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NAVIGATING THE MURKY WATERS OF IMPEACHMENT: FAQS

To Our Clients and Friends:

Gibson Dunn's Congressional Investigations team has been following the impeachment inquiry in the U.S. House of Representatives and has developed a set of questions and answers designed to help sort out the many competing claims being made on both sides of the aisle, by media, and by various commentators. We hope that you find this document helpful and invite you to let us know of other questions you have.

Since Speaker Nancy Pelosi's September 24, 2019 announcement of a formal impeachment inquiry,[1] a myriad of uncertainties have emerged and continue to unspool as witnesses parade through the House Permanent Select Committee on Intelligence. We hear daily summaries of testimony and competing takes on its significance, but it's not easy to discern how all of the developing information fits within the impeachment process.

Perhaps the most important question is the macro one. As the Trump Administration and House leadership spar over whether proper procedures are being followed and whether the Administration should cooperate with the inquiry, it is difficult to determine, "who is right?"

The Trump Administration has vowed to fight all Congressional subpoenas and refused to cooperate with the inquiry. On October 8, White House Counsel, Pat A. Cipollone, sent a letter to Speaker Pelosi and several committee chairs, arguing that the inquiry is "constitutionally invalid and a violation of due process."[2] Cipollone pointed to the secretive nature of the proceedings and argued that the inquiry was fueled by a partisan desire to "undo the democratic results of the last election" and "influence the next election."[3] In addition, he emphasized that a mere "announcement" was insufficient to authorize an official inquiry because the full House of Representatives failed to take a vote.[4]

Meanwhile, a legal action involving the authority of the House to access grand jury material in the Mueller Report teed up a key issue in the impeachment debate. On October 25, the District Court for the District of Columbia found that a House resolution was not necessary to initiate an impeachment inquiry.[5] In support of this conclusion, Chief Judge Beryl A. Howell cited multiple impeachment proceedings (and impeachments) of federal judges without a vote, as well as the absence of a vote for four months into President Clinton's impeachment inquiry.[6] The court also noted that it ultimately "lacks authority to require the House to pass a resolution tasking a committee with conducting an impeachment inquiry."[7] Shortly thereafter, on October 29, the Court of Appeals for the District of Columbia Circuit placed a stay on the decision.[8]

Two days later, following a month of closed-door discussions, the House passed a resolution to initiate the public phase of the impeachment inquiry.[9] The resolution authorizes the House Intelligence

Committee to conduct open hearings and grants the ranking Republican member on the committee the ability (with the concurrence of the chair) to issue subpoenas as well.[10] In announcing the initial draft of the resolution, Speaker Pelosi underscored that an affirmative vote on the resolution diminishes the ability for the Trump Administration to ignore subpoenas, withhold documents, and prevent witness testimony. Yet, while the resolution establishes a procedural outline for committee hearings, much ambiguity remains. The resolution directs committees "to continue their ongoing investigations as part of the existing House of Representatives inquiry."[11] There is no explicit grant of due process rights,[12] thereby leaving the Judiciary Committee to develop procedures "not inconsistent" with existing committee or House rules.

As discussed herein, impeachment proceedings are both complicated and rare, so there are seldom definitive answers to questions. In the sections that follow, we provide a series of questions and answers regarding impeachment such as: What does the U.S. Constitution require? What were the procedures used in past impeachments? Is there a difference between the impeachment and oversight powers of the House? Is impeachment a criminal proceeding? What is the role and effect of executive privilege in impeachment?

I. FAQs

A. What Is Impeachment?

Impeachment is a formal charge of misconduct made against the holder of a public office. Impeachment is the first step in a two-step process for the House and Senate to remove federal officials. The members of the House investigate allegations of misconduct. A majority is required to charge the official by authorizing articles of impeachment. When a president is impeached, the Chief Justice presides over the trial in the Senate. A two-thirds majority vote of the Senate is required to remove an official.[13]

B. Is Impeachment A Novel Idea?

In short, no. Impeachment, as an American procedure, was borrowed from Great Britain, as Alexander Hamilton noted in 1788.[14] Great Britain's use of impeachment as a process to remove government officials dates as far back as the late fourteenth century.[15] The first American impeachment was that of William Blount in 1797 for conspiring to assist Britain in capturing Spanish territory.[16] There have been nineteen individuals impeached by a vote of the House of Representatives since the country's founding.[17] Of those nineteen, eight have been convicted by a trial in the Senate.[18] The most recent impeachment by the House occurred in March of 2010 with the impeachment of Judge G. Thomas Porteous, Jr. of the Eastern District of Louisiana.[19] He was subsequently convicted by the Senate and removed from his position.[20]

C. What Does The Constitution Say About The Impeachment Process?

The Constitution allocates the impeachment power to the legislative branch, broadly states the types of offenses that warrant removing a president from office, and makes clear that a president can face a criminal trial after the Senate convicts him.

The Constitution gives only a skeletal framework for impeachment proceedings. Many of the missing details may be surprising. For example, the Constitution is silent about:

- How the House of Representatives presents its case to the Senate;
- Whether all Senators must be present to hear all of the evidence against the president;
- Whether the president must be present for the proceeding;[21]
- Whether the proceeding must be open to the public;
- What rules of evidence apply to the proceeding;
- Whether the president has a constitutional right to counsel;
- What standard of proof the House should use to charge and what standard the Senate should use to convict.

The answers to these questions are left to Congress.[22] Below is a list of constitutional requirements and the relevant constitutional provisions.

i. Constitutional Requirements

1. The impeachment process is split between the two chambers of Congress. The House of Representatives impeaches the president, meaning the House investigates. The House then authorizes the articles of impeachment, which are the charges against the president.[23] The Senate tries the case, meaning it decides whether to acquit or convict the president.[24]

2. The House of Representatives and the Senate each create their own rules for the investigation and trial.[25] This means that the Constitution does not require an impeachment proceeding to be exactly the same as a criminal trial. There is also very limited judicial review of impeachment proceeding procedures; federal courts may decline to resolve questions about impeachment proceedings.[26]

3. The Chief Justice *shall* preside over the Senate trial of a president.[27]

4. Two-thirds of the Senate must vote to convict the president.[28] If convicted, the president is removed from office.[29] The Senate can also disqualify a president from holding "any Office of honor, Trust, or Profit under the United States."[30]

5. A president may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors."[31] Treason is the only crime defined in the Constitution: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[32]

6. An impeachment proceeding does not require a jury trial.[33]

7. If a president or other official is removed from office by the Senate, he can then be subject to criminal proceedings: "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[34]

8. The Twenty-Fifth Amendment gives an alternative mechanism to remove the president from office. It requires two-thirds of both houses of Congress to vote to remove him.[35]

D. What Did The Framers Say About The Grounds For Impeachment?

As noted above, the Constitution specifically states that "Treason, Bribery, or other high Crimes and Misdemeanors" are grounds for impeachment. Looking to the debates during the ratification of the Constitution provides a little context as to what that phrase actually means. Impeachment first appeared to make its way into the Constitutional text via language proposed by the Virginia Plan, written by James Madison and argued for by George Mason.[36] The Virginia Plan stated that impeachment would be for "Malpractice and Neglect of Duty."[37] This language was revised and replaced with "Treason and Bribery." Fearing that treason and bribery would "not reach the many great and dangerous offences," Mason advocated for impeachment to cover "Treason, Bribery, or Maladministration."[38] However, Madison argued that the additional term was so vague that it would be "equivalent to a tenure during displeasure of the Senate."[39] Thus, the Convention delegates ultimately compromised and revised the phrase to "Treason, Bribery, or Other High Crimes and Misdemeanors" though they did not further clarify it. According to the ratification debates, the most vocal delegates with respect to this power thought maladministration was too low of a bar and treason and bribery alone to be an incomplete list. Renowned English legal commentator William Blackstone, with whom the framers were very familiar, defined "high misdemeanors," and the "first and principal" among such high misdemeanors was "the mal-administration of such high officers, as are in public trust and employment."[40] Thus, one can intuit that the Framers did intend to include maladministration of office as at least part of the definition of "high Crimes and Misdemeanors."

