

1-26-2021

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Recommended Citation

Steven D. Schwinn, *The Misguided On-Off Theory of Congressional Authority*, 95 Chi.-Kent L. Rev. 551 (2021).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol95/iss2/7>

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THE MISGUIDED ON-OFF THEORY OF CONGRESSIONAL AUTHORITY

STEVEN D. SCHWINN*

INTRODUCTION

Sometime in late 2019, President Donald Trump issued a breathtaking order. He instructed executive officials to categorically ignore House committee subpoenas for testimony and materials related to his alleged abuse of power.¹ The order meant not only that the executive branch would decline to cooperate in congressional investigations into the President's alleged misbehavior. It also meant that the executive branch would not even acknowledge the legitimacy of those investigations. In fact, the order was so shocking that it led to President Trump's second article of impeachment.

But while President Trump's order was stunning enough, it had nothing on the President's *reason* for issuing the order. The President claimed that the congressional committees utterly lacked authority to investigate him.² In particular, the President argued that House committees lacked authority to investigate his behavior pursuant to the House's *impeachment* authority, because the full House did not validly authorize an impeachment investigation. But at the same time, the President claimed that the House committees lacked authority to investigate him pursuant to the House's *legislative* power, because they already cited the House's impeachment authority, and they could not go back and switch out.

In short, the Administration claimed that when Congress turned one of its powers on (impeachment), it automatically turned off another (oversight). I will call this the "on-off theory" of congressional authority.

The on-off theory is remarkable for several reasons. For one, it builds on premises that cut against the text, judicial interpretations, and history of congressional authorities. It says that congressional authorities are distinct and mutually exclusive; that they operate in silos; and that Congress, in

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1. See *infra* note 12.
2. *Id.*

turning one authority on, necessarily turns another off. It says that when Congress cites its impeachment power, its committees necessarily lose their oversight authority.

Yet the text, judicial interpretations, and history of congressional authorities show just the opposite. Congressional authorities overlap, are mutually reinforcing, and are symbiotic. Congress can operate under one authority, or many. And it can use its authorities for different purposes. To put a sharper point on it, Congress could use its oversight authority to investigate, then use the fruits of the investigation for impeachment. Nothing in the Constitution forbids this. Indeed, forbidding it would do serious damage to our system of checks and balances, in particular to Congress's ability to check the executive branch.

For another, the on-off theory, now formally adopted by the executive branch, sets an important precedent for future impeachments and beyond. That is because in our system of separation of powers, we place "significant weight upon historical practice."³ In other words, we *count* presidential practices as a standard for future Presidents, especially when the coordinate branches validate, or even merely acquiesce in, those practices. Here, the Senate affirmatively validated President Trump's order, and his reasons for it, by acquitting him of the second article of impeachment, for obstruction of Congress. (It is not yet clear that the Senate majority fully understands the consequences, and irony, of this.) The episode now stands as a precedent for presidential behavior in future impeachments, and even presidential behavior in mine-run congressional oversight investigations.

We can therefore expect the on-off theory of congressional authority to do serious and lasting damage to Congress's powers to check and balance the coordinate branches, and, more generally, to our separation of powers. Congress is already at a comparative disadvantage in relation to the President in seeking to enforce its own oversight and investigation powers. The Trump Administration's general intransigence and noncooperation with congressional oversight has amply demonstrated this. The on-off theory only compounds this problem.

In this article, I will first trace the brief history of the House Committees' subpoenas, and the Trump Administration's refusal to comply. I will then examine the Administration's reasons for noncompliance. Finally, I will explore some of the problems with those reasons, and with the on-off theory of congressional authority.

3. *Zivotofsky v. Kerry*, 576 U.S. 5, 23 (2015) (quoting *NLRB. v. Noel Canning*, 573 U.S. 513, 514 (2014)).

I. BACKGROUND

On September 24, 2019, House Speaker Nancy Pelosi announced at a press conference that “the House of Representatives is moving forward with an official impeachment inquiry” into certain behavior by the President.⁴ She said that she was “directing . . . six Committees to proceed with” several previously pending “investigations under that umbrella of impeachment inquiry.”⁵ Speaker Pelosi’s announcement did not relate to the Mueller Investigation; instead it related to the complaint filed with the Inspector General of the Intelligence Community alleging that President Trump sought to pressure Ukrainian President Volodymyr Zelensky to investigate Hunter Biden’s connection to Burisma.⁶

Just three days after Speaker Pelosi’s announcement, on September 27, 2019, the House Committee on Foreign Affairs issued a subpoena to the Secretary of State seeking documents related to the recent conduct of diplomacy between the United States and Ukraine.⁷ In an accompanying letter, the chairs of the Committee on Oversight and Reform, the Permanent Select Committee on Intelligence, and the Committee on Foreign Affairs wrote that their Committees jointly sought these documents “[p]ursuant to the House of Representatives’ impeachment inquiry” (but not its legislative oversight authority).⁸ Soon after, the Committees also issued subpoenas to the Acting White House Chief of Staff, the Secretary of Defense, the Secretary of Energy, and several others in the executive branch. The Committees issued these subpoenas “[p]ursuant to the House of Representatives’ impeachment inquiry” and “in exercise of” the Committees’ “oversight and legislative jurisdiction.”⁹

4. Press Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), <https://www.speaker.gov/newsroom/92419-0> [<https://perma.cc/529R-K4S4>].

