PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 2020 | Issue 1 Article 2

12-1-2020

"Drive-by" Jurisdiction: Congressional Oversight in Court

Daniel Epstein

"Drive-by" Jurisdiction: Congressional Oversight in Court

Daniel Epstein*

Abstract

On July 9, 2020, in Trump v. Mazars USA, LLP and Trump v. Deutsche Bank AG, the Supreme Court held that the lower courts did not adequately consider the separation of powers concerns attendant to congressional subpoenas for presidential information. Given that the question presented in Mazars concerned whether Congress had a legitimate legislative purpose in subpoenaing the President's personal records, the Supreme Court's decision is anything but a model of clarity. The Court simultaneously opined that disputes "involving nonprivileged, private information" "do[ ] not implicate sensitive Executive Branch deliberations" while claiming "congressional subpoenas for the President's information unavoidably pit the political branches against one another." This essay presents a more precise framework for adjudicating interbranch disputes. By understanding Congress as it understands itself, this article draws a legal distinction between congressional investigations of the private sphere versus oversight of the Executive Branch. It analogizes Congress's regulatory investigations to the sorts of quasi-judicial, quasi-legislative regulatory inquiries commonplace among federal agencies. Like regulatory inquiries by federal agencies, subpoenas for testimony and documents are enforceable against the private sphere. Oversight subpoenas, it is argued, are not enforceable precisely because oversight involves political questions inappropriate for judicial resolution. Just like in the administrative context, where regulatory

* Vice President for Legal and Policy, Trust Ventures, a venture capital firm investing in highly regulated industries. From 2017 to 2020, Epstein was a Special Assistant and Senior Associate Counsel to the President. From 2009 to 2011, Epstein served as a counsel for oversight and investigations on the Committee on Oversight and Reform in the U.S. House of Representatives.

inquiries must be purged of evidence of political taint, any regulatory inquiry from Congress must be likewise detached from its more politicized counterpart in the name of oversight. In this sense, the accommodation hinted in Chief Justice Roberts' Mazars opinion can be properly understood as a requirement that Congress exhaust its political remedies before seeking private ones. As such, the analytic framework presented here makes the otherwise hard case of Mazars an easy case of identifying an improper attempt to conduct oversight in the facade of a regulatory inquiry, one tainted by prior political efforts and a prematurely clotured political process.

TABLE OF CONTENTS

I. INTRODUCTION

On April 27, 2020, in the companion cases of *Trump v. Mazars USA, LLP* and *Trump v. Deutsche Bank AG*, the Supreme Court requested the Office of Solicitor General and the parties brief "whether the political question doctrine or related justiciability principles bear on the Court's adjudication of these cases."[1] This essay seeks to answer that question in the affirmative and develops a framework for evaluating interbranch information disputes concealed within congressional investigations of businesses and individuals.[2] Both *Mazars*[3] and *Deutsche Bank*[4] are similar cases (hereinafter combined as "*Mazars*")[5]: congressional committees seeking from private companies (here, information about President Donald Trump) what they could not obtain directly from the Executive Branch.[6] The framework to be defended, however, relies on a set of assumptions that will be implicitly defended through exposition of the argument below. Those assumptions are as follows:

1) When a congressional committee makes the decision to conduct an investigation of the Executive Branch ("congressional oversight"), that choice commits Congress to obtaining a political, not legal, remedy for noncompliance.[7] The D.C. Circuit's accommodation doctrine is unsound because it presumes interbranch information disputes are justiciable.[8]

---

1. United States Supreme Court, Order List: 590 U.S. (Apr. 27, 2020), *available at* https://www.supremecourt.gov/orders/courtorders/042720zor_6k47.pdf.