E. Is A House Resolution Needed To Start An Impeachment Inquiry?

The impeachment process in the House of Representatives is "usually initiated…when a Member submits a resolution through the hopper (in the same way that all House resolutions are submitted)."[41] However, not every impeachment process has begun with a floor vote on whether to open an impeachment inquiry. In fact, three relatively recent judicial impeachments—that of Harry E. Claiborne, Alcee Hastings, and Walter E. Nixon—were not initiated by a House resolution explicitly authorizing an impeachment inquiry.[42] Additionally, nowhere in the Constitutional provisions on impeachment does it mention a requirement that a resolution first be passed to authorize an official impeachment inquiry. A recent Congressional Research Service report notes that " [i]n the past, House committees, under their general investigatory authority, have sometimes sought information and researched charges against officers prior to the adoption of a resolution to authorize an impeachment investigation."[43] While precedent exists for an impeachment inquiry to begin with a House vote, there is no Constitutional

provision requiring one, nor has the House, even recently, fully abided by this practice in all circumstances.

Perhaps an argument can be made that *judicial* impeachments, such as those mentioned above, function differently from *presidential* impeachments—and that the latter requires a resolution to officially open an inquiry, or at least to authorize a committee to commence an impeachment (as opposed to a legislative) investigation. After all, the Judiciary Committee that has led investigations into impeachable judges has explicit authority over the judiciary that is not analogous to any committee's jurisdiction over the president. Moreover, Congress has arguably established a separate process for initiation of judicial impeachment proceedings by authorizing the Judicial Conference to conduct investigations of misconduct by federal judges and, when the Conference determines "that consideration of impeachment may be warranted," to refer such matters to the House for further proceedings. 28 U.S.C. § 355(b). By contrast, the two other presidential impeachment proceedings of the modern era—those of Presidents Clinton and Nixon—have had an official resolution voted on by the full House. And now the current proceedings have included such a vote, too.

The Constitution does distinguish presidential impeachment proceedings from all others in that "[w]hen the President of the United States is tried, the Chief Justice shall preside."[44] However, there is no indication that any other procedural distinctions were intended. Further, although the House impeachment proceeding against President Nixon ultimately included a House resolution, the Judiciary Committee "began an examination of the charges against the President under its general investigatory authority."[45] The resolution that passed, which was reported by the House Rules Committee, provided for additional investigation authority.[46] Additionally, the past two presidential impeachment inquiries were the result of special prosecutor investigations—Archibald Cox in the case of Nixon and Ken Starr in the case of Clinton. In the current proceeding, the impeachment investigation was brought on by a whistleblower complaint and not the result of the report of a special prosecutor.

In short, every past impeachment case appears to be unique in both scope and procedure; however, it does not seem that a House Resolution authorizing an impeachment investigation or inquiry is required. Impeachment proceedings are ill-defined in the Constitution and vary based on the circumstances surrounding it. This current one is no different.

F. When Does Congress Have The Power To Issue Subpoenas Pursuant To An Impeachment Inquiry?

Congress has been engaging in investigations and issuing subpoenas since the beginning of the Republic.[47] Its power to do so was first confirmed by the Supreme Court in the 1927 case *McGrain v. Daugherty*. For the most part, the Constitution does not directly speak to the procedures or limits of Congressional authority in this space; instead, House and Senate rules primarily govern. Courts have limited their own oversight of Congress by holding that they do not have authority to impose particular structures or procedures on Congress when Congress is within the bounds of its Constitutional duties and delegations.[48]

i. What Subpoenas Can Congress Constitutionally Issue?

Congress can issue subpoenas to assist with its constitutionally delegated powers: legislation and impeachment.[49] Legislative subpoenas are by far the most common. Congress's legislative power (and thus its legislative power of investigation) is broad.[50]

In *McGrain*, Congress subpoenaed bank records related to the then-Attorney General and his Department of Justice. The Supreme Court concluded that the subpoena was valid because Congress's "power of inquiry . . . is an essential and appropriate auxiliary to the legislative function."[51] The Court went on to explain that Congress could investigate and issue subpoenas on any subject for which "legislation could be had," as long as the information requested would materially aid the legislation.[52] This is the limitation placed on investigations (and thus subpoenas) that are conducted pursuant to Congress's legislative power.

Occasionally, in cases such as *Mazars*, courts are faced with subpoenas that may serve mixed purposes. There, the House Committee on Oversight and Reform issued a subpoena to an accounting firm for records related to President Trump. President Trump, challenging the subpoena, argued that it was not properly "legislative" because the Committee's real purpose was to inquire about potentially impeachable offenses.

The *Mazars* majority found that the subpoena was issued pursuant to the Committee's authority to "legislate and conduct oversight regarding compliance with ethics laws and regulations,"[53] notwithstanding the potential implications of the subpoena for a potential impeachment. After finding a valid legislative purpose, the majority ended their inquiry.[54]

Judge Rao dissented vehemently from the majority's approach in *Mazars* on the basis that the Oversight Committee's true (or additional) aims were *impeachment*, not legislation. Judge Rao argued that investigations targeting questions of impeachment cannot permissibly be authorized by Congress's power to issue *legislative* subpoenas.[55] Here, she argued, any potential "legislative purpose" that might underlie the subpoena is dwarfed by the Committee's purpose to investigate the president for impeachable offenses.[56]

In a case such as *Mazars*, or even more so in a case where the president himself is subpoenaed, Rao highlights the importance of considering separation of powers principles when ruling on the legitimacy of such a subpoena. To allow Congress to use its *legislative power* to issue a subpoena to the Executive Branch while seeking the subpoena to assist its *impeachment* inquiry could risk trampling on the constitutional distinction between those two separate grants of authority. Judge Rao's dissent is novel, as the *Mazars* majority points out, but time will show which perspective will ultimately prevail.

ii. When Do Congressional *Committees* Have Subpoena Power?

An additional limitation on all subpoenas issued by Congress comes from the House and Senate Rules. When courts have evaluated the legitimacy of Congressional subpoenas, they have often looked to the rules and resolutions that authorized the investigation. This inquiry is particularly relevant when a Congressional *committee*, as opposed to the entire House or Senate, is the body issuing subpoenas.

