CONGRESS'S POWER TO INVESTIGATE CRIME: DID TRUMP KILL *KILBOURN*?

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Can Congress investigate crime? Targets of congressional investigations have tried to argue for decades that the Constitution grants Congress no authority to investigate illegal conduct, but instead vests this power exclusively in the executive and judicial branches. Former President Donald Trump was one of the most recent litigants to make this claim, repeatedly invoking a Supreme Court case from 1881, Kilbourn v. Thompson*, despite the fact that the Court condemned this opinion decades ago as "severely discredited." In contrast, Congress has successfully asserted its own constitutional authority to investigate all types of activity—including illegal conduct—not to prosecute the offenders, but to inform legislation and fulfill its various other legislative branch responsibilities.*

This Article sheds light on this recurrent debate by tracing its evolution across three historical periods. Since Kilbourn *is central to the claims of targets of congressional investigations, the Article begins with a reexamination of that case. It unearths surprising new details about Congress's original investigation and shows how the Court devalued Congress's investigative function, mischaracterized Congress's contempt power as judicial in nature, and adopted an approach that would require Congress to yield to other branches' parallel investigations. Second, a review of more than 100 subsequent court decisions tracks the dismantling of* Kilbourn's *premises over time. It shows how the Court corrected its errors, recognized Congress's investigative power as derived from its legislative branch authority rather than having judicial origins, and approved numerous congressional investigations while parallel criminal inquiries were ongoing. Third, this Article examines Trump's extensive but ultimately unsuccessful campaign before courts of all levels—including the Supreme Court—to resuscitate* Kilbourn *to block Congress from investigating his alleged crimes. In response to the question of whether Congress may investigate crime, this Article concludes that the answer is undoubtedly yes. Rather than bringing* Kilbourn *back to life, Trump's efforts had the opposite effect, creating a surfeit of new precedents that solidified Congress's authority.*

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INTRODUCTION

In 2021, former President Donald Trump sued to block the House Select Committee to Investigate the January 6th Attack on the United States Capitol ("January 6th Committee") from subpoenaing records from the National Archives regarding the Capitol insurrection and Trump's efforts to prevent the peaceful transfer of power. Among other claims, Trump declared that Congress had no authority to investigate his alleged crimes. The specific legal argument he and his attorneys made was that the Constitution vests authority to investigate illegal conduct exclusively in the executive and judicial branches. They asserted that "any investigation into alleged claims of wrongdoing is a quintessential law-enforcement task reserved to the executive and judicial branches" and that "Congress is not a law-enforcement branch of government."[1]

1. Brief for Plaintiff-Appellant at 22, Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021) (No. 21-5254).

The stakes of courts accepting this argument would be immense. If Trump or other targets of congressional investigations were to prevail, Congress's investigative authority would be at its weakest point when examining the most treacherous abuses of power. A committee could inquire about conduct short of illegality but could not compel witness testimony or the production of documents if it identified potential criminal conduct. A committee that uncovered criminal wrongdoing would have to significantly limit its inquiries whenever executive branch prosecutors claimed they were looking into a matter, degrading Congress's investigative authority and drastically curtailing investigations like the inquiry conducted by the January 6th Committee.

This Article focuses squarely on the foundational question of whether the Constitution grants authority to Congress to investigate potentially illegal conduct as part of its many legislative branch functions. Although this examination applies widely to all targets of congressional investigations, its resolution is particularly significant as Trump prepares for a second term after publicly threatening to weaponize the federal justice system if reelected.[2] It also has renewed urgency in light of the Supreme Court's recent decision on presidential immunity from criminal prosecution.[3]

Can Congress investigate crime? And if so, may it do so simultaneously with criminal prosecutors? The debate over these questions has a long history, and Trump is only the latest in a long line of litigants to raise this challenge. For many decades, targets of congressional investigations have sought to avoid complying with subpoenas by arguing that Congress lacks authority to investigate their crimes. For legal support, they have relied on a Supreme Court opinion from 1881, *Kilbourn v. Thompson*.[4] *Kilbourn* did not involve a criminal investigation, but a civil bankruptcy, and it did not involve federal prosecutors, but a bankruptcy court. However, the Court concluded that since a bankruptcy court was already handling the case, Congress had no jurisdiction to demand further testimony or documents from a witness in the underlying matter.

Targets of congressional investigations have tried to apply *Kilbourn*'s framing to argue that Congress is likewise barred from investigating criminal conduct and invading the province of law enforcement. This

2. *See, e.g.*, Martin Pengelly, *Donald Trump Vows to Lock Up Political Enemies if He Returns to White House*, GUARDIAN (Aug. 30, 2023, 11:55 AM), https://www.theguardian.com/us-news/2023/aug/30/trump-interview-jail-political-opponents-glenn-beck [https://perma.cc/9RV5-8X9Q].

3. Trump v. United States, 603 U.S. __ (2024).

4. Kilbourn v. Thompson, 103 U.S. 168 (1881).

approach, which I refer to as an *exclusive* separation of powers framework, pits committee investigators against criminal prosecutors in a zero-sum game and recognizes no distinction between investigating criminal conduct for the purpose of prosecuting an offender and doing so for the many purposes served by the legislative branch. Rather than allowing for concurrent investigations, this approach prioritizes the interests of prosecutors and insists that Congress's interests must yield to them.

On the other hand, congressional investigators have zealously safeguarded their authority to investigate all types of activity, including criminal conduct, to fulfill their legislative branch responsibilities, even while criminal investigators may be examining the same set of facts. Under this *parallel* separation of powers framework, each branch has authority to investigate concurrently, but for different constitutional objectives. Investigations are a common means to distinct ends: the legislative branch gathers information to assess problems and craft solutions for the nation, among other purposes, while prosecutors collect evidence to convict and punish individual perpetrators.

I shed light on this recurring debate by tracing its long-term evolution across three historical periods.

First, since *Kilbourn* is central to the claims of targets of congressional investigations, I begin with a detailed reexamination of that case. Part I unearths surprising new details about Congress's original investigation through contemporaneous floor debates, archived court filings, and additional House resolutions that were never mentioned in the Court's opinion and do not appear to have been raised in the academic literature. This evidence reveals that Congress conducted a much more sweeping investigation than the Court acknowledged. It also illustrates how the decision's doctrinaire framework mischaracterized and devalued Congress's investigative function. The opinion treated Congress's investigation as an affront to the Judiciary and cast Congress's investigative function—its contempt authority in particular—as a judicial power that Congress could borrow only in narrow instances referenced in the Constitution that resemble judicial proceedings, such as disciplining its own members or impeaching and trying federal officials. This new evidence, which largely had been lost to history, demonstrates that the Court's siloed view ignored how congressional investigations regularly evolve and serve multiple constitutional goals at once. It also buttresses and amplifies the findings of other prominent scholars who demonstrated long ago that the Court was wrong historically when it suggested the Founders never envisioned Congress holding witnesses in contempt when necessary for its legislative function.[5]

5. The two most prominent studies were published in 1926 in the lead-up to the Court's decision in McGrain v. Daugherty, 273 U.S. 135 (1927). The first was a

Part II pulls the historical thread of *Kilbourn* over the next century and a half. Based on a review of more than 100 court decisions, it demonstrates how *Kilbourn*'s core premises were steadily dismantled over time. The Court rejected that opinion's categorization of contempt as a judicial function and instead held that this power is inherent in, and integral to, the Constitution's grant of authority to the legislative branch. Without directly overruling *Kilbourn*, the Court eventually condemned the decision as "severely discredited,"[6] and as the Court moved from an exclusive to a parallel separation of powers approach, it approved multiple investigations in which Congress set out with the explicit purpose of examining criminal conduct, including at the same time as prosecutors.

Although the Court began to observe periodically that Congress may not engage in a "law enforcement" purpose, it did not explain what this means. Neither of the two cases it often cites for this premise, *McGrain v. Daugherty* and *Quinn v. United States*, found such a prohibited purpose.[7] In fact, this review of more than a century of case law identified no appellate or Supreme Court ruling that Congress had engaged in an unconstitutional law enforcement function. Based on this history, the prohibited purpose referred to by the Court appears to relate to Congress conducting an investigation for the sole purpose of prosecuting an individual absent any legitimate legislative branch interest.[8] For this reason, when Congress identifies potential criminal activity as part of its investigations, it routinely makes criminal referrals to the Justice Department so the Department can determine whether to prosecute the offenders.[9] This Part also details how the Court came

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two-part article by C.S. Potts, who became Dean of the School of Law at Southern Methodist University a year later. C.S. Potts, *Power of Legislative Bodies to Punish for Contempt* (pts. 1 & 2), 74 U. PA. L. REV. 691 (1926), 74 U. PA. L. REV. 780 (1926). The second was written by James Landis, then Dean of Harvard Law School. James Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (Dec. 1926). Both are discussed in detail below.

6. Hutcheson v. United States, 369 U.S. 599 (1962).

7. *See, e.g.*, Trump v. Mazars USA, LLP, 591 U.S. 848, 863 (2020) ("Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.' [citing Quinn v. United States, 349 U.S. 155, 161 (1955)] Thus Congress may not use subpoenas to 'try' someone 'before [a] committee for any crime or wrongdoing.' [citing McGrain v. Daugherty, 273 U.S. 135, 179 (1927)]").

8. One important exception the Court has recognized is Congress's "inherent" constitutional authority to prosecute and imprison individuals for contempt of Congress, although Congress has not used this authority in recent years. *See* CHRISTOPHER M. DAVIS ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 52–55 (2021).

9. *See Congressional Criminal Referrals Precedents*, CO-EQUAL (Dec. 2022), https://www.co-equal.org/guide-to-congressional-oversight/congressional-criminal-referrals-precedents#exec-summary [https://perma.cc/9DV2-SR9P] (noting that Congress has

to recognize other constitutional limitations to Congress's investigative power that targets may utilize, such as the Fifth Amendment's right against self-incrimination and executive privilege.

This Article does not resolve the separate and important debate about what happens when Congress trains its focus on criminal prosecutors and seeks information from them directly. Other scholars have debated, for example, whether executive privilege does, or should, allow the executive branch to withhold information from Congress about open and even closed criminal cases.[10] While I touch on these issues briefly in Part II, I focus primarily on Congress's fundamental constitutional investigative authority to demonstrate how *Kilbourn* was wrongly decided from the outset and how the Court came to abandon its core principles.

Part III provides the first detailed examination of Trump's disastrously unsuccessful campaign to bring *Kilbourn* back to life and redeploy its exclusive framework to block Congress from investigating his alleged crimes. I specifically focus on Trump because he and his aides made this claim more than any other litigant in recent history. As a result, there is an extensive record to examine, and the results are unmistakable. Trump and his aides made this claim dozens of times in written filings and oral arguments before courts of all levels—including the Supreme Court in *Trump v. Mazars*. They made them in response to the January 6th Committee and several other congressional investigations; they made virtually every conceivable legal iteration and factual variant of this claim; and they even enlisted the Justice Department to weigh in repeatedly on their behalf. Yet they never succeeded. Their claims were rejected, disregarded, or ignored every time as courts concluded that *Kilbourn* was "largely impotent as a guiding constitutional principle."[11]

So did Trump kill *Kilbourn*? Is it a dead letter? Not entirely. As mentioned, the Supreme Court has not formally overruled the case, but instead has criticized it while allowing it to teeter on an increasingly precarious legal precipice. In addition, as discussed in Part III, a few notable holdouts currently in the minority, including Justice Clarence Thomas and Judge Neomi Rao, still cling to *Kilbourn* despite its widely recognized deficiencies and the Supreme Court's repeated rejections

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referred more than 180 individuals and organizations to the Justice Department for criminal investigation since the 1920s).

10. *See, e.g.*, Emily Berman, *Executive Privilege Disputes Between Congress and the President: A Legislative Proposal*, 3 Alb. Gov't L. Rev. 741, 788–89 (2010); Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 Notre Dame L. Rev. 1373, 1378 (2002).

11. Trump v. Comm. on Oversight & Reform, 380 F. Supp. 3d 76, 99 (D.D.C. 2019).

of its premises over many decades.[12] So while *Kilbourn* may not be entirely defunct, it appears to have devolved into a vestigial organ of the *corpus juris*.

Part IV draws out some of the real-world and theoretical implications of this review for targets of congressional investigations, academics, courts, prosecutors, and Congress. In response to the question of whether Congress has authority to investigate crime, the answer is undoubtedly yes, as long as Congress is serving a valid legislative branch purpose. As I have pointed out elsewhere, it has become shorthand to refer to Congress's investigative powers as needing to serve a "valid legislative purpose," but the more precise description is that they must serve a "valid legislative *branch* purpose," which encompasses all of Congress's powers rather than legislating alone.[13] Targets may assert other constitutional defenses, but litigants will stand on extraordinarily weak legal footing if they defy subpoenas solely based on the claim that Congress lacks authority under the Constitution to investigate illegal activity. Although some scholars have observed that Congress's investigative powers were degraded during Trump's presidency,[14] others have identified precedents that may favor Congress.[15] This analysis contributes to this debate by illustrating how Trump's insistent, exhaustive, and uniformly unsuccessful legal efforts not only backfired, but created a surfeit of precedents that had the opposite of their intended effect: instead of bringing *Kilbourn* back to life, they should put to rest lingering doubts about whether Congress has authority to investigate criminal conduct.

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12. *See, e.g.*, Trump v. Mazars USA, LLP, 591 U.S. 848, 873–76, 885–87 (2020) (Thomas, J., dissenting). Although Thomas seems to pine for a bygone era with an enfeebled Congress (and proposed overruling the entire line of cases that limited *Kilbourn*'s reasoning), seven members of the Court declined to accept his view. *See also* Trump v. Mazars USA, LLP, 940 F.3d 710, 718–22 (D.C. Cir. 2019) (Rao, J., dissenting).

13. David Rapallo, *House Rules: Congress and the Attorney-Client Privilege*, 100 Wash. U. L. Rev. 455, 460 (2022) (including not only Congress's authority to legislate, but to impeach executive and judicial branch officials, discipline its own members, consent to emoluments, advise and consent to nominees, and serve other legislative branch functions). *See also Mazars*, 591 U.S. at 862–63 (upholding Congress's investigative powers that relate to "a *legitimate task* of the Congress") (citing Watkins v. United States, 354 U.S. 178, 187 (1957)) (emphasis added); Landis, *supra* note 5, at 213 (noting that Congress's power to investigate is "no less essential for legislation" than for any other legislative branch function and that its "[c]ompulsory powers, if necessary to one, are equally so to the other").

14. *See, e.g.*, Michael D. Bopp et al., *How President Trump's Tangles with Committees Have Weakened Congress's Investigative Powers*, 37 J.L. & Pol. 1, 19 (2021).

15. *See, e.g.*, Jonathan David Shaub, *The Mixed Legacy of the January 6 Investigation for Executive Privilege and Congressional Oversight*, 37 Const. Comment. 421, 422 (2022).

Finally, Part IV highlights how critical Congress's authority is to investigate presidential crimes, especially in the wake of the Supreme Court's recent decision in *Trump v. United States*. Since Justice Roberts's decision in that case recognized absolute immunity for presidents from criminal prosecution for the exercise of "core" presidential powers and presumptive immunity for other official acts, Congress's responsibility to closely examine executive action is more important than ever to the nation's system of checks and balances. Part IV offers preliminary observations on this issue, noting that Roberts's opinion appears to recognize Congress's authority in this area not only for impeachment, but for all legislative branch purposes.

I. *Kilbourn* and Congress's Original Investigation Reexamined

A. The Court's Opinion

In an opinion by Justice Samuel Miller in 1881, the Supreme Court concluded that the House of Representatives lacked authority to hold a real estate broker named Hallet Kilbourn in contempt.[16] Underlying the Court's decision was an exclusive separation of powers framework that envisioned the branches functioning in distinct silos with little, if any, overlap. The Court hailed this partitioning of authorities as "one of the chief merits of the American system of written constitutional law" and noted that "the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."[17] The Court also stated that it is "essential" that "the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others."[18]

In describing Congress's investigation, the Court referred to a House resolution passed on January 24, 1876.[19] That resolution stated that the United States had placed funds with the banking house of Jay Cooke & Co., which had gone into bankruptcy proceedings in federal court, and it noted that the Navy Secretary in particular had made "improvident deposits."[20] The resolution referred to a "real-estate pool" brokered by Kilbourn in which the bank had a large interest, as well as to a settlement made by the bankruptcy trustee that may have harmed creditors, including the United States.[21]

16. Kilbourn v. Thompson, 103 U.S. 168, 196 (1881).
17. *Id*. at 190–91.
18. *Id*.
19. *Id*. at 168.
20. *Id*.
21. *Id*.

The Court found that the House acted outside its jurisdiction when it held Kilbourn in contempt for refusing to answer questions and produce documents regarding the real estate pool.[22] Because a district court in the Eastern District of Pennsylvania was already addressing the bankruptcy, the Court held that the House "not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of government, because it was in its nature clearly judicial."[23] Throughout the opinion, the Court criticized the House's investigation as an affront to the Judiciary. The Court queried: "what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?"[24] The Court pressed its outrage further: "What was this committee charged to do? To inquire into the nature and history of the real-estate pool. How indefinite!"[25]

The Court argued that the House's investigation "could result in no valid legislation on the subject."[26] The Court did this by narrowly defining the scope of the House's inquiry in terms identical to the bankruptcy court's remit and by arguing repeatedly that the bankruptcy court was the only body that could provide remedies. The investigation could "*only* be properly and successfully made by a court of justice," and remedies could be provided "*only* by a judicial proceeding."[27] If the federal government was a creditor, "the *only* legal mode of enforcing payment of the debt is by a resort to a court of justice."[28] The court had the "*whole* matter before it" and would exercise "*all* the power."[29]

The Court also faulted the House for not identifying its "final action" before it launched its investigation, asserting that there was "no hint" of Congress's intentions.[30] Although the Court raised the possibility that Congress might pass legislation to restrict certain corporate activities, it dismissed the idea because the resolution included "no suggestion of the kind."[31]

Underpinning the Court's opinion was its characterization of the contempt power as a "judicial" tool that Congress could use only in limited circumstances that resemble judicial proceedings, such as disciplining its own members or impeaching and trying government

22. *Id*. at 196.
23. *Id*. at 192–93.
24. *Id*. at 194.
25. *Id*. at 195.
26. *Id*.
27. *Id*. at 193 (emphasis added).
28. *Id*. (emphasis added).
29. *Id*. at 194 (emphasis added).
30. *Id*.
31. *Id*. at 195.

officials.[32] In contrast, the Court suggested, but did not formally conclude, that Congress lacks power to hold witnesses in contempt when acting pursuant to its legislative power.[33] Although there were numerous British precedents in which the House of Commons used contempt to aid its legislative function, the Court rejected this parallel by claiming that the origin of the power in Parliament "goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament."[34] The Court argued that the power of the Commons had "no application" to the House of Representatives, "which exercises no functions derived from its once having been a part of the highest court of the realm."[35]

The Court rejected the argument that the contempt power was "necessary to enable either House of Congress to exercise successfully their function of legislation."[36] Although the Court claimed it was deciding the case "without passing upon the existence or non-existence of such a power in aid of the legislative function,"[37] its judicial/non-judicial dichotomy was necessary to distinguish its previous decision in *Anderson v. Dunn*, which had stood for more than fifty years as the authoritative statement on Congress's power to hold individuals in contempt.[38]

In *Anderson*, the Court confirmed that although the Constitution provides no explicit authority for Congress to conduct investigations or hold private citizens in contempt, this power is implied as necessary for Congress to carry out its constitutional functions.[39] The alternative, the Court warned, "obviously leads to the total annihilation of the power of the House of Representatives to guard itself against contempts."[40] In *Anderson*, the House had sought to compel the appearance of a private individual, but did not describe the specific authority under which it acted.[41] Yet the Court refused to presume that the House acted outside its authority.[42] The Court never suggested that Congress's contempt

32. *Id*. at 189–92.
33. *Id*. at 189.
34. *Id*. at 183.
35. *Id*. at 189.
36. *Id*.
37. *Id*. at 189. By weighing in on this subject at all, the Court contradicted its own counsel "to decide only what is necessary to the case in hand." *Id*. at 205.
38. Anderson v. Dunn, 19 U.S. 204 (1821).
39. *Id*. at 225–26.
40. *Id*. at 228.
41. *Id*. at 225, 234 (noting that "there is nothing on the face of this record from which it can appear on what evidence this warrant was issued").
42. *Id*. at 234.

powers were limited to fulfilling only some of Congress's powers and not others, but declared that Congress's contempt authority is "indispensable to the attainment of the ends of their creation."[43] While recognizing that this authority could be abused, the Court compared Congress to courts, which are also vested with authority to insist on "submission to their lawful mandates," and highlighted that Congress operates under the eye of public accountability.[44]

The Court in *Kilbourn* conceded that *Anderson* was analogous to *Kilbourn* "in many respects" and noted that neither provided much information about the House's objectives.[45] The Court admitted that in *Anderson*, "[n]either the warrant nor the plea described or gave any clew to the nature of the act which was held by the House to be a contempt."[46] But instead of following *Anderson*'s deference to Congress, the Court in *Kilbourn* found that *Anderson* may have involved an effort to discipline a House member—an appropriate judicial function of Congress's, in the Court's view—while in *Kilbourn* the House was acting solely pursuant to its non-judicial power of legislating.[47]

Finally, although *Kilbourn* did not relate to a criminal prosecution, the opinion suggested a parallel. Regarding the real estate pool, the Court asked, "Is it charged with any crime or offence? If so, the courts alone can punish the members of it."[48] Perhaps the Court was reflecting a concern that Congress itself was seeking to punish individuals rather than allowing the process to play out in the judicial sphere. However, it blurred the distinction between a court punishing a criminal act and Congress investigating a possible criminal act for non-punishment purposes. Although not part of the holding, this dictum suggested that if a criminal case were initiated, the executive and judicial branches should have all the power, and Congress should halt its efforts to obtain information through testimony or documentary evidence.

B. Academic Critiques

Scholars long ago demonstrated that *Kilbourn* mischaracterized Congress's investigative and contempt powers as judicial in nature.

43. *Id*. at 226.

44. *Id*. at 226–27 ("Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation.").

45. Kilbourn v. Thompson, 103 U.S. 168, 196 (1881).

46. *Id*. at 196.

47. *Id*. *See also id*. at 193–197 (stating that "the whole aspect of the case would have been changed" if the House were using its impeachment power, but this could not be inferred from the resolution).

48. *Id*. at 195.

First came a comprehensive two-part article in 1926 by C.S. Potts.[49] He showed how colonial legislatures used the contempt power routinely to oversee government entities,[50] how the Framers viewed it as inherent in the grant of power to the legislative branch,[51] and how "the nature and extent of the power was scarcely affected at all by the advent of written constitutions and the doctrine of the separation of the powers of government."[52] Potts illustrated how Congress's contempt power was "not an end itself but a means to an end, a part of the mechanism, so to speak, by which the legislative mill is enabled to turn out its grist."[53]

Next came a pivotal analysis by John Landis, then Dean of Harvard Law School.[54] Like Potts, he described colonial assemblies and state legislatures exercising contempt for legislative purposes,[55] offered precedents from early Congresses,[56] and demonstrated how Congress and courts used contempt as a tool "to effectuate the main purposes of their existence."[57] He also rejected *Kilbourn*'s distinction between judicial and non-judicial functions of Congress.[58]

Both Potts and Landis exposed the inaccuracy of *Kilbourn*'s claim that the contempt power originated in Britain as a judicial power that had "come down from the days when the two houses sat as one body, the High Court of Parliament."[59] As Potts pointed out, the House of Commons did not use contempt to vindicate its powers or privileges until the 1500s—"nearly three hundred years *after* the Commons had become a separate body."[60] Potts noted that *Kilbourn*'s distinction between Congress's "judicial" and "legislative" capacities was "essentially unsound,"[61] and Landis also put the lie to this claim.[62]

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49. Potts, *supra* note 5, at 817 (referring to the *Kilbourn* decision as having done "more than any other to unsettle the law governing legislative contempts").

50. *Id*. at 708–09.

51. *Id*. at 712–13.

52. *Id*. at 699.

53. *Id*. at 782–83.

54. Landis, *supra* note 5.

55. *Id*. at 165–69 (noting that adoption of the Constitution "was no break with the past" in this regard).

56. *Id*. at 170–94.

57. *Id*. at 159–60.

58. *Id*. at 214.

59. Potts, *supra* note 5, at 693; Landis, *supra* note 5, at 160.

60. Potts, *supra* note 5, at 696–97 (emphasis added), 780, 817.

61. *Id*. at 817 ("[N]o distinction is made between the different functions that a legislative body may be called on to perform. All alike are protected by the contempt powers inherent in such bodies.").

