CAN COMPANIES FIND REFUGE AGAINST CONGRESSIONAL INVESTIGATIONS IN THE POST-TRUMP ERA?

Date: 20 April 2021

Policy and Regulatory Alert

By: Andrew M. Wright, David C. Rybicki, Barry M. Hartman, Nancy C. Iheanacho

The congressional investigations landscape has shifted in the post-Trump era. With Democrats in charge of both chambers of Congress and the White House, more investigations will likely focus on the private sector. Beyond the politics inherent in every congressional investigation, the law of congressional investigations has also evolved. Suits involving the former president have forced courts to grapple with the reach and power of congressional investigations. This alert surveys judicial review of congressional inquiry power, including enforceability of House subpoenas absent authorizing legislation, judicial scrutiny of Congress's legislative purpose, minority party power to compel executive branch records, and the viability of common law privileges in congressional investigations. Understanding these developments will aid in the defense of companies and private parties charged with responding to a congressional investigation.

Congress's power to investigate is broad—as broad as its legislative authority. This “power of inquiry” is inherent in Congress's authority to “enact and appropriate under the Constitution.”[1] However, Congress's investigatory power is not boundless and must further a valid legislative purpose.[2] That said, the term “legislative purpose” is understood broadly not only to include gathering information for the purpose of legislating, but also overseeing consequential policy matters of concern to Congress and informing the public about the workings of government.[3]

Attendant with this broad inquiry power are several investigatory tools at Congress's disposal, including: (1) witness interviews, (2) depositions, (3) requests for information, (4) public committee hearings in which witnesses are questioned, (5) subpoenas for documents or testimony, and (6) referrals to the executive branch for investigation and prosecution. The subpoena power is one of the most effective among these tools used to bring recalcitrant witnesses to heel. However, the scope and reach of this power was challenged under the Trump administration, and a pending decision by the U.S. Court of Appeals for the D.C. Circuit has the potential to dramatically curtail the House's ability to enforce its subpoenas in federal courts.

PENDING CASES BEFORE DC CIRCUIT MAY IMPACT CONGRESSIONAL SUBPOENA POWER

At present, the fate of a critical tool used to compel cooperation with House investigations hangs in the balance. The uncertainty surrounding the House's subpoena enforcement power stems from litigation in *Committee on the Judiciary v. McGahn,*[4] a case involving the House Judiciary Committee's effort to seek civil enforcement of a subpoena compelling former White House Counsel Don McGahn's testimony in the committee's impeachment inquiry. On 31 August 2020, a divided D.C. Circuit panel held that the committee lacked authority to seek court-

ordered enforcement of a congressional subpoena directed at an executive branch official because Congress has not enacted legislation that authorizes such litigation.

Prior to this decision, the House relied on the U.S. District Court for the District of Columbia's ruling in *Committee on the Judiciary v. Miers*[5] to seek civil enforcement for its subpoenas. In contrast to the Senate, which has express statutory authority to bring a civil suit to enforce its subpoenas, the House, according to the federal district court in *Miers*, "has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power."[7]

On 18 February 2021, the D.C. Circuit further delayed the matter for two months, adopting a proposal by the Biden administration—over the objections of House Democrats—to postpone the proceedings. Much has been written about the constitutional separation-of-powers issues implicated by this delay.[8] For the private sector, however, the takeaway is simple: While the saga regarding congressional subpoena power unfolds in the courts, companies would be mistaken to believe they can disregard congressional subpoenas or inquiries.

D.C. CIRCUIT UPHOLDS SUBPOENA-LIKE POWER THAT MAY IMPACT COMPANIES AND PRIVATE PARTIES

In a 2-1 decision on 29 December 2020, the U.S. Court of Appeals for the D.C. Circuit upheld a subpoena-like power that can empower the minority in the House of Representatives. The case involved disputed records related to former President Trump's international hotels, which Democratic lawmakers attempted to access using the seven-member rule in 2017 when they were in the minority. The court ruled that lawmakers can turn to the courts to enforce the seven-member rule—a little-known statute that allows any seven members of the House Committee on Oversight and Reform to compel the executive branch to turn over material related to the committee's mandate.[9]

Although the statute operates against the executive branch, the rule would allow the minority party to compel production of records of companies and private parties held by executive branch agencies.

