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LAW REVIEW

"THE ILLUSORY PRECEDENT OF MCGRAIN V. DAUGHERTY"

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I. INTRODUCTION

On May 12, 2020, the Supreme Court heard arguments in the consolidated cases of *Trump v. Mazars USA, LLP* and *Trump v. Deutsche Bank AG*,[1] which concerned whether standing committees of Congress have constitutional and statutory authority to enforce subpoenas against private corporations to obtain the President's non-government records. From the perspectives of the congressional plaintiffs and the respective lower courts agreeing with their arguments, this question is easily answered. In 1927, the Supreme Court held in *McGrain v. Daugherty* that the Necessary and Proper Clause of Article I, § 8 empowered Congress, through its committees, to conduct investigations and compel compliance with its subpoenas as a necessary auxiliary of Congress's need for information to legislate effectively.[2] Consistent with that approach, the House Oversight and Reform Committee (*Mazars*) and the House Intelligence and House Financial Services committees (*Deutsche Bank*) sought to enforce subpoenas consistent with their legislative jurisdiction. Even the Office of Legal Counsel at the Department of Justice concedes that *McGrain* empowers duly authorized

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[1] 940 F.3d 710 (D.C. Cir. 2019), *vacated*, 140 S. Ct. 2019 (2020); 940 F.3d 146 (2d Cir. 2019). A related case is Trump v. Vance, 941 F.3d 631 (2d. Cir. 2019), *aff'd and remanded*, 140 S. Ct. 2414, yet it concerns the President's immunity from state criminal process.

[2] McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

congressional committees to enforce their oversight requests so long as those requests are for a legitimate legislative purpose.[3]

Given the Supreme Court's consideration of *McGrain* in both *Mazars* and *Deutsche Bank*, as well as the number of current interbranch disputes before the D.C. Circuit likely to percolate up before the Court,[4] this essay seeks to dispel the notion that *McGrain* supports the doctrine of judicial enforcement of the congressional oversight power.

II. HOW *MCGRAIN* IS READ

Two years into the Trump Administration, unified party control ended when the Democratic Party secured control of the U.S. House of Representatives. Since then, and when representing its committees before the federal courts, the House Office of General Counsel has relied on *McGrain* as support for the proposition that "Article I of the Constitution grants each House of Congress the power to use compulsory process to obtain information from third parties, including Executive Branch officials, that may aid it in carrying out its legislative and oversight responsibilities."[5] The Supreme Court's *McGrain* decision located the investigative power of Congress in the "Necessary and Proper" clause.[6] In elaborating on this finding, the Supreme Court held that the Constitution, Article I, § 8, clause 1, "invests" the Congress with "all legislative powers" granted to the United States and with the power, under clause 18, "to make all laws which shall be necessary and proper" for executing those powers.[7]

Courts, together with Congress and the executive branch,[8] rely upon *McGrain* for the propositions that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change"[9]; "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function"[10];

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[3] Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C., *1–2 (May 1, 2017) [hereinafter 2017 O.L.C. Opinion].
[4] Comm. on Judiciary v. McGahn, 951 F.3d 510, 523–24 (D.C. Cir. 2020) (vacated March 13, 2020); U.S. House of Representatives v. Mnuchin, Nos, 19-5176, 19-5331, 2020 U.S. App. LEXIS 8140, *7–8 (D.C. Cir. 2020 Mar. 13, 2020) (under D.C. Circuit Handbook of Practice and Internal Procedures 60 (2019) *en banc* was granted before the panel decision); Kupperman v. U.S. House of Representatives, 436 F. Supp. 3d 186 (D.D.C. Dec. 30, 2019); In re Committee on the Judiciary, U.S. House of Representatives, 951 F.3d 589, 603 (D.C. Cir. 2020).
[5] Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. at 35 (Aug. 20, 2019), Comm. on Ways and Means, U.S. House of Representatives v. U.S. Dep't of Treasury, et al., No. 1:19-cv-01974 (TNM), 2019 WL 8376047 (D.D.C. 2019) (citing *McGrain*, 273 U.S. at 175) [hereinafter House Memo ISO MSJ].
[6] *McGrain*, 273 U.S. at 160.
[7] U.S. CONST. art. I, § 8, cl. 1.
[8] 2017 O.L.C. Opinion, *supra* note 3.
[9] *McGrain*, 273 U.S. at 175.
[10] *Id.*

and it is an implied power of Congress "to make investigations and exact testimony, to the end that it may exercise its legislative function advisedly and effectively."[11]