5. *Id.*

6. *Id.*

7. Letter from Eliot L. Engel, Chair, Comm. on Foreign Affairs, Adam Schiff, Chair, Permanent Select Comm. on Intelligence, U.S. House of Representatives, and Elijah E. Cummings, Chair, Comm. on Oversight & Reform, U.S. House of Representatives, to Michael R. Pompeo, Sec’y of State I (Sept. 27, 2019).

8. *Id.*

9. Letter from Elijah E. Cummings, Chairman, Comm. on Oversight & Reform, U.S. House of Representatives, Adam B. Schiff, Chairman, Permanent Select Comm. on Intelligence, U.S. House of Representatives, and Eliot L. Engel, Chairman, Comm. on Foreign Affairs, U.S. House of Representatives, to John Michael Mulvaney, Acting Chief of Staff to the President I (Oct. 4, 2019); Letter from Adam B. Schiff, Chairman, Permanent Select Comm. on Intelligence, U.S. House of Representatives, Eliot L. Engel, Chairman, Comm. on Foreign Affairs, U.S. House of Representatives, and Elijah E. Cummings, Chairman, Comm. on Oversight & Reform, U.S. House of Representatives, to Mark T. Esper, Secretary of Defense I (Oct. 7, 2019); Letter from Adam B. Schiff, Chairman, Permanent Select Comm. on Intelligence, U.S. House of Representatives, Elijah E. Cummings, Chairman, Comm. on Oversight &

The White House quickly responded. In a scathing letter, rife with political allegations, White House Counsel Pat Cipollone sent a letter on October 8, 2019, to Speaker Pelosi and the three chairs, arguing that their impeachment inquiry was “constitutionally invalid.”¹⁰ Cipollone argued that the investigation was flawed, because the House did not specifically authorize it, because the investigation “violate[d] fundamental fairness and constitutionally mandated due process,” and because the investigation was motivated by politics.¹¹ According to the letter, the Administration would decline to cooperate or participate in the investigation, and President Trump would not permit executive branch officials to comply with the Committees’ subpoenas.¹²

Later that same month, on October 31, 2019, the House adopted Resolution 660, which “directed” six committees “to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America.”¹³ The Resolution also authorized procedures for impeachment proceedings before the Permanent Select Committee on Intelligence and the Judiciary Committee.¹⁴

The targets of the subpoenas ultimately declined to comply. The Committees nevertheless continued their investigations, and the House passed Articles of Impeachment against President Trump.¹⁵ The second article charged the President with obstruction of Congress for ordering executive branch officials not to comply with the Committees’ subpoenas, among other things.¹⁶

As the impeachment moved to the Senate for trial, the Department of Justice Office of Legal Counsel formally advised the White House that the

Reform, U.S. House of Representatives, and Eliot L. Engel, Chairman, Comm. on Foreign Affairs, U.S. House of Representatives, to Gordon Sondland, U.S. Ambassador to the Eur. Union 1 (Oct. 8, 2019); Letter from Eliot L. Engel, Chairman, Comm. on Foreign Affairs, U.S. House of Representatives, Adam B. Schiff, Chairman, Permanent Select Comm. on Intelligence, U.S. House of Representatives, and Elijah E. Cummings, Chairman, Comm. on Oversight & Reform, U.S. House of Representatives, to James Richard “Rick” Perry, Sec’y of Energy 1 (Oct. 10, 2019).

10. Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker, U.S. House of Representatives 2–3 (Oct. 8, 2019).

11. *Id.* at 1–3.

12. *Id.* at 7 (“Consistent with the duties of the President of the United States, and in particular his obligation to preserve the rights of future occupants of his office, President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.”).

13. H.R. 660, 116th Cong. § 1 (2019).

14. *Id.* § 4.

15. H.R. 755, 116th Cong. (2019).

16. *Id.* art. II.

Committees' subpoenas were invalid.¹⁷ The OLC opined that the full House did not authorize the Committees to investigate impeachment, that House Resolution 660 did not retroactively authorize the Committees to issue the subpoenas, and that the Committees did not have authority under House Rules to issue the subpoenas in furtherance of oversight.¹⁸ The OLC concluded that, because the subpoenas were invalid, President Trump could not be guilty of obstruction of Congress for ordering executive branch officials not to comply with them.¹⁹

The very next day, on January 20, 2020, President Trump filed his Trial Memorandum in the Senate. The Memorandum recited the exact same arguments that the OLC posed in its own advice to the White House.²⁰

The Senate voted to acquit President Trump of the second article by a vote of 47 to 53.²¹

II. ADMINISTRATION RESPONSE AND ARGUMENTS

The Trump Administration claimed that the Committees' subpoenas were invalid because the Committees lacked authority to issue the subpoenas.²² The two-part argument went like this: (1) the Committees did not have authority to issue the subpoenas under the House *impeachment* power, because the full House did not formally authorize the Committees to initiate their impeachment investigations; and (2) the Committees did not have authority to issue the subpoenas under the House *oversight* authority because their investigation was really designed to advance impeachment, not oversight. Thus lacking authority, the Committees could not issue the subpoenas, the subpoenas were therefore invalid, and President Trump's orders not to comply with them, by definition, could not constitute obstruction of justice.

