CO=Equal

CIVIL ENFORCEMENT OF CONGRESSIONAL SUBPOENAS

July 2024

Overview

The House and Senate rarely initiate lawsuits to enforce investigative subpoenas, in part because of the delay associated with going to court. Historically, Congress has addressed congressional subpoena disputes through the process of accommodation. If the accommodation process fails, however, civil enforcement is one option available to Congress. Two other options are criminal contempt and inherent contempt.[1]

On several occasions since the 1970s, Congress has brought civil actions to enforce its subpoenas, but the extent of this authority is uncertain. Litigation involving a 2019 House Judiciary Committee subpoena to a former White House Counsel resulted in court rulings affirming that congressional committees have standing to bring civil suits to enforce their subpoenas but leaving open whether Congress is able to obtain judicial review of a subpoena dispute absent a statute that specifically addresses congressional authority to sue.

The converse issue – whether subpoena recipients can go to court to challenge congressional subpoenas – is discussed in the Co-Equal precedent on immunity.[2]

---

[1] Congress has statutory authority to refer criminal contempt cases to the executive branch for prosecution. 2 U.S.C. §§ 192, 194 (at https://web.archive.org/web/20240628174055/https://law.justia.com/codes/us/2021/title-2/chapter-6/sec-192/ and https://web.archive.org/web/20240628174203/https://law.justia.com/codes/us/2021/title-2/chapter-6/sec-194/, respectively). While the text of the contempt statute states that it is the "duty" of the United States Attorney to bring before the grand jury a contempt that has been certified by the Senate or House, the Department of Justice has interpreted this duty as discretionary. *E.g.* Office of Legal Counsel, Letter for the United States Attorney for the District of Columbia, *Prosecutorial Discretion Regarding Citations for Contempt of Congress* (June 16, 2014), at https://web.archive.org/web/20240114194540/https://www.justice.gov/olc/file/2014-06-16-pros-disc-contempt-cong/download.

Inherent contempt is the implied constitutional power of Congress to arrest and detain individuals for non-compliance with congressional subpoenas. *See, e.g., McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927), at https://web.archive.org/web/20240315030148/https:/supreme.justia.com/cases/federal/us/273/135/#174. This power, however, has not been used to enforce subpoenas or address other obstruction of congressional legislative business since the 1930s. *See Congressional Subpoenas: Enforcing Executive Branch Compliance,* Congressional Research Service, R45653 (Mar. 27, 2019) (discussing historic use of the power), at https://web.archive.org/web/20240314065310/https://www.everycrsreport.com/files/20190327_R45653_ff9497823b359fb8733a1e4132f4c548abc69d15.pdf#page=19. Some members of Congress have recently introduced legislation to revive and operationalize use of this power. *E.g.* H.Res. 136 (118th Congress), at https://web.archive.org/web/20230419012403/https://www.congress.gov/bill/118th-congress/house-resolution/136?s=1&r=87.

[2] See the Co-Equal precedent on immunity at https://cdn.prod.website-files.com/5ccc693637a19d0db9dcba92/66abfad18d9abee650a455ce_Congressional%20Immunity.pdf. With respect to affirmative challenges to congressional subpoenas by subpoena recipients, courts have consistently ruled that the Constitution's Speech or Debate Clause, Art. I, § 6, cl. 1, bars judicial review. *See, e.g., Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975), at https://web.archive.org/web/20240315051751/https://supreme.justia.com/cases/federal/us/421/491/. However, courts have entertained actions brought to enjoin a custodian of records, such as a bank, from responding to a congressional subpoena.

I. The Civil Enforcement Authority of the House

A. The House Position

The House generally uses two procedures for initiating or intervening in a civil lawsuit. First, the full House may approve a resolution to authorize such action.[3] Second, the action can be authorized by the Bipartisan Legal Advisory Group (BLAG), which consists of the House Speaker and members of the majority and minority leadership and has authority under House Rule II(8)(b) to articulate the House position in litigation matters.[4]

