Tax & Financial Records Case

Oversight Committee-Mazars Case
Key Excerpts from 2019 Appeals Court Opinion

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On May 21, 2019, President Trump appealed the district court opinion dismissing his suit and upholding the House subpoena of Mazars, the president's longtime accounting firm. A D.C. Circuit 3-judge panel, with Judges Millett, Rao and Tatel, was assigned to Case No. 19-5142. On Oct. 11, 2019, the DC Circuit Court, in a 2-1 decision, affirmed the district court ruling, upheld the House subpoena, and dismissed the case. A dissent was filed by Judge Rao. A request for rehearing *en banc* was denied. *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), *reh'g en banc denied*, 941 F.3d 1180 (D.C. Cir.). Here are key excerpts from the panel's 134-page opinion and dissent; each excerpt consists of a direct quotation taken from the text of the opinion or dissent, with no changes in punctuation but with footnotes omitted.

De novo review
Our review is de novo.

Only one appellate-level precedent
Of all the historical examples, perhaps the most high-profile congressional investigation into a President—and the only one we have found that produced an appellate-level judicial opinion—was Congress's investigation into President Nixon.

No blanket immunity
Senate Select Committee strongly implies that Presidents enjoy no blanket immunity from congressional subpoenas. After all, if such immunity exists, it would have been wholly unnecessary for the court to explore the subpoena's particulars and to weigh "the public interest [in] favor[] [of] confidentiality" against a "showing of need by another institution of government"—that is, Congress.

Committee authority
As an initial matter, "whether [a] committee [is] authorized [to] exact the information" it has subpoenaed "must first be settled before . . . consider[ing] whether Congress had the [constitutional] power to confer upon the committee the authority which it claim[s]." *Rumely*, 345 U.S. at 42–43. In other words, it matters not whether the Constitution would give Congress authority to issue a subpoena if Congress has given the issuing committee no such authority. That said, once a committee has been delegated "[t]he power of the Congress to conduct investigations," that constitutional authority "is broad."

Not a law enforcement or trial agency
[B]ecause "the power of Congress . . . to investigate" is "co-extensive with [its] power to legislate," *Quinn*, 349 U.S. at 160, Congress may in exercising its investigative power neither usurp the other branches' constitutionally designated functions nor violate individuals' constitutionally protected rights. Congress may not conduct itself as "a law enforcement or trial agency," as "[t]hese are functions of the executive and judicial departments." *Watkins,* 354 U.S. at 187.

Can investigate only topics on which Congress could legislate
Congress may investigate only those topics on which it could legislate …. If no constitutional statute may be enacted on a subject matter, then that subject is off-limits to congressional investigators.

Materially aid an investigation
[C]ongressional committees may subpoena only information "calculated to" "materially aid[]" their investigations. *McGrain*, 273 U.S. at 177. Even a valid legislative purpose cannot justify a subpoena demanding irrelevant material.

Subpoena of third party custodian
At the outset, we emphasize that to resolve this case we need not decide whether the Constitution permits Congress, in the conduct of a legislative—that is, non-impeachment—investigation, to issue subpoenas to a sitting President. That issue is not presented here because, quite simply, the Oversight Committee has not subpoenaed President Trump. Rather, the Committee has issued its subpoena to Mazars, an accounting firm with whom President Trump has voluntarily shared records from his time as a private citizen, as a candidate, and as President. Neither the Trump Plaintiffs nor the Department of Justice argues that the Constitution denies Congress authority to subpoena non-governmental custodians of the President's financial information.

No privilege
Nor do the Trump Plaintiffs assert any property rights in, or executive or other recognized evidentiary privilege over, the subpoenaed information. See Complaint (failing to assert any claim of privilege or property right in the subpoenaed materials); Oral Arg. Tr. 15 (confirming that the President asserts no claim of executive privilege or immunity); *see also Couch v. United States*, 409 U.S. 322, 335 (1973) (recognizing that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases"); *Peerenboom v. Marvel Entertainment*, LLC, 148 A.D.3d 531,

532 (N.Y. App. Div. 1st Dep't 2017) (holding that "[t]here is no accountant-client privilege in [New York]").

Three-part test
[W]e consider whether the Oversight Committee is pursuing a legislative, as opposed to a law-enforcement, objective; whether the Committee is investigating a subject on which constitutional legislation "could be had," *McGrain*, 273 U.S. at 177; and whether the challenged subpoena seeks information sufficiently relevant to the Committee's legislative inquiry.

No law enforcement objective
The Supreme Court has framed its primary instruction on this point in the negative: the fact that an investigation might expose criminal conduct does not transform a legislative inquiry into a law-enforcement endeavor.

No motive test
[T]he Supreme Court has made plain that "in determining the legitimacy of a congressional act," courts may "not look to the motives alleged to have prompted it."