McGrain provides the setting for the underlying disputes in *Mazars* and *Deutsche Bank*. The House committees argue that certain information is needed as part of their legislative function, as articulated in jurisdictional rules authorizing the committees' oversight and legislative authority. The Trump Administration, and the President's personal lawyers, argue that the resolution must clearly state the legislative purpose, not simply refer to the broad jurisdictional authority adopted by the Rules Committee at the beginning of each Congress.[12] They further argue that the committees must articulate the legislative purpose in advance of an investigation via a floor resolution subject to the participation of the whole House.[13] These latter points form the President's claims that: (1) a legislative purpose is distinct from a political or law-enforcement purpose, and (2) the President is entitled to due process when subject to congressional investigations. It is this *McGrain*-informed clash that the Supreme Court is tasked with resolving.

III. WHY *MCGRAIN* IS READ INCORRECTLY

While *McGrain* nears a century in age, scholars and practitioners have seemingly overlooked the *McGrain* Court's articulation of the "principal questions involved" in the case: first, "whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution"; and, second, "whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose."[14] The *McGrain* Court even repeats its narrow application to disputes between Congress and the private sphere:

> "[t]he first of the principal questions, the one which the witness particularly presses on our attention, is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its

[11] *Id.* at 161.
[12] Trump v. Deutsche Bank AG, 943 F.3d 627, 646–47 (2d Cir. 2019), *rev'd and remanded*, 140 S. Ct. 2019 (2020) (citing Appellants' contention that the entire House of Representatives must pass a resolution authorizing a particular investigative power).
[13] Trump v. Mazars USA, LLP, 940 F.3d 710, 744–45 (D.C. Cir. 2019), *vacated*, 140 S. Ct. 2019 (2020) (citing Appellants' Brief at 23; Department of Justice's Brief at 14)*; see also* Letter from Pat A. Cipollone, Counsel to the President, to Hon. Nancy Pelosi, Speaker of the House, *et al.* 2–3 (Oct. 8, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf [https://perma.cc/SCA5-3666]; *accord* House Comms.' Auth. to Investigate for Impeachment, 44 Op. O.L.C., *2 (Jan. 19, 2020), https://www.justice.gov/olc/file/1236346/download [https://perma.cc/5DRP-B9KF].
[14] *McGrain*, 273 U.S. at 154.

> committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution."[15]

Leading up to the case, Congress held robust investigations aimed at Attorney General Harry Daugherty's failure to prosecute government officials involved in the Teapot Dome Scandal, among other claims of neglect and misfeasance of duty.[16] The Senate Select Committee on Investigation of the Attorney General and the Senate Committee on Public Lands and Surveys conducted lengthy investigations concerning allegations of illegal leasing of oil on naval reserves, preceding the use of any compulsory process by Congress.[17] President Warren Harding directed the Department of Justice to examine the transactions and appointed special counsel to conduct an investigation.[18] After these proceedings, the Senate issued a resolution on January 29, 1924, requesting that President Calvin Coolidge request Attorney General Daugherty's resignation.[19] On March 28, 1924, President Coolidge demanded and received Daugherty's letter of resignation.[20] As stated early in its opinion, the *McGrain* Court did not view its decision as concerning an interbranch information dispute but simply looked at Congress's power to investigate and compel compliance from "private individual[s]."[21]

