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Legal Sidebar

Legislative Purpose and Adviser Immunity in Congressional Investigations

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The Trump Administration has recently questioned the legal validity of numerous investigative demands made by House committees. These objections have been based on various grounds, but two specific arguments will be addressed in this Sidebar. *First*, the President and other Administration officials have contended that certain committee demands lack a valid "legislative purpose" and therefore do not fall within Congress's investigative authority. This objection has been made not only in response to investigations seeking information relating to the President's personal finances, including his financial records and federal tax returns, but also to challenge a subpoena issued by the House Judiciary Committee for the complete version of Special Counsel Mueller's report along with underlying evidence and materials. *Second*, the President has made a more generalized claim that his advisers cannot be made to testify before Congress, even in the face of a committee subpoena. This position, based upon the executive branch's longstanding conception of immunity for presidential advisers from compelled congressional testimony regarding their official duties, was recently put into effect by the White House in a letter announcing that the President directed former White House counsel Don McGahn not to appear at a scheduled House Judiciary Committee hearing. The letter asserted that Mr. McGahn, now a private citizen, "is absolutely immune from compelled congressional testimony with respect to matters occurring during his service as a senior adviser to the President."

While the particulars of any given information access dispute between the executive and legislative branches are important, existing legal precedent would suggest that these types of objections to Congress's exercise of its constitutionally based investigatory powers will likely face an uphill battle. As to the first question, courts have only rarely invalidated congressional investigative demands on the ground that the committee lacks a "legislative purpose." Instead, courts have generally acknowledged that the judiciary has a "duty of not lightly interfering with Congress' exercise of its legitimate powers." When the courts have questioned whether a committee is acting with a valid purpose, the issue has generally arisen in connection to an investigative demand issued to a private citizen that implicates individual constitutional rights, rather than in connection to an investigation of a government official. Recently, two federal district courts (in cases initiated by President Trump and affiliated entities) rejected arguments made by President Trump's personal attorneys that House committees exceeded their investigative authority by demanding access to the President's personal and organizational financial statements. In *Trump v. Committee on Oversight and Reform,* the U.S. District Court for the District of Columbia held

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that the House Committee on Oversight and Reform's subpoena to an accounting firm was supported by a valid legislative purpose. In doing so, the court displayed the restraint that has generally characterized judicial evaluation of the scope of Congress's Article I investigative power, holding that:

> The binding principle that emerges … is that courts must presume Congress is acting in furtherance of its constitutional responsibility to legislate and must defer to congressional judgments about what Congress needs to carry out that purpose. To be sure, there are limits on Congress's investigative authority. But those limits do not substantially constrain Congress. So long as Congress investigates on a subject matter on which 'legislation could be had,' Congress acts as contemplated by Article I of the Constitution.

Similarly, in *Trump v. Deutsche Bank*, another federal judge issued a bench ruling rejecting arguments that two House committees lacked a legislative purpose in issuing subpoenas to various financial institutions for financial and account information connected to President Trump, his family members, and others.

With regard to the second question of whether the President's advisers enjoy immunity from compelled congressional testimony, appellate courts have not spoken directly to the issue, but the only federal court to address the immunity question directly in a published opinion rejected such an argument.

Legislative Purpose in Congressional Investigations

Congress enjoys broad constitutional authority to obtain information relevant to an investigation from both within the federal government and from the private sphere. This "power of inquiry" has been deemed so essential to the functioning of Congress as to be implicit in the Constitution's vesting of legislative power in the Congress. The scope of the investigative authority is "penetrating" and "far-reaching," but because it derives from the grant of "legislative power" it must be exercised in a manner that "aid[s] the legislative function." The Supreme Court has generally implemented this principle by requiring that compulsory committee investigative actions — including subpoenas for documents or testimony — serve a valid "legislative purpose." This "legislative purpose" requirement is quite generous, permitting investigations into any topic upon which legislation could be had or over which Congress may properly exercise authority, including investigations undertaken by Congress to inform itself for purposes of determining how existing laws function or to determine whether new laws are necessary or old laws should be repealed or altered. It also permits investigations for purposes of conducting oversight to ensure that the executive branch is complying with its obligation to faithfully execute laws passed by Congress. As described by the Supreme Court in *Watkins v. United States*, the investigative power:

> encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

In addition to broadly interpreting the scope of the types of investigations that aid the legislative function, courts have also effectively adopted a presumption that committees act with a legislative purpose. This can be seen, for example, in *McGrain v. Daugherty*, a case arising out of a congressional investigation of the Attorney General's failure to prosecute certain individuals following the Teapot Dome scandal. Initially, a federal district court had invalidated a congressional committee's attempts to obtain testimony from the Attorney General's brother. The lower court reasoned that the committee's purpose was not legislative in nature, but was rather undertaken to "determine the guilt of the Attorney General" and to "put him on trial," which Congress "has no power to do." The Supreme Court, however, explicitly rejected this characterization of the committee's purpose, holding instead that:

> [T]he subject to be investigated was the administration of the Department of Justice — whether its functions were being properly discharged or were being neglected or misdirected, and particularly

> whether the Attorney General and his assistants were performing or neglecting their duties…. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.

In light of this oversight role, the Court held that "the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object."

The presumption that committees act with a legislative purpose is informed by other principles that reflect the judiciary's reluctance to question a committee's reasons for seeking information. The Supreme Court has made clear that when "Congress acts in pursuance of its constitutional power," the courts should not inquire into "the motives which spurred the exercise of" the investigative power. Judicial attempts to look inside the minds of Members, a district court recently declared, "misperceives the [c]ourt's role, which is not to determine the validity of the legislative purpose by 'testing the motives of committee members' based on public statements." Even evidence of bad intent will not "vitiate" an otherwise valid investigation.

Nor is a committee required to "declare in advance" the purpose of an inquiry or its ultimate legislative or oversight goal. The Supreme Court has stated that "[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. To be a valid legislative inquiry there need be no predictable end result."

The judicial reluctance to question congressional motives and the general presumption that committees act with a legislative purpose both play a significant role in limiting the effectiveness of raising legislative purpose as a defense to an otherwise valid congressional subpoena. However, the courts have acknowledged at least two general classes of investigations in which Congress may lack a legislative purpose. The Trump Administration has relied on both limitations in its argument that House committees are acting outside their authority.

Investigations into Private Conduct with no Relation to the Legislative Function

Congress does not act with a legislative purpose when investigating private conduct that has no nexus to the legislative function. In the 1880 decision of *Kilbourn v. Thompson*, the Supreme Court held broadly that the House and Senate do not "possess[] the general power of making inquiry into the private affairs of the citizen." In that case the Court invalidated the House's imprisonment of a member of the public during an investigation into the collapse of a private real estate pool. Taking a very restrictive view of Congress's investigation authorities, the opinion also questioned the House's authority to punish witnesses for non-compliance with investigative requests unless the inquiry was connected to either impeachment or the House's power to judge the election and qualification of its members. Yet, the Court has subsequently described the "loose language" of *Kilbourn*, and its narrow conception of Congress's investigative power as "severely discredited." For example, in discussing the reach of *Kilbourn*, the Court appears to have made a distinction between investigating purely private conduct of private citizens, which typically would not serve a legislative purpose, and investigating the private conduct of public office holders, which may, in many circumstances, serve a legislative purpose due to Congress's role in preserving good government. For example, in *Hutcheson v. United States*, the Court held that "[a]t 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.'"

Despite its criticism of *Kilbourn*, the Court has still expressed concern that congressional investigations into private conduct could infringe on personal privacy. In the 1957 decision of *Watkins v. United States*, the Court, in an opinion overturning a criminal contempt of Congress conviction on due process grounds, also discussed more generally Congress's investigative powers and described the legislative branch as

having "no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress." Although acknowledging that "[t]he public is, of course, entitled to be informed concerning the workings of its government," that justification for government oversight "cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals." As such, an investigation into "individual affairs is invalid if unrelated to any legislative purpose," as are attempts to "expose for the sake of exposure."

The Trump Administration relied on some of these privacy principles in challenging the House Oversight and Reform Committee subpoena for the President's financial records. For example, the President argued that the investigation "'has nothing to do with government oversight,' but is instead intended to expose for the mere sake of exposure 'the conduct of a private citizen years before he was even a candidate for public office . . . . '" As previously noted, this argument was recently rejected by the district court in *Trump*, where the court held instead that the Oversight and Reform Committee had articulated "facially valid legislative purpose[s]": including that the subpoenaed information would "aid its consideration of strengthening ethics and disclosure laws …[and] assist in monitoring the President's compliance with the Foreign Emoluments Clause."