The House position is that it has an inherent constitutional right to issue and enforce subpoenas, relying on the Supreme Court's decision in *McGrain v. Daugherty* that "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function."[5] According to the House, the House and its authorized committees have standing to bring subpoena enforcement lawsuits because noncompliance injures House institutional interests and prevents the House from carrying out its investigative responsibilities.[6] The House further maintains that the House has a cause of action to enforce investigative subpoenas under both (1) Article I of the Constitution, which is the source of authority for Congress to issue investigative subpoenas, and (2) the Declaratory Judgment Act, which provides that parties may obtain a judicial declaration of their "rights and other legal relations" in a case involving an actual controversy. An additional basis for obtaining judicial enforcement exists when the subpoena recipient is an executive branch official under the doctrine that federal courts have equitable powers to grant relief to address unlawful conduct by executive officials.[7]

In 1978, Congress enacted a law codified at 28 U.S.C. § 1365 that authorizes judicial enforcement of Senate subpoenas issued to private parties. The House position is that this statute provides an additional avenue of enforcement for the Senate but does not limit existing House civil enforcement authority.[8] In

---

[3] For example, the House approved a resolution in 2019 to authorize the House Judiciary Committee to initiate civil enforcement proceedings through the House General Counsel regarding subpoenas issued to Attorney General William Barr and former White House Counsel Donald McGahn. *See* H.Res. 430 (approved June 11, 2019), at https://web.archive.org/web/20221231011744/https:/www.congress.gov/bill/116th-congress/house-resolution/430.

[4] For example, the BLAG authorized the House in 2019 to file a lawsuit to stop the Trump Administration from expending funds on the border wall not appropriated by Congress for that purpose. *See* discussion of the BLAG authorization in Complaint, *U.S. House of Representatives v. Mnuchin,* Case No. 19-cv-969, at 26 (Apr. 5, 2019).

[5] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), at https://web.archive.org/web/20240315030148/https:/supreme.justia.com/cases/federal/us/273/135/#174.

[6] *See, e.g.,* Plaintiff's Reply in Support of Its Motion for Partial Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment, *House Judiciary Committee v. McGahn,* No. 19-cv-2379, at 6-10 (Oct. 16, 2019)).

[7] *See, e.g.*, Plaintiff's Reply in Support of Its Motion for Partial Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment, *House Judiciary Committee v. McGahn,* No. 19-cv-2379, at 29-37 (Oct. 16, 2019).

[8] *See* Plaintiff's Reply in Support of Its Motion for Partial Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment, *House Judiciary Committee v. McGahn,* No. 19-cv-2379, at 21-29 (Oct. 16, 2019); *see also* S. Rep. No. 95-170, at 91–92 (1977), at https://web.archive.org/web/20240115015039/https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf#page=99.

its legal briefings, the House has argued that nothing in the express language of that statute precludes House subpoena enforcement and that statements in the legislative history support this interpretation.[9]

B. The Caselaw

In recent years, the House has initiated lawsuits to enforce investigative subpoenas on five occasions:

1. In 2008 to enforce House Judiciary Committee subpoenas to White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolton;
2. In 2012 to enforce a House Oversight Committee subpoena to Attorney General Eric Holder; 3. In 2019 to enforce a House Ways and Means Committee subpoena to the Treasury Secretary for President Trump's tax returns;
4. In 2019 to enforce House Oversight Committee subpoenas to Commerce Secretary Wilbur Ross and Attorney General William Barr; and
5. In 2019 to enforce a House Judiciary Committee subpoena to former White House Counsel Donald McGahn.

In the first two lawsuits, the federal district court in Washington, D.C., upheld the House's right to enforce its subpoenas. The third and fourth lawsuits were resolved by parties without a court ruling on legal claims relating to the House's enforcement authority. In the fifth lawsuit, the *en banc* D.C. Circuit affirmed the House's standing to file an enforcement action but did not resolve the cause of action issue because the matter became moot when McGahn agreed to voluntarily testify.

The Miers, Holder, Treasury Department, and Barr Cases

In 2008, the House approved a resolution authorizing the House Judiciary Committee to initiate civil proceedings to enforce subpoenas to Bush White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolton for documents and testimony relating to the Committee's investigation of terminations of U.S. Attorneys in 2006.[10] This action followed (1) the refusal by Miers to appear or produce documents on the grounds that senior advisors to the President have "absolute immunity" from compelled congressional process and (2) the refusal by Bolton to produce documents based on executive privilege or to provide a privilege log describing the documents.[11]