2. A version of this essay can be found on the Yale Journal on Regulation blog. *See* Daniel Epstein, *Congressional Oversight Disputes as Political Questions, Part I: The Decline of the Interbranch Accommodation*, YALE J. ON REG. (June 8, 2020), https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-i-the-decline-of-the-interbranch-accommodation-doctrine-by-daniel-epstein/; Daniel Epstein, *Congressional Oversight Disputes as Political Questions, Part II: Accommodation as an Intrabranch Doctrine Governing Committee Investigations*, YALE J. ON REG. (June 15, 2020), https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-ii-accommodation-as-an-intrabranch-doctrine-governing-committee-investigations-by-daniel-epstein/.

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

4. Trump v. Deutsche Bank AG, 943 F.3d 627 (2d Cir. 2019).

5. Trump v. Mazars USA, LLP, 140 S. Ct. 660 (2019).

6. *Compare Mazars*, 940 F.3d at 710, *with Deutsche Bank*, 943 F.3d at 627.

7. H.R. Rep. No. 105-830, at 137 (1998) ("The Constitution contains a single procedure for Congress to address the fitness for office of the President of the United States—impeachment by the House, and subsequent trial by the Senate.") (citing U.S. CONST. art. I, § 9, cl. 3).

8. *See Mazars*, 940 F.3d at 748 (holding that a subpoena issued by Congress to Mazars was valid and enforceable). *But see id.* at 784 (Rao, J., dissenting) ("The Constitution and our historical

2) When a congressional committee makes the decision to conduct an investigation of a non-governmental entity, that choice permits Congress to obtain a legal remedy for noncompliance, but only if its investigation is cabined by a legitimate legislative (regulatory) purpose[9]—much in the same way that agency investigations, as distinct from law enforcement, are cabined by a rulemaking purpose under the Administrative Procedure Act.[10]
3) Legal doctrines that apply legislative purpose requirements to congressional oversight or deem regulatory investigations as non-justiciable fail to properly distinguish between "congressional oversight of administration" and "regulatory investigations by Congress." Both congressional oversight[11] and regulatory investigations by Congress[12] are creatures of law.

Even assuming the validity of the assumptions outlined, above, Congress would contend that the congressional suit to compel Mazars's compliance with its subpoena is justiciable under the "regulatory investigation" framework because the dispute is not between the Executive and Legislative Branches.[13]

This essay seeks to defend the argument that *Mazars* was an interbranch

practice draw a consistent line between the legislative and judicial powers of Congress. The majority crosses this boundary for the first time by upholding this subpoena investigating the illegal conduct of the President under the legislative power.").

9. *See id.* at 783 (Rao, J. dissenting) ("While congressional oversight investigations may probe a wide range of matters . . . such investigations may proceed ancillary to the legislative power.").

10. *See* Administrative Procedure Act, 5 U.S.C.S § 551 (2020); *accord*. Exec. Order No. 13892, 84 Fed. Reg. 55239 & Exec. Order No. 13924, 85 Fed. Reg. 31353 (stating that when investigations proceed via jurisdictional statements that function as "legal standards," those jurisdictional statements are "rules" not "adjudications" under the under the Administrative Procedure Act).

11. U.S. CONST. art. I, § 5. Congressional oversight derives its authority from the "Rules of Proceedings" clause, *id.*, which is referenced as the basis for section 136 of the Legislative Reorganization Act. 2 U.S.C. 190d (1970).

12. U.S. CONST. art. I, § 8. Congressional investigations of non-government persons under Congress's authority to regulate intelligibly are pursuant to the "Necessary and Proper" clause, *id.*, which first found statutory articulation in 1857 as an act entitled "An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony," 11 Stat. 155, ch. 19 (1857).

13. *Mazars*, 940 F.3d at 725 (stating that the court "must determine whether Congress's 'legislative purpose is being served' without taking into account either whether the investigation *will reveal*, or whether the investigators are *motivated to reveal*, criminal conduct").

