

# EMERGING CASE LAW ON CONGRESSIONAL OVERSIGHT

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## I. INTRODUCTION

It has been two years since the Wayne State University Law School published its inaugural *Wayne Law Review* edition dedicated to oversight.<sup>1</sup> Since then, U.S. federal courts have seen an influx of cases adjudicating issues related to the authority of Congress to obtain information in connection with its oversight investigations.<sup>2</sup> Some of the cases were filed by Congressional committees seeking to enforce their information requests;<sup>3</sup> others were filed by President Donald J. Trump,<sup>4</sup> the U.S. Department of Justice (DOJ),<sup>5</sup> or other parties<sup>6</sup> seeking to block Congressional access to information.

The number of congressional oversight cases now going through the courts is larger than at any time in recent memory.<sup>7</sup> To keep track of the case law developments, the Levin Center at Wayne Law has constructed a website that gathers in one place key information about each of the federal

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1. WAYNE L. REV., Vol. 64, No. 1 (2018), <http://waynelawreview.org/64-no-1/> [<https://web.archive.org/web/20200314203750/http://waynelawreview.org/64-no-1/>].

2. *See infra* Part III.

3. *See infra* note 31.

4. *See infra* notes 38, 40.

5. *See infra* note 39.

6. *See infra* note 41.

7. *See Emerging Case Law on Congressional Oversight*, LEVIN CTR. AT WAYNE L., <https://oversightcases.org/> [<https://web.archive.org/web/20200406152105/https://oversightcases.org/>] (noting that, until recently, fewer cases on this issue have been filed).

cases.<sup>8</sup> The purpose of the website is to assist Congress, the legal community, scholars who study oversight issues, and others to identify, analyze, and utilize the emerging case law information.<sup>9</sup> To further advance that objective, this article describes the website, the cases it currently covers, and ways in which the information may be used to deepen understanding of this rapidly evolving area of the law.

Most of the recent cases involve clashes between the congressional and executive branches over access to information.<sup>10</sup> Three cases have gone before the Supreme Court,<sup>11</sup> and more may follow. The judicial decisions in those cases will affect congressional oversight for generations to come, shaping the balance of power among the three branches of government and the effectiveness of the checks and balances envisioned by the Constitution. Understanding the cases and how they interact is critical to those interested in constitutional law, congressional oversight, and American democratic and political systems.

## II. EMERGING CASE LAW WEBSITE

The Levin Center website, entitled “Emerging Case Law on Congressional Oversight,” was publicly launched in January 2020.<sup>12</sup> It is a free online resource, developed and maintained by the Levin Center, for those seeking to understand the role of federal courts in shaping the authority of Congress to conduct oversight investigations.<sup>13</sup>

The website offers several types of information. First, on the home page, the website lists the cases being tracked.<sup>14</sup> All of the cases are relatively recent, with court opinions issued in 2016 or later.<sup>15</sup> The cases are grouped into six categories addressing: congressional access to grand jury information; executive branch claims of absolute immunity to congressional subpoenas; congressional access to tax and financial records related to the president; executive branch privilege claims opposing congressional access to information; congressional enforcement of subpoenas directed to the private sector; and efforts by Members of Congress to enforce the Constitution’s foreign emoluments clause.<sup>16</sup>

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8. *Id.*

9. *Id.*

10. *See infra* Part III.

11. *See infra* note 28.

12. *Emerging Case Law on Congressional Oversight*, *supra* note 7. As part of her work for the Levin Center, Ms. Bean helped design, author content, and launch the website.

13. *Id.*

14. *Id.*

15. *See id.*

16. *Id.*

Each listed case has an individual “Case Page.”<sup>17</sup> The Case Page identifies the “major issue” presented by the case, provides a brief summary of the case’s facts and procedural posture, and includes key pleadings and court opinions.<sup>18</sup> The pleadings and opinions are grouped according to whether they were issued by a district court, an appellate court, or the Supreme Court.<sup>19</sup>

In addition, for select court opinions containing major rulings—some of which exceed 75, 100, or even 150 pages in length—the Case Page provides a “Key Excerpts” document that pulls key quotations from the text of the opinion.<sup>20</sup> The quotations are reprinted in the order in which they appear in the opinion, without any commentary.<sup>21</sup> The selection of excerpts is intended to help distill the opinion to its most important elements, aid rapid analysis of case developments, and make it easier to understand and compare the legal principles that animate the various decisions.

