

Congressional Investigation of the Trump Indictment

April 19, 2023

Manhattan District Attorney Alvin Bragg, Jr. recently [asked](#) a federal district court to declare invalid a House Judiciary Committee (Committee) deposition subpoena issued as part of an inquiry into the indictment of former President Trump. The disputed subpoena was issued not to Mr. Bragg but to a former employee of the District Attorney’s office, Mark Pomerantz. Mr. Bragg’s [suit](#) names the Committee, Chairman Jim Jordan, and Mr. Pomerantz as defendants and seeks a court order enjoining Mr. Pomerantz from complying with the subpoena, partly on the ground that the Committee lacks the type of legitimate legislative purpose that is necessary to support a congressional subpoena. In making that argument, the [complaint](#) asserts that the Committee failed to satisfy the standards established by the Supreme Court in [Trump v. Mazars](#)—a case that applied a new and heightened scrutiny to congressional subpoenas for presidential records. A federal judge has [scheduled](#) a hearing in the case for April 19.

This Sidebar addresses two aspects of Mr. Bragg’s complaint. First, it briefly considers whether Mr. Bragg’s lawsuit can be maintained against the Judiciary Committee and Chairman Jordan. Second, the Sidebar addresses the appropriate standard to be applied if a court were to reach the merits of this dispute, and specifically whether the heightened scrutiny established in *Mazars* applies to the subpoena at issue.

Speech or Debate Clause Restrictions on Suits Against the House and its Members

Mr. Bragg’s lawsuit to quash the Committee’s subpoena was brought against the Committee, Chairman Jordan, and Mr. Pomerantz. It appears unlikely that Mr. Bragg will be able to maintain his suit against Chairman Jordan or the Committee. As discussed in this [previous Sidebar](#), the [Constitution’s Speech or Debate Clause](#) (Clause) generally bars certain claims when made against a Member of Congress or a congressional committee. The Clause largely immunizes Members from civil suits predicated on their “legislative acts,” and the [Supreme Court](#) has made clear that the exercise of the subpoena power “plainly fall[s]” within the definition of “legislative” for purposes of the Clause. As a result, courts have [repeatedly dismissed](#) civil lawsuits filed directly against Members of Congress or congressional committees seeking to quash or block congressional subpoenas.

Still, the Clause immunizes Members, not subpoenas. A court [may assess](#) the validity of a congressional subpoena when a party with an adequate interest in the demanded information sues the subpoena’s recipient—rather than a Member or a committee—to block that party from complying with the subpoena.

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The U.S. Court of Appeals for the D.C. Circuit has [explained](#) that, if a party is “not in a position to assert its claim of constitutional right by refusing to comply with a subpoena,” the Clause “does not bar the challenge so long as [M]embers . . . are not, themselves, made defendants in a suit to enjoin implementation of the subpoena.”

As such, it would appear that, even if the court dismisses Chairman Jordan and the Committee from the lawsuit, Mr. Bragg may be able to maintain his claim against Mr. Pomerantz—the recipient of the Committee’s subpoena. Chairman Jordan and the Committee, however, argue in their [opposition brief](#) that the congressional defendants are both immune from suit and necessary parties under the [Federal Rules of Civil Procedure](#). As a result, they [argue](#) that because the case “cannot proceed without them” it should be dismissed in its entirety.

Legislative Purpose and the Applicability of *Trump v. Mazars*

If the case does proceed, and a reviewing court reaches the merits of the claim, whether the Committee has a valid legislative purpose for its subpoena may be a central question in the case. The [Supreme Court](#) has established that the [scope of Congress’s investigative power](#) is coextensive with the scope of its power to legislate and appropriate under Article I of the Constitution. In order to police the outer bounds of this otherwise broad and “[indispensable](#)” power, the Court has [held](#) that a congressional subpoena is enforceable only when it serves a valid “legislative purpose” that is “related to, and in furtherance of, a legitimate task of the Congress.”

In the [complaint](#), Mr. Bragg asserts that “Congress lacks any valid legislative purpose to engage in a free-ranging campaign of harassment in retaliation for the District Attorney’s investigation and prosecution of Mr. Trump under the laws of New York.” Mr. Bragg further [argues](#) that the Committee does not have a legitimate legislative interest in “interfering” in a state criminal prosecution—a “sphere of authority” that the Tenth Amendment commits to the State of New York. The Committee disagrees, [asserting](#) that it has a legislative purpose in understanding how federal funds were used in furtherance of the indictment and to inform itself for purposes of potential legislation that could protect former Presidents from what the Committee views as “politically motivated” state prosecutions.

As discussed in this previous [Sidebar](#), and at greater length in this [CRS report](#), the legislative purpose test has historically been deferential to Congress, with the Supreme Court asking in cases like [McGrain v. Daugherty](#) only whether the subject being investigated is “one on which legislation could be had.” Other cases assessing the existence of a legislative purpose, like [Barenblatt v. United States](#), have also suggested that courts should not inquire into “the motives which spurred the exercise of” the investigative power or require a committee 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.”

According to the [complaint filed by Mr. Bragg](#), the appropriate test to apply to the Committee’s subpoena is a heightened form of scrutiny used by the Supreme Court in its 2020 opinion in *Trump v. Mazars*. That test, Mr. Bragg asserts, establishes certain “special considerations” that require “federal courts to probe Congress’s asserted purposes for pretext and evidence.”