This section recounts those arguments in detail, with an emphasis on point (2), which is, after all, the topic of this article. As described above, the Administration offered these same arguments in three key documents—White House Counsel Pat Cipollone's letter to Speaker Pelosi and the Committee chairs; the Office of Legal Counsel's opinion on the House Committees' Authority to Investigate Impeachment; and the Trial Memorandum of

17. House Committees' Authority to Investigate Impeachment, 44 Op. O.L.C. , at *1 (Jan. 19, 2020).

18. *Id.* at 3–4, 40.

19. *Id.* at 52–53.

20. Trial Memorandum of President Donald J. Trump 37–43 (Jan. 20, 2020).

21. 166 CONG. REC. S938 (daily ed. Feb. 5, 2020).

22. President Trump never formally invoked executive privilege as a reason why the subpoenas were invalid. Instead, the Administration only argued that the Committees lacked authority to issue the subpoenas.

President Donald J. Trump for President Trump's impeachment trial in the Senate. Of the three, the OLC memo provides by far the most detail, so this section draws principally on the OLC memo.

A. The Committees Did Not Have Authority Pursuant to Their Impeachment Power

The Trump Administration first claimed that the Committees lacked authority under the House's impeachment power, because (1) the full House had to specifically authorize the Committees to commence impeachment investigations, (2) it did not, and (3) its after-the-fact efforts to authorize were insufficient.²³

First, the Administration claimed that the full House had to specifically authorize an impeachment inquiry. The starting point for this argument was the text. The Administration claimed that because the Constitution vests the "sole Power of Impeachment" in the House (and not in a committee or other subdivision of the House), the full House *had to* specifically authorize an impeachment inquiry in order to empower a committee to investigate impeachment.²⁴ The Administration claimed that "[a] House resolution authorizing the opening of an impeachment inquiry plays a highly significant role in directing the scope and nature of the constitutional inquest that follows."²⁵ It explained: "Such a resolution does not just reflect traditional practice. It is a constitutionally required step before a committee may exercise compulsory process in aid of the House's 'sole Power of Impeachment.'"²⁶ According to the Administration, anything short of a full House vote would result in an impermissible delegation of authority, and an invalid investigation.

The Administration turned next to historical practice.²⁷ It argued that "[t]he House has expressly authorized every impeachment investigation of a President, including by identifying the investigative committee and authorizing the use of compulsory process."²⁸ Moreover, "[t]he same thing has been true for nearly all impeachment investigations of other executive officials and judges."²⁹ According to the Administration, "[m]ost significantly,

23. See generally House Committees' Authority to Investigate Impeachment, 44 Op. O.L.C. ____ (Jan. 19, 2020).

24. *Id.* at *2 ("For precisely that reason, the House itself must authorize an impeachment inquiry, as it has done in virtually every prior impeachment investigation in our Nation's history, including every one involving a President.").

25. *Id.* at *11.

26. *Id.* at *11 (quoting U.S. CONST. art. I, § 2, cl. 5).

27. *Id.* at *20–39.

28. *Id.* at *20.

29. *Id.*

during the impeachments of Presidents Nixon and Clinton, the House Judiciary Committee determined that the House must provide express authorization before any committee may exercise compulsory powers in an impeachment investigation.”³⁰

The Administration argued that the other branches have also hewed to this line, at least implicitly. As to the executive branch, the Administration said that prior Presidents, going back to President Washington, have distinguished between Congress’s legislative authority and its impeachment authority.³¹ The Administration claimed that this demonstrated that prior Presidents have insisted that the House formally authorize impeachment before they had to comply with impeachment-related inquiries.³² As to the judiciary, the Administration pointed out that the courts have acknowledged that congressional committees, when engaged in oversight investigations, act only with the authority delegated by the full house.³³ The Administration claimed that this same principle holds, and maybe with even greater force, in the context of impeachment.³⁴

Second, the Administration argued that the full House did not formally authorize an impeachment inquiry. The Administration pointed to House Speaker Nancy Pelosi’s statement at a press conference that “the House of Representatives is moving forward with an official impeachment inquiry.”³⁵ It argued that the Speaker alone could not authorize an impeachment inquiry, because, in short, “the House Rules do not give the Speaker any authority to delegate investigative power.”³⁶

Finally, the Administration argued that the House’s attempt to subsequently authorize the Committees to investigate impeachment only *after* they issued their subpoenas did not, in fact, authorize those subpoenas. In particular, the Administration argued that House Resolution 660 “was entirely prospective” and did not “ratify any previously issued subpoenas or even make any mention of them. Accordingly, the pre-October 31 subpoenas, which had not been authorized by the House, continued to lack compulsory force.”³⁷

30. *Id.* at *17.

