or, if either declines to act, by the other acting alone...."[101] Even so, "[i]n the event either [the Chair or the Ranking Member] so declines," the provisions continued, "either shall have the right to refer to the committee for decision the question whether such authority shall be so exercised …"[102] Thus, in the case that the Chairman and the Ranking Member disagreed on issuing a subpoena, the question would be settled by vote of the Judiciary Committee. The functioning of the provision was described by some Members of the Judiciary Committee as "practically

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as possible." *Clinton Impeachment Investigation Report*, *supra* note 3, at 3. For example, during the investigation into the possible impeachment of President Clinton, the House provided the Judiciary Committee with a variety of additional information-gathering tools that were not at that point available to the Committee, including the ability to compel responses to written interrogatories, conduct staff depositions, and issue subpoenas without a committee vote. *Id*. at 3-4.

[97] The only executive branch officials impeached by the House are Presidents Andrew Johnson (1867) and William Jefferson Clinton (1998) and Secretary of War William Belknap (1876). *See* CRS Report R44260, *Impeachment and Removal*, by Jared P. Cole and Todd Garvey, at 1 n. 5. The Judiciary Committee recommended articles of impeachment against President Richard Nixon, who resigned before the articles were considered by the House. *Nixon Impeachment Report*, *supra* note 20 at 1-3. There are other executive branch officials who have been the subject of some form of impeachment investigation, but whom were not ultimately impeached by the House. *See e.g.*, H.R. REP. NO. 45-134 (1879) (reporting articles of impeachment against George Seward); *Impeachment Articles Referred on John Koskinen: Hearing Before the H. Comm. On the Judiciary*, 114th Cong. (2016).

[98] HOUSE PRACTICE ch. 27 § 7 ("[T]he modern trend is to permit the accused to testify, present witnesses, cross-examine witnesses, and be represented by counsel."). *See also*, Reynolds, *supra* note 11 (describing procedural protections provided during the Clinton and Nixon impeachment investigations and noting that "while impeachment proceedings do not unlock significant new procedural avenues for the judiciary committee, they could, in theory afford the president more opportunities to inject himself or his lawyers into the spotlight"). As part of its ongoing investigation into alleged misconduct by President Trump, the Judiciary Committee adopted a resolution that would allow the President's counsel to "respond in writing to information and testimony presented to the Committee in open session." Resolution for Investigative Procedures Offered by Chairman Jerrold Nadler, H. Comm. on the Judiciary, 116th Cong. 4 (Sept. 12, 2019).

[99] STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., PRESENTATION BY INQUIRY STAFF CONSIDERATION OF INQUIRY RESOLUTION ADOPTION OF INQUIRY PROCEDURES 220 (Comm. Print 1998) (procedural provisions during Clinton impeachment investigation); *Nixon Impeachment Report*, *supra* note 20 at 8-9 (procedural provisions during Nixon impeachment investigation).

[100] H.R. REP. NO. 93-774 , at 3.

[101] H.Res. 581 §2, 105th Cong. (1998); H.Res. 803 §2, 93rd Cong. (1974).

[102] *Id*.

nullif[ying] any truly independent subpoena power for the ranking minority member …," as the Chairman's position would likely be upheld by the committee.[103]

Significantly, there may be some ways in which the House's investigative authority is either amplified or broadened during an impeachment investigation. The precise extent of any legal advantage, however, is not entirely clear. While there is a reservoir of historical—and to a much more limited extent judicial—precedents that can be used to analyze the House's authority to obtain information from the executive branch in traditional legislative investigations, the same cannot be said for impeachment investigations.[104] There have been relatively few impeachment investigations of executive branch officials, and none that have been presented to the courts for resolution of constitutional questions of information access. [105]

Despite the limited historical precedent, early statements from all three branches support the House's robust and expansive right of access to information pertinent to an impeachment investigation.[106] Since nearly its inception, the House has viewed its impeachment power as including "the right of inquiry … to the fullest and most unlimited extent," and "certainly impl[ying] a right to inspect every paper and transaction in any department."[107] Neither the executive nor judicial branches, the House has asserted, can "seek to impede the House in the exercise of its sole power to impeach."[108] And while the Supreme Court has little to no role in reviewing the impeachment power generally,[109] it has compared the House's right to information in an impeachment investigation to that of a court of law, stating that the House may obtain information "in the same manner and by the use of the same means, that courts of justice can in like cases."[110] As one district court has stated about presidential impeachment investigations,

> [I]t should not be forgotten that we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States. It

[103] H.R. REP. NO. 93-774, at 13 (individual and supplemental views) ("This provision practically nullifies any truly independent subpoena power for the ranking minority member, because in any case in which he may wish to issue a subpoena to which the chairman will not agree, the latter is clothed with the authority to take the question to the full Committee, where-in the sensitive type of case in which this situation is likely to arise-the chairman will predictably be upheld, and the minority overruled in most cases, by a straight party-line vote.").

[104] For a thorough discussion of how the House and Senate have historically exercised their investigative powers, see CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY (Roger A. Burns, David L. Hostetter, and Raymond W. Smock, eds.) (2011).

[105] *See supra* note 97. The major cases arising during the administration of Richard Nixon did not involve impeachment investigations. United States v. Nixon, 418 U.S. 683 (1974), arose from a criminal case, while Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), arose from an investigation carried out by a select committee of the Senate. Although the courts have issued decisions relating to congressional access to grand jury materials in an impeachment investigation, see Haldeman v. Sirica, 501 F.2d 714 (1974), this report does not treat those decisions as judicial resolution of constitutional information access disputes in an impeachment context because they generally focus on the proper interpretation of Rule 6(e). The Judiciary Committee's case against former White House Counsel Don McGahn may be one of the first subpoena enforcement cases to directly involve impeachment issues. Still, even in that case, the Committee is asserting both impeachment and legislative purposes. Complaint at 30, Comm. on the Judiciary v. McGahn, (D.D.C. 2019) (No 1:19-cv-2379).

[106] As early as 1796, President George Washington "admitted, by implication, that where the House expresses an intention to impeach, the right to demand from the Executive all papers and information in his possession belongs to it." H.R. REP. NO. 27-271, at 12.

[107] *Id*. at 4-6; 5 Annals of congress 601 (1796).

[108] *Nixon Impeachment Report*, *supra* note 20 at 209 (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1501)("[I]t is of great consequence that the President should not have the power of preventing a thorough investigations …).

[109] *See* Nixon v. United States, 506 U.S. 224, 230-38 (1993).

[110] Kilbourn v. Thompson, 103 US 168, 190 (1881).

> would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information.[111]

The executive branch appears to have similarly acknowledged the breadth of impeachment investigations, although usually in the context of denying Congress's right of access in a legislative investigation. In an oft-quoted example, President James K. Polk stated that the authority of the House in an impeachment investigation "would penetrate into the most secret recesses of the Executive Department" and would include the authority to "command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge."[112] "If the House of Representatives, as the grand inquest of the nation … should think proper to institute an inquiry," Polk continued, "every facility in the power of the Executive [would] be afforded to enable them to prosecute the investigation."[113]

The need for the House to obtain access to relevant information in an impeachment investigation may also be underscored by the essential role impeachment plays in ensuring presidential accountability.[114] For instance, given the Department of Justice's (DOJ's) position that a sitting President is not subject to indictment or criminal prosecution while in office, impeachment and removal may be one of the few available mechanisms to hold a President immediately accountable for criminal conduct.[115] Broad access to evidence either supporting or refuting allegations of presidential misconduct could be seen as essential if the House is to exercise its "right of accusing" and if the impeachment power is to maintain its envisioned role as an "essential check" on the executive branch generally and the President specifically.[116]

While these statements and principles establish a general proposition that the House enjoys broad access to information in an impeachment investigation, this access may be subject to certain constitutional limitations that generally attach to congressional investigative activity.[117] For example, provisions of the Bill of Rights that have been found to apply in legislative investigations, including the First Amendment, Fourth Amendment, and the Fifth Amendment's privilege against self-incrimination, may also apply in impeachment investigations.[118] Other

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[111] In re Report & Recommendation of June 5, 1972, 370 F. Supp. 1219, 1230 (D.D.C. 1974).

[112] 4 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (1897) 434-35.

[113] *Id*. Somewhat similar statements have been made by other Presidents. *See Nixon Impeachment Report*, *supra* note 20 at 207 (noting that the "uniform practice" of complying with House requests for information during an impeachment "has been acknowledged in the statements of various Presidents.").

[114] *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 688 (noting that the object of impeachment was to "reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals").

[115] *See*, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222-23 (2000) (reaffirming a prior conclusion that the "indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions"). *See also*, Nixon v Fitzgerald, 457 U.S. 731, 757 (1982) ("A rule of absolute immunity [in certain civil suits] for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment.").