While it is true that *Mazars* established a more rigorous framework for evaluating certain congressional subpoenas, as explained below, the opinion addressed a specific and unique factual context: a congressional subpoena for a President’s personal records. As a result, it is questionable whether the heightened scrutiny applied by the Supreme Court in *Mazars* would apply to the type of subpoena challenged by Mr. Bragg.

The Mazars Decision

In early 2019, various House committees issued subpoenas to President Donald Trump's accounting firm, Mazars LLC, for the President's personal financial documents. President Trump brought suit to block Mazars from complying with those subpoenas, primarily arguing that the committees lacked a legislative purpose for obtaining the documents. The federal [appellate courts](#), however, largely upheld the committee subpoenas by applying the historical approach discussed above.

The [Supreme Court](#) reversed and remanded, holding that in the context of congressional investigations the President must, as a constitutional matter, be treated differently than others. The [opinion](#) described the courts below as having mistakenly "treated these cases much like any other," applying standards and principles established in "precedents that do not involve the President's papers." The Court reasoned that "[c]ongressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers" that trigger a different, more exacting approach to the scope of Congress's power.

In order to satisfy these concerns, the opinion identified at least four "[special considerations](#)" to help lower courts appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President." These special considerations effectively establish a framework of heightened judicial scrutiny to be applied in reviewing congressional subpoenas for certain presidential documents. First, a reviewing court should "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers." Second, courts "should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose." Fourth, "courts should be careful to assess the burdens imposed on the President by a subpoena."

The Scope of Mazars

The *Mazars* opinion was tailored to a small subset of congressional subpoenas: those seeking presidential documents (and [specifically only those seeking personal](#), rather than official, presidential documents). The opinion was rooted in the doctrine of the separation of powers and the political relationship between Congress and the President. The Supreme Court's conclusions also specifically hinged upon the "[unique](#)" constitutional position of the President and the more than 200 years of historical practice that have guided the resolution of investigative disputes between Congress and the President. Interpreting the applicability of the *Mazars* test more broadly—for example, to apply the opinion's "special considerations" to congressional subpoenas issued in investigations not involving the President—could potentially place *Mazars* in tension with cases like *McGrain* and *Barenblatt*, a result the *Mazars* opinion did not explicitly acknowledge or appear to intend.

The D.C. Circuit appears to have adopted a similarly narrow reading of *Mazars* in the subsequent case *Trump v. Thompson*, albeit in what was likely "[non-binding dicta](#)." In that case, former President Trump sought to block the National Archives and Records Administration from providing a House select committee with his presidential records. In determining what framework to apply, the circuit court [noted](#) "significant doubt" that *Mazars* was the appropriate test to apply, reasoning that "[t]he *Mazars* test . . . was expressly tied to 'special concerns regarding the separation of powers' that arise when the 'legislative interests of Congress' clash with the 'unique position of the President.'" The court [reasoned that](#) "[t]hose separation of powers concerns" applied with less force since former President Trump "no longer occupie[d]" the "unique position of the President." Ultimately, the circuit court did not need to make a determination on the applicability of *Mazars* because it [concluded](#) that the "legislative interests at stake" were adequate to satisfy any of the tests proposed by the parties.

Mr. Bragg has [asserted](#) that the *Mazars* test should be extended in the context of the subpoena to Mr. Pomerantz, arguing that “[i]f the courts must rigorously scrutinize a congressional subpoena that threatens the balance of power between Congress and the executive, then so too must they rigorously analyze a subpoena that poses a triple threat—to a state executive officer, a state judicial proceeding, and our federal system itself.” There may be an argument that a congressional subpoena for a state’s investigative information raises similar structural constitutional concerns as those associated with congressional subpoenas for a President’s information. This line of argument would equate federalism principles—governing the separation of sovereign power between the federal government and the states—to the federal government’s internal separation of powers—governing the proper relationship between Congress, the President, and the federal judiciary. The argument is one that the Supreme Court could take up if given the opportunity but not one that is explicitly reflected in *Mazars*, which was, as described above, rooted in the historical, legal, and political relationship between Congress and the President.

It is not clear that an apt analogy can be drawn between Congress’s constitutional relationship to the President, who serves as the unitary head of the federal executive branch, and Congress’s constitutional relationship to a state official like a district attorney, who serves as a subordinate official within a state executive branch. The analogy may also be further complicated by other constitutional doctrines like [preemption and the Supremacy Clause](#), which are not at play in the separation of powers between Congress and the President. While the Supreme Court has characterized both federalism and the separation of powers as “[foundational](#)” structural principles, it has also [suggested](#)—at least in the context of presidential immunity from civil suits—that “[b]ecause the Supremacy Clause makes federal law ‘the Supreme Law of the Land,’” the division of power between the federal government and the states may “implicate concerns that are quite different from the interbranch separation of powers.”

A conclusion that *Mazars* does not apply to this dispute would not excuse the Committee from the requirement that its subpoena serve a valid legislative purpose. Instead, it would affect only how and with what degree of scrutiny the court might evaluate whether the subpoena is within the scope of Congress’s power. Whereas *Mazars* imposes a thorough and searching inquiry, the traditional legislative purpose test appears to be more deferential to Congress, and therefore is more easily satisfied.

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