In *United States v. Rumely*, for example, a House committee subpoenaed the names of people who had purchased certain types of books under resolution that authorized an investigation of "lobbying activities."[57] The Court ultimately held that the "sale of books" was not included in the authorization to investigate "lobbying activities."[58]

The court in *Mazars* recently took that same approach. After finding that the subpoena had a proper legislative purpose, the *Mazars* majority asked whether the committee was authorized to issue the subpoena at all. To analyze the Committee's power, the D.C. Circuit looked to House Rules to determine "whether the committee [was] authorized" by the full House "to exact the information" it sought.[59] The court noted that the House rules broadly authorize the Oversight Committee to conduct investigations to "review and study on a continuing basis the operation of Government activities at all levels, including the Executive Office of the President."[60] This includes the power to issue subpoenas to "carry[] out any of [its] functions and duties."[61] When such authority is built into a committee's creation, the committee does not need additional authorization from the full House to carry out its mandate.

While most committees have some legislative authority (and therefore the ability to issue legislative subpoenas), recent events have raised a somewhat novel question: when and how are Congressional committees authorized to issue *impeachment*-related subpoenas?

Some have opined that the entire House must vote to specifically provide a committee with impeachment-related investigative powers. By contrast, the U.S. District Court for the District of Columbia recently ruled that all "investigating committees" of the House have inherent authority by their very creation to conduct investigations, even where the committee develops and reports facts that may set an impeachment into motion.[62]

Now that the full House has voted to authorize the impeachment-related investigations of several committees, it is clear that those committees can properly issue subpoenas under their legislative or impeachment authority moving forward. But what about the subpoenas issued prior to the recent House vote? The recent D.C. district court ruling, for one, did not provide guidance on the legitimacy of subpoenas issued by "investigative committees" prior to impeachment inquiry authorization, nor did it pass on the authority of non-investigative committees to issue impeachment-related subpoenas. We are left asking: do the previously issued subpoenas need to have a "valid legislative purpose" to make them constitutionally permissible?

These are novel questions. The Supreme Court has yet to rule on these issues, making them ripe for continued debate and litigation.

G. Can Congress Subpoena A Sitting President? And, If So, Must The President Comply?

Congress has investigated sitting presidents on several occasions, both for actions taken before the president in question had taken office and for actions taken by the president in his official role.

In 1832, the House vested a select committee with subpoena power to investigate whether the President had knowledge of a contract that the Secretary of War had allegedly awarded fraudulently.[63] In 1946,

the Senate investigated whether the President had "provoked" Japan into attacking the United States.[64] And, finally, the well-known Watergate Investigation centered on President Nixon.[65]

Some presidents, such as President Reagan when he was investigated for his role in the Iran-Contra Affair, have complied willingly with Congress's subpoenas.[66] Others, such as President Nixon, have asserted executive privilege over the requested documents.[67]

When President Nixon fought the Congressional subpoenas directed at him, he did not contest that the issuing committee had the authority to so subpoena a sitting president. Neither did the D.C. Circuit, finding instead that executive privilege shielded the tapes. The court in *Mazars* interprets the *Nixon* decision as "impl[ying] that Presidents enjoy no blanket immunity from congressional subpoenas." If such immunity existed, says the *Mazars* court, the *Nixon* court would have had no reason to "explore the subpoena's particulars" and conduct the balancing test necessary in evaluating a claim of executive privilege.[68]

H. Is Impeachment A Criminal Proceeding?

Asking and answering this question is crucial for two related reasons. First, a criminal proceeding follows specific procedures leading up to and during a trial. These procedural rules govern the actions of the prosecutor, grand jury, judge, petit jury (i.e., the jury at trial), and, of course, the defendant and his lawyer. Second, a criminal defendant has specific constitutional rights, such as a right to a public trial, due process, and the right against self-incrimination.

There is no authoritative or definitive answer to whether an impeachment proceeding is a criminal proceeding. The text of the Constitution, the Framers' comments, court cases, and authoritative comments all indicate that impeachment proceedings are informed by, but are ultimately different from, criminal proceedings.

i. What Is A Criminal Proceeding?

A federal criminal case is brought on behalf of the United States to address a general grievance. If convicted, a criminal defendant can be fined (i.e., loss of property), imprisoned (i.e., loss of liberty), or put to death (i.e., loss of life). Consequently, criminal defendants are afforded additional constitutional protections. It is worth noting that non-criminal proceedings can have serious consequences but participants are not given the same panoply of rights afforded to criminal defendants. For example, a family evicted from their home is deprived of something valuable; yet, there is no constitutional guarantee of a lawyer in housing court. The due process clause ensures minimum procedural protections in civil proceedings, but does not impose the wide array of additional procedural protections applicable in the criminal context.

In a federal criminal proceeding, a prosecutor represents the United States. In conjunction with law enforcement, such as the FBI, she builds her case. Before she can file charges, she must present her evidence to a grand jury unless the defendant waives that right. The grand jury comprises members of the public and meets in secret. If the grand jury finds there is probable cause, they issue a true bill.

After receiving a true bill, the prosecutor may proceed to trial. Before trial, a petit jury is seated in order to decide questions of fact (e.g., Did the event happen? Did the defendant have the requisite mental state?). At trial, a judge presides over the trial and rules on questions of law, such as the admissibility of evidence.

After hearing the evidence from the prosecutor and any evidence from the defense, the petit jury deliberates in secret. They are not allowed to consider external evidence, such as news reports. To convict the defendant, the jury must unanimously find him guilty beyond a reasonable doubt.

ii. What Does The Constitution Say?

The Constitution uses the language of criminal law in discussing impeachment but also indicates that impeachment proceedings are procedurally different from a criminal proceeding. On the one hand, the Constitution uses the language of criminal law when talking about impeachment. For example, Article II states an official may be removed from office for "Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Similarly, "[t]he Senate shall have the sole Power to *try* all Impeachments . . . And no Person shall be *convicted* without the Concurrence of two thirds of the Members present."[69]

On the other hand, the Constitution is clear that impeachment is procedurally different from a criminal proceeding. Under the Constitution, a president is expressly made subject to impeachment proceedings *during* office; he can also be subject to criminal proceedings after he leaves office. Art. I, § 3 cl. 7 states that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." This structure indicates that impeachment and criminal proceedings are different.

Additionally, the Constitution states, "[t]he trial of all crimes, *except in cases of impeachment*, shall be by jury."[70] Similarly, "the President … shall have the Power to grant Reprieves and Pardons for Offenses against the United States, *except* in Cases of Impeachment."[71] The use of "except" implies that an impeachment proceeding is a type of criminal proceeding, while at the same time clarifying that an impeachment proceeding is different from a criminal trial.

Moreover, the trial in the Senate is different from a trial before a petit jury. First, the Senate is not a jury of the president's peers; the Senate is an elected body. Second, a president may be convicted by a two-thirds vote of the Senate, whereas a petit jury must unanimously convict a criminal defendant in a federal trial. Moreover, there is no double jeopardy violation if the Senate convicts a president and he is later tried in a criminal proceeding.