[116] THE FEDERALIST NO. 66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[117] Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights.").

[118] *Watkins*, 354 U.S. at 187-188. The proper application of the Fifth Amendment's Due Process clause to congressional proceedings is also somewhat unsettled. *See generally*, Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401 (2016). While the Clause may apply in some manner, see *Watkins*, 354 U.S. at 188, the precise "process" that is "due" depends on the nature of the congressional proceeding. A congressional investigation, (continued...)

constitutional principles that may limit committee access to information in legislative investigations, for example considerations arising from the separation of powers such as executive privilege, may prove less of an obstacle and apply with less strength in an impeachment investigation.[119]

Potential Investigative Advantages of an Impeachment Investigation

When examining the legal implications of impeachment investigations, and especially whether an investigation may strengthen the House's hand in any information access dispute with the executive branch, it may help to think of interbranch investigative conflicts as proceeding in two, sometimes overlapping, phases: a political phase and (in limited situations) a judicial phase.[120] This staged approach offers a useful analytical framework for assessing the impact an impeachment investigation may have on decision making in all three branches of government.

Impact of the Impeachment Power on the Political Stage of an Investigative Conflict

The first phase of an investigative dispute between Congress and the executive branch is typically political in nature, in that conflicts that may arise are generally steered by political forces, with outcomes dependent upon not only each branch's evaluation of the costs and benefits of a given position, but also each branch's willingness and ability to exert either direct or indirect pressure

(...continued)

whether conducted for legislative or impeachment purposes, is not a judicial or adjudicative proceeding, but is instead an "inquest" or fact finding proceeding. As the Supreme Court has noted, "when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." Hannah v. Larche, 363 U.S. 420, 442 (1960). The D.C. Circuit, for example, has stated that "the distinguishing factors" between a legislative investigation and a criminal proceeding "cause" congressional investigations "to be outside the guarantees of the due process clause of the Fifth Amendment and the confrontation right guaranteed in criminal proceedings by the Sixth Amendment." United States v. Fort, 443 F.2d 670, 679 (D.C. Cir. 1970). During the Nixon impeachment investigation, the President's counsel asserted that "[i]t is beyond question that in an impeachment proceeding, fundamental fairness must be accorded to the President of the United States." COMM. ON THE JUDICIARY, 93RD CONG., BRIEF ON BEHALF OF THE PRESIDENT OF THE UNITED STATES 118 (Comm. Print 1974). If the Due Process Clause applies, the process rights required to be afforded to an official in a Senate trial may be higher than those required for a House impeachment investigation. In *Hastings v. United States*, a district court decision that was vacated and remanded in light of the Supreme Court's nonjusticiability holding in *Nixon v. United States*, the district court determined that Due Process applied and that a Senate impeachment trial "must be conducted in keeping with the basic principles of due process that have been enunciated by the courts …" 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated*, 988 F.2d 1280 (D.C. Cir. 1993). *Nixon*, 506 U.S. at 230 (concluding that the Framers "did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try.'"). Ultimately however, because of the nonjusticiablity principles articulated in *Nixon*, "[S]enators decide for themselves on whether the Fifth Amendment due process clause applies to impeachment trials, and, if so, the process it requires." S*ee* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 40 (2d ed. 2000).

[118] *Watkins*, 354 U.S. at 187-188.

[119] *See infra* note 239; Gerhardt, supra nota 117, at 114 ("[B]oth constitutional history and structure suggest that that an impeachment proceeding is precisely the context in which the President should not be able to assert superiority over Congress.").

[120] As noted earlier, interbrach disagreements are generally resolved at the political phase, meaning that investigative disputes rarely enter into the judicial phase. Moreover, these phases are not required or established stages of congressional investigations. There is also significant overlap between the phases, as political and legal considerations factor into each.

on the other.[121] This phase is typically characterized by a process of negotiation and accommodation, which—though often guided by legal considerations[122]—is also influenced by the use of various levers of political or institutional influence.[123] For Congress, these levers are manifold, and include, among other tools, threatened and actual restrictions on appropriations, changes to delegated executive branch authority, delay of nominations, and attempted enforcement of subpoenas through mechanisms such as criminal contempt of Congress.[124] For the executive branch, leverage lies mainly in the fact that it possesses the information Congress seeks, and therefore delays or a continuation of the status quo may work in its favor. The vast majority of information access disputes are resolved at this political stage, typically either by the executive branch agreeing to comply with congressional demands, Congress relinquishing its request, Congress agreeing to narrow its inquiry, or through a settlement or information access agreement in which Congress is provided access under certain restrictions.[125]

Because of the nature of interbranch negotiations, and the paucity of impeachments of executive branch officials, it is difficult to assess the impact an impeachment investigation would have on the political phase of an interbranch dispute. Even so, the significance of a possible exercise of the impeachment power, along with a possible resulting increase in political and public pressure, may itself affect the executive's compliance decisions. During the Nixon impeachment investigation, the House Judiciary Committee noted that "not one" subject of the nearly 70 prior impeachment investigations "challenged the power of the committee conducting the impeachment investigation to compel the production of evidence it deemed necessary."[126] President Andrew Johnson, for example, voluntarily provided the Judiciary Committee with sensitive information during that committee's impeachment investigation—including confidential communications with advisers and information related to the use of his pardon and veto power.[127] Presidents Nixon and Clinton also pledged cooperation with House impeachment investigations.[128] But an

[121] *See* CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey, at 2.

[122] The Supreme Court has stated that "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation." *Watkins*, 354 U.S. at 187.

[123] *See* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 931 (2014) ("Congress may use legislative authorizations and appropriations as leverage against the Executive Branch to obtain requested information."); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002) (noting that oversight disputes are often "decided by the persistence of Congress and its willingness to adopt political penalties for executive noncompliance. Congress can win most of the time—if it has the will—because its political tools are formidable"). *See also*, United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977) (noting that the Framers relied "on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system").

[124] See CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner (discussing the tools available to Congress to influence executive branch decision-making).

[125] *See, e.g.*, Olivia Beavers and Morgan Chalfant, *Nadler Reaches Deal with Justice on Mueller Documents on Eve of Contempt Vote*, THE HILL, June 10, 2019 (describing an access agreement reached between the Judiciary Committee and DOJ).

[126] *Nixon Impeachment Report*, *supra* note 20, at 206.

[127] *Id*. (noting that during the Andrew Johnson impeachment investigation the Judiciary Committee "examined the circumstances leading to a number of presidential decisions, including the prosecution of Jefferson Davis, presidential pardons, the issuance of executive orders, the conduct of Reconstruction and the vetoing of legislation").

[128] *See Nixon Impeachment Report*, *supra* note 20, at 32; Andrew Miga, *White House in Crisis*, BOSTON HERALD (Oct. 9, 1998) (reporting that President Clinton "pledged to cooperate fully with the [impeachment] investigation.")

impeachment investigation is not a panacea for access. Both Nixon and Clinton were later viewed by the Judiciary Committee as withholding relevant evidence. President Nixon ultimately refused to comply with numerous committee subpoenas,[129] and President Clinton was accused of either refusing to comply with requests for written admissions or providing the Committee with false or misleading responses.[130]

The Judiciary Committee's response to the actions of President Nixon and President Clinton displays another tool of leverage that uniquely attaches to an impeachment investigation: the threat that noncompliance with committee demands for information could rapidly lead to the adoption of an article of impeachment for contempt of Congress. In a legislative investigation, the tools available to a committee to seek enforcement of a demand made to the executive branch are limited.[131] The primary current avenue for forcing compliance with a subpoena appears to be through the judiciary in a civil enforcement action.[132] The Senate Watergate Committee, which was engaged in a legislative investigation, pursued this avenue of enforcement when President Nixon refused to comply with that committee's subpoenas for White House tapes.[133]

The House Judiciary Committee, on the other hand, chose not to litigate enforcement of its subpoenas during its impeachment investigation of President Nixon, concluding that it would be "inappropriate to seek the aid of the courts" because the Framers had made clear—by vesting the impeachment power "solely" in the House—that there was not "any role for the courts in the impeachment process."[134] Instead, the Committee obtained portions of the information it needed from other sources (including the Watergate special prosecutor and grand jury) and recommended to the House an article of impeachment based on President Nixon's failure to comply with the Committee's subpoenas.[135] The Judiciary Committee took the same approach during the Clinton impeachment, approving and recommending to the House an article of impeachment based on the President's "refusing and failing to respond to certain written requests for admission" and for providing incomplete or "false and misleading" information to the Committee.[136] Knowledge that a committee engaged in an impeachment investigation is poised to recommend an independent article of impeachment for failure to comply with a committee subpoena might serve as a tool of leverage during negotiations in the political phase.

