HOW PRESIDENT TRUMP'S TANGLES WITH COMMITTEES HAVE WEAKENED CONGRESS'S INVESTIGATIVE POWERS

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INTRODUCTION

The tense political battles between former President Donald J. Trump and the United States House of Representatives under Democratic leadership renewed debates over the nature and extent of Congress's authority to investigate and conduct oversight of the Executive Branch. In furtherance of the House of Representatives' vigorous efforts to investigate President Trump, three House committees issued a series of subpoenas to banks and an accounting firm seeking the personal financial records of the President relating to periods both before and after he took office. The President and his business entities resisted, challenging the congressional subpoenas in court, thus drawing the judiciary into the fray. The President's challenges culminated in the issuance of the Supreme Court's historic decision in *Trump v. Mazars* and *Trump v. Deutsche Bank AG*, which announced groundbreaking new principles of law that will have profound implications for congressional oversight and investigations. In addition, the D.C. Circuit recently encountered related questions of congressional authority over the Executive Branch in connection with separate information requests to former White House Counsel Donald McGahn, leading to a series of hotly debated rulings (and an eventual settlement) in *Committee on the Judiciary v. McGahn*.

These cases arose against a seemingly well-established backdrop. It has long been understood that Congress possesses inherent constitutional authority to inquire into matters that could become the subject of legislation, such as through the use of compulsory process directed to both government officials and private citizens. As the Supreme Court recognized nearly a century ago, Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to

affect or change."[1] Thus, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[2] The Executive and Legislative Branches often resolve disputes about congressional requests for information through the "hurly-burly, the give-and-take of the political process between the legislative and the executive."[3] Only recently has Congress resorted to the courts in an effort to enforce subpoenas against Executive Branch officials.

In the past several decades, however, the informal negotiation process that traditionally resolved these disputes has been bypassed by both Congress and the Executive Branch or, most recently, related parties. In short, the courts have been called on with increasing frequency to offer guidance to the political branches about the interplay between their respective constitutional authorities. In the specific context of congressional requests for the President's records, only two decisions offer direct guidance. Both are of relatively recent vintage.

In the 1974 case *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit addressed a subpoena for the President's records after a Senate committee subpoenaed Richard Nixon for taped recordings of certain conversations with his staff related to the Watergate investigation.[4] Then, in 2020, the Supreme Court rendered its decision in *Mazars*, in which it observed that "from President Washington until now," the Court had "never considered a dispute over a congressional subpoena for the President's records."[5] In the related context of congressional requests for Executive Branch information more generally, the lower federal courts were solicited for assistance in resolving disputes between the Executive and Legislative Branches. These disputes arose in connection with congressional subpoenas related to the investigations of the firings of U.S. Attorneys in the Bush Administration and the Fast and Furious "gun-walking" scandal in the Obama Administration.[6]

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[1] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[2] *Id.* at 174.

[3] *Executive Privilege – Secrecy in Government: Hearings on S. 2170, S. 2378, and S. 2420 Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov't Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel).

[4] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc). There, the court refused to enforce the subpoena, and the committee did not petition for a writ of certiorari.

[5] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2019).

[6] *See* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

The recent increase in litigation notwithstanding, "portentous clash[es] between the executive and legislative branches"[7] have been infrequent. Consequently, questions remain about the nuances and contours of Congress's oversight power and exactly how far Congress's investigatory and corresponding enforcement powers extend. Indeed, whether and in what circumstances Congress can sue to vindicate its constitutional powers in light of the Supreme Court's decision in *Raines v. Byrd*[8] is just one of the open questions that courts have had to address in the disputes between the Trump Administration and congressional committees.

This article addresses the profound implications arising out of this unprecedented flurry of litigation regarding the scope and content of Congress's oversight and investigatory powers vis-à-vis the Executive Branch and private individuals. In addition, while the recent increase in litigation in this area has arisen in the context of clashes between the Legislative and Executive Branches, this article also will identify and discuss potential implications of the resulting decisions for private individuals and entities, who frequently are targets of congressional investigations.

Part I begins by examining the congressional rules implementing Congress's power to subpoena witnesses and documents and by reviewing the few, long-recognized structural limitations on Congress's subpoena power. The article then discusses the avenues by which Congress may enforce its demands for information and documents, focusing on the constitutional confrontations between the Executive and Legislative Branches stemming from congressional subpoenas, as well as instances when private individuals or organizations refuse to produce subpoenaed materials. Part II addresses the *Mazars*, *Deutsche Bank*, and *McGahn* decisions and provides a detailed analysis of their legal arguments, how these arguments rely on or distinguish earlier precedent, and the significance of the resolution of these issues for our understanding of the scope of Congress's investigative power. Part III evaluates the impact of these decisions on the equilibrium of power between the Executive Branch and Congress. In particular, this section discusses the standard that may or should apply to future disputes between the political branches (such as the dispute that has already arisen between former-President Trump and the Archivist of the United States over a House select committee's request for

[7] United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 384 (D.C. Cir. 1976).
[8] Raines v. Byrd, 521 U.S. 811 (1997).

archived documents from the Trump administration),[9] as well as the implications for future congressional investigations of private parties.

I. CONGRESS'S POWER TO INVESTIGATE AND TO ENFORCE

A. The Power to Investigate

1. Constitutional Basis

The Constitution vests Congress with "[a]ll legislative powers" granted to the federal government,[10] including the exclusive power to appropriate funds for the operation of the Executive Branch.[11] Inherent in Congress's authority to "enact and appropriate under the Constitution"[12] is the power to investigate, a power long recognized to be a "necessary and appropriate attribute of the power to legislate."[13] The investigative power is so central to Congress's ability to fulfill its role as lawmaker for the Nation that it can be permanently limited or modified only by constitutional amendment.[14] Without the power to compel the production of information regarding the operation of the government and the subjects on which it proposes to legislate, Congress's ability to exercise the full range of authority vested in it by the Constitution would be significantly curtailed. Put another way, without the power to investigate, Congress could inform itself only with publicly available information and non-public information voluntarily supplied by those who possess it. This would undermine Congress's ability to legislate effectively, particularly in areas where those who possess the information necessary to address an underlying problem are not inclined to share it, such as when the information involves misconduct or operational failings.

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[9] *See* Complaint, Trump v. Thompson, No. 21-2769 (D.D.C. Oct. 18, 2021), ECF No. 1.

[10] U.S. CONST. art. I, § 1.

[11] *Id.*, § 9, cl. 7.

[12] *E.g.*, Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[13] McGrain v. Daugherty, 273 U.S. 135, 175 (1927). This investigative power was "treated as an attribute of the power to legislate" by both the British Parliament and American colonial legislatures. *Id.* at 161. The U.S. House of Representatives asserted its investigative power as early as 1792 with the support of James Madison. *Id.* Several Supreme Court holdings in the late nineteenth century were predicated on Congress's possession of the investigative power. *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168 (1880) (holding that the House had exceeded its investigative authority in its investigation of wholly private affairs); *In re* Chapman, 166 U.S. 661 (1897) (sustaining a conviction for contempt of Congress for a witness who refused to answer questions during subpoenaed testimony).

[14] *Chapman*, 166 U.S. at 671–72 ("We grant that congress could not devest [sic] itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended.").

Unsurprisingly, Congress's inherent constitutional authority to investigate has been understood to be "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[15] Moreover, the scope of information that Congress is empowered to obtain has been viewed as similarly broad. Congress may request any and all information unless "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the . . . investigation."[16] The breadth of Congress's power to investigate had been "consistently reiterated and reinforced" by the Supreme Court in past cases,[17] which authorized congressional inquiry into the "administration of existing laws as well as proposed or possibly needed statutes"[18] and into the "departments of the Federal Government to expose corruption, inefficiency, or waste,"[19] including the White House and the Department of Justice.[20] Prior case law suggested that Congress was not required to state what it might do with the information gained in an investigation,[21] and that the legitimacy of a congressional inquiry is not contingent on a "predictable end result."[22]

2. Limited Judicial Role

Implicitly reinforcing what was understood to be the "penetrating" nature of Congress's power to investigate is the limited role the judiciary has typically played in assessing the appropriateness of a congressional inquiry. When Congress is exercising its investigative power in furtherance of a legitimate legislative function, it has generally been understood that the

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[15] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) (quoting *Barenblatt*, 360 U.S. at 111).

[16] Bean LLC v. John Doe Bank, 291 F. Supp. 3d 34, 44 (D.D.C. 2018) (quoting Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 21 (D.D.C. 1994) (quoting United States v. R. Enters., 498 U.S. 292, 300–01 (1991))).

[17] MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY, 14 (2017).

[18] Watkins v. United States, 354 U.S. 178, 187 (1957).

[19] *Id.* at 187.

[20] ROSENBERG, *supra* note 17, at 13 (noting that the Court in *McGrain* stated that all executive departments are creations of Congress and subject to Congress's plenary legislative and oversight authority). Additionally, "Congress's investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department." *Id.* at 14.

[21] For example, in 1897 the Supreme Court upheld a resolution authorizing an inquiry by finding that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded." *In re* Chapman, 166 U.S. 661, 670 (1897).

[22] ROSENBERG, *supra* note 17, at 16. In *Eastland*, the Court recognized that investigations evolve over time and sometimes "take[ ] the searchers up 'some blind alleys' and into nonproductive enterprises," but found that in order "[t]o be a valid legislative inquiry there need be no predictable end result." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975).

judiciary has very little power to intervene.[23] Unlike traditional investigative tools of the Executive Branch, congressional subpoenas are not subject to preemptive challenges brought against Congress. Congressional subpoenas can be challenged by subpoena recipients only in resisting a civil enforcement action brought by Congress, defending against a criminal contempt prosecution, or by means of a petition for habeas corpus in the case of individuals confined for contempt through an order of Congress.[24]

The Constitution's Speech and Debate Clause, which deprives the courts of jurisdiction to sit in judgment of legislative acts, precludes direct judicial challenges against congressional bodies or legislators to challenge congressional subpoenas.[25] The Supreme Court's decision in *Eastland v. U.S. Servicemen's Fund* is illustrative. There, a Senate subcommittee issued a subpoena to a bank seeking information about an organization's bank account.[26] The organization filed suit against the subcommittee and its chairman and staff seeking to enjoin enforcement of the subpoena and requesting a declaration that the subpoena was invalid as barred by the First Amendment.[27] The Court concluded that because the subpoena at issue fell within the sphere of legitimate legislative activity, the Speech or Debate Clause operated to "forbid invocation of judicial power to challenge the wisdom of Congress's use of its investigative authority."[28] The Court reasoned that the Clause serves as "an absolute bar to interference" when members of Congress and congressional committees are acting within the "legitimate legislative sphere."[29] As a result, a witness generally must refuse to comply with a subpoena and risk being held in contempt in order to contest the validity of the subpoena. Indeed, a witness generally would not have standing to challenge the subpoena unless and until the witness finds him- or herself in a contempt proceeding.[30]

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[23] *See* ALISSA DOLAN ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 27 (2014).

[24] *See* Michael D. Bopp et al., *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 CORNELL J.L. & PUB. POL'Y 453, 490 (2015).

[25] U.S. CONST. art. I, § 6, cl. 1.

[26] *Eastland*, 421 U.S. at 495.

[27] *Id.* at 496.

[28] *Id.* at 511.

[29] *Id.* at 503.

[30] *See* Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 BYU J. PUB. L. 37, 41 (1992) (discussing *Eastland*'s interpretation of the Speech and Debate Clause as reflecting the view that "the separation of powers doctrine prohibits the courts from interfering with Congress' [sic] legitimate exercise of its subpoena power to collect information pursuant to its legislative function. Accordingly, parties subject to a congressional subpoena generally have little recourse to the courts."); *see also* Bopp et al., *supra* note 24, at 458 ("Thus, to contest a subpoena, a witness generally must first refuse to comply with it, risk being cited for contempt, and then raise any objections as a defense to prosecution.").

Even when a congressional subpoena can be challenged indirectly, typically when the subpoena is directed to a third-party custodian of information and the party who claims an interest in the subpoenaed information does not attempt to enjoin the propounding committee or congressional officials but instead seeks to restrain the third party from producing the information, the courts have traditionally been reluctant to impose significant constraints on Congress's broad investigative powers. On the rare occasions when these issues have arisen in the lower courts, the judiciary has generally been highly deferential to Congress, reasoning that courts could "only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties.'"[31] An invasive "line-by-line review"[32] of a request from Congress has been deemed an inappropriate exercise of judicial review on the ground that the Constitution does not require that "every piece of information gathered in [a Congressional] investigation be justified before the judiciary."[33]

B. Limitations on the Power to Investigate

As broad and virtually limitless as Congress's investigative power may have seemed to be, prior case law did suggest some theoretical constraints on the outer reaches of Congress's investigative authority. It was understood that the Constitution, congressional rules, and constitutionally based privileges, such as the executive privilege, all apply to the legislative power of inquiry, although not necessarily in ways that imposed substantial limitations on the ability of Congress to seek and obtain information.

1. Separation of Powers and Legislative Purpose

In order to constitute permissible exercises of the implied authority to investigate in fulfillment of Congress's legislative power, investigations "must be related to, and in furtherance of, a legitimate task of the Congress."[34] Therefore, the power of inquiry is available to Congress only when (1) it has a valid legislative purpose or (2) it is discharging one of its other enumerated powers, such as impeachment, discipline of members, or

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[31] Bean LLC v. John Doe Bank, 291 F. Supp. 3d 34, 44 (D.D.C. 2018) (quoting Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 20–21 (D.D.C. 1994) (alteration in original)).

[32] *Id.* at 44.

[33] *Id.* (quoting McSurely v. McClellan, 521 F.2d 1024, 1041 (D.C. Cir. 1975)) (alteration in original).

