

Is Congress abusing subpoena authority?



AP Photo/Andrew Harnik

Attorney General William Barr arrives to testify before a Senate Judiciary Committee hearing on the Mueller report.

PRO: Democrats are doing it this time; Republicans have done it in the past

OAKLAND, Calif. — Efforts are underway to hold Attorney General William Barr in contempt of Congress, which in theory could result in a fine or jail time for Barr.

House Speaker Nancy Pelosi warns of a “constitutional crisis.”

Unfortunately, if there is such a crisis — and there isn’t — it would be the result of Congress’ abuse of its subpoena authority, which it would be wise to rein in.

Congressional investigations, subpoenas and threats to hold political rivals in contempt have become far too common in Washington. Although the Democrats are the ringmasters of the current circus, Republicans have engaged in similar conduct in the past.

A subpoena is a court-ordered command to either testify or produce documents or tangible objects. No specific constitutional provision authorizes Congress to issue subpoenas.

Congress claims the power is inherent in its legislative authority, needed at times to help determine whether an issue or concern requires legislation.

Congress’s subpoena and contempt powers often are traced back to the British Parliament. It is argued that the British context provides an example and surely the Framers of our Constitution wanted Congress to be able to use compulsion in its investigatory efforts.

This analogy is misguided in as much as under the British form of government Parliament was considered sovereign, possessing supreme power.

According to the eminent 18th-century jurist William Blackstone, author of the “Commentaries on the Laws of England,” Parliament “hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws.”

So powerful was the Parliament that “it can change and create afresh even the Constitution of the kingdom ...”

America’s Founders rejected the idea that a single branch or institution of government could possess ultimate sovereignty.

Instead, popular sovereignty held where the people are supreme and delegate certain powers through written constitutions to their federal and state governments.

The U.S. Constitution grants the House of Representatives the express

power to punish or expel its own members.

Under the legal principle of interpretation known as *expressio unius est exclusio alterius*, when one or more things of a class is expressly mentioned others of the same class are excluded.

By specifically recognizing the power of Congress to punish its own members, an argument can be made that the Constitution should be interpreted to exclude the power of Congress to punish others with contempt citations.



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Indeed, early American history has but a few examples where Congress used compulsory process to obtain facts relevant to its legislative and administrative functions.

Modern practice, however, features a flurry of subpoenas and threats of contempt proceedings. The courts have repeatedly recognized an inherent congressional power to issue subpoenas and to punish individuals refus-

ing to comply.

The Supreme Court, in the 1957 case *Watkins v. United States*, stated in sweeping fashion that “it is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the facts needed for intelligent legislative action.”

The high court also has recognized that the protections of the Bill of Rights such as right to counsel and right against self-incrimination apply to congressional investigations.

The real constitutional crisis has nothing to do with the subpoena for the unredacted Mueller report, but instead is the familiar theme of Congress acting outside its enumerated powers so it resembles the omnipotent legislature Blackstone described.

“Implied/inherent” powers have chipped away at the restraints of the Constitution for years and the current spectacle in Washington is just the latest example.

Congress should eschew such political sideshows and work within its enumerated powers to deal with real crises, such as our \$22 trillion national debt, border security and the ramifications of our failed nation-building exploits in the Middle East.

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CON: Not a constitutional crisis, just a supercharged political moment of democracy in action

WASHINGTON — Are we in a constitutional crisis? We have the makings of a political crisis, but the constitutional crisis that many are declaring has yet to materialize.

Crisis is a loaded word. At times it can be used in a widely agreed-upon context, but in the political realm it can often be used to emphasize a political point and is much more subjective in nature.

Take for example President Donald Trump’s recent assertions that there is a crisis on the border, which led him to declare a national emergency.

This is driven by his personal and politically subjective opinion on immigration policy.

Many others disagreed with the president about whether his definition of “crisis” was correct. Others, myself included, believe that the “crisis” at the border was created by Trump’s headline policies and is a humanitarian crisis.

The political battles continue around a host of issues, the rhetoric gets more heated with each battle, and at times that word — crisis — is used.

Democrats in control of the House of Representatives, for instance, are working to use their constitutionally backed powers of investigation to take up the work done in the Mueller probe and determine the extent of Russian election interference and any role Trump, his campaign, or associates played in the interference for questions left unanswered by the probe or that was outside the probe’s scope.

Congressional Democrats, in attempting to exercise their constitutional duties of oversight, have asked for documents, communications and witness testimony.

Trump’s White House and personal legal teams have responded to these fairly common and routinely honored requests with blanket refusals, even going as far as to sue the House committees to refuse legally obligated compliance.

Again, the word “crisis” is used as numerous elected officials and commentators declare that this activity is a “constitutional crisis.” But again the political nature of our current public and elected political discourse leads to wide variations on what is or is not a crisis.

But is this a constitutional crisis?

Well, the U.S. Constitution provides for congressional legislative powers and it was clear that the investigative powers needed to carry out that work were intended.

The Supreme Court and other courts have upheld and clarified these investigate powers. Some would say that Trump’s refusal to comply with congressional requests makes this

a constitutional crisis, but a recent court decision regarding a congressional subpoena of Trump’s financial documents ruled that Congress does have the power to subpoena and obtain such documents in carrying out its duties.

Others might argue that Congress is creating a constitutional crisis by ordering the release of sensitive documents that the White House may see as under executive privilege restrictions or that the Department of Justice may believe are to be kept clas-

sified to protect various functions of their work.

However, again, court rulings have often disagreed and accommodations made allowing for and confirming the congressional right to investigate.

What we truly face in this moment is a supercharged political problem.

A rule-bending and possibly law-breaking executive branch is protecting its political future, not the separations of powers that they claim.

The Department of Justice’s top leadership is stubbornly and sadly complying with these political motives.

Court rulings past and present, however, provide our path out of this predicament even as legitimate oversight actions are characterized as politically motivated.

So what we have is a political crisis but not yet a constitutional one. If, however, Trump through his related official and personal entities continues to resist legally obligated oversight somehow, if the judicial system complies, if the precedent and its constitutional role in ruling on any legal challenges to congressional investigative powers — then, we will ultimately see whether we also have a constitutional crisis.

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