---

[9] *See* Plaintiff's Reply in Support of Its Motion for Partial Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment, *House Judiciary Committee v. McGahn,* No. 19-cv-2379, at 21-29 (Oct. 16, 2019); *see also* Brief of Amici Curiae the Lugar Center and the Levin Center, *House Judiciary Committee v. McGahn,* No. 19-5331 (Apr. 16, 2020), at https://web.archive.org/web/20230921212425/https://levin-center.org/wp-content/uploads/2021/09/2020.04.16-Amicus-brief-supporting-House-in-McGahn-en-banc-circuit-court-hearing.pdf; and S. Rep. No. 95-170, at 91-92 (1977) (stating that the exception for federal officials in the statute codifying Senate subpoena enforcement procedures "is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government"), available at https://web.archive.org/web/20220504130530/https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf#page=99.

[10] H.Res. 980, 110th Cong. (2008), at https://web.archive.org/web/20221214034745/https://www.congress.gov/bill/110th-congress/house-resolution/980.

[11] *See* House Committee on the Judiciary, *Resolution Recommending that the House of Representatives Find Harriet Miers and Joshua Bolton, Chief of Staff, White House, in Contempt of Congress,* H. Rept. 110-423 (Nov. 2007), at

In this case, *Committee on Judiciary v. Miers*, a federal district court in the District of Columbia held (1) that the Committee had met the Article III standing requirements because it was seeking judicial redress for an injury that consisted of "both the loss of information to which it is entitled and the institutional diminution of its subpoena power";[12] (2) that the Committee had a cause of action under the Declaratory Judgment Act, as well as an implied cause of action to seek relief that is derived from its Article I powers;[13] and (3) that presidential advisors did not have absolute immunity from Congress.[14]

During the Obama Administration, the House authorized the Committee on Oversight and Government Reform to initiate judicial proceedings to enforce a subpoena for documents and testimony to Attorney General Eric Holder relating to the Committee's investigation of a gun smuggling interdiction initiative of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[15] This action followed a refusal by Holder on executive privilege grounds to produce a subset of documents concerning why the Department had taken certain actions during the course of the congressional investigation of the operation.[16]

Like the court in *Miers*, the federal court in the *Holder* case ruled the House Oversight Committee had established an institutional injury sufficient to establish standing, stating, "Here, the Committee has requested a particular set of documents in the course of an official investigation, it has issued a subpoena for that material, the Attorney General has withheld a clearly delineated subset of that material, and the House of Representatives has specifically authorized the initiation of this action to enforce the subpoena."[17] The court also determined that the Committee had established a cause of action by invoking the Declaratory Judgment Act to enforce its implied Article 1 constitutional right to issue subpoenas, stating that while "in most cases a plaintiff would *need* to identify a statutory (or a common law) cause of action to proceed in federal court," no independent cause of action needs to be identified where the Constitution is "the source of the right allegedly violated."[18] The court rejected the executive branch's motion to dismiss, ruling that the Constitution does not bar judicial review of the

https://web.archive.org/web/20221206181919/http://www.congress.gov/110/crpt/hrpt423/CRPT-110hrpt423.pdf.

[12] *Committee on Judiciary v. Miers,* 558 F. Supp. 2d 53, 71 (D.D.C. 2008), at https://web.archive.org/web/20240313023028/https://casetext.com/case/committee-on-judiciary-v-miers-3.

[13] *Committee on Judiciary v. Miers,* at 83-94.

[14] *Committee on Judiciary v. Miers,* at 99-107.

[15] H.Res. 706, 112th Cong. (2012), at https://web.archive.org/web/20221214023133/https://www.congress.gov/bill/112th-congress/house-resolution/706.

[16] *See* House Committee on Oversight and Government Reform, *Resolution Recommending that the House Find Eric. H. Holder, Attorney General, United States Department of Justice, in Contempt of Congress*, H. Rept. 112-546 (June 22, 2012), at https://web.archive.org/web/20240318180913/https://www.congress.gov/112/crpt/hrpt546/CRPT-112hrpt546.pdf.

[17] *Committee on Oversight v. Holder,* 979 F. Supp. 2d 1, at 20-22 (D.D.C. 2013), at https://web.archive.org/web/20240313043038/https://casetext.com/case/oversight-v-holder.