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[129] *Nixon Impeachment Report*, *supra* note 20, at 207.

[130] H.R. REP. NO. 105-830 at 77 (1998) ("In responding in such a manner, the President exhibited contempt for the constitutional prerogative of Congress to conduct an impeachment inquiry.") [hereinafter *Clinton Impeachment Report*].

[131] *See* CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey, at 4-6.

[132] *Id*. at 5.

[133] The Committee was ultimately rebuffed by the court. *Senate Select*, 498 F. 2d at 733. The House has seen greater success in enforcing subpoenas in more recent cases. *See* Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016) (directing executive branch compliance with a committee subpoena); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 105 (D.D.C. 2008) (rejecting executive branch defenses to compliance with committee subpoena).

[134] *Nixon Impeachment Report*, *supra* note 20, at 210.

[135] *Id*. at 208.

[136] *Clinton Impeachment Report*, *supra* note 130, at 76. The House did not approve that article (Article IV).

Impact of the Impeachment Power at the Judicial Stage of an Investigative Conflict

If there is an impasse at the political phase, either the House, or in very limited circumstances the executive branch,[137] may transition the investigation into the judicial stage by asking the federal judiciary to decide the ongoing disagreement.[138] Because political negotiations tend to continue, resolution of the dispute at this stage may occur either as a result of political accommodations undertaken by political actors, or as a result of the application of legal principles by federal judges.[139] Such cases usually require the courts to consider both the scope of Congress's investigatory power and any legal restrictions or privileges invoked by the executive branch.

The involvement of the courts in information access disputes between the legislative and executive branches has been historically rare, but appears to have become more common in recent years, at least with respect to disagreements over House subpoenas.[140] The traditional preference for political rather than judicial solutions seems supported by the fact that neither Congress nor the President appears to have turned to the courts to resolve an investigative dispute until the 1970s.[141] But it is not only the political branches that have been wary of judicially declared outcomes. The courts themselves have also generally sought to avoid adjudicating investigative disputes between the executive and legislative branches, instead encouraging settlement of their differences through a political resolution.[142] Consistent with that approach, lower federal courts have suggested that judicial intervention in investigative disputes "should be delayed until all possibilities for settlement have been exhausted."[143]

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[137] The Speech or Debate Clause generally prohibits courts from entertaining preenforcement challenges to congressional subpoenas. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975). However, when a party is "not in a position to assert its claim of constitutional right by refusing to comply with a subpoena," because the subpoena was issued to a neutral third party, the Clause "does not bar the challenge so long as members of the Subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena." United States v. AT&T, 567 F.2d 121, 123-25 (D.C. Cir. 1977).

[138] *See e.g.*, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) (subpoena enforcement lawsuit instituted by the House); Trump v. Comm. on Oversight & Reform of the United States House of Representatives, 380 F. Supp. 3d 76, 88 (D.D.C. 2019) (challenge to committee subpoena instituted by the President).

[139] *See* Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, POLITICO, (May 9, 2019), https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120 (describing a settlement reached during subpoena enforcement lawsuit).

[140] The House has authorized various lawsuits to enforce investigative demands in the 116th Congress. *See* Charlie Savage and Nicholas Fandos, *The House v. Trump: Stymied Lawmakers Increasingly Battle in the Courts*, N.Y. TIMES, Aug. 13, 2019.

[141] *See* Senate Select v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In 1928, members of a Senate special investigative committee brought suit to obtain documents associated with a disputed Senate election, but the claim was dismissed on jurisdictional grounds due to a lack of Senate authorization for the suit. Reed v. Delaware Cty. Com'rs, 277 U.S. 376, 389 (1928). JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 197 (1976) (noting that the Senate Select Committee's lawsuit to enforce the subpoena issued to President Nixon was "the first civil action to enforce a congressional subpoena issued to the executive").

[142] United States v. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) ("When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted."); United States v. AT&T, 567 F.2d 121, 123 (D.C. Cir. 1977) (describing the court's desire to "avoid a resolution that might disturb the balance of power between the two branches and inaccurately reflect their true needs" and to "refrain[] from deciding the merits of their claims").

[143] *House of Representatives*, 556 F. Supp at 152; *AT&T*, 567 F.2d at 127. When courts have reviewed exercises of the investigative power, that review has generally been narrow and "should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

The courts have never resolved an interbranch subpoena dispute in an impeachment investigation. As noted, there are many reasons for this, including the infrequent occasions in which such disputes arise, the fact that the Speech or Debate clause and the political question doctrine appear constitutionally to prevent judicial review of most aspects of the impeachment power, and because the House itself has suggested that seeking judicial involvement in an impeachment investigation is inappropriate.[144] Moreover, because impeachment is an internal House process, any exercise of the power is typically intertwined with the House's authority to set its own rules, an authority courts are reluctant to disrupt or second-guess.[145] Thus, some evidence suggests that both the House and the courts have viewed judicial involvement in an impeachment inquiry as inappropriate or in excess of the judiciary's power. As such, any discussion of the legal impact an impeachment investigation may have on the judicial stage of an investigation is necessarily speculative.

If the House[146] were to seek judicial enforcement of a subpoena issued as part of an impeachment investigation, questions surrounding the courts' role may increase the complexity of the case. To be sure, the courts have made clear that, when necessary, they have the authority to adjudicate subpoena enforcement cases.[147] But to the extent a court views an investigative conflict that arises during an impeachment investigation as constituting "judicial review" of the impeachment power, it could feel obligated to leave resolution of the dispute to the political branches. During the Nixon impeachment investigation, the House Judiciary Committee noted that its "determination not to seek to involve the judiciary reflected not only an intent to preserve the constitutional structure, but also the high probability that the courts would decline to rule on the merits of the case because it is nonjusticiable" under the political question doctrine.[148] Were the court to reach this conclusion it would cut off, at least in an impeachment investigation, one of the House's principal legal mechanisms of enforcing subpoenas issued to the executive branch. In such a scenario, the House might need to find other methods of compelling compliance with its investigative demands, including perhaps through the impeachment power itself.

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[144] *Nixon Impeachment Report*, *supra* note 20, at 210. *Nixon*, 506 U.S. 224, 233 (1993) (noting that there is no "evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers"); In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1446 (11th Cir. 1987).

[145] *See* United States v. Ballin, 144 U.S. 1, 5 (1892); *Nixon*, 506 U.S. at 230-31.

[146] Enforcement could also be sought by a House committee pursuant to the process established in H.Res. 430 and House Rule 2, which provides that "the chair of each standing and permanent select committee, when authorized by the Bipartisan Legal Advisory Group, retains the ability to initiate or intervene in any judicial proceeding before a Federal court on behalf of such committee." H.Res. 430, 116th Cong. (2019).

[147] United States v. Nixon, 418 U.S. 683, 697 (1974) (concluding that a dispute over "production or non-production" of material pursuant to a subpoena is "of a type which are traditionally justiciable"); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) ("The fact that this case arises out of a dispute between two branches of government does not make it non-justiciable; Supreme Court precedent establishes that the third branch has an equally fundamental role to play, and that judges not only may, but sometimes must, exercise their responsibility to interpret the Constitution and determine whether another branch has exceeded its power. In the Court's view, endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here."); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) ("Notwithstanding that the opposing litigants in this case are co-equal branches of the federal government, at bottom this lawsuit involves a basic judicial task—subpoena enforcement—with which federal courts are very familiar.").

[148] *Nixon Impeachment Report*, *supra* note 20, at 210-11. *Id*. at 212 ("In deciding upon the validity of subpoenas in an impeachment inquiry, the court would necessarily have to determine whether the subpoenaed material was reasonably relevant to the inquiry. This, in turn, would lead it to pass, at least implicitly, on the scope of constitutional grounds for impeachment.").

Nevertheless, if the House took a dispute to court, and the court was willing to hear it, there appear to be at least three potential ways in which an impeachment investigation could, relative to a legislative investigation, provide the House with a stronger legal position in any attempt to use the judiciary to obtain information.[149] All three are applicable to the current House investigations into the conduct of President Trump. An impeachment investigation may (1) improve the likelihood of a court authorizing committee access to grand jury materials; (2) relieve any possible limitations imposed by the requirement that a committee act with a "legislative purpose"; and (3) improve the likelihood that a committee will be able to overcome claims of executive privilege made in response to congressional demands. However, it is important to note that even in these areas, it is arguable that a congressional committee engaged in a legislative investigation could also obtain much of the same information, as both legislative and impeachment investigations constitute an exercise of significant constitutional authority.[150] As a result, while an impeachment investigation may very well increase the House's access to information, House committees may have substantial authority to obtain a significant amount of information without reliance on the impeachment power.