[34] Watkins v. United States, 354 U.S. 178, 187 (1957).

resolution of an election dispute.[35] As the Supreme Court has observed, Congress is not "a law enforcement or trial agency. These are functions of the executive and judicial departments of government. . . . Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[36] Thus, while Congress has near plenary power to investigate when acting *within* the scope of its legislative powers,[37] acting *outside* of the legislative power has been fatal to Congress's investigations in the rare circumstances where such a finding has been made.

The Supreme Court has applied this principle to invalidate a congressional investigation only once. In 1880, the Court held in *Kilbourn v. Thompson* that by conducting "a fruitless investigation into the personal affairs of individuals" related to pending litigation in a federal court, without any stated legislative purpose, the House of Representatives "not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."[38]

The Court has also noted that Congress is "without authority to compel disclosures for the purpose of aiding the prosecution of pending suits."[39] But the courts have never had occasion to invalidate a congressional subpoena on this ground. Courts have stated that Congress lacks a legislative purpose if it seeks to "expose for the sake of exposure"[40] and warned that "[t]he power to investigate must not be confused with any of the powers of law enforcement."[41]

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[35] Bopp et al., *supra* note 24, at 455–56. "Valid legislative purpose" has been defined broadly by the Court to include "gathering [public] information for purposes of legislating, overseeing governmental matters, or informing the public about the workings of government." *Id.* Congress can also use the investigative power in service of its other enumerated powers, such as impeachment. *See id.* at 456; *see also* Kilbourn v. Thompson, 103 U.S. 168, 189 (1880) (limiting the power of inquiry by that which is exercised "in aid of the legislative function").

[36] *Watkins*, 354 U.S. at 187.

[37] ROSENBERG, *supra* note 17, at 13.

[38] *Kilbourn*, 103 U.S. at 192, 195; *see also* Hutcheson v. United States, 369 U.S. 599, 613 n.16 (1962) ("At most, Kilbourn is authority for the proposition that Congress cannot constitutionally inquire 'into the private affairs of individuals who hold no office under the government' when the investigation 'could result in no valid legislation on the subject to which the inquiry referred.'") (quoting *Kilbourn*, 103 U.S. at 195).

[39] Sinclair v. United States, 279 U.S. 263, 295 (1929).

[40] *Watkins*, 354 U.S. at 200.

[41] Quinn v. United States, 349 U.S. 155, 161 (1955). However, "the mere fact that the conduct under inquiry may have some relevance to the subject matter of a pending" criminal investigation or trial does not "absolutely foreclose congressional inquiry." *See Hutcheson*, 369 U.S. at 624 (Brennan, J., concurring).

Given the paucity of case law applying these limitations, they have had little practical effect on reining in Congress's investigative power. With the almost limitless breadth of subjects that Congress could legislate, a congressional committee acting within the scope of its jurisdiction can artfully define its legislative inquiry to support a myriad of requests.[42] Based on the pre-*Mazars* case law, it plausibly could be argued (and was frequently argued by congressional lawyers) that a valid legislative purpose exists if Congress says it does. Courts were generally willing to accept Congress's stated legislative purpose at face value, making clear that the inquiry into whether an investigation serves a legislative purpose is a relatively narrow one. Whether Congress has an ulterior motive was not for the courts to determine. Rather, the remedy for "dishonest or vindictive motives" is "[s]elf-discipline and the voters" because the courts "are not the place for such controversies."[43] The Supreme Court previously stressed that courts "should not go beyond the narrow confines" of determining whether a committee's investigation falls within its province, and explained that for a court "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be *obvious* that there was a usurpation of functions exclusively vested" in the other branches.[44] Moreover, the Court emphasized that as long as Congress acts pursuant to its constitutional authority, "the Judiciary lacks authority to intervene on the basis of [Congress's] motives."[45] It is therefore exceptionally difficult to invalidate a congressional subpoena on the basis that the committee lacked a valid legislative purpose.

However, while congressional committees can broadly define the outer limits of their inquiries, they cannot redefine the limits of their jurisdiction. The investigative jurisdiction of a congressional committee is determined by the scope of authority delegated to the committee by the full House or Senate as reflected in House and Senate rules and resolutions.[46] The standard of review for whether information falls outside the scope of a committee's investigative jurisdiction has not been exacting, and no court has invalidated

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[42] *See* McPhaul v. United States, 364 U.S. 372, 382 (1960) (noting a broad committee inquiry and holding that "the permissible scope of materials that could reasonably be sought was necessarily equally broad").

[43] Tenney v. Brandhove, 341 U.S. 367, 378 (1951); *see also* Wilkinson v. United States, 365 U.S. 399, 412 (1961) ("[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner.").

[44] *Tenney*, at 378 (emphasis added).

[45] Barenblatt v. United States, 360 U.S. 109, 132 (1959).

[46] ROSENBERG, *supra* note 17, at 15 (citing United States v. Rumely, 345 U.S. 41, 42, 44 (1953); Watkins v. United States, 354 U.S. 178, 198 (1957)).

a subpoena because it strayed beyond a committee's authorized portfolio. Indeed, in *Senate Select Committee on Ethics v. Packwood*, the district court rejected the argument that a subpoena for a senator's personal diaries issued in the course of an ethics investigation was overbroad, holding that "[i]n determining the proper scope of a legislative subpoena, this Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the subcommittee] in the discharge of [its] duties.'"[47] Judicial scrutiny of jurisdictional challenges to a committee's request for information may (at least as a practical matter) be more exacting when the request implicates constitutional concerns.

2. Witnesses' Constitutional Rights

Recipients of congressional subpoenas do retain their rights under the Constitution. Outside of the Fifth Amendment privilege against self-incrimination, however, subpoena recipients have usually found little judicial success when invoking constitutional protections as a defense in contempt proceedings, although there have been relatively few litigated cases. We discuss First, Fourth, and Fifth Amendment protections below.

First Amendment

The First Amendment does not grant congressional witnesses an absolute right to refuse to respond to subpoenas, but it does provide protection in some circumstances. In the seminal case of *Barenblatt v. United States*, the Court held that in reviewing congressional demands for information that implicate First Amendment concerns, courts must balance the public and private interests at issue.[48] The "critical element" in this balancing is "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[49] In determining the weight of Congress's interest, courts look to the existence of a legislative purpose and the scope of authority delegated to the committee.[50] Although courts have recognized the application of the First Amendment in the context of a congressional investigation, the Supreme Court has never relied on the First Amendment to reverse a criminal conviction for contempt of Congress.[51] In practice, however, the First Amendment does play a

[47] Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 20–21 (D.D.C. 1994) (alteration in original) (quoting *McPhaul*, 364 U.S. at 281).

[48] Barenblatt v. United States, 360 U.S. 109 (1959).

[49] *Watkins*, 354 U.S. at 198.

[50] *See, e.g.*, Barenblatt v. United States, 360 U.S. at 109 (1959); Watkins v. United States, 354 U.S. 178 (1957); United States v. Rumely, 345 U.S. 41 (1953).

[51] DOLAN ET AL., *supra* note 23, at 37.

moderating role in some congressional investigations. Congress must take into account the potential for a successful First Amendment defense when considering whether to pursue criminal contempt or civil enforcement where a recalcitrant witness resists the production of information arguably protected by principles of free speech, freedom of association, and related First Amendment principles.

Fourth Amendment

Although the Supreme Court has never directly addressed whether the Fourth Amendment's prohibition against unreasonable searches and seizures applies to congressional investigations, several federal appellate decisions suggest that it does. The D.C. Circuit in *Hearst v. Black* warned that a congressional subpoena may not be used to search all records, explaining that it is "contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."[52] But the Supreme Court has never squarely addressed the scope of the Fourth Amendment's protection in the context of a congressional subpoena. For example, in *McPhaul v. United States*, the Court stated that a congressional subpoena seeking "all records, correspondence and memoranda" of an organization was not unreasonably broad.[53] The Court explained that an investigation's "relatively broad" scope or a committee's failure to describe with particularity the materials sought was not a sufficient rationale to quash the committee's subpoena.[54] Indeed, the Court stated that a broad congressional subpoena is reasonable so long as "[t]he description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them accordingly."[55]

Fifth Amendment

The Fifth Amendment privilege against self-incrimination is available to congressional witnesses.[56] The privilege primarily extends to testimony, not

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[52] Hearst v. Black, 87 F.2d 68, 71 (D.C. Cir. 1936) (quoting Fed. Trade Comm'n v. Am. Tobacco Co., 264 U.S. 298, 306 (1924)).

[53] McPhaul v. United States, 364 U.S. 372, 382 (1960).

[54] *Id.*

[55] *Id.* (quoting Brown v. United States, 276 U.S. 134, 143 (1928)). As noted previously, the Court in *Eastland* held that even valid investigations may lead "up some 'blind alleys' and into nonproductive enterprises." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975).

[56] *See* Watkins v. United States, 354 U.S. 178 (1957); Quinn v. United States, 349 U.S. 155 (1955); *see also* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

documentary evidence,[57] and is "personal in nature," meaning that it may not be invoked on behalf of corporations, partnerships, labor unions, or other "artificial" organizations.[58] Invoking the privilege does not require a specific verbal formula; committees should recognize "any reasonable indication" that the witness is invoking his or her Fifth Amendment privilege.[59] The privilege may be waived if done "intelligently and unequivocally."[60] Still, witnesses must tread carefully. For example, Lois Lerner, the then-director of the Internal Revenue Service's Exempt Organizations Division, invoked the Fifth Amendment in her refusal to testify during a congressional hearing regarding alleged inappropriate screening and scrutiny the IRS had applied to groups seeking tax-exempt status. However, before asserting her privilege against self-incrimination, Lerner made a lengthy opening statement to the committee in which she claimed she had engaged in no wrongdoing. Republicans on the committee argued that her opening statement constituted a waiver of her Fifth Amendment right, and later approved a resolution stating that Lerner had waived the privilege.[61] Interpreting Lerner's detailed opening statement as a waiver was never fully litigated, but the fracas indicates that witnesses should be careful when asserting this privilege.

By statute, legislators are empowered to obtain information protected by the privilege by requesting the issuance of judicial immunity orders. In particular, either House of Congress, and duly authorized congressional committees and subcommittees, can seek and obtain federal court orders granting use immunity and compelling a witness to testify or produce information.[62] Such immunity is "*use* immunity, rather than *transactional* immunity"—thus, instead of a general bar to prosecution, Congress can only obtain a grant of immunity against the use of the compelled testimony.[63]

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[57] *See* Fisher v. United States, 425 U.S. 391, 409 (1976); Andresen v. Maryland, 427 U.S. 463 (1976). In some circumstances, however, the privilege may operate to prevent compelled production of certain documentary evidence, such as personal papers in the possession of individual witnesses. *See* DOLAN ET AL., *supra* note 23, at 41 n.148; United States v. Doe, 465 U.S. 605, 613 (1984).

[58] DOLAN ET AL., *supra* note 23, at 40.

[59] *Id.* at 41.

[60] *Id.* at 41 (citing Emspak v. United States, 349 U.S. 190, 195 (1955)).

[61] H.R. Res. 574, 113th Cong. (2014).

[62] *See* 18 U.S.C. §§ 6002, 6005. Such grants of immunity "have figured prominently in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter)." ROSENBERG, *supra* note 17, at 20.

[63] DOLAN ET AL., *supra* note 23, at 42 n.161 (emphasis added). The immunity extends to information derived from the compelled testimony. ROSENBERG, *supra* note 17, at 21.

3. Statutes and Congressional Rules

Statutes sometimes include provisions circumscribing the scope of information that is available to Congress. One such statute, 26 U.S.C. § 6103(f), states that only the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation can be permitted access to the tax returns of individuals without a House or Senate resolution.[64] Similarly, several other statutes limit access to information related to intelligence activities.[65] Courts have held that statutes restricting public disclosure do not serve as a basis for either the Executive Branch or private parties to withhold documents from Congress.[66] Further, it is unlikely that any reviewing court would construe a statute to restrict Congress's access to information "unless the statute is express and unambiguous."[67] It is also doubtful that such a statute can bind future Congresses, given that the Constitution has been construed to confer on "either House" of Congress the independent constitutional authority to compel testimony or the production of documents.[68] Therefore, such statutes could be characterized as no more than voluntary restrictions imposed by each House on the authority of its committees and members to compel information in particular circumstances. The Constitution's Rulemaking Clause grants each House the authority to adopt such rules, but it also grants each House the unilateral authority to change such rules at will.[69]

Congress has also enacted a statute that grants original jurisdiction to the United States District Court for the District of Columbia over civil actions brought by the Senate to enforce congressional subpoenas.[70] That statute expressly excludes the enforcement of subpoenas against Executive Branch officers and employees "acting within [their] official capacit[ies]" unless the assertion of privilege is personal and not based on governmental privilege.[71]

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[64] 26 U.S.C. § 6103(f)(1).

[65] 50 U.S.C. §§ 3091–93.

[66] *See* F.T.C. v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 970 (D.C. Cir. 1980); Exxon Corp. v. F.T.C., 589 F.2d 582, 585–89 (D.C. Cir. 1978); Ashland Oil, Inc. v. F.T.C., 548 F.2d 977, 979 (D.C. Cir. 1976). The Congressional Research Service also notes that statutes such as the Trade Secrets Act have been invoked, but the authors are skeptical that such statutes actually provide protection for parties subject to congressional subpoenas. DOLAN ET AL., *supra* note 23, at 50–51.

[67] DOLAN ET AL., *supra* note 23, at 50.

[68] *Exxon*, 589 F.2d at 592.

[69] *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

[70] 28 U.S.C. § 1365(a).

[71] *Id.*; *see* Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510, 522 (D.C. Cir. 2020) ("Congress expressly *excluded* federal jurisdiction over suits involving Executive Branch assertions of 'governmental privilege.'") (emphasis in original), *vacated*, 968 F.3d 755 (D.C. Cir. 2020).