McGrain and its oft-cited progeny[22] involved clashes between individuals and Congress, not interbranch disputes. Thus, rendering their holdings inapplicable to those cases where Congress seeks to compel information from the executive branch. In *United States House of Representatives, Committee on the Judiciary v. McGahn*, now-retired Judge Griffith emphatically clarified that *McGrain* was not a separation of powers case.[23] Instead, Judge Griffith distinguished *McGahn*, which involved an interbranch dispute, from *McGrain*, *Kilbourn v. Thompson*,[24] and *Mazars*, which did not involve subpoenas to the executive branch.[25]

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[15] *Id.* at 160.
[16] *Id.* at 151–52.
[17] S. J. RES. 54, 68th Cong., 65 Cong. Rec. 1520 (1924); *Hearings Before the Select Committee on Investigation of the Attorney General, United States Senate, Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States*, 68th Cong., 1st Sess. (1924).
[18] *Id.*
[19] S. RES. 137, 68th Cong., 75 Cong. Rec. 1591 (1924) (enacted).
[20] 84th Cong., 101 Cong. Rec. 1146 (1955) (President Coolidge's letter to Attorney General Daugherty on March 27, 1924).
[21] *McGrain*, 273 U.S. at 154.
[22] United States v. Rumely, 345 U.S. 41, 46 (1953); Watkins v. United States, 354 U.S. 178, 187 (1957); Tenney v. Brandhove, 341 U.S. 367, 377–78 (1951); Barenblatt v. United States, 360 U.S. 109, 111 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503–07 (1975).
[23] 103 U.S. 168 (1880).
[24] *Id.*
[25] *Id.*; Comm. on the Judiciary of the United States House of Representatives v. McGahn, 951 F.3d 510 (D.C. Cir. 2020) (vacated March 13, 2020).

Judge Griffith viewed the federal courts as having jurisdiction over disputes, such as those in *Mazars*, due to their involvement of individual rights versus questions committed to the federal political branches. However, the facts at issue in *McGrain* suggest Congress's desire to avoid using compulsory process against the executive branch. The congressional inquiries directed toward the Harding Administration that led to the political remedy of removing Attorney General Daugherty indicate the political nature of congressional oversight of the administration. By the time the facts giving rise to *McGrain* occurred, the nexus of administrative oversight had passed. Instead of issuing a subpoena to Attorney General Harry Daugherty, the special committee issued and enforced a subpoena against the Attorney General's brother, Mallory "Mally" Daugherty—the president of the bank where Attorney General Daugherty held accounts. This factual premise is crucial in distinguishing the facts underlying *McGrain* from the facts characterizing the interbranch information disputes describing congressional oversight. First, the Department of Justice represented the Senate in the dispute.[26] Second, the Department of Justice distinguished between judicial review of the congressional "power to conduct an investigation in aid of its legislative functions [and] to compel attendance before it of witnesses and the production of books and papers" and non-structural constitutional "privileges as those against unreasonable searches and seizures, self-incrimination and the like."[27] In addition to the Court's presentation of the crucial question being one of Congress's power to compel compliance from private individuals, the *McGrain* decision did not analyze any separation of powers questions that undoubtedly involve interbranch information disputes.

To the extent *McGrain* is construed as justifying compelled congressional oversight of the executive branch under the Necessary and Proper Clause, the Legislative Reorganization Act of 1946 "overturned" that holding, clarifying that the authority for Congress to "exercise continuous watchfulness" over the executive branch is Article I, § 5, clause 2, the "rules of proceedings" clause.[28] Further, the Legislative Reorganization Act's congressional drafters were careful to exclude a judicial review provision in the statute.[29]

The House Office of General Counsel, in its litigation with the Trump Administration, argued consistently with the Legislative Reorganization Act of 1946, yet inconsistently with *McGrain*, contending that Article I, § 5 ("[e]ach House may determine the Rules of its Proceedings") provided the legal justification for Congress's power to demand compliance with its subpoenas to the executive branch.[30] In *Marshall v. Gordon*, the Supreme Court definitively opined that