31. *Id.* at *14–16.

32. *Id.*

33. *Id.* at *17–20.

34. *Id.*

35. *Id.* at *1 (quoting Press Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), www.speaker.gov/newsroom/92419-0 [<https://perma.cc/529R-K4S4>]).

36. *Id.* at *3.

37. *Id.* at *3–4. The OLC noted “[t]his opinion memorializes the advice we gave about subpoenas issued before October 31,” and that the Office “separately addressed some subpoenas issued after that date.” *Id.* at *4 n.5; *see also id.* at *49 (“But the resolution’s operative language does not address any

In sum, according to the Administration, the Committees' subpoenas were invalid because the Committees formally issued them under their impeachment authority, but "before they had received *any* actual delegation of impeachment-related authority from the House."³⁸ If the subpoenas were valid, then, the Committees had to have issued them pursuant to some other authority. The most obvious one—and the one cited by the Committees themselves—was the power of oversight. But the Administration impugned that one, too.

B. The Committees Did Not Have Authority Pursuant to Their Oversight Power

The Administration argued that the Committees lacked oversight authority to issue the subpoenas, because the Committees, having purported to turn on their impeachment power, necessarily turned off their oversight authority. The argument went like this: (1) the House's power of impeachment is distinct from its power of oversight; (2) the two powers are not interchangeable or overlapping, and a committee, without authorization from the full House, cannot toggle between the two; and (3) the Committees locked themselves into the impeachment power by citing it in the first instance, and their attempt to switch to oversight authority was disingenuous and contrived. According to the Administration, the Committees, without either the impeachment power or the oversight power, utterly lacked authority to issue the subpoenas; the subpoenas were invalid; and the President could not have obstructed Congress by instructing officials to ignore them.

The Administration argued first that the House's power of impeachment is distinct from its power of oversight. As the OLC memo opined:

[T]he House has recognized the fundamental difference between a legislative oversight investigation and an impeachment investigation. The House does more than simply pick a label when it "debate[s] and decide[s] when it wishes to shift from legislating to impeachment" and to authorize a committee to take responsibility for "the grave and weighty process of impeachment." . . . Because a legislative investigation seeks "information respecting the conditions which the legislation is intended to affect or change" . . . "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political

previously issued subpoenas or provide the imprimatur of the House to give those subpoenas legal force.").

The Administration also argued that House Resolution 430 could not have authorized the Committees' subpoenas because "that resolution did not confer any investigative authority." Instead, it only granted "any and all necessary authority under Article I" only "in connection with" certain "judicial proceeding[s] in federal court." *Id.* at *46 n.36 (quoting H.R. Res. 430, 116th Cong. (2019)).

38. *Id.* at *46.

acceptability, than on precise reconstruction of past events[.]” . . . By contrast, an impeachment inquiry must evaluate whether a civil officer did, or did not, commit treason, bribery, or another high crime or misdemeanor . . . and it is more likely than a legislative oversight investigation to call for the reconstruction of past events.³⁹

For the Administration, this difference mattered in terms of a committee’s investigative authority. The Administration argued that because a House committee’s power to investigate is restricted by the “controlling character” of the committee’s authorization by the full House,⁴⁰ a committee has different powers to investigate, depending on whether it is investigating for *impeachment*, or investigating for *oversight*. According to the Administration:

Both the legislative power and the impeachment power include an implied authority to investigate, including by means of compulsory process. But those investigative powers are not interchangeable. The House has broadly delegated to committees its power to investigate for legislative purposes, but it has held impeachment authority more closely, granting authority to conduct particular impeachment investigations only as the need has arisen.⁴¹

And “[b]ecause the House has different investigative powers, establishing which authority has been delegated has often been necessary in the course of determining the scope of a committee’s authority to compel witnesses and testimony.”⁴²

Second, the Administration went a step further and argued that the two powers are not merely different, they are also entirely distinct, and that a committee cannot switch between the two. As the OLC explained, “no committee may undertake the momentous move from legislative oversight to impeachment without a delegation by the full House of such authority.”⁴³ The Administration claimed that the full House, through its Rules, authorized committees to issue subpoenas “for matters within their *legislative* jurisdiction.”⁴⁴ In other words, “[t]he House and Senate do not act in a legislative

39. *Id.* at *10 (internal citations omitted). The Administration argued moreover that “all three branches of the federal government have recognized the constitutional distinction between a legislative investigation and an impeachment inquiry.” *Id.* at *13–14.

40. *Id.* at *2 (quoting *United States v. Rumely*, 345 U.S. 41, 44 (1953)).

41. *Id.* at *10.