Access To Grand Jury Materials

One area of ongoing dispute between the House and the Trump Administration is congressional access to grand jury materials. House investigations have thus far been unsuccessful in obtaining evidence and materials gathered by the grand jury empaneled for use in Special Counsel Robert Mueller's investigation of Russian interference in the 2016 election and possible obstruction of justice by President Trump. DOJ has asserted that the secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure prevent such a disclosure.[151] Past precedents, however, suggest that a court would likely accord a committee engaged in an impeachment investigation access to grand jury materials.[152]

Rule 6(e) establishes a general requirement of grand jury secrecy.[153] Under the Rule, identified persons (including attorneys for the government and grand jurors) may not disclose "a matter

[149] *See* Stern, *supra* note 11 ("While it is true that the House has substantial powers of inquiry apart from impeachment, there is little doubt that initiating impeachment proceedings would strengthen its investigatory position considerably.") A Judiciary Committee staff memo written during the Nixon impeachment investigation states that "the Supreme Court has contrasted the broad scope of the inquiry power of the House in impeachment proceedings with its more confined scope in legislative investigations. From the beginning of the Federal Government, Presidents have stated that in an impeachment inquiry the Executive Branch could be required to produce papers that it might with-hold in a legislative investigation." *See Texts of House Panel Memorandums on Subpoena to Nixon on Watergate Data*, N.Y. TIMES (April 12, 1974) While Presidents have reflected generally on the pervasive scope and strength of an impeachment investigation, the Supreme Court does not appear to have clearly articulated a definitive contrast between legislative and impeachment investigations. *See infra* notes 234-36 (discussing judicial comparisons between legislative and impeachment investigations).

[150] *See* CRS In Focus IF10015, *Congressional Oversight and Investigations*, by Todd Garvey and Walter J. Oleszek.

[151] Fed. R. Crim. P. 6(e).

[152] See CRS Report R45456, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight*, by Michael A. Foster, at 41-42. As noted, the Judiciary Committee has filed a petition asking the U.S. District Court for the District of Columbia to authorize disclosure of certain materials sought by the committee pursuant to the exception for disclosure preliminary to a judicial proceeding. See Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, Case: 1:19-gj-00048 (D.D.C. July 26, 2019).

[153] Creation of the rules was authorized by statute in 1940. Act of June 29, 1940, ch. 445, 54 Stat. 688. That statute provided the Supreme Court with the authority to establish general rules of criminal procedure upon approval by Congress. Proposed rules were submitted to Congress in 1945, and became effective in 1946. *See* STAFF OF H.R. COMM. ON THE JUDICIARY, 114TH CONG., FEDERAL RULES OF CRIMINAL PROCEDURE VII (Comm. Print 2016).

occurring before the grand jury" unless the disclosure fits within certain enumerated exceptions, many of which require court approval.[154] Although there is no clear definition of what constitutes a "matter occurring before the grand jury," the rule has generally been interpreted as broadly encompassing anything that might reveal what took place in the grand jury room.[155]

None of the exceptions in Rule 6(e) explicitly permit disclosure of grand jury material to Congress in the course of an investigation. But courts have previously provided Congress with access to these materials on various grounds. Disclosure has primarily been approved to a committee engaged in an impeachment investigation through the Rule's exception permitting release of protected materials "preliminary to or in connection with a judicial proceeding."[156] In these cases, courts appear to have viewed an impeachment trial in the Senate as a "judicial proceeding" and the impeachment investigation in the House as "preliminary" to that "judicial" trial.[157] As summarized by a federal district court, "There can be little doubt that an impeachment trial by the Senate is a 'judicial proceeding' in every significant sense and that a House investigation preliminary to impeachment is within the scope of the Rule."[158] These conclusions are further informed by two court opinions determining that committee *legislative* investigations do not meet the requirements of the judicial proceeding exception, including one in which a committee requested grand jury materials to "fulfill its oversight responsibilities."[159] Notably however, the legislative investigations did not involve an individual official's misconduct or raise impeachment issues.

Grand jury materials were disclosed to Congress during both the Nixon and Clinton impeachment inquiries, though there is ambiguity as to the legal reasoning applied by the courts in authorizing those disclosures. During the Nixon impeachment investigation, the House Judiciary Committee requested access to evidence and materials that had been presented to the court by the grand jury.[160] Judge John Sirica of the U.S. District Court for the District of Columbia concluded that disclosure to the Committee was "eminently proper, and indeed obligatory," but his opinion did not include a detailed discussion of Rule 6(e).[161] Judge Sirica appears to have relied on various factors in reaching his decision, including a belief that courts should "presumptively favor disclosure to those for whom the matter is a proper concern and whose need is not disputed"; the

[154] Fed. R. Crim. P. 6(e)(2)(B), (e)(3). The notion that courts may have the inherent authority to authorize the disclosure of grand jury materials was recently foreclosed, at least in the D.C. Circuit, in McKeever v. Barr, 920 F.3d 842, 844 (D.C. Cir. 2019).

[155] In re Special Grand Jury 89-2, 450 F.3d 1159, 1176 (10th Cir. 2006); United States v. Smith, 123 F.3d 140, 148 (3rd Cir. 1997); United States v. Dynavac, Inc., 6 F.3d 1407, 1411 (9th Cir. 1993); In re Grand Jury Subpoena, 920 F.2d 235, 241 (4th Cir. 1990).

[156] Fed. R. Crim. P. 6(e)(3)(E)(i). The party seeking the grand jury material must also show a "particularized need." *See* Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979); In re Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1230 (D.D.C. 1974) (holding that "[i]t would be difficult to conceive of a more compelling need than that" of an investigating committee during a presidential impeachment investigation).

[157] *See* Foster, *supra* note 152, at 41-42.

[158] In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1075-76 (S.D. Fla. 1987).

[159] In re Grand Jury Impaneled Oct. 2, 1978 (79-2), 510 F. Supp. 112, 116 (D.D.C. 1981) (denying congressional committee request for grand jury materials "to fulfill its oversight responsibilities" during an oversight investigation of the DOJ's Public Integrity Section); In re Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cas. 78,639 (D.D.C. 1979) (denying a Senate committee access to grand jury materials as part of a legislative investigation into the uranium industry).

[160] The material had been presented to the court by the grand jury with the recommendation that it be provided to the Judiciary Committee. Haldeman v. Sirica, 501 F.2d 714, 715 (D.C. Cir. 1974).

[161] In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219, 1227 (D.D.C. 1974).

fact that the President did not object to the release; and the desire to avoid the "incredible" conclusion that "grand jury matters should lawfully be available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation."[162] The D.C. Circuit affirmed in *Haldeman v. Sirica* by expressing "general agreement" with Judge Sirica's opinion. But it too identified no single or clear reason for permitting disclosure.[163] Despite neither Judge Sirica's district court opinion nor the D.C. Circuit's opinion in *Haldeman* making any explicit holding as to impeachment and Rule 6(e)'s judicial proceeding clause, a recent D.C. Circuit decision stated that "we read *Haldeman* ... as fitting within the Rule 6 exception for 'judicial proceedings.' Doing so reads the case to cohere, rather than conflict, with the Supreme Court and D.C. Circuit precedents...."[164]

The D.C. Circuit also authorized Independent Counsel Ken Starr to provide the Judiciary Committee with grand jury material in connection to the Clinton impeachment.[165] The reasoning of the judicial order, which occurred before the House had formally authorized the impeachment investigation, was perhaps even more opaque than in the earlier cases interpreting Rule 6(e)'s application to the Nixon impeachment investigation. However, the judicial order in the Clinton case appears to have been influenced by now-expired statutory requirements included in the Independent Counsel Statute (Act).[166] Upon a motion from Starr, the Special Division of the D.C. Circuit (responsible for overseeing the jurisdiction of Independent Counsels) authorized Starr to "deliver to the House of Representatives" material he found necessary to comply with the Act's explicit requirement that he advise the House of "any substantial and credible information which such independent counsel receives … that may constitute grounds for an impeachment."[167] Although not providing any analysis, the D.C. Circuit stated that "[t]his authorization constitutes an order for purposes of" the judicial proceeding provision of Rule 6(e).[168]

While there is precedent supporting the conclusion that a committee engaged in an impeachment investigation can obtain grand jury materials, there are also ways in which a committee engaged in a legislative investigation may be able to obtain that same information. [169] For example, two

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[162] *Id*. at 1230 ("[I]t should not be forgotten that we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States. It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information.").

[163] *Haldeman*, 501 F.2d at 715-16.

[164] McKeever v. Barr, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019).

