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Hearing on “Civil Enforcement of Congressional Authorities”

**Subcommittee on Courts, Intellectual Property, and the Internet
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I. Introduction

I would like to thank the Chairman, Ranking Member, and other members of the Subcommittee for the privilege of offering some thoughts as you consider congressional oversight and the enforcement of subpoenas.

I am the Vice President of the Constitutional Accountability Center (CAC), a non-partisan think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has drafted and distributed an issue brief that explains the historical and legal basis for the exercise of congressional oversight authority.¹ CAC has also filed several *amicus* briefs on congressional subpoenas.² I also speak on issues related to the Supreme Court, the lower federal courts, and the Constitution on academic panels, at public events, and in the media.

Congressional investigatory power is deeply rooted in our political system and is embedded in our Constitution, which grants Congress the power to legislate.³ As the Supreme Court has explained, “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”⁴ Given Congress's need for information to fulfill its legislative function, the Supreme Court has held that the congressional power to investigate is broad and is “indeed co-extensive with the power to legislate.”⁵

Despite this constitutional history and Supreme Court precedent, executive branch officials have repeatedly refused to comply with congressional requests for information.⁶ Accordingly, congressional committees have often been forced to engage in civil court proceedings, and resolution of these disputes

¹ Brianne J. Gorod, Brian R. Frazelle, & Ashwin P. Phatak, *ISSUE BRIEF: The Historical and Legal Basis for the Exercise of Congressional Oversight Authority*, Constitutional Accountability Center (Jan. 30, 2019), <https://www.theusconstitution.org/think-tank/issue-brief-the-historical-and-legal-basis-for-the-exercise-of-congressional-oversight-authority/>.

² *Trump v. Mazars USA, LLP*, Constitutional Accountability Center (last visited June 2, 2021),

<https://www.theusconstitution.org/litigation/trump-v-mazars-usa-llp/>;

Trump v. Deutsche Bank AG & Capital One, Constitutional Accountability Center (last visited June 2, 2021),

<https://www.theusconstitution.org/litigation/trump-v-deutsche-bank-ag-capital-one/>;

Committee on the Judiciary v. Donald F. McGahn, II, Constitutional Accountability Center (last visited June 2, 2021),

<https://www.theusconstitution.org/litigation/committee-on-the-judiciary-v-donald-f-mcgahn-ii/>.

³ See U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* § 8, cl. 18 (Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

⁴ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

⁵ *Quinn v. United States*, 349 U.S. 155, 160 (1955).

⁶ Frank O. Bowman III, *Trump's Defense Against Subpoenas Makes No Legal Sense*, *The Atlantic* (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/trumps-defense-against-subpoenas/605635/>; *Donald Trump Is Not the First President to Fight Subpoenas*, *The Economist* (May 2, 2019), <https://www.economist.com/usa/2019/05/02/donald-trump-is-not-the-first-president-to-fight-subpoenas>.

has been protracted.⁷ For instance, it has been more than two years since President Trump filed a lawsuit to declare the House Committee on Oversight and Reform’s subpoena of his accounting firm, Mazars USA, LLP “invalid and unenforceable.”⁸ Significantly, the House won in substantial part in federal court, including at the Supreme Court level, where the Court reaffirmed the House’s subpoena authority. Yet the Supreme Court remanded the case, and the litigation continues, which means that the House Oversight Committee has still not gotten access to the materials it needs to legislate.⁹

This example illustrates a serious problem, but one that Congress can address. Most significantly, Congress can put in place expedited review for oversight-related litigation, as it has done in several other areas of law.¹⁰

