

IMPEACHMENT



*Frequently asked questions about
the Mueller Report, impeachment,
and more*

Impeachment

How did impeachment wind up in the Constitution? The Framers, who created the framework of our government in writing the Constitution, were concerned that a president or another member of the executive branch could abuse his or her position in ways that would present an immediate threat to the democratic process.

- George Mason: “Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?” “Shall the man who has practised corruption, and by that means procured his appointment in the first instance, be suffered to escape punishment by repeating his guilt?”
- Benjamin Franklin: Why not “provide in the Constitution for the regular punishment of the executive, where his misconduct should deserve it, and for his honorable acquittal, where he should be unjustly accused?”
- James Madison: “He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation [embezzlement] or oppression. He might betray his trust to foreign powers.”¹

What is required to initiate impeachment proceedings? Impeachment proceedings can begin in one of two ways:

- 1) a Member introduces an impeachment resolution, and it’s voted on like any other bill. In this instance, there aren’t any investigations in the House, and the resolution goes straight to the Senate, or
- 2) a Member introduces a resolution authorizing an investigation likely to be performed by the House Committee on the Judiciary. In this instance, the Committee would perform an investigation (however it decides to do so) and then vote on whether to pursue articles of impeachment and report those articles to the full House. Then, the full House votes.²

Either way, passing articles of impeachment to the Senate only requires a simple majority vote. Note that the House does not vote to remove the President from office. The House votes to allege an impeachable offense, and the Senate takes it from there.

What happens next? If a simple majority in the House votes to impeach the President, he is impeached, which essentially means charged with a crime. That sends the matter to the Senate, which must elect to hold a trial. The House passes a resolution to appoint Members to play the role of prosecutors (known as “managers”). Next, the Senate holds a trial. The Chief Justice of the Supreme Court presides over the trial, meaning that he acts as a referee between the President’s lawyers and the House managers. The President has defense lawyers, and if at least two-thirds of the full Senate (67 senators) vote to remove the president, the vice president immediately becomes president.³

¹ Jill Lepore, “How Impeachment Ended up in the Constitution,” *The New Yorker* (May 2017) at: <https://www.newyorker.com/news/news-desk/how-impeachment-ended-up-in-the-constitution>

² “Impeachment,” *History, Art & Archives, United States House of Representatives* at: <https://history.house.gov/Institution/Origins-Development/Impeachment/>

³ Charlie Savage, “How the Impeachment Process Works,” *NYT* (May 2017) at: <https://www.nytimes.com/2017/05/17/us/politics/how-the-impeachment-process-works-trump-clinton.html>

What are the rules? There are no specific impeachment rules in the House. If the House passes articles of impeachment to the Senate, the Senate will then pass a resolution (like a bill) laying out trial procedures.⁴

What are the standards? The Constitution says: “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.”⁵ But there isn’t any controlling legal authority, so the Senate decides for itself whether the conduct in question rises to the level of an impeachable offense.⁶

What does “high Crimes and Misdemeanors” mean? The term evolved from 14th century British constitutional history, where it meant crimes against the government and committed by government officials.⁷

Is obstruction of justice an impeachable offense? Both Nixon and Clinton were charged with obstruction of justice, among other offenses.

From the Mueller Report: “Obstruction of justice can be motivated by a desire to protect non-criminal personal interests, to protect against investigations where underlying criminal liability falls into a grey area, or to avoid personal embarrassment. The injury to the integrity of the justice system is the same regardless of whether a person committed an underlying wrong.”⁸

How long have prior, recent impeachment proceedings taken? Nixon’s impeachment for obstruction of justice, abuse of power, and contempt of Congress took 10 months. Clinton’s impeachment for lying under oath and obstruction of justice took three months.⁹

The Mueller Report

What did the Office of Special Counsel investigate? Volume I of the “Report On The Investigation Into Russian Interference In The 2016 Presidential Election” (the Mueller Report) addresses whether the Trump Campaign conspired or entered into an agreement with the Russian government to release damaging information about the Clinton Campaign. Volume I establishes that the Russian government did interfere in the 2016 election and carried out a social media campaign that favored now-President Donald Trump and disparaged Hillary Clinton. Volume II presents the Office of Special Counsel (the Office)’s findings as to whether the President committed obstruction of justice.