[18] *Committee on Oversight v. Holder,* at 22-23, at https://web.archive.org/web/20240313043038/https://casetext.com/case/oversight-v-holder.

executive branch's claim of privilege in response to a legislative demand nor did prudential considerations merit dismissal.[19]

The courts in both *Miers* and *Holder* also declined to exercise their equitable discretion to dismiss the cases.[20]

In July 2019, upon receiving authorization from the House BLAG, the House filed a lawsuit to enforce House Ways and Means Committee subpoenas, as well as requests by the Committee under the provisions of 26 U.S.C. § 6103(f), for tax return information relating to former President Donald J. Trump.[21] The district court in January 2020 issued a stay pending Circuit Court proceedings in a case with related claims, *Committee on Judiciary v. McGahn* (discussed below).[22] During the time of the stay, the Department of the Treasury agreed to comply with a new June 2021 request for certain tax return information related to President Trump by the Ways and Means Committee under 26 U.S.C. § 6103(f), and the House voluntarily dismissed its complaint to enforce its 2019 subpoenas and 2019 statutory request.[23] (For a discussion of congressional access to tax information, see the Co-Equal summary at https://www.co-equal.org/guide-to-congressional-oversight/tax-records.)

In November 2019, upon receiving authorization from the House Bipartisan Legal Advisory Group, the House filed a lawsuit to enforce subpoenas issued by the House Oversight Committee to Secretary of Commerce Wilbur Ross and Attorney General William Barr to investigate the Trump Administration's plan to include a citizenship question on the 2020 U.S. Census.[24] This step followed a June 2019 Supreme Court ruling that the Administration's plan was based on a pretextual rationale and was illegal,[25] and a July vote by the House of Representatives to hold Secretary Ross and Attorney General Barr in contempt

---

[19] *Committee on Oversight v. Holder,* at 16-26, at https://web.archive.org/web/20240313043038/https://casetext.com/case/oversight-v-holder.

[20] *Committee on Judiciary v. Miers*, at 95-99; *Committee on Oversight v. Holder,* at 25.

[21] *See* Complaint*, Comm. on Ways and Means v. U.S. Dep't of the Treasury et al.*, No. 19-cv-01974 (D.D.C. July 2, 2019), at https://web.archive.org/web/20231001015340/https://storage.courtlistener.com/recap/gov.uscourts.dcd.208895/gov.uscourts.dcd.208895.1.0_1.pdf.

[22] *Minute Order, Comm. on Ways and Means v. U.S. Dep't of the Treasury et al.,* No. 19-cv-01974 (D.D.C. Jan. 14, 2020), at https://web.archive.org/web/20221111065617/https://www.courtlistener.com/docket/15868028/committee-on-ways-and-means-united-states-house-of-representatives-v/.

[23] *See Comm. on Ways and Means v. U.S. Dep't of Treasury et al.,* No. 21-5289, at 4-5 (D.C. Cir. 2022) (discussing the procedural history of the case), at https://web.archive.org/web/20220817224033/https://cases.justia.com/federal/appellate-courts/cadc/21-5289/21-5289-2022-08-09.pdf?ts=1660059177#page=4. Former President Trump then intervened to block release of the information at issue to the Committee, resulting in a D.C. Circuit opinion affirming the Committee's statutory authority to access this information. *Id.*

[24] *See* Complaint, *Comm. on Oversight and Reform v. Barr*, No. 19-cv-03557, at 13 (D.D.C. Nov. 26, 2019), at https://web.archive.org/web/20220329080741/https://storage.courtlistener.com/recap/gov.uscourts.dcd.213146/gov.uscourts.dcd.213146.1.0.pdf#page=13.

[25] *Dep't. of Commerce v. New York*, 139 S. Ct. 2551 (2019), at https://web.archive.org/web/20221128110155/https://supreme.justia.com/cases/federal/us/588/18-966/case.pdf.

for defying the subpoenas.[26] After the election of President Biden, the parties reached an agreement that enabled the Committee to review the documents,[27] which led the parties to dismiss the case without a court ruling on legal claims relating to the House's enforcement authority.[28]

The McGahn Case

In April 2019, the House approved a resolution authorizing civil action to enforce a House Judiciary Committee subpoena to former White House Counsel Donald McGahn relating to allegations that President Trump sought to obstruct the investigation by Special Counsel Robert Mueller into Russian interference in the 2016 presidential election.[29] Pursuant to a directive from the Trump White House, McGahn refused to provide testimony to the Committee.[30] In August 2019, the Committee filed suit in the federal district court in Washington, D.C., to enforce its testimonial subpoena to McGahn.[31]

In November 2019, the district court ruled in favor of the Committee and ordered McGahn to comply with the subpoena.[32] McGahn requested and was granted a stay of the order pending appellate review, and a three-judge appellate panel then dismissed the suit, ruling 2-1 that the Committee lacked standing.[33] The D.C. Circuit reheard the case *en banc* and reversed the panel's decision on standing 7-2

---

[26] H.Res. 497, 116th Cong. (2019), at https://web.archive.org/web/20230516073555/https://www.congress.gov/bill/116th-congress/house-resolution/497.