II. Congressional Oversight Power and Its Roots¹¹

a. *The History of Congressional Oversight*

The practice of legislative oversight predates the birth of the United States with “roots [that] lie deep in the British Parliament.”¹² For example, in the 1680s, the British Parliament investigated issues as diverse as the conduct of the army in “sending Relief” into Ireland during war, “Miscarriage in the Victualing of the Navy,” and the imposition of martial law by a commissioner of the East India Company.¹³ These investigations were premised on the idea that Parliament could not properly legislate if it could not gather information relevant to the topics on which it wanted to legislate. Thus, for example, a February 17, 1728 entry in the *Commons’ Journal* described a parliamentary committee’s investigation of bankruptcy law as follows:

Ordered, That the Committee, appointed to inspect what Laws are expired, or near expiring, and to report their Opinion to the House, which of them are fit to be revived, or continued, and who are instructed to inspect the Laws relating to Bankrupts, *and consider what Alterations are proper to be made therein*, have Power to send for Persons, Papers, and Records, with respect to that Instruction.¹⁴

This early British practice of legislative investigation was replicated by American colonial legislatures. “The colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention.”¹⁵ For example, in 1722, the Massachusetts House of Representatives declared that it was “not only their Privilege but Duty to demand of any Officer in the pay

⁷ David Janovsky & Sarah Turberville, *Congress Needs to Reclaim Its Time from the Courts*, Project on Government Oversight (Nov. 18, 2020), <https://www.pogo.org/analysis/2020/11/congress-needs-to-reclaim-its-time-from-the-courts/>.

⁸ Complaint at 13, *Trump v. Mazars USA, LLP*, No. 1:19-cv-01136 (D.D.C. Apr. 22, 2019).

⁹ Janovsky & Turberville, *supra* note 7.

¹⁰ Neal Devins, *The Majoritarian Rehnquist Court?*, 67-SUM Law & Contemp. Probs. 63, 70 (2004); Neal Devins, *Congress As Culprit: How Lawmakers Spurred On the Court’s Anti-Congress Crusade*, 51 Duke L.J. 435, 442-43 (2001).

¹¹ This entire portion of my testimony draws heavily from the Constitutional Accountability Center’s issue brief on the historical and legal basis for congressional oversight, see Gorod, Frazelle, & Phatak, *supra* note 1.

¹² James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926).

¹³ *Id.* at 162.

¹⁴ *Id.* at 163 (emphasis added) (citation omitted).

¹⁵ C.S. Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926).

and service of this Government an account of his Management while in the Public Employ.”¹⁶ In exercising that duty, the House called before it two military officers to question them about their “failure to carry out certain offensive operations ordered by the [H]ouse at a previous session,” over the objection of the Governor.¹⁷ Similarly, the Pennsylvania Assembly had “a standing committee to audit and settle the accounts of the treasurer and of the collectors of public revenues,”¹⁸ which had the “full Power and Authority to send for Persons, Papers and Records by the Sergeant at Arms of this House.”¹⁹

The United States Congress also demonstrated early in the Republic’s history that it viewed broadly its authority to investigate, including its authority to investigate the Executive Branch. As the Supreme Court would later recount, the first Congresses used compulsory process to investigate “suspected corruption or mismanagement of government officials.”²⁰

For example, in March 1792, only a few years after the adoption of the Constitution, the House created a special committee to inquire into a particular military defeat. Record of the debate in the House shows that a majority of Members believed that Congress should establish a select committee to investigate this matter itself, rather than direct the President to investigate. Representative Thomas Fitzsimons, for instance, believed it “out of order to request the President . . . to institute . . . a Court of Inquiry,” and instead argued that a committee was better suited “to inquire relative to such objects as come properly under the cognizance of this House, particularly respecting the expenditures of public money.”²¹ Similarly, Representative Abraham Baldwin “was convinced the House could not proceed but by a committee of their own,” which “would be able to throw more light on the subject, and then the House would be able to determine how to proceed.”²² Thus, the House rejected a proposal directing the President to carry out the investigation, and instead passed by a 44 to 10 vote a resolution creating its own committee to investigate.²³