Mantle of presidency may not extend to personal financial records
[I]t is far from obvious that President Trump, proceeding in his individual capacity, carries the mantle of the Office of the President in this case. The challenged subpoena seeks financial records totally unrelated to any of the President's official actions; indeed, for six of the eight years covered by the subpoena, President Trump was merely Mr. Trump or Candidate Trump.

Separation of powers concerns still linger in the air
[A]lthough the challenged subpoena, which seeks financial documents related to President Trump in his pre-presidential, private capacities, presents no direct inter-branch dispute, separation-of-powers concerns still linger in the air.

Legitimate legislative pursuits
[W]e conclude that the public record reveals legitimate legislative pursuits, not an impermissible law-enforcement purpose, behind the Committee's subpoena. As a result, we need not decide precisely what deference we owe Congress, as we would reach the same conclusion absent any deference at all.

Investigating illegal conduct can be consistent with enacting remedial legislation
In particular, the Trump Plaintiffs take issue with the first investigative rationale offered in Chairman Cummings's memorandum: "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office." Cummings Memo 4. But even if such an investigation would not by itself serve a legitimate legislative purpose, we can easily reject the suggestion that this rationale spoils the Committee's otherwise valid legislative inquiry. Simply put, an interest in past illegality can be wholly consistent with an intent to enact remedial legislation.

Wrongdoing does not grind Congressional investigation to a halt
"[S]urely," the Court concluded, "a congressional committee . . . engaged in a legitimate legislative investigation need not grind to a halt whenever . . . crime or wrongdoing is disclosed."

Investigating one individual
The lesson of *McGrain* is that an investigation may properly focus on one individual if that individual's conduct offers a valid point of departure for remedial legislation. Again, such is the case here. It is not at all suspicious that the Committee would focus an investigation into presidential financial disclosures on the accuracy and sufficiency of the sitting President's filings. That the Committee began its inquiry at a logical starting point betrays no hidden law-enforcement purpose.

No prior statement on particular legislation required
Congress's decision whether, and if so how, to legislate in a particular area will necessarily depend on what information it discovers in the course of an investigation, and its preferred path forward may shift as members educate themselves on the relevant facts and circumstances. Requiring Congress to state "with sufficient particularity" the legislation it is considering before it issues an investigative subpoena would turn the legislative process on its head.

Test is whether legislation could be had
We next assess whether that legislative investigation concerned a subject "on which legislation could be had."

Legislation may be had
[W]e emphasize that the relevant inquiry is whether legislation "may be had," *Eastland*, 421 U.S. at 508 (emphasis added), not whether constitutional legislation will be had. Accordingly, we first define the universe of possible legislation that the subpoena provides "information about," *id*., and then consider whether Congress could constitutionally enact any of those potential statutes.

Presidential financial disclosure laws may be constitutional
[T]he Mazars subpoena seeks information related to a class of statutes that impose far fewer burdens than laws requiring Presidents to change their behavior based on their financial holdings. This less burdensome species of law would require the President to do nothing more than *disclose* financial information.

The Trump Plaintiffs argue that the Constitution prohibits even these. Relying on Chief Justice Burger's concurrence in *Nixon v. Fitzgerald*, they contend that financial disclosure laws unconstitutionally "'impinge[] on and hence interfere[] with the independence that is imperative to the functioning of the office of a President.'"

The Court therefore announced the following test: "in determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally

assigned functions." *Id.* Applying this rule, we have no basis for concluding that complying with financial disclosure laws would in any way "prevent[] the [President] from accomplishing [his] constitutionally assigned functions."

The most persuasive evidence on this score comes from the Constitution itself. The very same document that "vest[s]" "[t]he executive Power . . . in [the] President," … also imposes two separate requirements pertaining to the President's private finances. The first, the so-called Domestic Emoluments Clause, prohibits the President from receiving "any . . . Emolument" from the federal or state governments other than a fixed "Compensation" "for his Services." Id. art. II, § 1, cl. 7. And the second, the so-called Foreign Emoluments Clause, prohibits any federal official "holding any Office of Profit or Trust"—the President included—from "accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" without "the Consent of the Congress." … If the President may accept no domestic emoluments and must seek Congress's permission before accepting any foreign emoluments, then surely a statute facilitating the disclosure of such payments lies within constitutional limits.

Though not dispositive, the fact that every President during the last four decades has filed financial disclosures offers persuasive evidence that such disclosures neither "prevent[]" nor "disrupt[]," *Nixon II*, 433 U.S. at 443, the President's efforts to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

Congress can require the President to make reasonable financial disclosures without upsetting this balance.

In the end, laws requiring disclosure exclude precisely zero individuals from running for or serving as President; regardless of their financial holdings, all constitutionally eligible candidates may apply.