Finally, the consequence of impeachment indicates that an impeachment proceeding is different from a criminal proceeding. One hallmark of a criminal proceeding is the sentencing exposure: impeachment is not a criminal proceeding because the official is not exposed to a loss of liberty (i.e., imprisonment) or life. If convicted in the Senate, the official is removed from office. The Senate may also vote to bar the official from holding future offices.

iii. What Did the Framers Say?

The Framers discussed whether impeachment is a criminal proceeding. There were a variety of opinions and it is difficult to draw a definitive conclusion given the disagreements among them.

The first impeachment proceeding in Congress raised this very question of whether impeachment is a criminal proceeding. The question was whether an impeached official, in this case Senator Blount, had to be tried with a jury in the Senate. Thomas Jefferson wrote to Senator Tazewell on the question of "whether an impeachment for a misdemeanor be a criminal prosecution?"[72] In consulting Blackstone and Wooddeson, two leading legal treatises, Jefferson concluded, "in Law language the term crime is in common use applied to misdemeanors, and that impeachments, even when for misdemeanors only are criminal prosecutions."[73] He took the position that the Senate must use a jury to try an impeached official. The Senate and other Framers disagreed. Ultimately, the Senate voted 26-3 against using juries in impeachment proceedings.[74]

During the proceeding against Sen. Blount, Rep. Dana took the position that "the process in cases of impeachment in this country is distinct from either civil or criminal—it is a political process, having in view the preservation of the Government of the Union."[75]

Madison indicated that he did not agree with Jefferson that impeachment is a criminal proceeding. In a letter to Thomas Jefferson, James Madison wrote, "[m]y impression has always been that impeachments are somewhat *sui generis*, and excluded the use of juries."[76] Merriam Webster defines *sui generis* as "constituting a class alone: unique, peculiar."

iv. What Have Courts Said?

Courts have said very little, probably because impeachment proceedings are rare and because the Supreme Court has held that impeachment proceedings fall under the political doctrine exception to judicial review.[77]

In the case of Judge Walter Nixon, the Supreme Court hinted that impeachment proceedings are different from criminal proceedings. Chief Justice Rehnquist wrote, "the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution provides for two separate proceedings. *See* Art. I, Sec. 3, cl. 7."[78]

In the same case, a circuit court judge wrote: "The inference that the framers intended impeachment trials to be *roughly akin* to criminal trials is reinforced by seemingly unrefuted statements made by Alexander Hamilton during the ratification debates."[79]

v. What Have Other Sources Said?

Other authorities such as Senators, the Department of Justice, and the transcripts of past proceedings all indicate that impeachment proceedings are informed by, but ultimately different from, criminal proceedings.

Senators have indicated they believe an impeachment proceeding is something different from a criminal trial. As Senator Crapo (R-ID) said about the Clinton trial: "As each Senator took the oath to provide impartial justice, . . . [n]o longer was the Senate a legislative body, it was a court of impeachment. A unique court, to be sure, not identical to traditional civil and criminal courts, but a court nonetheless." He also stated, "Although the 'beyond a reasonable doubt' standard of traditional criminal trials is not applicable in impeachment proceedings, I am convinced the evidence presented in this case [against President Clinton] meet[s] even this high standard."

The Department of Justice recently took the position that "[t]he Constitution carefully separates congressional impeachment proceedings from criminal judicial proceedings." (Chief Judge Howell rejected the Department of Justice's position in her recent decision.)

I. What Does It Mean That The House Of Representatives Is Like A Grand Jury?

In an impeachment proceeding, the House acts like a prosecutor and grand jury because it investigates and decides whether to bring charges.

In a criminal proceeding, a grand jury's investigation is kept secret. The defendant has very few rights during a grand jury investigation and proceeding; most of the rights we associate with criminal law attach only after an indictment is returned or charges are filed. In *United States v. Williams*, 504 U.S. 36, 49 (1992) the Supreme Court said, "certain constitutional protections afforded defendants in criminal proceedings have no application before that body [i.e. the grand jury]." For example, the target of the investigation does not have a right to present his case to the grand jury; that right attaches at trial. Similarly, he also does not have a right to cross-examine the witnesses in a grand jury proceeding; that right also attaches at trial.

i. Overview Of A Grand Jury

In a criminal proceeding, a grand jury must find there is probable cause before a person can be indicted.[80] The grand jury meets in secret.[81] The Supreme Court has explained why grand jury proceedings are secret:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the upmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who many testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures of persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was probability of guilt.[82]

A grand jury has the power to subpoena witnesses and physical evidence, including documents. A witness "cannot refuse to answer questions simply because the answer is embarrassing, may cause the witness to lose his job, or might implicate some other person in a crime."[83] However, a grand jury witness does enjoy the right against self-incrimination. This means a witness cannot be compelled to

answer questions that would implicate himself in a crime.[84] The law is relatively complicated when it comes to producing documents.[85]

ii. The House Of Representatives As A Grand Jury

The House of Representatives is like a prosecutor and grand jury because it considers the evidence against the president before deciding whether to authorize articles of impeachment. To the extent the House acts as a grand jury, it is not required to conduct its investigation in public.

Moreover, assuming the House investigation models a grand jury investigation, a president has very few rights. For example, a defendant in a grand jury proceeding does not have the right to present his own evidence. Neither he nor his attorneys have the right to be present during the questioning of witnesses or to question those witnesses. He does not have the right to receive exculpatory material during a grand jury proceeding. There is not a due process right per se because the grand jury is not depriving the defendant of life, liberty, or property; the grand jury is determining whether there is probable cause to move forward with such proceedings.

There are some notable differences between the House of Representatives and a grand jury. First, a grand jury consists of members of the public whereas the House is made up of elected officials. Second, a grand jury *must* meet in secret. The House of Representatives may choose to hold secret hearings or public hearings. Third, the grand jury has a clear standard of proof; they can return a true bill *only if* they find probable cause that the defendant committed the crime. The House of Representatives is free to select their own standard of proof. The Constitution does not specify what standard of proof the House of Representatives may or must use, instead simply vesting the "sole Power of Impeachment" in the House. U.S. Const. art. I, § 2, cl. 5.

J. What Does It Mean That The Senate Is Like A Petit Jury?

A petit jury is the jury on a criminal trial that decides questions of fact (e.g., was the light red?). Many commentators have described the Senate as a jury because the Senate decides whether to acquit or convict the president. However, there are several ways the Senate is different from a petit jury.

First, a criminal trial requires a unanimous jury. The Senate can remove the president from office with two-thirds of the Senators present.

Second, the Senate can decide questions of law and fact. Traditionally, a jury is a trier of fact (i.e., did this event happen, did the defendant have the intent?). The judge determines questions of law (i.e., what does this statute mean, is this evidence admissible?). During President Clinton's impeachment trial, Chief Justice Rehnquist ruled that, "[t]he Senate is not simply a jury, it is a court in this case. Therefore counsel should refrain from referring to senators as jurors."[86]

Third, jurors on a petit jury are instructed to decide the case based on the evidence presented in court. A judge instructs the jurors not to "consult dictionaries or reference materials, search the internet, websites, blogs" and jurors may not discuss the case with each other before deliberations. Since the Senate is not sequestered, senators do not have to abide by such restrictions. While a Senator may decide not to

discuss the case with the press, she will likely continue to read news stories and discuss the case with her colleagues.