Next, the website offers a “Case Status” report that provides a brief description of each case’s key court rulings and current standing, such as whether the case is final or is awaiting a district or appellate court decision.<sup>22</sup> The website also provides a “Key Case Citations” list for important court opinions.<sup>23</sup> Because many of the cases remain on appeal, both the case status report and case citations are regularly updated.

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17. See, e.g., *Deutsche Bank and Capital One Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/deutsche-bank-and-capital-one-case/> [<https://web.archive.org/web/20200406152226/http://oversightcases.org/deutsche-bank-and-capital-one-case/>].

18. See *id.*

19. See *id.*

20. See *id.* (follow “District Court Proceedings” hyperlink; then follow “Key Excerpts from 2019 District Court Opinion” hyperlink).

21. See Elise J. Bean, *Deutsche Bank-Capital One Case: Key Excerpts from 2019 District Court Opinion*, <https://oversightcases.org/wp-content/uploads/2020/01/Deutsche-Bank-Capital-One-Case-Key-Excerpts-from-2019-District-Court-Opinion.pdf> [<http://web.archive.org/web/20200416170119/https://oversightcases.org/wp-content/uploads/2020/01/Deutsche-Bank-Capital-One-Case-Key-Excerpts-from-2019-District-Court-Opinion.pdf>].

22. *Case Status*, LEVIN CTR. AT WAYNE L. (May 10, 2020), <http://oversightcases.org/case-status/> [<https://web.archive.org/web/20200513041312/http://oversightcases.org/case-status/>].

23. *Key Case Citations*, LEVIN CTR. AT WAYNE L. (Jan. 20, 2020), <http://oversightcases.org/key-case-citations/> [<https://web.archive.org/web/20200406152545/http://oversightcases.org/key-case-citations/>].

Finally, the website provides a list of “Key Issues.”<sup>24</sup> Over fifteen different issue areas are identified on such cross-cutting topics as the degree of “deference” courts show when adjudicating congressional investigative requests; the validity and nature of “[e]xecutive privilege” claims; and the “[r]elevancy” standards that courts apply when evaluating congressional information requests.<sup>25</sup> For each issue area, the website lists key quotations from the cases being tracked with links to the opinions from which the quotations are taken.<sup>26</sup>

Together, the case list, case pages, key excerpts, case status report, case citations, and key issues provide a detailed synopsis of the cases being tracked and make it easier to understand what the courts have decided, how the cases interact, and the most important elements of the newly emerging case law governing oversight efforts by Congress.<sup>27</sup>

### III. THE CASES

At the time of this writing, the website is tracking thirteen cases, of which three are awaiting decisions by the Supreme Court,<sup>28</sup> five are

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24. *Key Issues*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/key-issues/> [<https://web.archive.org/web/20200406152845/http://oversightcases.org/key-issues/>].

25. *Id.*

26. *Id.*

27. *See supra* Part II.

28. *See generally* Trump v. Comm. on Oversight & Reform, U.S. House of Representatives, 380 F. Supp. 3d 76 (D.D.C. 2019), *aff'd sub nom.* Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019), *reh'g en banc denied*, 941 F.3d 1180 (D.C. Cir. 2019), *cert. granted*, 140 S. Ct. 660 (Mem), No. 19-715 (Dec. 13, 2019) [hereinafter *House Oversight Committee-Mazars Case*]; Trump v. Vance, 395 F. Supp. 3d 283 (S.D.N.Y. 2019), *aff'd in part, vacated in part and remanded*, 941 F.3d 631 (2d Cir. 2019), *cert. granted*, 140 S. Ct. 659 (2019) (No. 19-715) (mem.); Trump v. Vance, 395 F. Supp. 3d 283 (S.D.N.Y. 2019), *aff'd in part, vacated in part and remanded*, 941 F.3d 631 (2d Cir. 2019), *cert. granted*, 140 S. Ct. 659 (2019) (No. 19-635) (mem.); Trump v. Deutsche Bank AG, No. 19 CIV. 3826 (ER), 2019 WL 2204898 (S.D.N.Y. May 22, 2019), *aff'd in part, remanded in part*, 943 F.3d 627 (2d Cir. 2019), *cert. granted*, 140 S. Ct. 660 (2019) (No. 19-760) (mem.).