Limitations based on executive privilege will be discussed in the following section.

House and Senate rules also impose various requirements that may give rise to potential defenses if they are not followed. Each House and Senate committee has discretion to establish rules governing the process of investigations and the issuance of subpoenas. For example, House Rule XI(2)(m) allows committees and subcommittees to authorize subpoenas when a majority of the committee or subcommittee is present, and, in most cases, to delegate that power to the committee chair by rule. It also requires authorized subpoenas to be signed by either the chair of the committee or a member designated by the committee. It also mandates that certain subcommittees, such as those of the Committee on Ethics, may authorize and issue subpoenas only by an affirmative vote of the majority of its members.[72] Senate Rule XXVI likewise authorizes any standing committee to issue subpoenas, but requires those committees to publish written rules of procedure and remain within their respective jurisdictions.[73] This patchwork of rules is reviewed and reaffirmed at the beginning of each Congress when rules governing committee practice and authorities are adopted and published in the Congressional Record.[74]

4. Executive Privilege

Executive privilege, when invoked to preclude witness testimony or the release of documents, can operate to constrain the reach of a congressional subpoena and thus limit a congressional inquiry. The interests underlying executive privilege can be traced to *Marbury v. Madison*, where the Supreme Court noted that the Judiciary's incursion "into the secrets of the cabinet" would appear to interfere "with the prerogatives of the executive."[75] In the ensuing centuries, the jurisprudence has developed to identify two categories of executive privilege—presidential communications privilege and deliberative process privilege. Though "closely affiliated" in their protection of certain aspects of executive decision making, the two privileges are "distinct and have different scopes."[76] Primary among their differences, the deliberative process privilege has generally been viewed as a common law privilege, rather than one derived directly from the constitutional separation

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[72] CLERK OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES, R. XI(2)(m)(3)(A)(ii) (2019).

[73] S. REP. NO. 116-6, at 273, R. XXVI (2019).

[74] *See* CLERK OF THE HOUSE OF REPRESENTATIVES, 114TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES,, R. XI(2)(a)(2) (2015); S. REP. NO. 113-18, at 31, R. XXVI(5)(b) (2013).

[75] Marbury v. Madison, 5 U.S. 137, 170 (1803).

[76] *In re* Sealed Case (The Mike Espy Case), 121 F.3d 729, 745 (D.C. Cir. 1997).

of powers.[77] In contrast, the presidential communications privilege is rooted in the Constitution.[78] Neither category is absolute, as courts will permit Congress to pierce the privilege and access the desired information through an appropriate showing of need, though the standard is more exacting for an exception to the presidential communications privilege.[79]

Presidential Communications Privilege

The leading case on the presidential communications privilege is *United States v. Nixon*.[80] In *Nixon*, the Supreme Court held that the presidential communications privilege is rooted in "the supremacy of each branch within its own assigned area of constitutional duties."[81] Accordingly, the presidential communications privilege is "inextricably rooted" in the Constitution.[82] Under this privilege, presidential communications are presumptively privileged in order to protect the presidential decision-making process.[83] Although a seemingly grand pronouncement of its protections, the privilege was defined rather narrowly by the *Nixon* court, which limited it to communications made "in the performance of [high Government officials'] manifold duties" and "in the process of shaping policies and making decisions."[84] The privilege also applies to any documents or communications "intimately connected" to the President's decision making and generated in the course of advising this decision-making process.[85]

Nixon concerned a judicial subpoena, but a D.C. Circuit case decided two months prior to *Nixon* examined the application of this privilege to a congressional subpoena.[86] In *Senate Select Committee v. Nixon*, the court held that "presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by *in camera* examination of the

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[77] *Id.* at 737, 745.

[78] Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982).

[79] In *Committee on the Judiciary, United States House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), the district court upheld a legislative subpoena to former presidential aides, rejecting the claims that executive privilege bestowed an absolute immunity on any present or former presidential aide from ever appearing before the committee in response to the subpoena. *See also* ROSENBERG, *supra* note 17, at 14.

[80] United States v. Nixon, 418 U.S. 683 (1974).

[81] *Id.* at 705.

[82] *Id.* at 708.

[83] *See id.*

[84] *Id.* at 705, 708.

[85] *In re* Sealed Case (The Mike Espy Case), 121 F.3d 729, 752–53 (D.C. Cir. 1997).

[86] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

conversations by a court."[87] The court explained that "the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations."[88] The court concluded that "the Select Committee has failed to make the requisite showing."[89]

In the absence of "clarifying decisions" on how to apply executive privilege to congressional subpoenas, other information-access cases can be useful for understanding the privilege's contours. *In re Sealed Case (The Mike Espy Case)*, for example, concerned a subpoena issued by the Office of Independent Counsel for records developed in the course of a White House Counsel's Office report to the President.[90] The court held that the presidential communications privilege protects only "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate."[91] But it also clarified that the privilege "should never serve as a means of shielding information regarding governmental operations" that do not directly involve the President's decision-making.[92] The privilege applies only to documents related to "quintessential and nondelegable Presidential power."[93]

Deliberative Process Privilege

The deliberative process privilege is broader than the presidential communications privilege and used more frequently to shield Executive Branch communications. This privilege permits the government to withhold records such as "advisory opinions, recommendations, and deliberations" that reveal deliberations and recommendations associated with the "process by which governmental decisions and policies are formulated."[94] Records must be both pre-decisional and deliberative in nature, in order to further the privilege's "ultimate purpose" of safeguarding the "'quality of *agency*

[87] *Id.* at 730.
[88] *Id.*
[89] *Id.* at 731.
[90] *In re* Sealed Case (The Mike Espy Case), 121 F.3d 729 (D.C. Cir. 1997).
[91] *Id.* at 752.
[92] *Id.*
[93] *Id.* at 752–53; *see also* Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108, 1119–21 (D.C. Cir. 2004).
[94] *Espy*, 121 F.3d at 737 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)).

decisions' by allowing government officials freedom to debate alternative approaches in private."[95]

Unlike the presidential communications privilege, which carries a presumption in favor of the Executive Branch, the deliberative process privilege enjoys no such presumption. As the court in *Espy* explained, whether the deliberative process privilege applies is to be determined "on a case-by-case, ad hoc basis."[96] Accordingly, the privilege can be overridden on a sufficient showing of need, including to "shed light on government misconduct."[97] The court observed that the privilege is "routinely denied" if shielding the deliberations fail to serve "the public's interest in honest, effective government."[98] So while the deliberative process privilege includes within its scope a broader class of communications, it provides less protection for those communications than does the presidential communications privilege.

Perhaps the most important distinction between the two privileges is that while the presidential communications privilege derives its force from the Constitution, the deliberative processes privilege has generally been viewed as a common law privilege. The D.C. Circuit explained in *Espy* that while "[t]he presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role," the "deliberative process privilege is primarily a common law privilege."[99] The Supreme Court also made this distinction expressly, observing that the presidential communications privilege is "rooted in the separation of powers under the Constitution," whereas "courts generally have looked to the common law to determine the scope of an official's evidentiary privilege."[100]

This distinction potentially has significant implications for congressional oversight. While Congress must recognize constitutionally based privileges,[101] it has traditionally taken the position that it has no obligation to recognize common law privileges, even though it has chosen to do so in most circumstances.[102] The U.S. House or Senate, then, could take the

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[95] *Id.* (quoting N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)).
[96] *Id.*
[97] *Id.* at 738.
[98] *Id.* (quoting Texaco P.R., Inc. v. Dep't of Consumer Affs., 60 F.3d 867, 885 (1st Cir. 1995)).
[99] *Id.* at 745.
[100] Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982).
[101] Barenblatt v. United States, 360 U.S. 109, 112 (1959).
[102] *See, e.g.*, CHRISTOPHER M. DAVIS ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 41 (2020). Among the common law privileges that Congress claims the authority to disregard (but usually chooses to recognize) are the attorney-client privilege and the attorney work product doctrine. A witness that raises either or both privileges must make the requisite showing that the privilege rightfully applies. A separate hurdle exists to successfully invoke the work product doctrine, as

position that the deliberative process privilege is not a valid reason to withhold documents or information requested in furtherance of legitimate congressional investigations.[103]

Notwithstanding this long-held understanding of the deliberative process privilege's common law underpinnings, the District Court for the District of Columbia's decision in the "Fast and Furious" case challenged the previously settled view, holding that the deliberative process privilege *does* find its foundation in the Constitution.[104] That litigation arose from a congressional investigation of a Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") operation called "Project Gunrunner," an initiative led by the Justice Department aimed at reducing United States-Mexico cross-border drug and gun trafficking and violence.[105] A whistleblower disclosed that under this operation, the ATF had permitted domestic firearms to be purchased illegally and then transported into Mexico."[106] The purpose of the operation was to trace the illegally purchased weapons in the hopes of ultimately apprehending Mexican drug cartel leaders, a concept referred to as "gun walking."[107]

The Department of Justice refused to comply with the House Committee on Oversight and Government Reform's subpoena, so the committee brought a civil enforcement action in federal court.[108] The Department argued that the deliberative process privilege shielded the requested records from the subpoena's reach.[109] The committee drew upon the distinction between the two executive privileges, arguing that the deliberative process privilege was founded on principles of common law rather than the

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some courts have held that a congressional investigation is not litigation for purposes of the doctrine's application. *See* Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J.L. & PUB. POL'Y 897, 905–06 (2012). Of course, congressional investigations often relate to matters that are also the subject of pending or potential litigation, so the work product doctrine may well be applicable in any event.

[103] Note, however, as will be discussed *infra*, this position has not been tested in court, and the Supreme Court's decision in *Mazars* has cast substantial doubt on this line of reasoning.

[104] Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016). When the litigation first began, the Attorney General was Eric H. Holder, Jr. Pursuant to Federal Rule of Civil Procedure 25(d), Loretta E. Lynch was substituted as defendant after she replaced Holder. *Id.* at 103 n.1.

[105] *Id.* at 106–07; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 106–08 (Nov. 2012), https://oig.justice.gov/reports/2012/s1209.pdf [hereinafter Operation Fast and Furious OIG Report].

[106] Operation Fast and Furious OIG Report at 109, 330–32, 336.

[107] *Id.* at 14, 103.

[108] *Comm. on Oversight & Gov't Reform*, 156 F. Supp. 3d at 107.

[109] *Id.*

Constitution and, therefore, could not be used to prevent enforcement of a congressional subpoena.[110]

The district court disagreed with the committee, holding that the deliberative process privilege could be invoked to shield records of an agency's internal deliberations over how to respond to congressional and media inquiries.[111] Relying on a strained reading of *Espy*, the court held that the deliberative process privilege has a constitutional basis and thus can be asserted against a congressional subpoena.[112]

The district court's opinion—and its expansive vision of the deliberative process privilege—was not reviewed on appeal, so it affords the Executive Branch some jurisprudential support for withholding records sought by legitimate congressional inquiries.[113] But even if the deliberative process privilege applies to congressional investigations, Congress has considerable grounds for resisting a broad view of that privilege's protections in the context of congressional oversight. As the D.C. Circuit has explained, "it makes no sense to permit the government to use [deliberative process] privilege as a shield" when "the nature of governmental officials' deliberations [is] *the* issue."[114] Given that the privilege was developed in situations where "the governmental decisionmaking process is collateral to the plaintiff's suit," it follows that the privilege should not operate to shield Executive Branch information from congressional oversight when the issue under investigation is the "governmental decisionmaking process" itself.[115]

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[110] Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 25–33, *Comm. on Oversight & Gov't Reform*, No. 1:12-cv-01332-ABJ (D.D.C. Dec. 16, 2013), ECF No. 61.

[111] *Comm. on Oversight & Gov't Reform*, 156 F. Supp. 3d at 110–12.

[112] *Id.* at 104. The court's reliance on *Espy* was misplaced. There was no congressional inquiry or congressionally issued subpoena at issue in *Espy*; rather, *Espy* involved an investigation of the Executive Branch by the Executive Branch. The court in *Espy* itself expressly rejected the notion that its analysis and holding would be applied in the context of a congressional inquiry, emphasizing that the opinion "should not be read as in any way affecting the scope of the privilege" in the congressional context. 121 F.3d at 753. And in any event, *Espy* does not support the notion that the deliberative process privilege is compelled by the Constitution. To the contrary, the *Espy* court made clear that the deliberative process privilege "originated as a common law privilege." *Id.* at 737; *see id.* at 745 ("[T]he deliberative process privilege is primarily a common law privilege."); *see also Nixon v. Fitzgerald*, 457 U.S. at 753.

[113] The committee appealed from the district court's rulings, but after the White House changed hands in 2017, the appeal was stayed pending settlement negotiations. In 2018, the parties reached a settlement conditioned on the district court's vacatur of its earlier rulings. The district court refused to vacate its earlier rulings, however, instead adhering to its questionable analysis of the source of the deliberative process privilege. Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Sessions, 344 F. Supp. 3d 1 (D.D.C. 2018). After control of the House of Representatives changed hands in 2019, the committee dismissed its appeal. Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Barr , No. 16-5078, 2019 WL 2158212 (D.C. Cir., May 14, 2019).

[114] *In re* Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (emphasis in original).

[115] *Id.*

That is doubly true when the subject matter of Congress's investigation encompasses potential wrongdoing by government actors. As the D.C. Circuit has explained, the deliberative process privilege "disappears altogether" when "there is any reason to believe government misconduct occurred."[116]

C. Enforcement Mechanisms for the Investigative Power

When the target of a congressional inquiry refuses to comply with a subpoena or otherwise impedes the investigation, lawmakers have several mechanisms potentially available to enforce their investigative authority. These include inherent contempt, criminal contempt, and civil enforcement.[117] Congress also can exercise its legislative prerogatives to attempt to secure compliance.

