



US Constitution

Will President Trump's subpoena fight cause a constitutional crisis?

What's the story?

On 22nd April 2019, President Trump took the unprecedented step of suing both the chairman of the House Oversight Committee, Elijah Cummings, and his own personal accounting company, Mazars USA, in an attempt to prevent the company from responding to a congressional subpoena instructing Mazars USA to provide information about the President's personal finances to the Oversight Committee. On 27th April, the President then sued Deutsche Bank and Capital One to prevent the banks from responding to subpoenas from the House Intelligence and Financial Services committees. The lawsuits, and the Trump Administration's blanket refusal to cooperate with congressional subpoenas or testify before congressional committees, have proven extremely divisive. Supporters argue that the President is right to stand up to congressional Democrats who are invasively and unlawfully using their oversight powers in the hope of finding anything that can help them win in 2020. But critics argue that, by refusing to respect longstanding constitutional norms, Trump is again undermining vital checks and balances.

Why are congressional committees seeking the President's tax records?

House Oversight Chair Elijah Cummings has explained that his committee wants: to determine whether the President has any "undisclosed conflicts of interest that may impair his ability to make impartial policy decisions"; to assess whether the President is complying with the US Constitution's Emoluments Clause, which bans federal officeholders from receiving gifts or payments from a foreign states; and "to review whether he has accurately reported his finances to the Office of Government Ethics and other federal entities." On 27th February, the President's former lawyer, Michael Cohen, testified before the House Oversight Committee that the President had illegally inflated or deflated the estimated value of his assets and liabilities on past financial statements, to either secure favourable loans or insurance offers. To verify these claims, Cummings sent Mazars a letter requesting eight years of financial records, citing House Rule X, which gives the Oversight Committee responsibility with conducting oversight of "the operation of Government activities at all levels, including the Executive Office of the President." On March 27, Mazars argued that existing laws prevented the release of information without a subpoena (a legal order requiring individuals to appear and testify, or produce documents). Cummings duly issued a subpoena on 15th April, requesting records from 2009 to 2019. However, on 22nd April, President Trump and the Trump Organisation took legal action, arguing there is no "legitimate legislative purpose" for subpoenaing Trump's financial records, and that the courts should therefore block their release.

What are Congress' subpoena powers?

Subpoena and oversight powers are not directly mentioned in the US Constitution. However, courts have long held that in order to effectively use the legislative powers clearly enumerated in Article I, Congress must have an *implied* power to demand evidence and testimony from the executive branch, and punish those who refuse to comply. In a case concerning a bribery scandal involving President Warren G. Harding's administration in 1927, the Supreme Court ruled that Congress' investigation powers were at their strongest when investigating fraud or maladministration in government. Congress can charge people who defy their subpoenas with 'contempt of Congress' – a federal crime. However, enforcing this charge is difficult. Congress has three options. Firstly, Congress can send the House sergeant-at-arms to arrest the offender, and imprison them somewhere at the Capitol. However, this option, which has not been used since 1935, may prove controversial and politically costly. Secondly, the House can file charges and ask the executive to prosecute. However, Attorney General William Barr may prove resistant to the idea of prosecuting the very person that appointed him, or other colleagues in the executive branch. Finally, Congress can go directly to the courts using a provision of the 1978 Ethics in Government Act. The courts could decide to imprison the offender until they comply. However, reaching this verdict could take months, if not years – possibly until after the 2020 Presidential Election.



What other investigations has the White House resisted?

The Mueller Report - On 18th April, a redacted (censored) version of the 'Mueller Report' was released, detailing the findings of Special Council Robert Mueller's investigation into allegations that Russia interfered in the 2016 US presidential election, that Trump's presidential campaign colluded with Russia, and that the President obstructed justice and illegally interfered with investigations into these claims. The report did not reach a conclusion on the question of whether the President obstructed justice, but it did detail 10 instances of potential obstruction, in which the President attempted to end or narrow the scope of the investigation, or influence some of the witnesses involved. The report noted that while the Justice Department could not charge a sitting president with obstruction of justice, the separation of powers gives Congress the authority to investigate and make a judgement. Many Democrats in Congress now want to do exactly that. On 19th April, the House Judiciary Committee issued a subpoena for the full, unredacted Mueller report. Attorney General William Barr instead reacted by offering to let six senior Democrats and six Republicans see a less-redacted, but not entirely uncensored, copy. On 22nd April, the House Judiciary Committee also issued a subpoena requiring former White House counsel Don McGahn to testify on 21st May. The Judiciary Committee wants to follow up on the Mueller Report's suggestion that McGahn may have witnessed obstruction of justice by the President. However, the White House has already stated it could invoke executive privilege to prevent McGahn from testifying. 'Executive privilege' is not directly mentioned in the US Constitution, however numerous presidents have argued that the separation of powers implies that they have a right to keep internal communications secret from the other branches of government. Presidents have argued that, in order to do their job, they need honest advice, and that aides will be reluctant speak openly if they fear that doing so might lead to them having to testify before a congressional committee.

Tax returns - The House Ways and Means Committee gave the Internal Revenue Service (IRS) until 10th April to hand over President Trump's personal tax returns from 2013-2018. After this deadline was missed, it was extended to 23rd April. Again, the Trump Administration failed to comply. White House chief of staff Mick Mulvaney said the request was a "political stunt" and that Democrats would "never" see Trump's tax returns. Since 1976, every single presidential candidate except Trump has released their tax returns to address any conflict of interest concerns. While there is no legal obligation to do this, it has become a constitutional convention, and, as such, Trump's secrecy has proven controversial.