information dispute in the sheep's clothing of a subpoena enforcement suit. The argument proceeds in two steps. First, it seeks to establish clarity for the legal framework governing congressional inquiries by showing that the accommodation doctrine, an exhaustion and ripeness doctrine of the D.C. Circuit, has been largely repudiated by the federal courts as an appropriate legal doctrine for evaluating interbranch information disputes. But second, it resurrects the accommodation doctrine as a valid doctrine for assessing regulatory disputes between Congress and a non-governmental party when the regulatory inquiry originated as an oversight matter, as in *Mazars*. This second argument simply rearticulates what accommodation actually is: exhaustion of the political process. This political exhaustion doctrine, however, requires the branches to use effective government relations to resolve disputes not as a means of ripening congressional suits against the Executive Branch but to ensure regulatory investigations are not a backdoor means for political oversight. In other words, the test for whether a congressional investigation constitutes political oversight is whether political remedies of appropriations, impeachment and removal, or elections effectively moot the supposed harm to Congress.

II. RECENT JURISPRUDENTIAL INDICATIONS OF THE DECLINING TENABILITY OF THE ACCOMMODATION DOCTRINE

The D.C. Circuit's accommodation doctrine states that a duly authorized congressional information request to the Executive Branch ("oversight") initiates the "implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches."[14] This back and forth between the branches has been described by the D.C. Circuit as a constitutionally-mandated process of accommodation by the parties of legislative need and Executive Branch confidentiality interests.[15] Accommodation is "mandated" by the branches "on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental

14. United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977) [hereinafter "AT&T 2"].

15. United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 385 (D.C. Cir. 1976) [hereinafter "AT&T 1"]. As the *AT&T 1* court explained, because the Justice Department sought an injunction against AT&T's compliance with a House subpoena, the court permitted the House to intervene as "the real defendant in interest." *Id.*

system."[16]

The D.C. Circuit's February 28, 2020, *McGahn* decision, authored by Judge Griffith, shreds the accommodation doctrine in a single stroke: "the entire analysis of the House's standing to intervene in *AT&T I* consists of a single sentence, followed by no citations. '[D]rive-by jurisdictional rulings of this sort' typically 'have no precedential effect.'"[17] Judge Griffith's position is that the Supreme Court's decision in *Raines v. Byrd*, a legislative standing case, definitively "compels the conclusion that we lack jurisdiction to consider lawsuits between the Legislative and Executive Branches."[18]

Even the *McGahn* district court, whose decision to enforce the subpoena for the testimony of the President's counsel was reversed by the D.C. Circuit, skeptically received arguments about accommodation, finding, "the Court cannot accept DOJ's present reliance on carefully curated rhetoric concerning historical accommodations practices".[19] And certainly, Judge Griffith, despite his deprecation of the accommodation doctrine as a tool justifying judicial review, noted its "use" in avoiding "premature[] involve[ment of] the courts".[20]

III. ACCOMMODATION AS A THRESHOLD FOR DEPOLITICIZING CONGRESS'S REGULATORY INVESTIGATIONS

Given judicial skepticism toward relying on accommodation as a framework for evaluating interbranch information disputes, the federal courts have an opportunity to reevaluate these disputes by grounding them in constitutional and statutory text. As noted above, Congress, in formalizing its committees, based their Executive Branch review authority as a function of congressional rules. Only in the aftermath of the Nixon presidency was judicial review of congressional oversight even fathomable—as noted

16. *AT&T 2*, 567 F.2d at 127. In *AT&T 2*, the D.C. Circuit held, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *Id*.

17. Comm. on the Judiciary of the United States House of Representatives v. McGahn, 951 F.3d 510, 525 (D.C. Cir. 2020) (alteration in original) (internal citation omitted) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) .

18. *McGahn*, 951 F.3d at 526; *accord.* Raines v. Byrd, 521 U.S. 811, 833 (1997). *Raines* found that "no suit [addressed by the D.C. Circuit] was brought on the basis of claimed injury to official authority or power." *Id*, at 826.

19. Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 173 (D.D.C. 2019).