1. Inherent Contempt Power

Congress's inherent contempt power, much like its investigative power, is "not specifically granted by the Constitution," but is considered necessary to investigate and legislate effectively.[118] The Supreme Court has recognized this inherent and unilateral contempt power without which Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, [might] meditate against it."[119]

As an "inherent" authority, there is no statute or rule that delineates the contours of the power. However, both the Senate and the House, as well as a handful of courts, have established and enforced certain procedural constraints on the use of the inherent contempt power.[120] These procedural requirements have rendered the inherent contempt power "cumbersome and inefficient,"[121] thereby limiting its practical utility. Indeed, the last time

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[116] *In re* Sealed Case (The Mike Espy Case), 121 F.3d 729, 746 (D.C. Cir. 1997); *see also In re* Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992) ("[T]he privilege may be overridden where necessary . . . to shed light on alleged government malfeasance.") (quoting *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 582 (E.D.N.Y. 1979))).

[117] Bopp et al., *supra* note 24, at 459.

[118] TODD GARVEY, CONG. RSCH. SERV., RL45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 14 (2019).

[119] Anderson v. Dunn, 19 U.S. 204, 228 (1821); *see also* McGrain v. Daugherty, 273 U.S. 135, 178 (1927).

[120] *See, e.g.*, Jurney v. MacCracken, 294 U.S. 125, 144, 147 (1935).

[121] Bopp et al., *supra* note 24, at 466. Such procedures include passing a resolution charging a person with contempt which states the allegations and includes a clause directing the witness to be served; holding a contempt trial in either the full House or Senate or directing a committee to hold evidentiary proceedings and make recommendations; and permitting access to counsel, defense witnesses, the

Congress invoked its inherent contempt power was in 1934.[122] Aside from these constraints, limitations on inherent contempt are otherwise similar to the limitations on Congress's investigative power more broadly.[123]

2. Criminal Contempt Power

Congress supplemented its inherent contempt power in 1857 with the enactment of a statutory criminal contempt procedure.[124] Congress was motivated to create a statutory contempt mechanism because exercise of its inherent contempt power was time-consuming and often inefficient and ineffective, and thus impractical as a method of forcing compliance with a congressional subpoena.[125]

Today, the criminal contempt statute is codified at 2 U.S.C. §§ 192 and 194 and makes the refusal to comply with a congressional subpoena a federal criminal offense. For a congressional subpoena to give rise to a criminal contempt prosecution, the subpoena "must have been issued for a legislative purpose, be pertinent to the matter under inquiry, and relate to a matter

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evidence against the witness, and the examination of witnesses. *Id.* at 460. Individuals found guilty of contempt may be imprisoned, either as punishment or to coerce compliance, until the end of the congressional session. Convicted witnesses may file habeas petitions in federal court to challenge their imprisonment. *Id.* at 460–61. Some scholars suggest that the Due Process Clause of the Fifth Amendment might also subject the inherent contempt power to some of the requirements embodied in the statutes governing criminal contempt, such as pertinence. *See* ROSENBERG, *supra* note 17, at 24.

[122] Bopp et al., *supra* note 24, at 466.

[123] In a strained and implausible effort to identify a separate basis on which to restrict Congress's well-established investigatory power, the Congressional Research Service has asserted that the exercise of the inherent contempt power by a single house of Congress does not "fit neatly into the Chadha mold" and may present a conflict with the requirements of bicameralism and presentment. TODD GARVEY, CONG. RSCH. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 26–27 (2019). This assertion has no support in case law or the Constitution, and reflects a fundamental misunderstanding of the nature of Congress's constitutional power to investigate, which has always been understood to be vested in each house of Congress individually, much like the exclusive power of each House to adopt its own rules, discipline its own members, and perform other functions that do not constitute the enactment of legislation (such as impeachment in the case of the House, and trying impeachments in the case of the Senate). Powers vested in the legislative chambers separately that do not entail the enactment of legislation have never been understood to be subject to the Presentment Clause, and therefore lack any connection to *Chadha*. Inherent contempt is plainly in this category, and cannot plausibly be characterized as the enactment of legislation. Indeed, if it were so viewed, it would presumably constitute an unconstitutional bill of attainder. *See* U.S. CONST., art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."); *Bill of Attainder*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a "bill of attainder" as "[a] special legislative act prescribing punishment, without a trial, for a specific person or group").

[124] James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1132–33 (2007).

[125] TODD GARVEY, CONG. RESEARCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 17–18 (2017) [hereinafter CONGRESS'S CONTEMPT POWER].

within the House or Senate committee's jurisdiction."[126] This "pertinency" requirement of the criminal contempt statute is an additional limitation not expressly included as one of the necessary elements for inherent contempt or civil enforcement, although similar notions of relevance may apply in those settings.[127]

In theory, the criminal contempt statute affords Congress a more fluid and efficient mechanism to enforce its investigative demands. On its face, the statute empowers Congress to compel the initiation of prosecutions under the criminal contempt statute by following the specified certification process. Once a contempt has been certified, the statute provides that the Department of Justice "shall" proceed with prosecution.[128] In recent decades, however, the Department of Justice has taken the position that Congress cannot force it to prosecute any individual because the power to prosecute crimes is vested exclusively in the Executive Branch.[129] In practice, this stance frequently has led the Department to decline to bring prosecutions, particularly in the case of Executive Branch officials who have refused to comply with congressional subpoenas.[130]

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[126] GARVEY, *supra* note 118 at 4 n.25 (citing Senate Permanent Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 134–38 (D.D.C. 2016)).

[127] *See* Watkins v. United States, 354 U.S. 178, 206 (1957) (reversing witness's contempt conviction for refusing to answer subcommittee's questions on the grounds that the subcommittee had failed to indicate the subject to which the questions were pertinent); Russell v. United States, 369 U.S. 749, 767–68 (1962) (holding that indictments charging refusal to answer certain questions posed by a congressional subcommittee were insufficient because they did not identify the subject under inquiry); Sacher v. United States, 356 U.S. 576, 577 (1958) (concluding that the witness's refusal to answer related only to questions not clearly pertinent to the subject on which the subcommittee had been authorized to take testimony, and therefore refusing to uphold the defendant's conviction for deliberately refusing to answer questions pertinent to the authorized subject matter); Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953) (holding that the government had not sustained the burden of proving the pertinency of the questions the witness had declined to answer).

[128] *See* 2 U.S.C. § 194. Section 194 provides: "Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry . . . and the fact of such failure or failures is reported to either House . . . it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

[129] *See, e.g.*, Letter from U.S. Att'y Stanley S. Harris to Speaker Thomas P. O'Neill, Jr. (Dec. 27, 1982), *reprinted in* H.R. REP. NO., at 98-323, at 48–49 (1983); Letter from Att'y Gen. Michael B. Mukasey to Speaker Nancy Pelosi (Feb. 29, 2008); Letter from Deputy Att'y Gen. James M. Cole to Speaker John A. Boehner (June 28, 2012).

[130] TODD GARVEY & ALISSA M. DOLAN, CONG. RSCH. SERV., RL34114, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 13–14 (2014).

3. Civil Enforcement Actions

In addition to, or in lieu of, criminal contempt, the House and the Senate also may seek to bring civil enforcement actions in federal court against uncooperative subpoena recipients. When Congress initiates a civil contempt action, the House or Senate petitions a federal court to order a person to comply with the congressional request.[131] If a court issues this order and the defendant again refuses to comply, the defendant may be found in contempt of court.[132]

The Senate's civil enforcement power is codified at 2 U.S.C. §§ 288b(b) and 288d, which authorize the Senate "to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpena [sic] or order" in a U.S. District Court. Those provisions contain an important limitation on the exercise of the vested authority reference to 28 U.S.C. § 1365, which confers jurisdiction on the federal courts to entertain such civil enforcement actions by the Senate, but excludes from that grant of jurisdiction any action "to enforce . . . any subpena [sic] or order issued to an officer or employee of the executive branch."[133]

The House's civil enforcement power is not codified. Rather, it is inferred from its investigative powers under the Constitution. It generally has been believed that the House may pursue a civil enforcement action by passing a resolution that authorizes the legislative entity that issued the subpoena to seek judicial relief. As will be discussed below, that belief has been called into question by the recent D.C. Circuit panel decision in *McGahn*, although that decision was vacated and the case was settled before it could be considered by the full court. In previous cases, when faced with a recalcitrant witness who fails to comply with a congressional subpoena, the full House adopted a resolution finding the individual in contempt and authorizing a committee to bring a civil action seeking to enforce the subpoena.[134] In recent years, the House has brought several such actions seeking to compel testimony and production of documents from Executive Branch officials.[135]

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[131] GARVEY, *supra* note 125, at 23.

[132] *Id.*

[133] 28 U.S.C. § 1365(a).

[134] *See, e.g.*, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 63 (D.D.C. 2008).

[135] Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013); Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019), aff'd in part, 968 F.3d 755 (D.C. Cir. 2020) (en banc), appeal dismissed, Order at

These cases are generally brought in the United States District Court for the District of Columbia, which has consistently ruled in favor of the House's authority to bring such suits.[136]

In keeping with the limited role courts play in reviewing congressional exercises of investigative authority, courts in the civil enforcement setting are limited in the scope of their review of challenged subpoenas. Even if the court determines that the subpoena fails to abide by legal standards for enforcement, the court is limited in the relief it may order. Namely, it can only refuse to issue an order instructing compliance.[137]

4. Other Enforcement Mechanisms

Beyond its assorted contempt powers, Congress has at its disposal an arsenal of other powers that it may exert as political leverage in order to obtain the Executive's compliance with investigative inquiries.

Senate Advice and Consent

First among these powers is the Senate's advice-and-consent role in the appointment process.[138] When the President submits the name of a nominee to the Senate, the nomination's prospects for confirmation depend largely on the cooperation of the Senate. Were the President to be engaged in a bitter information dispute with Congress, the Senate may condition consideration of one or more nominations on the executive's production of documents or witnesses pursuant to an existing subpoena. In fact, a single senator could block a president's nominee from consideration until the administration acquiesced to Congress's request for information. One evocative and successful use of the appointment power involved Ronald Reagan's

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1, *McGahn*, No. 19-5331 (D.C. Cir. July 13, 2021), ECF No. 1906135; Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury, No. 1:19-cv-01974, 2019 WL 4094563 (D.D.C. Aug. 29, 2019). In the last-cited case, the committee explained that its enforcement action had been authorized by the House's Bipartisan Legal Advisory Group ("BLAG"), exercising authority delegated to it by the full House. *See* Plaintiff's Memorandum of Law in Opposition to Defendants and Defendant-Intervenors' Motion to Dismiss at 33, Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury, No. 1:19-cv-01974 (D.D.C. Sept. 23, 2019) (stating that BLAG authorized suit by the House Ways & Means Committee to obtain President Trump's tax returns pursuant to 26 U.S.C. § 6103(f)); see H.R. Res. 430, 116th Cong. (2019) ("[A] vote of [BLAG] to authorize litigation . . . is the equivalent of a vote of the full House of Representatives."); CLERK OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES, R. II.8(b) (2019) ("[T]he Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.").

[136] *Miers*, 558 F. Supp. 2d at 108; *Holder*, 979 F. Supp. 2d at 20–22 (holding committee adequately alleged a concrete and particularized injury as result of Attorney General's assertion of executive privilege in response to congressional subpoena); *McGahn*, 415 F. Supp. 3d at 157.

[137] GARVEY, *supra* note 125, at 26.

[138] U.S. CONST. art. II, § 2.

nomination of Stephen S. Trott for a seat on the Ninth Circuit.[139] Senators Edward Kennedy and Howard Metzenbaum had requested internal documents from the Department of Justice. Initially the Department refused, relying on its "longstanding policy" not to provide internal, deliberative memoranda to persons outside the Department.[140] Faced with a recalcitrant Justice Department, the Senate delayed Trott's nomination until the Department acquiesced and turned over the requested documents. Four months after his initial nomination, Trott was considered by the Senate and later confirmed.[141]

The Power of the Purse

The Constitution grants to Congress the appropriations authority, which can be wielded as a potent weapon to compel compliance with investigations. As the power of the purse is bestowed on Congress alone, the Executive Branch is dependent on Congress for funding its priorities. Thus, when Congress encounters a recalcitrant Executive who refuses to comply with a congressional subpoena, Congress can in theory exert pressure by restricting the funds necessary for the Executive Branch to pursue its agenda. The major challenge is getting the House and the Senate to agree to the funding restrictions notwithstanding the Administration's opposition to such restrictions.

Legislative Authorizations

Congress's power to pass authorizing legislation also offers potential leverage against Executive officials or agencies to obtain oversight materials.[142] If an Executive official refuses to cooperate with a congressional inquiry, Congress could eliminate—or simply threaten to eliminate—that official's position. Congress likewise could revoke or limit authorization for a program of interest or legislative priority of the Executive in order to obtain requested oversight materials.

Weaponizing Public Opinion

Certainly, both Congress and the Executive can seek to channel political pressure through media and political campaigns. However, in some circumstances, Congress may be best positioned to craft a narrative that is

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[139] Ruth Marcus, *Impasse Over Justice Documents Ends*, WASH. POST, Mar. 25, 1988.

[140] *Id.*

[141] *Id.*

[142] FREDERICK M. KAISER ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 4 (2011).

more damaging—and thus more effective. In doing so, Congress can induce compliance with its inquiries, placing the Executive in the defensive position of resisting the congressional oversight function. The Executive's defenses are often too abstract or removed from the subject of the congressional inquiry to persuasively counteract Congress's narrative. Moreover, congressional committees can hold hearings with witnesses whose views are sympathetic to Congress, increasing their leverage over the Executive. Yet, these alternative means of encouraging compliance with congressional information requests are often less than satisfactory from Congress's perspective. They are time-consuming, often unsuccessful, and frequently costly in terms of the political capital that must be expended in order to implement them effectively.

