

# Impeachment Investigations Part II: Access

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The House has [opened](#) a “formal impeachment inquiry” into whether President Joe Biden “abused his public office for his family’s financial gain.” The [inquiry](#), which is being led by the Committee on Oversight and Accountability in coordination with the Judiciary Committee and the Committee on Ways and Means, marks an early step in a constitutional process that could lead to the nation’s third presidential impeachment in the last four years. It also may strengthen the House committees’ authority to obtain information, as there is reason to believe that invocation of the impeachment power could improve the committees’ legal claims of access to certain types of evidence relevant to the allegations of misconduct against President Biden.

This Sidebar is the second in a two-part series addressing a pair of interrelated issues prompted by the new impeachment inquiry. [Part I](#) of the series explores whether, as a legal and constitutional matter, the House must explicitly authorize an impeachment investigation for House committees to obtain any possible information-access benefits. This Sidebar considers what those benefits may be and, specifically, that transitioning to an impeachment investigation may bolster the House’s ability to obtain relevant evidence, especially through courts.

## The Tools and Scope of Impeachment Investigations as Compared to Legislative Investigations

Assessing whether invocation of the impeachment power improves the House’s ability to obtain relevant information requires a brief [comparison](#) of impeachment investigations to legislative investigations. The two types of investigations have much in common: both represent exercises of the House’s constitutional power; both can act as essential checks on executive overreach and help ensure preservation of the separation of powers; and both are unique and consequential powers characterized by their mix of judicial, legislative, and political features. In addition, whether engaged in an impeachment or legislative investigation, the [tools](#) used to gather information are now mostly the same. In any investigation, a committee would likely obtain information through informal requests, voluntary interviews, hearings, and subpoenas for documents, testimony, and depositions.

These similarities sometimes make it difficult to distinguish between the two types of investigation, especially because (as [discussed](#) in Part I) committee investigations are sometimes undertaken for a mix of legislative and impeachment purposes. Nevertheless, there are differences. Perhaps the primary distinction between the two investigations is that of scope. The Supreme Court has stated that legislative

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investigations must be carried out for a “[valid legislative purpose](#)”—typically either to inform a committee in its consideration of new legislation or to oversee the implementation of existing laws. While legislative investigations can inquire into misconduct, the Supreme Court has observed that they generally cannot be carried out solely to expose or punish wrongdoing and instead must [further](#) a “legitimate task of the Congress” and “concern[] a subject on which legislation ‘could be had.’”

Impeachment investigations, on the other hand, support a different legislative function: the House’s impeachment power. Rather than being confined and restricted by a necessary relationship to legislation, impeachment investigations are carried out to aid the House in determining whether sufficient grounds exist to charge an [impeachable official](#) (“[t]he President, Vice President and all civil Officers of the United States”) with an [impeachable offense](#) (“[t]reason, Bribery, or other high Crimes and Misdemeanors”). They are a direct response to allegations of significant wrongdoing, and as a result, impeachment investigations generally give committees more discretion to look at the specifics of individual misconduct.

By launching an impeachment inquiry, the House is effectively signaling a transition in the purpose of its investigations. Applied to the current topic, whereas previously, the committee investigations into the Biden family served the committees’ consideration of [potential legislation](#)—for example, whether there is a need for new financial disclosure requirements for members of the President’s family—the investigations are now also pursuing evidence relevant to a possible [impeachable offense](#). These two purposes are not mutually exclusive. Going forward, the inquiry may, and likely will, pursue a mix of both legislative and impeachment purposes.

## Information Access in an Impeachment Investigation

As a historical matter, all three branches have suggested that the House possesses a robust right of access to information when it is investigating for impeachment purposes. Since nearly its inception, the House has viewed its impeachment power as including “the right of inquiry . . . to the fullest and most unlimited extent” and “certainly impl[ying] a right to inspect every paper and transaction in any department” of the government. Federal courts have similarly [called](#) the impeachment of a President “a matter of the most critical moment to the Nation,” observing that “it would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair [impeachment] inquiry based on all the pertinent information.” The executive branch has likewise acknowledged the breadth of the House impeachment powers, although usually in the context of denying Congress’s right of access in a legislative investigation. In an oft-quoted example, [President James K. Polk](#) stated that the authority of the House in an impeachment investigation “would penetrate into the most secret recesses of the Executive Department” and would include the authority to “command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial.”

