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D.C. Circuit Curtails House of Representatives' Oversight Authority, And Other Developments in Congressional Investigations

On August 31, 2020, the D.C. Circuit issued a significant ruling that severely curtails the House of Representatives' practical power to conduct oversight and investigations. In *Committee on the Judiciary of United States House of Representatives v. McGahn*, No. 19-5331, 2020 WL 5104869, at *1 (D.C. Cir. Aug. 31, 2020), the Court held that the House of Representatives Committee on the Judiciary could not sue civilly to enforce a subpoena issued to former White House Counsel Don McGahn, reasoning that the House needs—and lacks—a statutory basis to file a civil cause of action.¹ We expect that the House of Representatives will seek rehearing *en banc* in the D.C. Circuit. Nevertheless, the ruling presents a timely opportunity to examine Congress' actual and practical abilities to conduct meaningful oversight and investigations, particularly as their oversight activities are increasing in light of the coronavirus crisis.

Congress wields broad powers to investigate. As the Supreme Court outlined recently in *Trump v. Mazars USA, LLP*:

Each House has power “to secure needed information” in order to legislate. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927). This “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” *Id.*, at 174. Without information, Congress would be shooting in the dark, unable to legislate “wisely or effectively.” *Id.*, at 175. The congressional power to obtain information is “broad” and “indispensable.” *Watkins v. United States*, 354 U. S. 178, 187, 215 (1957).²

Congress' subpoena authority is subject to certain legal, political and practical limitations. Congress' investigations must be “related to, and in furtherance of, a legitimate task of the Congress” and “serve a valid legislative purpose.” Congress cannot investigate “for the purpose of law enforcement,” as that task is assigned to the executive and judicial branches under the Constitution. And Congress cannot “inquire into

¹ *Comm. on the Judiciary of United States House of Representatives v. McGahn*, No. 19-5331, 2020 WL 5104869, at *1 (D.C. Cir. Aug. 31, 2020)

² *Trump v. Mazars USA, LLP*, 591 U.S. ____ (2020), slip. op. at 11, available at https://www.supremecourt.gov/opinions/19pdf/19-715_febh.pdf.

private affairs.”³ Subjects of congressional investigations also “retain their constitutional rights throughout the course of an investigation.”⁴

In addition to these substantive limits, there are procedural limits on Congress’ ability to enforce a subpoena. As the Congressional Research Service aptly explains, “The recipient of a duly issued and valid congressional subpoena has a legal obligation to comply, absent a valid and overriding privilege or other legal justification. But the subpoena is only as effective as the means by which it may be enforced. Without a process by which Congress can coerce compliance or deter non-compliance, the subpoena would be reduced to a formalized request rather than a constitutionally based demand for information.”⁵

In contrast to the House, the Senate has statutory authority to sue civilly under 2 U.S.C. § 288d and 28 U.S.C. § 1365(b). If the D.C. Circuit’s ruling stands and the House lacks a civil cause of action, the House is left to enforce a subpoena through one of two ways if the full Congress does not pass, and the President does not sign, authorizing legislation: (1) its inherent contempt power by ordering the Sergeant at Arms to detain an individual until they comply with the subpoena, a practice which has not been used since the 1930s; or (2) voting to hold the recipient in criminal contempt pursuant to 2 U.S.C. §§ 192, 194, and referring the citation to the U.S. Attorney for the District of Columbia for criminal prosecution.⁶

In addition to these legal limits, Congress faces political and practical limitations on its ability to enforce subpoenas. The dynamic political climate means that Congress’ priorities are ever-changing. And as a practical matter, the House is time-constrained by its two-year cycle: it takes significant time to negotiate, and achieve (or not) voluntary cooperation, just as it takes time to legally enforce a subpoena.

Nevertheless, these considerations alone are usually not reason for a company to completely resist voluntary compliance with requests for information, as the reputational and public risks of so doing are often significant. Lawmakers expect companies to comply voluntarily with requests for documents and interviews and to provide important executives in response to invitations to testify at hearings. As a matter of practice, companies almost always voluntarily comply to some extent, as evidenced at the very least by

³ *Id.* at 11-12.