20. *McGahn*, 951 F.3d at 537 (Henderson, J., concurring)..

below, the Supreme Court, in *Marshall v. Gordon*, while granting review of a dispute between a congressional committee and an Executive Branch official, determined that a congressional rule, as opposed to a law, cannot bind the Executive.[21] A different history characterizes congressional investigations of non-government persons and the judicial review thereof. Congressional investigations aimed at the development of public-facing regulatory standards were the antecedent to the modern administrative state. Such inquiries, separate from congressional proceedings based in Article I, § 5 (such as impeachment), are grounded in Article I, § 8's "Necessary and Proper" clause and first found statutory articulation in "An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony."[22]

As presented before the D.C. Circuit in *Mazars*, the House Oversight Committee subpoena to Mazars cited, as its authority, House Rule X, which authorizes the Committee to "investigate 'any matter at any time.'"[23] Standing committee jurisdictional rules trace back to the Legislative Reorganization Act of 1946.[24] This Act grounded congressional authority to "exercise continuous watchfulness" over the Executive Branch in the Rules of Proceedings Clause.[25] Section 101 of the Legislative Reorganization Act states that "[t]he following sections of this title are enacted by the Congress: . . . As an exercise of the rule-making power of the Senate and the House of Representatives."[26] Given this legal context, the Supreme Court has definitively opined that resolutions derived under the Rules of Proceedings Clause are not enforceable against the Executive Branch.[27] On the two

21. 243 U.S. 521, 536 (1917) (noting that a congressional rule that binds the Executive Branch "would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein . . . [and] there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution".

22. 11 Stat. 155, ch. 19 (1857).

23. Trump v. Mazars USA, LLP, 940 F.3d 710, 716 (D.C. Cir. 2019).

24. Legislative Reorganization Act of 1946, Pub. L. No. 79-601 (codified at 2 U.S.C. § 31).

25. Legislative Reorganization Act of 1946, § 136 (codified at 2 U.S.C. § 190d).

26. *Id.* at § 101.

27. Marshall v. Gordon, 243 U.S. 521, 536–37 (1917). Albeit largely dismissed by post-*McGrain v. Daugherty*, 273 U.S. 135 (1927) courts, *Kilbourn v. Thompson*, 103 U.S. 168, 182 (1880), explicitly rejected the idea that Congress could judicially enforce its contempt power as a form of punishment against private parties; *accord.* Anderson v. Dunn, 19 U.S. 204 (1821) (recognizing Congress's inherent contempt power against recalcitrant witnesses).

occasions prior to 1974 (when the Supreme Court decided *Nixon*[28]) where Congress held Executive Branch officials in contempt (George Seward in 1869 and Snowden Marshall in 1916), both were grounded as necessary for the purposes of considering impeachment.[29]

But if Congress as Executive Branch overseer versus Congress as regulator in need of information are distinguishable as a matter of constitutional and legal authority for purposes of judicial review, the accommodation doctrine would lack apparent utility. The problem *Mazars* introduces is that Congress may strategically target an Executive Branch official through an otherwise garden variety regulatory investigation. The same Oversight Committee that subpoenaed Mazars also filed suit against the General Services Administration for access to Trump Hotel documents,[30] and Oversight Committee members participated as plaintiffs in *Blumenthal et al. v. Trump*,[31] both cases which, like *Mazars*, sought judicial sanction against the President for alleged constitutional violations. The D.C. Circuit in *Blumenthal* and the D.C. district court in *Cummings v. Murphy* rejected the notion that the congressional plaintiffs had standing to sue.[32]

The results of these cases, then, would make it difficult to argue that cases like *Mazars*, involving disputes between Congress and a company, raise the sorts of separation of powers concerns that would invoke a bar to standing under *Raines v. Byrd*.[33] However, not all federal information disputes raising separation of powers questions involve a live conflict between Congress and the Executive Branch. Questions about the scope of presidential communications privilege or the Office of the President's immunity from civil discovery[34] have been resolved in the context of citizen

28. United State v. Nixon, 418 U.S. 683, 707 (1974) (holding if "the legitimate needs of the judicial process . . . outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch").

29. Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1135–39 (2009) (discussing the congressional history of finding George Seward and Snowden Marshall in contempt of Congress).

30. *See* Cummings v. Murphy, 321 F. Supp. 3d 92 (D.D.C. 2018).