⁴ Id.

⁵ U.S. Constitution. Art. II, Sec. 4.

⁶ Id.

⁷ “Impeachment,” *History, Art & Archives, United States House of Representatives* at: <https://history.house.gov/Institution/Origins-Development/Impeachment/>





⁸ Special Counsel Robert S. Mueller, III, “Report on the Investigation into Russian Interference in the 2016 Presidential Election,” *U.S. Department of Justice, Office of the Special Counsel, Volume II* (March 2019), p. 157.

⁹ “List of Individuals Impeached by the House of Representatives,” *History, Art & Archives, United States House of Representatives* at: <https://history.house.gov/Institution/Impeachment/Impeachment-List/>

How many instances of obstruction of justice did the Report detail? Quinta Jurecic, Managing Editor of Lawfare, prepared a “heat map,” which we’ve recreated below and which articulates all the conduct the Office considered and the degrees to which each rose to the level of obstruction.¹⁰

The Office assessed the three elements “common to most of the relevant statutes” (since there isn’t just one definition) relating to obstruction of justice: 1) an obstructive act, 2) a link between the act and an official proceeding, and 3) corrupt intent.

Mueller Report: Obstruction of Justice Heat Map

 “Substantial” evidence or similar  “Evidence could support” or similar; Mueller provides alternate readings  Unclear (Mueller’s assessment is difficult to interpret; Mueller could not obtain evidence due to privilege issues)  “Evidence does not establish”	Obstructive Act	Link	Intent
Conduct re: Flynn investigation	Red	Red	Orange
Conduct re: Comey announcement of Russia investigation	Yellow	Red	Yellow
Comey firing	Orange	Red	Orange
Efforts to fire Mueller	Red	Red	Red
Efforts to curtail Mueller	Red	Red	Red
Efforts to prevent disclosure of Trump Tower meeting	Green	Green	Green
Efforts to have Sessions take over investigation	Orange	Orange	Orange
Order to McGahn to deny attempt to fire Mueller	Red	Red	Red
Conduct toward Flynn	Yellow	Red	Yellow
Conduct toward Manafort (cooperation)	Red	Red	Red
Conduct toward Manafort (influencing jury)	Red	Red	Yellow
Conduct toward redacted individual (Stone?)	White	Red	White
Conduct toward Cohen (influencing testimony)	Yellow	Red	Orange
Conduct toward Cohen (cooperation)	Orange	Red	Orange

Why didn’t Special Counsel Robert Mueller indict the President? The Report details four reasons, in the Introduction to Volume II.

- The Office of Legal Counsel (OLC) said that “the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch

¹⁰ Quinta Jurecic, “Obstruction of Justice in the Mueller Report: A Heat Map,” *Lawfare* (April 2019) at: <https://www.lawfareblog.com/obstruction-justice-mueller-report-heat-map>

to perform its constitutionally assigned functions,” in violation of the “constitutional separation of powers.” Given that the Special Counsel is an attorney of the Department of Justice (DOJ), “the Office accepted OLC’s legal conclusion for the purpose of exercising prosecutorial jurisdiction.”¹¹

- OLC concluded that while the President may not be prosecuted, criminally investigating the President during his term is allowed. OLC acknowledged that the President will not have immunity from that prosecution after he leaves office. Given that and the “strong public interest in safeguarding the integrity of the criminal justice system,” the Office “conducted a thorough factual investigation in order to preserve the evidence when memories were fresh and documentary materials were available.”¹²
- The Office accepted the premise that it could not bring charges against the President. So, the Office did not apply a prosecutorial approach to investigating, since it could potentially result in a judgment that the President committed crimes. “Fairness concerns counseled against potentially reaching that judgment when no charges can be brought,” because there would be no adversarial opportunity (through a trial) for public name-clearing.¹³
- “[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President’s actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.”¹⁴