THE SUPREME COURT WEIGHS IN

Other developments impacting Congress's subpoena power stem from recent Supreme Court cases, most notably, *Trump v. Mazars*.[10] In April 2019, three congressional committees subpoenaed several private entities, seeking documents including the financial records of former President Trump, his family members, and affiliated businesses.[11] The House Committee on Financial Services reportedly sought financial records from Deutsche Bank and Capital One to inform its regulation of money laundering, financing of terrorism, and illicit funding in the real estate market.[12] The Permanent Select Committee on Intelligence subpoenaed Deutsche Bank for similar information, which it asserted would help efforts at preventing foreign interference in U.S. elections.[13] Lastly, the House Committee on Oversight and Reform subpoenaed Mazars USA, LLP, the president's accounting firm, seeking financial records that the Committee maintained would guide possible reforms to ethics and disclosure laws.[14]

Following the issuance of these subpoenas, the former president, in his individual capacity, as well as his family and affiliated businesses, sued to quash the subpoenas, bringing claims in the Southern District of New York against Deutsche Bank and Capital One and in the District Court for the District of Columbia against Mazars. In both cases, the congressional committees intervened as defendants. Both district courts denied the plaintiffs'

motions for preliminary injunctions, and the District Court for the District of Columbia granted summary judgment for the defendants.[15] The D.C. Circuit affirmed, and the 2nd Circuit affirmed "in substantial part."[16] The Supreme Court consolidated the cases, remanded, and issued the most significant ruling on congressional investigations in decades, with significant implications for companies and private parties.

MAZARS REQUIRES A MORE SEARCHING REVIEW OF CONGRESSIONAL PURPOSE IN CASES SEEKING A SITTING PRESIDENT'S PERSONAL INFORMATION

The Supreme Court emphasized that Congress has an extensive investigatory power incident to its legislative powers.[17] But as the lower courts had previously noted, congressional investigations are valid only insofar as they are in furtherance of a legitimate act of Congress.[18]

On the issue of whether "the usual rules for congressional subpoenas" change when the president's personal documents are at stake, the Supreme Court, borrowing the standard from the Supreme Court's decision addressing the Nixon tapes, rejected the former president's view that Congress needed a "demonstrated, specific need" to request information from the president.[19] Instead, the Supreme Court held that when a subpoena seeks the president's personal information, courts must specifically consider separation-of-powers dynamics to determine whether the subpoena furthers a legitimate legislative end.[20] To guide this inquiry, the Supreme Court provided a non-exhaustive list of considerations: (1) "whether the asserted legislative purpose warrants the significant step of involving the President and his papers[,]" (2) whether the subpoena is "broader than reasonably necessary to support Congress's legislative objective[,]" (3) the specificity of the evidence that the subpoenas advance a legitimate legislative aim, and (4) the burdens the subpoena imposes on the president.[21]

The open question for companies is whether the Supreme Court's cabined view of congressional investigative purpose, as it relates to presidential personal papers, will serve as a stepping stone toward more judicial scrutiny of congressional motives in other contexts. Put another way: With this precedent, would a court be willing to question congressional motives when a company defends against a highly political investigation that does not involve presidential equities? At some point, a private party will put that question to the test.

MAZARS STRENGTHENS COMPANIES' ABILITY TO ASSERT ATTORNEY-CLIENT PRIVILEGES IN CONGRESSIONAL INVESTIGATIONS

In what seems to be only a relatively unimportant side comment, the Supreme Court may have actually strengthened the hand of companies and agencies seeking to preserve attorney-client privilege in congressional investigations. The Supreme Court provided that the subjects of legislative subpoenas "retain their constitutional rights," as well as "common law and constitutional privileges with respect to certain materials."[22] This statement is significant because congressional investigators have long asserted that they are not bound by judge-made common law privileges, including the attorney-client privilege and attorney work-product doctrine.[23] While the Supreme Court's legal support was a lone citation to a decade-old Congressional Research Service report describing the 1995 Senate Whitewater dispute between the Clinton administration and congressional committees over attorney notes, the statement sends a signal that at least seven members of the Supreme Court, across a broad ideological spectrum, subscribe to the view that private parties retain the ability to resist subpoenas on traditional common law privilege grounds.