⁴ *Id.* at 12.

⁵ Congressional Research Service, Congressional Subpoenas: Enforcing Executive Branch Compliance (Mar. 27, 2019), available at <https://crsreports.congress.gov/product/pdf/R/R45653>.

⁶ Congressional Research Service, Congressional Subpoenas: Enforcing Executive Branch Compliance (Mar. 27, 2019), <https://crsreports.congress.gov/product/pdf/R/R45653>.

the fact that this Congress has issued subpoenas to only a handful of companies,⁷ while otherwise issuing subpoenas to many executive branch officials.⁸

Whether faced with a voluntary request for information or a subpoena, a company must carefully balance the company's business and legal interests with an imperative to cooperate with lawmakers' investigations. It is extremely common to receive broad requests for some of the company's most sensitive documents and information that Congress has no obligation to maintain as confidential. It is also common to negotiate with the Committee about the scope and timing of the document production, as well as to ask for confidentiality protections. It is also important to understand how a company's response compares to that of other subjects of the investigation. And it is common for the political dynamics between majority and minority members to influence the investigation and a company's strategy in response. Finally, at any point in the process, Congress has the ability to ratchet up pressure on the subject to voluntarily comply, and threaten subpoenas if it views the subject as lacking in cooperation.

A team of legal and other advisors who are experienced in dealing with congressional inquiries and their legal, political, and reputational implications can help advise companies at each step of an investigation, in addition to handling negotiations with committee staff on document production as well as potential hearings, depositions and requests for testimony from company executives. As we have detailed in other [client memos](#), congressional inquiries differ in marked ways from other investigations and legal actions, and a team of trusted advisors is crucial to successfully navigating the legal, political and reputational challenges a congressional inquiry presents.

While the 116th Congress is drawing to a close, companies should continue to expect congressional oversight in the next Congress, particularly with respect to the coronavirus crisis, which is impacting every sector of the government, the economy and Americans' lives. During this Congress, the House of Representatives

⁷ Companies who have received subpoenas in this Congress are Mazars USA, LLP, Deutsche Bank, and Capital One, seeking financial records of President Trump and his family members. The President challenged these subpoenas all the way to the Supreme Court, while the companies took no position on the legal issues in the cases. The Supreme Court held that these subpoenas exceeded the House's investigative authority under the Constitution. *See generally Trump v. Mazars USA, LLP*, 591 U.S. ___ (2020). On September 1, 2020, the House Committee on Oversight and Reform indicated it would issue a subpoena to AbbVie, Inc., as part of its investigation into prescription drug pricing. Press Release, Oversight Committee to Issue Subpoena to AbbVie, Inc., Sept. 1, 2020, available at <https://oversight.house.gov/news/press-releases/oversight-committee-to-issue-subpoena-to-abbvie-inc>.

⁸ Postmaster General (<https://oversight.house.gov/news/press-releases/oversight-committee-to-issue-subpoena-to-dejoy>); Secretary of State and top aides (<https://foreignaffairs.house.gov/2020/7/engel-subpoenas-records-from-pompeo-senate-gop-smear-campaign-against-bidens>); Secretaries of Justice and Commerce (<https://oversight.house.gov/news/press-releases/cummings-issues-statement-on-refusal-of-barr-and-ross-to-produce-subpoenaed>); White House Acting Chief of Staff (<https://oversight.house.gov/news/press-releases/white-house-subpoenaed-in-house-impeachment-inquiry>).