What were the limitations on the Special Counsel’s investigation? According to the Report, 1) individuals the Special Counsel interviewed lied or provided incomplete information, 2) the Office couldn’t access all relevant evidence because many subjects and witnesses lived abroad, and 3) the Office learned that some of the individuals they interviewed or investigated either deleted relevant communications or communicated during the relevant periods via encryption apps. “Accordingly, while this report embodies factual and legal determinations that the Office believes to be accurate and complete to the greatest extent possible, given these identified gaps, the Office cannot rule out the possibility that the unavailable information would shed additional light on (or cast in a new light) the events described in the report.”¹⁵

What guided the Special Counsel’s charging decisions? “The Office determined whether the conduct it found amounted to a violation of federal criminal law chargeable under the Principles of Federal Prosecution. The standard set forth in the Justice Manual is whether the conduct constitutes a crime; if so, whether admissible evidence would probably be sufficient to obtain and sustain a conviction; and whether prosecution would serve a

¹¹ Special Counsel Robert S. Mueller, III, “Report on the Investigation into Russian Interference in the 2016 Presidential Election,” *U.S. Department of Justice, Office of Special Counsel, Volume II* (March 2019), p. 1.

¹² *Id.* at p. 2.

¹³ *Id.* at p. 2.

¹⁴ *Id.* at p. 2.

¹⁵ *Id.*, Volume I at p. 10.

substantial federal interest that could not be adequately served by prosecution elsewhere or through non-criminal alternatives.”¹⁶

What did the Special Counsel find regarding the existence of a conspiracy between the Trump Campaign and the Russian government? “Although the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the Campaign expected it would benefit electorally from information stolen and released through Russian efforts, the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.”¹⁷

What did the Special Counsel find regarding whether the President attempted to obstruct the investigation? “[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President’s actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.”¹⁸

Subpoena Power

How many subpoenas has the House of Representatives issued this Congress relating to the Special Counsel investigation of the President? First, it’s important to note that some Committees have issued subpoenas that they’re keeping confidential to protect the privacy of the firms controlling the requested documents, when those organizations are unconnected to any underlying, potential crimes.

There are currently at least 11 outstanding subpoenas issued by Committees in the House and Senate. Four of those subpoenas are bipartisan.

What is the status of outstanding Congressional subpoenas? Six Committees have subpoenaed information relating to obstruction charges against the President:

- *House Permanent Select Committee on Intelligence*
 - Counterintelligence and foreign intelligence materials in the Mueller investigation, including the unredacted Mueller Report and underlying evidence from Attorney General Bill Barr [Bipartisan]¹⁹

¹⁶ Id. at pp. 8–9.

¹⁷ Id. at pp. 1–2.

¹⁸ Id., Volume II at p. 2.

¹⁹ “House Intelligence Committee Issues Subpoena for Counterintelligence and Foreign Intelligence Materials in Mueller Investigation, Including Report and Underlying Evidence,” *U.S. House of Representatives Permanent Select Committee on Intelligence* (May 2019) at: <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=638>

- *House Committee on the Judiciary*
 - Testimony from Don McGahn, former White House Counsel, and documents within his control relating to Special Counsel Mueller’s investigation²⁰
 - Counterintelligence and foreign intelligence materials in the Mueller investigation, including the unredacted Mueller Report and underlying evidence from Attorney General Bill Barr²¹
 - Testimony from Hope Hicks, former White House Communications Director²²
 - Testimony from Annie Donaldson, former Chief of Staff to former White House Counsel Don McGahn²³

- *House Committee on Financial Services*
 - Financial records from Deutsche Bank, Capital One, JP Morgan Chase, Bank of America, and Citigroup including tax returns, evidence of suspicious activity and, from Deutsche Bank: any internal communications regarding President Trump and his ties to foreign individuals²⁴

- *House Committee on Ways and Means*
 - Six years of President Trump’s tax returns and tax returns from eight of his businesses, from the U.S. Department of the Treasury and the Internal Revenue Service²⁵

