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Legal Sidebar

Enlisting Assistance or Intruding On Judicial Independence? Compelling Testimony by Supreme Court Justices

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In conjunction with growing public and congressional interest in how the Supreme Court approaches ethical issues, the Senate Judiciary Committee recently invited Chief Justice John G. Roberts Jr. or another Justice of his designation to testify at a hearing examining "the ethical rules that govern the Justices of the Supreme Court and potential reforms to those rules." Chief Justice Roberts, noting that testimony before Congress by the Chief Justice on matters other than appropriations and nominations is "exceedingly rare," declined that invitation and instead provided the Committee with a *Statement on Ethics Principles and Practice*s that currently guides all members of the Court. The committee chair, Senator Dick Durbin, responded by asking for additional information on the Court's current ethics guidelines, while affirming that the committee would proceed with its hearing on May 2 without the Supreme Court's input as "Supreme Court ethics reform must happen whether the Court participates in the process or not."

In a typical oversight scenario, if a witness refuses a congressional committee's request for testimony, the committee may consider the use of a subpoena to compel their attendance. A committee request for testimony from the sitting Chief Justice of the United States is not, however, a typical scenario. Nevertheless, the Chief Justice's response to the Judiciary Committee's invitation—in which he alluded to "separation of powers concerns and the importance of preserving judicial independence"—raises the question of whether Congress has authority to issue a subpoena to a Supreme Court Justice for information relating to the functioning of the Court. This Sidebar addresses that question by briefly outlining potentially applicable legal principles, including the constitutional separation of powers.

Governing Legal Principles

Federal judges are not prohibited from providing testimony to Congress. Judges may—and often do—choose to comply with congressional requests for information. Indeed, hundreds of judges, including Supreme Court Justices, have testified before Congress on issues such as judicial appropriations and compensation and the role of federal judges. Those appearances, however, have been voluntary. Neither Congress nor the courts have definitively addressed whether a committee, in the absence of voluntary

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cooperation, can *compel* the disclosure of information from a federal judge via a subpoena. The absence of any sustained congressional or judicial consideration of this question may be due, in part, to the infrequency with which such subpoenas have been necessary. Researching and identifying historical examples of congressional subpoenas is difficult, but CRS has identified one instance (outside of the impeachment context) of a committee issuing a subpoena to a sitting Justice of the Supreme Court.

In 1953, the House Un-American Activities Committee issued a subpoena for testimony to Associate Justice Thomas C. Clark as part of that committee's investigation into alleged communist infiltration of the federal government. The subpoena sought testimony from Justice Clark not about his actions on the Supreme Court but his actions as President Harry Truman's Attorney General, a role he held prior to his appointment and confirmation to the Court. The committee alleged that Justice Clark, along with President Truman, had participated in the promotion of a known Soviet spy.

Justice Clark refused the committee subpoena, asserting that his appearance would threaten the "complete independence of the judiciary." Justice Clark offered, however, to give "serious consideration" to written inquiries from the committee. A search of publicly available materials revealed no indication that the committee sent Justice Clark written interrogatories.

While the Supreme Court has suggested that "lack of historical precedent" for a certain practice can sometimes indicate a "severe constitutional problem," the actual text of the Constitution offers minimal assistance to this inquiry. Article III provides federal judges with independence from congressional influence in two ways: judges (1) "hold their Offices during good Behaviour" and (2) receive "a Compensation, which shall not be diminished during their Continuance in Office." There is, however, no constitutional provision that explicitly excuses a federal judge from the general requirement to comply with a subpoena from another branch of government. The absence of such language contrasts with the fact that the Constitution does provide such protections for Members of Congress. The Speech or Debate Clause immunizes Members from the threat of "intimidation" that is sometimes associated with compelled interbranch disclosures, at least for "legislative acts."

Absent express constitutional guidance, any limitations on Congress's authority to investigate and issue a subpoena to a Justice would likely arise implicitly from other constitutional principles. Two possible sources of such constraints include the requirement that congressional investigations serve a "valid legislative purpose" and the constitutional separation of powers.

A Threshold Question of Legislative Purpose

As discussed in previous CRS Legal Sidebars and Reports, the Supreme Court has deemed the "power of inquiry" so essential to the functioning of Congress as to be implicit in the Constitution's vesting of "All legislative Powers" in the House and Senate. The power is "far-reaching" and extends to "every affair of government," but because it derives from Article I's grant of legislative power, Congress must exercise it in a manner that "aid[s] the legislative function."

The Supreme Court has generally enforced this legislative-function requirement by assessing whether compulsory committee investigative actions—including subpoenas for documents or testimony—serve a "valid legislative purpose." The essential factor in this inquiry appears to be whether Congress has constitutional authority to legislate in the area under investigation. For example, Congress "cannot inquire into matters that are exclusively the concern of the Judiciary," because that is not a "subject on which legislation could be had." It does not appear, however, that an investigating committee needs to have particular legislation pending before it or prove conclusively that potential legislation is within its authority to enact in order to support an investigation. The D.C. Circuit has recently suggested that, when faced with a subpoena justified by "contemplated legislation that raises sensitive constitutional issues," courts are not "expected to pronounce in advance on whether [that] contemplated legislation . . . passes constitutional muster."

