

THE NECESSARY AND PROPER INVESTIGATORY POWER

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ABSTRACT

*Congressional investigatory power is broad and sweeping. While the power is not boundless, few topics, people, and documents are ordinarily out of reach. Congress has often leveraged its inquiry power for good. But Congress has also, at times, abused it, costing many Americans their liberty and reputations. Possible abuse has not thwarted the Supreme Court from recognizing an inquiry power. In *McGrain v. Daugherty*, the Court held that the power to procure information to support the lawmaking process complied with the Necessary and Proper Clause's commands, vesting Congress with wide authority to probe.*

Founding era concerns, early Congressional practices, and Necessary and Proper Clause jurisprudence suggest that the Court's present characterization of Congressional investigatory power is likely only one of myriad ways to characterize the implied investigatory power, and it may be the wrong one. By superimposing characteristics from Congress's prior investigations over the Court's current characterization, different permutations of Congressional investigatory power emerge. This Note argues that the Court's current characterization and some inferior characterizations of Congress's implied power may not be viable when measured against the Necessary and Proper Clause's commands. Thus, Congress might lack power

to investigate some people or things for purposes that may be advanced under the Court's controlling characterization. This Note urges the Court to thwart future abuse and recalibrate the relationship between the people and Congress by adopting a three-part, Mazars-inspired doctrine that operationalizes Necessary and Proper Clause concepts.

INTRODUCTION

It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.¹

Congressional investigatory power, or Congress's implied power to procure information from people through compulsory processes,² is broad and sweeping. While the power is not boundless,³ few topics, people, and documents are ordinarily out of reach.⁴ Congress has often leveraged its inquiry

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1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162 (Wilson & Blackwell pr., 1803).

2. See Jack Gose, *The Limits of Congressional Investigating Power*, 10 WASH. L. REV. 61, 62 (1935).

3. See Kent B. Milikan, *Limitations on the Congressional Power of Investigation*, 8 WM. & MARY L. REV. 630, 630 (1967).

4. See MORTON ROSENBERG, WHEN CONGRESS COMES CALLING 13 (2017), <https://archive.constitutionproject.org/wp-content/uploads/2017/05/Chapter-3.pdf> [<https://perma.cc/VV3M-9ZNF>]; Milikan, *supra* note 3, at 632; Stephen G. Dormer, *The Not-So Independent Counsel: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act*, 86 GEO. L.J. 2391, 2397 (1998); Martin Shapiro, *Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations*, 15 VAND. L. REV. 535, 535, 553 (1962); Claude Moore Fuess, *Congressional Immunity and Privilege*, 70 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 148, 150 (1950).

power for good—to understand and make informed decisions about pressing public issues and events.⁵ But Congress has also, at times, abused it, needlessly costing many Americans their liberty and reputations.⁶ Possible abuse has not thwarted the Supreme Court from recognizing an inquiry power.⁷ In *McGrain v. Daugherty*, the Court held that the implied power to procure information complied with the Necessary and Proper Clause's commands, vesting Congress with wide authority to probe.⁸

Founding era concerns, early Congressional practices, and Necessary and Proper Clause jurisprudence suggest that the Court's present characterization of Congressional investigatory power is likely only one of myriad ways to characterize the implied investigatory power, and it may be the wrong one.⁹ By superimposing characteristics from Congress's prior

5. JAMES HAMILTON, *THE POWER TO PROBE* 6–12 (First Vintage Books ed., 1977); see generally Andrew McCaense Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 404 (2015) (emphasizing importance of oversight); McKay Smith & Alan Wehbé, *A Bipartisan Vehicle for Change: Proposing A Novel Investigative Framework Designed to Improve and Empower Congressional Investigations*, 29 STAN. L. & POL'Y REV. 237, 244 (2018) (noting useful functions of oversight).