[27] "House panel, Commerce Department reach agreement on Census Documents," *The Hill* (August 31, 2021), at https://thehill.com/regulation/court-battles/570249-house-panel-commerce-department-reach-agreement-on-census-documents/; *see also* House Committee on Oversight and Reform, *Memorandum from Chairwoman Carolyn Maloney to Members of the House Committee on Oversight and Reform*, at 8 (July 20, 2021) (discussing resolution of the Committee's demand for information), at https://web.archive.org/web/20240106035636/https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022.07.20%20COR%20Census%20Memorandum.pdf#page=8.

[28] Stipulation of Dismissal, *Comm. on Oversight and Reform v. Garland*, No. 19-cv-3557 (D.D.C. Jan. 7, 2022), at https://web.archive.org/web/20220522164623/https://www.brennancenter.org/sites/default/files/2022-01/Stipulation_of_Dismissal_2022-01-07.pdf.

[29] H.Res. 430, 117th Cong. (2019), at https://web.archive.org/web/20221231011744/https://www.congress.gov/bill/116th-congress/house-resolution/430; Subpoena from Chairman Jerrold Nadler to Donald F. McGahn II (Apr. 22, 2019), at https://web.archive.org/web/20230424010622/https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/mcgahn%20subpoena%204.22.19.pdf.

[30] Letter from White House Counsel Pat A. Cipollone to Chairman Jerrold Nadler (May 20, 2019). https://web.archive.org/web/20190608045549/https://d3i6fh83elv35t.cloudfront.net/static/2019/05/PACLetterJN05.20.2019.pdf.

[31] *See* Complaint, *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. Nov 25, 2019) (No. 1:19-cv-2379), at https://web.archive.org/web/20240115015453/https://www.politico.com/f/?id=0000016c-6dc6-d14f-ad7e-6fd7372c0000. The House Judiciary Committee and the Trump Administration reached an agreement on the document portion of the Committee's subpoena prior to the House's decision to bring the enforcement suit for McGahn's testimony. *See Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 159-60 (D.D.C. Nov. 25, 2019) (discussing the Committee agreement with the White House), at https://web.archive.org/web/20240314025101/https://casetext.com/case/comm-on-judiciary-v-mcgahn.

[32] *See McGahn*, 415 F. Supp. 3d 148 at 171.

[33] *See Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510, 531 (D.C. Cir. Feb. 28, 2020), at https://web.archive.org/web/20200303195928/https://cases.justia.com/federal/appellate-courts/cadc/19-5331/19-5331-2020-02-28.pdf?ts=1582927248.

on August 7, 2020.[34] The *en banc* Circuit remanded the case to the panel with instructions to consider the remaining legal claims.[35]

The three-judge D.C. Circuit panel then dismissed the suit a second time on August 31, 2020, ruling 2-1 that the House failed to state a viable cause of action.[36] The panel relied on the absence of any statute giving the House express authority to enforce its subpoenas in court. It further found that the Declaratory Judgment Act does not provide a cause of action as it is merely procedural and does not create substantive rights, and it declined to exercise equitable discretion to hear the case.[37]

Following the three-judge action dismissing the suit, the *en banc* D.C. Circuit granted the Judiciary Committee's request for a second rehearing.[38] Before the D.C. Circuit could issue a second *en banc* opinion, however, the incoming Biden Administration resolved the dispute by agreeing that McGahn could testify behind closed doors and filed a joint motion with the House to dismiss the case and vacate the three-judge panel's August 31, 2020, opinion.[39] In July 2021, the D.C. Circuit accepted the motion and dismissed the case.[40] The vacation of the panel decision and the absence of any other appellate