- *House Committee on Oversight and Reform*
 - Ten years’ worth of President Trump’s financial records from the accounting firm Mazars USA “relating to the Committee’s investigation into allegations that President Trump inflated or deflated financial statements for potentially improper purposes. The allegations were supported by corroborating documents produced to the Committee by the President’s longtime personal lawyer, Michael Cohen.”²⁶

²⁰ Andrew Desiderio and Kyle Cheney, “Don McGahn won't comply with House Democrats' subpoena,” *Politico* (May 2019) at: <https://www.politico.com/story/2019/05/07/don-mcgahn-wont-comply-with-house-democrats-subpoena-1308802>

²¹ Tim Mak, “House Judiciary Plans Contempt Vote For Attorney General Barr Over Mueller Report,” *NPR* (May 2019) at: <https://www.npr.org/2019/05/06/720628285/house-judiciary-plans-contempt-vote-for-attorney-general-barr-over-mueller-report>

²² Jeremy Herb and Manu Raju, “House panel issues subpoenas for Hope Hicks, Annie Donaldson,” *CNN* (May 2019) at: <https://www.cnn.com/2019/05/21/politics/hope-hicks-annie-donaldson-subpoenas/index.html>

²³ Id.

²⁴ Zachary Warmbrodt and John Bresnahan, “House Democrats subpoena Deutsche Bank in Trump investigation,” *Politico* (April 2019) at: <https://www.politico.com/story/2019/04/15/democrats-subpoena-deutsche-bank-1277199>

²⁵ Nicholas Fandos, “House Ways and Means Chairman Subpoenas Trump Tax Returns,” *NYT* (May 2019) at: <https://www.nytimes.com/2019/05/10/us/politics/trump-tax-returns-subpoena.html>

²⁶ “Committee Seeks Documents on Accuracy of President Trump’s Financial Statements,” *U.S. House of Representatives Committee on Oversight and Reform* (March 2019) at: <https://oversight.house.gov/news/press-releases/committee-seeks-documents-on-accuracy-of-president-trump-s-financial-statements>

- *Senate Select Committee on Intelligence*
 - Documents from former National Security Advisor Michael Flynn about his contacts with Russian officials, including a transcript of his conversation with former Russian ambassador Sergey Kislyak [Bipartisan]²⁷
 - Testimony from Donald Trump, Jr. relating to a 2016 meeting in Trump Tower and his role in President Trump’s attempts to build a skyscraper in Moscow [Bipartisan]²⁸
 - Counterintelligence and foreign intelligence materials in the Mueller investigation, including the unredacted Mueller Report and underlying evidence [Bipartisan]²⁹

Executive Privilege

What is executive privilege? Since 1792, presidents have claimed a qualified (not absolute) right to keep certain documents and information confidential, in the face of demands from the legislature. Executive privilege can be overcome if the legislature demonstrates enough need for the requested documents or information (in the eyes of the judge considering the subpoena).

Does executive privilege explicitly exist in the Constitution? No.

Is it constitutional? Presidents have claimed executive privilege is implied in the Constitution—and the Supreme Court agreed in *U.S. v. Nixon*—through the separation of powers doctrine (the idea that the executive, legislative, and judicial branches of government are each given certain powers to check and balance the other branches). The principle that presidents should be allowed to keep certain documents and information confidential stems from their need for honest and straightforward advice from aides and the presumption that aides won’t give candid advice if they could then be called to testify under oath. If a court were called upon to determine the validity of a president’s executive privilege claim, it would balance the executive’s interest in candid advice as necessary to maintain the separation of powers doctrine against Congress’s need for the information to conduct its investigatory responsibilities.