II. CONGRESSIONAL INVESTIGATIONS AND THE TRUMP ADMINISTRATION: *MAZARS*, *DEUTSCHE BANK*, AND *MCGAHN* AS CASE STUDIES

Despite the relatively small number of cases addressing the scope of Congress's investigative power and the paucity of Supreme Court precedent squarely resolving many of the key issues, the principles articulated and reaffirmed by the lower courts have been sufficiently clear. These principles support a generally accepted understanding of the broad parameters of Congress's investigative authority and the courts' limited role in this context. Under that view, Congress has a robust and far-reaching ability to investigate a wide range of issues and use compulsory process to support its inquiries. In the rare instances where negotiation and compromise fail to resolve a dispute, Congress can seek enforcement of subpoenas by the courts. Certainly, judicial enforcement is often a less-than-ideal solution to noncompliance; litigating these disputes can be a slow and involved process, which often frustrates Congress's inquiries through inordinate delay. Nonetheless, the courts have been generally favorable to Congress's investigative efforts, reaffirming Congress's broad power to conduct oversight and investigations and declining to look behind congressional expressions of legislative purpose in order to enforce the few limitations on that power. Thus, Congress could historically count on the Judiciary to accept at face value its assertions of legislative purpose and to presume that the use of compulsory process furthers a legitimate need in nearly all cases.

This seeming consensus was challenged in the course of the highly contentious public battles between the House of Representatives and the Trump Administration over congressional subpoenas issued pursuant to investigations of both President Trump and his administration. Congress

announced investigations and issued subpoenas, but its targets refused to comply. Ultimately, these disputes came under the scrutiny of the courts and the opportunity presented itself to obtain authoritative appellate pronouncements on the contours of Congress's power to investigate and enforce its subpoenas. The challenges to congressional authority raised in the *Mazars* and *Deutsche Bank* cases before the Supreme Court, and the *McGahn* case before the D.C. Circuit, created the potential for a major shift in the balance of power between the Legislative and Executive Branches in the context of congressional oversight and legislative fact-finding. As discussed below, that potential has already been realized in part as a result of the Supreme Court's long-awaited ruling in the consolidated *Mazars* and *Deutsche Bank* cases; the *McGahn* case settled, but the D.C. Circuit's panel decision may remain persuasive authority.

A. Trump v. Deutsche Bank AG and Trump v. Mazars

In April 2019, three committees of the House of Representatives issued four subpoenas for the financial records of President Trump, his children, and his affiliated businesses.[143] While the records sought by the committees substantially overlapped, each committee justified its requests differently.[144] Two House committees—the Committee on Financial Services and the Committee on Intelligence—issued subpoenas to the creditors of President Trump and several of his businesses.[145] The Financial Services Committee's two subpoenas[146] were issued in furtherance of the committee's investigation "into financial institutions' compliance with banking laws . . . to determine whether current law and banking practices adequately guard against foreign money laundering and high-risk loans."[147] The Intelligence Committee subpoenaed financial documents as part of its investigation into "whether foreign actors have financial leverage over President Trump,

[143] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026 (2020).

[144] *Id.* at 2026–27.

[145] *Id.* at 2027.

[146] As part of its investigation into financial institutions' compliance with banking laws, the Financial Services Committee issued subpoenas to 11 financial institutions. Brief for Respondent Committees of the U.S. House of Representatives at 18, Trump v. Mazars USA, LLP, 2020 WL 1154733 (U.S. Feb. 26, 2020) (Nos. 19-715, 19-760). Only two of those subpoenas—issued to Deutsche Bank and Capital One—were subsequently challenged by President Trump. *Id.*

[147] *Id.* at 17. Specifically, the Financial Services Committee issued its two subpoenas pursuant to House Resolution 206, which called for "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H.R. Res. 206, 116th Cong., 5 (2019). The committee also cited to its oversight plan that detailed its intent to review banking regulation and "examine the implementation, effectiveness, and enforcement" of laws designed to prevent money laundering and terrorism financing. H.R. REP. NO. 116-40, at 84 (2019).

whether legislative reforms are necessary to address these risks, and whether our Nation's intelligence agencies have the resources and authorities needed to combat such threats."[148] Shortly after those subpoenas were issued, the House Committee on Oversight and Reform subpoenaed President Trump's personal accounting firm, Mazars USA LLP, for business and personal financial documents related to the President and his businesses.[149] The Oversight Committee stated that the records requested would inform its investigation into whether Congress should amend or supplement ethics-in-government and financial disclosure laws.[150]

President Trump and his associates challenged the subpoenas in federal court, contesting the Oversight Committee subpoena in the U.S. District Court for the District of Columbia—the *Trump v. Mazars*[151] case—and the Financial Services and Intelligence committees' subpoenas in the Southern District of New York—the *Trump v. Deutsche Bank*[152] case. By suing the private recipients of the subpoenas, President Trump's lawyers were able to avoid the jurisdictional bar of the Speech or Debate Clause, which would have precluded judicial relief directed to the committees themselves. The Department of Justice also filed briefs in support of the President's challenge as a friend of the court.

The President's argument was threefold: first, Congress lacked a "legitimate legislative purpose"; second, the subpoenas violated the separation of powers and lacked historical or legal support; and third, the committees lacked express authority to issue these particular subpoenas. The lower courts did not agree. In *Mazars*, the district court ruled for the House on the basis that the requested financial information served a "valid legislative purpose" given that Congress could consider whether to adopt legislation addressing financial disclosure requirements for presidential

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[148] Brief for Respondent Committees of the U.S. House of Representatives at 25, Trump v. Mazars USA, LLP, 2020 WL 1154733 (U.S. Feb. 26, 2020) (Nos. 19-715, 19-760).

[149] Trump v. Comm. on Oversight and Reform of the U.S. House of Representatives, 380 F. Supp. 3d 76, 82 (D.D.C. 2019).

[150] *Id.* at 82–84. Chairman Elijah Cummings detailed the justification for the subpoena in a memorandum to the Oversight Committee, referring to recent testimony by the President's former personal attorney Michael Cohen, along with several documents prepared by Mazars and supplied by Cohen. *Id.* at 87. According to the memorandum, this testimony suggested that the President may have misrepresented his financial condition in communications with financial institutions. *Id.* Chairman Cummings stated that the committee had "full authority to investigate" whether the President engaged in illegal conduct before and during his tenure in office as well as whether he was complying with the Emoluments Clauses of the Constitution. *Id.*

[151] 380 F. Supp. 3d at 82.

[152] Trump v. Deutsche Bank AG, No. 19 Civ. 3826 (ER), 2019 WL 2204898 (S.D.N.Y. May 22, 2019).

candidates and Presidents.[153] In reaching its decision, the district court began with a review of the historical understanding of Congress's investigative power and its ability to use a compulsory process to further its investigative needs. Referring to *Watkins*, *McGrain*, and *Barenblatt*, the court described these powers as "broad," "penetrating[,] and far-reaching" but not unbounded.[154] In deferring to Congress's stated legislative purpose, the court held that "Congress's motives are off limits" and courts "must proceed from the assumption" that Congress acts with a legitimate purpose.[155] Relying on *Watkins* and *Eastland*, the court further explained that it may not try "to decipher whether Congress's true purpose in pursuing an investigation is to aid legislation or something more sinister such as exacting political retribution."[156] As long as the subject matter of the investigation is "one on which legislation *could be had*," the court will not stand in the way of Congress's investigative actions.[157]

On appeal, the D.C. Circuit affirmed, casting aside the Justice Department's contention that the committee's investigation was motivated by an unlawful law-enforcement purpose.[158] The court also rejected the Justice Department's argument that the committee failed to offer a "clear, *specific* statement" of the legislative purpose justifying the subpoena, explaining that the Department had misunderstood the pertinency requirement, which arises only in the context of a contempt proceeding as set forth in *Watkins*.[159] The court explained that *Watkins* did not require Congress to identify its purpose with sufficient particularity in order to justify a subpoena.[160]

The court also took issue with the Department's argument that the subpoena failed because the inquiry could not result in valid legislation regarding the President. The relevant inquiry, the court explained, is "not whether constitutional legislation *will* be had," only whether it "*may* be had."[161] Again, the court's analysis reflected its wariness of constraining Congress's oversight powers. Under the D.C. Circuit's approach, courts must first "define the universe of possible legislation" the subpoena could

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[153] 380 F. Supp. 3d at 101.

[154] *Id.* at 91 (first quoting Watkins v. United States, 354 U.S. 178, 187 (1957); then quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)).).

[155] *Id.* at 91–92.

[156] *Id.* at 92.

[157] *Id.* (quoting McGrain v. Daugherty, 273 U.S. 135, 177 (1927)) (emphasis in original).

[158] Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019).

[159] *Id.* at 730 (emphasis in original).

[160] *Id.* (first quoting Watkins v. United States, 354 U.S. 178, 209 (1957); then quoting Barenblatt v. United States, 360 U.S. 109, 123 (1959))).

[161] *Id.* at 732 (quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508 (1975)).

inform.[162] Next, they should consider only whether "Congress could constitutionally enact *any* of those potential statutes," not whether the full range of potential legislation would have been constitutional.[163] In the court's view, the information sought by the committee cleared this low threshold requirement.[164]

Turning to the relevancy standard that applies to congressional subpoenas, the court looked to *McGrain*, *Watkins*, and *McPhaul* for the "straightforward proposition" that "Congress may subpoena only that information which is 'reasonably relevant' to its legitimate investigation."[165] Reviewing the documents requested, the court discerned "no indication that the subpoena follow[ed] from indiscriminate dragnet procedures" or otherwise lacked in '"probable cause"' that Mazars could possess information helpful to the committee.[166] The court found the Department's argument that the committee lacked authority to conduct its investigation equally unavailing. The court has "no authority" to interpret the House Rules narrowly "absent a *substantial* constitutional question" about the House's legislative authority.[167] Noting the absence of such a question, the court concluded the subpoena was valid and enforceable.[168]

The congressional committees fared equally well in the *Deutsche Bank* case, where the district court also upheld the committees' congressional subpoenas as valid exercises of their investigative authority.[169] On appeal, the Second Circuit affirmed "in substantial part," holding that the subpoenas were sufficiently related to legislation under the committees' consideration relating to national security, terrorism, money laundering, and "the movement of illicit funds through the global financial system including the real estate market."[170]

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[162] *Id*.

[163] *Id.* (emphasis added).

[164] *Id.* at 739 ("At bottom, this subpoena is a valid exercise of the legislative oversight authority because it seeks information important to determining the *fitness of legislation* to address potential problems within the Executive Branch and the electoral system.") (emphasis in original).

[165] *Id.* at 740 (quoting McPhaul v. United States, 364 U.S. 372, at 381–82 (1960)).

[166] *Id.* at 740–41 (quoting Barenblatt v. United States, 360 U.S. 109, 134 (1959)) (internal quotation marks omitted).

[167] *Id.* at 742, 746 (emphasis added).

[168] In the dissent's view, the "gravamen" of the subpoena was investigating alleged illegal conduct by the President, which the House could pursue through its impeachment powers as opposed to its legislative powers. *Id.* at 773–74 (Rao, J., dissenting). The House could otherwise become a "roving inquisition over a co-equal branch of government." *Id.* at 748. The D.C. Circuit denied rehearing en banc. Trump v. Mazars USA, LLP, 941 F.3d 1180, 1180–82 (D.C. Cir. 2019).

[169] Trump v. Deutsche Bank AG, No. 19 Civ. 3826 (ER) 2019 WL 2204898, at *1 (S.D.N.Y. May 22, 2019).

[170] Trump v. Deutsche Bank AG, 943 F.3d 627, 658, 676 (2d Cir. 2019).

After reciting the long line of cases broadly construing Congress's power to investigate, the court zeroed in on the limitation of that power most relevant to the dispute before it: namely, that Congress may not use its investigative power "to inquire into private affairs unrelated to a valid legislative purpose."[171] The court first concluded that in identifying the committees' legislative purpose, it was appropriate to consult "several sources," including the authorizing resolutions of the committee, the remarks of the committee chairman or members of the committee, and the nature of the proceedings itself.[172] These sources, the court explained, fully identified "the interest of the Congress in demanding disclosures" as the *Watkins* court required.[173]

The court then tackled the plaintiffs' broader argument that the true reason the committees issued the subpoenas was not to advance a legislative purpose, but instead to embarrass the President. Like the D.C. Circuit, the Second Circuit promptly dismissed this argument, citing to the Supreme Court's admonition that courts are not to look at the motives alleged to have prompted a congressional inquiry.[174] Thus, so long as the "valid legislative purposes that the Committees have identified are being pursued and are not artificial pretexts for ill-motivated maneuvers," the committees have acted within their constitutional authority.[175] The court's analysis of the relevancy standard was limited to its discussion of the amicus brief of the United States, which argued that subpoenaed information not "demonstrably critical" to the investigation should be deemed insufficiently pertinent when directed at the President's records.[176] The "demonstrably critical" standard applies when a claim of executive privilege has been made.[177] Because no such claim had been asserted in the case and the documents sought did not implicate the President's "constitutional interests," the court concluded that the stringent "demonstrably critical" standard did not apply.[178]

The Supreme Court granted certiorari and consolidated the cases for plenary review, focusing its analysis on the question of whether the subpoenas issued for the personal records of a sitting President of the United

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[171] *Id.* at 652 (quoting Quinn v. United States, 349 U.S. 155, 161 (1955)).
[172] *Id.* at 655 (quoting Watkins v. United States, 354 U.S. 178, 201, 209 (1957)).
[173] *Id.* at 656 (quoting *Watkins*, 354 U.S. at 198).
[174] *Id.* at 663.
[175] *Id.* at 664.
[176] Brief for the United States as Amicus Curiae Supporting Petitioners at 9, 2020 WL 563912, Trump v. Mazars USA, LLP (U.S. Feb. 3, 2020) (Nos. 19-715, 19-760).
[177] Trump v. Deutsche Bank AG, 943 F.3d 627, 671 (2d Cir. 2019).
[178] *Id.* at 671.