---

[34] *Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. Aug. 7, 2020) (en banc), at https://web.archive.org/web/20221109000701/https://cases.justia.com/federal/appellate-courts/cadc/19-5331/19-5331-2020-08-07.pdf?ts=1596812432. In light of its decision in *McGahn* on standing, the *en banc* panel ordered a three-judge panel of the D.C. Circuit to review a lower court ruling in *U.S. House of Representatives v. Mnuchin* that the House lacked standing to bring that suit. Order, *U.S. House of Representatives v. Mnuchin,* 969 F.3d 353 (D.C. Cir. 2020) (online at: https://web.archive.org/web/20240321203752/https://casetext.com/case/us-house-of-representatives-v-mnuchin-2). The *Mnuchin* case involved a claim by the House that then-President Trump had improperly transferred funds to construct a border wall in contravention of congressional appropriations restrictions. The three-judge panel ruled that the House had demonstrated a concrete and particularized injury sufficient to establish standing in that case, because the President's transfer of these funds injured the House's institutional authority to impose spending limits under the Appropriations Clause, U.S. Const. art I, § 9, cl. 7. *See U.S. House of Representatives v. Mnuchin,* No. 19-5176 (D.C. Cir. Sept. 25, 2020), at https://web.archive.org/web/20240624170355/https:/cases.justia.com/federal/appellate-courts/cadc/19-5176/19-5176-2020-09-25.pdf?ts=1601044270. The court explained that the House as a body of Congress was "individually and distinctly" injured because "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys." *Id.*

[35] *See id.*

[36] *See Comm. On the Judiciary v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. Aug. 31, 2020), at https://web.archive.org/web/20240624170655/https:/cases.justia.com/federal/appellate-courts/cadc/19-5331/19-5331-2020-08-31.pdf?ts=1598895087.

[37] *See id*.

[38] *Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2020 U.S. App. LEXIS 32573 at *5–6 (D.C. Cir. Oct. 15, 2020) (en banc), at https://web.archive.org/web/20240618160514/https://cases.justia.com/federal/appellate-courts/cadc/19-5331/19-5331-2020-10-15.pdf?ts=1602793832.

[39] *See* Joint Motion to Dismiss Appeal and Consent Motion to Vacate Panel Opinion at 1, *Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021) (No. 19-5331), at https://web.archive.org/web/20240628173348/https://storage.courtlistener.com/recap/gov.uscourts.cadc.36240/gov.uscourts.cadc.36240.1208338353.0.pdf.

[40] *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2021 U.S. App. LEXIS 20759 at *1 (D.C. Cir. July 13, 2021) (en banc), at https://web.archive.org/web/20240325151042/https://www.courtlistener.com/docket/30596/committee-on-the-judiciary-v-donald-mcgahn-ii/.

court ruling to date leaves open the question of whether an express federal statute is a prerequisite for establishing a cause of action to obtain judicial enforcement of a congressional subpoena.

II. Civil Enforcement Authority of the Senate

Title VII of the 1978 Ethics in Government Act addresses civil enforcement of a Senate subpoena. Section 703 (2 U.S.C. § 288b) requires adoption of a Senate resolution before Senate Counsel may bring a civil action to enforce a subpoena.[41] Section 705(c) (2 U.S.C. § 288d(c)) specifies certain procedures the Senate must follow before adopting the resolution, such as the requirement that the committee or subcommittee seeking enforcement file a report describing the procedures followed in issuing the subpoena, the extent to which the target complied, objections or privileges the target raised, and "the comparative effectiveness" of bringing a civil action, certifying a criminal contempt of Congress, or initiating an inherent contempt proceeding.[42] The Senate vote on a resolution to initiate a civil action is not privileged, so it can be subject to a filibuster.

Section 705(f) of the Ethics in Government Act amends the jurisdiction of the federal district courts by creating a new section, 28 U.S.C. § 1365, expressly authorizing judicial enforcement of Senate subpoenas.[43] The statutory language, however, contains a major limitation. It states that the section "shall not apply to … any subpoena … issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity." During consideration of the legislation, the Senate Committee with jurisdiction over the bill stated that this language "is not intended to be a Congressional finding that the federal courts do not now have authority to hear a civil action to enforce a subpoena, against an officer or employee of the Federal Government.[44]

Senate enforcement actions since enactment of the 1978 statute have concerned subpoenas to private parties.[45] The most recent Senate civil enforcement action concerning a subpoena to the executive branch appears to be litigation initiated in 1973 to enforce a subpoena to President Nixon from the Senate Select Committee to Investigate Presidential Campaign Activities. In that proceeding, the Senate position was that the "federal question" statute codified at 28 U.S.C.