Is executive privilege usually upheld? It depends. In 1954, then-President Eisenhower claimed executive privilege to prevent administration officials from testifying at the Army’s hearings on Senator Joe McCarthy. In 1974, when Nixon claimed executive privilege to prevent the release of the Watergate tapes, the Supreme Court unanimously held that then-Special Counsel Leon Jaworski demonstrated “sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment.” However, the Court

²⁷ Mark Mazzetti and Maggie Haberman, “Donald Trump Jr. Is Subpoenaed to Testify to Senate Panel on Russia Contacts,” *NYT* (May 2019) at: <https://www.nytimes.com/2019/05/08/us/politics/donald-trump-jr-subpoena.html>

²⁸ Kevin Johnson and Erin V. (GNS) Kelly, “Michael Flynn refuses Senate subpoena, invokes Fifth Amendment,” *USA Today* (May 2017) at: <https://www.usatoday.com/story/news/2017/05/22/report-michael-flynn-refuses-senate-subpoena-invokes-fifth-amendment/102011174/>

²⁹ “Counterintelligence and Foreign Intelligence Materials in Mueller Investigation, Including Report and Underlying Evidence,” *U.S. House of Representatives Permanent Select Committee on Intelligence* (May 2019) at: <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=638>

maintained “the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties.”³⁰

Contempt of Congress

What specific tools does Congress have to enforce its subpoenas? Based on precedent, statutes, and court rulings, both chambers of Congress have the power to invoke three types of contempt proceedings if a Committee’s investigation is being obstructed.

1. **Criminal contempt of Congress.** If a Committee rules that its subpoena has been defied, under this statutory authority (2 U.S.C. § 192) enacted in 1857, that Committee can refer the matter to the Speaker of the House or the Senate President who then certifies and refers the matter to the U.S. attorney, “whose duty it shall be to bring the matter before a grand jury for its action.”³¹ If the grand jury issues an indictment, the judge assigned to the ensuing criminal prosecution can either sentence the defendant to jail time or assess fines.
2. **Civil lawsuit brought by the House or Senate.** The Senate and its Committees have statutory authority (2 U.S.C. §§ 288b, 288d; 28 U.S.C. §1365) to file lawsuits in federal court to enforce their subpoenas. Though the House has no similar statutory authority, the federal district court in Washington, D.C. has extended the same power to the House, pursuant to the House authorizing a Committee to file a lawsuit. In either case, an executive branch member can contest the subpoena based on a governmental privilege. But if the district court upholds the subpoena, it can then hold the defendant in contempt of court (instead of contempt of Congress),³² at which point the judge can assess fines or imprison the defendant.³³ One of the benefits of contempt of court versus contempt of Congress is the court’s well-practiced ability to send a defendant to a brick and mortar detention facility (i.e. jail or prison).
3. **Inherent contempt of Congress.** Technically, if an individual defies a Congressional subpoena, either chamber of Congress has the direct authority adopt a resolution to arrest, jail, or potentially fine that individual.³⁴ The Sergeant-at-Arms then takes the individual into custody and brings him or her before the House or Senate for a hearing. If found guilty, the House or Senate may then detain or imprison the defendant until he or she complies with the subpoena.³⁵ In practice though, Congress doesn’t have a brick and mortar detention facility. In one instance, the Sergeant-at-Arms held Robert Stewart, then-chairman of the board of Standard Oil Co., at the Willard Hotel overnight for refusing to answer questions at a Senate hearing.³⁶

³⁰ U.S. v. Nixon, 418 U.S. 683 (1974).

³¹ 2 U.S.C. § 194

³² Todd Garvey, “Congressional Subpoenas: Enforcing Executive Branch Compliance,” *Congressional Research Service* (March 2019) at: <https://fas.org/sgp/crs/misc/R45653.pdf>

³³ 1 Stat. 83, § 17 (1789)

³⁴ *Jurney v. MacCracken*, 294 U.S. 125, 147–48 (1935)

³⁵ Todd Garvey, “Congressional Subpoenas: Enforcing Executive Branch Compliance,” *Congressional Research Service* (March 2019) at: <https://fas.org/sgp/crs/misc/R45653.pdf>

³⁶ Samuel Erman and Edward Kleinbard, “The House has the power to arrest people who defy its orders,” *Washington Post* (May 2019) at: https://www.washingtonpost.com/outlook/2019/05/15/house-has-power-arrest-people-who-defy-its-orders/?utm_term=.7d2b9cca47ec