States exceeded the House's authority.[179] In its exposition, the Court remarked on the novelty of the circumstances of the dispute, noting that in the more than two centuries since the Nation's founding it had "never addressed a congressional subpoena for the President's information."[180] Unlike past cases involving other types of subpoenas, here the President's records were sought not by "prosecutors or private parties in connection with a particular judicial proceeding," but instead by Congress pursuant to its self-defined "broad legislative objectives."[181] As the latest in the "ongoing relationship" between the political branches, long characterized by "rivalry and reciprocity," this dispute raised separation-of-powers sensitivities that would "necessarily inform[ ]" the Court's decision-making.[182]

Relying on the long-existing standard applied by courts when assessing the validity of congressional subpoenas, the House asked the Court to uphold the subpoenas, arguing that the subpoenas "relate[ ] to a valid legislative purpose" and "concern[ ] a subject on which legislation could be had."[183] The House argued that its committees have historically "investigated the wide range of issues on which Congress legislates" and have done so by seeking information from sitting Presidents and their associates.[184] The House argued that the subpoenas clearly met the low bar applied to congressional inquiries and their compulsory processes, given that the materials sought would inform the House's consideration of pending legislation.[185] Further, it asserted that the permissibility of its investigation was not affected by the fact that it targeted the President's alleged wrongdoing.[186] What mattered—and what was clearly present—was a valid legislative purpose.[187]

The President, on the other hand, rejected the House's appeal to tradition and history, describing the subpoenas as "unprecedented."[188] President Trump asserted that a decision upholding the subpoenas would permit Congress to seek the records of a sitting President simply by uttering the

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[179] Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

[180] *Id.* at 2026.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 2033 (first quoting Barenblatt v. United States, 360 U.S. 109, 127 (1959); then quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506 (1974)).

[184] Brief for Respondent Committees of the U.S. House of Representatives at 2–3, 2020 WL 1154733, Trump v. Mazars USA, LLP (U.S. Feb. 26, 2020) (Nos. 19-715, 19-760).

[185] *Id.* at 46–47.

[186] *Id.* at 47–54.

[187] *Id.* at 39.

[188] Brief for Petitioners at 15. 2020 WL 528039, Trump v. Mazars USA, LLP (U.S. Jan. 27, 2020) (Nos. 19-715, 19-760).

"magic words" that the records would relate to a legislative issue Congress was investigating.[189] If Congress need only meet this formalistic, low threshold to subpoena a sitting President's personal records, President Trump claimed Congress would imbue itself with law-enforcement capabilities outside of its legislative power.[190] Instead, President Trump urged the Court to impose the same standard that is used in executive privilege cases.[191] Thus, moving forward, Congress would have to establish a "demonstrated, specific need" for the information and show that the information is "demonstrably critical" to its legislative purpose.[192]

The Court began by highlighting the uniquely partisan and adversarial dispute before it, which represented a "significant departure from historical practice."[193] Although the political branches had at various times throughout history disagreed about the scope of Congress's ability to access information, the Court explained that such disagreements had largely been resolved through "negotiation and compromise" rather than litigation.[194] This long-standing practice, the Court explained, was built on the recognition that cases concerning "the allocation of power between [the] two elected branches of Government" gave rise to sensitive constitutional concerns.[195] These concerns imposed on courts a duty to ensure "the compromises and working arrangements" between the branches would not be "needlessly disturb[ed]."[196]

Turning to the parties' arguments, the Court reaffirmed Congress's authority to obtain information so that it can legislate effectively, an authority that is both "broad" and "indispensable."[197] It is not, however, limitless. A congressional subpoena must address a "valid legislative purpose" and must be "related to, and in furtherance of, a legitimate task of the Congress."[198] But the court concluded that these limitations do not, as President Trump argued, warrant the imposition of a "demonstrably critical"

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[189] *Id.* at 21.

[190] *Id.* at 42–43.

[191] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020) (citing United States v. Nixon, 418 U.S. 683 (1974); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 725 (D.C. Cir. 1974).

[192] Brief for Petitioners at 53. 2020 WL 528039, Trump v. Mazars USA, LLP (U.S. Jan. 27, 2020) (Nos. 19-715, 19-760) (first quoting United States v. Nixon, 418 U.S. 683, 713 (1974); then quoting *Senate Select Comm. v. Nixon*, 498 F.2d at 731)).

[193] *Mazars*, 140 S. Ct. at 2031.

[194] *Id*.

[195] *Id.* at 2031 (quoting N.L.R.B. v. Noel Canning, 573 U.S. 513, 524–26 (2014)).

[196] *Id.* (quoting *Noel Canning*, 573 U.S. at 524–26).

[197] *Id.* at 2031 (quoting Watkins v. United States, 354 U.S. 178, 187 (1967)).

[198] *Id.* (first quoting *Watkins*, 354 U.S. at 187; then quoting Quinn v. United States, 349 U.S. 155, 161 (1955)).

standard on congressional subpoenas for presidential documents.[199] The President's reliance on *Nixon* and *Senate Select Committee* was misplaced because those cases involved privileged "Oval Office communications," not non-privileged, personal information.[200] In the Court's view, the "demonstrably critical" standard would be too stringent as a limitation on Congress's ability to compel the production of non-privileged, private information that does not implicate sensitive Executive Branch deliberations. The Court explained that the standards proposed by the President, applied outside the context of privileged information, "would risk seriously impeding Congress in carrying out its responsibilities."[201] Applying the same standards to all subpoenas for the President's information, absent any distinctions, would also depart from long-standing precedent.

Turning to the House's arguments, the Court also rejected the House's position that these subpoenas were like any other request for information and should be treated as such as long as the committee had a "valid legislative purpose" for issuing the subpoenas. The flaw in this argument, the Court noted, is that it fails to appreciate the significance of the separation-of-powers concerns that would arise if there were no identifiable limits to be applied to Congress's subpoena authority.[202] The Court explained that giving Congress a nearly automatic victory in the courts each time it seeks to enforce a subpoena through judicial review would forever disrupt the delicate balance of power between Congress and the Executive Branch.[203] These concerns are only exacerbated, not lessened, by the fact that the subpoenas sought the President's personal papers, as opposed to official Administration records.[204]

Based on the foregoing analysis, the Court announced what it called a "balanced approach" to govern future interbranch disputes, one that it viewed as protecting Congress's ability to investigate the President while also mitigating the risk of improper congressional inquiry.[205] Without purporting to announce a definitive list of governing considerations, the Court set forth four factors to account for the separation of powers concerns raised by interbranch disputes in this context.

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[199] *Id.* at 2032 (quoting Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974)).

[200] *Id.* at 2032–33.

[201] *Id.* at 2033.

[202] *Id.* at 2033–34.

[203] *See id.* at 2034.

[204] *Id.* at 2034–35.

[205] *Id*. at 2035.

First, courts must consider whether "other sources could reasonably provide Congress the information it needs in light of its particular legislative objective."[206] Because "constitutional confrontation between the branches should be avoided whenever possible," courts should carefully analyze whether the asserted legislative purpose "warrants the significant step of involving the President and his papers."[207] If Congress could reasonably obtain the records it seeks from other sources, it should not be entitled to request these from the President.[208] Elaborating further, the Court distinguished the need for information in a judicial proceeding, where "[t]he very integrity of the judicial system" would be undermined without the full panoply of potential information, from the need for information in the legislative setting, where Congress is not placed at a major disadvantage if "every scrap of potentially relevant evidence is not available."[209]

Second, subpoenas may be "no broader than reasonably necessary to support Congress's legislative objective."[210] The "specificity of the subpoena's request" functions to "narrow the scope of possible conflict between the branches" and protects against "unnecessary intrusion" on the functions of the Oval Office.[211]

Third, Congress must "adequately identif[y] its aims and explain[] why the President's information will advance its consideration of the possible legislation," and courts should likewise "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[212] The Court described a sliding scale for evaluating this evidence—the "more detailed and substantial the evidence . . . the better," particularly when Congress seeks documents that raise sensitive constitutional issues.[213] Also relevant to this analysis is the way Congress characterizes the legislation it is contemplating. Thus, if legislation will raise "sensitive constitutional issues, such as legislation concerning the Presidency," the Court said it will be "impossible" to conclude that a valid legislative purpose exists *unless* Congress sufficiently explains why the President's information is necessary for advancing its legislative goals.[214]

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[206] *Id.* at 2035–36.

[207] *Id.* at 2035 (citing Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 389–90 (2004)) (internal quotation marks omitted).

[208] *Id.*

[209] *Id.* at 2036 (quoting *Cheney*, 542 U.S. at 382 and Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (1974)).

[210] *Id.*

[211] *Id.* (quoting *Cheney*, 542 U,S. at 387).

[212] *Id.*

[213] *Id.*

[214] *Id.*

Finally, courts "should be careful to assess the burdens imposed on the President by a subpoena."[215] Burdens placed by judicial process and litigation on the President's time and attention, "without more, generally do not cross constitutional lines."[216] But it is a different situation when the burden is imposed by a congressional subpoena because the subpoena "stem[s] from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage."[217] In essence, Congress may have the power to investigate and obtain information it requires for "intelligent legislative action."[218] But when Congress's focus is trained on the President, the special concerns attendant to preservation of the separation of powers require courts to tread carefully arbitrating disputes between the two branches.

Notably, quietly woven into its articulation of this multifactor analysis, the Court stated that recipients of congressional subpoenas retain *both* "*common law* and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege."[219] As previously discussed, Congress has traditionally taken the position that it is not bound to recognize common law privileges and may determine, on a case-by-case basis, whether to accept a witness's request to invoke such privileges against a congressional subpoena, but this position has not been tested in litigation. The Court's apparent endorsement of common law privileges as a basis for resisting congressional subpoenas upsets this long-asserted position and has significant implications beyond the context of disputes between Congress and the President. While the Court's treatment of common law privileges is arguably dicta, both the Executive Branch and private litigants can be expected to take the position on the basis of this language that Congress is

[215] *Id.* Justices Thomas and Alito filed dissenting opinions. Justice Alito predicted that "the Court's decision places a sitting President in the same unenviable position as any other person whose records are subpoenaed by a grand jury," *Trump v. Vance*, 140 S. Ct. 2412, 2451 (2020) (Alito, J., dissenting), and posited that the House should be required to put forward a detailed explanation of its "constitutional authority to enact the type of legislation that it is contemplating" and to justify "the scope of the subpoenas in relation to the articulated legislative needs." *Mazars*, 140 S. Ct. at 2048 (Alito, J., dissenting). Justice Alito signaled that conclusory statements of a committee's authority to investigate should be insufficient to support a congressional subpoena of the President's records. *See id.* at 2048. Justice Thomas took a much broader position, arguing that Congress's legislative power does not authorize it to subpoena personal documents belonging to the President or anyone else. *Id.* at 2047 (Thomas, J., dissenting). Although Congress has the power to investigate, Justice Thomas reasoned, that power does not extend to private documents. *Id.* Instead, Congress "should pursue [its] demands" for documents under its impeachment power. *Id.*

[216] *Id.* at 2036.

[217] *Id.*

[218] *Id.* (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

[219] *Id.* at 2032 (emphasis added).

obligated to observe common law privileges in the same way that courts and grand juries must observe them. Although the ultimate success of this argument remains to be seen, the Court unquestionably provided an additional basis on which the Executive (and private parties) can seek to rebuff congressional subpoenas and, in so doing, further restricted Congress's oversight and investigative powers.

B. Committee on the Judiciary v. McGahn

In parallel to Special Counsel Robert Mueller's investigation into Russian interference in the 2016 election and associated allegations of Executive Branch misconduct, the House Judiciary Committee opened an investigation to review allegations that President Trump and his associates had engaged in malfeasance.[220] As part of this investigation, the committee ordered former White House Counsel Don McGahn to produce certain documents related to President Trump's alleged efforts to obstruct the Russia investigation.[221] Upon McGahn's refusal, the committee issued a subpoena for the documents and for his in-person testimony.[222] One day prior to McGahn's scheduled testimony, the White House Counsel informed the committee that the President had instructed McGahn not to testify, asserting that certain presidential advisers enjoyed "absolute testimonial immunity."[223]

After threats to issue a contempt citation failed to induce McGahn to comply with the subpoena, the House passed a resolution authorizing the committee to use "all necessary authority under Article I of the Constitution" to initiate judicial proceedings to enforce the subpoena.[224] While the committee and the White House reached a compromise regarding the requested documents, no such agreement was reached on McGahn's live testimony. The committee then sued McGahn in federal court, requesting that the court declare McGahn's refusal to testify to be "without legal justification."[225]

In an opinion focused primarily on questions of justiciability, the district court ruled in favor of the committee. The court rejected the Department of Justice's various justiciability arguments and held that Article III permitted

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[220] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 156 (D.D.C. 2019).
[221] *Id.* at 157.
[222] *Id.*
[223] *Id.* at 153.
[224] H.R. Res. 430. 116th Cong., (2019).
[225] *McGahn*, 415 F. Supp. 3d at 153.

it to adjudicate the dispute. The court framed the dispute not as one that raised a political question charged with separation-of-powers concerns, but rather as a "subpoena-enforcement dispute" raising "garden-variety legal questions that the federal courts address routinely and are well-equipped to handle."[226] Nor was the court persuaded by the Department's challenges to the committee's standing, holding that "outright defiance of *any* duly issued subpoena" qualified as an injury for purposes of standing.[227] On the merits, the court agreed that McGahn's refusal to testify was "without legal justification" and instructed him to appear before Congress.[228]

On appeal, a divided panel of the D.C. Circuit reversed the district court, holding that the committee lacked Article III standing. In the panel majority's view, the federal judiciary "lack[s] authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity 'beyond the [federal] government.'"[229] The court emphasized that Article III concerns were heightened in view of the separation-of-powers issues inherent in the dispute.[230] It is these limitations, the court explained, that are necessary to maintain the "proper—and properly limited—role of the courts in a democratic society," which does not involve "amorphous general supervision of the operations of government."[231] its conclusion on reviewability, the court also addressed the statutory scheme governing civil enforcement of congressional subpoenas, observing that the Senate—but not the House—is authorized to seek civil enforcement of congressional subpoenas.[232] This scheme carves out disputes involving the Executive Branch, implying that Congress has recognized that its disputes with the Executive are not justiciable.[233]

Notwithstanding what it perceived as the high bar imposed by the Constitution and the current statutory regime—and contrary to the Department of Justice's position—the court recognized that, in certain circumstances, interbranch information disputes could be justiciable. The majority acknowledged that a statute authorizing purely interbranch information suits would "reflect Congress's (and perhaps the President's)

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[226] *Id.* at 177.