In sum, we detect no inherent constitutional flaw in laws requiring Presidents to publicly disclose certain financial information. And that is enough. … [W]e conclude that given the constitutionally permissible options open to Congress in the field of financial disclosure, the challenged subpoena seeks "information about a subject on which legislation may be had."

Legislative role v. impeachment

To be sure, a Congress pursuing a legitimate legislative objective may, as the many examples recounted in the dissent demonstrate, choose to move from legislative investigation to impeachment. But the dissent cites nothing in the Constitution or case law—and there is nothing—that compels Congress to abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process.

The dissent proposes a brand-new test for the President (and other "impeachable officials," Dissenting Op. at 44) that would enfeeble the legislative branch. According to the dissent, once some Members—or perhaps just one Member—raise "suspicions of criminality" by an impeachable official, Congress must "end[]" all legislative investigation and either do

nothing at all or "move[] that part of the investigation into impeachment." Dissenting Op. at 19.

In other words, Congress must either initiate the grave and weighty process of impeachment or forgo any investigation in support of potential legislation. Under the dissent's novel test, "even a valid legislative purpose" cannot "justify" the investigation. Id. at 19. The dissent identifies nothing in the text, structure, or original meaning of Article I or Article II of the Constitution to support such a sweeping rule of legislative paralysis. As the Trump Plaintiffs and the Department of Justice agree, the Supreme Court has said just the opposite: "a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever . . . crime or wrongdoing is disclosed." *Hutcheson*, 369 U.S. at 618.

Relevancy requirement
[I]f a committee could subpoena information irrelevant to its legislative purpose, then the Constitution would in practice impose no real limit on congressional investigations.

Reasonably relevant standard
Congress may subpoena only that information which is "reasonably relevant" to its legitimate investigation.

Of course, the Committee may discover nothing notable in Mazars's 2011 through 2013 records. But that is not the test for relevancy. As the Supreme Court has explained, "[t]he very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises."

Eight years of documents falls comfortably on the relevant side of the line
[I]nformation from the past may at some point become so stale as to be irrelevant to present inquiries, but the eight-year mark falls comfortably on the relevant side of the line.

Three–part test met
We harbor no doubts that the subpoena to Mazars comports with constitutional limits, as it seeks documents reasonably relevant to a legitimate legislative inquiry into "a subject on which legislation may be had."

Courts cannot invalidate House rules
The Constitution gives "[e]ach House" of Congress authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, meaning that courts lack the power to invalidate a duly authorized congressional subpoena merely because it might have been "better [if] . . . the full House" had specifically authorized or issued it, Oral Arg. Tr. 130.

But unless and until Congress adopts a rule that offends the Constitution, the courts get no vote in how each chamber chooses to run its internal affairs.

Rao Dissent

Investigating illegal conduct requires impeachment process
The majority breaks new ground when it determines Congress is investigating allegations of illegal conduct against the President, yet nonetheless upholds the subpoena as part of the legislative power. The Committee on Oversight and Reform has consistently maintained that it seeks to determine whether the President broke the law, but it has not invoked Congress's impeachment power to support this subpoena. When Congress seeks information about the President's wrongdoing, it does not matter whether the investigation also has a legislative purpose. Investigations of impeachable offenses simply are not, and never have been, within Congress's legislative power. Throughout our history, Congress, the President, and the courts have insisted upon maintaining the separation between the legislative and impeachment powers of the House and recognized the gravity and accountability that follow impeachment. Allowing the Committee to issue this subpoena for legislative purposes would turn Congress into a roving inquisition over a co-equal branch of government. I respectfully dissent.

Allegations that an impeachable official acted unlawfully must be pursued through impeachment.

Legislative power versus impeachment power
The text and structure of the Constitution, its original meaning, and longstanding practice demonstrate that Congress's legislative and judicial powers are distinct and exercised through separate processes, for different purposes, and with entirely different protections for individuals targeted for investigation.

The most important question is not whether Congress has put forth some legitimate legislative purpose, but rather whether Congress is investigating suspicions of criminality or allegations that the President violated a law. Such investigations may be pursued exclusively through impeachment. The House may not use the legislative power to circumvent the protections and accountability that accompany the impeachment power.

Inter-branch conflict is at issue
The Committee's subpoena is directed to Mazars but targets the President's papers. The form of the subpoena cannot mask the inter-branch conflict between Congress and the President.

Legislative investigations cannot target violations of law
In pursuit of remedial legislation, the Committee may investigate broadly, but this subpoena goes too far because the legislative power cannot target whether the President violated the law.

Impeachment process targets the individual
As an exercise of judicial power, the impeachment process targets the individual. … [I]mpeachment addresses a public official's wrongdoing—treason, bribery, and high

crimes or misdemeanors—while problems of general maladministration are left to the political process.