42. *Id.* at *13.

43. *Id.* at *2.

44. *Id.*

role in connection with impeachment,” and “[t]he House’s impeachment authority differs fundamentally in character from its legislative power.”⁴⁵

The OLC acknowledged that House Rules “confer legislative oversight jurisdiction on committees and authorize the issuance of subpoenas to that end,” but it argued that “they do not grant authority to investigate for impeachment purposes.”⁴⁶ According to the Administration, that is because the House Rules do not use the word “impeachment”—they are silent on the question. “The most obvious conclusion to be drawn from that silence is that the current House, like its predecessors, retained impeachment authority at the level of the full House, subject to potential delegations in resolutions tailored for that purpose.”⁴⁷

Moreover, the Administration claimed that “the House Rules continue to reflect the long-established distinction between legislative and non-legislative investigative powers.”⁴⁸ In particular, the Administration claimed that House Rule X addresses only “the *legislative* jurisdiction of the standing committees,”⁴⁹ and that this authority does not include *impeachment* authorities.⁵⁰ It claimed that neither Rule XI nor Rule XII expands House committees’ subpoena powers beyond their jurisdiction in Rule X, because, ultimately, Rule X sets the committees’ baseline jurisdiction for the purpose of these other rules and authorities.⁵¹

According to the Administration, then, the subpoenas were not supported by the Committees’ power to investigate impeachment. That is because when the Committees issued their subpoenas, “the House Rules did not provide authority to any of those committees to issue subpoenas in connection with potential impeachment.”⁵² If the subpoenas were valid, they must have been authorized by the Committees’ oversight authority.

But the Administration argued, finally, that the Committees were not exercising their oversight authority, despite the Committees’ claim to the contrary. In short, the Administration contended that the Committees’ initial invocation of the impeachment power locked them into the impeachment power, and their subsequent reference to their oversight authority was only

45. *Id.* at *12.

46. *Id.* at *40.

47. *Id.*

48. *Id.*

49. *Id.* at *41.

50. *Id.* at *42 (“Consistent with the foregoing textual analysis, Rule X has been seen as conferring legislative oversight authority on the House’s committees, without any suggestion that impeachment authorities are somehow included therein.”).

51. *Id.* at *43.

52. *Id.* at *45.

an opportunistic and disingenuous attempt to provide cover for their investigations. As an initial matter, the Administration argued that it had authority—indeed, that it had a *duty*—to second-guess a committee’s assertion of authority before responding to *any* request from a committee.⁵³ But the OLC went on to say that the Committees’ “token invocation” of their oversight authority was merely cover for their *true* purpose, to “compel the production of information to further an impeachment inquiry.”⁵⁴ The OLC seemed to argue that the Committees’ reference to their oversight authority was not sufficiently independent of their reference to their impeachment authority, that it was not sufficiently robust, or that it was not sufficiently detailed, and therefore the Administration did not need to take it seriously.⁵⁵

OLC was gracious enough to say that should a congressional committee issue a subpoena “in the bona fide exercise of their legislative oversight jurisdiction” the Administration would evaluate it “as part of the constitutionally required accommodation process” and “consistent with the long-standing confidentiality interests of the Executive Branch.”⁵⁶ But in the end,

While the House committees could have sought some information relating to the same subjects in the exercise of their legislative oversight authority, the subpoenas they purported to issue ‘pursuant to the House of Representatives’ impeachment inquiry’ were not in support of such oversight. We therefore conclude that they were unauthorized.⁵⁷

In sum, the Administration claimed that the House’s authority over impeachment was different and entirely distinct from its oversight authority; that a House committee could not toggle between the two, at least without authorization from the full House; and that the Committees, having locked themselves into their impeachment authority, could not alternatively issue subpoenas under their oversight authority. Ultimately, the Administration claimed that because the Committees lacked authority to issue the subpoenas—under either their impeachment power or their oversight authority—the President’s order to executive branch officials not to comply with the subpoenas could not constitute obstruction of Congress.

53. *Id.* at *47–48. Among other claims to support this argument, the OLC wrote, “To the contrary, a threshold inquiry that should be made upon receipt of any congressional request for information is whether the request is supported by any legitimate legislative purpose.” *Id.* (quoting *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 74 (1986)).

54. *Id.* at *48.

55. *Id.* at *48–49 (“Apart from their token invocation of ‘oversight and legislative jurisdiction,’ the letters offered no hint of any legislative purpose. . . . Absent [authority by the full House to initiate an impeachment investigation], the committee chairs’ passing mention of ‘oversight and legislative jurisdiction’ did not cure that fundamental defect.”).

56. *Id.* at *48.

57. *Id.* at *40.

III. PROBLEMS WITH THE ON-OFF THEORY OF CONGRESSIONAL AUTHORITY

The Administration's sweeping and novel arguments leave much to critique. But in this article, I will focus on just three areas. First, the Administration misunderstands the way congressional authority works. Next, the Administration's claims about Congressional authority are not supported by the law and historical practice. And finally, the Administration's claims, now validated, at least to some degree, by the President's acquittal in the Senate, could leave Congress with dramatically diminished authority to conduct investigations across the board.