[165] Order, In Re Madison Guaranty Sav. & Loan Assoc., No. 94-1(D.C. Cir. 1998).

[166] 28 U.S.C. §§ 591-599.

[167] *Id*. § 595(c).

[168] Order, In Re Madison Guaranty Sav. & Loan Assoc., No. 94-1(D.C. Cir. 1998).

[169] Foster, *supra* note 152, at 35-42. There may also be an argument that Rule 6(e) should be subject to alteration or repeal by either the House or Senate acting unilaterally. The Supreme Court has recognized that "one legislature cannot abridge the powers of a succeeding legislature." Fletcher v. Peck 10 U.S. 87, 135 (1810). A corollary to this principle arguably provides that Congress, by statute, cannot seek to entrench a restriction on a constitutional power accorded to a single chamber, such as the House or Senate power to set its own rules. *See* United States v. Ballin, 144 U.S. 1, 5 (1892) (holding that house rulemaking authority "is a continuous power, always subject to be exercised by the house"). As such, statutes that purport to impose internal procedural requirements or restrictions on either the House or the Senate are generally enacted "with full recognition of the constitutional right of either House to change the rules … at any time, in the same manner, and to the same extent as in the case of any other rule of that House." *See e.g.*, 5 U.S.C. § 802(g)(2). This is the case despite bicameralism and presentment limitations imposed by Article I and, as interpreted in INS v. Chadha, 462 U.S. 919, 951 (1983), requiring that "the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Thus, even when a procedural rule is placed in statute, it may generally be changed unilaterally by either the House or Senate through each (continued...)

courts have authorized disclosure of grand jury materials during a legislative investigation based on a determination that Congress has a "constitutionally independent legal right" to obtain information in furtherance of "legitimate legislative activity" that either overrides Rule 6(e) or requires that the rule be interpreted in a way that does not apply its nondisclosure requirements to legitimate investigative requests of Congress.[170] For example, in *In re Grand Jury Investigation of Ven-Fuel*, a Florida federal district court held that a congressional subcommittee engaged in "legitimate legislative activity" was entitled to grand jury information because it had "demonstrated [a] constitutionally independent legal right to the documents" sought.[171] The decision was based on the court's reading of the Speech or Debate Clause, which the court interpreted as providing "the inherent, implied power to conduct legislative activity" including investigations, and upon a desire to "avert and minimize" constitutional conflict between the branches.[172] While *Ven-Fuel* has been subject to some judicial criticism for its interpretation of the Speech or Debate Clause,[173] the opinion nevertheless supports the proposition that a committee engaged in legitimate legislative investigative activity has a right of access to grand jury material despite Rule 6(e).[174]

As such, while Congress is most likely to obtain access to grand jury materials as part of an impeachment investigation, there are arguments that a committee can potentially gain access to such material as part of a traditional legislative investigation.

Implications for Legislative Purpose

The Trump Administration has argued that some of the ongoing House investigations, especially those focusing on the President's conduct before taking office, lack a "legislative purpose" and therefore exceed the committees' investigative authority.[175] Those arguments have thus far been

(...continued)

chamber's normal process of changing its own rules. It is arguable that the same principle could apply to other powers provided directly to either chamber by the Constitution—including the investigative power which belongs independently to the House and Senate, or the impeachment power which is accorded solely to the House. Under such an interpretation, any statutory restriction (including Rule 6(e)) on the House or Senate's authority to obtain information that would otherwise fall within its constitutional authority would be subject to change or alteration through the action of one house. Otherwise, the Congress that enacted the statutory provision will have bound future Houses and future Senates in how they may exercise their constitutional power of inquiry.

[170] *See* Foster, *supra* note 152, at 36-39.

[171] *Ven-Fuel*, 441 F. Supp. 1299, 1307 (M.D. Fla. 1977).

[172] *Id*. at 1304-05. *See also*, In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1075 (S.D. Fla. 1987) (holding that the House is "entitled to obtain grand jury records by virtue of the Speech or Debate Clause").

[173] *See* In re Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cas. 78,639, 78,642 (D.D.C. 1979) (rejecting that the Speech or Debate Clause can be used as a "sword to enable Congress to penetrate an otherwise secret function of one of the other branches").

[174] There are other Rule 6(e) exceptions that may permit disclosure during a legislative investigation. *See* Foster, *supra* note 152, at 40-41 (discussing exceptions for disclosure to "any government personnel … that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law" and disclosure of grand jury materials relating to certain intelligence and national security matters to "any appropriate federal … government official"). The House Permanent Select Committee on Intelligence, for example, has asserted that Rule 6(e) "poses no bar to disclosure to the Committee of grand jury material involving foreign intelligence or counterintelligence." *See* Letter from Adam B. Schiff, Chairman, House Permanent Select Committee on Intelligence to William Barr, Attorney General (May 8, 2019), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=638.

[175] See generally, CRS Legal Sidebar LSB10301, *Legislative Purpose and Adviser Immunity in Congressional Investigations*, by Todd Garvey.

rejected by the three courts that have reached the merits of the question (two district courts and the D.C. Circuit).[176] Nevertheless, the legislative purpose requirement appears to be substantially limited as a defense to a subpoena in an impeachment investigation.

As noted, Congress enjoys broad constitutional authority to obtain information relevant to its legislative investigations. But because that authority is derived from the Constitution's delegation of legislative power to Congress, it extends only to those inquiries that can be said to "aid the legislative function."[177] The Supreme Court has generally implemented this constitutional limit on the scope of the investigative power by requiring that committee investigations serve a valid "legislative purpose."[178] The legislative purpose requirement is quite generous, permitting investigations into any topic upon which legislation could be had or over which Congress may properly exercise authority, including investigations undertaken by Congress to inform itself for purposes of lawmaking or possibly to ensure that the executive branch is complying with its obligation to faithfully execute laws passed by Congress.[179]

In practice, the legislative purpose requirement rarely acts as a significant restriction on legislative investigations, especially those relating to government officials. This is principally because the scope of what constitutes a permissible legislative purpose is broad and because courts have effectively adopted a presumption that committees act with a valid purpose.[180] But the courts have acknowledged at least two general types of investigations in which Congress likely exceeds its authority. First, Congress does not act with a legislative purpose when investigating private conduct that has no nexus to the legislative function. As summarized by the Supreme Court, a committee "cannot constitutionally inquire 'into the private affairs of individuals who hold no office under the government' when the investigation 'could result in no valid legislation on the subject to which the inquiry referred.'"[181] Second, the Supreme Court has stated that Congress does not act with a legislative purpose when the subject of an investigation is a function "exclusively" committed to another branch of government. As stated in *Barenblatt v. United States*: "[l]acking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive."[182] The D.C. Circuit recently reaffirmed this restriction,

[176] Trump v. Mazars USA, LLP, No. 19-5142, 2019 U.S. App. Lexis 30475, at *2 (D.C. Cir. Oct. 11, 2019); Trump v. Comm. on Oversight & Reform of the United States House of Representatives, 380 F. Supp. 3d 76, 82-83 (D.D.C. 2019) ; Trump v. Deutsche Bank AG, 2019 U.S. Dist. LEXIS 86902 (S.D.N.Y 2019).

[177] *See* McGrain, 273 U.S. at 175.

[178] Watkins v. United States, 354 U.S. 198, 201 (1957).

[179] *Id. at 187. See also Mazars*, 2019 U.S. App. Lexis 30475, at * 53 (emphasizing that "the relevant inquiry is whether legislation '*may be had*,' not whether constitutional legislation will be had")(citations omitted).

[180] *See* Garvey, *supra* note 175, at 2-3*; McGrain*, 273 U.S. at 178 (holding that "the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object."); *id.* ("We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed …") (citation omitted).

