

UNFAIR, UNPRECEDENTED, & UNDEMOCRATIC Historical Impeachment in the House versus Treatment of President Trump

The Constitution provides for a two-step process for the removal of federal officials: the House of Representatives “shall have the sole Power of Impeachment”¹ and “the Senate shall have the sole Power to try all Impeachments.”² The president, vice president, and all civil officers of the United States are subject to impeachment. Impeachment proceedings have been initiated in the House more than 60 times but less than a third of those proceedings have led to actual impeachments and only eight officials (all federal judges) have been convicted and removed from office by the Senate. In total, 15 federal judges, two Presidents (Andrew Johnson in 1868 and Bill Clinton in 1998), a cabinet secretary (William Belknap in 1876), and a U.S. Senator (William Blount in 1797)³ have been impeached by the House.

“In most cases, impeachment proceedings in the House have been initiated either by introducing a resolution of impeachment through the hopper or by offering a resolution of impeachment on the floor as a question of the privileges of the House.”⁴ Once such a resolution has been introduced, “[u]nder the modern practice, an impeachment is normally instituted by the House by the adoption of a resolution calling for a committee investigation of charges against the officer in question.”⁵ After such an investigation, the committee may “recommend the dismissal of charges or it may recommend impeachment.”⁶ If the investigating committee recommends impeachment and reports articles of impeachment to the House, the full House considers the articles of impeachment on the floor. In short, impeachment in the House “generally proceeds in three phases: (1) initiation of the impeachment process; (2) Judiciary Committee investigation, hearings, and markup of articles of impeachment; and (3) full House consideration of the articles of impeachment.”⁷ “All impeachments to reach the Senate since 1900 have been based on resolutions reported by the Committee on the Judiciary.”⁸ Before the creation of the Judiciary Committee in 1813, impeachments were referred to a special committee for investigation.⁹

At this point, however, the “impeachment process” in the House for considering whether to impeach President Trump is not following traditional House practice. Rather than a formal impeachment process involving debate and votes by the full House prior to taking each step in the process, the process with regard to President Trump is at the ad hoc, fiat of Speaker Pelosi. Indeed, instead of the House voting to authorize one (or more) of its committees to begin investigating whether to impeach the President, Speaker Pelosi sua sponte announced by press

¹ U.S. Const. Art. I, § 2.

² U.S. Const. Art. I, § 3.

³ Senator Blount’s impeachment trial, the first ever conducted, established the principle that members of the House and Senate are not “civil officers” under the Constitution and, accordingly, can only be removed from office by a two-thirds vote for expulsion by their respective chambers.

⁴ CHARLES W. JOHNSON, JOHN V. SULLIVAN, & THOMAS J. WICKHAM, JR., *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 614 (2017) (“House Practice”).

⁵ *Id.*

⁶ *Id.*

⁷ Elizabeth Rybicki & Michael Greene, *The Impeachment Process in the House of Representatives* at i (2019).

⁸ House Practice at 615.

⁹ *Id.*

conference that the House “is moving forward with an official impeachment inquiry.”¹⁰ Her statement, however, has no legal effect: a declaration by the Speaker in a press conference is not a substitute for action by the full House.

A. Traditional Presidential Impeachment Process in the House

The impeachment process may be initiated as the result of various events, including the receipt and referral of information from an outside source, like an independent counsel or the Judicial Conference of the United States, investigations by congressional committees under their general oversight authority, or the introduction of articles of impeachment. Regardless of what instigates an impeachment inquiry, there are normally three formal stages of House action. First, an impeachment inquiry is authorized, most often through the adoption of a resolution directing the Judiciary Committee to investigate a federal official. Second, the investigating committee conducts an investigation, prepares articles of impeachment, and reports them to the House. Third, the full House considers the articles of impeachment and, if they are adopted, appoints managers to present the articles in the Senate.

In our nation’s history, the House has impeached only two presidents, although the impeachment and removal of President Richard Nixon is largely accepted to have been inevitable barring his resignation. In all three of these cases, the full House voted to authorize impeachment proceedings.¹¹ The impeachment of President Andrew Johnson began in 1867 with the authorization by the full House to commit the matter to the Committee on the Judiciary for the purpose of inquiring into President Johnson’s conduct.¹² In the cases of President Nixon in 1974 and President Clinton in 1998, the full House explicitly granted the Judiciary Committee authority to conduct an impeachment proceeding. Indeed, even in the wake of an investigation conducted by an independent counsel, whose statutory obligation was to inform the House whether articles of impeachment should be pursued,¹³ in the case of President Clinton, the House recognized the importance of a full House vote to initiate Congress’s greatest constitutional check on the executive: the removal of the president from office.

