

DC Circuit Undercuts Congress' Subpoena Power: Important New Authority for Targets of Congressional Investigations

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Recipients of subpoenas often rely on common-law privileges, including attorney-client privilege and the work-product doctrine, to protect confidential and strategic communications, narrow their responses, and even quash subpoenas entirely. Whether recipients of *congressional* subpoenas can do the same has long been a contested question.

Congress has taken the position that it is not bound to respect common-law privilege assertions and that instead the chair of the investigating committee has final authority to rule on such claims. And while, in practice, congressional investigators will often respect these claims, they do not always. In one episode, a law firm managing partner was threatened with contempt of Congress for refusing to produce documents that his firm argued contained client confidences. Facing possible criminal prosecution and sanctions, the managing partner produced the documents.

But in its 2020 decision in *Trump v. Mazars*, the Supreme Court indicated that, contrary to Congress' longstanding position, common-law privileges *do* apply in the context of congressional investigations. Writing for the court, Chief Justice John Roberts



Courtesy photos

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Jr. noted in dicta that recipients of congressional subpoenas “have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications.”

That sentence reverberated across the small congressional bar. And it drew substantial criticism from defenders of congressional power. One congressional scholar wrote that, insofar as the chief justice “meant to suggest a broad consensus among Congress and the Judiciary that witnesses may defy congressional subpoenas based on the common law attorney-client privilege, that claim is simply wrong.” Said another commentator: “the Supreme Court’s

poorly researched dicta on this point should not be given any weight.”

Now, new language from the U.S. Court of Appeals for the District of Columbia in *United States v. Navarro* suggests that judges heard Chief Justice Roberts loud and clear—and that his view in *Mazars* is taking root.

‘United States v. Navarro’

Navarro arose from a subpoena sent to a former aide to President Donald Trump, Peter Navarro, by the House Select Committee to Investigate the Jan. 6, 2021, Attack on the U.S. Capitol. The Select Committee subpoenaed Navarro for documents and testimony related to the 2020 presidential election and its aftermath.

Navarro claimed the information was shielded by executive privilege and neither produced the subpoenaed documents nor appeared for his scheduled deposition. He was held in contempt of Congress and convicted by a jury, serving a four-month sentence. Navarro appealed.

In a unanimous opinion last week, the D.C. Circuit affirmed Navarro’s conviction. While much of the decision focused on Navarro’s claim of executive privilege and separation of powers arguments, in setting the stage for subsequent discussion, the opinion states that “recipients of congressional subpoenas ‘retain common law and constitutional privileges’ against governmental demands for the disclosure of requested information.” The opinion cites *Mazars* in support.

Why ‘Navarro’ Matters

Although still dicta, the language in *Navarro* has three key implications for those who find themselves under congressional scrutiny.

First, it offers another source of authority—from the D.C. Circuit, no less—to argue that recipients of congressional subpoenas are entitled to invoke

common-law privileges like attorney-client privilege and attorney work product. This added weight will help targets of congressional inquiries and their counsel protect certain information and negotiate with Congress to minimize the scope and nature of their response.

Second, *Navarro* arguably goes a step further than *Mazars*. While *Mazars* claimed that it has “long been understood” that recipients of congressional subpoenas retain common-law and constitutional privileges, *Navarro* outright asserts that these recipients in fact *do* retain such privileges. This shift is subtle but significant: *Mazars* made a historical claim about how the law has been interpreted; *Navarro* affirmatively states what the law is.

Finally, *Navarro* comes at a notable moment for congressional inquiries. Congress has shown itself increasingly willing to wield its investigative powers against companies and private individuals—a trend that is likely to continue regardless of who controls the House and Senate next year. *Navarro*, coupled with *Mazars*, offers clients and their counsel a significant tool to push back against this pressure.

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