

ALERT

SCOTUS on Congressional Subpoenas: When Congress Subpoenas “Presidential Papers,” Some Limits Apply

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In a highly anticipated decision, Chief Justice John Roberts, in a 7-2 decision (Thomas, J. and Alito, J., dissenting), opined for the majority in *Trump et al. v. Mazars USA, LLP, et al.*, that while Congress maintains broad authority to subpoena records for valid legislative purposes, when a President’s private personal records are subpoenaed, this invokes separation of powers concerns that limits Congress’s broad subpoena authority. In such circumstances, the Supreme Court of the United States (SCOTUS) held that courts should apply a tailored analysis to determine whether such subpoenas are valid.

Background on the Decision

At issue in the case were four congressional subpoenas issued by three different House Committees to private entities (Deutsche Bank, Capitol One Bank, Mazars USA, LLP), seeking financial information regarding President Trump, his children, and his businesses. The Committees, when issuing the subpoenas, indicated that the information sought was to help guide legislative reform on topics ranging from money laundering to foreign meddling in U.S. elections. The President sought to strike down the subpoenas, arguing that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers.

The United States Court of Appeals for the D.C. Circuit and Second Circuit both upheld the validity of the congressional subpoenas, applying the long-settled rule that Congress has broad latitude to subpoena information when the information sought is related to a

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legislative purpose.

Indeed, the Supreme Court has long recognized Congress’s expansive power to issue subpoenas related to investigations. Nearly a century ago the Supreme Court declared in *McGrain v. Daugherty* (1927) that “the power of [congressional] inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.” Since then, courts have repeatedly recognized the legal validity of congressional subpoenas and the presumption that subpoenas are issued pursuant to Congress’s legislative function. *Watkins v. United States* (1957).

While President Trump acknowledged this expansive Congressional subpoena authority, his attorneys argued that the Committees from which the subpoenas were issued were “not legislating” but “engaging in law enforcement.”

Alternatively, President Trump argued that a more demanding standard should apply to the subpoenas here to curb an otherwise unchecked Congressional oversight power. His attorneys (and the Solicitor General) argued that a demanding standard applicable to requests for “executive privilege”-type information (with a requirement of “demonstrated, specific need”) – as recognized in *United States v. Nixon* (1974) and *Senate Select Committee on Presidential Campaign Activities v. Nixon* (D.C. Cir. 1974) – should apply to this case.

The Supreme Court Decision

Chief Justice Roberts, writing for the majority, reiterated the longstanding view that Congress has the constitutional authority to “secure needed information” to legislate, and that congressional subpoenas must serve a “valid legislative purpose,” distinct from “law enforcement” purposes.

While the House urged the Supreme Court to simply affirm Congress’s broad power to investigate (and compel compliance with subpoenas when there is a valid legislative purpose), and while President Trump urged the Court to severely limit this power by recognizing an executive-privilege type limitation to invalidate the subpoenas, the Supreme Court instead adopted a middle ground. It held that while Congress has broad authority to issue enforceable subpoenas, courts should nevertheless undertake a “balanced” approach to address separation of powers concerns that arise when Congress seeks a President’s personal papers.

Some of the specific considerations in applying this “balanced approach” to address separation of powers concerns include:

- Whether the request involving the President and his papers is necessary, or whether the information can be obtained elsewhere;
- Whether the subpoena is no broader than reasonably necessary to support Congress’s legislative objective;
- Whether the evidence offered by Congress to establish a subpoena advances a valid legislative purpose; and

- Whether there are burdens imposed on the President by a subpoena, particularly when a rival political branch may be incentivized to use a subpoena for institutional advantage.

The Supreme Court therefore vacated the circuit court decisions and remanded the cases for the lower courts to apply this balanced approach to determine the validity of the congressional subpoenas at issue.

Congressional Investigations Going Forward

Because the Supreme Court’s decision focuses on instances when Congress subpoenas a President’s personal records, the decision does not necessarily curb Congress’s longstanding power to issue congressional subpoenas to other private entities for valid legislative purposes.

And, because the underlying cases will be remanded for further consideration by the lower courts consistent with the new “balanced” approach announced by the Supreme Court, there will likely be new lower court opinions issued at some point to guide future cases.

Notwithstanding this, there are a couple of notable aspects of this Supreme Court decision that bear upon congressional investigations going forward.

First, in the majority opinion, Chief Justice Roberts specified, in a fairly conclusive manner, that congressional subpoena recipients “have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications.”

This recognition of “common law and constitutional privileges” is significant because congressional committees have at times taken the position that common law privileges – such as the attorney-client privilege – does not apply to congressional requests for information. While many congressional committees will in fact give substantial weight to invocation of the attorney-client privilege, it is quite noteworthy that the Supreme Court here specified that these privileges are indeed a lawful basis to withhold information from congressional investigators.

Second, in thinking about congressional oversight going forward, the overall import of the Supreme Court’s decision should be viewed in the broader context of the drumbeat of congressional oversight over the past two years – of both the Administration and private industry.

When Democrats took control of the House in early 2019, Committee chairs issued a flurry of congressional requests to the Administration and private industry, and adopted several parliamentary rule changes to speed up the enforcement process for its subpoenas. The larger consequence of these rule changes going forward is that these changes are likely to become the norm, even for future oversight demands made on private industry completely unrelated to congressional oversight of the Administration.

Congressional oversight will indeed continue beyond the upcoming election in November. The coronavirus pandemic itself has ushered in new sweeping areas of congressional oversight, particularly following massive stimulus efforts and the creation of new congressional oversight bodies. And issues attendant to the pandemic have already elicited calls from Congress for more information from private industry, ranging from topics like consumer privacy to healthcare supply chains.

It is therefore imperative for industries to remain attentive to what Congress is probing at any given time and prepare accordingly.

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Wiley’s White Collar Defense and Government Investigations practice advises companies and individuals on navigating Congressional investigations.