Historical evidence
[T]he historical evidence demonstrates that Congress often begins an investigation into the executive branch with general questions properly pertaining to legislation; however, if an inquiry turns to suspicions of criminality, Congress moves that part of the investigation into impeachment or ends the inquiry into the impeachable official.

Motive not proper inquiry
In general, courts properly refrain from questioning legislative motive when assessing the legitimacy of congressional investigations, *accord* Maj. Op. 22, but this does not excuse us from the judicial duty to assure Congress is acting "in pursuance of its constitutional power."

No double purpose permitted
[T]he Committee states a double purpose—to investigate "criminal conduct by [President] Trump" and also to pursue remedial legislation relating to government ethics. … [T]he Committee's inquiry into legislative proposals may continue in any number of legitimate directions. Yet the Committee's specific investigation targeting the President, if it is to continue, may be pursued only through impeachment.

Investigating illegality by private individuals versus impeachable officials
This is the first time a court has recognized that a congressional investigation pertains to "whether and how illegal conduct has occurred," Maj. Op. 30, but then upholds that investigation under the legislative power. … The majority maintains that "an interest in past illegality can be wholly consistent with an intent to enact remedial legislation." *Id.* at 29. To the extent the precedents support this general principle, however, it has been applied only in the context of *private individuals*.

Tangentiality test
[T]he questions of illegal conduct and interest in reconstructing specific financial transactions of the President are "too attenuated and too tangential" to the Oversight Committee's legislative purposes.

Congress cannot circumvent impeachment process
In *McGrain* and *Kilbourn*, the Court allows Congress some leeway in its legislative investigations so long as it is not seeking to use the legislative power to circumvent the impeachment process.

Subpoena exceeds Congress' legislative power
I would find that this subpoena exceeds the legislative power of Congress because it seeks to uncover wrongdoing by the President.

Insufficient notice to President
Moreover, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the Court requires "an express statement by Congress" before subjecting the President to legislative restrictions and oversight. … The House Rules may upset the balance of power by failing to provide notice to the President.

Improper advisory determinations on possible legislation
The majority concludes that amendments to "the Ethics in Government Act . . . to require Presidents and presidential candidates to file reports more frequently, to include information covering a longer period of time, or to provide new kinds of information such as past financial dealings with foreign businesses or current liabilities of closely held companies" would pass constitutional muster. … In the absence of any statute that has run the Article I, section 7, gauntlet, such determinations are advisory at best.

Impeachment protections
The Constitution divides the impeachment and removal powers between the House and Senate, U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6; limits the scope of impeachable offenses, U.S. CONST. art. II, § 4; and provides for limited punishments upon conviction by the Senate, U.S. CONST. art. I, § 3, cl. 7. Senate trials of impeachment are an exercise of judicial power and have always been understood to include constitutional and common law protections similar to what might be available in the judicial context. … Allowing the use of legislative power to reach illegal conduct undermines the protections afforded to officials being investigated for impeachable offenses. … Moreover, expanding the legislative power to include investigations of illegal conduct eviscerates Congress's accountability for impeachment.

Choosing between legislative and impeachment remedies for misconduct
[I]t should be startling when the majority asserts it is a "quintessentially legislative judgment that some concerns about potential misconduct are better addressed through . . . legislation than impeachment." Maj. Op. 49. The majority argues in effect that Congress must be able to choose to target the wrongdoing of the President through its legislative powers, instead of impeachment. If this does not quite sanction a bill of attainder, it comes awfully close.

Investigating illegality would be new bludgeon against Executive
Allowing the legislative power to reach investigation of impeachable offenses provides Congress with a new bludgeon against the Executive, making it all too easy for Congress to encroach on the executive branch by targeting the President and his subordinates through legislative inquiries.

[A]llowing Congress to use the legislative power to investigate individual officials for unlawful conduct takes "oversight" to a whole new level. The Constitution provides in effect that Congress cannot reach such allegations by "side-blows," Cong. Globe, 29th Cong., 1st Sess. 641 (1846) (statement of Rep. Adams), but must instead proceed through impeachment.

Single chair versus House decision to investigate
Under the majority's decision, Congress may choose to launch investigations of illegal conduct under the legislative power—a choice that under the current rules may be implemented by a single committee chairman without the accountability and deliberation that precede impeachment.

Impact on Presidential staff
The prospect of a Congress that can use the legislative power, rather than impeachment, to reach illegal conduct of executive officers could very well "weaken the Presidency by reducing the zeal of his staff."

No decision on subpoena under impeachment power
Footnote: As the Committee has not relied on the impeachment power for this subpoena, I do not consider whether or how this court would assess such a demand for documents under the impeachment power.