[181] Hutcheson v. United States, 369 U.S. 599, 613 n. 16 (1962) (quoting Kilbourn v. Thompson, 103 U.S. 168, 195 (1881)). Nor does Congress have power to "expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

[182] Barenblatt v. United States, 360 U.S. 109, 112 (1959); Quinn v. United States, 349 U.S. 155, 161 (1955) (concluding that the power to investigate does not "extend to an area in which Congress is forbidden to legislate"). The precise scope of this constraint as applied to oversight investigations of the executive branch is unclear and rarely used to invalidate a specific congressional investigative demand. In Tenney v. Brandhove, for example, the Supreme Court suggested that "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." 341 U.S. 367, 378 (1951).

holding that when "no constitutional statute may be enacted on a subject matter, then that subject is off-limits to congressional investigators."[183]

The legislative purpose requirement would appear to impose few, if any, consequential restrictions on a committee impeachment investigation.[184] But the manner in which the requirement applies to an impeachment inquiry may depend upon whether the source of authority for such an inquiry is thought to derive from the House's general legislative power or from the Constitution's specific provisions concerning impeachment.[185] If an impeachment investigation derives from Article I's vesting of legislative power in the House and Senate, then the legislative purpose requirement would likely apply as it does to other investigations conducted pursuant to that power. The requirement, however, would appear to be easily satisfied in an impeachment investigation because the legislative function and purpose that is being served is clear: the committee is assisting the House in carrying out its impeachment power. If, on the other hand, the authority for an impeachment investigation does not arise from Article I's vesting of "legislative powers" in a Congress, but instead derives directly and independently from the House's impeachment power, it need not be exercised in "aid of the legislative function,"[186] and, as a result, the legislative purpose restriction would not apply.[187]

Regardless of how the requirement relates to impeachment, it would appear that the scope of an impeachment investigation is principally governed not by the need for a "legislative purpose," but instead by its relationship to the House's impeachment role.[188] As such, the permissible scope of an impeachment investigation is initially narrow, in that the investigation would presumably need to relate to the House's role in determining whether an impeachable official has committed an impeachable offense.[189] But once an investigation meets that threshold requirement, the scope of the investigation is broad, to potentially include any matter "reasonably relevant" to the possible impeachment.[190]

While the legislative purpose requirement is unlikely to impose any substantial restriction on the scope of an impeachment investigation, both the previously discussed Supreme Court case law and more recent decisions from two federal district courts and the D.C. Circuit suggest that the

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[183] *Mazars*, 2019 U.S. App. Lexis 30475, at *28 ("Congress may investigate only those topics on which it could legislate … If no constitutional statute may be enacted on a subject matter, then that subject is off-limits to congressional investigators.").

[184] During the impeachment investigations of Andrew Johnson, the President supplied the House with both private bank records and documents relating to the exercise of his pardon power. *Nixon Impeachment Report*, *supra* note 20, at 206.

[185] *See* pages 7-10 *supra* .

[186] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[187] *See* Reynolds, *supra* note 11 (arguing that with respect to a legislative purpose argument "it would simply not be relevant in the context of impeachment proceedings, because the power to impeach is contained in an entirely separate and discrete section of the U.S. Constitution.").

[188] The scope of an impeachment investigation may also be limited by the language of any authorizing resolution adopted by the House. *See Clinton Impeachment Investigation Report*, *supra* note 3, at 3 ("The scope of the inquiry authorized by this resolution will permit consideration of any matter necessary to the Committee's inquiry into the existence or nonexistence of sufficient grounds for impeachment.").

[189] H.R. REP. NO. 271, 27th Cong. (1843) ("The President himself, in the discharge of his most independent functions, is, subject to the exercise of this power-a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent.").

[190] *Nixon Impeachment Report*, *supra* note 20, at 212. *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975)("The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."). Even if the legislative purpose requirement does not constrain an impeachment investigation, other constitutional considerations may still apply. *See supra* notes 117-19.

requirement plays a similarly narrow role in legislative investigations focusing on presidential misconduct. For example, both the D.C. federal district court and the D.C. Circuit recently rejected an attempt by President Trump to block his accounting firm from complying with a House Oversight and Reform Committee subpoena for the President's financial records on the ground that the Committee lacked a legislative purpose.[191] In holding that the Committee had authority to seek the financial documents as part of its ongoing legislative investigation, the district court explicitly noted that "Congress plainly views itself as having sweeping authority to investigate illegal conduct of a President," even "before initiating impeachment proceedings."[192] The court was not willing to adopt an interpretation of legislative purpose in legislative investigations that would "roll back the tide of history" regarding congressional investigations of the President.[193]

The D.C. Circuit affirmed in *Trump v. Mazars USA, LLP*, holding in a 2-1 decision that the Committee's subpoena was a valid exercise of the Committee's authority to conduct legislative investigations.[194] In doing so, the court made two key holdings as to the proper application of the legislative purpose requirement, both of which support committee authority to investigate presidential misconduct as part of a legislative investigation. First, the court held that the Committee had articulated "strong evidence" of its legitimate legislative purpose by asserting that the subpoenaed information was needed to "review multiple laws and legislative proposals," including legislation pending before the House.[195] The fact that one of the Committee's purposes was to investigate potential criminal wrongdoing or misconduct by the President did not undermine the committee's legitimate purposes as "an interest in past illegality can be wholly consistent with an intent to enact remedial legislation."[196] Indeed, a committee's "interest in alleged misconduct" can be "in direct furtherance of its legislative purpose."[197] Second, the court held that the subject of the Committee investigation was one "on which legislation may be had."[198] The court evaluated legislation that would require the presidential disclosure of financial information as the appropriate "category of statutes" that could result from the committee investigation.[199] Applying separation-of-powers principles to that general class of statute, the court could "detect no inherent constitutional flaw in laws requiring Presidents to publicly disclose certain financial information."[200]

The dissenting judge in *Mazars* would have concluded that "[i]investigations of impeachable offenses simply are not, and never have been, within Congress's legislative power" because "impeachment provides the exclusive mechanism for Congress to investigate such conduct."[201] In

[191] *See Mazars*, 2019 U.S. App. Lexis 30475, at *2; Garvey, *supra* note 175, at 2.

[192] Trump v. Comm. on Oversight & Reform of the United States House of Representatives, 380 F. Supp. 3d 76, 95 (D.D.C. 2019).

[193] *Id*. at 96.

[194] *Mazars*, 2019 U.S. App. Lexis 30475, at *2.

[195] *Id*. at *37, 100.

[196] *Id*. at *41-42.

[197] *Id*. at *44.

[198] *Id*. at *66.

[199] *Id*. at *57 ("We take this category of statutes as the appropriate object of our litmus test in this case.").

[200] *Id*. at *66.Thus, in light of the "constitutionally permissible options open to Congress" the court found that "the challenged subpoena seeks 'information about a subject on which legislation may be had.'" *Id*. (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508 (1975)).

[201] *Id*. at *98, 104-05, 113 (Rao, J., dissenting) (contending that "allegations of illegal conduct against the President cannot be investigated by Congress except through impeachment"). In discussing the type of conduct that could not be (continued...)

response to this "novel" position,[202] the majority opinion engaged in some limited discussion of the relationship between legislative and impeachment investigations.[203] That discussion was characterized by deference to Congress. As the court noted, the Constitution leaves questions of "whether to commence the impeachment process" and when to "move from legislative investigation to impeachment" to Congress's "judgment."[204] Moreover, Congress, and not the courts, must make the "quintessentially legislative" determination of whether misconduct is "better addressed" through "oversight and legislation" or through the "grave and weighty process of impeachment."[205]

In sum, the legislative purpose requirement is unlikely to be construed as posing an obstacle to information access in an impeachment investigation. Nor does the requirement appear to serve as a consequential legal limitation on legislative investigations, including those focusing on executive branch misconduct, so long as a committee can articulate a connection to a "subject on which legislation may be had."[206]

Overcoming Claims of Executive Privilege

Executive privilege has been formally asserted as a justification for noncompliance with committee subpoenas in the ongoing House investigations.[207] As discussed, a court may be hesitant to resolve a conflict between a congressional committee and the President over executive privilege—instead preferring that the political branches negotiate a resolution or that Congress enforce its demands by use of its own legislative and impeachment powers.[208] However, if a court were to address a privilege dispute, including one over subpoenaed documents or testimony by executive officials, there are reasons to believe that a committee engaged in an impeachment investigation may be more likely to overcome a presidential assertion of the privilege than a committee engaged in a traditional legislative investigation.[209] Even still, a committee engaged in

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investigated as part of a legislative investigation, the dissenting judge sometimes referred to the narrower "unlawful" *id*. at *103, or "illegal conduct" *id*. at *104, and at other times to the broader "impeachable offenses," *id*. at* 98 or even "wrongdoing." *Id*. at *101.

[202] The majority viewed this "novel" position as unsupported by any case law and one that endorsed a "sweeping rule of legislative paralysis" that "would enfeeble the legislative branch" and "reorder the very structure of the Constitution." *Id.* at *69, 72. The majority also described the dissent's position as in conflict with the Supreme Court's statement in *Hutcheson v. United States* that "a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever … crime or wrongdoing is disclosed." 369 U.S. 599, 618 (1962).

[203] *Mazars*, 2019 U.S. App. Lexis 30475, at *66-73.

[204] *Id*. at *72.

[205] *Id*. at *69, *72.

[206] *Eastland*, 421 U.S. at 508; *McGrain*, 273 U.S. at 177.