6. See, e.g., Michael Perino, *The Financial Crisis Inquiry Commission and the Politics of Governmental Investigations*, 80 UMKC L. REV. 1063, 1070 (2012); Joseph H. Harrison & Robert F. McCoy, *Constitutional Law—Congressional Investigations: Limitations on the Implied Power of Inquiry*, 28 NOTRE DAME L. REV. 373, 373 (1953); Fuess, *supra* note 4, at 152–55; ALAN BARTH, *GOVERNMENT BY INVESTIGATION* 14, 17, 82–83 (1955); Arthur M. Schlesinger Jr., *Introduction to the Previous Edition*, in ROBERT C. BYRD CENTER FOR LEGISLATIVE STUDIES, *CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY* xxiii (Roger A. Bruns et al. eds., Revised 1st ed. 2011); Louis B. Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143, 143–45 (1949); G. L. Tyler, *House Un-American Activities Committee*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 780 (Paul Finkelman ed., 2006).

7. See *U.S. v. Poindexter*, 698 F. Supp. 300, 304 (D.D.C. 1988); *McGrain v. Daugherty*, 273 U.S. 135, 175–76 (1927).

8. *McGrain*, 273 U.S. at 160–61, 175.

9. That the investigatory power may be characterized and that *McGrain* and its subordinate characterizations may not be viable when measured against history and the

investigations over the Court's current characterization of Congressional investigatory power, different permutations of the power emerge. To ascertain each characterization's viability, courts must assess whether and to what extent each characterized power is "necessary and proper for carrying [an enumerated power] into Execution[.]"¹⁰ This Note contends that the *McGrain* court's characterization and some inferior ones may not be viable when measured against the Necessary and Proper Clause's commands. In other words, Congress might lack power to investigate some people or things for

Necessary and Proper Clause's commands are not new ideas. Justice Thomas began his *Trump v. Mazars, LLP* dissent by suggesting that the Congressional Petitioners' characterization of its implied power—"the implied power to issue legislative subpoenas"—"[wa]s too broad." 140 S. Ct. 2019, 2037–38 (2020) (Thomas, J., dissenting). Notably, he treated the disputed Congressional exercise as an extension of narrower implied power—an implied "power to subpoena private, nonofficial documents[.]" *Id.* at 2038. Measuring the narrowly characterized implied power against the Necessary and Proper Clause's commands and early Congressional practice, he concluded that Congress lacked the narrower power, and that *McGrain* was overinclusive to the extent that it included the narrower implied power. *See id.* at 2038–42, 2045, 2047. While Justice Thomas suggested that *McGrain* was unlikely valid, *id.* at 2044 (noting that "*McGrain* . . . misunderstands both the original meaning of Article I and the historical practice underlying it"), he also clarified that he was not commenting on "the constitutionality of legislative subpoenas for other kinds of evidence." *Id.* at 2038 n.1. This Note aims to fully grapple with *McGrain*, analyzing the breadth of its inferior characterizations and the permissibility of its characterization of the implied investigatory power. As indicated throughout, this Note assigns weight to some of the same historical events and concepts as Justice Thomas. This Note's undertaking, however, is broader and explores a range of arguments not covered or fully developed in Justice Thomas's dissent.

Scholarship examining Congressional inquiry often leaves undisturbed the Court's broad characterization of Congressional investigatory power. *See, e.g.,* William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 795, 814–26 (2004); Dormer, *supra* note 4, at 2392–93; James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1121 (2007).

10. U.S. CONST. art. I, § 8. Like Justice Thomas, this Note understands the Necessary and Proper Clause as the only textual basis to assess the inferior characterizations' viability. *See Mazars*, 140 S. Ct. at 2037–38; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537, 559 (2012).

purposes that may be advanced under the Court's controlling characterization.

The Court should thwart future abuse and recalibrate "the balance of" power between Congress and the people¹¹ by adopting the following three-part, *Mazars*-inspired doctrine that operationalizes Necessary and Proper Clause concepts.¹² First, to ascertain whether Congress has power to investigate, courts should determine whether the expression of¹³ Congressional investigatory power is "Proper" to the extent that it: (1) is tethered to actual, legitimate ends;¹⁴ (2) is closely connected to a specific enumerated power;¹⁵ (3) does not acquire powers wholly allocated to other branches;¹⁶ and (4) does not violate a witness's constitutional rights.¹⁷ Second, courts should determine whether Congressional means are "Necessary" to the extent that they are "reasonably adapted"¹⁸ to achieve Congress's proposed legislative end.¹⁹ Finally, after examining Congressional ends and means, courts should holistically balance the parties' interests to assess whether Congressional

11. See BARTH, *supra* note 6, at 12; *cf. Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting).

12. As suggested, this doctrine is modeled after that offered by the Court in *Mazars*. However, this Note synchronizes *Mazars* with Necessary and Proper Clause concepts and suggests additional doctrinal boundaries enumerated in Part IV of the Note.