Immigration policy - On 25th April, the White House denied the House Oversight Committee's request to question senior advisor Stephen Miller over immigration policies that he is widely considered to have been the driving force behind. In particular, it has been reported that Miller influenced the decision to replace the leadership of the Department of Homeland Security, which Trump had criticised for what he perceives as a failure to secure the southern border. It is now up to the Oversight Committee to decide whether or not to issue a subpoena, which the White House would likely challenge in court.

Security Clearances - On 23rd April, it was reported that President Trump had ordered former White House Personnel Security Director Carl Kline to ignore a subpoena from the House Oversight Committee, which is investigating claims from a whistle-blower that the White House has authorised top-secret security clearances for the President's son-in-law Jared Kushner, and other members of the executive, even though career security officials had already rejected their applications.

2020 Census - John Gore, the principal deputy assistant attorney general for the Department of Justice's Civil Rights Division, received a subpoena from the House Oversight Committee on 2nd April, to answer questions about the decision to add a controversial new citizenship question to the upcoming 2020 census. However, Gore defied the subpoena, with the backing of the Attorney General, because the Committee would not allow Justice Department lawyers to be present during the questioning.

Debate! President Trump has said that he will not cooperate because the House is too partisan. Is this a justifiable? Does it matter if the Democrats have 2020 in mind? Is 'neutral' oversight possible? Would Trump comply with Republican subpoenas? How would Republicans have felt if Obama had done this?



How does this fit into your exams?

US Constitution – Is the US Constitution still fit for purpose?

The Trump Administration's refusal to comply with congressional subpoenas is an interesting example when writing about whether the US Constitution's checks and balances are still working effectively over two centuries after ratification. As the US Constitution is codified, it is easy to assume that the various checks and balances that exist can all be clearly traced to the written text. However, while the executive and legislative branches each possess a number of clearly *enumerated* powers, it is also agreed that each also possesses a number of *implied* powers, which the branches have argued are essential if they are to carry out the responsibilities assigned to them. It is much easier for the branches to contest the limits of powers that are not directly mentioned in the US Constitution. Historically, Congress's implied oversight powers have relied on the executive to respect unwritten conventions and Supreme Court precedent, which have evolved over time. However, while there are many examples of previous presidential administrations resisting the most politically awkward congressional subpoenas, President Trump is the first to declare, "We're fighting all the subpoenas". President Trump has repeatedly proven that he is unafraid to disregard constitutional norms that only carry a potential *political*, rather than *legal*, cost. While members of his Administration have challenged subpoenas on the grounds that they serve no "legitimate legislative purpose", as required by the Supreme Court, Trump justified his blanket opposition to congressional oversight by arguing that the committee heads issuing these subpoenas "aren't, like, impartial people. The Democrats are trying to win 2020." Depending on your perspective, this stance is either entirely justified, or leading America towards a serious constitutional crisis.

The President's supporters argue that the Mueller report has already cleared the President of the most serious charge of colluding with the Russian Government, and point out that the Special Counsel did not charge the President with obstruction of justice. They believe that Democrats, disappointed by this verdict, are using congressional committees, and tax payers' money, to continue their partisan 'witch hunt', abusing their power to search for any evidence they can use to discredit the President, while disingenuously claiming to be conducting normal and proper oversight. They argue that there is no legitimate legislative purpose for these subpoenas, only a political one – winning the 2020 elections.

However, the President's critics believe that his challenge to the authority of a co-equal branch of government poses a grave threat to checks and balances that have proven to be more delicate, and more dependent on good will and constitutional norms, than previously believed. They argue that, despite the misrepresentation and censorship of the White House, the Mueller Report clearly suggests that the Special Counsel intended for Congress to follow up on the many potential cases of obstruction it found over the course of its investigation, and they find it troubling that the White House is now doing all that it can to disrupt such scrutiny. Democrats counter claims of excessive oversight by pointing out that in Trump's first two years in office, the Republican controlled House did not issue a single subpoena to the White House, despite numerous scandals and public concerns. They also argue that Republicans behaved very differently while Barack Obama was in office. Writing for USA Today, Kurt Bardella, a former advisor and spokesperson for Republicans on the House Oversight Committee, argued that if this was a Democratic president, the party would be pushing for impeachment. He noted how under Obama, "we issued more than 100 subpoenas to the Obama administration, held the attorney general in contempt of Congress, filed a lawsuit challenging the President's use of executive privilege, and formed a special select committee to investigate what happened in Benghazi, Libya."

Many commentators have argued that the White House's insistence that recent subpoenas serve no legitimate legislative purpose only pushes Democrats to take the ultimate step of impeachment. There is no disputing that the US Constitution gives the House the exclusive power to impeach the President, and Democrats could argue that the decision of whether or not to take this ultimate step obviously requires key testimony and documents from the executive branch. So, while it is arguably a flaw that the vague language of the US Constitution can lead to such fundamentally different interpretations of vital checks and balances, the Founders did include impeachment powers that the 116th Congress could theoretically use to bring a constitutional crisis to an end – if it is willing to risk the political costs.