62. *Id*. at 160 (documenting how "the earliest commitments for contempt postdated the era, if such there was, of the functioning of Parliament as a court").

Both also noted how *Kilbourn* disregarded the "well-established presumption in favor of the legality and regularity of official action" by coordinate branches of government.[63] Potts decried judges who "substitute their judgment of facts and remedies for that of the legislative bodies to whose judgment and discretion the matter is committed, and to say that because *they* cannot see any appropriate legislative remedy, none exists."[64] Landis warned against the Court imputing subversive motives to the House, which is "contrary to the traditional attitude of courts in reviewing the constitutionality of legislative action."[65]

In response to the Court's claim that the investigation could result in no valid legislation, Potts quickly ticked off a variety of bills Congress might have considered, including preventing future government officials from making similar "improvident" deposits, limiting the power of bankruptcy trustees to prefer some creditors over others, and regulating real estate pools in the District of Columbia, over which the Constitution granted jurisdiction to Congress.[66] Landis agreed that the Court erred in demanding "[d]etailed definitiveness of legislative purpose" and warned that "investigators cannot foretell the results that may be achieved."[67]

Criticism of *Kilbourn* was not uniform. One early commentator praised the opinion as "an outstanding landmark in the defense of individual rights."[68] He cited Alexander Hamilton's concern about the tendency of legislative power "to absorb every other" and that Congress might exert "an imperious control" over other branches.[69] He also recounted Dean Wigmore's denunciation of Congress's "debauch of investigations" at the time "with a stench that has not passed away."[70]

Although these arguments reflect more of a general disdain for Congress than a constitutional prohibition, such disdain may explain why the Court was so dismissive towards the House. In fact, when

63. Potts, *supra* note 5, at 815.

64. *Id*. at 817 (emphasis in original).

65. Landis, *supra* note 5, at 218.

66. Potts, *supra* note 5, at 819–20. *See also* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW 230 (2007) (noting that the Court was "far too restrictive as to what constituted a legitimate purpose of the House" and that the "inability to see these legitimate purposes in the committee's inquiry was the Court's failure, not the committee's") (citing Potts, *supra* note 5, at 819).

67. Landis, *supra* note 5, at 217; M. Nelson McGeary, *The Congressional Power of Investigation*, 28 NEB. L. REV. 516, 517–18 (1949) (noting that the "bulk of investigations are conducted for the principal purpose of obtaining information to help Congress in drafting legislation").

68. Frederic R. Coudert, *Congressional Inquisition vs. Individual Liberty*, 15 VA. L. REV. 537, 547 (1929).

69. *Id*. at 538 (quoting Federalist No. 17).

70. *Id*. at 544 (quoting 19 ILL. L. REV. 452, 453 (1925)).

Justice Miller authored the opinion, he apparently believed *nobody* in Congress should exercise *any* type of investigative power. In a private letter penned a year later, he explained the message he hoped to send with his opinion: "[I]t is time that it was understood that courts and grand juries are the only inquisitions into crime in this country. I do not recognize the doctrine that Congress is the *grand inquest of the nation*, or has any such function to perform."[71]

C. New Revelations About Congress's Investigation

Textbook treatments of *Kilbourn* describe the inquiry launched by the House in 1876 after Jay Cooke & Co. filed for bankruptcy.[72] They explain that the bank invested in the real estate pool, that Kilbourn was held in contempt when he refused to provide information about it, and that the Court found the investigation was outside the House's jurisdiction because it could not result in any relief other than measures the bankruptcy court was considering.[73] Finally, they note that this opinion offered a restrictive vision of separation of powers that came to be viewed as deficient in many respects.[74] Academic critiques similarly recount the facts as set forth by the Court.[75]

Suppose, however, that instead of starting in 1876, Congress launched its investigation two years earlier, *before* Jay Cooke & Co.'s bankruptcy settlement. Suppose Congress, instead of examining a purely private enterprise, was examining massive corruption across the entire District of Columbia government involving real estate speculation,

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71. Charles Fairman, Mr. Justice Miller and the Supreme Court 1862-1890, 333–34 (1939) (emphasis in original). Politics also may have played a role. Miller was active in Republican politics before President Lincoln nominated him to the Court and served as a member of the Republican-majority Electoral Commission in the wake of the contested election of 1876, where he voted to seat Rutherford B. Hayes despite his loss of the popular vote to Democratic candidate Samuel J. Tilden. *Id.* at chs. II, III, and XII.

72. *See, e.g.*, William B. Lockhart et al., Cases and Materials on Constitutional Rights and Liberties 470 (4th ed. 1975); Edward L. Barrett, Jr. & William Cohen, Constitutional Law: Cases and Material 1376 (6th ed. 1981); Albert B. Saye, American Constitutional Law: Cases and Text 128 (West Grp. 2d ed. 1979) (1975); Gerald Gunther, Cases and Materials on Constitutional Law 1420 (9th ed. 1975).

73. Lockhart et al., *supra* note 72, at 470 (quoting Kilbourn v. Thompson, 103 U.S. 168, 193, 195 (1881)).

74. *Id*. *See also* Barrett & Cohen, *supra* note 72, at 1376 (noting that Justice Miller's opinion was "not one of his best" and "gave scant recognition to the power of Congress to conduct investigations to obtain information for future legislation").

75. *See, e.g.*, Potts, *supra* note 5, at 818; Landis, *supra* note 5, at 215; Gerald D. Morgan, *Congressional Investigations and Judicial Review, Kilbourn v. Thompson Revisited*, 37 Calif. L. Rev. 556, 566 (1949); McGeary, *supra* note 67, at 516–18; Todd David Peterson, *Contempt of Congress v. Executive Privilege*, U. Pa. J. Const. L. 77, 82–84 (2011).

public works contracts, street improvement programs, and self-dealing involving millions of taxpayer dollars. Suppose that instead of focusing on the actions of private individuals, Congress was also investigating legislative and executive branch officials—including Jay Cooke's brother Henry, whom President Ulysses Grant had appointed to be the District's first governor. And suppose Henry had *personally* invested in the real estate pool, had an ownership interest in his brother's bank, and had resigned a week before the bank failed. This all happened, as I show below.

1. The Origin of Congress's Investigation

Although the Court in *Kilbourn* claimed the House gave no "hint" of its legislative purposes, the text of the January 24, 1876, resolution referred back to an investigation initiated in the previous Congress.[76] The resolution explicitly mentioned the "late joint select committee to inquire into the affairs of the District of Columbia," which had been established two years earlier to examine the real estate pool and other matters, but stated that the "matter of the real estate pool was only partially inquired into" and the earlier joint select committee's work was left unfinished.[77] This reference was more than a hint—the resolution incorporated an investigation from the previous Congress, demonstrating that they shared investigative and legislative goals. Yet the Court failed to describe any part of that previous investigation. Because the resolution referenced the previous investigation explicitly, it is critical to assessing the House's purposes, as well as its decision in 1876 to renew this inquiry and dramatically expand its scope.

The decision to investigate a real estate pool in the District of Columbia did not occur in a vacuum, but in the wake of two massive scandals in 1873: the implosion of one of the country's largest banks led by Jay Cooke, which resulted in a national economic crisis; and the implosion of D.C.'s municipal government led by his brother, Henry Cooke, which resulted in a national political crisis. In a devastating week for the nation (and the Cooke family), Jay's bank collapsed just one week after Henry resigned as Governor.[78]

The Panic of 1873 was the most severe global economic crisis in history up to that point.[79] It was ignited in the United States by the

76. The full text of the resolution is reprinted in H.R. Rep. No. 44-242, at 1 (1876).
77. *Id.*
78. *Resignation of Gov. Cooke*, Evening Star, Sept. 13, 1873, at 1; *The Great Financial Crash*, Alexandria Gazette, Sept. 20, 1873, at 2.
79. *See* Nicolas Barreyre, *The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of American Politics*, 10 J. Gilded Age &

collapse of Jay Cooke & Co., which was followed by a run on other banks that swept across the nation.[80] As the *New York Times* reported, the Stock Exchange was "so completely demoralized that it became evident that it was folly to continue buying and selling."[81] The subsequent depression spread to multiple sectors and resulted in the failure of hundreds of businesses, massive job losses, and the collapse of wages nationwide.[82]

At the same time, grave questions were being raised about corruption in the District's newly formed government. Pursuant to the Constitution's District Clause, Congress passed the Organic Act in 1871 to unite Washington, Georgetown, and Washington County as a single territory with a new government.[83] President Grant appointed Henry Cooke as Governor.[84] With Alexander "Boss" Shepherd spearheading post-war development projects through the Board of Public Works, the District saw significant improvements and "an extraordinary market in land speculation and building."[85] After several years under Cooke's leadership, however, District citizens, property owners, and taxpayers began sending petitions to Congress complaining that District officials were spending taxpayer funds on a raft of unnecessary and "worthless"

PROGRESSIVE ERA 403 (2011) (noting that the "Great Depression" commonly referred to the Panic of 1873).

80. *Id*. at 406–08 (explaining that an earlier crash in Vienna in May 1873 "dampened the mood of European investors" who began liquidating their U.S. investments, including in railroad securities, and Jay Cooke, as the primary financial backer behind the Northern Pacific transcontinental railroad, went bankrupt in September 1873 when he was unable to sell new securities in a tight market with the project far from completion). *See also* Scott Reynolds Nelson, *The Real Great Depression*, CHRON. HIGHER EDUC. (Oct. 17, 2008), https://www.chronicle.com/article/the-real-great-depression/ [https://perma.cc/ZC7L-CYUY] (noting that when "Jay Cooke proved unable to pay off his debts, the stock market crashed in September, closing hundreds of banks over the next three years"); Hugh Rockoff, *Banking and Finance 1789-1914*, *in* 2 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 643, 668–69 (Stanley L. Engerman & Robert E. Gallman eds., 2000).

81. *The Panic in Wall Street*, N.Y. TIMES, Sept. 21, 1873, at 1.

82. EDWARD C. KIRKLAND, *Business Vicissitudes*, *in* INDUSTRY COMES OF AGE: BUSINESS, LABOR AND PUBLIC POLICY 1860-1897 1, 4–9 (1961). *See also* Roger W. Babson, *The Recovery from the Great Panic of 1873*, N.Y. TIMES, Apr. 9, 1911, at 75; Barreyre, *supra* note 79, at 409.

83. An Act to Provide a Government for the District of Columbia, ch. 62, 16 Stat. 419–29 (1871) (repealed 1874); U.S. CONST. art. I, § 8, cl. 17.

84. *Appointment of Governor Henry D. Cooke the Man*, EVENING STAR, Feb. 27, 1871, at 1.

85. KATE MASUR, *To Save the Common Property and Respectability of* All, *in* AN EXAMPLE FOR ALL THE LAND 214, 217–33 (2010) (also noting the rise of real estate investors, including Kilbourn, who had been prominent in the consolidation movement and had offices near Jay Cooke's bank).

contracts.[86] They alleged that District officials awarded contracts to benefit the "residences of certain of said officers" and "amassed large fortunes while in office."[87]

Congress launched a broad, bipartisan, and bicameral investigation. The House and Senate, both under Republican control, adopted a joint resolution in February 1874 to establish a committee to investigate these allegations and identify any "unlawful" contracts.[88] Congress launched this investigation before any part of the bankruptcy settlement with Jay Cooke & Co. occurred.[89] The resolution also charged the committee with determining whether changes to the Organic Act were warranted to protect the rights of citizens and safeguard taxpayer funds.[90]

The committee issued a damning report, concluding unanimously that the District's government was "a failure."[91] The committee found that it was "too cumbrous and too expensive" and had insufficient safeguards against "maladministration and the creation of indebtedness."[92] The committee determined that District officials had overspent authorized funding levels by millions of dollars and approved projects that were so "pernicious" that it made "little difference in some respects what plan of letting contracts was adopted; any plan under these circumstances would have been found defective."[93]

As the committee conducted its investigation, it identified several allegations regarding real estate speculation schemes, including a "real estate pool" brokered by Kilbourn involving the purchase of several plots of land in the District. The committee had obtained a letter Kilbourn sent in 1871 indicating that "H.D.C." had directed him to invest in the real estate pool.[94] The committee established that H.D.C. referred to Governor Henry D. Cooke.[95] In light of the proliferation of illegal contracts in the District, the committee obtained testimony from Governor Cooke, who admitted that he had a direct personal financial interest in the real estate pool and contributed both his personal funds

86. S. Rep. No. 43-453, pt. 1, at 2 (1874).
87. *Id*. at II.
88. *Id*. at I (adopted by House on Feb. 2, 1874 and Senate on Feb. 5, 1874).
89. The court appointed a trustee for Jay Cooke & Co. on January 30, 1874. *The Estate of Jay Cooke & Co*., N.Y. Times, Jan. 31, 1874, at 4. The trustee reportedly did not begin settling with railroad or other interests until May 7, 1874, although these settlements appeared to be partial. *Affairs of Jay Cooke & Co.: Terms of Settlement with the Creditors*, N.Y. Times, May 8, 1874, at 1.
90. S. Rep. No. 43-453, pt. 1, at I (1874).
91. *Id*. at XXIX.
92. *Id*.
93. *Id*. at VII–VIII.
94. *Id*. at Charges of the Memorialists, Exhibit B, 41.
95. S. Rep. No. 43-453, pt. 2, at 255 (1874).

and funds from the bank.[96] Yet, he also claimed he did not know the identities of other investors, had no idea where the real estate was located, had no documents memorializing the arrangement, and had invested his funds "simply on the suggestion of Mr. Kilbourn."[97]

When Congress first interviewed Kilbourn—two years earlier than the Court's opinion reported—he initially denied that the Governor was a beneficiary, although he later admitted Cooke's financial interests.[98] However, Kilbourn refused to provide additional information, instead demanding more specificity in the accusations.[99] When the committee admonished Kilbourn that this was not an adequate basis for refusing, he responded that "I have done nothing" and the "parties whom I represent have done nothing."[100] When asked whether beneficiaries included members of the District government, Kilbourn answered that only Governor Cooke was involved,[101] but when asked whether any beneficiary was "a member of either House of Congress," Kilbourn refused to answer.[102]

Given the sweeping nature of its investigation, Congress prioritized the large challenges facing the District's governance, so the real estate corruption investigation was put on hold until the following Congress.[103] Regarding the District's government, the committee determined that "no remedy short of its abolition and the substitution of a simpler, more restricted and economical government will suffice."[104] Congress passed a bill creating a temporary commission while it considered a more permanent solution, and President Grant signed it.[105] As Kate Masur has observed, terminating District self-governance was remarkable for a Congress controlled by Republicans supposedly devoted to Reconstruction, and it reflected an effort by some to assign blame to the Black voting populace for the corruption of wealthy speculators and government officials.[106]

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96. *Id*. at 1024.
97. *Id*. at 1024–25.
98. *Id*. at 254.
99. *Id*. at 253–54.
100. *Id*. at 254.
101. *Id*.
102. *Id*. at 256.
103. S. Rep. No. 43-453, pt. 1, at VI.
104. *Id*. at XXIX.
105. *Id*. at XXVIII (noting there was "not sufficient time to prepare a proper system of framework for the government of the District, and have it fully discussed and passed upon at the present session of Congress"); H.R. Rep. No. 647, at 1, 2 (1874) (replacing District government with commission of members appointed by president with advice and consent of Senate).
106. Masur, *supra* note 85, at 249–56; Kate Masur, *Epilogue*, *in* An Example for All the Land, 257 (2010) (noting that ending D.C. self-government was

While the Court's opinion focused almost exclusively on the bankruptcy settlement, this broader context indicates that the House and Senate authorized the joint committee to conduct its investigation prior to the settlement in order to focus on a wide range of issues, including real estate speculation in the District, oversight of taxpayer funds, illegal public works contracts, wasteful street improvement programs, ties between government officials and private individuals and corporations that stood to profit, and whether members of Congress or the executive branch were implicated. I agree with other scholars that the Court should have upheld the House's investigation even on the facts as it recounted them, but this new evidence further undermines the Court's claim that the investigation "could result in no valid legislation." Congress could have considered reforms to bar certain District officials from awarding or overseeing contracts, prohibit them from serving at the same time as members of private banking institutions, or prevent real estate speculation by District employees who award taxpayer-funded contracts. Congress also could have passed transparency reforms for members of Congress and the executive branch, such as requiring the disclosure of financial holdings to prevent conflicts of interest.

2. The House's Follow-on Investigation

It was within this context that the House resumed its own investigation in the following Congress to complete its work and run to ground the previous allegations regarding the real estate pool. The biggest political difference, however, was that the intervening election had given Democrats control of the House due in large part to concerns about widespread corruption in the Grant Administration and the depression following the Panic of 1873.[107] In addition to placing ascendant Democrats in a position to investigate Grant-appointed officials in the D.C. government, this election effectively marked the beginning of the end of Reconstruction. A close analysis of the House's actions before, during, and after it held Kilbourn in contempt demonstrates that it was acting not only based on its constitutional authority to pass legislation, but also pursuant to its power of the purse, its authority over District matters, and its powers to discipline members and impeach executive branch officials if warranted.

"symbolic of the federal government's waning commitment to Reconstruction" and "highly significant for residents of the capital").

107. *See* 7 JAMES RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE MCKINLEY-BRYAN CAMPAIGN OF 1896 132–33 (1920) (noting that Republicans lost nearly half of their seats).

On January 24, 1876, the House adopted its resolution to establish a select committee to investigate the real estate pool.[108] As expected, Kilbourn was recalled to testify. During his appearance, Kilbourn confirmed that when Governor Cooke directed him to invest funds in the real estate pool, Cooke was serving as Governor, *and* as president of the District's Board of Public Works, *and also* as "a member of the banking-house of Jay Cooke & Co."[109] Nevertheless, Kilbourn continued to refuse to provide information about the identities or financial interests of other members of the arrangement.[110] He also claimed the bank no longer had interests in the real estate pool since the bankruptcy had been "settled through the courts."[111]

The committee rejected these arguments and held Kilbourn in contempt.[112] It issued a report to the House, which passed a resolution directing the Sergeant at Arms, John Thompson, to arrest Kilbourn and bring him to the bar of the House for questioning.[113] Kilbourn continued his refusals there, arguing that any connection between the bank and the real estate pool had "long ago been satisfactorily explained" to the court, which "alone has authority to furnish the remedy for a wrong."[114] The House rejected these claims and used its inherent contempt power to order that Kilbourn be held until he complied with its demands.[115]

In addition, the House Speaker referred Kilbourn for criminal prosecution under the relatively new contempt statute passed in 1857.[116] A grand jury indicted Kilbourn, and the U.S. Attorney issued his own warrant for Kilbourn's arrest.[117] This development prompted an interesting dilemma: should the House continue to hold Kilbourn under its own authority until the end of the session or turn him over to the U.S. Marshals to be tried under the yet-untested criminal statute? After a lengthy debate, the House voted to retain custody of Kilbourn.[118] During this debate, various members of the House responded to, and

108. H.R. Rep. No. 242, at 1 (1876).
109. *Id*. at 4.
110. *Id*. at 3–4 (arguing that he "violated no law," was "not charged with any fraud," and was engaged in "private" business).
111. *Id*. at 8.
112. *Id*. at 10.
113. 4 Cong. Rec. 1708 (1876).
114. *Id*. at 1715–16.
115. *Id*. at 1716.
116. Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155 (current version at 2 U.S.C. § 192). *See In re* Chapman, 166 U.S. 661, 671–72 (1897) (finding statute was not meant to provide exclusive remedy, and Congress retained the ability to exercise its own power).
117. 4 Cong. Rec. 2008 (1876).
118. *Id*. at 2019–20.

directly refuted, Kilbourn's arguments that the House had no purpose but to undo the bankruptcy settlement.[119]

In a major development less than a week later on April 3, 1876, the House passed another resolution confirming that its investigation included members of the Grant Administration and the House itself.[120] During debate on this resolution, its sponsor, Rep. Glover of Missouri, explained that it authorized the committee to investigate not only actions related to the real estate pool, but any other misconduct the committee identified.[121] The House was making clear again that it was investigating corruption that may have involved public officials, and it was laying the groundwork to discipline members or impeach executive branch officials if necessary, a position that was repeated just days later.

The following week, Kilbourn's attorney petitioned the supreme court of the District for a writ of habeas corpus directing the Sergeant at Arms to deliver him to the court.[122] In response, the House directed the Judiciary Committee to consider a response, and the Committee recommended that the House retain custody of Kilbourn.[123] On the House floor, Rep. Hurd of Ohio summarized and reiterated yet again the many different reasons Congress had been seeking information from Kilbourn for more than two years:

> [T]here are many views of the case in which the inquiries that were propounded to Mr. Kilbourn were pertinent. They were pertinent in the view, as it has been alleged, that it was sought to procure information as to whether members of Congress had been engaged in real-estate speculations in this city by which their actions in legislation might be improperly and corruptly influenced. It has been suggested that there were persons connected with various branches of the Government who had likewise been interested in the same real-estate speculation, and as to their conduct as a basis for possible impeachment it was proper and pertinent to inquire as to all the transactions relating to what was known as the "real-estate pool." In addition to that, as has been suggested in the argument before the committee, the question as to the right of Congress to appropriate money and as to the amount of money that may be required to be

119. *Id*. at 2009 (quoting Rep. New of Indiana: "We are not trying a civil case upon issues made. There are no parties, plaintiff, or defendant. We are not trying a criminal charge with Mr. Kilbourn as the defendant. We are trying to find out what we can, within the scope of the resolution, as to the subject-matter involved therein. If when we get through, we can make more specific allegations, they will be found in our report.").
120. *Id*. at 2158.
121. *Id*.
122. *Id*. at 2417.
123. *Id*. at 2512.

> appropriated is one of the most important for this House to decide; and therefore information upon that point might be desired by the committee in this particular connection.[124]

In presenting this summary, Rep. Hurd referred back to conduct covered by both the 1876 and 1874 resolutions, and he invoked the integrity of the House's legislative function, its explicit constitutional jurisdiction over the District, the critical importance of its appropriations process, and its power to investigate its own members and impeach members of the executive branch.

When the House refused to release Kilbourn, he submitted a petition to the D.C. Supreme Court claiming he was unlawfully imprisoned, and the court ordered his release.[125] Kilbourn then sued the House Speaker, committee members, and Sergeant at Arms for his forcible arrest and confinement, and the D.C. supreme court ruled in the House's favor.[126] The U.S. Supreme Court then took up Kilbourn's appeal and issued the opinion discussed above.[127]

Although the Court faulted the House for not identifying its ultimate legislative goals, the House would have had little reason to do so. *Anderson* had presumed the validity of the House's contempt action without demanding such specificity and without distinguishing among Congress's judicial and non-judicial authorities. During debates on the House floor, members repeatedly cited *Anderson* to support their position.[128] Some have suggested that the House's attorneys bear some

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124. *Id*. at 2483.

125. H.R. Misc. Doc. No. 174, at 1 (1876).

126. Transcript of Record at 1, 20–21, Kilbourn v. Thompson, 103 U.S. 168 (1881) (No. 144). Since neither the Speaker nor the committee members were directly involved in arresting Kilbourn, they pleaded separately from the Sergeant at Arms, but they all argued that Kilbourn should not be allowed to proceed since they acted "by the tenor and effect of the standing rules and orders ordained and established by the said House." The court dismissed Kilbourn's suit and ordered him to pay $1,000 for the defendant's legal fees. No opinion was issued. Kilbourn then filed a writ of error at the Supreme Court, which agreed to hear the case. *Id.* at 2–3, 20–21.

127. The Court held that the Sergeant at Arms could be found liable for damages, but that the House Speaker and committee members were protected by the Speech or Debate Clause, leaving only Thompson at risk. *Kilbourn*, 103 U.S. at 204–05. On remand, the D.C. Supreme Court found that Kilbourn was entitled to $60,000 in damages from the Sergeant at Arms. This amount was subsequently reduced to $20,000, which Congress ultimately paid on Thompson's behalf. *See In re* Pacific Ry. Comm'n, 32 F. 241, 252–53 (N.D. Cal. 1887) (describing subsequent proceedings).