13. For the purposes of this Note, a subpoena is considered an expression of the investigatory power. Thus, courts will examine whether Congress possesses power on a motion to quash.

14. See Marshall, *supra* note 9, at 815–16; *Mazars*, 140 S. Ct. at 2036.

15. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271, 324, 330–31 (1993); see also *United States v. Comstock*, 560 U.S. 126, 134 (2010).

16. See Lawson & Granger, *supra* note 15, at 271, 297, 333–34; *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

17. See Lawson & Granger, *supra* note 15, at 271, 297, 328–29; *Barenblatt*, 360 U.S. at 111–12; UNIV. OF CAL. PRESS, *Current Documents: The Supreme Court Upholds Congressional Investigation of Communism in Education*, in CURRENT HISTORY, 37, 105 (1959).

18. *Comstock*, 560 U.S. at 143 (citing *United States v. Darby*, 312 U.S. 100, 121 (1941)).

19. *Mazars*, 140 S. Ct. at 2035–36.

ends are “Proper” to the extent that the exercise of compulsory power over an individual does not “upset the balance of”²⁰ power allocated between the people and Congress.²¹ If adopted, the doctrine detailed in this Note will ground the investigatory power in constitutional text and stymie future abuse.

Part I details the investigatory power’s origins, exercise, and judicial reception. Part II describes how the investigatory power presently operates and its costs. In Part III, this author suggests that, under Necessary and Proper Clause jurisprudence, Congress may lack power to reach certain people or objects. Finally, Part IV proposes the *Mazars*-inspired doctrine detailed above.

I. THE SWEEPING POWER

Ratified on June 21, 1788, Article I of the United States Constitution established Congress, America’s federal legislative branch.²² Unlike Parliament, who enjoyed supremacy among governmental institutions,²³ Congress has finite powers.²⁴ While Article I does not expressly entrust Congress with an investigatory power,²⁵ this Part details how the Court and

20. BARTH, *supra* note 6, at 12.

21. In some ways, this inquiry might resemble the first portion of the *Mazars* test. See *Mazars*, 140 S. Ct. at 2035–36.

22. See *Legislative Branch*, NAT’L CONST. CTR. (2023), <https://constitutioncenter.org/interactive-constitution/article/article-i> [<https://perma.cc/X5E7-V6UM>].

23. *Mazars*, 140 S. Ct. at 2038 (Thomas, J., dissenting); see generally Kenneth R. Mayer & Howard Schweber, *Does Australia Have a Constitution—Part II: The Rights Constitution*, 25 UCLA PAC. BASIN L.J. 265, 282 (2008) (describing Parliamentary sovereignty).

24. See *Mazars*, 140 S. Ct. at 2037; see also Tom G. Palmer, *Limited Government and the Rule of Law*, in CATO HANDBOOK FOR POLICYMAKERS 13–18 (8th ed.), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policy-makers/2017/2/cato-handbook-for-policy-makers-8th-edition-2_0.pdf [<https://perma.cc/VZB3-QC2G>].

25. *Mazars*, 140 S. Ct. at 2031.

Congress have nevertheless recognized the power as integral to federal lawmaking.²⁶

A. *Parliament's Investigatory Power*

English practice paved the way for Congressional compulsory power.²⁷ By 1604, Parliament had power, in one case, to summon “an Officer, and . . . view and search any Record or other thing of that kind[.]”²⁸ Early on, Parliament had exercised punitive power to address bribery, threats, libels, and election-related issues.²⁹ And by the late seventeenth century, “Parliament had numerous committees in place investigating government operations.”³⁰ All told, Parliament inquired into a range of matters, including “poor laws, prison administration, [and the] operations of the East India Company[.]”³¹

26. See generally MORTON ROSENBERG, CONG. RSCH. SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995); *Rules of Procedure for Senate Investigating Committees: Hearings Before the Subcomm. On Rules of the S. Comm. On Rules and Admin.*, 83rd Cong. 640 (1954) (excerpt from Felix Frankfurter, *Hands Off the Investigation*, NEW REPUBLIC (May 21, 1924)).