undergoing or have completed appellate court review,<sup>29</sup> and five remain or were concluded at the district court level.<sup>30</sup>

Half of the cases were initiated by Congress, through its committees, to enforce its right to obtain information.<sup>31</sup> They include lawsuits to secure a judicial order to obtain, for example, grand jury materials from the court,<sup>32</sup> testimony from a former White House counsel,<sup>33</sup> or tax returns

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29. See generally *In re* Application of Comm. on the Judiciary, U.S. House of Representatives for an Order Authorizing Release of Certain Grand Jury Materials, 414 F. Supp. 3d 129 (D.D.C. Oct. 25, 2019) Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted sub nom.*, U.S. House of Representatives v. Mnuchin, No. 19-5331, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020); Trump v. Comm. on Ways & Means, U.S. House of Representatives, 415 F. Supp. 3d 38 (D.D.C. 2019), *appeal docketed*, No. 19-5360 (D.C. Cir. Dec. 23, 2019); Senate Permanent Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017); Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018), *rev'd per curiam*, 949 F.3d 14 (D.C. Cir. 2020) (remanding case with instructions to dismiss).

30. See generally *Kupperman v. U.S. House of Representatives*, No. 19-3224 (R JL), 2019 WL 7293589 (D.D.C. Dec. 30, 2019); Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dept. of Treasury, Case No. 1:19-cv-01974 (TNM), 2019 WL 4673726 (D.D.C. Sept. 4, 2019); Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Sessions, 344 F. Supp. 3d 1 (D.D.C. 2018); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34 (D.D.C. 2018); Comm. on Oversight & Reform, U.S. House of Representatives v. Barr, No. 1:19-cv-03557-RDM, (D.D.C. argued Jan. 30, 2020).

31. See *Mueller Grand Jury Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/mueller-grand-jury-case> [<https://web.archive.org/web/20200406153049/http://oversightcases.org/mueller-grand-jury-case/>]; *McGahn Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/mcgahn-case/> [<https://web.archive.org/web/20200406153145/http://oversightcases.org/mcgahn-case/>]; *House Ways & Means Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/house-ways-means-case/> [<https://web.archive.org/web/20200406153235/http://oversightcases.org/house-ways-means-case/>]; *House Census Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/census-case/> [<https://web.archive.org/web/20200406153347/http://oversightcases.org/census-case/>]; *Fast and Furious Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/fast-and-furious-case/> [<https://web.archive.org/web/20200406153436/http://oversightcases.org/fast-and-furious-case/>]; *Backpage.com Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/backpage-com-case/> [<https://web.archive.org/web/20200406153518/http://oversightcases.org/backpage-com-case/>]; *Members of Congress Emoluments Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/members-of-congress-emoluments-case/> [<https://web.archive.org/web/20200406153605/http://oversightcases.org/members-of-congress-emoluments-case/>].

32. *Mueller Grand Jury Case*, *supra* note 31.

33. *McGahn Case*, *supra* note 31.

from the U.S. Treasury Department.<sup>34</sup> Committees also sought to enforce subpoenas seeking agency documents,<sup>35</sup> private sector records,<sup>36</sup> or a mix of the two.<sup>37</sup>

The other half of the cases were initiated by parties seeking to block Congressional access to information.<sup>38</sup> Three of the suits were filed by President Trump, with support from the Department of Justice, to quash congressional (or grand jury) subpoenas directed to third parties for tax or financial information relating to the President.<sup>39</sup> Another suit was filed by the President to prevent Congress from asking the State of New York for copies of his state tax returns.<sup>40</sup> Two additional lawsuits were filed by other congressional subpoena targets seeking to block Congress's access to the requested information.<sup>41</sup>

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34. *House Ways & Means Case*, *supra* note 31.