[26] *McGrain*, 273 U.S. at 150.
[27] *Id.* at 137.
[28] Legislative Reorganization Act of 1946, 60 Stat. 812, 832 (1946).
[29] Even if *McGrain* was apropos to interbranch information disputes, our jurisprudence has evolved to conclude that any legislative process that can legally bind the Executive must go through bicameralism and presentment—which is never the case for a cameral jurisdictional statement, committee resolution, or chairman's letter. INS v. Chadha, 462 U.S. 919, 952 (1983).
[30] House Memo ISO MSJ, *supra* note 5, at 23 n.63.

compulsory resolutions derived under the rules of proceedings clause are not enforceable against the executive branch.[31] The rules of proceedings clause instead present a basis for congressional enforcement of contempt. In the two occasions before 1974 where Congress held executive branch officials in contempt (customs official George Seward in 1879 and U.S. Attorney for the Southern District of New York Snowden Marshall in 1916), both were grounded as necessary for considering impeachment.[32] The Court decided *Marshall v. Gordon* after *In re Chapman* (relied on by *McGrain* and concerning the use of compulsory process against private citizens for purposes of investigating members of Congress) and before *McGrain,* which reflected the Court's recognition of the distinction between contempt of executive branch officials versus contempt of private citizens. The latter was justiciable; the former was not.

IV. *MAZARS* AND *DEUTSCHE BANK* ARE INTERBRANCH INFORMATION DISPUTES

The House Financial Services Committee and House Permanent Select Committee on Intelligence investigation of Deutsche Bank and the House Oversight and Reform Committee's investigation of Mazars are aimed at, respectively, "investigating the questionable financing provided to President Trump and The Trump Organization by banks like Deutsche Bank to finance its real estate properties"[33] and the President's "financial interests in businesses across the United States and around the world that pose both perceived and actual conflicts of interest."[34] While President Trump, in his personal capacity, has argued that these inquiries are aimed at determining whether the President engaged in criminal conduct—an impermissible legislative purpose—even crediting the stated congressional interests in financial reform or ensuring compliance with the Ethics in Government Act, the fact that under *McGrain*, the inquiry as specifically tailored to President Trump is an auxiliary to legislation means that any resulting legislation would be targeted to President Trump. Any conceivable legislation of the sort would be invalid as an unconstitutional bill of attainder under Article I, Section 9.[35] It is difficult to conceive of legislative text resulting from these inquiries that does not somehow conclude that President Trump violated a statute. And certainly, legislation cannot serve to impugn the President after the Senate failed to remove him.

[31] 243 U.S. 521, 536 (1917).
[32] 8 Cong Rec H 1771 (Feb 22, 1879); Marshall v. Gordon, 235 F 422, 424–25 (S.D.N.Y. 1916).
[33] 165 Cong. Rec. H2698 (daily ed. Mar. 13, 2019).
[34] H. R. Rep. No. 116-40 at 156 (2019).
[35] Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 846–47 (1984).

If, however, the stated interest of the committees is to determine if the President accepted emoluments in violation of the Constitution,[36] then such interest directly concerns the President's official acts and should fall out of the *McGrain* framework and within the D.C. Circuit's framework of non-justiciability as established in *McGahn*. Congressional oversight engenders political disputes with political remedies (e.g., impeachment, resignation, re-election) and need not be cabined by a policy requirement (e.g., legislative purpose) as opposed to a political one. Because interbranch information disputes are not justiciable, Congress may base its oversight on nakedly political purposes.

V. AN IMPLICATION OF MISREADING *MCGRAIN*

Only a motivated reading of *McGrain* could lead to a conclusion that it applies to congressional investigations of the executive branch. The *McGrain* Court viewed its holding as simply applying the Supreme Court's prior decision in *In re Chapman*,[37] thus upholding the precedent that the Necessary and Proper Clause justified Congress's reliance on a statute authorizing the use of a compulsory process to summons witnesses for testimony. Had the *McGrain* Court sought to apply such a constitutional justification to executive branch witnesses, it would have had to distinguish *In re Chapman*, which it chose not to do.[38]