128. For example, when Rep. New of Indiana spoke on March 28, 1876, he quoted key portions of *Anderson* to ensure they would be "part of the record in this case" and explained how the House used the contempt authority affirmed by *Anderson* during its Credit Mobilier investigation, in which the "books of one of the banking houses of

responsibility for the outcome in *Kilbourn*.[129] Certainly, they might have supplied more information to the Court about the House's authorities, objectives, and previous investigation if they had not been relying on *Anderson*. In their defense, neither of the two lower courts based its decision on the House's supposed lack of jurisdiction.[130] In addition, Kilbourn's refusal to identify members of the real estate pool was widely known and reported as front-page news for weeks.[131] The Court seemed to acknowledge this, noting that the resolution characterized the "partial" investigation conducted during the previous Congress as "something well known and understood."[132]

The deeper problem was the Court's double standard. The Court looked back at *Anderson*, as well as the House's order, the Speaker's warrant, and the Sergeant at Arms's plea in that case, but was unable to identify any specific grounds on which Congress held the plaintiff in contempt.[133] Yet, the Court still concluded that the House in *Anderson* was disciplining one of its members based solely on a "slight inference" from "something in one of the arguments of counsel."[134] In contrast, the Court ignored much more powerful evidence of the House's purposes in *Kilbourn*, including resolutions passed by the entire House and statements by members on the House floor. The Court also disregarded the House attorneys' brief to the Court, which explained that the committee might issue a report, recommend new legislation, or make a

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this city, covering a period of over one year, were freely overhauled by and before the committee." 4 CONG. REC. 2009–10 (1876).

129. *See, e.g.*, Landis, *supra* note 5, at 215–17 (noting that the "wants of counsel are mirrored in the decision"); Michael Stern, *Kilbourn and Chapman and Rao. Oh My.*, POINT OF ORDER (Oct. 24, 2010), https://www.pointoforder.com/2019/10/24/kilbourn-and-chapman-and-rao-oh-my/ [https://perma.cc/JZ8K-QTD3] (noting that rather than offering a more comprehensive explanation of Congress's actions and purposes, the House moved to dismiss on the pleadings and included "little more than the resolution and other formal actions approved by the House").

130. In the first case, the D.C. Supreme Court ruled for Kilbourn based on a finding that Congress ceded jurisdiction over contempt actions to federal courts when it passed the criminal contempt statute in 1857. H.R. MISC. DOC. NO. 174, at 240. In the second case, the D.C. Supreme Court granted the House's special plea to dismiss Kilbourn's claims based on the fact that they were acting by virtue of their offices in the House. Transcript of Record at 3, 11, 20, *Kilbourn*, 103 U.S. 168 (No. 144).

131. *See, e.g.*, *The District "Real Estate Pool,"* EVENING STAR, Mar. 4, 1876, at 1; *The Hallet Kilbourn Case*, NAT'L REPUBLICAN, Apr. 17, 1876, at 1.

132. *Kilbourn*, 103 U.S. at 194. *See also* MICHAEL A. ROSS, *Shattered Dreams*, *in* JUSTICE OF SHATTERED DREAMS 225-26 (2003) (noting that Justice Miller would not allow his wife to "invest in Washington real estate for fear that he would be accused of speculation").

133. *Kilbourn*, 103 U.S. at 196–97.

134. *Id*. at 196.

referral to the Justice Department to prosecute the matter if necessary.[135] As the House's brief asserted, "The whole subject was before them. It was, undoubtedly, within their legislative power."[136]

Instead of recognizing that Congress's investigative and contempt authorities are inherent in the power granted by the Constitution to the legislative branch, the Court mischaracterized them as judicial in nature. As a result, the Court viewed Congress's use of these powers with suspicion and as an affront to its own authority. This exclusive approach also prevented the Court from recognizing that congressional investigations regularly evolve to serve multiple legislative branch objectives at the same time or in rapid succession. What began as a minor complaint from residents about a local street improvement program erupted into a major scandal that caused the entire District government to collapse as it turned up broader evidence of squandered taxpayer funds, illegal contracts, maladministration, and pervasive corruption that implicated both private sector and public officials.

II. Congressional Investigations of Criminal Conduct and the Degradation of *Kilbourn*

In the century and a half after *Kilbourn* was decided, Congress reasserted its authority and launched multiple sweeping inquiries, including many that set out explicitly to investigate criminal conduct. During this period, the Court rejected *Kilbourn*'s inaccurate assertion that Congress, in essence, was exercising a judicial function when it held witnesses in contempt when they refused to comply with Congress's demands for information. Instead, the Court ruled forcefully that Congress's authority to make investigative demands—and its power to enforce them—are inherent in the Constitution's grant of legislative authority. The Court abandoned *Kilbourn*'s exclusive separation of powers framework and repeatedly affirmed that criminal and congressional investigations could occur at the same time. Although the Court began repeating a refrain that Congress may not engage in a prohibited "law enforcement" purpose, it consistently held that conducting investigations for legislative branch purposes was constitutionally valid. In fact, a review of these investigations and more than 100 court decisions examining them reveals no case in which the Supreme Court or any appellate court invalidated any congressional inquiry on this basis.[137]

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135. Brief for Defendants at 26, Kilbourn v. Thompson, 103 U.S. 168 (1881) (No. 144).
136. *Id*.
137. An initial set of 191 cases was generated using headnotes from the three cases commonly cited for the "law enforcement" claim: Kilbourn v. Thompson, 103 U.S.

A. *The Dismantling of* Kilbourn*'s Core Premises (1882–1929)*

The first fifty years after *Kilbourn* brought a dramatic shift from that case's "low water mark" for congressional investigations in 1881 to the pinnacle of the late 1920s when they "reached heights of national importance which have never been exceeded," as scholars at the time observed.[138] Although the Court declined to criticize *Kilbourn* directly in this period, it narrowed and eventually rejected many of its core premises.

In the first congressional contempt case to reach the Court after *Kilbourn*, *In re Chapman*, the Senate sought testimony from a private stockbroker who refused to answer questions about potentially illegal trades made on behalf of Senators considering a tariff bill.[139] The Court upheld the contempt action, finding that the Senate was acting "for the purpose of censure or expulsion" of its members.[140] Instead of following *Kilbourn*'s insistence that Congress declare its "final action" at the outset of its investigation, the Court found it was "not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[141] However, the Court still operated under *Kilbourn*'s distinction that contempt was reserved for "judicial" actions such as disciplining members rather than for aiding legislation.

Twenty years later, a case arose during a criminal investigation of a member of Congress. In *Marshall v. Gordon*, a U.S. Attorney named H. Snowden Marshall was investigating Rep. Frank Buchanan for violating the Sherman Anti-Trust law, and a federal grand jury issued an indictment.[142] Buchanan filed impeachment charges against the U.S.

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168 (1881) (Westlaw headnotes 6 and 7, Lexis headnotes 6, 7, 8, and 11); McGrain v. Daugherty, 273 U.S. 135 (1927) (Westlaw headnotes 9, 10, and 11, Lexis headnotes 10, 11, and 12); and Quinn v. United States, 349 U.S. 155 (1955) (Westlaw headnotes 3 and 4, and Lexis headnote 3). Of those, 75 appeared not to be directly relevant, leaving 116, many of which are discussed in Parts II and III.

138. McGeary, *supra* note 67, at 516, 519.

139. *In re* Chapman, 166 U.S. 661 (1897); Chapman v. United States, 5 App. D.C. 122, 123 (D.C. Cir. 1895); 2 Hinds' Precedents § 1611–13.

140. *In re* Chapman, 166 U.S. at 669. *See also* Potts, *supra* note 5, at 795 (noting that the resolution's omission of the Senate's ultimate purpose "was treated as a matter of no significance").

141. Potts, *supra* note 5, at 820. *See* Michael Stern, *Kilbourn, Chapman, and Rao. Oh My.*, Point of Order (Oct. 24, 2019), https://www.pointoforder.com/2019/10/24/kilbourn-and-chapman-and-rao-oh-my/ [https://perma.cc/JZ8K-QTD3] (suggesting the Court's more deferential standard may have been due to Chapman's conviction, the first under the criminal contempt statute, by a court rather than Congress).

142. Marshall v. Gordon, 243 U.S. 521, 531 (1917). Buchanan was indicted for "conspiring to foment strikes in American munition factories as part of a campaign, financed by the German government, to check the exportation of munitions to the

Attorney, and the House appointed a subcommittee to investigate.[143] During the investigation, the *New York Times* published an article quoting anonymous sources accusing the House of trying to frustrate the action of the grand jury.[144] When the subcommittee threatened to hold the reporter in contempt for not revealing his source, the U.S. Attorney sent a letter admitting he was the source and accusing the subcommittee of operating in bad faith.[145] In response to this inflammatory letter, the House ordered Marshall's arrest.[146] Ultimately, the Supreme Court ruled in favor of the U.S. Attorney, concluding that his letter did not amount to a contempt of Congress because its insults did not endanger "the preservation of the power of the House to carry out its legislative authority."[147] However, as others have observed, the Court raised no concerns with the committee investigating an ongoing law enforcement matter with an active grand jury, even when the prosecutor was accusing the committee of trying to scuttle the case.[148]

The Teapot Dome scandal resulted in one of the most significant congressional investigations of corruption in American history, involving leases of federal oil fields and the failure of the Justice Department to prosecute the offenders. These inquiries resulted in two landmark cases: *McGrain v. Daugherty* in 1927 and *Sinclair v. United States* in 1929.[149] Although the oil fields had been under the Navy's control, Interior

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entente allies." *The House Holds a U.S. Attorney in Contempt*, U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/25769809118?ret=True [https://perma.cc/7MPW-E488].

143. *Id*.

144. *Id. See also* Leonard R. Holmes, *Marshall Refuses Buchanan Evidence,* N.Y. TIMES, Mar. 3, 1916, at 4.

145. United States *ex rel.* Marshall v. Gordon, 235 F. 422, 424 (S.D.N.Y. 1916).

146. 6 Cannon's Precedents § 531.

147. *Id*. § 534. *See also* Potts, *supra* note 5, at 801 ("It seems probable that . . . the court was strongly influenced by the very peculiar state of facts there involved. For one cannot close his eyes to the fact that there is much to give color to the district attorney's charges that a member of Congress was prostituting his great privilege of instituting impeachment charges against public officials for the purpose of saving himself.").

148. Potts, *supra* note 5, at 798 (noting that "the court does not question the power of the House, in a proper case, to punish for contempt"); JOSH CHAFETZ, CONGRESS'S CONSTITUTION 179 (2017) ("Neither the House nor the Court seemed to have any doubt that the House could arrest and hold a federal prosecutor for actions which were truly within the scope of Congress's contempt power, rightly construed."). However, others point out that these issues were not squarely before the Court. *See, e.g*., Peterson, *supra* note 75, at 130; Jonathan David Shaub, *The Executive's Privilege,* 70 DUKE L. J. 1, 44 n.185 (2020); Michael Stern, *Marshall v. Gordon and its Significance*, POINT OF ORDER (Nov. 5, 2019), https://www.pointoforder.com/2019/11/05/marshall-v-gordon-and-its-significance/ [https://perma.cc/YU8U-NPNS] (comparing Chafetz and Peterson).

149. McGrain v. Daugherty, 273 U.S. 135 (1927); Sinclair v. United States, 279 U.S. 263 (1929).

Secretary Albert Fall convinced President Warren Harding to transfer control to him.[150] Fall then granted leases without competitive bidding or informing Congress or the public.[151] The Teapot Dome oil field in Wyoming was leased to Mammoth Oil Company owned by Harry F. Sinclair.[152] When others in the state complained that they were cut out,[153] Senator Robert LaFollette introduced resolutions calling on the Senate Committee on Public Land and Surveys to investigate.[154] He also urged Senator Thomas Walsh, the Committee's junior member and a Democrat in the minority, to lead the investigation, which was expected to be tedious and time-consuming.[155] In 1923, Fall left Harding's cabinet and took a job with Sinclair and Mammoth Oil "as rumors circulated about his newfound wealth."[156]

Concerned that Attorney General Harry Daugherty was not prosecuting those implicated in the scandal, the Senate authorized a separate special committee to investigate.[157] The committee called Mally Daugherty—the Attorney General's brother and president of Midland National Bank, which was believed to be involved in the scandal—to testify and produce records, but he refused.[158] The Senate then adopted a second resolution directing the Sergeant at Arms to arrest

150. Burt Noggle, *The Origins of the Teapot Dome Investigation*, 44 MISS. VALLEY HIST. REV. 237, 245–46 (1957).

151. J. Leonard Bates, *The Teapot Dome Scandal and the Election of 1924*, 60 AM. HIST. REV. 303, 304 (1955).

152. Noggle, *supra* note 150, at 258.

153. *Id*.

154. *Id*. at 261; S. Res. 282, 67th Cong. (1922).

155. There were political similarities with *Kilbourn*. Both the Grant and Harding Administrations were swept up in corruption scandals, and both involved Republican-majority Courts deciding cases relating to Republican executive branch officials (although the Court in *Kilbourn* did not acknowledge that Congress was investigating executive branch officials). Bates, *supra* note 151, at 305–06 (noting that Democrats were caught up in the scandal as well). The biggest political difference was that the House was controlled by Democrats when *Kilbourn* was held in contempt, while the Senate was controlled by Republicans during the Teapot Dome investigation. *Portraits in Oversight: Thomas Walsh and the Teapot Dome Investigation*, LEVIN CTR. FOR OVERSIGHT & DEMOCRACY (Nov. 5, 2023), https://www.levin-center.org/senator-walsh-and-the-teapot-dome-investigation/ [https://perma.cc/8Q96-K2NZ]. Another difference was that after President Harding's death in August 1923, Harlan Stone, Daugherty's successor as Attorney General, represented the Senate before the Supreme Court during President Coolidge's administration, "thereby putting both political branches squarely on the side of congressional investigatory authority." Michael Stern, *Will the Mazars Court Overrule McGrain?*, POINT OF ORDER (June 2, 2020), https://www.pointoforder.com/2020/06/02/will-the-mazars-court-overrule-mcgrain-part-one/ [https://perma.cc/X88B-VP7Q].

156. LEVIN CTR., *supra* note 155.

157. S. Res. 157, 68th Cong. (1924).

158. *Ex parte* Daugherty, 299 F. 620, 622 (S.D. Ohio 1924).

Daugherty and bring him to the bar of the Senate.[159] According to a May 21, 1924 article by then-Harvard Law professor Felix Frankfurter, the Harding Administration mobilized its own forces and influential allies to raise "every conceivable obstruction" to the investigation, claiming that abusive investigators should be reined in.[160] In a famous defense, Frankfurter refuted these claims and lauded congressional investigations as critical for "ventilating issues for the information of Congress and the public."[161]

However, the district court struck down the Senate's action in an opinion that could not have been a more faithful application of *Kilbourn*'s framework.[162] This decision likely came closest to finding that Congress engaged in an impermissible law enforcement purpose. The district court agreed with *Kilbourn*'s suggestion that Congress had no contempt power in aid of legislation, and as in *Kilbourn*, invalidated the Senate's action on the basis that it was a "judicial" function.[163] The district court compared the Senate investigation to a prosecution and accused the Senate of usurping judicial power.[164] The court denounced the Senate's investigation as an effort "to determine the guilt of the Attorney General" and "to hear, adjudge, and condemn."[165]

In the two years between the district court and Supreme Court decisions, Potts and Landis issued their influential critiques discussed above.[166] After exposing *Kilbourn*'s historical and precedential flaws, they argued that the district court in *Daugherty* never should have relied on "all the weaknesses of that case."[167] Both Potts and Landis highlighted the same example of the district court's one-sidedness in *Daugherty*. Specifically, the district court, to demonstrate that members of Congress believed they lacked authority to use contempt to help inform legislation, quoted a single member of Congress, Senator

159. *Id*. at 623 (stating that his appearance was necessary to "obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper").

160. Felix Frankfurter, *Hands Off the Investigations*, NEW REPUBLIC, May 21, 1924, at 329.

161. *Id*. at 329–30.

162. *Ex parte Daugherty*, 299 F. at 630–32.

163. *Id*. at 636–38.

164. *Id*. at 639.

165. *Id*. (internal quotations omitted).

166. The district court decision in *Daugherty* was issued on May 31, 1924, but the Supreme Court did not issue its decision until more than two years later on January 17, 1927.

167. Potts, *supra* note 5, at 823–24. *See also* Landis, *supra* note 5, at 221 (responding to the district court's assertion that the Senate may not impeach the Attorney General at the bar of public opinion by noting that this "represents only the reaction of public opinion to the facts elicited by the Senate inquiry").

Charles Sumner in 1860, arguing that the Constitution did not authorize the use of contempt "merely" for a legislative purpose.[168] Potts and Landis both pointed out the key missing fact: Sumner's argument failed overwhelmingly.[169] They also quoted another Senator in that debate, legislative giant William Fessenden of Maine, who made the successful case in favor of Congress's power and won the day.[170]

When the Supreme Court issued its landmark decision in *McGrain v. Daughterty*, it found the district court was "wrong" when it held that the Senate was seeking to put the Attorney General "on trial before it" and was therefore "exercising the judicial function."[171] Instead, the Court held that the Senate's investigation was permissible even if it identified criminal activity and concluded that "legislation could be had" on a range of topics.[172] The Court approved the Senate's resolution, which accused the Attorney General of failing to prosecute specific individuals[173] and threatened to take away ongoing Justice Department investigations through legislation.[174] The Court did not overrule *Kilbourn*, but constrained it in several respects. It rejected *Kilbourn*'s historical distinction between the origins of parliamentary and congressional power, as well as its attempt to label contempt a judicial function.[175] Instead, the Court held that Congress's "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to

168. *Ex parte Daugherty*, 299 F. at 637. The context was the Senate's investigation of the raid by John Brown on the armory at Harpers Ferry. When Thaddeus Hyatt defied a subpoena to testify, the Senate debated a resolution to hold him in contempt. Potts, *supra* note 5, at 808–09.

169. Potts, *supra* note 5 at 809–10; Landis, *supra* note 5, at 188–89. The resolution was adopted with 44 senators in favor and 10 opposed. CONG. GLOBE, 36th Cong., 1st. Sess. 3006, 3007 (1860).

170. Potts, *supra* note 5, at 810; Landis, *supra* note 5, at 189.

171. McGrain v. Daugherty, 273 U.S. 135, 177 (1927). *See also id*. at 179 n.20 (quoting Senator George as stating: "It is not a trial now that is proposed, and there has been no trial proposed save the civil and criminal actions to be instituted and prosecuted by counsel employed under the resolution giving to the President the power to employ counsel." (citing 68 CONG. REC. 3397, 3398 (1924)).

172. *Id*. at 178–80.

173. *Id*. at 151–52 (alleging that the Attorney General failed "to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their conspirators").

174. *Id*. at 151 (noting that the resolution proposed legislation to take "important litigation then in immediate contemplation out of the control of the Department of Justice and placing the same in charge of special counsel to be appointed by the President").

175. *Id*. at 174 ("It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time.").

the legislative function."[176] In addition, just as Potts and Landis had, the Court highlighted the district court's one-sided reference to the Senate debate on the Harpers Ferry raid and cited the same response by Senator Fessenden defending Congress's authority.[177] As Michael Stern and others have noted, there is significant evidence that the work of academics played a key role in the Court's decision.[178]

Kilbourn's legal architecture was further dismantled two years later in *Sinclair v. United States*.[179] Returning to its investigation of the corrupt leases, the Senate held Harry Sinclair, Mammoth Oil Company's owner, in contempt after he refused to testify.[180] Reminiscent of *Kilbourn*, he argued that the Senate had taken all the steps it could and that only the judicial branch could act.[181] He pointed to the Senate resolution directing the President to have suits brought to cancel the leases, prosecute other criminal and civil actions as appropriate, and appoint a special counsel.[182] He noted that, in fact, a prosecution had been brought and a special grand jury was investigating.[183] Sinclair argued that the whole matter was therefore a judicial question.[184]

The Court rejected this argument, finding that although Congress is "without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," its power "to require pertinent disclosures in aid of *its own constitutional power* is not abridged because the information sought to be elicited may also be of use in such suits."[185] According to the Court, the Senate had constitutional authority

176. *Id*. *See also id*. at 167 (also referencing statutes enacted in 1798, 1817, 1857, and 1862 recognizing the existence of Congress's legislative contempt power).

177. *Id*. at 161–64.

178. Michael Stern, *Will the Mazars Court Overrule McGrain?*, POINT OF ORDER (June 2, 2020), https://www.pointoforder.com/2020/06/02/will-the-mazars-court-overrule-mcgrain-part-one/ [https://perma.cc/X88B-VP7Q] (highlighting how a Harvard student influenced by Frankfurter initiated this effort, Justice Brandeis circulated the Landis article during the Court's conference on the case, and Frankfurter later reported that Landis' article "turned the trick") (citations omitted).

179. Sinclair v. United States, 279 U.S. 263 (1929).

180. *Leases upon Naval Oil Reserve: Hearing Before the S. Comm. on Pub. Lands & Surv.*, 68 CONG. 2897–99 (1924) (statement of Harry S. Sinclair, President, Mammoth Oil Co.).

181. *Id*. at 2896–97.

182. *Id*. at 2895–96 (alleging the leases were entered into "under circumstances indicating fraud and corruption" and "in violation of the laws of Congress").

183. *Id*. at 2897.

184. *Id*. ("I shall reserve any evidence I may be able to give for those courts to which you and your colleagues have deliberately referred all questions of which you had any jurisdiction, and shall respectfully decline to answer any questions propounded by the committee.").

185. Sinclair, 279 U.S. 263, 295 (1929) (emphasis added). *See also id*. at 294 (noting that *McGrain* left standing *Kilbourn*'s assertion that Congress does not have

to continue investigating—even while the criminal investigations were ongoing—to evaluate changes to laws regulating oil and gas leases on public lands, answer questions about clearing title to certain lands against outstanding claims, or assess whether the powers of executive officials "should be withdrawn, limited, or allowed to remain unchanged."[186]

This era marked a dramatic swing from the Court disparaging the authority and necessity of congressional investigations in *Kilbourn* to showing tremendous deference to Congress's own determinations of its constitutional objectives in *McGrain* and *Sinclair*.[187] It also marked a transition from *Kilbourn*'s exclusive separation of powers framework to a parallel approach that recognized Congress's independent authority to investigate criminal conduct at the same time as prosecutors.

B. The Supreme Court's Criticism of Kilbourn *(1930–2016)*

Two trends materialized in the period after the Teapot Dome investigations. First, the Court began criticizing *Kilbourn* in increasingly direct language as it cemented Congress's authority to investigate criminal activities for legislative purposes. Second, partially in response to investigations by the House Committee on Un-American Activities and others, the Court began restricting committee investigations based on other limitations, such as a lack of authorization by their parent houses, a lack of pertinency of questions, and individual protections in the Bill of Rights.

The 1953 case of *United States v. Rumely* was the first to openly criticize *Kilbourn* even as it concluded that a committee exceeded the authority granted to it by the House.[188] The resolution establishing

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general power to investigate the private affairs of citizens, but utilizing a more forgiving standard and finding the Senate was not investigating issues that were "merely" or "principally" related to Sinclair's personal affairs).

186. *Id*. at 298–99.

187. Nikolas Bowie and Daphna Renan describe an inverse trend with the Court's approach to statutory interpretation during this same period—from Reconstruction to its 1926 decision in *Myers v. United States*—during which it shifted from a deferential "republican" separation of powers view to a "juristocratic" approach in which the Court began invalidating statutes based on its own interpretation of implied separation of powers limits. They attribute this increasing judicial intervention to an evolving Lost Cause ideology and opposition to Reconstruction. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L. J. 2020, 2025–28 (2022) (citing Myers v. United States, 272 U.S. 52 (1926)). *Kilbourn* does not appear to factor into the trend they describe, perhaps because it involves Congress's investigative function instead of a statute, but Justice Miller used his own view of separation of powers limitations to block the investigative efforts of anti-Reconstruction House Democrats. *See* Michael A. Ross, *The* Slaughter-House Cases, *in* JUSTICE OF SHATTERED DREAMS 210 (2003) (contending that Miller was no opponent of Reconstruction).