Fourth, senators can be called as witnesses under existing rules for impeachment trials.[87] In a criminal trial, a witness cannot serve as a juror.

K. Does The President Have A *Constitutional* Right To Due Process?

It is not self-evident that a president has a constitutional right to due process in an impeachment proceeding.

The due process clause states no person shall be "deprived of life, liberty or property without due process of law." U.S. Const., Amend. V. The plain text does not seem to encompass impeachment proceedings and past impeachments do not seem to have relied on the due process clause. Of course, a commitment to fairness and a legitimate process demand that an elected official must have some protections in an adversarial proceeding against him.

There are several reasons the Fifth Amendment due process clause does not seem to apply to an impeachment proceeding.

First, according to the plain text of the due process clause of the Constitution, a person is guaranteed due process only in cases where life, liberty, or property is at stake. If a president is convicted, he is removed from office. Removal from elected office is not a deprivation of life or liberty. While there is case law on whether government employment constitutes a property interest, it may be a stretch to apply those cases to the Office of the President.

Second, the House and Senate have historically relied on their power to make the rules of proceedings, not the due process clause, to grant the president procedural protections. When the House impeached President Clinton, it adopted rules to "provide the President with certain procedural rights[,]" "similar to those adopted by the Committee in 1974." Specifically:

> The President and his counsel shall be invited to attend all executive session and open committee hearings. The President's counsel may cross examine witnesses. The President's counsel may make objections regarding the pertinency of evidence. The President's counsel shall be invited to suggest that the Committee receive additional evidence. Lastly, the President or the President's counsel shall be invited to respond to the evidence adduced by the Committee at an appropriate time.[88]

Pursuant to H. Res. 660, the House Judiciary Committee has given the President some procedural protections once the House Permanent Select Committee on Intelligence Committee completes its investigation and issues its report setting forth its findings and recommendations.[89] The President and his counsel are to be given copies of reports and they are invited to attend the Judiciary Committee proceedings. The rules authorize his counsel to question witnesses subject to "instructions from the chair or presiding member." The chair, in consultation with the ranking member, may invite the President's

counsel to respond to evidence presented. The counsel may also submit requests for additional witnesses.

Third, one of the only court decisions to address the question of due process during impeachment proceedings determined that due process applied in only a general sense. (It is important to note that this court case is not precedential. The decision is from a district court and the decision was vacated by the D.C. Court of Appeals.) The district court judge wrote, "[t]here is no reason to believe that the full panoply of due process protections that apply to a trial by an Article III court necessarily apply to every proceeding. Impeachment trials are unique, and are entitled to be carried out using procedures that befit their special nature. However, they must be conducted in keeping with the basic principles of due process that have been enunciated by the courts and, ironically, by the Congress itself."[90]

L. Does The President Have A *Constitutional* Right To Exculpatory Material?

A president probably does not have a constitutional right to exculpatory material, known as *Brady* evidence, during the House impeachment proceeding. *Brady* material is specific to criminal trials and impeachment is probably not a criminal trial. Moreover, even a criminal defendant does not have a right to *Brady* material during the investigation phase. That right attaches after charges are filed. House Resolution 660 does not include a provision to turn over exculpatory material.

In a criminal case, due process requires that the prosecution turn over favorable or exculpatory evidence to the defendant. This is known as "*Brady* evidence."[91] A criminal defendant does *not* have a right to *Brady* material during the investigation phase. The right to favorable evidence applies only after charges are filed. In other words, the target, i.e., the defendant, of the investigation does not have a right to exculpatory material during a grand jury proceeding. (The grand jury only determines whether there is probable cause to bring a charge, not whether there is proof beyond a reasonable doubt.) Moreover, the prosecutor is not obligated to present exculpatory material evidence to the grand jury.[92] Therefore, a president probably does not have a right to favorable or exculpatory evidence during the investigation portion of impeachment proceedings.

It is a closer question whether a president has a right to exculpatory evidence during a trial in the Senate. On the one hand, *Brady* material relies on the due process clause and it is not obvious that the due process clause applies. (See section K). On the other hand, *Brady* material is relevant "to guilt or to punishment."[93] Because an impeachment trial does raise questions about guilt, the president could claim he does or should have a have a right to the material. That said, the more public and transparent the process, the less likely an explicit *Brady* right would be needed.

M. How Do Impeachment And Executive Privilege Interact?

The question of whether a president can invoke executive privilege during impeachment proceedings is largely unsettled by the courts, but will likely prove a battleground between the House and the administration in the weeks and months to come. The Supreme Court has never ruled directly on the issue, but has given some indication about the contours of executive privilege in other circumstances.

i. Overview Of Executive Privilege

Executive privilege (also known as presidential communications privilege) is a qualified right of the president, based in the constitutional separation of powers, to preserve the confidentiality of communications, information, and documents related to presidential decision-making. As the D.C. Circuit has explained: "The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need."[94]

The privilege also extends to close aides of the president, in order to "provide sufficient elbow room for advisers to obtain information from all knowledgeable sources" and not otherwise chill robust policy discussion within the Executive branch.[95]

ii. Other Forms Of Privilege

Executive privilege is a broad, umbrella term that is often used loosely for other legal concepts depending on the context. In general, it serves to protect confidential presidential communications. There are also two related forms of privilege that are sometimes viewed as components of executive privilege: diplomatic privilege and deliberative process privilege.

- *Military, Diplomatic, and National Security Secrets:* The Supreme Court has long recognized that the president has a common-law based right to withhold documents related to military, diplomatic and state secrets and communications and documents related to the same.[96]

- *Deliberative Process Privilege:* Lower courts have held that the deliberative process extends beyond the confines of the White House, and presidential communications themselves, to other departments within the Executive branch, allowing such agencies "to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[97] Its scope and applicability remain uncertain.

A third concept is executive immunity, but this too can have conflicting meanings. On one hand, it is a separate doctrine that provides an absolute protection for the president regarding civil liability for official acts in office.[98] On the other, it represents a concept advocated for by the current and prior administrations that Executive branch officials are immune from compelled testimony before Congress.[99]

iii. George Washington's View Of Executive Privilege And Impeachment

In 1796, President George Washington asserted executive privilege against a House demand for diplomatic communications surrounding the Jay Treaty by arguing that the House only had the power to compel such documents during an impeachment proceeding. In doing so, he noted "[i]t does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the

House of Representatives, *except that of an impeachment*, which the resolution [demanding the papers] has not expressed."[100]

That episode produced additional guidance from Washington's advisers, similarly recognizing the unique powers of an impeachment proceeding. Attorney General Charles Lee indicated "there may be occasions when the books and original papers should be produced: for instance to sustain an impeachment commenced."[101] Secretary of War James McHenry similarly queried, "But as the House of Representatives are vested with the sole power of impeachment, has it not a right as an incident to that power to call for papers respecting a treaty when the object is impeachment?"[102] While the House never received the documents, Washington did share them with the Senate when it considered the treaty for approval.[103]

iv. Claiming Privilege Against Congressional Subpoenas

The President has directed several current and former administration employees to refuse both to comply with Congressional subpoenas or to appear before hearings on Capitol Hill. These refusals have not always been accompanied by a formal invocation of executive privilege. At the same time, the administration has wielded broad claims of the Executive branch's rights and immunities under the separation of powers and the requirements of maintaining confidentiality.