A. The Administration Misunderstands How Congressional Authority Works

Contrary to the Administration's position, congressional authorities are not mutually exclusive, such that congressional power under one is necessarily different than congressional power under another. Moreover, they do not operate on an on-off switch, such that activating one authority means that Congress automatically deactivates another. Instead, congressional authorities overlap, and they reinforce and complement each other.

If there were any doubt, we need only consult the text of the Constitution itself, in particular the Necessary and Proper Clause. That Clause gives Congress the vast and sweeping authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁵⁸ The Clause, along with the conjunctive "and" that connects the various congressional authorities in Article I, Section 8, joins and blends those authorities—and, indeed, "all other Powers" of the government—and unifies them. It underscores the fact that these authorities overlap, and that they reinforce and complement each other.

The Supreme Court has validated this unified reading of congressional authority time and again, since the early days of the Republic. Thus, the Court in *McCulloch v. Maryland* famously held that Congress had authority to create a national bank.⁵⁹ The Court ruled that several of Congress's enumerated authorities, operating together, along with the Necessary and Proper

58. U.S. CONST. art. I, § 8, cl. 18.

59. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Clause, empowered Congress to create the bank.⁶⁰ More recently, the Court in *United States v. Comstock* somewhat less famously upheld a federal law that provided for the civil commitment of federal prisoners, who would otherwise be released from prison, as “sexually dangerous persons.”⁶¹ The Court acknowledged that congressional authorities overlap and complement and reinforce each other to empower Congress to enact federal criminal law.⁶² And it held that the Necessary and Proper Clause unifies and magnifies those authorities to empower Congress to enact the civil confinement law at issue in that case.⁶³ These cases, and many others, show that congressional authorities work together, as a unified and harmonized system of authorities, and not separately.

And just as congressional authorities work together, so, too, Congress’s ancillary powers of oversight and investigation work together. That is because, as the Court has said, congressional authority to engage in oversight and investigation derives from Congress’s various constitutional authorities. If the constitutional authorities work together, the derivative powers of oversight and investigation must, too. This means that Congress has the power to engage in oversight and investigation *across* its various authorities, including authorities in Article I, Section 8, and even its impeachment authorities. In other words, Congress could engage in oversight and investigation for the purpose of legislation *and* for impeachment, and vice versa. And nothing in the Constitution requires Congress to point to the specific authority it relies upon for any particular oversight and investigation. Indeed, such a requirement would only undercut the unified and symbiotic way that congressional authorities work together.

All this means that the Committees were well within their authority in issuing the subpoenas. Even assuming that the full House did not validly authorize the Committees to investigate impeachment,⁶⁴ under House Rule

60. *Id.* at 353–54 (“We contend, that it was necessary and proper to carry into execution several of the enumerated powers, such as the powers of levying and collecting taxes throughout this widely-extended empire; of paying the public debts, both in the United States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several states; of raising and supporting armies and a navy; and of carrying on war.”).

61. *United States v. Comstock*, 560 U.S. 126 (2010).

62. *Id.* at 136 (“And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.”).

63. *Id.* at 137, 149.

64. This is an outright specious claim, with its own set of problems that are well beyond the scope of this paper. But I cannot help pointing out the most head-spinning one: it turns the House’s “sole power of impeachment” entirely inside out by allowing the President, not the House, to determine how the House exercises its power.

X the Committees had all the authority they needed to issue the subpoenas. That Rule establishes the jurisdiction of House committees, and authorizes them broadly to engage in oversight “[i]n order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated,” among other purposes.⁶⁵ In order to aid committees in their oversight, House Rule XI authorizes committees and their chairs “to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”⁶⁶ The Committees easily could have investigated matters that were well within their jurisdictions under House Rule X, including issues in the impeachment, and to issue subpoenas pursuant to their authorities under House Rule XI. Again, nothing in the Constitution or the House Rules required the Committees to name and to stay within their precise authorities. Indeed, everything about the text, judicial interpretations, and history of the Constitution says just the opposite.

In short, and contrary to the Administration’s arguments, congressional authorities work together, not separately, and they do not operate on an on-off switch. The text, judicial interpretations, and our history all say that Congress *can* use its power to investigate for legislative purposes also to advance its impeachment power, and, for that matter, vice versa. The Committees’ subpoenas were well within the bounds of Congress’s several symbiotic authorities.

B. The Administration’s Claims Are Not Supported By Law and Practice

Next, the Administration’s claims about congressional authority are not supported by judicial interpretations and historical practice by the executive branch. Indeed, the Administration’s *own* cited authorities fall short of its sweeping claims.