35. *House Census Case*, *supra* note 31; *Fast and Furious Case*, *supra* note 31.

36. *Backpage.com Case*, *supra* note 31.

37. *Members of Congress Emoluments Case*, *supra* note 31.

38. *House Oversight Committee-Mazars Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/house-oversight-committee-mazars-case> [<https://web.archive.org/web/20200515013726/http://oversightcases.org/house-oversight-committee-mazars-case/>]; *Deutsche Bank and Capital One Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/deutsche-bank-and-capital-one-case/> [<https://web.archive.org/web/20200406152226/http://oversightcases.org/deutsche-bank-and-capital-one-case/>]; *Manhattan DA-Mazars Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/manhattan-da-mazars-case/> [<https://web.archive.org/web/20200406153858/http://oversightcases.org/manhattan-da-mazars-case/>]; *New York Law on State Tax Returns Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/new-york-law-on-state-tax-returns-case/> [<https://web.archive.org/web/20200406153942/http://oversightcases.org/new-york-law-on-state-tax-returns-case/>]; *Fusion GPS Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/fusion-gps-case> [<http://web.archive.org/web/20200424143728/http://oversightcases.org/fusion-gps-case/>]; *Kupperman Case*, LEVIN CTR. AT WAYNE L., <http://oversightcases.org/kupperman-case/> [<https://web.archive.org/web/20200406154029/http://oversightcases.org/kupperman-case/>].

39. *House Oversight Committee-Mazars Case*, *supra* note 38; *Deutsche Bank-Capital One Case*, *supra* note 38; *Manhattan DA-Mazars Case*, *supra* note 38.

40. *New York Law on State Tax Returns Case*, *supra* note 38.

41. *Fusion GPS Case*, *supra* note 38 (discussing an action filed by a private business seeking unsuccessfully to quash a congressional subpoena issued to a bank for financial information related to the business); *Kupperman Case*, *supra* note 38 (discussing an action filed by a former White House official seeking a court order to determine whether he should comply with a congressional testimonial subpoena or a presidential order forbidding his compliance with that subpoena and dismissing the action as moot when Congress withdrew the subpoena in question).

At the time of writing, most of the courts that issued decisions in these cases upheld the right of Congress to obtain the information it wanted.<sup>42</sup> But eight of the thirteen cases were still in litigation, and their outcomes could change.<sup>43</sup> In addition, the three cases before the Supreme Court are likely to produce important new legal principles that may restrict the ability of Congress to conduct oversight investigations.<sup>44</sup>

#### IV. UNDERSTANDING THE EMERGING CASE LAW

Though the “right of Congress to conduct investigations has been litigated in the courts for more than 200 years,” the body of case law now governing the congressional oversight process rests on a relatively limited number of court decisions.<sup>45</sup> Those cases have generally upheld the authority of Congress “to conduct broad inquiries and compel testimony and documents,”<sup>46</sup> subject to certain limitations.<sup>47</sup> In recent decades, fewer cases adjudicating congressional oversight disputes have been filed, and most cases concluded with district court opinions that have had limited precedential effect.<sup>48</sup>

##### *A. Impact of the Trump Presidency*

Since the election of President Trump in 2016, however, federal courts have seen a rise in the number of new cases adjudicating the authority of

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42. *Case Status*, LEVIN CTR. AT WAYNE L., (MAR. 16, 2020), <http://oversightcases.org/case-status/> [<https://web.archive.org/web/20200406152443/http://oversightcases.org/case-status/>].

43. *Id.*

44. *See generally* Trump v. Comm. on Oversight & Reform, U.S. House of Representatives, 380 F. Supp. 3d 76 (D.D.C. 2019), *aff'd sub nom.* Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019), *reh'g en banc denied*, 941 F.3d 1180 (D.C. Cir. 2019), *cert. granted*, 140 S. Ct. 660 (2019) (No. 19-715) (mem.); Trump v. Vance, 395 F. Supp. 3d 283 (S.D.N.Y. 2019), *aff'd in part, vacated in part and remanded*, 941 F.3d 631 (2d Cir. 2019), *cert. granted*, 140 S. Ct. 659 (2019) (No. 19-635) (mem.); Trump v. Deutsche Bank AG, No. 19 CIV. 3826 (ER), 2019 WL 2204898 (S.D.N.Y. May 22, 2019), *aff'd in part, remanded in part*, 943 F.3d 627 (2d Cir. 2019), *cert. granted*, 140 S. Ct. 660 (2019) (No. 19-760) (mem.).