[227] *Id.* at 189 (emphasis added).

[228] *See id.* at 153, 215.

[229] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020) (quoting Raines v. Byrd, 521 U.S. 811, 834 (1997).

[230] *See id.* at 517.

[231] *Id.* at 516, 518 (first quoting Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009); then quoting *Raines*, 521 U.S. at 829).

[232] *Id.* at 522.

[233] *See id.*

view that judicial resolution of interbranch disputes is 'consistent with a system of separated powers.'"[234] The majority also distinguished *Nixon* by explaining that "executive-privilege claims arising out of criminal subpoenas" would remain justiciable because criminal cases necessarily determine the rights of individuals.[235]

The panel majority attempted to dull the sting of its holding by emphasizing that its decision does not render Congress "powerless."[236] Rather, the court pointed to the myriad "political tools" afforded to Congress by the Constitution that could be used to force the Executive Branch to comply with its inquiries.[237] For example, Congress could "hold officers in contempt, withhold appropriations, refuse to confirm the President's nominees, harness public opinion, delay or derail the President's legislative agenda, or impeach recalcitrant officers."[238] By using these existing resources to assert its interests, Congress can enforce its investigative powers "without dragging judges into the fray."[239]

The full U.S. Court of Appeals for the D.C. Circuit voted to vacate the panel's ruling and rehear the case en banc.[240] After hearing oral argument, the court issued its en banc decision holding that the committee had Article III standing to sue in federal court.[241] The court's analysis began by reaffirming the "essentiality of information to the effective functioning of Congress."[242] Citing to its own precedent, the court also emphasized that legislative inquiries, and thus requests for information, "may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress."[243] In this context, therefore, the committee's right to have McGahn appear to testify and produce documents was "long-recognized" as necessary for Congress to discharge its constitutional responsibilities.[244] When McGahn refused to testify in response to the committee's subpoena, the committee was "deprived . . . of specific information sought in the exercise of its constitutional

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[234] *Id.* at 530 (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).
[235] *Id.* at 531.
[236] *Id.* at 519.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] U.S. House of Representatives v. Mnuchin, Nos. 19-5176, 19-5331, 2020 WL 1228477, at *1 (D.C. Cir. Mar. 13, 2020).
[241] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc).
[242] *Id.* at 764.
[243] *Id.* at 765 (quoting Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938)).
[244] *Id.*

responsibilities."[245] This caused Congress to suffer a concrete and particularized injury sufficient to convey standing under Article III of the Constitution.[246] In the court's view, "permitting Congress to bring th[e] lawsuit preserve[d] the power of subpoena that the House of Representatives [was] already understood to possess."[247] In fact, it was McGahn's challenge to the committee's standing, *not* the court's enforcement of the subpoena, "that s[ought] to alter the *status quo ante* and aggrandize the power of the Executive Branch at the expense of Congress."[248] Indeed, in a nod to the extrajudicial negotiating process that provided much of the context for the Supreme Court's opinion in *Mazars*, the court mused, "[w]ithout the possibility of enforcement of a subpoena issued by a House of Congress," what incentive would the Executive Branch have "to reach a negotiated agreement in an informational dispute[?]"[249] Little, in the court's view.

The en banc court's decision addressed only the question of whether the committee had standing under Article III to seek enforcement in federal court of its subpoena, so the full court remanded the case to the original three-judge panel to consider the remaining issues in the case, including whether the committee had a cause of action to bring its claim.[250] Again by a two-to-one vote, the panel concluded that the committee lacked a cause of action to enforce its subpoena in the courts because no statute affords the House the authority to do so.[251] While conceding that the Constitution permits federal courts to hear suits brought by Congress to enforce its subpoenas, the panel majority believed that Congress *itself* must authorize enforcement suits, because no statute expressly permits such suits to be brought on behalf of the House or its committees. The majority based its analysis primarily[252] on two Watergate-era statutes providing the Senate, but not the House, with a cause of action to enforce its subpoenas.[253] The

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[245] *Id.* at 763.

[246] *Id.* at 768. The court determined that the asserted injury also met the remaining prongs of the standing analysis.

[247] *Id.* at 771.

[248] *Id.*

[249] *Id.*

[250] *Id.* at 778.

[251] *See* Comm. on Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020).

[252] The majority also found support for its position from the apparent lack of any historical "tradition" of courts hearing civil actions brought by Congress in an attempt to remedy constitutional violations by "a former Executive Branch official in an interbranch information dispute." *Id.* at 124.

[253] *Id.* at 123 (citing 2 U.S.C. § 288d and 28 U.S.C. § 1365(b)). Perhaps not coincidentally in light of the majority's reliance on the Senate's statutory authority, the author of the majority opinion was Circuit Judge Thomas B. Griffith, who previously served as Senate Legal Counsel. The legislative history of the cited provisions states that "the statute is not intended to be a congressional finding that

absence of such a statute here, the majority argued, reflected Congress's implied decision not to authorize the House to sue. In a dissenting opinion, Judge Judith Rogers wrote that Congress's ability to seek judicial enforcement of its subpoenas is necessarily implied in Article I of the Constitution.[254] Judge Rogers explained that Article I affords Congress not only the power to demand testimony and information, but "also the power 'to enforce' such a demand."[255] In her view, the Constitution's text as well as Supreme Court precedent make clear that Article I implies a right to seek the judiciary's assistance in enforcing a subpoena.

The panel majority's decision threatened negative practical implications. Although the majority clarified that its decision did not preclude Congress "from *ever* enforcing a subpoena in federal court; it simply precludes it from doing so without first enacting a statute authorizing such a suit."[256] Enacting such a statute would be very difficult. Presidents of both parties have consistently resisted Congress's subpoena enforcement authority; thus, it is likely that any statute authorizing subpoena enforcement would be vetoed and require supermajority votes in both chambers. For that reason, the panel majority's holding threatened to have profound effects on the House's ability to investigate the Executive Branch—and potentially beyond. On the day the panel's decision was reached, House Speaker Nancy Pelosi summarized the impact of the decision this way: "If allowed to stand, this wrong-headed Court of Appeals panel ruling threatens to strike a grave blow to one of the most fundamental Constitutional roles of the Congress: to conduct oversight on behalf of the American people, including by issuing our lawful and legitimate subpoenas."[257]

Shortly after the panel issued its opinion, the full D.C. Circuit granted the House's petition for rehearing en banc, thereby vacating the panel's decision.[258] After the Biden Administration took office in 2021, the House Judiciary Committee and the Executive Branch reached a settlement pursuant to which the committee would conduct a transcribed interview of

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the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the federal government." S. REP. NO. 95-170, at 91–92 (1977). *See generally* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 86–87 (2008).

[254] *McGahn,* 973 F.3d at 127 (Rogers, J., dissenting).

[255] *Id.*

[256] *Id.* at 125–26 (emphasis in original).

[257] Press Release, Speaker of the House, Pelosi Statement on Court of Appeals Panel Ruling in McGahn Case (Aug. 31, 2020).

[258] Order at 1, Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. Oct. 15, 2020), ECF No. 1866426.

McGahn and release the transcript publicly at a later date.[259] The scope of the interview was narrowly circumscribed, with questioning limited to information and events that pertained to McGahn and had already been described in the public portions of the Mueller Report.[260] The interview took place on June 4, 2021, and the transcript was released five days later. The next day, the parties filed a joint motion in the D.C. Circuit seeking dismissal of the appeal and vacatur the three-judge panel opinion that the full D.C. Circuit had agreed to rehear en banc.[261] The parties explained that since McGahn had appeared and answered the questions posed, "further litigation to enforce the subpoena is unnecessary."[262] Notably, in the joint motion, the Justice Department stated its belief that the panel's opinion was correct but that it nonetheless agreed to vacatur "in the interest of accommodation between the branches."[263] On July 13, 2021, the D.C. Circuit dismissed the appeal.[264]

III. A CHANGED CONGRESSIONAL ENFORCEMENT LANDSCAPE?

As the Supreme Court noted in *Mazars*, the political branches have historically negotiated disagreements over congressional inquiries and subpoenas without turning to judicial assistance in resolving these disagreements. Thus, the courts have usually managed to avoid wading into sensitive, consequential issues of the balance of power between the political branches. Until now. The *Mazars* decision, and to a lesser extent, the *McGahn* decision, are the most significant rulings on congressional investigations in recent history, potentially circumscribing Congress's investigatory capabilities in meaningful ways.

The *McGahn* panel's holding posed a serious threat to congressional oversight because it not only closed the courthouse doors to congressional efforts to enforce subpoenas against the Executive Branch, but it arguably threatened the House's ability to obtain judicial enforcement of subpoenas issued to private parties as well. Unlike the Senate, the House has no statutory cause of action for bringing civil enforcement actions against

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[259] Agreement Concerning Accommodation, Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. May 12, 2021).

[260] *Id.*

[261] Joint Motion to Dismiss Appeal, and Consent Motion to Vacate Panel Opinion at 2, Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. Jun. 10, 2021).

[262] *Id.*

[263] *Id.* at 1.

[264] Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331, slip op. at 1 (D.C. Cir. July 13, 2021) (per curiam).

private parties. Therefore, under the panel's rationale, it could have been argued that the House would have no cause of action to bring a civil enforcement action against a private party that had received a subpoena but refused to comply. Under this view, the House still could seek criminal enforcement of a contempt citation, but that mechanism would place it at the mercy of the Executive Branch without the more flexible civil litigation path. Private parties, aware of the House's weakened ability to enforce its subpoenas, might become less willing to cooperate and negotiate with House investigators.

Although the Senate could in theory increase its investigative activity to compensate for the House's weakened authority, such a result would be unlikely for three reasons. First, different parties may control the House and Senate, and the party that holds the Senate majority may not share the investigative priorities of the House majority. Second, congressional resources are limited, and even the relatively generous staffing on the Senate side (compared to the House) is insufficient to permit the Senate to effectively investigate the full range of issues currently investigated by both chambers. Finally, the Senate's deliberative culture and need for bipartisan support for subpoenas predispose that chamber to be more selective than the House in choosing which matters to investigate.

Although the vacatur of the panel majority's ruling means that it is not binding, it remains important for its potential persuasive value. Prior to the *McGahn* decision, the United States District Court for the District of Columbia had consistently held that the House had a cause of action to bring subpoena enforcement suits.[265] Now, the targets of House subpoenas will presumably use the *McGahn* panel's analysis to argue that the House has no cause of action to enforce its subpoenas. As a result, the *McGahn* settlement leaves the House in a somewhat worse position than it was previously, because the absence of a definitive D.C. Circuit ruling and the unfavorable panel opinion bolsters the ability of even private-party subpoena recipients to contest the House's civil enforcement authority. As for subpoenas to Executive Branch officials, the Department of Justice will continue to advance the panel's position in future disputes. It may be years before another vehicle to resolve this issue is ripe for judicial consideration.

Mazars, while framed in terms of respecting the historical balance of power between Congress and the Executive, including extrajudicial

[265] *See* Comm. on Oversight and Government Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1, 20–22 (D.D.C. 2013); Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 108 (D.D.C. 2008).

negotiations and the balancing of each branch's respective interests, can be read as working significant changes in the previously understood scope and effectiveness of Congress's oversight powers. First, *Mazars* represents the first time that the Supreme Court has ruled in favor of a collateral attack on a congressional subpoena by a third party seeking to enjoin the recipient from complying with the subpoena. President Trump's suit against the recipients of the committees' subpoenas—the custodians of the subpoenaed records—effectively permitted him to challenge the subpoenas themselves. The decision confirms the ability of targets of congressional investigations, whether executive officials or private parties, to obtain prompt judicial review when a congressional subpoena is directed to a third-party custodian for information belonging to the plaintiff.

Second, past clashes between the political branches were characterized by two relevant interests: Congress's oversight power and the Executive's desire to protect privileged information. But *Mazars* was distinct. Congress did not seek the official records of the Executive Branch, but instead sought the personal records of the President, obviating concerns of executive privilege, and arguably minimizing separation-of-powers concerns. Yet, even in this unique setting, the Supreme Court articulated what is in effect a new, more difficult, multipart test for establishing the enforceability of congressional subpoenas that implicate the separation of powers. And, while the President is not immune from the reach of a congressional subpoena, by peeking behind the veil of Congress's articulated legislative purpose, the Supreme Court has strengthened the ability of the Executive Branch—and potentially private litigants—to justify resistance to congressional inquiries and requests for information.