188. United States v. Rumely, 345 U.S. 41 (1953).

the committee authorized it to investigate "all lobbying activities" to influence legislation,[189] but the secretary of an organization under investigation refused to provide the names of individuals who purchased their materials.[190] The Court wanted to avoid pitting the witness's First Amendment rights against Congress's right to investigate, noting that it was bound to refrain from balancing competing constitutional interests unless it was unavoidable.[191] The Court found that it was avoidable in this case by utilizing a narrower, but reasonable definition of "lobbying" to refer only to efforts to influence *Congress* but not the *public generally*.[192] The Court concluded that the committee, by demanding documents relating to attempts to influence private buyers, acted beyond its authorization.[193] During its discussion about "not needlessly projecting delicate issues for judicial pronouncement," the Court warned of *Kilbourn*'s "loose language," highlighted "the weighty criticism" to which the opinion had been subjected, and specifically referenced Landis's seminal article discussed above.[194] The Court also referred to *McGrain* and *Sinclair* as having made significant "inroads" on *Kilbourn*.[195] Based on these factors, the Court warned that *Kilbourn*'s defects "strongly counsel abstention from adjudication unless no choice is left."[196]

A year later, the Court issued an opinion that not only recognized Congress's authority to investigate crime, but also found that Congress's national legislative interests could outweigh the interests of criminal prosecutions. In *Adams v. State of Maryland*, the Court examined a Senate resolution authorizing the Judiciary Committee to investigate "organized crime."[197] The Committee called Adams to testify, and he confessed to running a gambling business in Maryland.[198] When local law enforcement tried to use his testimony to prosecute him under state law, Adams relied on a federal statute granting immunity to witnesses compelled to testify before Congress.[199] The Court concluded that Adams was immune from state prosecution.[200] It made clear—in the first

189. H.R. Res. 298, 81st Cong. (1949).
190. *Rumely*, 345 U.S. at 42.
191. *Id*. at 45.
192. *Id*. at 47.
193. *Id*. at 41.
194. *Id*. at 45–46 (citing Landis, *supra* note 5, at 153).
195. *Id*.
196. *Id*.
197. Adams v. State of Maryland, 347 U.S. 179 (1954). *See* S. Res. 202, 81st Cong. 2d Sess. (1950).
198. *Id*. at 179–80.
199. *Id*. at 180 (explaining that the statute provided that no testimony by a witness before Congress could be used in "any criminal proceeding against him in any court").
200. *Id*.

sentence of its opinion—that it understood Adams had been summoned "before a Senate Committee *investigating crime*."[201] The Court expressed no concern with the Senate's authority to do so. Instead, the Court acknowledged that Congress could, in certain cases, prevent courts "from convicting a person for crime on the basis of evidence he has given to help the national legislative bodies carry on their governmental functions."[202]

In two key cases involving the Fifth Amendment, the Court recognized that witnesses may invoke their right not to incriminate themselves before Congress. In *Quinn v. United States*, the Court held that a witness did not have to recount "any special combination of words" to invoke this right.[203] The Court added a general background statement that "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."[204] This reference appears to distinguish between the power to investigate for legislative branch purposes and the power to investigate for the purpose of criminal prosecution, with the key question being what purpose the investigation serves. In *Quinn*, the Court indicated that Congress was not engaging in a law enforcement function. Similarly, in *Emspak v. United States*, after reiterating that a witness need not use predetermined wording to invoke his right against self-incrimination,[205] the Court rejected the witness's claim that the committee was "trying to perhaps frame people for possible criminal prosecutions."[206]

In *Watkins v. United States*, the Court found that a committee's failure to explain adequately the pertinency of its questions gave the witness insufficient notice about the scope of the investigation to satisfy due process requirements of the Fifth Amendment.[207] Nevertheless, the opinion confirmed that "[t]he power of the Congress to conduct

201. *Id*. at 179 (emphasis added).
202. *Id*. at 183.
203. Quinn v. United States, 349 U.S. 155, 162 (1955).
204. *Id*. at 161 (citing Kilbourn v. Thompson, 103 U.S. 168, 192–93 (1881)).
205. Emspak v. United States, 349 U.S. 190, 194 (1955).
206. *Id*. at 195 (quoting *Communist Infiltration of Labor Unions: Hearings Before H. Comm. on Un-American Activities Regarding*, 81st Cong., 1st Sess. Part II at 840) and at 200–01 (adding that evidence obtained by the Committee could furnish "'a link in the chain' of evidence needed to prosecute petitioner for a federal crime"). *Cf*. United States v. Icardi, 140 F. Supp. 383, 389 (D.D.C. 1956) (dismissing perjury charge when witness testimony "could not have influenced" and was "not material" to subcommittee investigation and its purpose was to indict the witness if he adhered to former statements).
207. Watkins v. United States, 354 U.S. 178, 214–15 (1957) (union official answered questions about his own affiliations with the Communist Party but not about associates no longer members).

investigations is inherent in the legislative process"[208] and affirmed the duty of all witnesses to comply with congressional subpoenas.[209] As in *Quinn*, the Court included a background paragraph that stated: "Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government."[210] Although no one had asserted that Congress was acting as a law enforcement or trial agency, this line generally tracked *Quinn*'s phrasing and illustrates how the Court began to repeat this refrain in subsequent cases.

In *Barenblatt v. United States*, the Court held that a subcommittee's legitimate legislative purpose outweighed a witness's First Amendment right not to answer questions.[211] The dissent invoked *Kilbourn* to argue that the committee was engaged in an unconstitutional law enforcement purpose, making virtually the same argument Attorney General Daugherty had in *McGrain*—the committee was attempting to "try, convict, and punish" the witness, a task the Constitution "grants exclusively to the courts."[212] In response, the Court gave one of the most frequently cited endorsements of Congress's investigative authority: "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[213] Importantly, the Court stated that this was "not a case like Kilbourn v. Thompson," declaring that the "constitutional legislative power of Congress in this instance is beyond question."[214]

Finally, the Court leveled its most direct criticism of *Kilbourn* in its 1962 opinion in *Hutcheson v. United States*.[215] As in *Adams*, the Senate

208. *Id*.

209. *Id*. at 187–88. Although *Watkins* is often cited for the proposition that "there is no congressional power to expose for the sake of exposure," the opinion warned that the Court's function is not to test the motives of committee members, even if their "sole purpose" may be to bring down on witnesses "the violence of public reaction." *Id*. at 199–200.

210. *Id*. at 187.

211. Barenblatt v. United States, 360 U.S. 109, 126–27 (1958).

212. *Id*. at 136–37. *See also id*. at 154 (the dissent also claiming the subcommittee was "undertaking a purely judicial function").

213. *Id*. at 111.

214. *Id*. at 133. *See also id*. at 132 (rejecting claim that Congress was usurping a judicial or law enforcement function because its objective was "purely 'exposure'" and noting that "the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power").

215. Hutcheson v. United States, 369 U.S. 599 (1962) (plurality opinion). Six justices participated in the decision, which was decided by a vote of four to two. However, Justice Douglas, in his separate dissent, "agree[d] with the Court that the questions asked petitioner by the Committee were within its competence and were pertinent to the legislative inquiry," instead preferring to overturn the Court's cases that allowed state criminal proceedings to use Fifth Amendment pleas against defendants.

resolution explicitly authorized an investigation of "criminal" activity,[216] a fact the Court noted without concern.[217] Although the witness had been indicted in a state proceeding, he waived his Fifth Amendment right against self-incrimination before Congress.[218] Instead, he argued that answering the questions might "aid the prosecution" in the state proceeding and operate as a sort of "pretrial" of the criminal charges.[219] In the most direct attempt yet to extend *Kilbourn*'s exclusive framework from civil bankruptcies to criminal prosecutions, the dissent argued that inquiries into criminal conduct were "outside the power of a committee to ask."[220]

The Court rejected these arguments and denounced *Kilbourn* as "severely discredited."[221] The Court cited its own previous condemnation of *Kilbourn* in *Rumely* and concluded that *Kilbourn* does not "stand for the pervasive principles for which it is presently relied on."[222] Noting that *Kilbourn* was the only decision cited by the dissent, the Court disagreed that Congress had "invaded domains constitutionally reserved to the Executive and the Judiciary" or lacked jurisdiction to ask questions that "touched on matters then pending in judicial proceedings."[223] The Court affirmed that Congress may conduct investigations in parallel with criminal prosecutions based on the Constitution's grant of authority to

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216. S. Res. 74, 85TH CONG. (1957) (authorizing committee to investigate "the extent to which criminal or other improper practices or activities are, or have been, engaged in in the field of labor-management relations").

217. Hutcheson v. United States, 369 U.S. 599, 600–01 (1962).

218. *Id*. at 609.

219. *Id*. at 606–07 (quoting *Hearings Before the Select Comm. on Improper Activities in the Labor or Mgmt. Field*, pt. 31, 85th Cong., 2d Sess. 12115 (1958)). Since other cases established that states could take such action, the witness asked the Court to overrule those cases so he would not be put in a position of prejudicing his prosecution or being held in contempt of Congress. The Court declined because the witness "unequivocally and repeatedly" waived his right against self-incrimination, noting that if the witness had claimed the privilege, the appropriate time for considering that question would have been on review of his state conviction. *Id*. at 607–13.

220. *Id*. at 638. *See also id*. at 635 ("[A] pending civil case was enough to bar inquiries concerning the transactions in that litigation. There is far more reason, it seems to me, to apply that principle to this case where Congress attempts to compel a witness to supply testimony which could be used to help convict him of a crime.").

221. *Id*. at 613 n.16.

222. *Id*. (citing United States v. Rumely, 345 U.S. 41, 46 (1953)).

223. *Id*. Justice Warren apparently was the only one pressing for this application of *Kilbourn*; his fellow dissenter, Justice Douglas, argued for overturning the result on due process grounds. *Id*. at 638 *et seq*. In his concurrence, Justice Brennan also rejected extending *Kilbourn* to criminal cases, stating: "The congressional inquiry before us here is in sharp contrast to that in *Kilbourn*. The Select Committee was seeking factual material to aid in the drafting and adopting of remedial legislation to curb misuse by union officials of union funds—unquestionably a proper legislative purpose." *Id*. at 623.

the legislative branch.[224] Holding the opposite, according to the Court, would "limit congressional inquiry to those areas in which there is not the slightest possibility of state prosecution."[225] As the Court explained:

> [S]urely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is disclosed.[226]

In completing this decades-long inversion of *Kilbourn*'s rationale—and its tone towards Congress—the Court warned that the Judiciary has its own duty of "not lightly interfering with Congress's exercise of its legitimate powers."[227]

After *Hutcheson*, few judicial opinions cited *Kilbourn*, reflecting its waning significance. The Supreme Court referenced the case on only a handful of occasions, including in dissenting opinions,[228] for unrelated legal principles,[229] and in cases that did not involve Congress's investigative function but its legislative function.[230] For example, the Court cited *Kilbourn* in cases involving legislation relating to the Appointments Clause[231] and in a concurring opinion in a decision finding that a state's legislative branch investigation violated a witness's

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224. *Id*. at 613.

225. *Id*. at 619.

226. *Id*. at 618 (citing Sinclair v. United States, 279 U.S. 263, 295 (1929), and McGrain v. Daugherty, 273 U.S. 135, 179-180 (1927)).

227. *Id*. at 622. This turnabout was so complete that the dissent claimed the opinion was tantamount to an effort to "overrule" *Kilbourn*. *Id*. at 632 n.8.

228. *See* Nixon v. Adm'r of General Servs., 433 U.S. 425, 507, 514 (1983) (Burger, J., dissenting) (disagreeing with Court's decision to uphold Presidential Recordings and Materials Preservation Act); U.S. v. Providence Journal Co., 485 U.S. 693, 712 (1988) (Stevens, J., dissenting) (citing *Kilbourn* as example of Congress retaining private counsel).

229. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (citing *Kilbourn* for the principle that the Constitution "grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session").

230. *See* Patchak v. Zinke, 583 U.S. 244, 250 (2018) (rejecting claim that Congress infringed on judicial power in passing legislation and citing *Kilbourn* for proposition that each branch "'exercise[s] . . . the powers appropriate to its own department,' and no branch can 'encroach upon the powers confided to the others'"); I.N.S. v. Chadha, 462 U.S. 919, 997 (1983) (White, J. dissenting) (opposing decision finding legislative veto unconstitutional and citing *Kilbourn* for proposition that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body").

231. *See, e.g*., Buckley v. Valeo, 424 U.S. 1, 137–38 (1976) (citing *Kilbourn* for the proposition that Congress may delegate investigative, but not enforcement powers to a commission); *id*. at 281 (citing "severe strain" placed on separation of powers principles caused by *Kilbourn* and noting that "[a]ny notion that the Constitution bans any admixture of powers that might be deemed legislative, executive, and judicial has had to give way").

First and Fourteenth Amendment association rights.[232] In the lower courts, a district court cited *Kilbourn* for the proposition that Congress was required to provide transcripts of its investigative interviews to a defendant in a military prosecution, but the Fifth Circuit overruled that decision.[233] None of these cases cited *Kilbourn* to hold that Congress was prohibited from investigating criminal activity.

C. Note on Executive Privilege

In addition to being able to invoke constitutional rights available to all targets of congressional investigations, such as the Fifth Amendment right against self-incrimination, presidents have asserted executive privilege when Congress has sought information directly from the executive branch. As mentioned in the introduction, this Article focuses primarily on whether Congress has authority under the Constitution to investigate criminal activity for valid legislative branch purposes. It does not seek to resolve the separate question of whether the executive branch may withhold information from Congress based on executive privilege. Nevertheless, this section briefly addresses this related issue for two limited purposes: first, to note unhelpful comparisons of congressional and criminal investigations made by courts that appear to carry forward remnants of *Kilbourn*'s disdain for Congress's investigative authority; and second, to highlight the ongoing debate about whether executive privilege could, or should, apply when Congress seeks information from open or closed criminal case files.

First, the Watergate scandal prompted investigations by both prosecutors and congressional committees, and courts handling separate litigation evaluated the different purposes and informational needs of both. On the criminal side, when a grand jury sought access to Nixon's Oval Office tapes, he claimed an absolute privilege over his communications with top aides and asserted that only he could determine when this privilege applied.[234] The D.C. Circuit Court rejected this claim in *Nixon v. Sirica*, instead recognizing a qualified privilege that weighed "the public interest protected by the privilege

232. Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 562 (1963) (Black, J., concurring) (agreeing that state failed to show substantial relation between information sought and subject of overriding and compelling state interest, and citing *Kilbourn* for proposition that investigations are improper when they can "result in no valid legislation on the subject").

233. Calley v. Callaway, 382 F. Supp. 650, 703 (M.D. Ga. 1974); Calley v. Callaway, 519 F.2d 184, 223 (5th Cir. 1975).

234. Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973).

against the public interests that would be served by disclosure in a particular case."[235]

In Congress, the Senate directed a new Select Committee to investigate "illegal" and other activities relating to the 1972 campaign.[236] When the Select Committee sought access to the tapes, the district court did not follow the Circuit Court's framework in *Nixon v. Sirica*. Instead of weighing the interests of the two parties against each other—Congress and the President—the court weighed the interests of Congress and the criminal investigation, unilaterally assigning "priority" to the latter.[237] The court even sent its own request asking the special prosecutor, who was not a party to the case, to speculate about how producing the tapes to the Senate might lead to unwanted pretrial publicity.[238] Although the special prosecutor replied that making this prediction was "impossible," the court declared that "the time has come" for the Senate to stand down in light of "blazing" publicity that could risk jury bias.[239]

When the D.C. Circuit Court reviewed the district court's decision regarding the Senate Select Committee, it found that the lower court erred by weighing the interests of Congress against *criminal investigators* rather than against *the President*.[240] The court held that the sufficiency of the Select Committee's showing depended "solely" on whether the tapes were "demonstrably critical to the responsible fulfillment of *the Committee's* functions."[241] Despite this improvement, the opinion offered a troubling new suggestion that Congress may need less accurate or thorough information than a criminal investigation. Without citing any precedent, the court declared that "legislative judgments normally

235. *Id*. at 715–16.

236. S. Res. 60, 93rd CONG. § 1(a) (1973) (directing committee to investigate "illegal, improper, or unethical activities" and "determine . . . the necessity or desirability of new congressional legislation").

237. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 523 (D.D.C. 1974).

238. *Id*. at 522.

239. *Id*. at 524. In contrast, a separate district court in New York had rejected an effort by two criminal defendants to argue that the Select Committee's hearings created undue pre-trial publicity that required the court to dismiss their indictments. United States v. Mitchell, 372 F. Supp. 1239, 1260–61 (S.D.N.Y. 1973) (relying on a First Circuit opinion holding that although congressional investigations could negatively impact ongoing criminal cases, the appropriate judicial remedy was to make adjustments in the criminal cases) (citing Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952)).

240. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 729 (D.C. Cir. 1974) (noting that the district court "undertook independently" to weigh the interest of criminal prosecutions and "found it necessary to assign priority to the public interest in 'the integrity of the criminal process, rather than the Committee's need'").

241. *Id*. at 731 (emphasis added).

depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events" and that "Congress frequently legislates on the basis of conflicting information provided in its hearings."[242] Ruling against the Select Committee, the court concluded that the Senate's need was "too attenuated and too tangential."[243] Although the appellate court raised no constitutional objection to the Senate's authority to investigate criminal activity—or to adopt a resolution directing the committee to do so—it seemed to channel *Kilbourn*'s approach of replacing Congress's own determination of its investigative needs with the opinions of judges.[244] As discussed in more detail in Part III, the Supreme Court later repeated this line with apparent approval in *Trump v. Mazars*.[245]

The second point related to this executive privilege discussion involves what standard applies when Congress seeks information directly from criminal investigators. The executive branch has attempted to develop a separate prong of executive privilege to withhold information about open, and in some cases even closed, criminal investigations. However, it has relied, and continues to rely to some extent, on *Kilbourn* to support its position. One of the most prominent examples was a letter sent in 1941 by Attorney General Robert Jackson to Chairman Carl Vinson of the House Committee on Naval Affairs declining a request to produce FBI investigative files on strikes and other labor disturbances impacting naval contracts.[246] Jackson cited *Kilbourn*'s exclusive separation of powers view to argue not only that the executive branch had authority to withhold information from

242. *Id*. at 732.

243. *Id*. at 733 (adding that Senate's need was "merely cumulative" since House Judiciary Committee already had copies of the tapes as part of impeachment inquiry).

244. The Senate did not appeal this decision, and the Supreme Court has never considered how executive privilege applies in response to a congressional investigation. *See* Todd Garvey, Cong. Rsch. Serv., R47102, Executive Privilege and Presidential Communications: Judicial Principles 2 (2022). The Supreme Court's subsequent decision in *United States v. Nixon* addressed the criminal investigation, concluding that his generalized privilege assertion "must yield to the demonstrated, specific need for evidence in a pending criminal trial." United States v. Nixon, 418 U.S. 683, 713 (1974). Although Nixon invoked *Kilbourn* to argue for an absolute privilege, the Court observed that "the separate powers were not intended to operate with absolute independence." *Id*. at 706–07 (referencing Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1881), and quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

245. Professor Josh Chafetz has described in detail the flaws in both *Senate Select Committee* and *Mazars* in denigrating congressional efforts [to] obtain information. *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 Geo. L.J. 125, 135 (2021).

246. Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'ys Gen. 45 (1941).

Congress about ongoing investigations, but that the courts could not review these determinations.[247] However, his letter failed to mention *McGrain* or other judicial precedents weakening *Kilbourn*'s core principles. Although some subsequent Justice Department iterations of this argument dropped direct references to *Kilbourn*,[248] others continued to rely on the case to support broader policy arguments that disclosing such information could reveal information to potential targets, deter prosecutors from deliberating freely, disclose law enforcement tactics, and create the potential for undue pressure over prosecutorial decisions.[249]

For just as long, Congress has insisted on its own authority to obtain this type of information when necessary for its legislative branch purposes, and reports by Congress's research arm cite examples in which committees have obtained such information.[250] Although it may seem surprising, the Supreme Court has never ruled on a claim of executive privilege asserted by the President against Congress,[251] and no court has ever held that executive privilege applies to information Congress seeks about ongoing criminal cases,[252] although that may change in the future.[253] As a result, the Justice Department cites its own

247. *Id.* at 49–50.

248. *See, e.g.*, Letter from Assistant Att'y Gen. for Legislative Affairs Robert Raben, Dep't of Justice, to Chairman John Linder, Sub. on Rules and Organization of the House, House Comm. on Rules (Jan. 27, 2000) (not citing *Kilbourn*, but referencing Attorney General Jackson's letter and others to illustrate the Department's "longstanding policy . . . to decline to provide Congressional committees with access to open law enforcement files").

249. *See, e.g.*, Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 112 n.17 (1984); Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 74 n.11, 74–78 (1986) (asserting authority to withhold open *and closed* law enforcement files from Congress).

250. *See, e.g.*, Alissa M. Dolan & Todd Garvey, Cong. Rsch. Serv., R42811, Congressional Investigations of the Department of Justice, 1920–2012: History, Law, and Practice 8–10 (2012); Morton Rosenberg, Cong. Rsch. Serv., 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry 21 (1995) (noting that the Court has held that although "prosecutorial powers have 'typically' been performed by Executive Branch officials . . . the exercise of prosecutorial discretion is in no way 'central' to the functioning of the Executive Branch").

251. Todd Garvey, Cong. Rsch. Serv., R47102, Executive Privilege and Presidential Communications: Judicial Principles 2 (2022).

252. Michael A. Foster & Todd Garvey, Cong. Rsch. Serv., LSB10271, The Special Counsel's Report: Can Congress Get It? 5 (2019).

253. Earlier this year, House Republicans held Attorney General Merrick Garland in contempt for withholding audio tapes of President Biden's interview with Special Counsel Robert Hur after Hur concluded his investigation of Biden's handling of classified information. H. Res. 1292, 118th Cong. (2024). Biden had asserted executive privilege over the tapes (but not the written transcript) based on the law enforcement

previous assertions for support.[254] Although the Department consistently declines initial efforts by Congress to obtain access to such information, the Department has eventually produced it in some cases, usually under significant political pressure.[255]

Scholars have different views on this question. Professor Todd David Peterson has argued that "there is no instance in which Congress's need for information from an open criminal investigation could outweigh the negative effects of disclosure of such information."[256] Although he expertly details the negative consequences that could result if Congress obtains information from open criminal cases,[257] his assertion butts up against *McGrain*, which approved of Congress reviewing the Department's prosecutorial decision-making even as it was

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prong of executive privilege. Letter from Edward N. Siskel, Couns. to the President, The White House, to Jim Jordan, Chairman, House Comm. on the Judiciary, and James Comer, Chairman, House Comm. on Oversight & Accountability (May 16, 2024). The Justice Department declined to prosecute Garland under the criminal contempt statute. Letter from Carlos Uriarte, Assistant Att'y Gen., Dep't of Just., to Mike Johnson, Speaker, U.S. House of Reps. (June 14, 2024). The Judiciary Committee then filed a civil suit challenging Biden's assertion of executive privilege. House Comm. on Judiciary v. Garland, 1:24-cv-1911 (D.D.C. filed July 1, 2024). *See also* Todd Garvey, Cong. Rsch. Serv., LSB11172, The Hur Tapes and the President's Claim of Executive Privilege (2024) (noting that the Justice Department "does not cite any judicial precedent in its description of the scope of the law enforcement privilege" but instead relies on its "own opinions").

254. *See, e.g.*, Linder Letter, at 2 (citing 5 Op. O.L.C. 27, 31 (1981); 3 (citing 40 Op. Att'y Gen. 45, 46 (1941); 4 (citing 10 Op. O.L.C. 68, 76–77 (1986) and Memorandum from Thomas E. Kauper, Deputy Assistant Att'y Gen., O.L.C., to Edward L. Morgan, Deputy Couns. to the President, The White House (Dec. 19, 1969)).

255. *See The History of Congressional Access to Deliberative Justice Department Documents: Hearing Before the H. Comm. on Gov't Reform & Oversight,* 197th Cong., 605–07 (2002) (Testimony of Ass't Att'y Gen. for Leg. Affairs Dan Bryant) (testifying that the Department shared information during open investigations involving the Palmer Raids in 1920–1921, Teapot Dome in 1927, the McGrath matter in 1952, the Bill Carter matter in 1980, ABSCAM in 1982, the General Dynamics case in 1987, Rocky Flats in 1989–1990, the B&L matter in 1992, environmental crimes reviews in 1992–1993, the White House Travel Office in 1995–1996, and campaign finance irregularities from 1997–2000, during which the Department produced memoranda from Federal Bureau of Investigations Director Louis Freeh and Campaign Finance Task Force Chief Charles La Bella from 1997–2000). A more recent example was the Department's disclosure of information during its open investigation of former Secretary of State Hillary Clinton's emails. *See, e.g.*, Letter from Bob Goodlatte, Chairman, House Comm. on the Judiciary, and Trey Gowdy, Chairman, House Comm. on Oversight & Gov't Reform, to Mitch McConnell, Majority Leader, U.S. Senate, Matthew Whitaker, Acting Att'y Gen., Dep't of Just., and Michael Horowitz, Inspector Gen., Dep't of Just. (Dec. 28, 2018) (describing documents and interviews with investigative and prosecutorial decisionmakers).