Numerous similar congressional investigations took place over the subsequent decades. For instance, in 1800, a select committee was formed to investigate the circumstances of the Treasury Secretary’s recent resignation. Representative Roger Griswold believed such an investigation was important because if there is an investigation “on the retirement of every Secretary of the Treasury from office” about “his official conduct, it will operate as a general stimulus to the faithful discharge of duty.”²⁴ The committee was directed “to examine into the state of the Treasury, the mode of conducting business therein, the expenditures, of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury.”²⁵

b. Congressional Oversight, the Power to Investigate, and Supreme Court Precedent

Congress’s power to investigate is deeply rooted in our political tradition, and the ability of Congress to investigate is embedded in our national charter, which gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution.”²⁶

¹⁶ *Id.* (citation omitted).

¹⁷ *Id.*

¹⁸ *Id.* at 709.

¹⁹ *Id.* (citation omitted).

²⁰ *Watkins v. United States*, 354 U.S. 178, 192 (1957).

²¹ 3 *Annals of Cong.* 492 (1792).

²² *Id.*

²³ *Id.* at 493.

²⁴ 10 *Annals of Cong.* 788 (1800).

²⁵ *Id.* at 796-97.

²⁶ U.S. Const. art. I § 8, cl. 18.

Since the twentieth century, the Supreme Court has consistently connected the power to legislate with Congress's broad power to investigate. For example, in the 1927 case *McGrain v. Daugherty*, the Court considered whether the Senate, in the course of an investigation regarding the Department of Justice, could compel a witness—in that case, the brother of the Attorney General—to appear before a Senate committee to give testimony.²⁷ The Court held that “the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.”²⁸ As the Court explained, the power to compel witnesses to testify is an essential aspect of the power to legislate:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.²⁹

Applying these principles, the Court then turned its attention to whether the particular subpoena at issue was designed “to obtain information in aid of the legislative function.”³⁰ The Court concluded that it was, and explained: “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.”³¹ Two years later, the Court reiterated that “the power of inquiry is an essential and appropriate auxiliary to the legislative function.”³²

In 1955, the Court emphasized the breadth of Congress's power to investigate. In *Quinn v. United States*, the Court considered whether a member and field representative of the United Electrical, Radio and Machine Workers of America who was subpoenaed before a subcommittee of the House Committee on Un-American Activities could be convicted of contempt of Congress under 2 U.S.C. § 192.³³ As in *McGrain*, the Court described the breadth of Congress's investigatory powers in unequivocal terms:

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.³⁴

Similarly, in *Watkins v. United States*, the Court again made clear that “investigation is part of lawmaking,”³⁵ and once more described the congressional power to investigate expansively:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It 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.

²⁷ *McGrain*, 273 U.S. at 150-52.

²⁸ *Id.* at 154.

²⁹ *Id.* at 175; see *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (reaffirming this language).

³⁰ *Id.* at 176.

³¹ *Id.* at 177.

³² *Sinclair v. United States*, 279 U.S. 263, 291 (1929).

³³ *Quinn*, 349 U.S. at 156-57.

³⁴ *Id.* at 160-61.

³⁵ 354 U.S. at 187.

In short, the House and Senate possess broad powers to investigate rooted in the Constitution's grant of the legislative power to Congress under Article I. Indeed, even the executive branch has agreed. As the Department of Justice's Office of Legal Counsel has noted, "[i]t is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws."³⁶ There is therefore agreement among the three branches that Congress can investigate the executive branch as part of its power to legislate. And of course, Congress's investigatory power extends beyond the government, allowing it to obtain from private entities information relevant to any area of legislative interest.³⁷

III. The Problem

Over the last four decades, there has been a crisis with regard to the effectiveness of congressional oversight, particularly with respect to oversight of the executive branch.³⁸ Recently, this crisis deepened, with delays in congressional ability to obtain information due to executive branch officials refusing to comply with subpoenas and release information requested from House committees.³⁹ According to *Politico*, as of April 2019, the last "administration ha[d] at least 30 times refused or delayed turning over documents to 12 House committees."⁴⁰ In addition, "[a] half dozen officials ha[d] refused to appear before five committees while two officials ha[d] refused to come in for interviews with two other committees."