For the Nixon impeachment, the House passed H. Res. 803 on February 6, 1974, which stated “[t]he Committee on the Judiciary . . . is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon.”¹⁴ Judiciary Committee Chairman Peter Rodino (D-NJ) stated at the time:

We have reached the point when it is important that the House explicitly confirm our responsibility under the Constitution. *Such a resolution has always been passed by the House. It is a necessary step if we are to meet our obligations.* The sole power of

¹⁰ Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), <https://www.speaker.gov/newsroom/92419-0>.

¹¹ H. Res. 581, 105th Cong. (1998); H. Res. 803, 93d Cong. (1974); Cong. Globe, 39th Cong., 320-21 (1867).

¹² Cong. Globe, 39th Cong., 320-21 (1867).

¹³ 28 U.S.C. § 595(c) (“An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel’s responsibilities under this chapter, that may constitute grounds for an impeachment.”).

¹⁴ H. Res. 803, 93d Cong. (1974).

impeachment carries with it the power to conduct a full and complete investigation of whether sufficient grounds for impeachment exist or do not exist, and by this resolution these investigative powers are conferred to their full extent upon the Committee on the Judiciary.¹⁵

For the Clinton impeachment, the House passed two resolutions that recognized the importance of a full House vote in initiating impeachment proceedings. On September 11, 1998, the full House passed H. Res. 525 allowing the Judiciary Committee “to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced.”¹⁶ Then, on October 8, 1998, the full House passed H. Res. 581, which stated, “[t]he Committee on the Judiciary . . . is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach William Jefferson Clinton.”¹⁷

In fact, even the two most recent impeachment inquiries related to federal district court judges were initiated by resolution.¹⁸

It would appear that at least part of the reason the House has traditionally launched impeachment inquiries through resolution is that the House’s impeachment power has not been delegated to the Judiciary Committee, or any other standing committee in the House. In fact, the House Rules are silent on the issue of impeachment. Without action by the full House, neither the House Judiciary Committee, nor any other House committee has the authority under the rules to conduct an impeachment inquiry. The notion that a House committee, or committees, may initiate (or the Speaker may direct committees to initiate) impeachment proceedings on behalf of the House without any debate or vote on the House floor is unprecedented and undemocratic. Speaker Pelosi’s September 24, 2019, announcement that multiple House committees will “proceed under that umbrella of impeachment inquiry”¹⁹ does not change the fact the whole House has not voted to delegate its impeachment authority to any of its committees. The House’s current “impeachment inquiry” has no support in any official House action.

In addition to action by the full House, in both the impeachment proceedings against President Nixon and those against President Clinton, the Judiciary Committee adopted its own rules that provided further procedural safeguards to both the respective president and the

¹⁵ 120 Cong. Rec. 2171 (Feb. 6, 1974) (emphasis added).

¹⁶ H. Res. 525, 105th Cong. (1998).

¹⁷ H. Res. 581, 105th Cong. (1998).

¹⁸ H. Res. 424, 111th Congress, Authorizing and directing the Committee on the Judiciary to inquire whether the House should impeach Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas, and H. Res. 1448, 110th Congress, Authorizing and directing the Committee on the Judiciary to inquire whether the House should impeach G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana. In three instances of judicial impeachment immediately prior to Judges Kent and Porteous, however, the House did not approve a resolution explicitly authorizing an impeachment inquiry (Harry E. Claiborne, Judge, U.S. District Court of Nevada (1985-1986); Alcee Hastings, Judge, U.S. District Court, Southern District of Florida (1987-1988); Walter L. Nixon, Judge, U.S. District Court, Southern District of Mississippi (1988-1989)).