256. Peterson, *supra* note 10, at 1441.

257. *Id*. at 1430–46.

occurring.[258] As a compromise, Professor Emily Berman has proposed that Congress pass legislation to codify a law enforcement prong of executive privilege, but allow it to be overcome at a lower threshold than the "specific need" standard for presidential communications in *United States v. Nixon*.[259]

There are strong policy reasons that should guide both the executive branch *and* Congress in safeguarding law enforcement information, but these policy considerations do not necessarily provide constitutional authority to withhold this type of information from Congress. Just as Congress had compelling reasons to demand such information in *McGrain*, it may have equally compelling reasons to seek such information in the future.[260]

III. Trump's Unsuccessful Campaign to Revive *Kilbourn*

In order to block Congress from investigating his alleged crimes, Donald Trump, his aides, and their attorneys launched an aggressive campaign to resuscitate *Kilbourn*'s exclusive separation of powers framework to argue that Congress lacked authority to investigate crime. They made this argument dozens of times in response to investigations by various committees during litigation before federal courts at every level, including the Supreme Court. As I document below, their written pleadings and oral arguments made numerous variants of the claim that committees were engaging in a prohibited "law enforcement" purpose, including that a committee stated explicitly that its goal was to investigate Trump's "crimes"; that members of Congress made public statements that they were investigating his "criminal" conduct; that the "true purpose" of a committee's investigation was to "prosecute" him; that a committee's investigation was a form of "punishment"; that a committee's investigation bore the "hallmarks" of a criminal prosecution; and that a committee's subpoena was "indistinguishable" from a prosecutor's demands for specific documents. All of these arguments failed.

A. House Oversight Committee Investigation

On February 27, 2019, the House Committee on Oversight and Reform held a momentous hearing with Trump's former attorney and fixer, Michael Cohen, who testified that Trump engaged in potentially

258. McGrain v. Daugherty, 273 U.S. 135, 177 (1927).

259. Berman, *supra* note 10, at 788–89.

260. *Id*. (noting that Congress has "a legitimate reason to investigate evidence that the Executive is carrying out its law enforcement obligations in a partisan manner in contravention of existing statutes and regulations").

illegal activities before and during his presidency.[261] He claimed that Trump inflated and deflated the value of his assets on official submissions and concealed payments to silence women alleging affairs on financial disclosures filed with the Office of Government Ethics.[262] The Committee was also investigating Trump's potential violations of the Emoluments Clauses, his lease with the General Services Administration for his hotel in Washington, D.C., and other matters.[263] At the time of the hearing, Cohen had pleaded guilty to eight criminal charges.[264]

In light of Cohen's testimony, some Committee members were troubled by Trump's potential crimes and constitutional violations. As Chairman Elijah Cummings stated, "Mr. Cohen's testimony raises grave questions about the legality of Donald Trump's—President Donald Trump's conduct."[265] To corroborate his testimony, Cohen produced copies of some of Trump's financial statements and checks Trump signed before and after assuming office.[266] When Chairman Cummings sent a document request to Mazars USA LLP, a financial services firm that prepared many of Trump's financial statements,[267] the company responded that it could produce the documents only with a subpoena.[268]

Chairman Cummings sent a memo notifying Committee members about the need for a subpoena, elaborating on the purposes of the

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261. *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. (2019) [hereinafter *Hearing with Michael Cohen*].

262. *Id*. at 13–14, 38–39.

263. *See* Letter from Elijah Cummings, Chairman, House Comm. on Oversight & Reform, to Pat Cipollone, Couns. to the President, The White House 1 (Jan. 8, 2019) (regarding Ethics in Government Act); Letter from Elijah Cummings, Chairman, House Comm. on Oversight & Reform, to Pat Cipollone, Couns. to the President, The White House 7 (Feb. 15, 2019) (regarding ethics laws governing campaign finance issues); and Letter from Elijah Cummings, Chairman, House Comm. on Oversight & Reform, to Emily Murphy, Admin., Gen. Servs. Admin. 1 (Apr. 12, 2019) (regarding Emoluments Clause violations).

264. Plea Agreement, United States v. Cohen, No. 18-CR-602 (S.D.N.Y. Aug. 21, 2018), ECF No. 23.0F. Cohen was sentenced to three years in prison but was not scheduled to report for his sentence until May 6, 2019, so he agreed to testify before the Committee in the interim. Nicholas Fandos, *Michael Cohen Agrees to Testify Next Week, Setting Stage for a High-Stakes Hearing*, N.Y. Times (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/us/politics/michael-cohen-testimony.html [https://perma.cc/2PE6-E24L].

265. *Hearing with Michael Cohen*, *supra* note 261, at 6.

266. *Id*. at 13, 38.

267. Letter from Elijah Cummings, Chairman, House Comm. on Oversight & Reform, to Victor Wahba, Chairman & Chief Exec. Officer, Mazars USA, LLP 1, 4 (Mar. 20, 2019).

268. Letter from Jerry Bernstein, Couns. for Mazars USA, LLP, to Elijah Cummings, Chairman, House Comm. on Oversight & Reform (Mar. 27, 2019).

investigation, attaching a copy of the subpoena, and seeking feedback from Committee members.[269] As in the Cohen hearing, he was explicit that one of the issues the Committee was investigating was whether Trump "engaged in *illegal conduct*."[270] He also explained that a key purpose of the inquiry was to inform the Committee's review of various laws and legislative proposals in its jurisdiction.[271] Cummings issued the subpoena the following week.[272]

Trump sued to block Mazars from complying with the subpoena.[273] His attorneys, citing *Kilbourn* repeatedly, argued that the Committee was exercising unconstitutional law enforcement powers.[274] Seizing on Chairman Cummings's statement that the Committee was investigating Trump's illegal conduct, Trump's attorneys claimed this fact alone invalidated the investigation.[275] They argued that the Committee was engaging in "a quintessential law-enforcement task reserved to the executive and judicial branches."[276]

The Committee responded that its interests were not in prosecuting Trump's conduct, which would be a law enforcement purpose, but in assessing whether existing laws were adequate, amendments were necessary, or new legislation was required.[277] As the Committee noted,

269. Memorandum from Elijah Cummings, Chairman, House Comm. on Oversight & Reform, to Members of the House Comm. on Oversight & Reform 4 (Apr. 12, 2019) (attaching subpoena).

270. *Id*. (emphasis added) (explaining that Committee was investigating whether Trump had "undisclosed conflicts of interest that may impair his ability to make impartial policy decisions," was "complying with the Emoluments Clauses of the Constitution," and had "accurately reported his finances to the Office of Government Ethics and other federal entities").

271. *Id*. Related legislation included The For the People Act, H.R. 1, 116th Cong. (2019); The White House Ethics Transparency Act, H.R. 391, 116th Cong. (2019); The Relatives in Government Getting Employment Dishonorably Act, H.R. 681, 116th Cong. (2019); The Restoring the Public Trust Act, H.R. 706, 116th Cong. (2019); and The Executive Branch Comprehensive Ethics Enforcement Act, H.R. 745, 116th Cong. (2019)).

272. Subpoena from House Comm. on Oversight and Reform to Mazars USA, LLP (Apr. 15, 2019).

273. Complaint, Trump v. Comm. on Oversight & Reform of U.S. House of Representatives, 380 F. Supp. 3d 76 (D.D.C. 2019) (No. 19-cv-01136).

274. *Id*. at 2, 3, 5, 6.

275. *Id*. at 2, 6 (citing Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1881)).

276. Statement of Points and Authorities in Support of Plaintiffs' Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 11, Trump v. Comm. on Oversight & Reform of U.S. House of Representatives, 380 F. Supp. 3d 76 (No. 19-cv-01136).

277. Opposition of Intervenor-Defendant Committee on Oversight and Reform of the U.S. House of Representatives to Plaintiffs' Motion for a Preliminary Injunction at 22, Trump v. Comm. on Oversight & Reform of U.S. House of Representatives, 380 F. Supp. 3d 76 (D.D.C. 2019) (No. 19-cv-01136 APM).

"the possibility that the Committee could find criminal activity here does not convert the Committee's inquiry into a law-enforcement task, nor does it invalidate the legitimate legislative purpose for the Committee's subpoena to Mazars."[278] The Committee pointed out that when it discovered criminal activity in the past, it referred those cases "to the proper Executive Branch officials."[279]

The district court rejected Trump's arguments, concluding in blunt language that *Kilbourn* was "largely impotent as a guiding constitutional principle"[280] and holding that the Committee's investigation "fits comfortably" within the scope of Congress's investigative powers.[281] "Just because a congressional investigation has the potential to reveal law violations," the court explained, "does not mean such investigation exceeds the legislative function."[282] The court cited all the reasons *Kilbourn* could not be relied on, including the Supreme Court's criticism of its "loose language" in *Rumely*, the "inroads" made by *McGrain* and *Sinclair*, and Landis's review of its historical and other deficiencies.[283]

Trump was undaunted. On appeal to the D.C. Circuit, his attorneys again relied heavily on *Kilbourn*.[284] In addition to the Cummings memo, they pointed to other Committee members who stated publicly that they were investigating his alleged crimes.[285] Trump's attorneys argued, "If this rationale does not violate the prohibition on Congress conducting law-enforcement investigations, then nothing does."[286] They conceded that the Committee had identified legislative branch interests

278. *Id*. at 22 (citing Hutcheson v. United States, 369 U.S. 599, 618 (1962)).
279. *Id*.
280. Trump v. Comm. on Oversight & Reform of U.S. House of Representatives, 380 F. Supp. 3d 76, 100 (D.D.C. 2019).
281. *Id*. at 95 (referencing the Senate Watergate Committee investigation, S. Res. 60 (93rd Cong., 1st Session) (Feb. 7, 1973), and the Senate Whitewater investigation, S. Res. 120 (104th Cong., 1st Session, 1995)).
282. *Id*. at 97.
283. *Id*. at 99.
284. Brief for Appellants, Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142) (citing Kilbourn v. Thompson, 103 U.S. 168 (1881) at pages 17, 18, 19, 28, 34, 35, 45, 47, and 51).
285. *Id*. at 7–8. During the Cohen hearing, several members made similar statements, including Rep. Katie Hill ("I ask these questions to help determine whether our very own president committed felony crimes while serving in the Oval Office, including efforts to conceal payments that were intended to mislead the public and influence the outcome of an election."); Rep. Lacy Clay ("I'd like to talk to you about the president's assets since by law these must be reported accurately on its federal financial disclosure."); and Rep. Ro Khanna ("This document is compelling evidence of federal and state crimes including financial fraud . . . after the President took office."). *Hearing with Michael Cohen*, *supra* note 261, at 37, 107, 150.
286. Brief for Appellants at 33, Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142).

the subpoena furthered but, invoking *Kilbourn* repeatedly, argued that "Congress is simply not allowed to conduct law-enforcement investigations of the President."[287] Trump and his attorneys then went further, arguing that *Kilbourn* stood for the premise that "congressional investigations are *themselves* a form of 'punishment'."[288]

Trump appeared to get a boost when the Justice Department under Attorney General William Barr filed an amicus brief claiming the Committee's avowed purpose of investigating potential crime was unconstitutional.[289] Perhaps recognizing the weakness of *Kilbourn*, the Department chose not to cite it even once, but still claimed that Chairman Cummings's memo and subpoena "bear some of the hallmarks" of a law enforcement investigation.[290] Seizing on this point, Trump's attorneys filed a supplemental brief elevating the Department's phrase as "crucial" and arguing that "[i]f anyone knows what is and isn't law enforcement, it's the Department of Justice."[291]

The appellate court rejected all of Trump's arguments, stating: "Simply put, an interest in past illegality can be wholly consistent with an intent to enact remedial legislation."[292] The Court cited the resolutions in *Hutcheson* authorizing a committee to investigate "criminal" activities and in *Sinclair* authorizing a committee to investigate "fraud and corruption," concluding that both were constitutionally sound because they were ascertaining "whether additional legislation might be advisable."[293] The Court noted that if *Kilbourn* had created "any doubt" about Congress's power to conduct investigations to further legislation, "the Supreme Court dispelled that cloud" in *McGrain*, *Sinclair*, *Watkins*, *Barenblatt*, and other subsequent cases.[294]

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287. *Id*. at 12, 35.

288. Reply Brief for Appellants at 9–10, Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142) (emphasis in original) (citing Kilbourn v. Thompson, 103 U.S. 168, 191 (1881); Watkins v. United States, 354 U.S. 178, 187 (1957); and Marshall v. Gordon, 243 U.S. 521, 546 (1917)).

289. Brief for the United States as Amicus Curiae at 9, Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142).

290. *Id*. at 17–18.

291. Appellants' Response to Amicus Brief at 8, Trump v. Mazars, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142).

292. Trump v. Mazars USA, LLP, 940 F.3d 710, 728 (D.C. Cir. 2019).

293. *Id*. at 728–29 ("So too here. Like the committees in *Hutcheson* and *Sinclair*, the Oversight Committee has expressed an interest in determining whether and how illegal conduct has occurred. But also like the committees in *Hutcheson* and *Sinclair*—indeed, even more so—the Oversight Committee has repeatedly professed that it seeks to investigate remedial legislation. In fact, the House has even put its legislation where its mouth is: it has passed one bill pertaining to the information sought in the subpoenas and is considering several others. . . . The Committee's interest in alleged misconduct, therefore, is in direct furtherance of its legislative purpose.").

294. *Id*. at 718–22.

Dissenting, Judge Neomi Rao cited *Kilbourn* a dozen times to propose a new separation of powers vision. She noted that the Committee "consistently maintained that it seeks to determine whether the President broke the law," and she complained that the majority upheld the subpoena "as part of the *legislative power*."[295] She was right on both counts; this is precisely what *McGrain* allowed. However, her new approach proposed barring the House from issuing subpoenas to investigate potential criminal activity by "impeachable" officials unless it launches a formal impeachment inquiry.[296] The majority responded that her proposal would directly contradict *McGrain* and "the test the Supreme Court has enforced for more than a century."[297] The majority also warned that her proposal would allow a single member of Congress to raise "suspicions of criminality," after which a committee would have to decide to impeach or drop the inquiry.[298]

At the Supreme Court, Trump and his attorneys prioritized as their top argument the assertion that the Committee was engaged in an illegitimate law enforcement purpose—a "non-legislative task."[299] They argued that it was not "contested" that the Committee was investigating crime and that the D.C. Circuit agreed.[300] Both assertions were accurate.[301] In response, the House challenged the premise of Trump's argument.[302] Citing *Sinclair*, *Hutcheson*, and *McGrain*, the House asserted that "Congress may investigate activities that are the subject of existing grand jury investigations or indictments of the very

295. *Id*. (emphasis in original).

296. *Id*. at 748 (Rao, J., dissenting). *See also* Michael Stern, *Kilbourn, Chapman, & Rao. Oh My.*, POINT OF ORDER (Oct. 24, 2019), https://www.pointoforder.com/2019/10/24/kilbourn-and-chapman-and-rao-oh-my/ [https://perma.cc/JZ8K-QTD3] (noting that *Kilbourn* "plainly does not say what Rao claims it says").

297. *Mazars*, 940 F.3d at 737–38 (citing Barenblatt v. United States, 360 U.S. 109, 127 (1958)) (also noting that she cited "nothing in the Constitution or case law—and there is nothing—that compels Congress to abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process").

298. *Id*. at 738.

299. Petition for a Writ of Certiorari at 19, Trump v. Mazars USA, LLP, 591 U.S. 848 (2020) (No. 19-715). When Trump appealed, the Supreme Court combined the Oversight Committee case with its review of subpoenas issued by the House Financial Services and Intelligence Committees discussed in Part III.B, below.

300. *Id*. at 20.

301. Trump and his attorneys also asserted that the Committees "seem comfortable confessing to engaging in law enforcement because, in their view, there is nothing wrong with it." Reply Brief for Petitioners at 18, *Mazars*, 591 U.S. 848 (Nos. 19-715, 19-760). In fact, the Committees never "confessed" to engaging in "law enforcement," but instead fully acknowledged, and defended, investigating criminal activity in service of their legislative branch interests.

302. Brief for Respondent Committees of the U.S. House of Representatives at 47, *Mazars*, 591 U.S. 848 (No. 19-715).

witnesses providing testimony without engaging in an impermissible law-enforcement inquiry."[303] Amici, in addition to recounting *Kilbourn*'s deficiencies, pointed out that the Committees "would not purport to charge the official, put him or her on trial (absent an impeachment, which the Constitution expressly authorizes), or impose punishment," but "are instead overseeing the conduct of Executive officials, among other things, in order to inform the public and enable a possible statutory or appropriations response."[304]

In its decision, the Supreme Court completely ignored Trump's law enforcement argument even though he had made it a priority at every stage of the litigation. Instead of concluding that Congress's investigative power derives from a judicial source, the Court found that it is inherent in the Constitution's grant of authority to the legislative branch.[305] The Court upheld its longstanding position that the Constitution authorizes Congress to compel the production of information "needed for intelligent legislative action" and highlighted that it "unquestionably" remains "the duty of *all* citizens to cooperate."[306] Because the information was being sought from the President, the Court noted that separation of powers concerns were implicated, and it established a new four-part test to balance the interests of Congress and the President.[307] But those factors did not question Congress's authority to investigate illegal conduct to advance a valid legislative branch function.[308]

Justice Thomas dissented, calling on the Court to overrule *McGrain* and its progeny precisely *because* those cases "rejected *Kilbourn*'s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power."[309] Thomas put forth his own

303. *Id*. at 49.

304. Brief of Separation-of-Powers Law Professors as Amici Curiae Supporting Respondents at 19–20, *Mazars*, 591 U.S. 848 (No. 19-715) (citing Watkins v. United States, 354 U.S. 178, 200, n.33 (1957); McGrain v. Daugherty, 273 U.S. 135, 179–80 (1927)).

305. Trump v. Mazars USA, LLP, 591 U.S. 848, 862–63 (2020) (citing *McGrain*, 273 U.S. at 161, 174).

306. *Id*. at 871 (citing Watkins v. United States, 354 U.S. 178, 187 (1957)) (emphasis in *Mazars*).

307. *Id*. at 869–71 (including (1) whether the legislative purposes warrant "involving the President and his papers"; (2) whether the subpoena is "no broader than reasonably necessary to support Congress's legislative objective[s]"; (3) whether the evidence offered by Congress establishes that the subpoena furthers a valid legislative purpose; and (4) whether the burdens on the President "cross constitutional lines").

308. The closest the Court got to this issue was in its discussion of the first factor, when it compared access to information in criminal proceedings and congressional proceedings and suggested that Congress's legislative interests may not be sufficient "to justify access to the President's personal papers when other sources could provide Congress the information it needs." *Id*. at 869.

309. *Id*. at 884 (Thomas, J., dissenting).

novel position: Congress should have no authority to issue legislative subpoenas for any "private, nonofficial documents," even if they served a valid legislative purpose.[310] Invoking *Kilbourn* repeatedly,[311] Thomas sought to bring back its flawed historical argument that the Founders never envisioned Congress issuing legislative subpoenas because the new nation was breaking from an abusive, judicial, and supreme Parliament—a claim debunked by Potts and Landis and rejected by *McGrain* nearly a century earlier.[312] Finally, Thomas committed the same one-sided error as the district court in *McGrain*: he cited Senator Sumner's opposition to legislative subpoenas in the investigation of John Brown's raid on Harpers Ferry but, in a curious omission, disregarded Senator Fessenden's response and the Senate's overwhelming adoption of the resolution to issue the subpoenas.[313]

Some had wondered before the decision whether the Court might do exactly what Trump and Thomas suggested by overruling *McGrain* and reinstating *Kilbourn*'s exclusive view.[314] But the Court, with seven justices joining the opinion, affirmed its previous cases upholding Congress's investigative authority as a core legislative branch power.[315] The opinion included a standard background line citing *McGrain* and *Quinn* for the proposition that Congress may not issue subpoenas for law enforcement purposes, but the Court did not suggest that the committee was doing so, despite repeated and insistent efforts by Trump and his aides to make that case.[316] Of more general concern for congressional investigators, and as discussed in Part IV, the Court seemed to adopt the misguided suggestion from the D.C. Circuit's opinion in *Senate Select Committee* that congressional investigations may not have the same need for thoroughness and accuracy as criminal proceedings.[317]

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310. *Id*. at 891.

311. *See id*. at 873, 875, 881, 883, 884, 885, 889.

312. *See id*. at 873–84.

313. *Id*. at 880–81. This omission is particularly odd since the Court's opinion in *McGrain*, which Thomas discussed extensively, had corrected the district court's error and included the full context in its opinion.

314. *See, e.g*., Michael Stern, *Will the* Mazars *Court Overrule McGrain?*, Point of Order (June 2, 2020), https://www.pointoforder.com/2020/06/02/will-the-mazars-court-overrule-mcgrain-part-one/ [https://perma.cc/X88B-VP7Q].

315. *Mazars*, 591 U.S. at 862–63 (including *McGrain*, *Watkins* & *Quinn*, among others).

316. *Id*. at 863. In a separate dissent, Justice Alito appeared to agree with Judge Rao, asserting that there was "disturbing evidence of an improper law enforcement purpose." *Id*. at 892 (Alito, J., dissenting) (citing 940 F.3d 710, 767–71 (CADC 2019) (Rao, J., dissenting)).

317. *See Mazars*, 591 U.S. at 870 (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974)). The Court cited a case for this point that did not involve Congress as a party, but rather private litigants who brought civil litigation to enforce the Federal Advisory Committee Act with respect

As the case wound its way back on remand, Trump, his attorneys, and the Justice Department continued to press the same law enforcement argument but kept failing at every turn.[318] As the district court concluded, "Plaintiffs have advanced this argument at each stage of review, and no court has accepted it . . . . This court rejects it once more."[319] The D.C. Circuit also rejected Trump's claim again, finding that the Committee's subpoena advanced a valid legislative branch purpose and "not an illegitimate law-enforcement one."[320] Applying the Supreme Court's new test, the Circuit Court narrowed portions of the subpoena, but ultimately held that the Committee "adequately described its legislative aims and sufficiently set forth how, in its view, the subpoenaed information will further its consideration of potential legislation."[321] During this same period, Trump also challenged the validity of the New York state criminal case against him by claiming the District Attorney copied the Oversight Committee's subpoena to Mazars "virtually word for word."[322] This effort to suggest illicit coordination between congressional and criminal prosecutors also failed.[323]

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to Vice President Dick Cheney's Energy Task Force. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367 (2004) (noting that the "need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in [United States v.] *Nixon*").

318. *See, e.g.*, Appellants' Supplemental Brief at 23-24, Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142) (arguing unsuccessfully that while it is safe to assume investigations into "past illegality" can be consistent with legislative branch purposes, "that assumption is not safe when the investigative target is the President"); Brief for the United States as Amicus Curiae at 18, Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019) (No. 19-5142) (arguing unsuccessfully that the Committee has no constitutional warrant to investigate whether an individual "broke the law"); Plaintiffs' Motion for Summary Judgment and Supporting Memorandum of Points and Authorities at 31, Trump v. Mazars USA, LLP, 560 F. Supp. 3d 47 (D.D.C. 2021) (No. 19-cv-01136-APM) (arguing unsuccessfully that it was improper for the Committee to investigate "the President's wrongdoing"); Appellants' Brief at 52–53, Trump v. Mazars USA, LLP, 39 F.4th 774 (D.C. Cir. 2021) (Nos. 21-5176, 21-5177) (arguing unsuccessfully that the Committee may not investigate the President's "illegal conduct"); Appellants' Reply Brief & Cross-Appellees' Response Brief at 60, Trump v. Mazars USA, LLP, 39 F.4th 774 (D.C. Cir. 2022) (Nos. 21-5176, 21-5177) (arguing unsuccessfully that evidence of an invalid law enforcement purpose was "voluminous, lopsided, and largely undisputed").

319. Trump v. Mazars USA, LLP, 560 F. Supp. 3d 47, 60 (D.D.C. 2021) (citing 940 F.3d at 728) (noting that the Supreme Court refused to take up Trump's argument).

320. Trump v. Mazars USA, LLP, 39 F.4th 774, 808–09 (D.C. Cir. 2022) (citing McGrain v. Daugherty, 273 U.S. 135, 180 (1927)) (noting that Trump was unsuccessful before the Supreme Court when he argued that the Committee "issued the Mazars subpoena for an impermissible law-enforcement purpose" (citing Brief for Petitioners 36–45, *Mazars*, 591 U.S. 848 (No. 19-715))).

321. *Id*. at 791–92.

322. Emergency Application for Stay Pending the Filing and Disposition of a Petition for Writ of Certiorari at 7, Trump v. Vance, 591 U.S. 786 (Oct. 13, 2020) (No. 20A63).

323. Trump v. Vance, 591 U.S. 786 (2021) (denying stay); Trump v. Vance, 480 F. Supp. 3d 460, 507 (S.D.N.Y. 2020) (granting motion to dismiss with prejudice).