In response to this obstruction, the House of Representatives was forced to engage in several lawsuits relating to the information being subpoenaed. Unfortunately, these lawsuits have taken far too long to be resolved.

An example proves instructive. In early 2019, the House Committee on Oversight and Reform subpoenaed then-President Trump's accounting firm, Mazars USA, LLP for documents related to President Trump's and his businesses' finances from 2011 until the present. On April 22, 2019, President Trump and his businesses sued Mazars, asking the U.S. District Court for the District of Columbia to declare the subpoena "invalid and unenforceable," and the Oversight Committee subsequently intervened to defend its subpoena. The District Court ruled in favor of the House, and the D.C. Circuit affirmed.⁴¹

The President's lawyers then asked the Supreme Court to hear the case, and in July 2020, the Court held, in accordance with precedent and with centuries of history, that Congress has broad investigatory powers and can investigate the executive branch and even the President himself. However, because the Court concluded that the lower courts had not properly taken into account separation of powers concerns, the Court also vacated the lower court's opinion and remanded the case back to the D.C. Circuit for further proceedings.⁴² In October 2020, the D.C. Circuit held oral arguments on whether the case should be remanded to the district court, and ultimately concluded that it should.⁴³ And now, more than two years

³⁶ *Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch*, 9 Op. Att'y Gen. 60, 60 (1985); see *id.* at 61 ("It is now settled that Congress' power to obtain information necessary to legislate is broad.").

³⁷ Gorod, Frazelle, & Phatak, *supra* note 1, at 10.

³⁸ *Inherent Contempt Fine Rules*, Good Government Now (last visited June 2, 2021), <https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/>.

³⁹ Victoria Bassetti & Tim Lau, *Trump's Troubling Rebuke of Congressional Oversight*, Brennan Center (May 7, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-troubling-rebuke-congressional-oversight>.

⁴⁰ Anita Kumar & Andrew Desiderio, *Trump Showdown With House Democrats Ignites Into All-Out War*, *Politico* (Apr. 23, 2019), <https://www.politico.com/story/2019/04/23/trump-investigators-congress-1288795>.

⁴¹ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2028 (2020).

⁴² *Id.* at 2036.

⁴³ Quinta Jurecic & Bryce Klehm, *Whither the Trump Financial Documents Cases?*, *Lawfare* (Mar. 2, 2021), <https://www.lawfareblog.com/whither-trump-financial-documents-cases>.

after the start of the lawsuit, the issue is nowhere near resolved, as there is still a pending motion for summary judgment at the district court level.⁴⁴

This is just one example, which I am providing simply because of its ongoing nature and because it was litigated at every level of the federal court system. How one feels about any given example might be influenced by one's partisan affiliation, one's feelings about a presidency, or one's commitment to the underlying subject matter. But the problem is larger than any subject, political party, or presidency. In countless cases, delays in the courts have prevented Congress from receiving information to which it is entitled and which it needs to do its job. In countless cases, delays in the courts have prevented Congress from receiving information to which it is entitled and which it needs to do its job. The consequences of such delays are particularly acute in the House, which is not a continuing body. Every time a new House is sworn in, its ongoing investigations end, and its subpoenas expire. To be sure, House committees can reissue subpoenas, but if the new leadership decides not to do so, the ongoing litigation could be mooted, foreclosing resolution of the litigation and the chance of the House receiving the material it was seeking.