¹⁹ Speaker Pelosi declared, “[t]oday, I am announcing the House of Representatives is moving forward with an official impeachment inquiry. I am directing our six Committees to proceed with their investigations under that umbrella of impeachment inquiry.” Nancy Pelosi, *Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), <https://www.speaker.gov/newsroom/92419-0>.

committee's minority members. In 1974, the Judiciary Committee unanimously adopted procedures for the Nixon impeachment inquiry concerning, for example, the presentation of evidence by committee counsel and the opportunity for the President's counsel to respond.²⁰ In 1998, the Judiciary Committee approved procedures for the Clinton impeachment inquiry modeled after these procedures.²¹

Moreover, in recent decades, it has been more common than not that impeachment proceedings were initiated as a result of information provided from an independent, outside investigation. In four of the five judicial impeachment investigations undertaken by the Judiciary Committee since 1980, "the accused judge had either been subject to a federal criminal trial or pled guilty to a federal criminal charge prior to the initiation of impeachment proceedings in the House."²² In the case of the impeachment of President Clinton, the results of an independent counsel investigation alleging impeachable offenses were submitted to the House and referred to the Judiciary Committee.

B. Clinton Impeachment

In January 1994, Attorney General Reno appointed Robert Fiske as a special prosecutor to investigate President Clinton's land dealings and examine any possible links between the President and the suicide of senior White House aide Vince Foster. On August 5, 1994, after the Independent Counsel statute was reauthorized, a special, three-judge panel of U.S. Court of Appeals judges replaced Fiske with Kenneth Starr. Starr was initially authorized to investigate the Clintons' pre-presidency financial dealings with the Whitewater Land Company, but was later authorized to conduct a wide-ranging investigation of alleged abuses, including the firing of White House travel agents, the alleged misuse of FBI files, and President Clinton's conduct while he was a defendant in a sexual harassment lawsuit filed by a former Arkansas state government employee, Paula Jones. After a lengthy investigation into these areas and others, on September 9, 1998, Starr submitted his referral (the Starr Report) to Congress pursuant to 28 U.S.C. § 595(c). The report contained 11 possible grounds for impeachment. Along with the report, Starr submitted 36 boxes of supporting materials.

After Starr submitted his report to the House, the House, on September 11, 1998, adopted a privileged resolution by a vote of 363 to 63 to refer the Starr Report to the Judiciary Committee "for a deliberative review. . . to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced."²³ The resolution also ordered the immediate printing and release to the public of the first 445 pages of the report and directed the Judiciary Committee to review the balance of the material submitted by Starr and determine whether it should be held in executive session or be printed and released to the public. The

²⁰ See DESCHLER'S PRECEDENTS, ch. 14, §6.5, pp. 498-499; DESCHLER'S PRECEDENTS ch. 14, §6.9, pp. 503-504.

²¹ See U.S. Congress, House Committee on the Judiciary, Authorization of an Inquiry Into Whether Grounds Exist for the Impeachment of William Jefferson Clinton, President of the United States; Meeting of the House Comm. on the Judiciary Held October 5, 1998; Presentation by Inquiry Staff Consideration of Inquiry Resolution Adopting Inquiry Procedures, committee print, 105th Cong., 2nd sess., December 1998, Committee Print Ser. No. 8 (1998).

²² Betsy Palmer, *The Role of the House of Representatives in Judicial Impeachment Proceedings: Procedure, Practice, and Data* at 12 (2011).

²³ H. Res. 525 (105th Cong.).

material held in executive session could only be reviewed by members of the Judiciary Committee and designated committee staff.

Once the Judiciary Committee reviewed the Starr Report and related material, it reported a privileged resolution authorizing an impeachment inquiry by the Committee.²⁴ The full House then approved the resolution.

In addition to the House resolutions authorizing the review of the Starr Report and the impeachment inquiry, the Judiciary Committee passed procedural rules for conducting the impeachment inquiry. These rules were aimed at ensuring a fair impeachment process for President Clinton and provided for, among other things: the President and his counsel shall be invited to 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; the President or the President's counsel shall be invited to respond to the evidence adduced by the Committee at an appropriate time.²⁵

C. Impeachment Process with regard to President Trump

As is discussed above, impeachment inquiries in the House have traditionally been formally opened by a vote of the full House and have provided the subject of the impeachment inquiry procedural protections that are lacking in the "impeachment inquiry" into President Trump's conduct. Indeed, the Trump impeachment inquiry violates fundamental principles of fairness and any semblance of due process. For instance, as is more fully discussed below, the current impeachment process denies President Trump many basic due process rights guaranteed all Americans, such as the right to cross-examine witnesses, to call witnesses, to receive transcripts of testimony, to have access to evidence, and to have counsel present.