27. See Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 866 (1975); Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2451 (2002).

28. James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 160 (1926) (quoting MATTHEW HALE, THE ORIGINAL INSTITUTION POWER AND JURISDICTION OF PARLIAMENTS 105 (1707)).

29. TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 6–7 (1955).

30. Marshall, *supra* note 9, at 785. William Pitt had also remarked in 1742 that there had been “many parliamentary inquiries into the conduct of ministers of state[.]” William Pitt, *Second Speech of Lord Chatham on a Motion for Inquiring into the Conduct of Sir Robert Walpole*, in CHAUNCEY A. GOODRICH, SELECT BRITISH ELOQUENCE 84 (1897).

31. TAYLOR, *supra* note 29, at 8; see also Landis, *supra* note 28, at 162–63; Marshall, *supra* note 9, at 785 (“In the early eighteenth century, Parliament’s use of its investigatory powers was commonplace and extensive.”).

By the mid-eighteenth century, Parliament was extraordinarily powerful.³² In a 1742 address, William Pitt remarked that Parliament served as “[t]he Grand Inquest of the Nation[,]” meaning it had a “duty to inquire into every step of public management, both abroad and at home[.]”³³

B. Founding Attitudes Toward Legislative Power

By the time of the Framing, however, unbounded legislative power, and governmental power more generally, had concerned some.³⁴ Thomas Jefferson remarked that “concentrat[ed]” legislative power exemplified “despotic government” and further contended that it was vitally important to stem abuse before one branch garnered too much power.³⁵ In a letter to Jefferson, John Jay also opined that “legislative, judicial, and executive Power[]” should not be concentrated in a single branch.³⁶ James Madison echoed Jay in *Federalist 47*, remarking that “the very definition of tyranny” concerned “[t]he accumulation of all powers” in a single entity.³⁷

Some contemplated the scope of legislative power in the *Federalist Papers*. In *Federalist 52*, for example, Alexander Hamilton or Madison made clear that Congress would have only some of Parliament’s “supreme . . . authority[.]”³⁸ In *Federalist*

32. Mazars, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *162; FEDERALIST NO. 53, at 331 (James Madison) (Clinton Rossiter ed., 1961) (“Parliament is transcendent and uncontrollable[.]”).

33. Pitt, *supra* note 30, at 82–84.

34. See BARTH, *supra* note 6, at 4–7; see generally JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 365–67, 373–74 (2nd ed., 1851).

35. JEFFERSON, *supra* note 2, at 160–61, quoted in THE FEDERALIST NO. 48, *supra* note, 32 at 311 (James Madison); BARTH, *supra* note 6, at 7.

36. Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), <https://founders.archives.gov/documents/Jefferson/01-10-02-0189> [<https://perma.cc/UV3Q-L6F5>].

37. THE FEDERALIST NO. 47, *supra* note, 32 at 301 (James Madison).

38. THE FEDERALIST NO. 52, *supra* note, 32 at 329 (emphasis added) (Alexander Hamilton or James Madison).

78, Hamilton appeared to recognize that the people's power superseded legislative power.³⁹ Indeed, he suggested that a federal legislative body would be unable to police its own powers, and dismissed the idea that the Constitution could let legislators "substitute their *will* to that of their constituents."⁴⁰ If the people's will conflicted with the legislature's will, Hamilton suggested that courts prefer "the Constitution . . . to the statute, the intention of the people to the intention of their agents."⁴¹ Finally, Madison's remarks in *Federalist 48* reflected a skepticism toward legislative power.⁴² Madison held that Congress could surreptitiously usurp institutional power and run roughshod over the people it claimed to represent, opining that "it [wa]s against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."⁴³

The Anti-Federalists were also skeptical of concentrated governmental power.⁴⁴ In *Brutus No. 1*, the author (likely Robert Yates)⁴⁵ remarked that "every body of men, invested with power, [is] ever disposed to increase it, and to acquire a superiority over every thing that stands in [its] way."⁴⁶ To the author, powerful elected officials would act in a self-interested manner, and correcting such abuse would be difficult.⁴⁷ The putative scope of the proposed Necessary and Proper Clause

39. THE FEDERALIST NO. 78, *supra* note, 32 at 467 (Alexander Hamilton).

40. *See id.*

41. *See id.*

42. THE FEDERALIST NO. 48, *supra* note 32, at 309 (James Madison).

43. *See id.*, quoted in BARTH, *supra* note 6, at 6–7.