In one example, the White House Counsel's office sought to restrict the testimony before Congress of former senior National Security Council staffer Fiona Hill. In doing so, it cited the classified nature of the information, along with the deliberative process privilege and executive privilege, as well as the then-absence of an official vote on impeachment. The White House's letter noted that "even if it were the case that executive privilege operates differently in connection with an impeachment inquiry, there is no ground for Dr. Hill to believe that she may disclose privileged information on that basis to the House Committee."[104] Hill eventually testified.

Other recent administrations have also claimed executive privilege. President Obama invoked it once, during the Congress's investigation of Operation Fast and Furious; President Bush asserted it six times, in matters ranging from EPA air quality standards to the revelation of Valerie Plame's identity as a CIA agent.[105] President Clinton invoked executive privilege in relation to multiple grand jury proceedings, both inside and outside the context of his impeachment over the Lewinsky affair.[106]

v. The Supreme Court And *Nixon*

The Supreme Court did consider President Nixon's invocation of executive privilege during his impeachment, but that case, *United States v. Nixon*, addressed a grand jury subpoena in the separate and distinct setting of a criminal prosecution.[107] Nevertheless, the Supreme Court narrowed the scope of the privilege in several meaningful and relevant ways, rejecting the president's claim of an absolute executive privilege and providing a balancing test between the confidentiality of presidential communications and the rule of law.[108] This remains the fundamental judicial framework for evaluating executive privilege today.

> [N]either the doctrine of separation of powers nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.[109]

vi. Other Notable Court Cases

The Supreme Court has never ruled directly on executive privilege in the context of a dispute with Congress. However, several other cases in the lower courts have added texture and nuance to the concept.

- In 1997, the D.C. Circuit added significant jurisprudence to the scope of executive privilege in *In re Sealed Case*. Among other things, the case established a distinction between the presidential communications privilege and the deliberative process privilege, emphasizing that the former relates to "direct decisionmaking by the President," including his close advisers.[110] It also reinforced that the privilege may only be overcome by a substantial showing that the "subpoenaed materials likely contain[] important evidence" that is not available with due diligence elsewhere.[111]

- In 2008, the D.C. District Court in *Committee on the Judiciary v. Miers*, determined that while an administration official could invoke executive privilege as to specific questions, she could not assert the privilege in a blanket manner to altogether prevent compelled testimony before Congress.[112] *Miers* was stayed pending appeal, and eventually settled, leaving its impact somewhat ambiguous.

- In 2016, the D.C. District Court again took up the scope of the privilege, this time regarding a Congressional subpoena requesting documents related to the Fast and Furious investigation. While it held that the deliberative process privilege provided a qualified basis for resisting Congressional subpoenas, it nonetheless found that "under the specific and unique circumstances of this case … the qualified privilege invoked to shield material that the Department has already disclosed has been outweighed by a legitimate [Congressional investigative] need that the Department does not dispute, and therefore, the records must be produced."[113]

N. Can Congress Enforce A Subpoena Against Administration Officials Unwilling To Testify?

Also undefined is the balance between Congress's subpoena power and administration officials' invocation of privilege or immunity. Preliminary—but likely not definitive—answers to this question, however, may come soon, as at least two current and former White House officials have sought a resolution of where they stand from the courts.

i. Options To Enforce A Subpoena

Congress has two paths to enforce a subpoena: criminal contempt and civil action. In both cases, enforcing compliance with the subpoena presents unique challenges. Congress can hold an individual who willfully refuses to comply with a committee subpoena in contempt of Congress.[114] But a contempt of Congress citation is referred back to the Executive branch for prosecution, which in the case of contempt by Executive officials would essentially require the administration to prosecute itself. Congress can also bring a civil action to enforce compliance with its subpoena, but this routes the issue through the courts and could require potentially protracted litigation.[115] In the time between 2008 and the current administration, Congress has held an Executive branch official in criminal contempt four times, and in each case the administration declined to bring the issue before a grand jury.[116]

The main constraint on bringing a civil enforcement action to challenge an assertion of executive privilege is time—it may well take months or years for the courts, which are already hesitant to address such thorny political topics, to resolve a dispute between the branches of government. Moreover, House Democrats have made clear that they may find strategic value in not pursuing litigation regarding their subpoena power. In a letter issuing a subpoena to President Trump's personal attorney Rudy Giuliani, House Democrats noted "[y]our failure or refusal to comply with the subpoena, including at the direction or behest of the president or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against you and the president."[117] An adverse inference would presumably be used as a stand-in for incriminating evidence in follow-on litigation or impeachment proceedings.

ii. Punting to the Courts

The difficulties with subpoena enforcement are center stage in ongoing litigation involving two former White House advisers—Charles Kupperman, a former Deputy National Security Adviser; and Donald McGahn, former White House Counsel. Faced with a Congressional subpoena in one hand, and a letter from the White House Counsel in the other telling them to not to testify, Kupperman and McGahn decided to punt these unsettled legal questions to the courts.

Kupperman, under subpoena to testify from the House but ordered by the White House to refuse to appear on the basis of testimonial immunity, sought a declaratory judgment from the D.C. District Court to resolve what he called "irreconcilable commands by the Legislative and Executive Branches of the Government."[118] Kupperman's complaint notes that "he is aware of no controlling judicial authority definitively establishing which Branch's command should prevail," but that his personal stakes are high—on the one hand, defying a Congressional subpoena could result in criminal contempt, on the other, an erroneous decision to appear could "unlawfully impair the President in the exercise of his core national security responsibilities."[119] U.S. District Judge Richard J. Leon has fast-tracked this case and set oral argument for December 10.[120] A similar dispute is unfolding in court regarding former White House Counsel Don McGahn, who also claimed testimonial immunity. Press reports indicate that, in a recent hearing on the case, U.S. District Judge Ketanji Brown Jackson was skeptical of the administration's claim of blanket immunity and questioned how such a broad privilege could be squared with fundamental separation of powers concepts.[121]

For either case, however, a determinative outcome is unlikely. Even if one of the district court judges rules in favor of the House or the administration on the balance between a subpoena and concepts of executive privilege and immunity, that decision will undoubtedly be appealed to the D.C. Circuit. So too would any appellate decision be appealed, with the potential for a subsequent argument *en banc* or a petition to the Supreme Court following that. The effect of this may be to frustrate the efforts of the House—as long as litigation remains pending, the legal ramifications of not complying with Congressional subpoenas will remain undetermined. In light of this, the administration will likely continue to command its current and former officials not to testify.

