

Congressional Subpoenas: If the President Can't Resist Them, Who Can?

Trump hopes he will fare better before the U.S. Court of Appeals for the Second Circuit on Aug. 23, but U.S. Supreme Court precedent renders that unlikely.

BY JUSTIN SHUR, CALEB HAYES-DEATS AND ALLISON GORSUCH

On Aug. 23, the U.S. Court of Appeals for the Second Circuit will hear arguments on President Donald Trump's challenge to a congressional subpoena that demands his records from two financial institutions. Before the district court, Trump did not fare well. The difficulty of his position arises from the breadth of congressional power. A congressional subpoena is valid if it relates to a topic on which "legislation could be had" or on which a committee has oversight. Almost any topic is susceptible to legislation or oversight. Thus, Trump has lost and will likely continue to do so.

The Trump Organization's Arguments

This year, Congress has issued multiple subpoenas to entities that provide financial services to Trump or the Trump Organization. On April 15, the House Committee on Financial Services subpoenaed Deutsche Bank and Capital One for financial and account information. On that same day, the House Committee on Oversight and Reform issued a subpoena to Mazars USA LLP, the president's accountant, seeking audited financial statements and related documents.

In response, Trump filed two suits in federal district courts, one in New York and another in Washington, D.C., to block the financial institutions from complying. Each suit argues that the subpoenas: (1) exceed Congress' authority; (2) usurp executive and judicial functions; and (3) inquire into a citizen's private affairs.



President Donald Trump announces the nomination of Judge Brett Kavanaugh to be Associate Justice at the U.S. Supreme Court, replacing Justice Anthony Kennedy, in the East Room of the White House, on July 9, 2018.

Each of these defenses faces considerable difficulty, and both district courts have rejected them. As one court put it, no court has "interfered with a congressional subpoena [on these bases] in nearly 140 years." Trump hopes he will fare better in appeals to the Second and D.C. Circuits.

Outside of Congressional Authority

Trump first challenges the subpoenas on the grounds that they exceed the issuing committees' authority. But this is unlikely to be fruitful ground.

The Constitution grants the House and the Senate the power to determine their internal rules. Those rules delegate different parts of each chamber's jurisdiction and functions to its separate

committees. Any subpoena issued by a particular committee must fall within its delegated jurisdiction. If a subpoena covers topics that fall outside the committee's delegation, then the recipient may have a basis for challenging it. And the rules contain some surprises.

But ultimately, the House and Senate rules delegate broad jurisdiction to almost every committee. For example, the House Committee on Financial Services has jurisdiction over "banks and banking" as well as "insurance generally." The House Committee on Oversight and Government Reform has particularly broad jurisdiction. In addition to a delegation covering vast subject areas (e.g., "Government management"), it can investigate "any other matter" delegated to another committee. Two committees' jurisdictions can also overlap, even if they are within the same legislative chamber.

Congress' past investigations demonstrate the breadth of its jurisdiction. In 2005, Congress investigated the use of steroids in baseball, citing its authority to regulate drugs. In 1954, the Senate demanded testimony on whether comic books were corrupting American youth. No legislation resulted from either hearing, but a number of non-government entities and private citizens were subpoenaed to produce documents and provide testimony.

Usurping Executive and Judicial Functions

Trump also argues that the subpoenas invade the province of the executive and judicial branches. Only the executive branch has the authority to enforce the criminal laws, and only the judiciary can hold criminal trials. Trump argues that Congress, through these subpoenas, usurps the powers of coordinate branches by attempting to investigate and adjudicate potential violations of criminal laws.

Once again, however, the president's argument is not likely to succeed. Courts have long held that criminal and legislative investigations can overlap. And experience has shown that the same subject can relate to violations of criminal law and potential legislation or congressional oversight. Most famously, the Senate investigated the Watergate scandal as part of its oversight function, even though that scandal resulted in multiple criminal convictions.

Only where a congressional committee's usurpation of another branch's function is "obvious" will a court intervene. But usurpation is not "obvious" unless Congress lacks a legitimate investigatory purpose. The breadth of Congress' investigatory power thus means that findings of usurpation will be rare.

Inquiring Into Citizens' Private Affairs

Finally, Trump accuses the congressional committees of improperly investigating the affairs of a private citizen. While Congress does not possess "the general power of making inquiry into the private affairs of [a] citizen," the Supreme Court has held that this limitation applies only when private affairs are unrelated to a valid legislative purpose.

Thus, the president's arguments once again run up against the breadth of Congress' power to investigate for a valid purpose. Many, if not most, federal laws regulate citizens' private interactions—therefore, there is likely to be a valid legislative purpose of some sort relating to the information sought. And the mere fact that the information sought is private doesn't matter. Subpoenas are available for the specific purpose of obtaining information that would otherwise remain private.

Each of Trump's defenses runs headlong into the breadth of congressional power. For that reason, two district courts have already rejected them. Trump hopes he will fare better before the Second Circuit, but longstanding Supreme Court precedent renders that unlikely.

Justin Shur, Caleb Hayes-Deats & Allison Gorsuch are attorneys at MoloLamken. Their practice focuses on white-collar investigations, appeals and complex civil litigation.