44. Mitzi Ramos, *Anti-Federalists*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1175/anti-federalists> [<https://perma.cc/Z6TV-Q9KY>].

45. Gordon Lloyd, *Brutus I*, TEACHING AM. HIST., <https://teachingamericanhistory.org/document/brutus-i/> [<https://perma.cc/SYR9-EEDE>].

46. BRUTUS NO. 1, in THE ANTI-FEDERALIST PAPERS 287–88 (Ralph Ketcham ed., 2003).

47. *See id.* at 292–93.

appeared to drive some of the author's concerns. To the author, the Clause was so sweeping that it would result in "an entire consolidation" of federal power.⁴⁸

During the Constitutional Convention, James Wilson emphasized the people's supremacy over their government, remarking "that the supreme, absolute and uncontrollable authority, remain[ed] with the people[.]" not the legislative branch.⁴⁹ Madison too had echoed his earlier remarks, adding that "[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex[.]" which, at least to Madison, presented "the real source of danger to the American Constitutions[.]"⁵⁰

C. Early Congressional Investigations

St. Clair Investigation. In 1792, Congress probed a military operation executed under President Washington.⁵¹ Despite a failed first motion,⁵² the House eventually approved a resolution broadly authorizing a committee "to call for such persons, papers, and records, as may be necessary[.]"⁵³

President Washington and several cabinet members discussed the investigation's implications.⁵⁴ The group believed

48. *See id.* at 286.

49. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting) (quoting Statement of James Wilson in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 426 (1836)).

50. 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 345 (1845) (statement of James Madison).

51. *Mazars*, 140 S. Ct. 2019, 2038–40 (2020) (Thomas, J., dissenting) (highlighting *St. Clair* inquiry); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927); George C. Chalou, *General St. Clair's Defeat*, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 3.

52. *See* 3 ANNALS OF CONGRESS 493 (1792).

53. *See id.*

54. Thomas Jefferson, *Cabinet Meetings* (Mar. 31, 1792), reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 303–04 (Albert Ellery Bergh ed., 1907), discussed in TAYLOR, *supra* note 29, at 23.

that Congress had power to investigate the St. Clair operation,⁵⁵ but Hamilton thought Congress could not reach certain information.⁵⁶ On Jefferson's account, Hamilton appeared concerned that Congress would inappropriately seek private information concerning "how far their own members and other persons in the government had been dabbling in stocks . . . [and] banks[.]"⁵⁷

Congress appeared to take the cabinet's concerns to heart.⁵⁸ On April 4, 1792, Congress resolved that Washington "cause the proper officers to lay before this House such papers of a public nature, in the Executive Department[.]"⁵⁹ The committee eventually sought participation from General St. Clair and others.⁶⁰

Post-St. Clair. The Supreme Court first addressed the legality of Congressional contempt processes in 1821 in connection with a bribe offered to a member.⁶¹ Noting that Article I did not include a contempt power, the Court questioned whether such a power might be implied.⁶² Although "the genius and spirit of . . . [American] institutions [we]re hostile to the exercise of implied powers[,]" Congressional power was far more

55. See 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 54, at 304.

56. *See id.*

57. *See id.*

58. Chalou, General St. Clair's Defeat, 1792-93, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 8.

59. 3 ANNALS OF CONGRESS 536 (1792).