Whether Congress can wield its compulsory powers to *investigate* Supreme Court activity thus appears to depend largely on whether Congress can *legislate* on Supreme Court activity. Congress's legislative authority over the Court, while subject to some important restrictions and more constrained than its authority over the lower federal courts, is still substantial. Congress controls the Court's funding (subject to the Compensation Clause) and the number of Justices. It has also enacted general legislation directly or indirectly impacting the entire federal judiciary, including laws governing judicial sentencing, judicial procedure, and certain financial disclosure laws. Investigations adequately connected to contemplated legislation in these areas likely fall within Congress's authority.

Congress appears to lack legislative authority, however, when it comes to the central aspects of the judicial decisionmaking function. The Supreme Court has recognized the "imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." Congress cannot, for example, supplant judges in that judicial role, establish a "rule of decision" in a particular case, or directly overturn a final judicial decision. Investigations connected to these areas, such as an investigation into how and why a judge ruled on a specific issue, may lack a legislative purpose and therefore be outside of Congress's investigate power.

There are other areas in which Congress's authority over the Court is ambiguous. For example, whether Congress has legislative authority to enact mandatory ethical rules of conduct for the Supreme Court is a debated question, and one discussed at greater length in this Sidebar. A congressional investigation into how the Court applies its own code of conduct, undertaken to assist a committee in determining whether it is necessary for Congress to reform Supreme Court ethics rules, may present the type of "sensitive constitutional issue[]" that the D.C. Circuit suggested would not require a court to make a constitutional pronouncement in advance. The validity of such an inquiry could depend on various factors but, if challenged, a reviewing court would not need to engage in a rigorous constitutional analysis of Congress's contested legislative authority to impose ethical rules on the Supreme Court. Instead, to find a valid legislative purpose, it appears the court would need only conclude that there is no "inherent constitutional flaw" to the general class of legislation (e.g., legislation to reform Supreme Court ethics rules) upon which the committee seeks to inform itself.

Limitations Imposed by the Constitutional Separation of Powers

If a congressional committee has a valid legislative purpose for seeking information from a Justice, it then becomes necessary to consider whether the act of compelling that Justice to comply with the committee's demands otherwise violates the constitutional separation of powers.

Certain aspects of the delicate relationship between Congress and the courts are well established through judicial decisions (e.g., Congress cannot retroactively overturn a final judicial decision in a particular case) or historical practice (e.g., disagreement with a judge's rulings is not grounds for impeachment and removal by Congress). Much remains subject to debate, however, partly because of the nature of the judiciary's separation-of-powers jurisprudence. Whether a congressional act impermissibly infringes on the judicial power may depend upon the application of a "pragmatic, flexible view of differentiated government power" that focuses on whether one branch is "prevented from accomplishing its constitutionally assigned functions." Central to that constitutional function is the "imperative need for total and absolute independence of judges in deciding cases." The leading example of this approach is the Supreme Court case *Mistretta v. United States*.

In *Mistretta*, the Supreme Court rejected a separation-of-powers challenge to a law creating an independent sentencing commission comprised partly of federal judges and tasked with promulgating sentencing guidelines. *Mistretta* established the applicable framework for assessing possible congressional intrusions into the judicial power, holding that the courts must evaluate whether Congress

has "impermissibly threaten[ed] the institutional integrity of the judicial branch." A court might assess a congressional subpoena to a Justice under this standard.

The *Mistretta* Court made at least two statements that may be instructive for this inquiry. First, the Court found it important that Congress had not placed any direct mandates on individual judges. While the law required that at least three judges serve on the commission, service "by any particular judge" was "voluntary." Since the law did not exert "coercive power," the Court explicitly noted that it need not address whether Congress could require any particular judge to serve on the commission. A subpoena, on the other hand, is by definition coercive and individualized, rather than voluntary and generalized. Still, a subpoena would not coerce a judicial act or decision or otherwise direct the exercise of judicial power. Any threat to the integrity of the courts would instead appear to be based on perceptions of intimidation and any implicit, resulting effect on the decisionmaking function.

Second, the *Mistretta* Court noted the desirability of Congress being able to "enlist the assistance of judges" in making legislative decisions. The Court explained:

> [T]he Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of the judicial function and where purposes of the Commission are not inherently partisan, such enlistment is not coercion or co-optation, but merely assurance of judicial participation.

Supreme Court ethics rules would similarly seem to be a "uniquely judicial subject" on which Congress would benefit from the "uniquely judicial view" of the Justices. Still, if a Justice refuses to participate in that exchange of ideas, does a subpoena represent a permissible means to "enlist" the aid of a federal judge and ensure "judicial participation" in a legislative endeavor?