45. *Emerging Case Law on Congressional Oversight*, *supra* note 7 (citing as an example United States v. Burr, 25 F. Cas. 30, 34–35 (C.C.D. Va. 1807)).

46. *Id.*; *see also, e.g.*, McGrain v. Daugherty, 273 U.S. 135 (1927); Barenblatt v. United States, 360 U.S. 109 (1959); Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491 (1975).

47. *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168 (1880); Marshall v. Gordon, 243 U.S. 521 (1917); United States v. Rumely, 345 U.S. 41 (1953); Quinn v. United States, 349 U.S. 155 (1955); Watkins v. United States, 354 U.S. 178 (1957).

48. *See, e.g.*, Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17 (D.D.C. 1994); House Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); House Comm. on Oversight & Gov’t Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

Congress to compel information from the executive branch.<sup>49</sup> In many of those cases, the President and his administration have not just objected to congressional information requests as overly broad or unreasonable, but they have taken aggressive and novel stances aimed at limiting the very ability of Congress to obtain information, including asserting that Congress has no standing to enforce its subpoenas in court;<sup>50</sup> that Congress lacks authority to investigate any conflict of interest or financial disclosure issues related to a president;<sup>51</sup> that Congress is without authority to obtain grand jury materials;<sup>52</sup> and even that the judiciary has no constitutional basis to adjudicate disputes between the executive and legislative branches.<sup>53</sup>

Some courts have reacted with strong language. In one opinion, a court wrote:

[W]e are at a point in history in which the Executive branch appears to be categorically rejecting once-accepted and standard applications of Legislative and Judicial branch authority; therefore, federal courts are being called upon to evaluate novel

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49. See *Emerging Case Law on Congressional Oversight*, *supra* note 7 (listing the new cases involving the authority of Congress to compel information from the executive branch and providing links for more information about the recent cases).

50. See, e.g., Brief for Defendant-Appellant at 15–16, *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, No. 19-5331, 2019 WL 6715119 (D.C. Cir. Dec. 9, 2019); Memorandum of Points & Authorities in Support of Defendants’ Motion to Dismiss, Or, in the Alternative, for Summary Judgment & in Opposition to Plaintiff’s Motion for Summary Judgment at 14–16, *U.S. House of Representatives v. Barr*, No. 19-cv-03557-RDM (D.D.C. Jan. 14, 2020) (full text available at <https://oversightcases.org/wp-content/uploads/2020/02/2020-1-14-DOJ-motion-to-dismiss-or-for-summary-judgment-in-House-census-case.pdf> [<https://web.archive.org/web/20200406154237/https://oversightcases.org/wp-content/uploads/2020/02/2020-1-14-DOJ-motion-to-dismiss-or-for-summary-judgment-in-House-census-case.pdf>]).

51. See, e.g., Brief for Petitioners at 45–47, *Trump v. Mazars USA, LLP*, Nos. 19-715, 19-760, 2020 WL 528039 (S. Ct. Jan. 27, 2020).

52. Department of Justice’s Response to the Application of the House Judiciary Committee for an Order Authorizing Release of Certain Grand Jury Materials at 6, 8–9, 12, *In re Application of Comm. on the Judiciary, U.S. House of Representatives for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-5219, 2020 WL 1487735 (D.C. Cir. Feb. 27, 2020).