---

[41] 2 U.S.C 288b, at https://web.archive.org/web/20240624182701/https:/law.justia.com/codes/us/2021/title-2/chapter-9d/sec-288b/.

[42] 2 U.S.C. 288d(c), at https://web.archive.org/web/20240624182731/https:/law.justia.com/codes/us/2021/title-2/chapter-9d/sec-288d/.

[43] 28 U.S.C. 1365, at https://web.archive.org/web/20240624182803/https:/law.justia.com/codes/us/2021/title-28/part-iv/chapter-85/sec-1365/.

[44] Senate Committee on Governmental Affairs, Report Accompanying the Public Officials Integrity Act, S. Rep. No. 95-170, at 91-92 (1977), at https://web.archive.org/web/20240115015039/https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf#page=99.

[45] *See* Congressional Research Service, *Congress's Contempt Power and Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure,* RL34097, at 29, (May 12, 2017) (stating that since passage of the law, it appears the Senate had authorized enforcement actions at least six times, all of which involved subpoenas to private parties), at https://web.archive.org/web/20240313232038/https://sgp.fas.org/crs/misc/RL34097.pdf.

§ 1331 provides federal courts jurisdiction to review Senate enforcement actions.[46] At the time that case was initiated, the federal question statute contained an "amount in controversy" requirement of $10,000. The court found that the Senate failed to establish that the amount in controversy met this threshold, so the federal question statute did not apply.[47] The Senate appealed this ruling, and in the interim Congress swiftly enacted a statute specifically stating that the Senate Select Committee was authorized to sue to enforce a subpoena to the President and that the federal district court in the District of Columbia had jurisdiction to review civil subpoena enforcement actions brought by that Committee "without regard to the sum or value of the matter in controversy."[48] The D.C. Circuit subsequently reviewed and ruled on the merits of the Select Committee's claim, declining to enforce the subpoena to the President on grounds of executive privilege.[49] In 1976, Congress enacted legislation removing the amount in controversy requirement from the federal question statute with respect to suits against the United States or its officers,[50] and in 1980 Congress enacted legislation removing the amount in controversy requirement from the federal question statute altogether.[51]

Going forward it is likely that Senate efforts to enforce subpoenas against executive branch officials will encounter challenges similar to those faced by the House regarding whether there is an existing cause of action for such suits, given that the *McGahn* litigation left that issue unresolved.

---

[46] *Senate Select Comm. on Presidential Campaign Activities et al. v. Nixon I*, 366 F. Supp. 51, 59 (D.D.C. 1973), at https://web.archive.org/web/20170716115159/http://law.justia.com/cases/federal/district-courts/FSupp/366/51/1502878/.

[47] *Id.* at 60-61.

[48] Pub. L. 93-190 (1973), at https://web.archive.org/web/20220707105128/http://www.congress.gov/93/statute/STATUTE-87/STATUTE-87-Pg736.pdf.

[49] *Senate Select Comm. on Presidential Campaign Activities et al. v. Nixon II*, 498 F.2d 725, 733 (D.C. Cir. 1974), at https://web.archive.org/web/20240113141624/https://law.justia.com/cases/federal/appellate-courts/F2/498/725/325890/. In weighing the public interest protected by executive privilege against the public interests advanced by the Senate investigation in this case, the court emphasized that a House impeachment committee had undertaken an inquiry with overlapping subject matter such that the Senate demand for the specific information at issue was "from a congressional perspective, merely cumulative." The court further noted that since the time the Committee initiated the lawsuit to enforce its subpoena the executive branch had released transcripts of some of the audiotaped conversations the Committee sought through the subpoena. *Id.*

[50] Pub. L. No. 94-574 (1976), at https://web.archive.org/web/20211019191910/https://www.congress.gov/94/statute/STATUTE-90/STATUTE-90-Pg2721.pdf.

[51] Pub. L. No. 96-486, 94 Stat. 2369, at https://web.archive.org/web/20220705102402/https://www.congress.gov/96/statute/STATUTE-94/STATUTE-94-Pg2369.pdf.