[207] *See* Jacqueline Thomsen, *Trump Asserts Executive Privilege Over Subpoenaed Census Docs*, THE HILL, June 12, 2019; Rachael Bade, Carol D. Leonnig, and Matt Zapotosky, *Trump Asserts Executive Privilege Over Mueller Report; House Panel Holds Barr in Contempt*, WASH. POST., May 8, 2019. *See also* H.Res. 430, 116th Cong. (2019) (authorizing committee civil subpoena enforcement suits).

[208] *See supra* notes 140-43.

[209] *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 115 (2d ed. 2000) (arguing that "[a]llowing the [P]resident to withhold information from Congress on the basis of an assertion of privilege" undercuts the goal of presidential accountability, by permitting the President to "hinder the only constitutionally authorized process by which Congress may hold him accountable for his conduct"). Different considerations may apply if a committee engaged in an impeachment investigation sought to compel the testimony of the President himself. *See* CRS Legal Sidebar LSB10130, *Compelling Presidential Compliance with a Judicial Subpoena*, by Todd Garvey.

a legislative investigation, depending on the "nature and appropriateness" of the committee's function and its need for the information, may also be able to access certain material covered by the privilege.[210]

Executive privilege is a term that has been used to describe the President's power to "resist disclosure of information the confidentiality of which [is] crucial to fulfillment of the unique role and responsibilities of the executive branch of our government."[211] However, there is not one, single "executive privilege." Instead, there is a suite of distinct privileges, each of different—though sometimes overlapping—scope. These privileges primarily include the presidential communications privilege, which generally protects communications involving the President or his close advisers that relate to presidential decisions;[212] the deliberative process privilege, which generally protects predecisional and deliberative communications made within the executive branch;[213] and, at least under the executive branch's view, the law enforcement privilege, which arguably protects the contents of open (and sometimes closed) law enforcement files, including evidence gathered in an investigation and communications related to investigative and prosecutorial decisionmaking.[214]

In a congressional investigation, the precise privilege asserted in response to a subpoena is an important determination because each component privilege arises from a different source of law, with some components more firmly established in judicial precedent than others. For example, while the Supreme Court has recognized that the presidential communications privilege derives from the Constitution,[215] the deliberative process privilege appears to arise principally from the common law, but, at least in the view of one district court, may have a "constitutional dimension."[216] On the other hand, although the executive branch asserts that the law enforcement privilege derives from both the President's powers under Article II and constitutionally based individual trial and privacy rights, those arguments have not been directly tested in court—at least not in the context of a congressional subpoena where committees have previously objected to that privilege's use.[217]

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[210] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

[211] In re *Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997).

[212] *See* Judicial Watch v. Dep't of Justice, 365 F.3d 1108, 1113-14 (D.C. Cir. 2004) (describing the presidential communications privilege).

[213] *See* In re *Sealed Case*, 121 F.3d at 737 (describing the deliberative process privilege).

[214] *See* Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff, 32 Op. O.L.C. 7, 10 (2008) (describing the "law enforcement component of executive privilege"). *See also* CRS Legal Sidebar LSB10271, *The Special Counsel's Report: Can Congress Get It?*, by Michael A. Foster and Todd Garvey (describing congressional access to the law enforcement materials).

[215] United States v. Nixon, 418 U.S. 683, 705-06 (1974) ("Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.").

[216] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016).

[217] *See* H. COMM. ON OVERSIGHT AND GOV' REFORM, 110TH CONG., REP. ON PRESIDENT BUSH'S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008) ("The Attorney General's argument that the subpoena implicates the 'law enforcement component' of executive privilege is equally flawed. There is no basis to support the proposition that a law enforcement privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege.").

What is apparent is that none of the executive privileges, even if found to cover subpoenaed information, necessarily presents an absolute bar to congressional access. As announced by the Supreme Court in *United States v. Nixon*, when faced with an executive privilege dispute courts must "resolve [the] competing interests in a manner that preserves the essential functions of each branch."[218] When the showing of need is adequate, the privilege is overcome. For example, in *Nixon*, the Court held that the President's "generalized interest in confidentiality … must yield to the demonstrated, specific need for evidence in a pending criminal trial...."[219] As such, it would appear that the type of privilege at play, the corresponding executive need for confidentiality, and Congress's interest in obtaining the information all may impact potential judicial outcomes in an executive privilege dispute.[220]

The Supreme Court has never addressed executive privilege's application in either a legislative or impeachment investigation.[221] In fact, the leading (and arguably only substantive appellate) case addressing any component of executive privilege in the congressional context is the D.C. Circuit's decision in *Senate Select Committee v. Nixon*.[222] 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 advisers in the Oval Office,[223] thus squarely implicating the presidential communications privilege. Notably, the subpoena was issued as part of a legislative, rather than impeachment, investigation.

Although ultimately siding with the President, the D.C. Circuit made clear that a President's assertion of executive privilege could be overcome by a "strong showing of need by another institution of government …"[224] As applied to Congress in the exercise of its investigative powers, this meant that a committee may overcome the President's privilege when it has shown that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function."[225]

The Senate Watergate Committee sought to make the required showing by asserting it had a "critical" need for the tapes to carry out the two functions that most frequently form the basis of a legislative investigation: oversight and lawmaking.[226] First, pursuant to its oversight function, the Committee argued that access to the tapes was necessary to "oversee the operations of the

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[218] *Nixon,* 418 U.S. at 707. *See also,* Nixon v. Sirica, 487 F.2d 700, 716 (D.C. Cir. 1973) (balancing the interests "that would be served by disclosure in a particular case").

[219] *Nixon*, 418 U.S. at 713. The Supreme Court has acknowledged that there may be greater protections for "military, diplomatic, or sensitive national security secrets." *Nixon,* 418 U.S. 706.

[220] For example, the D.C. Circuit has made clear that the deliberative process privilege is more easily overcome than the presidential communications privilege. *See* In re *Sealed Case,* 121 F.3d 729, 745-46 (D.C. Cir. 1997) (concluding that "negation" of the deliberative process privilege is subject to less "scrutiny" than the presidential communications privilege and "disappears altogether when there is any reason to believe government misconduct occurred"); Judicial Watch, Inc. v. Dep't of Justice, 365 F. 3d 1108, 1113-14 (D.C. Cir. 2004).

[221] In *Nixon,* which involved a criminal trial subpoena, the Court explicitly stated that "we are not here concerned with the balance between the President's generalized interest in confidentiality … and congressional demands for information." *Nixon,* 418 U.S. at 712 n.19.

[222] 498 F. 2d 725 (D.C. Cir. 1974). *See also,* United States v. AT&T Co., 567 F.2d 121, 123 (D.C. Cir. 1977).

[223] *Senate Select,* 498 F.2d at 726-27.

[224] *Id.* at 730.

[225] Notably, the court clarified that the "nature of the presidential conduct that the subpoenaed material might reveal," including President Nixon's alleged criminal misconduct, was not a significant factor in assessing whether the privilege was overcome. *Id*. at 731. Instead, that analysis depended "solely" on the "nature and appropriateness" of the committee's function. *Id*.

[226] *Id*. at 731-32.

executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view."[227] Second, pursuant to its lawmaking function, the Committee argued that "resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it 'would aid in a determination whether legislative involvement in political campaigns is necessary.'"[228]

The circuit court rejected both arguments, holding that the Senate Watergate Committee's need was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoenas."[229] That holding, however, appears to have been based on a pair of unique facts: copies of the tapes had been provided to the House Judiciary Committee under that Committee's impeachment investigation and the President had publicly released partial transcripts of the subpoenaed conversations.[230] Both of these disclosures significantly impacted the appellate court's assessment of the Senate Watergate Committee's need for the tapes. For example, because the House Judiciary Committee had already obtained the tapes, any further oversight need by the Watergate Committee was "merely cumulative."[231] With regard to the Watergate Committee's lawmaking functions, the D.C. Circuit held that the particular content of the conversations was not essential to future legislation, as "legislative judgments normally depend more on the predicted consequences of proposed legislative actions ... than on precise reconstruction of past events."[232] Any "specific legislative decisions" faced by the Committee, the court concluded, could "responsibly be made" based on the released transcripts.[233]

There was some suggestion in *Senate Select* that the case may have been resolved differently if the committee seeking the tapes had been engaged in an impeachment investigation. This line of reasoning was developed in the decision below, where the district court, after holding that the President was not obligated to comply with the Watergate Committee's subpoena, noted that "Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations."[234] On appeal in *Senate Select*, the D.C. Circuit also drew a somewhat similar comparison between the Senate Watergate Committee's oversight function and the House Judiciary Committee's impeachment function. The court did not, however, make any clear statement as to how it would weigh one relative to the other. Instead it stated that

> we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential

[227] *Id*.

[228] *Id*. at 731.

[229] *Id*. at 733.