The Secretary of the Treasury and the President's personal lawyers have similarly argued that the House Committee on Ways and Means "lacks a legitimate legislative purpose" for demanding the President's federal tax returns and is instead an attempt to "harass" the President. The Ways and Means Committee, on the other hand, has stated that it is seeking the President's returns for purposes of "considering legislative proposals and conducting oversight related to our Federal tax laws." Any assertion that the committee is overseeing the enforcement and implementation of the federal tax laws, the President's lawyers argue is "obviously pretextual." The Committee on Ways and Means is currently considering whether to seek enforcement of its demand for the tax returns in court.

Investigations into Matters Committed to Another Branch of Government

A second class of investigations that may lack a legislative purpose are those focused on matters that are exclusively committed to another branch of government. The theory behind this limitation is that if an issue is committed exclusively to the executive or judicial branch, then Congress can't legislate on that issue; and if Congress can't legislate on the issue, then it can't investigate it.

In *Barenblatt v. United States* the Supreme Court explained that "[l]acking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." The Court elaborated on this separation of powers line of reasoning in *Watkins*, where it stated that 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." The precise scope of this constraint as applied to oversight investigations of the executive branch is unclear and rarely used to invalidate a specific congressional investigative demand. In *Tenney v. Brandhove*, for example, the Court suggested that "[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 Judiciary or the Executive." As a practical matter, even the pardon power, which has been viewed as exclusive to the President, has been subject to some degree of congressional oversight—though the executive branch maintains that any information provided to Congress relating to particular pardon decisions was "done so only voluntarily and without conceding congressional authority to compel disclosure."

The President argued in *Trump* that the Oversight and Reform Committee had usurped executive and judicial functions by engaging in an investigation focused on whether the President had violated the law. The court rejected that argument, citing to *McGrain* for the proposition that "the mere prospect that a

congressional inquiry will expose law violations does not transform a permissible legislative investigation into a forbidden executive or judicial function." The DOJ has made somewhat similar arguments in response to the House Judiciary Committee subpoena, asserting that by demanding the Special Counsel's investigative files the Committee has entered into a territory reserved for the executive branch. "The Committee," DOJ asserts, "has no legitimate role in demanding law enforcement materials with the aim of simply duplicating a criminal inquiry—which is, of course, a function that the Constitution entrusts exclusively to the Executive Branch." The Judiciary Committee, on the other hand, has stated that its purposes include, but are not limited to, "investigating any possible malfeasance, abuse of power, corruption, obstruction of justice, or other misconduct on the part of the President or other members of his Administration;" "considering whether the conduct uncovered may warrant amending or creating new federal" legislation; and "considering whether any of the conduct described in the Special Counsel's Report warrants the Committee taking any further steps under Congress's Article I powers." The House Judiciary Committee has voted to recommend that the House cite the Attorney General for contempt of Congress as a result of his noncompliance with the committee subpoena, and the House may consider seeking enforcement of the subpoena in the courts.

Executive Branch Immunity from Congressional Testimony

The White House recently directed former White House Counsel Don McGahn not to comply with a House Judiciary Committee subpoena for documents that the Trump Administration believes "implicate significant Executive Branch confidentiality interests and executive privilege." A subsequent letter advised the Committee that the President also directed McGahn not to appear at a scheduled committee hearing, the executive branch having concluded that current and former presidential advisers, including McGahn and others, enjoy a form of immunity from compelled attendance at a congressional hearing or deposition. Although prior Presidents have made similar assertions, historical practice — and the only federal court decision directly considering the question —support the contention that Congress has considerable power to compel documents or testimony from presidential advisers.

The Supreme Court has made clear that "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action." That cooperation is generally compelled through the issuance of a subpoena. A subpoena "has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase." Instead, absent an overriding privilege or right, witnesses have an "unremitting obligation to respond."

But the executive branch over several successive administrations has argued that at least some presidential advisers cannot be compelled to appear before a congressional committee because it would intrude upon constitutionally protected interests of the President. Claims of absolute immunity have been asserted with respect to those "immediate advisors," like the Counsel to the President, who have "no statutory authority and instead act solely to advise and assist the President." Such advisers are "constitutionally distinct," in the executive branch's view, from heads of agencies and other executive officials "whose appointments require the Senate's advice and consent, and whose responsibilities entail the administration of federal statutes," and who "can and do testify before Congress."