31. *See* Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) *rev'd*, 949 F.3d 14 (2020).

32. Blumenthal v. Trump, 949 F.3d 14, 21 (D.C. Cir. 2020); *Cummings*, 321 F. Supp. 3d at 117.

33. *See Raines*, 521 U.S. 811, 829–30 (1997) (holding members of Congress did not have standing to sue over loss of political power alleged from the Line Item Veto Act giving the President the power to strike items in a bill).

34. Cheney v. United States Dist. Court, 542 U.S. 367, 385 (2004).

suits under information access statutes,[35] as well as conflicts between presidentially-appointed investigators like Independent Counsels.[36] In the context of congressional oversight hidden within a regulatory investigation, information law disputes between citizens with public rights against the government provide meaningful judicial standards for the significance and vitality of accommodation. D.C. Circuit Judge Merrick Garland's decision in *Judicial Watch, Inc. v. United States Secret Service* "barred . . . end runs" to seek indirectly from the President information involving "separation-of-powers concerns" when sought directly by Congress.[37] As such, Congress should not be permitted to obtain a legal remedy by converting an oversight matter into a regulatory investigation when the evidence reflects a congressional failure to exhaust the political remedies available through the oversight process. An oversight matter like *Mazars* could be resolved through either, or all of, restricting the President's power legislatively (particularly through appropriations), impeaching and removing the President, removing the President through the electoral process, or utilizing public pressure to force the President to resign. When Congress pursues oversight, then seeks to avoid a political remedy by substituting the government target for a non-governmental one, it has failed to effectively depoliticize its regulatory investigation.[38] Politicized regulatory investigations constitute oversight which by definition is not required to have a legitimate rulemaking purpose.[39]

The accommodation principle that requires exhaustion of political remedies prior to a legitimate regulatory investigation being ripe for judicial review invokes several federal administrative law doctrines. First, it incorporates a requirement that Congress "exhaust" political remedies in making any initial choice to conduct congressional oversight before

35. *See e.g.* Buzzfeed, Inc. v. FBI, No. 18-cv-2567 (BAH), 2020 WL 2219246 (D.D.C. May 7, 2020).

36. *In re* Sealed Case, 121 F.3d 729, 734, 762 (D.C. Cir. 1997) (noting the "difficult business of delineating the scope and operation of the presidential communications privilege" by having to balance the interests of "the efficacy and quality of presidential decisionmaking" with "the dangers involved in cloaking governmental operations in secrecy").

37. 726 F.3d 208, 225–226 (D.C. Cir. 2013).

38. Trump v. Mazars USA, LLP, 940 F.3d 710, 748 (2019) (Rao, J. dissenting) ("[T]he subpoena targets the President and raises implications for the separation of powers that the majority cannot brush aside simply because the subpoena is addressed to the President's accountants, Mazars USA, LLP.")

39. *See* Robert Longley, *Congressional Oversight and the US Government*, THOUGHTCO. (January 6, 2020), https://www.thoughtco.com/congressional-oversight-4177013.

Congress can meaningfully pursue the same subject matter through a regulatory investigation.[40] Second, it applies the requirement that regulatory decision-making be free from political taint to Congress's regulatory investigations.[41]

In order for the argument to be valid, the law of administrative agencies must inform congressional investigations. But this move is not a difficult one once we consider that any legislative power that can be validly delegated to the Executive Branch is judicially reviewable as ministerial as opposed to discretionary. The Supreme Court has long sanctioned congressional delegation of its investigative authority to committees as legislative agencies.[42] In 1838, the Supreme Court in *Kendall v. United States* crafted a distinction between congressional regulation of the ministerial responsibilities of Executive Branch officials and the political duties of such officials which would be immune from congressional inspection.[43] The idea that Congress can assign ministerial duties to Executive officers and monitor their compliance with such duties is a central ideology held by congressional oversight principals and good government advocates.[44]

---

40. *See* Abbott Labs v. Gardner, 387 U.S. 136, 148–49 (1967); Weinberger v. Salfi, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."); Citizens for Responsibility & Ethics v. Am, Action Network, 410 F. Supp. 3d 1, 20 (D.D.C. 2019) ("Administrative exhaustion requirements ensure that an agency is able to take a first pass at the facts alleged and to make determinations using its relative expertise. Exhaustion also promotes conciliatory efforts.").