IV. One Solution – Expedited Court Review

One potential solution to delayed resolution of congressional oversight is for Congress to establish a pathway for expedited review of oversight disputes in the federal courts. Congress has considered this option before. For instance, during the 116th Congress, Rep. Madeleine Dean (D-PA) introduced the Congressional Subpoena Compliance and Enforcement Act of 2019, which would streamline the process of resolving disputes over subpoenas.⁴⁵ The provisions echo those of the Congressional Subpoena Compliance and Enforcement Act of 2017, legislation introduced by Rep. Darrell Issa (R-CA) in the 115th Congress.⁴⁶ According to the provisions of both legislative proposals, any time the House, Senate, or one of its committees or subcommittees brings a civil action against the recipient of a congressional subpoena, the federal courts at every level must “expedite to the greatest possible extent the disposition of any such action and appeal.”⁴⁷

In addition, both pieces of legislation further provide that if a three-judge court is requested by the plaintiff, “the action shall be heard by a three-judge court . . . and shall be reviewable only by appeal directly to the Supreme Court of the United States.”⁴⁸ The bills also add: “Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.” Allowing for expedited review and a direct appeal to the Supreme Court would allow for a quicker and more efficient process when it comes to enforcing congressional subpoenas.

This kind of expedited review is not without precedent. For example, 28 U.S.C § 2284 allows a three-judge panel to proceed over actions “challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”⁴⁹ Similarly, the Balanced Budget and Emergency Deficit Control Act of 1985,⁵⁰ the Cable Television Consumer Protection and Competition Act of 1992,⁵¹ the Communications Decency Act of 1996,⁵² the Bipartisan Campaign Finance

⁴⁴ Plaintiffs’ Motion for Summary Judgement and Supporting Memorandum of Points and Authorities, *Trump v. Mazars USA, LLP*, No. 1:19-cv-01136 (D.D.C. Apr. 5, 2021).

⁴⁵ H.R. 3732, 116th Cong. (2019).

⁴⁶ H.R. 4010, 115th Cong. (2017).

⁴⁷ H.R. 3732, 116th Cong. (2019); H.R. 4010, 115th Cong. (2017).

⁴⁸ *Id.*

⁴⁹ 28 U.S.C. § 2284(a).

⁵⁰ Pub. L. No. 99-177, § 274, 98 Stat. 1037, 1098 (1985).

⁵¹ Pub. L. No. 102-385, § 23, 106 Stat. 1460, 1500 (1992).

⁵² Pub. L. No. 104-104, § 561, 110 Stat. 56, 142 (1996).

Reform Act of 2002,⁵³ and the Voting Rights Act⁵⁴ all contained provisions allowing disputes to be heard by a three-judge court, with available direct appeal to the Supreme Court. Expedited review is no less important with respect to disputes involving congressional subpoenas.

In addition to making provision for a three-judge panel and appellate review that is both streamlined and expedited, Congress should also consider clarifying that this pathway would govern regardless of any other statutory schemes implicated by its subpoena. To cite just one example, documents created or maintained by the White House are subject to the Presidential Records Act, which sets out its own procedures for resolving disputes.⁵⁵ Congress should make clear that other statutory schemes notwithstanding, disputes over congressional oversight in the federal courts will be resolved through the expedited pathway.

V. Conclusion

Congressional oversight power is rooted firmly in both law and history. Congress's right to obtain information is not in doubt. What is in doubt, however, is whether Congress will be able to obtain the information to which it is entitled in a timely fashion. Currently, when oversight disputes go to the federal courts, this remains an open question. Congress should consider expedited court review as one possible way of answering it.

⁵³ Pub. L. No. 107-155, § 403, 116 Stat. 81, 113 (2002).

⁵⁴ Pub. L. No. 89-110, §§ 4, 5, 10, 79 Stat. 437, 438, 439, 442 (1965).

⁵⁵ Pub. L. No. 95-591, 92 Stat. 2523 (1978); see also Austin Evers, Ryan Goodman, & Justin Hendrix, *Congress Proved It Can't Handle the Jan. 6 Mess. The Right Commission Could*, Wash. Post (May 14, 2021), <https://www.washingtonpost.com/outlook/2021/05/14/capitol-riot-commission-congress/>.