53. See, e.g., Memorandum of Points & Authorities in Support of Defendants’ Motion to Dismiss, Or, in the Alternative, for Summary Judgment & in Opposition to Plaintiff’s Motion for Summary Judgment, *supra* note 50, at 14–16 (interpreting *Raines v. Byrd*, 521 U.S. 811, 828 (1997) as follows: “Although ‘[t]here would be nothing irrational about a system that granted standing’ to resolve direct interbranch disputes over institutional powers, ‘it is obviously not the regime that has obtained under our Constitution to date,’ which ‘contemplates a more restricted role for Article III courts’”).



exercises of Executive power that allegedly threaten the prerogatives of the other branches of government in unique ways . . . . Nor can [the court] abide DOJ’s less-than-subtle suggestion that, under our constitutional scheme, the Legislature and the Judiciary are both hopelessly stymied when it comes to addressing alleged abuses by the Executive branch, such that, ultimately, the President wields virtually unchecked power.<sup>54</sup>

Another court offered this analysis:

To give the Attorney General the final word [on what documents are produced to Congress, with no opportunity for judicial review,] would ‘elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint.’<sup>55</sup>

These strong sentiments, however, both of which appear in federal district court opinions, may not be shared by the Supreme Court.<sup>56</sup>

That was part of the message conveyed by a panel of legal experts convened by the Levin Center to discuss four of the cases contesting congressional oversight of the executive branch.<sup>57</sup> One of the panelists, Professor Victoria Nourse, described the upcoming judicial decisions in the cases as “excruciatingly important to the future of the separation of powers” and “the most important time in memory” in terms of the balance of power between the executive and legislative branches.<sup>58</sup>

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54. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 173, 199 (D.D.C. 2019), *vacated and remanded*, 951 F.3d 510 (D.C. Cir. 2020), *reh’g en banc granted sub nom.*, U.S. House of Representatives v. Mnuchin No. 19-5331, 2020 WL 1228477 (D.C. Cir. March 13, 2020).

55. Comm. on Oversight & Gov’t Reform, U.S. House of Representatives v. Sessions, 344 F. Supp. 3d 1, 4 (D.D.C. 2018) (citing Comm. on Oversight & Gov’t Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1, 11–12 (D.D.C. 2013)).

56. Levin Center at Wayne Law, *Emerging Case Law on Congressional Oversight*, YOUTUBE (Jan. 24, 2020), [https://www.youtube.com/watch?v=\\_5KhuqXNbBU&t=2s](https://www.youtube.com/watch?v=_5KhuqXNbBU&t=2s) (featuring as panelists Jonathan Adler, Johan Verheij Memorial Professor of Law, Case Western Reserve University School of Law; Kirsten Matoy Carlson, Associate Professor, Wayne State University Law School; Victoria Nourse, Ralph V. Whitworth Professor in Law, Georgetown University Law Center; and Andrew M. Wright, Partner, K&L Gates LLP).

57. *See generally id.*

58. *Id.* at 1:54:00–1:57:00.

Professor Jonathan Adler observed that in recent decades, when the executive branch pushed “really hard” to expand its power at the expense of Congress, the courts generally ruled against the executive branch, but he also warned that the same pattern might not hold in the cases now before the courts.<sup>59</sup> Professor Kirsten Carlson expressed the opinion that it is as important today as when the Framers first drafted the Constitution to worry about the scope of presidential power and the need for Congress to act as a counterweight to protect American democracy.<sup>60</sup> She also noted that the recent oversight cases seemed to arise from a lack of accommodation between the executive and legislative branches, which she described as a “serious loss for our country” if the branches were no longer willing to work out their differences before going to court.<sup>61</sup>

Legal expert Andrew Wright, who worked in both Congress and the White House on oversight investigations, noted that the decisions made by the courts in the pending cases would directly affect how future oversight information requests would play out because the executive branch officials and congressional staffers actually negotiating the issues would take into account how the courts would rule.<sup>62</sup> For that reason, he predicted that the decisions being made in the instant cases will have “massive consequences” for future congressional oversight of the executive branch.<sup>63</sup>

#### *B. Using “Key Issues” to Aid Case Analysis*

To encourage further analysis of the legal principles emerging from the congressional oversight cases, the “Key Issues” section of the website provides excerpts from key court opinions on more than fifteen separate topics.<sup>64</sup> A sample of the topics suggests the significance of these cases for American jurisprudence, U.S. constitutional law, and the future of congressional oversight investigations.<sup>65</sup>

*Presumptions and deference due Congress.* These excerpts from court opinions discuss the presumptions that courts apply to Congress, such as a presumption that congressional committees will act within the bounds of the law and the degree of deference that courts should show to Congress as a co-equal branch of government.<sup>66</sup>

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59. *Id.* at 2:03:00–2:04:00.