41. *See* Aera Energy LLC v. Salazar, 642 F.3d 212, 222 (D.C. Cir. 2011) ("[A]n agency must determine, and give effect to, the decision that would have been made had politics not intruded.").

42. For instance, legislation passed in 1879 permitted Congress to delegate its adjudication of private claims against the United States (traditionally handled by the Committee on Claims) to a federal trial judge. 20 Stat. 278.

43. Kendall v. United States, 37 U.S. 524, 610 (1838) ("There are certain political duties imposed upon many officers in the executive department, the dischcarge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.").

44. *See* Myers v. United States, 272 U.S. 52, 264–274 (1926) (Brandeis, J. dissenting); *see also* Daniel Epstein, *Kendall v. United States and the Inspector General Dilemma*, UNIV. OF CHI. L. REV. ONLINE (June 22, 2020), https://lawreviewblog.uchicago.edu/2020/06/22/ig-dilemma-epstein/.

The Supreme Court, the same year that both the Legislative Reorganization Act and the Administrative Procedure Act became law, held that agency exercises of the "subpoena power for securing evidence" with "the aid of the district court in enforcing it" is an "authority . . . clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers."[45] Thus, in no uncertain terms, Congress's power to conduct regulatory investigations can be delegated to quasi-legislative agencies. The theory of accommodation presented here, then, involves the application of administrative law principles to regulatory investigations by Congress to ensure they are not backdoor means of political oversight. Political exhaustion ensures that Congress's regulatory investigation is for a legitimate rulemaking (legislative) purpose.

IV. CONCLUSION

The D.C. Circuit's October 11, 2019 opinion in *Trump v. Mazars* stated, "[t]he lesson of *McGrain* is that an investigation may properly focus on one individual if that individual's conduct offers a valid point of departure for remedial legislation. Again, such is the case here."[46] The framework presented here permits the distinction of *Mazars* from *McGrain* by reintroducing "accommodation" as a test for evaluating the legitimacy of regulatory investigations. In *McGrain*, the investigative target was the brother of the former Attorney General and the political remedy—removal of an Attorney General alleged to have engaged in wrongdoing—had already occurred before the case reached any court.[47] None of these circumstances are present in the *Mazars* case. A political exhaustion requirement for regulatory investigations by Congress ensures clarification of justiciable conflicts between Congress and individual witnesses while averting the need for federal courts to craft political remedies in legal terms. *Raines v. Byrd* sought to prevent the judicial superintendence of the Legislative Branch's own power by placing courts in the position of determining what constitutes an intrabranch informational injury.[48]

45. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 214 (1946).

46. 940 F.3d 710, 729 (D.C. Cir. 2019).

47. McGrain v. Daugherty, 273 U.S. 135, 150–52 (1927).

48. 521 U.S. 811, 833 (1997) ("Although the contest here is not formally between the political branches . . . it is in substance an interbranch controversy about calibrating the legislative and

Congress has a near limitless amount of institutional remedies for Executive Branch noncompliance in the form of inherent contempt, impeachment, removal, appropriations, or competitive electioneering. But Congress's decision to not engage in political remedies in favor of using its investigative power should not be an opportunity for judicial paternalism as a substitute for effective politics. Requiring Congress's regulatory inquiries to be free of any nexus to congressional oversight of administration and to be untainted by the inherently political nature of oversight is not simply a means for protecting a fair process—it prevents Congress from abdicating its political responsibility to oversee the administrative state.

executive powers, as well as an intrabranch dispute between segments of Congress itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the Judicial Branch . . . by embroiling the federal courts in a power contest nearly at the height of its political tension.") (internal citation omitted).

***