created the Select Subcommittee on the Coronavirus Crisis, which is tasked with examining, among other things, “the efficiency, effectiveness, equity, and transparency of the use of taxpayer funds and relief programs to address the coronavirus crisis” and “reports of waste, fraud, abuse, price gouging, profiteering, or other abusive practices related to the coronavirus crisis.”⁹ Other House committees are likewise pursuing oversight of the private sector amid the coronavirus crisis. A few examples: the Select Subcommittee recently requested documents from Eastman Kodak Company regarding a federal loan to support the production of ingredients for generic drugs and executives’ stock trading prior to the announcement of the loan.¹⁰ House Oversight’s Subcommittee on Economic and Consumer Policy investigated Philips North America Corporation’s contract with the Department of Health and Human Services to supply the federal government with low-cost ventilators,¹¹ issuing a report and requesting that the HHS Inspector General further investigate potential taxpayer waste.¹² The Energy and Commerce’s oversight subcommittee is investigating health and dental insurers’ policies and practices amid the coronavirus crisis,¹³ and the Committee on Small Business is investigating contractors working to process Emergency Injury Disaster Loan applications.¹⁴

As these examples suggest, for each request for information directed specifically to a company, there are many more requests to executive branch agencies investigating various aspects of the government’s response to the coronavirus crisis that may implicate the private sector. For example, the Select Subcommittee is investigating the Treasury Department’s and Small Business Administration’s management of the Paycheck Protection Program (“PPP”) amid allegations that banks favored larger companies to the detriment of small businesses, and has sent requests for documents to these agencies as

⁹ H. Res. 935 § 3(a).

¹⁰ Press Release, Chairs Clyburn, Waters, Maloney Seek Documents on Kodak Loan and Windfall For Executives, Aug. 5, 2020, available at <https://coronavirus.house.gov/news/press-releases/chairs-clyburn-waters-maloney-seek-documents-kodak-loan-and-windfall-executives>.

¹¹ Letter from Chairman Raja Krishnamoorthi to Victor Rocha, Chief Executive Officer, Philips North American Corporation, Apr. 15, 2020, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-04-15.RK%20to%20Rocha%20Philips%20re%20Triology%20Evo.pdf>.

¹² Letter from Chairman Raja Krishnamoorthi to Christi Grimm, Acting Insepctor General, Department of Heath and Human Services, Aug. 6, 2020, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-08-06.RK%20to%20Grimm-%20HHS%20IG%20re%20Ventilator%20Procurement%20Contract.pdf>.

¹³ Press Release, E&C Launches Investigation into Health and Dental Insurers, Aug. 13, 2020, available at <https://energycommerce.house.gov/newsroom/press-releases/ec-launches-investigation-into-health-and-dental-insurers>.

¹⁴ Letter from Chairman James E. Clyburn and Chairwoman Nydia M. Velazquez to Jay Farner, Chief Executive Officers, Quicken Loans, July 30, 2020, available at <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-07-30.Clyburn%20to%20Rocket%20Loans%20re%20Contracting.pdf>.

well as to multiple banks.¹⁵ It is also investigating potential conflicts of interest and vaccine selection processes of Operation Warp Speed (“OWS”), the current administration’s program to develop, manufacture and distribute coronavirus vaccines, and has sent requests for information to the Chief Advisor of OWS, the Secretary of Health and Human Services, as well as a federal contractor advising OWS.¹⁶

No matter who is in control of the Congress or the executive branch, Congress’ important imperatives of protecting Americans’ lives as well as protecting against waste, fraud, and abuse likely means that the private sector will continue to face a Congress eager to investigate.

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¹⁵ Press Release, Select Subcommittee Launches Investigation Into Disbursement of PPP Funds, June 15, 2020, available at <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-disbursement-ppp-funds>.

¹⁶ Letters from Chairman James E. Clyburn to Secretary Alex M. Azar II, Department of Health and Human Services; Dr. Moncef Slaoui, Chief Advisor, Operation Warp Speed; and David S. Harris, Chief Executive Officer, Advanced Decision Vectors LLC, Aug. 12, 2020, available at <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-08-12.Clyburn%20to%20Harris%20re%20Operation%20Warp%20Speed.pdf>; <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-08-12.Clyburn%20to%20Slaoui%20re%20Operation%20Warp%20Speed.pdf>; <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-08-12.Clyburn%20to%20Azar%20re%20Operation%20Warp%20Speed.pdf>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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