As these statements suggest, the significance of a possible exercise of the impeachment power, along with a resulting increase in political and public pressure, may itself increase a committee’s leverage in negotiating over access to information. Such an exercise might also affect the Executive’s inclination to comply with committee requests. This initial willingness, however, is likely to depend on whether the executive branch views the impeachment investigation as “[legitimate](#),” which, as discussed in [Part I](#), may be influenced by whether the House has explicitly authorized the investigation.

If negotiations between Congress and the subject of a congressional investigation break down, the courts are sometimes asked to resolve the dispute. In that scenario, a committee investigating for impeachment purposes may be in a more favorable legal position with respect to grand jury information, privileged materials, and personal financial information than a committee investigating solely for a legislative purpose.

## Grand Jury Materials

A committee engaged in an impeachment investigation is likely to have improved access to grand jury materials, including those connected to previous or ongoing federal criminal investigations. In the current inquiry, this access means that House committees may be able to obtain evidence and testimony presented to a federal grand jury during investigations into Hunter Biden's compliance with federal [gun](#) and [tax](#) laws, so long as that information is relevant to the current investigation and the committee can show an adequate need.

[Rule 6\(e\) of the Federal Rules of Criminal Procedure](#) establishes a general requirement of grand jury secrecy. Under the Rule, any “matter occurring before the grand jury” is treated as confidential unless (1) disclosure fits within certain enumerated exceptions and (2) the party seeking the information can show a “[particularized need](#).” Although there is no clear definition of what constitutes a “matter occurring before the grand jury,” courts have generally [interpreted the rule](#) as broadly encompassing anything that might reveal what took place in the grand jury room.

None of the exceptions in Rule 6(e) explicitly permit disclosure of grand jury material to Congress during an investigation. Even so, courts have previously provided [Congress](#) with access to these materials during an impeachment investigation—generally through reliance on Rule 6(e)'s exception permitting release of protected materials “[preliminary to or in connection with a judicial proceeding](#).” In these [cases](#), courts have viewed an impeachment trial in the Senate as a “judicial proceeding” and the impeachment investigation in the House as “preliminary” to that “judicial” trial.

During the 2019 impeachment investigation of President Trump, the House Judiciary Committee petitioned a federal court to obtain grand jury materials connected with Special Counsel Robert Mueller's investigation. Both the [district court](#) and the U.S. Court of Appeals for the District of Columbia Circuit ([D.C. Circuit](#)) authorized the Committee's access to the requested materials because the committee was engaged in an impeachment investigation that was preliminary to a judicial proceeding. The Supreme Court, however, [vacated these opinions](#) after the case became moot while pending before the Court. Still, they are suggestive of how courts within the D.C. Circuit may rule if again presented with the question.

## Executive Privilege

An impeachment investigation may also improve the likelihood that a committee will be able to overcome executive privilege assertions made in response to committee subpoenas. President Biden has not formally asserted [executive privilege](#) at any time during his administration, but invocation of one of the privileges protecting confidential executive branch deliberations (including the [presidential communications privilege](#)) remains a possibility as the impeachment inquiry continues.

The House has viewed the need for information in an impeachment investigation as superseding the President's need to maintain the confidentiality of executive branch deliberations. During the Nixon impeachment investigation, the House Judiciary Committee argued that a claim of executive privilege “cannot be permitted to prevail over the fundamental need to obtain all the relevant facts in the impeachment process.” As stated by the committee:

Whatever the limits of legislative power in other contexts—and whatever need may otherwise exist for preserving the confidentiality of Presidential conversations—in the context of an impeachment proceeding the balance was struck in favor of the power of inquiry when the impeachment provision was written into the Constitution.