60. *Id.* at 1:57:00–2:00:00.

61. *Id.* at 2:00:00.

62. *Id.* at 1:53:00–1:54:00.

63. *Id.*

64. *Key Issues*, *supra* note 24.

65. *Id.*

66. *Id.*

*Limits on oversight authority.* These excerpts discuss the constitutional, statutory, and jurisdictional limits on Congress's investigative authority and the courts' "delicate task" of balancing private rights against the public need for information.<sup>67</sup>

*Immunity issues.* These excerpts analyze claims that the president or the president's current or former aides enjoy absolute immunity from congressional subpoenas, along with claims that the president may assert immunity on behalf of an aide, even over that aide's objection.<sup>68</sup>

*Financial and tax records.* These excerpts discuss the extent to which Congress can subpoena financial and tax records, including from third parties such as a bank or accounting firm for records relating to the president.<sup>69</sup> These excerpts also discuss the standard of review courts should use when evaluating those information requests, especially for records that do not involve government activity or executive privilege but pertain to the president's non-governmental activities.<sup>70</sup>

*Separation of powers.* These excerpts discuss separation of powers concerns, including whether the judicial branch has the constitutional authority to resolve interbranch disputes between the congressional and executive branches.<sup>71</sup>

*Executive privilege.* These excerpts discuss executive privilege, including who can assert it, how to assert it, and how far it extends.<sup>72</sup>

*Subpoena enforcement.* These excerpts discuss efforts to enforce or quash a congressional subpoena, including questions related to who has standing to sue, what standard of review should be applied by courts when ruling on objections to a subpoena, whether courts may second-guess Congress on the information it needs to conduct an investigation, whether courts have the authority to review congressional subpoenas on a line-by-line basis, and whether the standard of review differs for subpoenas seeking presidential, agency, or private sector records.<sup>73</sup>

*Relevancy.* These excerpts discuss the standard of review courts should apply when a congressional subpoena is challenged on relevancy grounds, who has the burden of proof when claiming an information request is irrelevant or overly burdensome, whether courts should evaluate relevancy on a document-by-document basis, and the extent to which

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

courts should allow Congress to pursue information that may lead to blind alleys.<sup>74</sup>

*Stay pending appeal.* These excerpts discuss the standards courts should apply when evaluating a request by a party for a stay of proceedings pending appeal, the obligation of courts to move expeditiously when reviewing information requests by a co-equal branch of government, and the impact of delayed document production on the effectiveness of a congressional investigation.<sup>75</sup>

*Impeachment.* These excerpts discuss the interaction between normal legislative oversight investigations and impeachment proceedings, how and when impeachment proceedings are triggered, the extent to which impeachment proceedings affect the scope of judicial review of a congressional information request, and whether Congress may investigate allegations of wrongdoing by a government official only in an impeachment setting or also in an oversight investigation.<sup>76</sup>

These cross-cutting legal issues affect multiple oversight cases and will likely determine the conduct of congressional investigations for decades into the future.<sup>77</sup>

#### V. NEXT STEPS

The Levin Center at Wayne Law plans to continue to track key cases adjudicating issues related to congressional oversight, regularly update the information on the website, and add new cases as they arise.<sup>78</sup> Clashes between the executive and legislative branches over access to information—and the role of the judiciary in addressing those disputes—are central to most of the cases now in the courts; the resulting legal principles are expected to unfold throughout 2020 and in the years to follow.<sup>79</sup> Congress, the legal community, scholars who study oversight, constitutional experts, and other interested parties, including members of the public, are invited to continue to make use of the emerging case law website to better understand the impact of the courts on congressional oversight.

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See generally *Emerging Case Law on Congressional Oversight*, *supra* note 7.

79. *Id.*