1. Many impeachment investigations begin based on the recommendation of an independent entity

In recent years, impeachment inquiries have been based on investigations by independent entities, like the independent counsel's office or the Judicial Conference of the United States. In the last presidential impeachment, a communication from the independent counsel appointed to investigate President Clinton was referred to the Judiciary Committee pursuant to an original resolution reported by the House Rules Committee.²⁶ In that communication, the independent counsel identified 11 grounds for impeaching President Clinton and provided evidence to support those grounds.²⁷ Recent impeachments of federal judges were initiated by resolutions submitted after (or near the time of) the receipt of findings of misconduct from the Judicial Conference. The House has impeached five federal judges since 1980. In three of those cases, the Judiciary Committee began impeachment investigations shortly after receipt of a Judicial Conference transmittal (Judge Hastings, 1987; Judge Nixon, 1988; Judge Porteous, 2008). The Judiciary

²⁴ H. Res. 581, 105th Cong.

²⁵ See House Report 105-703, accompanying H. Res. 581 (105th Cong.).

²⁶ H. Res. 525, 105th Cong.

²⁷ See House Report 105-703, accompanying H. Res. 581 (105th Cong.).

Committee acted prior to receiving such a determination in two other instances (Judge Claiborne, 1986; Judge Kent, 2009); however, the Judicial Conference did eventually transmit recommendations to Congress that impeachment may be warranted.

Unlike these recent impeachment inquiries, the effort to impeach President Trump appears to be based on a phone call between President Trump and President Zelensky of Ukraine. Moreover, unlike these other impeachment inquiries, which were based on the findings of an independent entity, this inquiry was launched without even waiting to see what was actually said on the phone call. Speaker Pelosi held a press conference announcing an “impeachment inquiry” before President Trump had even secured agreement from the Government of Ukraine and taken the extraordinary step of declassifying and publicly releasing the record of the call. Furthermore, the Justice Department’s “Criminal Division reviewed the official record of the call and determined, based on the facts and applicable law, that there was no campaign finance violation and that no further action was warranted.”²⁸

2. The current impeachment process denies President Trump the same basic pre-inquiry due process afforded to President Clinton.

The House’s current impeachment process denies President Trump the same basic pre-inquiry due process afforded to President Clinton. The Whitewater Investigation began nearly five years before the House voted on an impeachment inquiry and involved painstaking investigative work first by a special counsel and then by an independent counsel. President Clinton fought the investigation vigorously, including by raising multiple privilege claims. He was able to litigate those claims fully through the courts. President Trump, by contrast, fully cooperated with the Mueller investigation. He never raised privilege claims, made his White House Counsel available to testify for over thirty hours, and agreed to answer written questions under penalty of perjury.

But rather than giving President Trump the same due process rights that President Clinton had to raise and litigate claims of constitutional privilege, House Intelligence Committee Chairman Schiff has repeatedly threatened to impeach President Trump for trying to litigate these claims. This is in direct contrast to what then-Congressman Schumer said in 1998 when Ken Starr recommended impeaching President Clinton for raising privilege claims: “[t]o suggest that any subject of an investigation—much less the President with obligations to the institution of the presidency—is abusing power and interfering with an investigation by making legitimate legal claims, using due process and asserting constitutional rights, is beyond the ken of serious consideration.”²⁹ The House ultimately declined to impeach President Clinton on this ground.

²⁸ Statement of Kerri Kupec, Director, Office of Public Affairs, Dept. of Justice (Sept. 25, 2019).

²⁹ *House Committee on the Judiciary, Authorization of an Inquiry Into Whether Grounds Exist for the Impeachment of William Jefferson Clinton, President of the United States; Meeting of the House Comm. on the Judiciary Held October 5, 1998; Presentation by Inquiry Staff Consideration of Inquiry Resolution Adopting Inquiry Procedures*, 105th Cong., Committee Print No. 8 (1998) (statement of Rep. Schumer).

3. With the Clinton impeachment the House even voted to authorize an initial review of the evidence before starting formal impeachment proceedings

On September 11, 1998, the full House adopted a resolution that instructed the Judiciary Committee to: (1) review a communication received from the independent counsel, which transmitted substantial and credible information received by the independent counsel in the course of his investigation that may constitute grounds for an impeachment of President Clinton, and (2) “determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced.”³⁰ During the floor debate on the resolution, Rules Committee Chairman Solomon stated about the resolution:

It is not the beginning of an impeachment process in the House of Representatives. It merely provides the appropriate parameters for the Committee on the Judiciary, the historical proper place to examine these matters, to review this communication and make a recommendation to the House as to whether we should commence an impeachment inquiry.³¹

However, unlike the Clinton impeachment inquiry, for which the mere review of the evidentiary materials upon which the opening of a formal impeachment inquiry might be based required a vote of the full House, for an actual inquiry into President Trump’s conduct, the House is skipping all formal House action in favor of a press statement by Speaker Pelosi.