The assertion of absolute immunity for presidential advisers derives from the position that, as the head of an independent, co-equal branch, the President cannot be compelled to provide testimony before Congress. The executive branch has characterized immediate advisers as alter egos of the President, assisting him "on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional

responsibilities." Accordingly, the executive branch reasons, these advisers cannot be compelled to testify about their official duties, as doing so would interfere with the separation of powers, both by interfering with the President's "independence and autonomy from Congress" and hindering the executive branch's "strong interests in confidentiality as well as the President's ability to obtain sound and candid advice." In the executive branch's view, these considerations would not be adequately protected even if presidential advisors declined to answer specific questions on executive privilege grounds in the course of compelled testimony; only absolute immunity from compelled congressional testimony would afford adequate protection. As a result, Presidents have at times prevented both current and former close advisers from testifying before Congress. Yet, as at least one court has pointed out, many presidential advisers have previously testified before committees pursuant to a subpoena, suggesting that it is "hardly unprecedented" for advisers to "testify and assert privilege where appropriate" (a general distribution memorandum identifying examples of congressional testimony by presidential advisers is available upon request from CRS analyst Henry B. Hogue).

The Executive's position of absolute immunity for presidential advisers was tested when President George W. Bush asserted that former White House Counsel Harriet Miers was wholly immune from being compelled to appear and testify before the House Judiciary Committee as part of an investigation into the firing of U.S. Attorneys. In *Committee on the Judiciary v. Miers*, the U.S. District Court for the District of Columbia held that the "asserted absolute immunity claim here is entirely unsupported by existing case law." Moreover, the court characterized the Supreme Court's previous rejection of absolute immunity for presidential advisers in civil suits for money damages to be "all but conclusive on this question" and to "powerfully suggest" that presidential advisers do not possess absolute immunity in the congressional context. Ultimately, the court concluded that Miers "must appear before the Committee to provide testimony," but that she could invoke executive privileges in response to specific questions from committee members. To hold otherwise, the court reasoned, would transform executive privilege "into an absolute privilege and Congress's legitimate interest in inquiry could be easily thwarted."

The *Miers* opinion did leave the door open to possible limited assertions of qualified immunity for presidential advisers, stating that such protections "might conceivably be appropriate in some situations involving national security or foreign affairs" and "might apply where Congress is not utilizing its investigation authority for a legitimate purpose but rather aims simply to harass or embarrass a subpoenaed witness." However, the court followed this statement by concluding that the testimony sought by the Committee in *Miers* clearly did not involve national security or foreign affairs, and that the Committee was "acting pursuant to a legitimate use of its investigative authority." In doing so, the court rejected an argument forwarded by the executive branch — relying on the *Barenblatt* language discussed above—that the decision to remove a U.S. Attorney was "an issue on which Congress has no authority to legislate and thus no corresponding right to investigate." The court described the Executive's characterization of the Judiciary Committee inquiry as "far too narrow[]," and instead viewed the investigation as a "broader inquiry into whether improper partisan considerations have influenced prosecutorial discretion." "It defies both reason and precedent," the court concluded, to suggest that the Committee, "which is charged with oversight of DOJ generally, cannot permissibly employ its investigative resources on this subject." The district court opinion was stayed pending appeal, and was ultimately dismissed after a settlement was reached (between a newly elected Congress and President) under which Miers testified before the Committee in executive session.

Following *Miers*, Presidents have at times directed presidential advisers not to appear before congressional committees. Executive branch legal opinions supporting these directives have generally outlined the Executive's historical reluctance to allow such testimony, while also noting that the DOJ "respectfully disagrees" with the court's conclusion in *Miers*. The *Miers* decision, while offering persuasive authority, was a district court decision that does not bind courts in later disputes.

Considerations for Congress

Congress can respond to executive branch non-compliance with committee subpoenas in a variety of ways. In addition to citing a witness for criminal contempt of Congress, an approach the House Judiciary Committee is considering for McGahn and has already begun for the Attorney General's failure to comply with the Committee's subpoena for the Mueller report and its underlying documents, the House may also choose to go to court and seek an order directing compliance with the subpoena. If the House chooses the judicial route for some or all of these information access disputes, a court will likely be faced with delicate questions of legislative purpose, executive privilege, and perhaps related separation of powers concerns, the resolution of which could have a significant impact on the political branches' posture toward each other in the oversight context.

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