[230] S. REP. NO.93-981, at 1083 (1974) ("It is clear, therefore, that the court's decision rested, as the court observed, on 'the peculiar circumstances of this case,' and should not necessarily prevent legislative committees in the future from obtaining materials relating to Presidential communications.").

[231] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 734 (D.C. Cir. 1974).

[232] *Id*. at 732.

[233] *Id*. at 733.

[234] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 523 (D.D.C. 1974) ("But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration.").

> impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source.[235]

The Supreme Court made a similar suggestion nearly a century earlier in *Kilbourn v. Thompson*, reasoning 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."[236]

These general statements suggest that courts may treat impeachment investigations differently from legislative investigations, but they do not elaborate on how or why. Although not directly articulated by the courts, there appears to be a variety of reasons an impeachment investigation might be balanced against an invocation of executive privilege in a manner that is more favorable to congressional access.

First, it is arguable that the importance of the impeachment function's constitutional role in addressing misconduct by federal officials and preserving the separation of powers[237] requires that impeachment investigations be afforded the utmost deference when weighed against executive branch confidentiality interests.[238] Indeed, there is substantial support for the proposition that executive privilege simply cannot be used to refuse Congress access to relevant information in an impeachment investigation.[239] As previously discussed, Congress has long viewed its power to obtain information in furtherance of its impeachment power to reach "the fullest and most unlimited extent."[240] In its report on the Nixon impeachment investigation, the House Judiciary Committee adopted this argument, concluding that

> [w]hatever 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.[241]

Because the House's need for information in an impeachment investigation has been equated to that of a court in a judicial proceeding,[242] it is possible to analogize the situation to that considered by the Supreme Court in *United States v. Nixon*, where the Court weighed the

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[235] *Senate Select*, 498 F.2d at 734.

[236] *Kilbourn*, 103 U.S. at 193. The *Kilbourn* decision took a very restrictive view of Congress's investigative power—essentially limiting permissible inquiries to those connected to either impeachment or the House's power to judge the election and qualification of its Members. The Supreme Court has subsequently described that narrow conception of Congress's investigative power as "severely discredited." Hutcheson v. United States, 369 U.S. 599, 613 n.16 (1962).

[237] THE FEDERALIST NO. 66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (reasoning that "the powers relating to impeachments are … an essential check … upon the encroachments of the executive").

[238] *See, e.g.*, Memorandum for All Executive Department and Agency General Counsel's Re: Congressional Requests to Departments and Agencies Protected By Executive Privilege (Sept. 28, 1994) (stating that "[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings"); Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 267 (1984) ("[T]he privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers.").

[239] *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 630 (1991) ("Once the impeachment process has commenced, Congress has plenary power. It is generally recognized that executive privilege will not shield a President from producing documents relating to an impeachment inquiry."); Gerhardt, *supra* note 117 at 113-15 (questioning the applicability of executive privilege during an impeachment investigation).

[240] H.R. REP. NO. 27-271, at 12.

[241] *Nixon Impeachment Report*, *supra* note 20, at 209.

[242] *Kilbourn*, 103 U.S. at 190.

privilege in the context of a criminal trial subpoena.[243] It could be argued that as in response to a subpoena in a pending criminal proceeding, a court could similarly view the privilege as insufficient to withstand a subpoena in an impeachment investigation. As articulated by the Judiciary Committee, "[i]f a generalized Presidential interest in confidentiality cannot prevail over 'the fundamental demand of due process of law in the fair administration of justice,' neither can it be permitted to prevail over the fundamental need to obtain all the relevant facts in the impeachment process."[244] This position is buttressed by concerns expressed by all three branches that executive privilege should not be used to hide wrongdoing, which would form the core of any impeachment investigation.[245]

Second, courts have suggested that the frequency with which disclosure may occur in a particular context is an important factor in any executive privilege balancing. For example in *Nixon*, the Supreme Court reasoned that "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."[246] Similar reasoning was applied in *Dellums v Powell*, in which the D.C. Circuit held that an executive privilege claim by former President Nixon was overcome in a civil suit alleging a civil conspiracy among high-level federal officials to deny a group of citizens their constitutional rights.[247] There, the circuit court held that "the possibility of disclosure" in such a limited class of cases "is not unlike the possibility of disclosure in criminal cases—the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled."[248] 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 in an impeachment investigation may be greater than in a legislative investigation. In *Senate Select*, the court suggested that specific information was not always necessary for Congress to carry out its lawmaking tasks.[249] In doing so, the court distinguished the role of a legislative investigation from that of a grand jury investigation:

> There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a

[243] *See* United States v. Nixon, 418 U.S. 683, 713 (1974) (holding that a generalized claim of executive privilege "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."). Given the House's investigatory role, a better analogy may be to the judiciary's weighing of the privilege in the context of a grand jury investigation in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) and later in In re *Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

[244] *Nixon Impeachment Report*, *supra* note 20, at 209. President Nixon disagreed with the Committee's reasoning, arguing that compliance with committee subpoenas would "constitute such a massive invasion into the confidentiality of Presidential conversations that the institution of the Presidency itself would be fatally compromised." *Id*. at 193.

[245] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) ("It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing.").

[246] *Nixon*, 418 U.S. at 712.

[247] Dellums v. Powell, 566 F.2d 167, 247 (D.C. Cir. 1977) (identifying a "strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment").

[248] *Id*. at 247.

[249] *Senate Select*, 498 F.2d at 732-33.

> legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes … We see no comparable need in the legislative process, at least not in the circumstances of this case.[250]

Impeachment investigations (and impeachment decisions), on the other hand, might require a more exacting factual record.[251] A decision to impeach is not a typical *generalized* legislative determination, but is perhaps more aptly characterized as a *specific* finding that the evidence suggests wrongdoing adequate to support the impeachment of a federal official.[252]

Impeachment is assuredly a weighty legislative interest, and long-standing visions of the power suggest that a committee engaged in an impeachment investigation may be more likely to overcome the President's privilege than a committee engaged in a legislative investigation. Nevertheless, it remains the case that in certain circumstances, a committee engaged in a legislative investigation may also obtain information protected by executive privilege. History provides numerous examples of the executive branch voluntarily disclosing information to Congress that it initially identified as protected.[253] Moreover, *Senate Select* cannot be read as establishing that legislative investigations can never overcome claims of executive privilege. As was stated by the Watergate Committee, "the court's decision rested, as the court observed, on 'the peculiar circumstances of this case,' and should not necessarily prevent legislative committees in the future from obtaining materials relating to presidential communications."[254] Instead, it would appear that a committee engaged in a legislative investigation can itself overcome a claim of executive privilege so long as it can show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function."[255]

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[250] *Id*. at 732.

[251] *See* Reynolds, *supra* note 11 ("The decision of whether to impeach requires the development of a detailed, backward-looking factual record or specific conduct by the president.").

[252] *See* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 264 (1974) (rejecting an assertion by Attorney General Richard Kleindienst that to impeach Congress needs neither "facts nor evidence … all it needs … is votes"). The House's impeachment role has sometimes been compared to that of a grand jury. *See* In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219, 1230 (D.D.C. 1974) (concluding that a committee engaged in an impeachment investigation "acts simply as another grand jury").

[253] Such disclosures are often made in order to alleviate pressure or potential penalties imposed by Congress. As a representative example, during an investigation into the White House Travel Office, contested documents were turned over to Congress on the day a contempt resolution against the White House Counsel was scheduled for a floor vote.

See H.REP. NO. 104-874, at 47 (1997). As noted, similar disclosures have occurred in this Congress. *See* Olivia Beavers and Morgan Chalfant, *Nadler Reaches Deal with Justice on Mueller Documents on Eve of Contempt Vote*, THE HILL, June 10, 2019.

[254] S. REP. NO.93-981, at 1083 (1974).

[255] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974). Although not clearly established, drawing from other contexts, this may include showing that "the subpoenaed materials likely contain important evidence and that this evidence, or equivalent evidence, is not practically available from another source." *See* In re *Sealed Case*, 121 F.3d 729, 759 (D.C. Cir. 1997).

Conclusion

An impeachment investigation is a substantial exercise of constitutional power vested exclusively in the House of Representatives. Invocation of the power likely strengthens the House's existing investigative authorities in ways that may allow the House (through its committees) to obtain more information from the executive branch than might otherwise be received through more traditional legislative investigations. Even so, reliance on the impeachment power may not always be necessary for Congress to obtain sensitive categories of information, including grand jury materials, evidence of private misconduct, or information protected by executive privilege. Whether investigating to inform itself for purposes of legislating, to conduct oversight of the executive branch, or to determine whether there is adequate reason to impeach a federal official, the House has broad authority to access relevant and needed information.

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