The Supreme Court has never addressed an executive privilege claim by a sitting President in either a traditional oversight investigation or an impeachment investigation. It is clear, however, that executive privilege, even if found to cover subpoenaed information, does not present an absolute bar to congressional access. Instead, courts must [balance](#) the executive's interest in confidentiality against

Congress's need for (and, perhaps, the [public interest](#) in) disclosure of the information. The D.C. Circuit recently summarized that when a congressional subpoena is met with a claim of executive privilege, "the bottom-line question has been whether a sufficient showing of need for disclosure has been made so that the claim of presidential privilege 'must yield[.]'"

The D.C. Circuit's 1974 decision in *Senate Select Committee on Presidential Campaign Activities v. Nixon* may provide some insight into how impeachment could impact this balancing approach. That case involved an effort by the Senate Watergate Committee to enforce a subpoena issued to President Nixon for recordings of specific conversations he had with presidential advisors in the Oval Office, thus squarely implicating aspects of executive privilege, but *not* in the context of an impeachment investigation. The court ultimately sided with the President, at least partly because the President had publicly released transcripts of some tapes and the House Judiciary Committee had already obtained others. In nonbinding dicta, however, the court seemed to suggest that its analysis might have been different if the subpoena had been part of the House Judiciary Committee's separate but "overlap[ing]" impeachment investigation of the President, as that investigation "has an express constitutional source." The Supreme Court made a similar suggestion nearly a century earlier in *Kilbourn v. Thompson*, reasoning again in dicta that while the House in that case lacked a valid legislative purpose to compel testimony, if an investigatory purpose "had been avowed to impeach . . . , the whole aspect of the case would have been changed." In two more recent cases (though neither involved executive privilege), the D.C. Circuit likewise described the House's "[unique interest](#)" in obtaining information as part of an impeachment investigation and [reiterated](#) that "[p]ublic confidence in a procedure as political and public as impeachment is an important consideration justifying disclosure."

While these general statements suggest that courts might treat impeachment investigations differently from traditional legislative investigations, they do not elaborate on how or why. One might argue that the importance of the impeachment function's [constitutional role](#) in addressing misconduct by federal officials and preserving the separation of powers requires that impeachment investigations be afforded the utmost deference when weighed against executive branch confidentiality interests. Courts may also view impeachment investigations as requiring a more exacting factual record of the conduct of a particular official, elevating the need for specific evidence, in contrast to a traditional legislative investigation. While the invocation of the impeachment power in a House investigation does not alter the scope of the executive privileges, it may increase the likelihood that a committee could overcome those privileges in court.

## Personal Financial Records, *Mazars*, and Investigations of the President

Finally, a committee investigating for impeachment purposes may be in a stronger position to obtain personal records, including financial documents of the President and his family. Bank records have played a [substantial](#) role in the current inquiry and will likely continue to do so given that the House Oversight Committee has expressed a desire to "follow the money" and has now [issued](#) subpoenas for Hunter and James Biden's bank statements. Chairman Comer has also [suggested](#) that he may eventually need to demand the President's own records. An impeachment investigation would appear to provide the House committee with two possible advantages in obtaining these types of records.

First, an impeachment investigation may more readily justify the need for personal bank records than a legislative investigation. While personal information may often bear on proposed legislation and provide a committee with insight into the problems that legislation is intended to resolve (and therefore can sometimes be obtained by committees in a legislative investigation), the Supreme Court has [suggested](#) that "personal" documents like financial records have a "less evident connection to a legislative task." Moreover, both the Supreme Court and the D.C. Circuit have suggested that Congress may not always require the level of specificity often contained in personal financial records to make legislative judgments. "[E]fforts to craft legislation involve predictive policy judgments," the Court has [reasoned](#), "that are 'not

hamper[ed] . . . in quite the same way’ when every scrap of potentially relevant evidence is not available.” In *Senate Select*, the D.C. Circuit similarly noted that “there is a clear difference between Congress’s legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.” *Whereas* “legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events,” entities like grand juries must “determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.”