After losing these cases, Trump agreed to settle, and Mazars began producing records.[324] As documented in a report issued by the Committee's new ranking member, Rep. Jamie Raskin, these documents revealed that foreign countries spent millions of dollars at Trump's properties while he was president in apparent violation of the Foreign Emoluments Clause.[325]

B. House Financial Services and Intelligence Committee Investigations

While the Oversight Committee was conducting its investigation, the House Committee on Financial Services and Permanent Select Committee on Intelligence were conducting their own inquiries into Trump's finances. On April 11, 2019, the Financial Services Committee issued subpoenas to Deutsche Bank AG and Capital One Financial Corporation seeking financial documents relating to Trump and his businesses. Chair Maxine Waters stated that the investigation would examine potential money laundering and "questionable financing provided to President Trump and The Trump Organization by banks like Deutsche Bank to finance its real estate properties."[326] The Intelligence Committee also issued a subpoena to Deutsche Bank, and Chairman Adam Schiff explained that the purposes of that investigation included determining the "extent of any links and/or coordination between the Russian government, or related foreign actors, and individuals associated with Donald Trump's campaign, transition, administration, or business interests, in furtherance of the Russian government's interests."[327]

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324. Order, Trump v. Mazars USA, LLP, 560 F. Supp. 3d 47 (D.D.C. Sept. 11, 2022) (No. 1:19-cv-01136-APM) (approving Stipulated Agreement and retaining jurisdiction to enforce settlement); Letter from Carolyn B. Maloney, Chairwoman, House Comm. on Oversight & Reform, to Debra Steidel Wall, Acting Archivist of the United States (Nov. 14, 2022), https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/2022-11-14.CBM%20to%20Steidel%20Wall-NARA%20re%20Mazars%20Docs.pdf [https://perma.cc/T7TN-XAXD].

325. Staff of H. Comm. on Oversight & Accountability, 118th Cong., Democratic Rep. on White House for Sale: How Princes, Prime Ministers, and Premiers Paid Off President Trump 14 (Comm. Print 2024) (recommending legislative reforms to develop systems to ensure future presidents abide by the provision). However, in a blow to Congress's institutional interests, when Republicans took over the House in 2022, the new Committee chair, Rep. James Comer, abandoned the court-approved settlement. Order, Trump v. Mazars USA, LLP, No. 1:19-cv-01136-APM (D.D.C. July 5, 2023) (approving Joint Motion for Entry of Dismissal with Prejudice and to Terminate the Case).

326. 165 Cong. Rec. H2698 (daily ed. Mar. 13, 2019) (statement of Rep. Maxine Waters) ("The movement of illicit funds throughout the global financial system raises numerous questions regarding the actors who are involved in these money laundering schemes and where the money is going.").

327. Press Release, Adam Schiff, Chairman, House Permanent Select Comm. on Intel., Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019),

Trump filed a complaint in the Southern District of New York seeking to prevent the financial institutions from complying.[328] He and his attorneys argued that the committees were "assuming the powers of the Department of Justice"[329] and were "trying to determine whether the President engaged in business practices that violated civil or criminal law."[330] At oral argument, Trump's attorneys asserted that "investigation of crimes is no less of an executive function than the actual prosecution of them."[331] Again, they relied on *Kilbourn*.[332] Trump's attorney also claimed that the face of the subpoenas alone demonstrated a law enforcement purpose because they sought information about whether laws were broken[333] and because prosecutors might seek similar information.[334] In response, the Committees corrected the legal and precedential omissions left by Trump's attorneys.[335]

The district court rejected Trump's arguments and found that the committees were not engaged in impermissible "law enforcement" activities, had not "usurped" powers of the judicial or executive branches, and were not seeking to "prosecute plaintiffs."[336] The court concluded that the committees provided "ample justification establishing clear,

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https://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=447 [https://perma.cc/5XEV-9ZQW].

328. Complaint, Trump v. Deutsche Bank, 2019 WL 2204898 (S.D.N.Y. May 22, 2019) (No. 1:19-cv-03826-ER).

329. *Id*. at 3, 7 (citing Quinn v. United States, 349 U.S. 155, 161 (1955), Watkins v. United States, 354 U.S. 178, 187 (1957), and Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1881)).

330. Reply in Support of Plaintiffs' Motion for a Preliminary Injunction at 7, Trump v. Deutsche Bank, 2019 WL 2204898 (S.D.N.Y. May 22, 2019) (No. 1:19-cv-03826-ER). *See also id.* at 2 (arguing the subpoena was "a transparent attempt to conduct a law-enforcement investigation into whether the President's businesses violated civil or criminal law").

331. Transcript of Oral Argument at 9, Trump v. Deutsche Bank, 2019 WL 2204898 (S.D.N.Y. May 22, 2019) (No. 1:19-cv-03826-ER).

332. *Id*. at 8–9.

333. *Id*. at 6 (noting, for example, that the Capital One subpoena sought information about financial transfers in excess of $10,000, which therefore relate to "potential violation of various statutes").

334. *Id*. at 6–7 (arguing that if "the U.S. Attorney's office in the Southern District of New York wanted to launch the broadest possible investigative warrant of the plaintiffs in this case, it could not ask for more than it has asked for in the Capital One subpoena").

335. Opposition of Intervenor-Defendants Committee on Financial Services and Permanent Select Committee on Intelligence of the U.S. House of Representatives to Plaintiffs' Motion for a Preliminary Injunction at 18, Trump v. Deutsche Bank, 2019 WL 2204898 (S.D.N.Y. May 22, 2019) (No. 1:19-cv-03826-ER) (citing Hutcheson v. United States, 369 U.S. 599, 618 (1962)).

336. Conference at 74–75, Trump v. Deutsche Bank, 2019 WL 2204898 (S.D.N.Y May 22, 2019) (No. 1:19-cv-03826-ER).

legitimate legislative purposes."[337] In pointed language, the court directed Trump and his attorneys to heed the warning from *Quinn*—Congress's power to investigate "should not be confused" with powers of law enforcement.[338]

On appeal to the Second Circuit, Trump and his attorneys again tried to collapse the distinction between investigation and prosecution, arguing that investigation itself is "a law-enforcement power that lies within the exclusive province of the executive branch."[339] They also asserted that the subpoenas were impermissible because they were "indistinguishable from a criminal subpoena."[340] In response, the Committees openly acknowledged that they were investigating activity that was potentially criminal, but made clear that they were doing so for legislative branch, rather than law enforcement, purposes.[341] The Second Circuit concluded that the subpoenas served valid legislative branch purposes.[342] It also rejected the claim, based on statements

337. *Id*.

338. *Id*. at 72–73 (citing Quinn v. United States, 349 U.S. 155, 155 (1955)) ("[Plaintiffs] contend that, at best, the Committees seek these documents so they can conduct law-enforcement activities that the Supreme Court has held are reserved to the other branches. The Court disagrees. The power to investigate should not be confused with any of the powers of law enforcement").

339. Brief for Plaintiffs-Appellants at 15, Trump v. Deutsche Bank, 943 F.3d 627 (2d Cir. 2019) (No. 19-1540-cv). *See also id.* at 18–19 (repeating the claim debunked by Potts, Landis, and *McGrain* that the contempt power in Parliament was different than the contempt power in Congress due to its "judicial authority") (citing Kilbourn v. Thompson, 103 U.S. 168, 192 (1881)).

340. *Id*. at 35–36. *See also* Reply Brief for Plaintiffs-Appellants at 9, Trump v. Deutsche Bank, 943 F.3d 627 (2d Cir. 2019) (No. 19-1540-cv) (arguing that "congressional investigations are *themselves* a form of 'punishment'") (emphasis in original). As with the Oversight Committee, the Justice Department submitted an amicus brief. Brief for the United States as Amicus Curiae, Trump v. Deutsche Bank, 943 F.3d 627 (2d Cir. 2019) (No. 19-1540-cv). As with that investigation, Trump argued that "[i]f anyone knows what is and isn't law enforcement, it's the Department of Justice." Supplemental Brief for Plaintiffs-Appellants in Response to *Amicus Curiae* United States at 10, Trump v. Deutsche Bank, 943 F.3d 627 (2d. Cir. 2019) (No. 19-1540-cv).

341. Brief for the Committee on Financial Services and Permanent Select Committee on Intelligence of the U.S. House of Representatives at 46, Trump v. Deutsche Bank, 943 F.3d 627 (2d Cir. 2019) (No. 19-1540) ("The fact that the same underlying conduct by the banks or by Mr. Trump might be unlawful does not invalidate the investigations.") (citing *Hutcheson*, 369 U.S. at 618; McGrain v. Daugherty, 273 U.S. 135, 179–80 (1927)).

342. Trump v. Deutsche Bank, 943 F.3d 627, 658–65 (2d Cir. 2019) ("Any investigation into the effectiveness of the relevant agencies' existing efforts to combat money laundering or the need for new legislation to render such efforts more effective can be expected to discover evidence of crimes, and such discovery would not detract from the legitimacy of the legislative purpose in undertaking the investigation. The Supreme Court long ago rejected Appellants' argument." (citing *McGrain*, 273 U.S. at 179–80, and Sinclair v. United States, 279 U.S. 263, 295 (1929)).

from other members, that the "real object" of the investigation was to "embarrass" Trump.[343]

As noted above, the Supreme Court consolidated the Financial Services, Intelligence, and Oversight Committee cases into a single decision in *Trump v. Mazars*, where it disregarded Trump's primary argument that the Committees were engaged in an unconstitutional law enforcement function.[344]

C. January 6th Committee Investigation

From its inception, it was evident that Congress's investigation of the Capitol insurrection would include a review of criminal conduct. Live coverage of the mob viciously beating police officers as they stormed the Capitol, called for the execution of the Vice President, and hunted down lawmakers soon turned into reports of grave injuries and deaths.[345] The resolution adopted by the House was broad, directing the Committee to investigate "the facts, circumstances, and causes" of the insurrection, as well as "the influencing factors that fomented such an attack on American representative democracy while engaged in a constitutional process."[346] The resolution also directed the Committee to report on any "findings, conclusions, and recommendations for corrective measures."[347]

As the Committee took up its work, it became clear that the Justice Department and other law enforcement agencies would be conducting their own investigations and prosecutions at the same time. Perhaps

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343. *Id*. at 664.

344. In response to the Court's decision, the Financial Services and Intelligence Committees narrowed their subpoenas to Deutsche Bank, the Financial Services Committee withdrew its subpoena to Capital One, and the circuit court remanded the case to the district court. Order, Trump v. Deutsche Bank, 943 F.3d 627 (2d Cir. Dec. 14, 2020) (No. 19-1540-cv). Despite months of negotiations, no resolution was reached, and Republicans abandoned the subpoenas when they took control of the House in 2023. Zoe Tillman, *Trump Drops Deutsche Bank Subpoena Fight with New GOP-Led House*, Bloomberg (Jan. 27, 2023), https://www.bloomberg.com/news/articles/2023-01-27/donald-trump-drops-deutsche-bank-subpoena-fight-with-new-republican-led-house?embedded-checkout=true [https://perma.cc/CB8P-YS2Z].

345. *See, e.g*., Wash. Post, *LIVE COVERAGE: Mob Storms the U.S. Capitol on Jan. 6th 2021*, YouTube (Jan. 6, 2021), https://www.youtube.com/watch?v=_EQfUbE4bL8 [https://perma.cc/F8ZJ-SE26]; *Trump's American Carnage*, PBS: Frontline (Jan. 6, 2021), https://www.pbs.org/wgbh/frontline/documentary/trumps-american-carnage/transcript/ [https://perma.cc/39TJ-L3D6]; Susan Dominus & Luke Broadwater, *The Capitol Police and the Scars of Jan. 6*, N.Y. Times Mag. (Jan. 4, 2022), https://www.nytimes.com/2022/01/04/magazine/jan-6-capitol-police-officers.html [https://perma.cc/3HWC-WNUK].

346. H.R. Res. 503, 117th Cong. §§ 1, 3(1) (2021).

347. *Id*. at §§ 4(a)(3), 4(c).

more than with any other investigation in history, the Committee's work would dovetail with these ongoing criminal cases. The Committee conducted more than 1,000 interviews and depositions and nine public hearings featuring more than 70 witnesses.[348] At the same time, criminal convictions eventually climbed into the hundreds and are still growing as of the date of this Article.[349]

At the conclusion of its investigation, the Committee issued a report informing members of Congress and the public about the results of its investigation.[350] The report proposed key legislative reforms drawn directly from the facts obtained by the Committee,[351] recommended steps federal agencies could take to counter violent extremism without waiting for legislation,[352] and made proposals for Congress to consider for its own internal operations.[353] The Committee also made referrals to the Justice Department for criminal prosecutions of Trump and several aides.[354] The Committee noted that it was up to prosecutors rather than

348. H. Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Final Report, H.R. Rep. No. 117-663, at 3 (2d Sess. 2022); H. Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Business Meeting (Oct. 13, 2022) (unofficial transcript can be found at *Here's Every Word From the 9th Jan. 6 Committee Hearing on its Investigation*, NPR (Oct. 13, 2022), https://www.npr.org/2022/10/13/1125331584/jan-6-committee-hearing-transcript [https://perma.cc/KJB3-S5GS]).

349. *See 43 Months Since the Jan. 6 Attack on the Capitol*, Dep't of Just., https://www.justice.gov/usao-dc/43-months-jan-6-attack-capitol [https://perma.cc/43L8-KAKQ] (last updated August 6, 2024) (reporting that 1,488 defendants have been charged and 944 sentenced). A Supreme Court decision narrowing the scope of an obstruction charge brought against approximately 350 defendants has caused some of their cases to be reviewed. *See* Fischer v. United States, 603 U.S. __ (2024). *See also* Ella Lee, *DOJ Seeks Foothold after Supreme Court Loss on Jan. 6 Obstruction Charge*, Hill (July 7, 2024), https://thehill.com/regulation/court-%20battles/4753974-supreme-court-jan-6-obstruction-charge/ [https://perma.cc/JCG6-G3XA].

350. H.R. Rep. No. 117-663 (including appendices on agency preparations for and responses to the attack, the D.C. National Guard's preparations, the extent to which the Trump campaign raised donations alleging that the election was stolen, and malign foreign influence).

351. *Id*. at 689–92 (including H.R. 8873, The Presidential Election Reform Act, and legislation to create a mechanism to evaluate whether to bar individuals involved in the insurrection from holding future office under Section 3 of the 14th Amendment, expand the scope and penalties of various criminal statutes, and create a cause of action for the House to support subpoenas in federal court). *See also* Liz Cheney & Zoe Lofgren, *We Have a Bill to Help Prevent Another Jan. 6 Attack*, Wall St. J. (Sept. 18, 2022), https://www.wsj.com/articles/we-have-a-bill-to-prevent-another-jan-6-attack-cheney-committee-electoral-count-president-11663535092 [https://perma.cc/QH2J-2FBQ].

352. H.R. Rep. No. 117-663, at 689–90.

353. *Id*. at 690–92 (including to enhance oversight of Capitol Police, evaluate the role of the media in promoting false information, and examine potential abuse of the Insurrection Act).

354. *Id*. at 99, 103–112 (referring Trump and others for prosecution for obstructing an official proceeding (18 U.S.C. § 1512(c)), conspiracy to defraud the United States

Congress to determine whether to prosecute based on the evidence collected.[355]

Because congressional investigators and criminal prosecutors were operating in tandem, their investigations often intersected. The Committee guarded its constitutional prerogatives and provided information to law enforcement agencies only when it deemed appropriate. For example, as the investigation proceeded, the Justice Department requested transcripts of the Committee's interviews that might "contain information relevant to a criminal investigation we are conducting."[356] The Committee declined at that time because the testimony related to evidence the Committee was still developing.[357] This dispute spilled into public view when the Department suggested the Committee's failure to provide these transcripts might complicate its ability "to investigate and prosecute those who engaged in criminal conduct in relation to the January 6 attack on the Capitol."[358] Again, the Committee declined, and Chairman Bennie Thompson explained that while the Committee wanted to accommodate the Department, its "higher priority" was conducting its investigation and compiling the report required by the House resolution.[359] The Committee subsequently agreed to share information with both federal and state prosecutors and included this fact in its final report.[360]

(18 U.S.C. § 371), conspiracy to make a false statement (18 U.S.C. §§ 371, 1001), actions to incite, assist, or aid and comfort an insurrection (18 U.S.C. § 2383), and other conspiracies (18 U.S.C. §§ 372 and 2384)).

355. *Id*. at 689 (noting that "prosecutorial authorities will now make their determinations on whether to prosecute individuals involved").

356. Letter from Kenneth Polite, Jr. Assistant Att'y Gen. for the Crim. Div., & Matthew Graves, U.S. Att'y for the Dist. of Columbia, to Timothy Heaphy, Staff Dir., Jan. 6th Comm. (Apr. 20, 2022) (as quoted in Glenn Thrush & Luke Broadwater, *Justice Dept. Is Said to Request Transcripts from Jan. 6 Committee,* N.Y. TIMES (May 17, 2022), https://www.nytimes.com/2022/05/17/us/politics/jan-6-committee-transcripts.html [https://perma.cc/6ZBH-NXJM]).

357. Thrush & Broadwater, *supra* note 356 (quoting Chairman Bennie Thompson stating that giving the Department access would be "premature" in light of the Committee's ongoing work).

358. Letter from Kenneth Polite, Jr. Assistant Att'y Gen. for the Crim. Div., Matthew Olsen, Assistant Att'y Gen. for Nat'l Sec., & Matthew Graves, U.S. Att'y for the Dist. of Columbia, to Timothy Heaphy, Chief Investigative Couns., Jan. 6th Comm. (June 15, 2022).

359. Kyle Cheney & Josh Gerstein, *Tensions Escalate as DOJ Renews Request for Jan. 6 Panel Transcripts*, POLITICO (June 16, 2022), https://www.politico.com/news/2022/06/16/tensions-escalate-as-doj-renews-request-for-jan-6-panel-transcripts-00040267 [https://perma.cc/8BQS-S76V] (quoting Thompson as stating: "We have a report to do. So, we're not going to stop what we're doing to share information that we've gotten so far with the Department of Justice. . . . We will eventually cooperate with them.").

360. Zachary Cohen et al., *House January 6 Committee Handing Over Investigative Materials to DOJ*, CNN (Dec. 20, 2022), https://www.cnn.com/2022/12/20/politics/

The Committee's investigation also intersected with the criminal justice process when the Committee voted to hold four witnesses in contempt for defying its subpoenas: trade advisor Peter Navarro, former chief strategist Stephen Bannon, deputy chief of staff Dan Scavino, and chief of staff Mark Meadows.[361] Under the criminal contempt statute, it was the Justice Department's responsibility to move forward with these prosecutions, and although it later informed the Committee that it would prosecute Navarro and Bannon, it indicated with little explanation that it would not bring cases against Scavino and Meadows.[362] Although some have speculated that prosecuting Bannon and Navarro was easier for the Department because both refused to provide any testimony or documents, it remains unclear why the Department did not prosecute Scavino and Meadows since both provided only a fraction of the information sought by the Committee and failed to comply fully with the terms of their subpoenas.[363] In any case, by moving forward with at least

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january-6-committee-justice-department-handoff [https://perma.cc/Z7LG-RNFU]; H.R. REP. NO. 117-663, at 112 (noting that the Committee provided information to Justice Department and Fulton County District Attorney's Office).

361. H.R. REP. NO. 117-663, at 119–20 (Bannon was not a White House employee at the time of the insurrection).

362. Letter from Matthew Graves, U.S. Att'y for the Dist. of Colum., to Douglas Letter, House Couns. (June 3, 2022) (as cited in Alan Feuer & Luke Broadwater, *Navarro Indicted as Justice Dept. Opts Not to Charge Meadows & Scavino*, N.Y. TIMES, June 4, 2022, at 11). *See also* H.R. REP. NO. 117-663, at 119 (stating that the reasons for the Justice Department's refusal to bring these contempt cases "are not apparent to the Committee"). Bannon and Navarro were both convicted and sentenced to four months in prison. Judgment in a Criminal Case, United States v. Bannon, CR-21-670-CJN (2022) (No. 1:21-cr-00670); Verdict Form, United States v. Navarro, 22-CR-200 (2022) (No. 1:22-cr-00200). Navarro began serving his sentence in March 2024 following unsuccessful appeals to the D.C. Circuit and Supreme Court. *See* Navarro v. United States (No. 23A843), 2024 WL 1839082 (in chambers); Navarro v. United States, 144 S. Ct. 771 (2024). Bannon began serving his sentence in July 2024 after a unanimous panel of the D.C. Circuit affirmed his conviction and the Supreme Court declined to review his case. *See* Judgment, United States v. Bannon, 22-3086 (2024) (No. 1:21-cr-00670); Bannon v. U.S., 144 S. Ct. 2704 (2024).

363. *See, e.g.*, Evan Perez et al., *DOJ Declines to Charge Meadows and Scavino with Contempt of Congress*, CNN (June 4, 2022), https://www.cnn.com/2022/06/03/politics/justice-department-declines-charge-meadows-scavino-january-6 [https://perma.cc/XR5F-37VW]. An interesting question arises as to whether the Department may have been in discussions about potential cooperation arrangements and did not want to impair those efforts with a prosecution on behalf of Congress. *See, e.g.*, Dennis Aftergut, *Why the DOJ Did Not Indict Mark Meadows (and What It Should Do Next)*, NBC NEWS (June 7, 2022), https://www.nbcnews.com/think/opinion/trump-lackey-mark-meadows-escaped-january-6-prosecution-peter-navarro-rcna32319 [https://perma.cc/HJA2-PUCC]. *See also* Rohini Kurup & Jonathan Shaub, *Dissecting the Justice Department's Prosecutorial Decisions on Navarro, Meadows, and Scavino*, LAWFARE (July 20, 2022, 9:12 AM), https://www.lawfaremedia.org/article/dissecting-justice-departments-prosecutorial-decisions-navarro-meadows-and-scavino-0 [https://perma.cc/T889-VCLH] (noting another potentially key difference in that the Justice

two of these contempt prosecutions, the Justice Department reflected its view that the Committee was serving valid legislative branch purposes and was not engaging in prohibited law enforcement purposes.

Throughout the Committee's investigation, Trump and his aides refused to comply with demands for information and filed suits to block the Committee from obtaining documents and testimony. One of their primary arguments was that the Committee had no authority to investigate crime, and they cited *Kilbourn* repeatedly. As in previous investigations, this argument failed every time.

For example, when the Committee sought documents from the National Archives, Trump sued to block the request, asserting, among other claims, that the Committee was serving no valid legislative purpose by investigating the insurrection, which he deemed a "law enforcement" power assigned exclusively to the executive and judiciary.[364] The district court found that the Committee's request served a valid legislative purpose, and the court had "no difficulty discerning multiple subjects on which legislation 'could be had' from the Select Committee's requests."[365] The court gave Trump's law enforcement argument only passing notice, concluding that the Committee's inquiry was not illegitimate simply because it "could have law enforcement implications."[366]

Trump repeated the argument on appeal and again was unsuccessful. His attorneys argued that the Committee was seeking to "try" Trump for wrongdoing, citing *McGrain*, but not acknowledging that this was precisely the argument the Supreme Court rejected in that case.[367] Trump's attorneys also argued that the Committee's failure to identify specific legislation at the outset of its investigation was evidence of "an

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Department may have concluded that Meadows and Scavino had a viable affirmative defense since they had received letters from Trump's attorney directing them not to comply on the basis of immunity); Michael Stern, *Bannon, Garland and Contempt of Congress: Part II (The Bannon Contempt)*, POINT OF ORDER (July 1, 2024), https://www.pointoforder.com/2024/07/01/bannon-garland-and-contempt-of-congress-part-ii-the-bannon-contempt/ [https://perma.cc/NP9F-KV5C] (noting a new Justice Department doctrine "never before addressed by an OLC opinion" that former advisors to former presidents may refuse to testify before Congress unless there has been "a sufficient showing of need or the immunity has been waived").

364. Complaint at 21, Trump v. Thompson, 573 F. Supp. 3d 1 (D.D.C. 2021) (No. 21-cv-2769) (citing Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1881)). Trump also claimed he had asserted executive privilege although President Biden, as the current executive, had waived the privilege. *Id*. at 9–10.

365. Trump v. Thompson, 573 F. Supp. 3d 1, 22 (D.D.C. 2021) (citing McGrain v. Daugherty, 273 U.S. 135, 177 (1927) and *In re* Chapman, 166 U.S. at 669–70).

366. *Id*. at 20 (citing *Watkins*, 354 U.S. at 198, and Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938)).

367. Trump v. Thompson, 20 F.4th 10, 42 (D.C. Cir. 2021) (citing *McGrain*, 273 U.S. at 179).

improper law enforcement purpose."[368] In perhaps the broadest iteration of their claim, they argued that *any* congressional investigation into *any* "wrongdoing" is barred by the Constitution as a prohibited law enforcement function.[369]

"Not at all," the D.C. Circuit Court answered.[370] "The mere prospect that misconduct might be exposed does not make the Committee's request prosecutorial. Missteps and misbehavior are common fodder for legislation."[371] The court affirmed the district court's opinion, agreed with the Committee's legislative interests, rejected Trump's separate claim of executive privilege, and cleared the Archives to produce documents.[372] Although the Committee's investigation may have resulted in an "alley oop" to the Department of Justice through criminal referrals,[373] it did not invalidate the Committee's valid legislative branch interests.