II. Conclusion

We will continue to keep you informed on these and other related issues as they develop.

APPENDIX

Constitutional Provisions About Impeachment

Art. I, § 2, cl. 5: The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Art. I, § 3, cl. 6: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Art. I, § 3, cl. 7: Judgment in Cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Art. I, § 5, cl. 2: Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Art. II, § 2, cl. 1: [The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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.

Art. III, § 2, cl. 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

Art. III, § 3, cl. 1: Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Amend. XXV, § 4: Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

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[1] Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. Times (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html?module=inline.

[2] Letter from Pat A. Cipollone, White House Counsel, to Nancy Pelosi, Speaker, House of Representatives, 2 (Oct. 8, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf.

[3] *Id.* at 1.

[4] *Id.* at 2–3.

[5] *In re* Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, 1:19-gj-00048-BAH (Oct. 25, 2019 D.D.C.) (the finding that a House resolution was unnecessary to authorize an impeachment inquiry was part of the central issue of the case, which was centered upon whether the House is authorized to access grand jury material).

[6] *Id.* at *50–52.

[7] *Id.* at *53.

[8] Order No. 19-5288, *In re* Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, 1:19-gj-00048-BAH (Oct. 29, 2019 D.C. Cir.).

[9] H. Res. 660 (Oct. 31, 2019); Elise Viebeck, Karoun Demirjian, Rachael Bade and Mike DeBonis, *A divided House backs impeachment probe of Trump*, Wash. Post (Oct. 31, 2019), https://www.washingtonpost.com/national-security/house-to-vote-on-rules-governing-next-phase-of-trump-impeachment-inquiry/2019/10/31/bc2f5e7a-fbcc-11e9-ac8c-8eced29ca6ef_story.html.

[10] H. Res. 660, § 2; Deirdre Walsh, *House Democrats Release Draft Resolution on Impeachment Inquiry*, NPR (Oct. 29, 2019), https://www.npr.org/2019/10/29/774380175/read-house-democrats-release-draft-resolution-on-impeachment-inquiry (providing the text of the initial draft resolution).

[11] H. Res. 660, § 1.

[12] The resolution did, however, provide rights to the ranking minority member of the Permanent Select Committee (the "minority"). First, as determined by the chair, the chair and the ranking minority member (or a designated staff member) will be permitted to question witnesses for equal specified periods of longer than five minutes. Second, the ranking member may submit to the chair any requests for witness testimony relevant to the investigation. Third, the ranking member (with the concurrence of the chair) may issue subpoenas for the attendance and testimony of any person or the production of documents and interrogatories for the furnishing of information.

[13] See Congressional Research Service, *The Impeachment Process in the House of Representatives* 1 (Oct. 10, 2019).

[14] Alexander Hamilton, *The Federalist No. 65* (Mar. 7, 1788).

[15] Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 Tex. Rev. L. & Pol. 117, 126 (1998).

[16] *Id.* at 134.

[17] *List of Individuals Impeached by the House of Representatives*, History, Art & Archives, United States House of Representatives, https://history.house.gov/Institution/Impeachment/Impeachment-List/.

[18] *Impeachment*, United States Senate, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm. An argument can be made that nine individuals have been removed by the Senate in connection with an impeachment proceeding as they expelled William Blount by other means before trial after the first ever successful impeachment vote in the House of Representatives.

[19] *See*, supra, n.17.

[20] *See*, supra, n.18.

[21] During the first impeachment trial, the defendant was not present. *See Blount Expulsion*, United States Senate, https://www.senate.gov/artandhistory/history/common/expulsion_cases/Blount_expulsion.htm (last accessed Nov. 1, 2019) ("Despite Blount's absence, his impeachment trial began in the Senate on December 17, 1798.").

[22] U.S. Const. art. I, § 5, cl. 2. ("Each House may determine the Rules of its Proceedings.").

[23] U.S. Const. art. I, § 2, cl. 5.

[24] U.S. Const. art. I, § 3, cl. 6.

[25] U.S. Const. art. I, § 5, cl. 2.

[26] *See Nixon v. United States*, 506 U.S. 224 (1993) (note: the Nixon in this case was former Judge Walter Nixon, not former President Richard Nixon).

[27] U.S. Const. art. I, § 3, cl. 6 (emphasis added).

[28] U.S. Const. art. I, § 3, cl. 6.

[29] U.S. Const. art. I § 3, cl. 7.

[30] U.S. Const. art. I, § 3, cl. 7.

[31] U.S. Const. art. II § 4.

[32] U.S. Const. art. III § 3, cl. 2.

[33] U.S. Const. art. III, § 2, cl. 3. *See also* Buckner F. Melton Jr., *Federal Impeachment and Criminal Procedure: the Framers' Intent*, 52 Md. L. R. 437 (1993) (The Senate rejecting a resolution to use a jury in the first impeachment proceeding).

[34] U.S. Const. art. I, § 3, cl. 7.

[35] U.S. Const. Amend. XXV, § 4.

[36] Erick Trickery, *Inside the Founding Fathers' Debate Over What Constituted an Impeachable Offense*, Smithsonian Magazine (October 2, 2017); *see also* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 723 n.4 (1988).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] United States House of Representatives Committee on the Judiciary, Report By the Staff of the Impeachment Inquiry, Feb. 1974. James Madison later described Blackstone's Commentaries on the Laws of England as "a book which is in every man's hand." *Id.*

[41] Congressional Research Service, *The Impeachment Process in the House of Representatives* 1 (Oct. 10, 2019).

[42] *Id.* at 4.

[43] *Id.* at 1.

[44] U.S. Const. art II § 4.

[45] Congressional Research Service, *The Impeachment Process in the House of Representatives* 5 (Oct. 10, 2019).

[46] *Id.*

[47] *See Trump v. Mazars USA, LLP*, No. 19-5142, 2019 WL 5089748 (D.C. Cir. Oct. 11, 2019) for a history of congressional investigations prior to 1927.

[48] *In re Application of the Committee on the Judiciary*, Grand Jury Action No. 19-48 (BAH) (D.D.C. Oct. 25, 2019) at 52 (citing *Mazars*, 2019 WL 5089748 at *24); *see also Barker v. Conroy*, 921 F.3d 1118, 1130 (D.C. Cir. 2019).

[49] U.S. Const. art I, § 2, cl. 5

[50] *Watkins v. U.S.*, 354 U.S. 178, 187 (1957).

[51] *McGrain v. Daugherty*, 273 U.S. 134, 174–75 (1927).

[52] *Id.* at 175–76.

[53] *Mazars*, 2019 WL 5089748, at *6 (citing Letter from Elijah E. Cummings, Chairman, House Committee on Oversight and Reform, to Pat Cipollone, Counsel to the President, The White House 1 (Feb. 15, 2019) at 7–8).

[54] *Mazars*, 2019 WL 5089748, at *46

[55] *Mazars*, 2019 WL 5089748, Rao, J., dissent at *2.

[56] *Mazars*, 2019 WL 5089748, Rao, J., dissent at *6.