Third, pre-*Mazars* jurisprudence did not require courts to consider whether Congress is able to obtain the information it seeks from sources other than the Executive—sources that would not implicate separation-of-powers concerns. But the Supreme Court in *Mazars* appears to have signaled a shift in the legal landscape here as well. Even if Congress "adequately identifies its aims" and explains how the information requested advances "its consideration of the possible legislation," the Court indicated that if Congress is able to reasonably obtain the information from "other sources," it may not use its subpoena power to obtain access to the President's information.[266] In other words, subpoenaing the President's information must be Congress's last resort. Otherwise, *Mazars* arguably requires a court to invalidate the congressional subpoena. While the Court expressed its

[266] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020).

holding in the context of the President's personal papers, its rationale rests on broader separation-of-powers concerns. Accordingly, the Department of Justice probably will argue in future disputes that Congress must first attempt to obtain the requested information from sources outside of the Executive Branch. Only after such requests fail may Congress direct a subpoena to the Executive.

Fourth, *Mazars* places a greater burden on Congress to focus its subpoenas on information relevant to its investigation such that the subpoena can be shown to be "no broader than reasonably necessary."[267] This is a significant departure from the broad scope that some courts had previously recognized as appropriate for congressional subpoenas. Before *Mazars*, some district courts had stated that courts could inquire only as to whether the records sought are "not plainly incompetent or irrelevant to any lawful purpose" of the committee.[268] Indeed, these courts had treated Congress's subpoena power as analogous to that of a grand jury. The district courts in *Packwood* and *Bean*, for example, relied heavily on *United States v. R. Enterprises, Inc.*,[269] which dealt with subpoenas issued by a grand jury.[270] In upholding the congressional subpoenas at issue in those cases, the *Packwood* and *Bean* courts borrowed from *R. Enterprises* the proposition that subpoenas should be enforced unless the district court determines that there is no reasonable possibility that the category of materials sought will provide information relevant to the "general subject" of the investigation.[271] *Mazars* effectively overturns this approach, expressly distinguishing between criminal proceedings and "efforts to craft legislation," and emphasizing that, in contrast to the need for "full disclosure" in the criminal context, Congress does not need "every scrap of potentially relevant evidence" to perform its functions.[272] Thereby, it makes clear that the scope of Congress's subpoena power (and thus its leeway in crafting broad subpoenas) are considerably more circumscribed than that of a grand jury. While announced in the context of a subpoena directed to the President's papers, this limitation on Congress's subpoena power may provide fertile grounds for challenges by private parties as well. The logic of the Court's rationale in rejecting the

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[267] *Id.*

[268] Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 20–21 (1994) (quoting McPhaul v. United States, 364 U.S. 372, 381 (1960)).

[269] United States v. R. Enters., 498 U.S. 292 (1991).

[270] *Id.* at 294.

[271] *Packwood*, 845 F. Supp. at 20–21.

[272] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020) (first quoting United States v. Nixon, 418 U.S. 683, 709 (1974); then quoting Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 384 (2004)).

criminal analogy applies equally to private as well as governmental targets of congressional subpoenas.

Fifth, not only must a congressional subpoena now be as narrow as practicable, *Mazars* also contemplates that evidence—the "more detailed and substantial . . . the better"—must be "offered by Congress to establish" the validity of the legislative purpose it seeks to achieve.[273] In addition, the decision indicates that, particularly when its investigation relates to legislation that "raises sensitive constitutional issues," Congress cannot proceed unless it "adequately identifies its aims and explains" why the information it requests "will advance its consideration of the possible legislation."[274] Motivating this newly heightened standard appears to be dissatisfaction with the existing legislative-purpose analysis, which the Court described as "limitless," thus permitting Congress to "exert an imperious controul [sic]" over the Executive Branch.[275] Congress must now, in effect, show its work and adequately describe the nexus between the records sought and the legislation the committee is considering. Thus, courts are to engage in a much more rigorous examination of a committee's legislative purpose than the analyses lower courts have traditionally used. Additionally, this more onerous standard could pose serious problems for Congress in future congressional investigations. Congress does not always know what information will be necessary or relevant to legislation and will often issue broad subpoenas as part of its fact-finding work.[276] Significantly, while the Court tied various facets of its analysis to the fact that Congress was seeking the President's personal papers, the heightened scrutiny of legislative purpose does not appear to be limited to that context, further constraining Congress's flexibility in seeking Executive Branch information. Indeed, the Court's requirement that Congress identify its aims and explain why the requested information will advance its consideration of legislation when its investigation "raises sensitive constitutional issues" may well be applied even in investigations of private parties that trench upon constitutional concerns.

Sixth, and relatedly, the requirement that courts be more "attentive to the nature of the evidence offered by Congress to establish" the validity of its legislative purpose suggests that courts may now need to take account of

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[273] *Id.*

[274] *Id.*

[275] *Id.* at 2034 (quoting THE FEDERALIST NO. 71, at 484 (Alexander Hamilton)).

[276] United States v. R. Enters., 498 U.S. 292, 300–01 (1991) ("One simply cannot know in advance whether information sought during the investigation will be relevant."); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975) (explaining that a legislative investigation "takes the searchers up some 'blind alleys' and into nonproductive enterprises").

Congress's motivations for requesting Presidential information.[277] Notwithstanding the numerous statements in prior cases to the effect that congressional motives are not a proper subject of judicial consideration, the Court's opinion in *Mazars* pointedly fails to reiterate that mantra, laying the foundation for broader consideration of legislative motive in future cases.

Last, as noted above, the Court stated that recipients of congressional subpoenas "retain common law and constitutional privileges," thereby dealing a serious blow to Congress's untested position that it may dispense with common law privileges whenever it chooses.[278] While witnesses called to testify in congressional investigations have always enjoyed constitutional protections,[279] there has been no significant judicial authority addressing the applicability of common law privileges.[280] Thus, while congressional committees have usually permitted witnesses to assert attorney-client privilege[281] and potentially attorney work product privilege,[282] Congress has taken the position that it is under no obligation to respect such privileges. Subpoena recipients are more likely to challenge that view going forward, now that the highest court in the land has endorsed the applicability of common law privileges as defenses to congressional subpoenas. The *Mazars* Court's statement to this effect potentially affords the public and private targets of congressional inquiries the opportunity to invoke the full panoply of common law protections to resist a committee's compulsory process and to seek enforcement of these privileges in the course of litigation.[283]

The impact of *Mazars* will be more than theoretical. Courts are already determining whether to apply the framework established in *Mazars* in circumstances that do not involve a sitting president's challenge to Congressional subpoenas. For example, on October 18, 2021, former President Trump sued to enjoin the Archivist of the United States from producing documents from the Executive Office of the President and the

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[277] *Mazars*, 140 S. Ct. at 2036.

[278] *Id.* at 2032 ("[R]ecipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege").

[279] Watkins v. United States, 354 U.S. 178, 188 (1957).

[280] *See* Bopp & Lay, *supra* note 102.

[281] *Id.* at 906.

[282] *Id.* at 918.

[283] The increasing resort to the courts to seek judicial enforcement of congressional subpoenas provides additional fodder for this argument, because in the federal courts "[t]he common law . . . governs a claim of privilege" unless the Constitution, a federal statute, or a rule prescribed by the Supreme Court "provides otherwise." FED. R. EVID. 501. Government and private targets of subpoena enforcement actions may well point to *Mazars* and Rule 501 as support for the view that Congress has no power to compel production of information protected by common law privileges, because nothing in the Constitution or any applicable statute or rule "provides otherwise."

Office of the Vice President in response to a request from the House Select Committee to Investigate the January 6th Attack on the United States Capitol.[284] Former President Trump sought declaratory relief, as well as preliminary and permanent injunctive relief, arguing that (1) the Committee's request serves no valid legislative purpose; (2) the documents requested are protected by the presidential communications privilege, the deliberative process privilege, attorney-client privilege, and the attorney work product privilege; and (3) the request is improper under the framework established by *Mazars*.[285] The House Select Committee opposed former President Trump's request for a preliminary injunction on the grounds that (1) the request serves a valid legislative purpose; (2) the documents are not protected by executive privilege because President Biden has not asserted the privilege and the Committee's need for the documents outweighs former President Trump's interest in confidentiality as a former President; (3) the *Mazars* test does not apply to claims raised by former Presidents; and (4) even if *Mazars* did apply, the Committee's request satisfies its test.[286]

The court rejected former President Trump's request for a preliminary injunction, explaining that "[a]t bottom, this is a dispute between a former and incumbent President," and "the incumbent's view is accorded greater weight."[287] In evaluating whether the document request served a valid legislative purpose, the court employed a "highly deferential" analysis, noting that the "key factor is whether there is some discernable legislative purpose."[288] The court acknowledged that the Select Committee had "cast a wide net" but concluded that the request was within Congress's legislative authority because (1) the request was limited to Presidential records; (2) Congress's power to obtain information is broad; and (3) President Biden's decision not to assert executive privilege alleviated any concern that the requests were overbroad.[289] The court concluded that President Trump's status as a former president, together with President Biden's and the Select Committee's agreement that the records should be produced, "reduces the import of the *Mazars* test."[290] Even if the *Mazars* test did apply, the court

[284] Complaint at 2–3, 25–26, Trump v. Thompson, No. 21-2769 (D.D.C. Oct. 18, 2021), ECF No. 1.

[285] *Id.* at 3–8, 25–26; *see* Statement of Points and Authorities in Support of Plaintiff's Motion for a Preliminary Injunction at 15–36, Trump v. Thompson, No. 21-2769 (D.D.C. Oct. 19, 2021), ECF No. 5-1.

[286] Congressional Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction at 17–38, Trump v. Thompson, No. 21-2769 (D.D.C. Oct. 29, 2021), ECF No. 19.

[287] Trump v. Thompson, No. 21-2769, 2021 WL 5218398, at *7 (D.D.C. Nov. 9, 2021).

[288] *Id.* at *11.

[289] *Id.* at *13.

[290] *Id.* at *14.

concluded that all four of its factors weighed in favor of production of the requested documents.[291]

Former President Trump appealed the denial of his motion for a preliminary injunction, and the D.C. Circuit granted his emergency requests for an administrative injunction and for an expedited briefing schedule.[292] The court emphasized that it was enjoining the defendants "from releasing the records requested by the House Select Committee" only to preserve the status quo and protect the court's jurisdiction pending its consideration of former President Trump's claims of executive privilege, and that its decision was not in any way a ruling on the merits.[293] As of this writing, the D.C. Circuit has yet to issue its decision. This case will provide the courts with an early opportunity to determine whether *Mazars* applies to challenges to congressional document requests brought by a former President, and, if so, how the *Mazars* factors should apply to a congressional request for archived documents from a previous presidential administration. The case also may offer guidance as to whether courts may be willing to extend the logic of *Mazars* to challenges brought by private parties or are likely to fall back on the traditional standard for evaluating challenges to Congressional document requests, a standard that is highly deferential to Congress.

CONCLUSION

The *Mazars* decision portends both practical and structural changes to Congress's exercise of its oversight and investigative power and its use of compulsory process. Congress will need to develop protocols and procedures for ensuring that its investigations are well supported by House Rules and carefully crafted statements of legislative purpose. In addition, Congress will need to fashion targeted, well-defined requests for information that are readily portrayed as directly advancing the stated purpose of the investigation. Investigating committees will be well-advised to adhere to these criteria in order to maximize their ability to defend their subpoenas and satisfy the *Mazars* adequacy-and-specificity standards before the courts. And after the panel decision and settlement in *McGahn*, both Executive Branch and private-party recipients of congressional subpoenas will have an enhanced basis for arguing that Congress must pass authorizing

[291] *Id.* at *14–*15.
[292] Trump v. Thompson, No. 21-5254, 2021 WL 5239098, at *1 (D.C. Cir. Nov. 11, 2021).
[293] *Id.*

statutes permitting it to enforce its subpoenas, creating the potential for greater uncertainty and delay.

More immediately, committees are likely to encounter heightened recalcitrance from targets of investigations who feel empowered by *Mazars* and *McGahn* to resist congressional requests. The ramifications of these decisions are already making themselves felt. For example, in 2020, the Department of State seized on *Mazars* to refuse to cooperate with a subpoena issued by the House Foreign Affairs Committee in relation to its investigation of President Trump's replacement of Steve Linick as State Department Inspector General. Despite having provided the requested records to Republican-controlled Senate committees, the Department argued that under the *Mazars* decision, the committee was required to provide a detailed and substantial explanation of its purpose, and, in the Department's view, had failed to do so. The Department believed the committee's purpose was "a political one, not a legislative one," and accordingly, an insufficient basis on which to issue a compulsory process. Ultimately, the Department turned over the documents, but its early obduracy reflects the changed nature of the interplay between the branches as a result of *Mazars*. It will be interesting to see if Executive Branch agencies in the Biden Administration raise the same or similar objections.

Additionally, congressional committees increasingly may find themselves forced to seek information initially from sources other than the Executive Branch. Hence, congressional committees may direct more of their investigative mechanisms at government contractors and trade associations, as opposed to executive departments and agencies.

The *Mazars* and *McGahn* decisions may also increase the likelihood of future litigation by causing the Executive Branch (and, to a lesser extent, private parties) to conclude that the courts are less hostile to efforts to resist enforcement of congressional subpoenas. The threat of a civil enforcement action if subpoena recipients failed to comply may be less weighty than it once was, potentially emboldening the targets of congressional investigations and making the accommodation process between the Legislative and Executive Branches even more difficult and time-consuming.

In sum, *Mazars*, and to a lesser extent, the nonbinding *McGahn* panel decision, provide fertile ground for the Executive Branch and private parties to stall and buy time in the hopes of a change in congressional focus. Ironically, the longest-lasting result of the aggressive, multi-faceted congressional investigations of the Trump Administration may turn out to

be a significant and permanent curtailment of Congress's oversight powers, to the detriment of its ability to properly perform its legislative functions.