Trump was not alone. Other former Trump officials, outside advisors, and supporters made similar claims in their own court actions, all of which failed. They included John Eastman, a law professor who advised Trump, in Eastman's suit to block his university from producing his records;[374] former White House chief of staff Mark Meadows in a suit against the House Speaker and the Committee to block enforcement of a subpoena for documents and testimony;[375] former political advisor Steve Bannon in an attempt to defend against criminal contempt charges for defying the Committee's subpoenas;[376] former national security

368. Brief for Plaintiff-Appellant at 21–22, Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021) (No. 21-5254).

369. *Id*. at 22.

370. Trump v. Thompson, 20 F.4th 10, 42 (D.C. Cir. 2021).

371. *Id*.

372. *Id*. at 49.

373. *Election Night in America* (CNN television broadcast Dec. 6. 2022), available at https://transcripts.cnn.com/show/se/date/2022-12-06/segment/03 [https://perma.cc/SJ7V-K8V3] (statement of Van Jones).

374. Complaint at 8, Eastman v. Thompson, No. 8:22-cv-00099 (C.D. Cal. Jan. 20, 2022) (asserting that "the Committee's overriding purpose is criminal investigation and law enforcement, not legislative"); Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 WL 1407965, at *7 (C.D. Cal. Jan. 25, 2022) (finding a valid legislative purpose and noting that congressional investigations "might reveal evidence of criminal acts or other wrongdoing").

375. Complaint at 28, Meadows v. Pelosi, 639 F. Supp. 3d. 62 (D.D.C. 2021) (No. 1:21-cv-03217) ("Law enforcement and the punishment of perceived legal wrongs are not valid legislative purposes."); Meadows v. Pelosi, 639 F. Supp. 3d. 62, 76 (D.D.C. 2022) (declining to examine the motives that prompted the investigation and finding the issue irrelevant to the controlling issue of Speech or Debate Clause immunity (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975)).

376. Motion to Dismiss the Indictment at 12, United States v. Bannon, No. 21-670 (CJN), 2022 WL 1205478 (D.D.C. Apr. 15, 2022) (claiming subpoena was "an unconstitutional attempt to usurp the executive branch's authority to enforce the law"); Brief of Appellant at 52, United States v. Bannon, No. 22-3086 (D.C. Cir. May 3,

advisor Michael Flynn in a suit to block a subpoena for documents and testimony;[377] and so-called "alternate" Arizona electors Michael and Kelli Ward in a suit to block Committee subpoenas.[378]

The January 6th Committee would have been irreparably hindered in fulfilling its constitutional duties if courts had accepted Trump's argument that Congress lacks authority to investigate criminal activity. It would have been unable to enforce subpoenas for documents, compel testimony from recalcitrant witnesses, or hold defiant targets in contempt. It would have had to rely only on information that individuals were willing to provide voluntarily. In fact, the Committee was able to engage in fact-finding that uncovered disturbing new information, and it held compelling hearings that informed the public about these revelations. The Committee then proposed sweeping legislative reforms, offered numerous recommendations for agency action and congressional operations, and, when potential criminal conduct was identified, referred those cases to the Justice Department for prosecution. The Committee also provided the seminal account of one of the most egregious insurrections in the nation's history. Its final report informed members of Congress and the electorate about these events in a comprehensive way that no individual criminal prosecution or combination of prosecutions could have done, thus fulfilling Congress's ultimate representative function by helping the citizenry participate more effectively in their democracy.

IV. Implications and Additional Considerations

Congress's constitutional power to investigate all types of conduct, including potential crimes, is critical to an effective system of checks and balances; it is also particularly relevant in the face of a second Trump presidency and the Supreme Court's recent ruling on presidential immunity from criminal prosecution. A key goal of this Article is to document the current state of the law and provide an

2023) (claiming Committee's subpoena was "an unconstitutional attempt to usurp the executive branch's authority to enforce the law").

377. Complaint at 31, Flynn v. Pelosi, No. 8:21-cv-02956-KKM-SPF (M.D. Fla. Dec. 21, 2021) ("General law enforcement is not a valid legislative purpose."); Flynn v. Pelosi, No. 8:21-cv-02956-KKM-SPF, 2021 WL 10397028, at *2 (M.D. Fla. Dec. 22, 2021) (finding that Flynn failed to comply with procedures to seek temporary restraining order).

378. Complaint at 10, Ward v. Thompson, 630 F. Supp. 3d 1140 (D. Ariz. 2022) (No. 3:22-cv-08015-SMB) ("[T]he Subpoena appears to facially serve the purpose of law enforcement or as a prelude to a criminal investigation."); Ward v. Thompson, 630 F. Supp. 3d 1140, 1152 (D. Ariz. 2022) (rejecting claim that the subpoena "was issued to harass them or is otherwise for an improper law enforcement purpose").

in-depth review of its evolution. Another is to warn of the dangers of returning to the faulty *Kilbourn*-era premises supported by Trump and like-minded judges. Although their views have been relegated to the minority to date, the zeal and frequency of these claims foreshadow a potentially more determined resurgence of these efforts in light of Trump's return to the White House. Below I draw out some practical and theoretical implications of this analysis and offer considerations for targets of investigations, academics, courts, prosecutors, Congress, and future presidents.

A. Future Targets of Congressional Investigations

To briefly summarize the preceding analysis, *Kilbourn* was flawed from the beginning. The opinion was based on a disdainful view of Congress, an overly restrictive understanding of the various legislative branch purposes of investigation, and an inaccurate conception of congressional investigative power. It improperly characterized Congress's contempt power as judicial rather than legislative in its origin, history, and purpose. By treating this authority as if it belonged to another branch, the Court drastically limited the purposes for which Congress could use it. The opinion put forth an exclusive separation of powers framework in which Congress could not exercise this power if another branch occupied the field. In the decades that followed, however, the Court corrected these errors and recognized that Congress's investigative power derives from the legislative branch's core constitutional authority. Jettisoning *Kilbourn*'s exclusive framework in favor of a parallel view of separation of powers, the Court approved of numerous congressional investigations that ran concurrently with criminal investigations. Although Trump's recent unsuccessful campaign to resuscitate *Kilbourn* would have returned to that opinion's exclusive approach, his widespread failures had the opposite effect of creating an entirely new line of precedents reaffirming Congress's core authority.

The most immediate practical implication for future targets of congressional investigations is that they will place themselves in legal peril if they refuse to comply with demands for testimony or documents based solely on the claim that Congress lacks authority to investigate criminal activity. This review demonstrates that the Constitution vests Congress with authority to investigate various types of conduct—including illegal activities. Targets may continue trying to contort the Court's statement that Congress may not engage in a "law enforcement" purpose into a short-hand reference to *Kilbourn*'s exclusive separation of powers framework, but that approach has never worked. *Kilbourn*'s legal reasoning has been thoroughly undermined, and the Court

has made clear that the key question is whether a congressional investigation serves valid legislative branch purposes. Targets have several constitutional defenses available, such as the Fifth Amendment right against self-incrimination and executive privilege over certain information for executive branch officials, but the fact that Congress may be investigating crime is not a valid basis for defying its demands.

This analysis leads to a broader theoretical point as well. With respect to longstanding academic debates over separation of powers, it may be tempting to describe this historical evolution as a transition from *Kilbourn*'s "formalist" vision, with stove-piped branches that have exclusive ownership of particular powers, to the more modern "functionalist" vision of overlapping functions performed by "separated institutions *sharing* powers," as political scientist Richard Neustadt characterized them.[379] However, the Court's correction of *Kilbourn*'s errors and its recognition of Congress's authority to conduct parallel investigations "conjoin" both formalist and functionalist modes.[380]

From a formalist perspective, Congress's investigative authority is completely its own—not borrowed or siphoned away from another branch. *Kilbourn*'s elemental flaw was in mischaracterizing Congress's contempt power as judicial rather than inherent in its legislative authority, but as this review shows, this power is within Congress's stovepipe and exists independent of investigative powers that prosecutors or grand juries may use.[381] This power is "shared" only in the sense that other branches may use similar tools for their own distinct constitutional purposes. Although scholars have noted a recent return to formalist principles in other contexts,[382] recognizing Congress's investigative power to serve its core legislative branch purposes is entirely consistent with a formalist theoretical framing.

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379. Richard E. Neustadt, Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan 29 (1990). *See also* William Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 Harv. J. L. & Pub. Pol'y 21 (1998–1999) (noting overlapping aspects of formalism and functionalism).

380. Here I borrow Professor Eskridge's observation regarding Congress's legislative authority and apply it to Congress's investigative authority. *See* Eskridge, *supra* note 379, at 29. Others have challenged the binary nature of these theories and suggested more complex relationships between them. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987); Eskridge, *supra* note 379, at 23–28 (exploring cases that rest firmly in both theories and observing that the Constitution "embodies within its four corners both precepts").

381. For an insightful comparison of both doctrines and their shortfalls, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939 (2011).

382. *See, e.g.*, Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 Geo. Wash. L. Rev. 1088 (2022).

Separately, from a functionalist perspective, parallel investigations by Congress and prosecutors each serve their respective constitutional purposes, and requiring one to bow to the other would sacrifice the interests of the branch required to defer.[383] Barring Congress from investigating at the same time as prosecutors would prevent it from achieving its key functions of obtaining information necessary to intelligently draft legislation, fund federal programs, oversee departments and agencies, and inform itself and the American people about the workings of their government.

B. Considerations for the Judiciary

From a normative perspective, this review offers several points for courts to consider. One lesson of *Kilbourn's* history—and its demise—is that courts should respect Congress's judgments about the information it needs to fulfill its own constitutional responsibilities and the various legislative branch purposes such information may serve. Congressional investigations are fundamentally different from criminal investigations in that they regularly evolve—in fact are intended to evolve over time—as they uncover facts and tailor legislative branch responses. They may serve multiple legislative branch purposes at the same time or progress as additional facts are discovered. Prosecutors are required to declare at the outset of prosecutions the specific crimes they intend to prove, while the House and Senate typically authorize their committees to investigate and report any legislative or other recommendations they deem appropriate. Flexibility is a feature of the legislative process rather than a deficiency, and it helps ensure that legislative branch actions are informed by, and responsive to, the facts that are established. This is not to suggest that courts lack authority to determine the constitutionality of congressional action. But as the Court explained in its post-*Kilbourn* decisions, courts have an obligation to honor the longstanding presumption that Congress's actions are valid, refrain from imputing spurious motives, and reject demands that Congress declare its ultimate action at the outset of an investigation.

Nevertheless, scholars have warned of a broader effort by the Court to centralize power by inserting itself into the constitutional decision-making prerogatives of other branches.[384] In fact, in *Mazars*, although the Court declined to accept Trump's arguments to revive *Kilbourn*, it used

383. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 18 (2017) (describing formalist and functionalist theories, as well as his "multiplicity-based" view).

384. *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022); Allen Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24 (2023).

demeaning language to describe Congress's motives and established a new test that only committees, and not criminal prosecutors, are required to meet.[385] From a separation of powers perspective, if one agrees that Congress's investigative power is in fact "essential" to its core legislative functions, as Roberts wrote,[386] and that a prosecutor's investigative power is essential to executive branch functions, then it appears that the Judiciary exceeds its authority when it manufactures additional hurdles that apply to Congress alone. As the Court cautioned in *Hutcheson*—its opinion most critical of *Kilbourn*—"just as the Constitution forbids the Congress to enter fields reserved to the Executive and Judiciary, it imposes on the Judiciary the reciprocal duty of not lightly interfering with Congress's exercise of its legitimate powers."[387]

For these reasons, the Supreme Court should abandon the unfounded assertion it elevated from the D.C. Circuit Court opinion in *Senate Select Committee* that Congress does not need the same level of accurate and thorough information as prosecutors. For example, Congress has authority to immunize targets—and scuttle their criminal prosecutions—and therefore must be able to base its decisions on accurate information.[388] On a broader level, legislative actions can profoundly impact American society. They merit the same careful collection of information as criminal investigations to develop factual foundations for decision-making. Not only is the Court wrong that Congress needs less accurate information, but the opposite may be true; a criminal prosecution may implicate a single individual or group of individuals—albeit in potentially life-and-death ways—but legislation may affect the lives, health, safety, economic well-being,

385. *See* Chafetz, *supra* note 245, at 140 (comparing Trump v. Mazars USA, LLP, 591 U.S. 848 (2020) with Trump v. Vance, 591 U.S. 786 (2020), in which the Court upheld a grand jury subpoena to Mazars—albeit from a state rather than federal grand jury—without the four-part test created for Congress, and noting that "while *Vance* holds that the president is a citizen like any other for purposes of grand jury subpoenas, *Mazars* holds that congressional subpoenas for the president's records must receive especially skeptical treatment by the courts"); Josh Chafetz, *The New Judicial Power Grab*, 67 St. Louis U. L.J. 635 (2023).

386. Trump v. Mazars USA, LLP, 591 U.S. 848, 862 (2020) (citing McGrain v. Daugherty, 273 U.S. 135, 174 (1927)).

387. Hutcheson v. United States, 369 U.S. 599, 622 (1962). *See also id*. at 618–19 (noting that "it does not lie with this Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes").

388. *See, e.g.*, Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev., 1, 9 (1988) ("The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.").

and fundamental rights of hundreds of millions of people.[389] In addition, unlike criminal investigations that are bound by secrecy, Congress has a responsibility to inform the electorate of significant national events in a timely manner.[390] There is no constitutional basis to elevate the informational needs of the former over those of the latter.[391]

Although one could argue that the Court's suggestion should be limited to cases involving Congress's demands for presidential information (since it was first raised in *Senate Select Committee* and then in *Mazars*), the better approach is for the Court to drop this line of dicta altogether.[392] Treating congressional inquiries as less dependent on robust fact-finding derives from a misguided and ultimately unhelpful comparison to criminal proceedings. It may prompt judges to denigrate congressional information requests and substitute their own determinations for those of Congress. At the same time, this vague approach provides no objective or practical framework for judges to carry out this task and determine how much detail Congress requires in a given investigation. This responsibility should be left to Congress, which the Constitution vests with solemn authority to formulate legislative policies to meet the needs of the nation.[393]

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389. *See Mazars*, 591 U.S. at 862 (noting that Congress's power to investigate "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them'") (quoting *Watkins*, 354 U.S. at 187).

390. *See, e.g.*, LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN-CONTRA MATTERS 558 (1994). As Judge Walsh wrote:

"[I]t is Congress . . . that is primarily responsible for the accurate public disclosure of the facts. . . . Ultimately, it is Congress that is empowered to legislate in a manner that not only will preclude future similar transactions in a narrow sense, but that also will facilitate the effective management of foreign policy and that will discourage disregard for existing legal strictures. . . . [The Independent Counsel's] first responsibility, in contrast, is the prosecution of criminal conduct. Accordingly, it is not his duty to develop for the public the knowledge of what occurred."

391. *Id.* (noting that when a conflict develops between prosecutors and Congress, "the law is clear that it is Congress that must prevail" and that "[t]his is no more than a recognition of the high political importance of Congress's responsibility" and "the appropriate place to strike the balance, as resolution of this conflict calls for the exercise of a seasoned political judgment that must take a broad view of the national interest").

392. To its credit, the D.C. Circuit took this approach after *Mazars* when it denied Trump's claim of executive privilege over documents subpoenaed by the January 6th Committee. It discarded *Senate Select Committee*'s dicta devaluing Congress's need for information as compared to criminal investigations and instead weighed Trump's claim against Congress's "demonstrably critical" need for the records. Trump v. Thompson, 20 4th 10, 44 (D.C. Cir. 2021) (also finding that Trump's claim failed under other tests), *cert. denied*, 595 U.S. __, 142 S. Ct. 1350 (2022).

393. *See Mazars*, 591 U.S. at 862.

C. Implications for Criminal and Congressional Investigators

It is understandable that prosecutors would prefer to be left alone to do their jobs without worrying about congressional committees investigating the same set of facts, or worse, second-guessing or interfering with their work. From their vantage point, *Kilbourn*'s suggestion of barring congressional investigations into illegal activity may seem advantageous. Of course, the flip side is true too: congressional investigators may become frustrated with prosecutors who issue ominous but vague warnings about the potential negative effects of congressional investigations on future prosecutions.

In practice, concurrent investigations are common. Committees sometimes agree to requests from prosecutors to refrain from taking certain actions that might impair ongoing criminal cases. For example, committees have agreed not to seek testimony from witnesses[394] and to curtail requests for documents.[395] Even as they make these accommodations, however, committees safeguard their authority to decide for themselves whether and how to conduct their investigations.[396] In other cases, committees have declined requests from prosecutors, including requests to postpone investigations until the conclusion of criminal trials,[397] as well as requests to delay witness interviews, allow Department attorneys to join committee interviews, or consult with the Department on materials before releasing them publicly.[398]

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394. *See, e.g.*, H. Comm. on Oversight & Gov't Reform, 110th Cong., Rep. on Jack Abramoff's Contacts with White House Officials (2008) (agreeing not to depose four witnesses, including Abramoff, while Department was conducting criminal investigations).

395. Letter from Chairman Henry Waxman, House Comm. on Oversight & Gov't Reform, to Att'y Gen. Michael Mukasey, Dep't of Justice (Dec. 3, 2007) (describing negotiations with Special Counsel to narrow categories of documents sought by the Committee in investigation of leak of covert identity of CIA officer Valerie Plame Wilson).

396. *See, e.g.*, *Hearing on Blackwater USA Before the H. Comm. on Oversight & Government Reform*, 110th Cong. 3–4 (2007) (Opening Statement of Chairman Henry A. Waxman) (agreeing to request by Justice Department to delay public testimony after announcement of criminal investigation into 2007 massacre of Iraqi civilians by Blackwater USA, but noting that negotiations were discretionary and that "Congress has an independent right to this information").

397. *See, e.g.*, Letter from Assistant Att'y Gen. for Legislative Affairs Ronald Weich, Dep't of Justice, to Chairman Darrell Issa, House Comm. on Oversight & Gov't. Reform (Apr. 19, 2011) (warning that Committee investigation of Operation Fast and Furious risked compromising prosecution of "alleged firearms traffickers, drug dealers, and money launderers"); Letter from Ranking Member Elijah Cummings, House Comm. on Oversight & Gov't Reform, to Chairman Darrell Issa, House Comm. on Oversight & Gov't Reform (Apr. 21, 2011) (noting Department's request to delay Committee investigation until after the trial of 20 alleged gun traffickers scheduled two months later).

398. Letter from Ranking Member Elijah Cummings, House Comm. on Oversight & Gov't Reform, to Chairman Darrell Issa, House Comm. on Oversight & Gov't

There are risks with Congress rejecting prosecutors' requests, including inadvertently revealing the identities of potential witnesses whose cooperation is not publicly known[399] or unintentionally disclosing documents that are under seal or contain other confidential information.[400] In these cases, experts in congressional and criminal investigations counsel good faith consultations to understand and accommodate the constitutional objectives of both, but they do not place the value of a criminal prosecution over the value of congressional investigations.[401] Congressional and criminal investigations are based on distinct constitutional authorities that serve fundamentally different

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Reform (May 9, 2011) (reflecting meeting between Department and Committee staff). *See also* Letter from Ranking Member Elijah Cummings, House Comm. on Oversight & Gov't Reform, to Chairman Darrell Issa, House Comm. on Oversight & Gov't Reform (May 13, 2011) (noting that "Department officials recognized the Committee's ultimate authority to interview these individuals").

399. Letter from Assistant Att'y Gen. for Legis. Affs. Ronald Weich, Dep't of Justice, to Chairman Darrell Issa, House Comm. on Oversight & Gov't Reform (Apr. 19, 2011) (objecting to subpoena to a cooperating witness in upcoming trial and noting that witness's attorney expressed concern that testimony "might jeopardize his physical safety").

400. Letter from Ranking Member Elijah Cummings, House Comm. on Oversight & Gov't Reform, to Chairman Darrell Issa, House Comm. on Oversight & Gov't Reform (May 9, 2011) (noting that Committee released one document that had been under seal pursuant to a court order and another that lacked sufficient redactions to conceal the identity of a target from a previous investigation and a description of a meeting between that target and a cooperating defendant in the current case).

401. *See, e.g.*, *Concurrent Congressional and Criminal Investigations: Lessons from History Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism*, 115th Cong. 3 (2017) (statement of Richard Ben-Veniste) (testifying that there are "no compelling reasons" that congressional and criminal investigations "should not proceed concurrently" and that the "system works best" when committees are "both appropriately aggressive and at the same time thoughtfully deferential to legitimately prosecutorial objectives"); *Concurrent Congressional and Criminal Investigations: Lessons from History Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism*, 115th Cong. 7-8 (2017) (statement of Professor Charles Tiefer) (recommending "discussions in good faith" and foregoing certain congressional powers in exchange for assistance from prosecutors, such as periodic reports); *Concurrent Congressional and Criminal Investigations: Lessons from History Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism*, 115th Cong. 2, 5 (2017) (statement of Andrew L. Frey) (testifying that a preference for criminal investigations "ignores the potentially significantly greater capacity of a fair and comprehensive Congressional investigation" and urging "close consultation between the two investigations" on questions of immunity, publicity, and other matters); *Concurrent Congressional and Criminal Investigations: Lessons from History Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism*, 115th Cong. 2, 8-9 (2017) (statement of Danielle Brian, Project on Government Oversight) (noting that "history shows that the public can benefit when both the executive and legislative branches examine the same scandals and events at the same time" and detailing "best practices" for concurrent inquiries).

interests. Both are vital to democracy and are due deference under the Constitution.

How far may Congress go before it crosses the threshold from a valid legislative branch purpose into an unconstitutional "law enforcement" function? As this review demonstrates, there is a surprising paucity of cases in which courts have concluded that Congress engaged in a prohibited law enforcement purpose. Even cases cited repeatedly for this principle, such as *McGrain* and *Quinn*, did not find that Congress engaged in such an unconstitutional purpose. If the demarcation is appropriately drawn between conducting an investigation for valid legislative branch purposes as opposed to a prosecution, a court might invalidate a subpoena if a committee's sole objective were to collect evidence to criminally prosecute an individual or scuttle a prosecution, without any legislative branch purpose whatsoever. But that standard is exceedingly difficult to meet.

For example, after Republicans took control of the House in 2022, several committee chairs launched investigations into the multiple federal and state prosecutions of former President Trump. In one prominent example, House Judiciary Committee Chair Jim Jordan—who had defied his own subpoena from the January 6th Committee[402]—issued a subpoena to a prosecutor who had worked in Manhattan District Attorney Alvin Bragg's office, which subsequently convicted Trump on 34 felony counts.[403] For many Members of Congress, it would be unthinkable to jeopardize an ongoing criminal prosecution, even as they insist this is Congress's decision to make.[404] However, when Bragg challenged Jordan's subpoena to his former employee, the district court concluded that the subpoena was valid.[405] Commentators expressed

402. H.R. Rep. No. 117-663, at 114, 116.

403. Letter from Chairman Jim Jordan, House Comm. on the Judiciary, to Mark F. Pomerantz, Former N.Y. Cnty. Special Assistant District Att'y (Apr. 6, 2023) (accompanying subpoena); Ben Protess et al., *Trump Convicted on All Counts to Become America's First Felon President*, N.Y. Times (May 30, 2024), https://www.nytimes.com/2024/05/30/nyregion/trump-convicted-hush-money-trial.html [https://perma.cc/2ZCP-YEX3].

404. *See, e.g.*, Letter from Ranking Member Elijah Cummings, House Comm. on Oversight & Gov't Reform, to Chairman Darrell Issa, House Comm. on Oversight & Gov't Reform (Apr. 19, 2011) ("I believe the Committee has a responsibility and an obligation to investigate allegations of wrongdoing, and that the Committee retains the ultimate authority to determine the manner in which it conducts its investigations. But we must act responsibly, and we should proceed extremely carefully to ensure that our actions do not place people in danger or undermine potential prosecutions.").