[57] 345 U.S. 41, 42 (1953).

[58] *Id.* at 45, 48.

[59] *Mazars*, 2019 WL 5089748, at *54 (citing *Rumely*, 345 U.S. at 42–43).

[60] House Rule X, cl. 3(i).

[61] House Rule XI, cl. 2(m)(1); *see also* Rules of the House Committee on Oversight and Reform, 116th Cong., Rule 12(g) (2019) (authorizing the Oversight Committee Chair to issue subpoenas as provided in Rule XI to conduct an investigation within the Committee's jurisdiction).

[62] *In re Application of the Committee on the Judiciary*, Grand Jury Action No. 19-48 (BAH) (D.D.C. Oct. 25, 2019) at 54, citing *Jefferson's Manual*, which governs the House in all applicable situations as per House Rule XXI.

[63] *See* H.R. Rep. No. 22-502, at 1 (1832).

[64] S. Doc. No. 79-244, at xiii, 251 (1946) (exonerating the president of this charge).

[65] S. Res. 60, 119 Cong. Rec. 3255, 93rd Cong. §1(a) 1973).

[66] *See* Morton Rosenberg, Congressional Research Service, RL 30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* 14 (Aug. 21, 2008).

[67] *See Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974).

[68] *Mazars*, 2019 WL 5089748, at 18.

[69] U.S. Const. art. I, § 3, cl. 6 (emphasis added).

[70] U.S. Const. art. III, § 2 (emphasis added).

[71] U.S. Const. art. II, § 2, cl. 1.

[72] Letter from Thomas Jefferson to Henry Tazewell (Jan. 27, 1798), available in Wilbur S. Howell, Jefferson's Parliamentary Writings 11 (2016).

[73] *Id.*

[74] Buckner F. Melton, *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 Md L. R. 427, 439, 454 (1993).

[75] Hinds' Precedents, Volume 3. Available at https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-19.htm.

[76] Letter from James Madison to Thomas Jefferson (Mar. 4, 1798), available at https://founders.archives.gov/documents/Madison/01-17-02-0062, last accessed Oct. 24, 2019.

[77] See *Nixon v. U.S.*, 506 U.S. 224 (1993).

[78] *Id.* at 234.

[79] *Nixon v. United States*, 938 F.2d 239, 260 (D.C. Cir. 1991) (Randolph, J., concurring) aff'd, 506 U.S. 224 (1993) (emphasis added).

[80] U.S. Const. Amend. V.

[81] See Fed. R. Crim. P. 6(d) ("The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.")

[82] *Douglas Oil Co. v. Petrol Oil Stops Northwest*, 441 U.S. 211, 219 n.10 (1979).

[83] Ronald J. Allen, Et Al., Criminal Procedure: Adjudication And Right To Counsel 1097 (2nd ed. 2016).

[84] *Id.*

[85] *Id.* at 1085.

[86] Joan Biskupic, *Chief Justice Assumes a Speaking Part*, Wash. Post, Jan. 23, 1999, at A13.

[87] *See* Senate Rule for Impeachment XVIII ("If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.").

[88] H.R. Rep. No. 105-795, at 25 (1998).

[89] H. Res. 660, §§ 2(6) & 4; *Impeachment Inquiry Procedures in the Committee on the Judiciary Pursuant to H. Res. 660*, https://rules.house.gov/sites/democrats.rules.house.gov/files/ImpeachmentInquiryProceduresJudiciary.pdf (last accessed Nov. 6, 2019).

[90] *Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated by Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993).

[91] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[92] *See United States v. Williams*, 504 U.S. 36 (1992).

[93] *Brady*, 373 U.S. at 87.

[94] *In re Sealed Case*, 121 F.3d 729, 745–46 (D.C. Cir. 1997).

[95] *Id*. at 745.

[96] *See United States v. Reynolds*, 345 U.S. 1, 6–8 (1953); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp*., 333 U.S. 103, 111 (1948); *Totten v. United States*, 92 U.S. 105, 106–07 (1875).

[97] *In re Sealed Case*, 121 F.3d at 737.

[98] *See Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

[99] *Testimonial Immunity Before Congress of Former counsel to the President*, 43 Op. O.L.C., slip op. (May 20, 2019), https://www.justice.gov/olc/opinion/testimonial-immunity-congress-former-counsel-president ("The immunity of the President's immediate advisers from compelled congressional testimony on matters related to their official responsibilities has long been recognized and arises from the fundamental workings of the separation of powers.").

[100] 5 Annals of Cong. 760–62 (1796) (emphasis added).

[101] Letter from Attorney General Charles Lee to President George Washington (Mar. 26, 1796), https://founders.archives.gov/documents/Washington/05-19-02-0491.

[102] Letter from Secretary of War James McHenry to President George Washington (Mar. 26, 1796), https://founders.archives.gov/documents/Washington/05-19-02-0492.

[103] 4 Annals of Cong. at 761.

[104] Letter from Michael Purpura, Deputy Counsel to the President, to Lee S. Wolosky, Esq. (Oct. 14, 2019).

[105] Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments* (Dec. 15, 2014), 26–28.

[106] *Id*. at 25.

[107] *United States v. Nixon*, 418 U.S. 683, 710 (1974).

[108] *Id*. at 703–710.

[109] *Id.* at 706.

[110] *In re Sealed Case*, 121 F.3d at 745, 754.

[111] *Id*. at 757.

[112] 558 F. Supp. 2d 53, 99 (D.D.C. 2008).

[113] *Committee on Oversight and Government Reform v. Lynch*, 156 F. Supp. 3d 101, 115 (D.D.C. 2016).

[114] *See* 2 U.S.C. 192.

[115] *See* 2 U.S.C. 288b.

[116] Congressional Research Service, *Congressional Subpoenas: Enforcing Executive Branch Compliance* (Mar. 27, 2019).

[117] The Hill, *Giuliani Subpoenaed as Trump Rages Against Schiff, Whistleblower* (Oct. 1, 2019), https://thehill.com/homenews/morning-report/463762-the-hills-morning-report.

[118] Compl. of Charles Kupperman at 2, *United States House of Representatives v. Donald Trump*, No. 193224 (D.D.C. 2019).

[119] *Id*. at 2–3.

[120] *See* Washington Post, *U.S. Judge Fast-Tracks Hearing Over House Impeachment Subpoena to Former National Security Aide Charles Kupperman* (Nov. 4, 2019), https://www.washingtonpost.com/local/public-safety/us-judge-fast-tracks-hearing-over-house-impeachment-subpoena-to-ex-trump-deputy-national-security-adviser-charles-kupperman/2019/11/04/5606e5bc-ff3e-11e9-8bab-0fc209e065a8_story.html.

[121] *See* Washington Post, *John Bolton's Former Deputy Asks Judge to Resolve Conflicting Demands for House Impeachment Testimony* (Oct. 31, 2019), https://www.washingtonpost.com/local/legal-issues/john-boltons-former-deputy-asks-judge-to-resolve-conflicting-demands-for-house-impeachment-testimony/2019/10/31/6119ae8c-f9b0-11e9-8190-6be4deb56e01_story.html.

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