As to judicial interpretations, the Administration cites one Supreme Court and two lower court cases on congressional oversight authority in support of its claim that the judiciary has “recognized the constitutional

65. Rules of the House of Representatives, 116th Cong., Rule X(2)(b)(1) (2019).

66. Rules of the House of Representatives, 116th Cong., Rule XI(m)(1)(B) (2019). House Rule XI(m)(3)(A)(i) authorizes a committee to delegate “[t]he power to authorize and issue subpoenas . . . to the chair . . . under such rules and under such limitations as the committee may prescribe.”

distinction between a legislative investigation and an impeachment inquiry.”⁶⁷ But by the Administration’s own reckoning, these cases only say, at most, that congressional authorities to investigate for *legislation* and to investigate *impeachment* are *different*, not that they are *distinct*. These cases say nothing about whether a committee might use authorities in a unified way, or to toggle between them, in order to support an investigation.

As to historical practice, the Administration has a similar problem: all of the Administration’s examples—from Washington through Jackson through Polk—all turn on congressional oversight authority.⁶⁸ According to the Administration, all the referenced Presidents disputed Congress’s authority to investigate a subject in order to advance its oversight authority.⁶⁹ But at the same time, they took the position that Congress might have had authority to investigate the subject if it were engaged in an impeachment.⁷⁰ But by the Administration’s own descriptions, these say, at most, that Presidents have understood Congress’s various powers as different. They say nothing about whether Presidents have understood Congress’s powers as complementary.

In sum, these authorities and examples say, at most, that Congress’s various powers are different. That is hardly controversial: of course they are. But these authorities and examples cannot support the Administration’s much more aggressive claims that Congress’s various powers are distinct, and that they operate on an on-off switch. These authorities say nothing of that, and they say nothing to take away from the text, judicial interpretations, and history that all point to a unified, integrated set of congressional authorities, as above.

C. The Administration’s Claims Could Dramatically Undercut Congressional Authority

Finally, the Administration’s sweeping arguments, and its categorical refusal to comply with, or even acknowledge the legitimacy of, the Committees’ subpoenas threaten to do lasting and serious harm to congressional authority across the board.

67. House Committees’ Authority to Investigate Impeachment, 44 Op. O.L.C. ____, *13 (Jan. 19, 2020) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 749 (D.C. Cir. 2019); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974)).

68. *Id.* at 14–16.

69. *Id.*

70. *Id.*

For one, the Administration's claims and approach set a dangerous and damaging precedent. Remember that in our system, in matters of separation of powers, we place "significant weight" on the prior practices of the different branches as they relate to each other.⁷¹ In particular, the accepted past practices of our Presidents become precedent for future presidential actions. If we need any reminding of this, we need only recall the many debates around President Trump's impeachment itself—and how those debates almost invariably turned on congressional and executive practices in prior presidential impeachments.

Here, the Administration's *claims* set a precedent for future Presidents that congressional authorities are distinct and disjointed; that congressional committees need to point to specific authorization for their investigations by their full house; and that Congress and its committees are stuck with the authority they first cite, and cannot use authorities in a complementary way, or swap them out once an investigation has commenced. Moreover, the Administration's *approach* sets a precedent for future Presidents that the executive branch has authority to judge for itself the validity of Congress's investigations, oversight, impeachments, and even other exercises of its authority, and that the executive branch can simply ignore congressional investigations that it unilaterally deems invalid. These precedents sweep far beyond impeachments; instead, they potentially apply to congressional authority in relation to the executive branch in *any* congressional act of investigation or oversight.

For another, these precedents are now validated by Congress itself and are currently being tested in the courts. As to Congress, the Senate's vote to acquit President Trump reinforces the precedential weight of the Administration's sweeping claims. As with President Trump's impeachment, future presidential impeachments will look not only to the President's behavior, but also to the outcome in Congress. If the outcome validates the President's position, as here, it stands as a kind of super-precedent for future presidential behavior and future impeachments.

As to the courts, the *en banc* D.C. Circuit is now considering a related issue, whether former White House Counsel Don McGahn was absolutely immune from a subpoena issued by the House Judiciary Committee, and whether the courts can even hear this kind of inter-branch dispute.⁷² A three-judge panel of the D.C. Circuit ruled in February 2020 that the courts lacked

71. *Zivotofsky v. Kerry*, 576 U.S. 5, 23 (2015) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014)).

72. *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, 951 F.3d 510, 522 (D.C. Cir. 2020), *vacated sub nom.* *United States House of Representatives v. Mnuchin*, 2020 U.S. App. LEXIS 8140, at *7, *8 (D.C. Cir. 2020).

jurisdiction over the case, effectively stripping Congress of any serious power it had to force compliance with such a subpoena.⁷³ The court reasoned that federal courts do not have jurisdiction under Article III to hear disputes between Congress and the executive branch, unless those disputes result in an injury to a party outside the government.⁷⁴ The court explained:

The Constitution does not vest federal courts with some “amorphous general supervision of the operations of government.” . . . Instead, as Chief Justice Marshall explained, federal courts sit “to decide on the *rights of individuals*” To that end, we lack authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity “beyond the [Federal] Government.” Without such a harm, any dispute remains an intramural disagreement about the “operations of government” that we lack power to resolve.⁷⁵

The full D.C. Circuit vacated the ruling and is currently reconsidering the case *en banc*.⁷⁶ If the full D.C. Circuit ultimately agrees with the three-judge panel, or if the full court otherwise restricts Congress’s authority to enforce its subpoenas directed at executive branch officials in court, the ruling could hinder Congress’s ability to force compliance with its subpoenas and, as a practical matter, validate President Trump’s sweeping position that the Committees lacked the power to issue and enforce their subpoenas.