Two district court opinions from 2004 may inform this specific question, with each coming to opposite conclusions as to Congress's legislative (and by implication investigative) authority to compel the disclosure of information from federal judges. These cases involved neither subpoenas nor Supreme Court Justices. Instead, they involved Congress gathering information from federal judges in a manner arguably analogous to subpoenas: statutory reporting requirements (in this instance, reporting data on downward departures from federal sentencing guidelines). In *United States v. Mendoza*, a federal district court in California acknowledged that the law did not give either the executive or legislative branch "any direct coercive power over the judiciary for their judicial acts," but it nevertheless found that the "threat" of such coercion was "blatantly present." The court then suggested broadly that "Congress does not have any direct oversight of the Judiciary." To the contrary, in *United States v. Schnepper*, a different federal district court judge in Hawaii reviewed the same provision and concluded that the provision was a "convenient information-gathering tool" that did not "undermine the integrity of the Judicial Branch." "Fortunately," the court reasoned, "judges are not endowed with such malleable wills as to be improperly swayed by the opinions of the Executive or Congress." Whatever threat to judicial integrity the provision posed, the court concluded, was adequately countered by the independence provided to lower federal judges by Article III of the Constitution.

Ultimately, it may be useful to view the separation-of-powers concerns associated with a congressional subpoena to a Justice on a spectrum. Least objectionable might be subpoenas furthering generalized investigations of topics that do not relate to the judicial decisionmaking process and do not target actions of an individual judge. Such investigations would appear to present a minimal risk to the integrity or independence of the Court or its Justices. Most objectionable might be focused investigations of an individual Justice's decisions that could be viewed as an attempt to intimidate a judge and influence judicial acts. Such an investigation would appear to present a higher risk to the integrity of the judiciary. In between these two poles likely exists an area of uncertainty in which the enforceability of a congressional subpoena may depend on the specifics of the inquiry.

The Analogy to Presidential Subpoenas

In the absence of existing judicial precedent evaluating congressional subpoenas to Supreme Court Justices, a court might look to the judicial treatment of congressional subpoenas to a sitting President to inform its separation-of-powers analysis. Chief Justice Roberts alluded to this analogy in his response to the committee.

Presidents are not absolutely immune from congressional subpoenas. In *Trump v. Mazars*, the Supreme Court affirmed that, because "Congress's responsibilities extend to 'every affair of government,'" "[l]egislative inquiries might involve the President in appropriate cases." The Court held, however, 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 judicial review of the subpoena. In order to satisfy these concerns, the *Mazars* opinion identified a series of "special considerations" (discussed in greater detail here) to help lower courts appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President." These considerations, which amount to a form of heightened scrutiny, were informed by the "distinctive" relationship—defined by "both rivalry and reciprocity"— that exists between the two "political branches."

The separation-of-powers concerns that attach to a congressional subpoena for certain presidential information may also be present in a congressional subpoena to a Supreme Court Justice. Like the President, an argument can be made that Supreme Court Justices serve a "unique constitutional role." Yet, because Congress does not have the same "political" relationship with the Court that it has with the President, there may not be the same concern that Congress will use its subpoenas "for institutional advantage." If similar separation-of-powers concerns do exist, then a congressional subpoena to a Justice would likely be subject to a *Mazars*-like form of increased judicial scrutiny.

Mazars, however, pertained only to a subpoena for documents. It did not address a congressional subpoena for testimony. With respect to testimony, the Department of Justice has historically taken the position that under the separation of powers, the President cannot be made to appear before a congressional committee. A Supreme Court Justice may attempt to borrow from this executive branch legal reasoning to assert that judges possess similar "absolute immunity" from congressional testimony. Although courts have previously recognized a qualified executive privilege for certain confidential presidential communications and a qualified judicial privilege for certain confidential judicial deliberations, no court has ever recognized absolute presidential immunity from congressional testimony or even considered the existence of a judicial corollary. The Supreme Court has, however, suggested that—at least in the context of a subpoena for testimony during a civil trial—presidential testimony could be taken in a way that "accommodates" both constitutional requirements and the President's "busy schedule."

Conclusion

There appear to be few clear answers to the legal questions that would arise from a congressional subpoena to a sitting Supreme Court Justice. Resolving these questions would likely involve an assessment of the constitutional significance of historical practice (Congress apparently having only subpoenaed a sitting Justice on one occasion,), and the application of the Supreme Court's separation-of-powers jurisprudence to this novel circumstance. At a minimum, however, if challenged in court, a congressional subpoena to a sitting Justice would likely be subject to heightened judicial scrutiny with its final validity possibly determined by the Supreme Court itself. That review may hinge on the Justices' own perception of whether and to what degree the subpoena threatens their judicial integrity and independence. Still, the courts are not the only avenue for enforcing a congressional subpoena. In instances where judicial enforcement is unlikely or unavailing, Congress may choose to rely on other legislative powers to encourage compliance with its subpoenas.

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