4. The House has traditionally opened impeachment inquiries by a vote of the full House

The House has never initiated an impeachment inquiry into a president without a majority of the House taking political accountability for that decision by voting to authorize such a dramatic constitutional step.³² In fact, in recent years, the House has even initiated impeachment inquiries against federal district court judges through vote of the full House.³³

On October 8, 1998, the full House adopted a resolution that “authorized and directed [the Judiciary Committee] to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach William Jefferson Clinton, President of the United States of America.”³⁴ The resolution also authorized interrogatories and subpoenas for testimony and tangible things. In the committee report accompanying H. Res. 581, the Judiciary Committee explained that “there exists substantial and credible evidence of fifteen separate events directly involving President William Jefferson Clinton that could constitute felonies which, in turn, may constitute grounds to proceed with an impeachment inquiry.”³⁵

³⁰ H. Res. 525, 105th Cong.

³¹ 144 Cong. Rec. H7588 (daily ed. September 11, 1998) (statement of Rep. Solomon).

³² H. Res. 581, 105th Cong. (1998); H. Res. 803, 93d Cong. (1974); Cong. Globe, 39th Cong., 320-21 (1867).

³³ H. Res. 424, 111th Cong. (2009) (Samuel B. Kent); H. Res. 15, 111th Cong. (2009) (G. Thomas Porteous).

³⁴ H. Res. 581, 105th Cong. (1998).

³⁵ House Report 105-703, accompanying H. Res. 581, 105th Cong. (1998).

Similarly, for President Nixon, on February 6, 1974, the House passed H. Res. 803 by a vote of 410 to 4. This resolution was ordered favorably reported out of the Judiciary Committee by voice vote on January 31, 1974, and authorized the Committee to investigate fully and completely whether sufficient grounds existed for the House to impeach President Nixon. The resolution specifically authorized the Judiciary Committee to use compulsory process, such as subpoenas and interrogatories.³⁶

In regard to President Trump, the House has forgone any formal opening of an impeachment inquiry, instead launching the gravest inter-branch conflict contemplated by the Constitution through nothing more than a press conference at which the Speaker simply announced an “official impeachment inquiry.” This ad hoc process is unprecedented and lacks the necessary authorization for a formal impeachment proceeding.

5. In the Nixon and Clinton impeachments the House Judiciary Committee afforded Nixon and Clinton due process rights and gave the committee minority additional powers

In both the Nixon and Clinton impeachments, the House afforded Presidents Nixon and Clinton basic procedural process rights to ensure fairness of the inquires against them, including permitting the accused president to testify, present witnesses, cross-examine witnesses, and be represented by counsel.³⁷ Minority members of the committee were also given additional powers.

For the Trump “impeachment inquiry” no such fundamental (and basic) fairness and due process protections have been afforded the President. This is in direct contrast to Chairman Nadler’s own express acknowledgment, at least when the sitting president was a member of his own party, that “[t]he power of impeachment . . . demands a rigorous level of due process,” and that in this context “due process mean[s] . . . the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel.”³⁸

In addition to protecting the due process rights of the subject of the impeachment inquiry, in the Nixon and Clinton impeachments, the House also provided the Judiciary Committee’s minority with additional authorities. In particular, in the Nixon and Clinton impeachment inquiries, the ranking minority member of the Judiciary Committee was granted the authority to issue subpoenas.³⁹ This standard, bi-partisan practice of granting the ranking member the authority to issue subpoenas subject to the same rules as the majority is being abandoned for the Trump impeachment inquiry.

³⁶ H. Res. 103, 93rd Cong. (1974).

³⁷ 3 HINDS §§ 2445, 2470, 2471, 2501, 2518; DESCHLER’S PRECEDENTS ch. 14 § 6; *see also* House Report 105-703, accompanying H. Res. 581, 105th Cong. (1998).

³⁸ *Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen (Part II): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 3 (2016) (statement of Rep. Jerrold Nadler); *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 17 (1998) (statement of Rep. Jerrold Nadler).

³⁹ H. Res. 581, 105th Cong. (1998); H. Res. 803, 93rd Cong. (1974).