405. Bragg v. Jordan, 669 F. Supp. 3d 257 (S.D.N.Y. 2023) ("The subpoena was issued with a 'valid legislative purpose' in connection with the 'broad' and 'indispensable' congressional power to 'conduct investigations'.").

outrage that Jordan was abusing his authority,[406] but the court found that "[i]t is not the role of the federal judiciary to dictate what legislation Congress may consider or how it should conduct its deliberations in that connection."[407] Critics decried this investigation as a naked attempt to interfere with the prosecution on Trump's behalf,[408] but from a legal standpoint, Bragg was unable to convince the court that Jordan lacked any valid legislative branch interest.[409]

Congress is vested with broad powers to summon individuals and demand documents as part of its investigative function. As a result, it has an obligation to consider whether its actions run counter to the best interests of the nation, unduly compromise ongoing criminal investigations, or unfairly abuse the interests of individuals. Congress faces serious short- and long-term risks when it engages in abusive conduct. In the most self-interested terms, abusing this power risks political damage—members of Congress could be voted out of office or their party could be relegated to minority status.[410] Although this traditional disincentive may have less bearing in increasingly polarized political climates,[411] abusive actions could be counter-productive to an investigation itself, undermining the integrity of a particular inquiry or committee and resulting in public opprobrium that encourages defiance by witnesses and impairs investigative objectives. Worse, Congress could suffer long-term damage as an institution, including through judicial rulings that cabin congressional authority in new ways in response to perceived congressional abuses.[412]

406. *See, e.g.*, Jennifer Rubin, *Opinion: Jim Jordan Doesn't Understand His Job*, Wash. Post (Mar. 27, 2023), https://www.washingtonpost.com/opinions/2023/03/27/jim-jordan-bragg-abuse/ [https://perma.cc/SWS2-ZZTX].

407. Bragg v. Jordan, 669 F. Supp. 3d at 261.

408. *See, e.g.*, Press Release, H. Comm. on Oversight & Accountability, Ranking Member Raskin Issues Statement on Republicans' Abuse of Congressional Power to Defend Trump (Mar. 20, 2023), https://oversightdemocrats.house.gov/news/press-releases/ranking-member-raskin-issues-statement-on-republicans-abuse-of-congressional [https://perma.cc/9JRU-N2VE].

409. The court noted that Jordan's subpoena was for a deposition of "a *private citizen* who is *no longer employed* by any state government and who has written a book and spoken extensively about the subject matter of the congressional inquiry," leaving unresolved the question of Congress seeking information from current prosecutors involved in ongoing cases. Bragg v. Jordan, 669 F. Supp. 3d at 270 (emphasis in original).

410. *See, e.g.*, *Portraits in Oversight: Joe McCarthy's Oversight Abuses*, Levin Ctr. for Oversight & Democracy (accessed Feb. 2, 2024), https://levin-center.org/what-is-oversight/portraits/ [https://perma.cc/WPL5-2K9A].

411. *See, e.g.*, Thomas B. Edsall, *America Has Split, and It's Now in 'Very Dangerous Territory*,' N.Y. Times (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/opinion/covid-biden-trump-polarization.html [https://perma.cc/ZZ8D-WSGM] (collecting numerous studies on the causes and effects of increased polarization).

412. *See* Rapallo, *supra* note 13, at 504–05 (describing how a rush to court by the House Committee on Oversight and Government Reform amid widespread bipartisan

One step the House of Representatives in particular could take to help restore its standing in the eyes of the public, gain credibility in its investigations, and reduce the risk of negative court rulings is to repeal its rule allowing committee chairs to issue subpoenas unilaterally. After the abuses of the McCarthy era, no committee chairs had issued subpoenas without a vote of the committee or the consent of the ranking minority member.[413] Beginning in 1995, however, Rep. Dan Burton, the Republican Chairman of the Committee on Government Reform, issued more than 1,000 unilateral subpoenas despite widespread criticism.[414] After subsequent chairs reversed this practice, Chairman Darrell Issa returned to it in 2011, issuing more than 100 unilateral subpoenas during his tenure.[415] House Republicans expanded this practice to additional committees in 2015,[416] and many Democrats retained it when they took the House in 2019.[417] Some Members of the House, including several who led investigative committees, have warned about the negative effects of this approach and encouraged their colleagues to reform this process.[418] To date, however, it remains unchanged.

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condemnation of its Operation Fast and Furious investigation may have contributed to first and only district court decision finding constitutional underpinnings to the deliberative process privilege when asserted before Congress).

413. H. Comm. on Gov't Reform & Oversight, Interim Rep. on Investigation of Political Fundraising Improprieties and Possible Violations of Law, Sixth Rep., Additional and Minority Views, H.R. Rep. 105-829, at 3946 (2d. Sess. 1998).

414. *See* Staff of H. Comm. on Gov't Reform, 109th Cong., Democratic Rep. on Congressional Oversight of the Clinton Administration (Comm. Print 2006). *See also* Eric Schmitt, *House Panel Subpoenas Wrong Person by Confusing Asian Names*, N.Y. Times (Apr. 16, 1997), https://www.nytimes.com/1997/04/16/us/house-panel-subpoenas-wrong-person-by-confusing-asian-names.html [https://perma.cc/FWV3-8DEH].

415. Sebastian Payne, *Darrell Issa's Record-Breaking Subpoena-Palooza*, Wash. Post (July 15, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/15/darrell-issas-record-breaking-subpoena-palooza/ [https://perma.cc/63KL-24JQ].

416. Lauren French, Zachary Warmbrodt & John Bresnahan, *GOP Set to Strengthen Committee Chairmen's Subpoena Power*, Politico (Jan. 12, 2015), https://www.politico.com/story/2015/01/house-committee-chair-subpoena-powers-114190 [https://perma.cc/MP5F-QJQ9].

417. Anthony Adragna, *The Powerful Weapon House Republicans Handed Democrats*, Politico (Oct. 28, 2018), https://www.politico.com/story/2018/10/28/house-republicans-subpoena-trump-943265 [https://perma.cc/7HN4-WZQX].

418. *See, e.g.*, Henry A. Waxman, *Opinion: Congressional Chairmen Shouldn't Be Given Free Rein Over Subpoenas*, Wash. Post (Feb. 5, 2015), https://www.washingtonpost.com/opinions/a-congressional-subpoena-is-too-powerful-to-be-issued-unilaterally/2015/02/05/a9d75160-aca8-11e4-9c91-e9d2f9fde644_story.html [https://perma.cc/X8CD-N6GA] (describing the "McCarthy-Burton-Issa model" as "an invitation to abuse that diminishes the prospect for responsible congressional oversight").

As previous Supreme Court decisions have affirmed repeatedly, remedies rest with Congress and the voters.[419] In *McGrain*, the Court acknowledged that Congress's investigative power "may be abusively and oppressively exerted."[420] However, it added: "If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing."[421] Although these retorts may give cold comfort to targets under a committee's microscope, zealously safeguarding Congress's authority in this regard is critical to preserving its ability to fashion national policies in the public interest and serve as a check on the executive. While calls for restricting congressional authority predictably increase in the wake of concerning actions taken by certain committee chairs, preserving that authority may be more imperative in the years to come than in any time in recent memory.

D. Effects of Presidential Criminal Immunity Decision

Congress's investigative authority is particularly critical to the nation's system of checks and balances in the wake of the Supreme Court's recent decision in *Trump v. United States* regarding criminal conduct committed by a president. Chief Justice Roberts for the first time ruled that presidents have absolute immunity from criminal prosecution for "core" presidential powers and presumptive immunity from criminal prosecution for official acts.[422] In the short period since the opinion was issued, there has been withering criticism of the seismic shift it wrought in the balance of powers by eliminating broad swaths of criminal

419. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."); Watkins v. United States, 354 U.S. 178, 199–200 (1957) ("But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."); Barsky v. United States, 167 F. 2d 241 (App. D.C. 1948), *cert. denied*, 334 U.S. 843 ("The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people. . . . The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded.").

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

421. *Id.*

422. Trump v. United States, 603 U.S. __ (2024) (applying only to presidents, however, and not to aides involved in criminal conspiracies).

accountability for future presidents.[423] If the decision holds,[424] Congress will stand as the central structural check against presidents who abuse their official power under broad claims of constitutional immunity.[425]

Roberts's opinion seemed to recognize this fact in two ways. First, it noted that the Constitution explicitly charges Congress with investigating potential criminal conduct by presidents, noting for example that "[i]mpeachment is a political process by which Congress can remove a President who has committed 'Treason, Bribery, or other high Crimes and Misdemeanors'."[426] Trump also acknowledged that he could be impeached by the House and convicted by the Senate for his official acts, even as he argued unsuccessfully that his criminal prosecution should not proceed unless those steps occurred first.[427] In

423. *See, e.g.*, Kate Shaw, *The Supreme Court Creates a Lawless Presidency*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/opinion/supreme-court-immunity-trump.html [https://perma.cc/SK4E-HBLN]; Quita Jurecic & Benjamin Wittes, *A Decision of Surpassing Recklessness in Dangerous Times*, LAWFARE (July 2, 2024), https://www.lawfaremedia.org/article/a-decision-of-surpassing-recklessness-in-dangerous-times [https://perma.cc/5T44-RMBL]; Andrew Rudalevige, *The Supreme Court's Immunity Decision Sidesteps History*, GOOD AUTH. (July 4, 2024), https://goodauthority.org/news/immunity-supreme-court-scotus-president-trump-july1-ruling/ [https://perma.cc/BY8D-9AXX]; Steve Vladeck, *The Broader Article II Implications of the Trump Immunity Ruling*, ONE FIRST (July 22, 2024), https://www.stevevladeck.com/p/91-the-broader-article-ii-implications [https://perma.cc/3RYW-8E76]; Andy Wright, *Presidential Immunity Decision May Have Implications for Congressional-Executive Divide on Criminal Contempt*, JUST SECURITY (Aug. 26, 2024), https://www.justsecurity.org/98895/presidential-immunity-congressional-contempt/ [https://perma.cc/P6VJ-QD72]; *75 Organizations Call to Overturn Supreme Court Presidential Immunity Ruling*, PUBLIC CITIZEN (Sept. 23, 2024), https://www.citizen.org/article/75-organizations-call-to-overturn-supreme-court-presidential-immunity-ruling/ [https://perma.cc/EUB5-W8WP].

424. *See, e.g.*, Telephone interview by Brad Rourke with Neil Katyal and J. Michael Luttig (July 8, 2024), https://x.com/KetteringFdn/status/1810318889059852612 [https://perma.cc/M6H4-2DC6].

425. As Arthur M. Schlesinger, Jr. noted in 1975: "While the conventional assumption is that the strength of legislative bodies lies in the power to legislate, a respectable tradition has long argued that it lies as much or more in the power to investigate. The investigative power may indeed be the sharpest legislative weapon against Executive aggrandizement." Arthur M. Schlesinger Jr., *Introduction* to ROBERT C. BYRD CENTER FOR LEGISLATIVE STUDIES, CONGRESS INVESTIGATES: A DOCUMENTED HISTORY (1975), *reprinted in* CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY xx–xxi (Roger A. Bruns, David L. Hostetter & Raymond W. Smock, eds., Facts on File 2011).

426. Trump v. United States, 603 U.S. __ (2024) (quoting U.S. Const. art. II, §4). *See also* Peter Shane, *The King (Presumptively) May Do No Wrong*, AM. CONST. SOC'Y (July 8, 2024), https://www.acslaw.org/expertforum/the-king-presumptively-may-do-no-wrong/ [https://perma.cc/2ZFE-PFVS] ("Of course, Congress, at least in principle, could impeach and remove a murderous President.").

427. Brief for the Petitioner, Trump v. United States, 603 U.S. __ (2024) (No. 23-939) ("The Founders thus adopted a carefully balanced approach that permits the

rejecting Trump's argument, the Court observed that "[t]ransforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government."[428] Although Justice Sotomayor pointed out in her dissent that Roberts's framework still could result in the "nonsensical" result of presidents retaining presumptive immunity against criminal prosecution even after House impeachment and Senate conviction,[429] their common understanding was that Congress has authority to investigate a president's official acts, including those that may be criminal, not for prosecutorial purposes but for legislative branch purposes.

Second, beyond Congress's impeachment power, Roberts drew a stark contrast between presidential prosecution and imprisonment on one hand and demands for information in the possession of presidents on the other. He cited *Burr* and *Nixon* for the proposition that presidents are not absolutely immune from these types of information demands, but instead may be subject to subpoena.[430] In distinguishing those cases, Roberts stated that "[c]riminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and *Nixon*."[431] Instead, he noted that cases involving information demands must balance a president's interests in withholding information against the interests served by the

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criminal prosecution of a former President for his official acts, but only if that President is first impeached by the House and convicted by the Senate").

428. Trump v. United States, 603 U.S. __ (2024) (citing U.S. Const. art. I, §3, cl. 7) ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

429. *Id*. (Sotomayor, J., dissenting) ("[The majority arrives at an official-acts immunity even more expansive than the one Trump argued for. On the majority's view (but not Trump's), a former President whose abuse of power was so egregious and so offensive even to members of his own party that he was impeached in the House and convicted in the Senate still would be entitled to 'at least presumptive' criminal immunity for those acts.").

430. *Id*. ("Chief Justice Marshall's decisions in *Burr* and our decision in *Nixon* recognized the distinct interests present in criminal prosecutions. Although *Burr* acknowledged that the President's official papers may be privileged and publicly unavailable, it did not grant him an absolute exemption from responding to subpoenas. *See Burr II*, 25 F. Cas. at 192; *Burr I*, 25 F. Cas. at 33–34. *Nixon* likewise recognized a strong protection for the President's confidential communications—a "presumptive privilege"—but it did not entirely exempt him from providing evidence in criminal proceedings. 418 U.S. at 708.").

431. *Id*.

entity seeking the information.[432] As mentioned above, for example, the Court in *Nixon* concluded that the president's privilege assertion "must yield to the demonstrated, specific need for evidence in a pending criminal trial."[433]

In the same way, Roberts declined to accept Trump's argument in *Mazars* that presidents may block informational demands from committees even when they explicitly seek information about potential presidential crimes.[434] Instead, the Court looked to whether Congress's efforts to obtain information fulfilled "a legitimate task of the Congress"[435] and reiterated that Congress's investigative power is both "broad" and "indispensable" to its legislative branch purposes.[436] Rather than granting Trump an absolute privilege to defy informational demands from Congress regarding his potential criminal conduct, the Court employed a balancing approach to take account of "the significant legislative interests of Congress and the 'unique position' of the President."[437]

It is not hyperbolic to observe that Trump threatened to weaponize the nation's justice system in unprecedented ways.[438] He and his allies promised to launch a sweeping campaign of retribution,[439] deploy

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432. *Id*. (referencing the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions") (citing United States v. Nixon, 418 U.S. 683, 703, 707 (1974)).

433. *Nixon*, 418 U.S. at 713.

434. Trump v. Mazars USA, LLP, 591 U.S. 848, 871 (2020) ("When Congress seeks information 'needed for intelligent legislative action,' it 'unquestionably' remains 'the duty of *all* citizens to cooperate.'") (citing Watkins v. United States, 354 U.S. 178, 187 (1957)) (emphasis in *Mazars*).

435. *Id*. at 863 (citing *Watkins*, 354 U.S. at 187).

436. *Id*. at 862 (citing *Watkins*, 354 U.S. at 187).

437. *Id*. at 869–71 (setting forth four-part balancing test).

438. *See, e.g*., @realDonaldTrump, Truth Social (June 12, 2023), ("I WILL APPOINT A REAL SPECIAL 'PROSECUTOR' TO GO AFTER THE MOST CORRUPT PRESIDENT IN THE HISTORY OF THE USA, JOE BIDEN."); *Trump on Univision: The Former President Talks about the Latino Vote, Foreign Policy and Economy*, Univision (Nov. 9, 2023), https://www.univision.com/univision-news/politics/donald-trump-exclusive-univision-interview [https://perma.cc/RR94-5T9S] ("[I]f I happen to be president and I see somebody who's doing well and beating me very badly, I say, 'Go down and indict them.' Mostly what that would be, you know, they would be out of business. They'd be out, they'd be out of the election.").

439. *See, e.g*., @realDonaldTrump, Truth Social (June 6, 2023), ("INDICT THE UNSELECT J6 COMMITTEE"); Rebecca Jacobs, *Trump Has Threatened Dozens of Times to Use the Government to Target Political Enemies*, Citizens for Resp. and Ethics in Washington, May 22, 2024 (including President Biden, former President Obama, Senate Democrats, lawyers, prosecutors, judges, and other judicial officials, election workers, nonprofit charities, and many others).

the instruments of government against political adversaries,[440] scuttle criminal investigations of himself and his political allies,[441] and pardon hundreds of convicted felons,[442] all while continuing to spur his supporters to violence.[443] He vowed to violate existing statutes and constitutional provisions to openly challenge Congress's power of the purse, "impound" funds appropriated for purposes he opposes, "end" certain agencies such as the Department of Education "immediately," and withhold funds for the World Health Organization, energy subsidies passed by Congress in the 2022 Inflation Reduction Act, and others.[444] He promised to "totally obliterate" the civil service and install loyalists in their place[445] and declared that he will order mass raids, militarized

440. *See, e.g.*, Isaac Arnsdorf, Josh Dawsey & Devlin Barrett, *Trump and Allies Plot Revenge, Justice Department Control in a Second Term*, WASH. POST (Nov. 6, 2023), https://www.washingtonpost.com/politics/2023/11/05/trump-revenge-second-term/ [https://perma.cc/5BPX-YPEB] (including against his former chief of staff, John Kelly, former Attorney General William Barr, his former attorney Ty Cobb, and former Chairman of the Joint Chiefs of Staff General Mark Milley).

441. *See, e.g.*, Charlie Savage, *What if Trump is Elected with Criminal Charges Still Looming?*, N.Y. TIMES (Aug. 1, 2023), https://www.nytimes.com/live/2023/08/01/us/trump-indictment-jan-6#what-if-trump-is-elected-with-criminal-charges-still-looming [https://perma.cc/79FV-7S8P] ("Trump could simply use his power as president to force the Justice Department to drop the matter, as he has suggested he might do.").

442. *See, e.g.*, Tom Dreisbach & Noah Caldwell, *The Trump Campaign Embraces Jan. 6 Rioters with Money and Pardon Promises*, NPR (Jan. 4, 2024, 5:00 AM), https://www.npr.org/2024/01/04/1218672628/the-trump-campaign-embraces-jan-6-rioters-with-money-and-pardon-promises [https://perma.cc/S6TV-A9K6]; *Read the Full Transcripts of Donald Trump's Interviews With TIME*, TIME (Apr. 30, 2024, 7:00 AM) https://time.com/6972022/donald-trump-transcript-2024-election/ [https://perma.cc/APX5-B5NZ] ("Q: Will you consider pardoning every one of them? Trump: I would consider that, yes.").

443. *See, e.g.*, Aaron Blake, *Two Years after Jan. 6, Trump is Still Promoting Violent Rhetoric*, WASH. POST (Feb. 2, 2023), https://www.washingtonpost.com/politics/2023/02/02/trump-violent-rhetoric-social-media/ [https://perma.cc/Q3PT-39VD] (collecting examples).

444. Jeff Stein & Jacob Bogage, *Trump Plans to Claim Sweeping Powers to Cancel Federal Spending*, WASH. POST (June 7, 2024, 6:00 AM), https://www.washingtonpost.com/business/2024/06/07/trump-budget-impoundment-congress/ [https://perma.cc/YC3N-2KDM] (noting that Trump has stated on his campaign website that he will unilaterally cut off funding for certain programs, "promising on his first day in office to order every agency to identify 'large chunks' of their budgets that would be halted by presidential edict").

445. *See, e.g.*, *Former Pres. Trump: "I Am Your Justice . . . I Am Your Retribution,"* C-SPAN (Mar. 4, 2023), https://www.c-span.org/video/?c5060238/pres-trump-i-justicei-retribution [https://perma.cc/6SL6-YUX6]; Jim VandeHei & Mike Allen, *Behind the Curtain: Trump Allies Pre-Screen Loyalists for Unprecedented Power Grab*, AXIOS (Nov. 13, 2023), https://www.axios.com/2023/11/13/trump-loyalists-2024-presidential-election [https://perma.cc/NHR6-V8BG].

deportations, and the construction of detention camps.[446] These and other threatened actions raise complex and grave questions about their legality, and if efforts to revive *Kilbourn* are given any quarter, Congress's ability to investigate these matters could be irreparably harmed. Scholars no doubt will continue to debate whether presidents may assert separate defenses to fend off congressional demands, such as invoking executive privilege over ongoing criminal investigations. But the answer to the underlying question—whether Congress may investigate criminal conduct for valid legislative branch purposes—should not be in doubt.

Conclusion

Congress's authority to conduct investigations derives from the Constitution's core grant of legislative power, and the authority to investigate potential illegal activity for the purpose of setting public policy for the entire nation is just as critical as a prosecutor's power to try an individual offender, if not more so. Congressional investigations of vital national significance would not have gotten off the ground if Congress were barred from investigating matters when criminal conduct was at issue from the beginning. Likewise, investigations already underway would flounder and collapse if Congress were forced to halt its inquiries after criminal investigations were launched. Congress has an obligation to conduct its investigations responsibly, and there are steps it can take to enhance its credibility. But if Congress were disempowered from investigating wrongdoing that implicates criminal activity, its ability to detect waste, fraud, and abuse would be reduced to meaninglessness. Adopting this approach would tilt the balance of power between the branches, undermine Congress's ability to serve as a check on the other branches, and allow the executive branch to stymie congressional investigations, including into its own actions, by claiming that a criminal inquiry may be underway.

Over many decades, House and Senate committees have conducted a wide range of investigations into potential illegal activity while criminal investigations were ongoing. These have included

446. *See, e.g.*, Charlie Savage et al., *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump's 2025 Immigration Plans*, N.Y. Times (Nov. 11, 2023), https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html [https://perma.cc/JG56-9CAH].

inquiries into Watergate,[447] Iran-Contra,[448] Whitewater,[449] campaign finance violations,[450] fundraising by the Teamsters,[451] allegations that China acquired U.S. nuclear technology,[452] the collapse of Enron,[453] the September 11th attacks,[454] Blackwater USA's actions in Iraq,[455] the outing of covert CIA operative Valerie Plame,[456] Jack Abramoff's illegal lobbying activities,[457] the 2008 financial crisis,[458] offshore tax evasion,[459] the botched Fast and Furious gunrunning operation,[460] the alleged targeting of tax-exempt organizations by the Internal Revenue Service,[461] security breaches and misconduct by Secret Service

447. S. Rep. No. 93-981 (1974); H.R. Rep. No. 93-1305 (1974).
448. H.R. Rep. No. 100-433, S. Rep. No. 100-216 (1987).
449. S. Rep. No. 104-280 (1996).
450. H.R. Rep. No. 105-829 (1998).
451. Staff of Subcomm. on Oversight & Investigations of the Comm. on Educ. and the Workforce, 106th Cong., Rep. on the Financial, Operating and Political Affairs of the International Brotherhood of Teamsters (Comm. Print 1999).
452. H.R. Rep. No. 105-851 (1999).
453. *Destruction of Enron-Related Documents by Andersen Personnel: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Com.*, 107th Cong. (2002); *An Overview of the Enron Collapse: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 107th Cong. (2001).
454. H.R. Rep. No. 107-792, S. Rep. No. 107-351 (2002).
455. Staff of H. Comm. on Oversight & Gov't Reform, 110th Cong., Private Military Contractors in Iraq: An Examination of Blackwater's Actions in Fallujah (Comm. Print 2007).
456. Staff of H. Comm. on Oversight & Gov't Reform, 110th Cong., Rep. on President Bush's Assertion of Executive Privilege in Response to the Comm. Subpoena to Att'y Gen. Michael B. Mukasey (Comm. Print 2008).
457. Staff of H. Comm. on Oversight & Gov't Reform, 110th Cong., Proposed Rep. on Jack Abramoff's Contacts with White House Officials (Comm. Print 2008).
458. *See, e.g.*, *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2008).
459. Staff of Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affairs, 113th Cong., Rep. on Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts (Comm. Print 2014).
460. Staff of H. Comm. on Oversight & Gov't Reform & Staff of S. Comm. on the Judiciary, 112th Cong., Fast and Furious: The Anatomy of a Failed Operation, Part I of III (Comm. Print 2012).
461. Staff of H. Comm. on Oversight & Gov't Reform, 113th Cong., The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Rep. of Findings for the 113th Cong. (Comm. Print 2014); Minority Staff of H. Comm. on Oversight & Gov't Reform, 113th Cong., No Evidence of White House Involvement or Political Motivation in IRS Screening of Tax-Exempt Applicants (Comm. Print 2014).

personnel,[462] the attacks on the U.S. compound in Benghazi,[463] Internet sex trafficking,[464] and many others.

Whether they set out to examine criminal activity or came across it during their inquiries, these investigations and many others like them are a fundamental and critical component of Congress's legislative branch functions. Congress's power to investigate crime is not only permissible, but *indispensable*, to fulfilling its responsibilities under the Constitution.

462. H.R. Rep. No. 114-385 (2015).
463. H.R. Rep. No. 114-848 (2016).
464. Staff of Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong., Rep. on Backpage.com's Knowing Facilitation of Online Sex Trafficking (Comm. Print 2016).