ADDITIONAL TAKEAWAYS FOR COMPANIES AND PRIVATE PARTIES

There are additional, important takeaways for companies and other private actors. First, although the cases are largely framed as presenting separation-of-powers issues, they began as inquiries to private actors, specifically financial institutions and an accounting firm. This serves as a reminder that outreach from a congressional committee, whether in the form of a request for information or a subpoena, should be afforded the weight and consideration that it deserves. Additionally, private actors should note that the Supreme Court and the lower courts largely affirmed the (arguably) broad legislative purposes advanced by the various congressional committees. Most importantly, in spite of the significant separation-of-powers concerns implicated by matters involving the personal papers of a sitting president, the Supreme Court largely affirmed the House's congressional subpoena power, suggesting that private actors will have little respite from the reach and power of such subpoenas when issued, at least for now.

Companies can face significant reputational and legal risk when responding to a congressional inquiry. Responding even to seemingly friendly requests for background information can create potentially damaging exposure and lead to allegations of misleading Congress. Partnering with experienced congressional investigations counsel is the key to managing these risks.

FOOTNOTES

[1] Barenblatt v. United States, 360 U.S. 178, 187 (1957).

[2] *See* Wilkinson v. United States, 365 U.S. 399, 408–09 (1961); Watkins v. United States, 354 U.S. 178, 199–201 (1957).

[3] *Id.*

[4] 973 F.3d 121 (D.C. Cir. 2020).

[5] 558 F. Supp. 2d 53 (D.D.C. 2008).

[6] See 2 U.S.C. §§ 288b, 288d, and 28 U.S.C. § 1365.

[7] *Miers,* 558 F. Supp. 2d at 77.

[8] *See*, e.g., Andy Wright, *Unpacking Biden Administration vs. Congressional Tension in the McGahn Case*, JUST SEC. (Feb. 23, 2021), https://www.justsecurity.org/74907/unpacking-biden-administration-vs-congressional-tension-in-the-mcgahn-case/.

[9] *See* 5 U.S.C. § 2954 (“An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.”).

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

[11] *See id*. at 2026

[12] *Id*. at 2027

[13] *Id.*

[14] Trump v. Mazars USA, LLP, 940 f.3d 710, 714,716 (D.C. Cir 20119)

[15] See Trump v. Comm. on Oversight & Reform, 380 F. Supp. 3d 76 ,105 (2019); Transcript of Record at 87, Trump v. Deutsche Bank, No. 19-cv-03826 (S.D.N.Y. May 22, 2019). In *Deustche* Bank, the district court did not consolidate the motion for preliminary injunction with the parties' motions for summary judgment. See Transcript of Record, supra, at 87.

[16] *Mazars*, 940 F.3d at 714; Trump v. Deutsche Bank AG, 943 F.3d 627, 632 (2d. Cir. 2019).

[17] *Mazars*, 140 S. Ct. at 2031–32.

[18] *Id.*

[19] *Id*. (*quoting* United States v. Nixon, 418 U.S. 683, 713 (1974)).

[20] *Id*. at 2035.

[21] *Id*. at 2036.

[22] *Id*. at 2032.

[23] Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L. J. 401 (2016), https://ssrn.com/abstract=2660917.

KEY CONTACTS

ANDREW M. WRIGHT
PARTNER

WASHINGTON DC
+1.202.778.9387
ANDREW.WRIGHT@KLGATES.COM

DAVID C. RYBICKI
PARTNER

WASHINGTON DC
+1.202.778.9370
DAVID.RYBICKI@KLGATES.COM

BARRY M. HARTMAN
PARTNER

WASHINGTON DC
+1.202.778.9338
BARRY.HARTMAN@KLGATES.COM