When investigating for impeachment purposes, a congressional committee would appear to function more like a grand jury—needing specific information to reconstruct events to determine whether a specific individual “did or did not commit” an impeachable offense. Moreover, when the alleged impeachable offense under investigation involves the receipt of funds in exchange for official acts, financial records appear to be not only relevant but possibly crucial to a full inquiry.

A second possible advantage relates to the standards for congressional access to personal presidential records established in the Supreme Court’s decision of *Trump v. Mazars*. In *Mazars*, the Court clarified that “because Congress’s responsibilities extend to ‘every affair of government,’” committee investigations “might involve the President in appropriate cases.” However, the opinion also created what is, in effect, a heightened standard, derived from the separation of powers, to be applied to subpoenas seeking “the President’s personal information.” Rather than simply determining whether a committee request serves a “valid legislative purpose,” the *Mazars* test requires a more scrutinizing review. This review consists of four “special considerations” requiring courts to (1) “carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers”; (2) “insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective”; (3) “be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose”; and (4) “assess the burdens imposed on the President by a subpoena.”

By its terms, *Mazars* applies only to the President’s personal records. But the House impeachment inquiry may soon face attempts to extend *Mazars*’ heightened scrutiny to personal records of the President’s immediate family members. This argument may draw from D.C. Circuit decisions that have applied *Mazars* to the records of a *former* President—mainly out of concern for the impact such demands would have on a *sitting* President. In so extending *Mazars*, the court has *worried* that “if there were no limits to Congress’s ability to drown a President in burdensome requests the minute he leaves office,” then “Congress [] could *wield the threat of intrusive post-Presidency subpoenas* to influence the actions of a sitting President ‘for institutional advantage.’”

A subpoena issued for the records of a private party who happens to be a family member of the President does not, on its face, raise equivalent separation-of-powers concerns as a subpoena issued for the records of a sitting or former President. Nevertheless, Courts may consider that Congress could “wield the threat of intrusive” subpoenas to the President’s family members in an effort to “influence the actions of a sitting President.” Adopting that line of reasoning to apply heightened scrutiny to committee subpoenas seeking personal information of a private party, however, would be a new and significant extension of *Mazars*.

Whatever its scope in the legislative investigation context, it is not clear whether *Mazars* applies *at all* in the impeachment context. The language employed by the Court in crafting the four considerations reflects an emphasis on Congress’s need to inform itself for purposes of *legislation*. The opinion does not mention impeachment—an unsurprising fact given that *Mazars* did not arise in the context of an impeachment investigation and the committees *disclaimed* any reliance on the impeachment power. Moreover, the “special considerations” established in *Mazars* reflected, *according to the Court*, the “tradition of negotiation and compromise” that has *characterized* disputes between Congress and the President “for more than two centuries.” It was this long-standing historical practice in legislative investigations that led



the Court to craft its “balanced approach.” The same “tradition of negotiation and compromise” does not appear to exist in impeachment investigations, both because they are comparatively infrequent and, according to the House, until the 1970s there was a near “uniform historical practice” of recognizing “the power of the committee conducting the impeachment investigation to compel the production of evidence it deemed necessary.” It is possible then, that the *Mazars* factors do not apply when a committee is seeking the President’s personal information for purposes of a possible impeachment.

Still, because the *Mazars* standards arose from the separation of powers, it may be that the special considerations apply to *any* subpoena that pits Congress against the President. As noted above, one of the Court’s concerns appears to have been the prospect of congressional harassment of a President, which can occur in either legislative or impeachment investigations. In either case, the subpoena [would](#) “stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.” If *Mazars* does apply, the weight of the House’s interest in obtaining evidence as part of an impeachment investigation and the centrality of financial records to understanding allegations of unjust enrichment may increase the likelihood that the House committees can satisfy the Court’s special considerations. On at least [three different occasions](#), committees have overcome the *Mazars* test to obtain personal presidential records—each time without reliance on the impeachment power. It would seem, then, that a committee seeking information relevant to the House’s weighty interest in a full and fair impeachment investigation would have a reasonable likelihood of satisfying the *Mazars* standards, if they apply.

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