But if *McGrain* presented a parallel issue to *In re Chapman*, the Supreme Court could have procedurally resolved *McGrain* upon granting certiorari. Only in the Supreme Court's 1946 decision in *Oklahoma Press Publishing Co. v. Walling,*[39] issued in the twilight before President Truman's signature of the Administrative Procedure Act of 1946, can *McGrain* be understood as a presaged justification for presidentially insulated, quasi-legislative, quasi-judicial agency investigations. The Supreme Court decided *McGrain* a year after the question of the President's power to remove a postmaster official in *Myers v. United States*[40] and followed several administrative law challenges filed in the Court of Federal Claims, which heard claims arising under the Constitution or statute that entailed money damages (the constitutional challenge to removal in *Humphrey's Executor* was likewise filed in the Court of Federal Claims).[41]

Oklahoma Press addressed the question of a private target's challenge to an administrative agency subpoena for records and information. For the first time, the Court had to evaluate the question of validity when Congress delegates its investigative powers to a non-law-enforcement agency for purposes of

[36] Resp'ts' Opp. to Emergency App. for a Stay of Mandate at 6, Trump et al. v. Mazars et al., 940 F.3d 710 (2d Cir. 2019).
[37] 166 U.S. 661, 671–72 (1897).
[38] *Id.* ("that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions . . . was to effect [] the act of 1857[.]").
[39] 327 U.S. 186 (1946).
[40] 272 U.S. 52 (1926).
[41] 295 U.S. 602, 612, (1935); *see also Ex parte* Bakelite Corp., 279 U.S. 438, 452–53 (1929).

investigating conduct covered by statute. In its reference to *McGrain*,[42] the Court analogized an agency investigation as effectively a delegation of Congress's own inquiries for a legislative purpose ("It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command").[43] In effect, if Congress could validly delegate its investigative powers to committees, it certainly could delegate such powers to administrative agencies charged with implementing regulatory norms established by Congress.[44]

If *McGrain* is read to govern legislative inquiries of private citizens and *Oklahoma Press* applies that principle to regulatory inquiries by congressional agencies, then the Administrative Procedure Act's definition of both "rule"[45] and "rulemaking"[46] can be understood in a new light. Just as congressional investigations are bound by a rulemaking purpose, so too must agency investigations be considered a process for formulating a rule, i.e. "an agency statement of general or particular applicability and future effect designed to implement [] or prescribe law or policy[.]"[47]

By misreading *McGrain*, American public law jurisprudence has mistakenly adjudicated interbranch information disputes and simultaneously failed to treat regulatory investigations (by agencies) as an antecedent to rulemaking (the clear holding of *McGrain*). And such inquiries, bound by a regulatory purpose, are ones the Administrative Procedure Act requires to be disclosed publicly in advance. But the concept of administrative subpoenas as legislative inquiries is not the received view of the law.[48] By extending *McGrain* to provide judicial review of

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[42] *Oklahoma Press*, 327 U.S. at 216 n.55 (citing McGrain v. Daugherty, 273 U.S. 135, 156–58 (1927) ("The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempt committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served. A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation; and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment. We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.")).
[43] *Id.* at 209.
[44] *See* ICC v. Brimson, 154 U.S. 447, 474–77 (1894).
[45] Defined as encompassing part of an agency statement designed to implement law. 5 U.S.C. § 551(4) (2011).
[46] Defined as governing the process for formulating such a statement. *Id.* § 551(5).
[47] *Id.* § 551(4); *See* FTC v. Am. Tobacco Co., 264 U.S. 268, 303 (1924), *and Brimson*, 154 U.S. at 477, for a discussion on this theory that investigations were a part of rulemaking.
[48] *But cf.* Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019), revoked by Exec. Order No. 13992, 86 Fed. Reg. 7,049 (Jan. 20, 2021).

congressional oversight of the administration, our jurisprudence has ignored the extent to which Congress's delegation of its investigative functions is not subject to due process requirements. In narrowing *McGrain* to its proper holding, courts are better positioned to exercise review over the regulatory power of investigation, which, while evolving from congressional oversight, has certainly evaded its contemporary attention.