

## Government Controversies and Public Policy Litigation | Appellate and Supreme Court

# Not Just About Tax Returns: The Supreme Court Clarifies Congressional Subpoena Power—and Its Limitations

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When a company finds itself in receipt of a congressional subpoena, it may wonder whether Congress had authority to issue that subpoena. Yesterday, the United States Supreme Court shed light on that question in its decision in *Trump v. Mazars USA, LLP*, Nos. 19-715 & 19-760. While the decision focused on Congress's power to subpoena the President's personal documents, the decision gives some insight into the Court's thoughts regarding the Legislative Branch's subpoena power more generally.

Specifically, the Court confirmed that Congress's power to subpoena is far from limitless, and defenses to congressional subpoenas may exist in some situations. This decision may therefore open up new avenues to object for those who become the subject of a congressional investigation and wish to push back on congressional demands for information.

### The Subpoenas' Story

In April 2019, three US House of Representatives committees issued four subpoenas demanding that third parties—banks and an accounting firm—produce documents regarding President Trump's, and his family's, personal and business finances. The House Committee on Financial Services issued two subpoenas requesting documents related to foreign transactions and other financial activity of the President and certain members of his family, ostensibly to advance its "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." Slip Op. at 3. The Permanent Select Committee on Intelligence issued the same subpoena as part of a broader investigation "into foreign efforts to undermine the US political process." Slip Op. at 4. And, the House Committee on Oversight and Reform issued a subpoena seeking financial information as part of an investigation into potentially undisclosed conflicts of interest and alleged violations of the Emoluments Clause. Slip Op. at 5.

The President and his family challenged the subpoenas. The lower courts held that the subpoenas were enforceable, and President Trump sought review in the Supreme Court.

### The Court's Decision

After describing the history of how subpoena-based disputes between Congress and various presidents have been resolved, the Court discussed the basis for—and limits to—Congress's subpoena power. Specifically, the Court affirmed that Congress's subpoena power cannot be used for law enforcement purposes. In other words, Congress cannot use its subpoena authority to put someone on trial for a crime or wrongdoing, nor does Congress have the "power to expose for the sake of exposure." Slip Op. at 12. Indeed, the Court confirmed that congressional investigations used solely to "punish" those investigated would be "indefensible." Not only that, the Court reinforced the limitations to the subpoena power, including that the subpoena must serve a "valid legislative purpose," and is proper only if it is "related to, and in furtherance of, a legitimate task of Congress." Slip Op. at 11. In addition, the Court reaffirmed that those subject to a congressional subpoena have both constitutional

and common law privileges—including attorney-client privilege—against the subpoena.

However, the Court, at the same time, reaffirmed Congress’s broad subpoena power, which aids “Congress’s important interest in conducting inquiries to obtain the information it needs to legislate effectively.” Slip Op. at 14. The Court stressed the concept that the subpoena power is a “power of inquiry,” which is “essential” to serve the “legislative function.” Slip Op. at 11.

Then, turning to the facts of the cases before it, the Court rejected the parties’ proposed test for evaluating the subpoenas based on its own precedent as well as principles surrounding the separation of powers. The Court found the President’s proposed test—that the House must show a “demonstrated, specific need” for the information—to be too demanding. But the Court also found the House’s proposed test—that subpoenas for the President’s personal documents were subject to the same standard as any other subpoena—would result in Congress having an “unlimited” subpoena power regarding the President’s personal papers, which would allow Congress to “aggrandize itself at the President’s expense, just as the Framers feared.” Slip Op. at 16.

Finding that neither test would do, and given the “weighty concerns regarding the separation of powers,” the Court offered four non-exclusive “special considerations” courts should take into account:

- Determine whether the claimed legislative purpose behind the subpoena “warrants the significant step of involving the President and his papers,” considering whether “other sources could reasonably provide Congress the information it needs in light of its particular legislative objective.” Slip Op. at 19.
- Require that the subpoena be “no broader than reasonably necessary to support Congress’s legislative objective.” *Id.*
- Attune to “the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose”; the “more detailed and substantial the evidence of Congress’s legislative purpose, the better.” Slip Op. at 19-20.
- Evaluate the burdens the subpoena would impose on the President. Slip Op. at 20.

Having set out those factors, the Court remanded to the lower courts to apply them.

### **Reading the Tea Leaves**

While *Mazars* addressed congressional subpoenas directed toward the President, and ultimately did not decide whether the subpoenas at issue were valid, the decision gives some insight into the Court’s views on congressional subpoena power more generally. The Court reaffirmed that Congress’s authority to issue subpoenas, while strong, is not limitless, and that even where Congress has authority to issue a subpoena, the subject of the subpoena may nevertheless have a defense against complying with it.

Valid defenses to a congressional subpoena exist and are likely to be raised more often as a result of this decision—even by private parties. Those subject to a congressional subpoena therefore would be wise to examine the subpoena’s underlying rationale and validity, and to determine whether the constitutional and common law defenses to a subpoena referenced by the Court are applicable.

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