Finally, for a third, absent judicial intervention, there is precious little that Congress can *actually* do to enforce its investigation powers. And that is cause for worry in a checks-and-balances system like ours. Professor Van Alstyne, in a prescient piece over a half-century ago, explained why:

Secondly, the power to investigate would appear to be indispensable to the maintenance of Congressional independence. Unlike the executive branch, Congress has no vast structure of administrative personnel constantly gathering and correlating information and studying the various practical problems encountered in the daily administration of governmental affairs. If Congress were to be denied the power to independently investigate problems of national scope, it would be largely dependent on the executive branch to supply it with the necessary factual justification for a proposed legislative program. Detailed information with regard to administrative policies and the practical operation of statute law would necessarily have to come, for the most part, from those charged with the responsibility of formulating such policies and administering such laws. Even where the highest good faith is attributed to the executive branch, the dangers of such dependence for factual data need no elaboration for

73. *McGahn*, 951 F.3d at 522.

74. *Id.* at 515–16.

75. *Id.* (emphasis in original) (citations omitted).

76. *Mnuchin*, 2020 U.S. App. LEXIS 8140.

lawyers who are sensitive to the inadequacies of the fact-finding process even in the impartial adversary forum of the courtroom.

Thirdly, the investigatory power plays an indispensable role as a check upon the untrammelled exercise of executive power. The great bulk of special investigations have been directed historically at specific functions, activities, or individuals in the executive branch. The very possibility that a government official may be called to account for his stewardship before a Congressional investigating committee undoubtedly exerts a beneficial influence for more responsible administration. . . . If we are to pay more than mere lip service to this basic concept, it would seem clear that Congress must retain the power to investigate to determine whether the policies it has formulated as the lawmaking agency have been altered or misconceived in their administration or interpretation by the law executing agency.⁷⁷

As the court noted in *McGahn*, Congress can, in theory, pressure the executive branch into complying with subpoenas by “hold[ing] officers in contempt, withhold[ing] appropriations, refus[ing] to confirm the President’s nominees, harness[ing] public opinion, delay[ing] or derail[ing] the President’s legislative agenda, or impeach[ing] recalcitrant officers.”⁷⁸ But in practice, these are ineffectual against a defiant administration, like this one. The Trump Administration has time and again flatly declined to cooperate with congressional oversight and investigation, slow-walked responses, evaded inquiries, and generally foot-dragged in an effort to run the clock on investigations. This Administration is impervious to congressional attempts to check it using traditional tools. For example, this Administration has sidestepped the Senate’s check under the Appointments Clause by making unprecedented use of the power unilaterally to appoint “acting” officials.⁷⁹ It has sidestepped Congress’s appropriations power by reprogramming funds for pet projects.⁸⁰ Officials seem to wear congressional contempt as a badge of honor. And impeachment seems only to embolden the President.

In short, the Administration’s response to impeachment is a particularly strong reminder that there is little that Congress can actually do to enforce its investigation, oversight, and even impeachment powers.

77. Arvo Van Alstyne, *Congressional Investigations*, 15 F.R.D. 471, 747–75 (1953).

78. *McGahn*, 951 F.3d at 519.

79. See, e.g., Aaron Blake, *Trump’s government full of temps*, WASH. POST (Feb. 21, 2020), <https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days/> [<https://perma.cc/6ZJU-VC6R>].

80. See, e.g., Paul Sonne & Nick Miroff, *Pentagon to divert \$3.8 billion from its budget to build more of Trump’s border barrier*, WASH. POST (Feb. 13, 2020), https://www.washingtonpost.com/national-security/pentagon-to-divert-38-billion-from-its-budget-to-build-more-of-trumps-border-barrier/2020/02/13/1f937000-4e93-11ea-9b5c-eac5b16dafaa_story.html [<https://perma.cc/GX5X-NHJG>].

CONCLUSION

The Administration's on-off theory of congressional authority says that Congress's various powers are distinct and mutually exclusive; that they operate like silos; and that Congress and its committees cannot toggle between them. Yet we know from the text, judicial interpretations, and history of our Constitution that this is not right. These sources tell us that Congress's authorities overlap, that they work together in a symbiotic way, and that Congress can use one authority, or more, for different, but mutually-reinforcing, purposes. Still, the Administration's on-off theory, now on the record and validated by the Senate, threatens to do serious and lasting harm to Congress's authorities to check and balance the coordinate branches of government, and, more broadly, to our separation of powers system.