60. *See* Chalou, *supra* note 6, at 12-14; James T. Currie, *The First Congressional Investigation: St. Clair's Military Disaster of 1791*, 20 PARAMETERS, 95, 97-99 (1990), <https://press.armywarcollege.edu/parameters/vol20/iss1/6/> [<https://perma.cc/Z334-YD3W>]; Matthew Waxman, *Remembering St. Clair's Defeat*, LAWFARE (Nov. 4, 2018), <https://www.lawfareblog.com/remembering-st-clairs-defeat> [<https://perma.cc/T4DR-YJ75>].

61. *Anderson v. Dunn*, 19 U.S. 204, 205 (1821).

62. *See id.* at 225.

circumscribed than Parliamentary power, alleviating concerns that an implied authority might be abused.⁶³ Furthermore, the Court insisted that Congressional contempt power was itself rather circumscribed, explaining that it involved “the least possible power adequate to the end proposed.”⁶⁴

Other important investigations followed.⁶⁵ Congress’s 1832 investigation into the Second Bank of the United States highlighted early disagreement over the appropriate scope of Congressional investigatory power.⁶⁶ Heading up the minority position, John Quincy Adams believed that the investigation’s political motivations set a “precedent of portentous evil” and provided “an odious persecution of individual citizens to prostrate the influence of personal or political adversaries by the hand of power.”⁶⁷ In his final report, Adams condemned the committee’s exercise of “inquisitorial power over multitudes of individuals having no connection with the bank other than that of dealing with them in their appropriate business of discounts, deposits and exchange[.]”⁶⁸ and believed that such actions were beyond the scope of Congressional power.⁶⁹ In addition to protesting the attenuated link between individuals and the inquiry subject, Adams further emphasized that the committee could not reach some private information,

63. *See id.* at 233.

64. *See id.* at 230–31 (emphasis in original) (internal quotation marks omitted).

65. Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 46 (2009); TAYLOR, *supra* note 29, at 33.

66. John D. Macoll, *Second Bank of the United States*, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 64; Mazars, 140 S. Ct. 2019, 2041–42 (2020) (Thomas, J., dissenting) (highlighting Second Bank investigation).

67. *Rep. of the Comm. of Inquiry by the H.R. at Wash., Concerning the Bank of the United States*, 22nd Cong. 71 (1832) (Mr. Adams’s Report).

68. *See id.* at 65–66.

69. *See id.* at 68.

making clear that “domestic or family concerns . . . [and officials’] moral, or political, or pecuniary standing in society” were off-limits.⁷⁰

Curiously, and seemingly in agreement with Adams, the majority maintained in their report that “they ha[d] not felt themselves at liberty to inquiry into the private concerns of any individuals, unless the public interest was involved in their transactions with the President and Directors of the Bank.”⁷¹ The majority suggested that they had looked only “generally . . . into the proceedings of the Bank[,]” and had done so to determine whether the bank had absconded the public interest, had abused its power, and should continue as an entity.⁷²

Nearly thirty years after the Second Bank investigation, the inquiry into the Harper’s Ferry insurrection sparked further debate regarding Congress’s power to compel participation in investigations.⁷³ Abolitionist Franklin Sanborn believed that Congress had overstepped and lacked any authority to compel him to testify.⁷⁴ James Redpath similarly declined to cooperate and testify, believing “the investigation was . . . unconstitutional[.]”⁷⁵ Thaddeus Hyatt, a prominent businessman,⁷⁶ remarked in a letter to the investigating committee that he “fe[lt] bound in duty . . . to ignore as usurpations the exercise of unconstitutional powers in a matter of import so grave

70. *See id.* at 66.

71. *Id.* at 18.

72. *See id.* at 18-19

73. *Mazars*, 140 S. Ct. at 2042 (highlighting Harper’s Ferry investigation).

74. Roger A. Bruns, *John Brown’s Raid on Harpers Ferry*, in *CONGRESS INVESTIGATES*, *supra* note 6, at 132.

75. *See id.* at 133.

76. *See id.* at 133–34.

and far-reaching as the present.”⁷⁷ Congress’s inquiry was, to Hyatt and others, something that extended far beyond Congressional power.⁷⁸

The recalcitrant witnesses were not without Congressional support. Speaking to whether to hold Hyatt in contempt, Senator Charles Sumner remarked that the situation before the Senate was “novel” because it concerned the use of compulsive power outside of the body’s usual ambit.⁷⁹ Namely, the investigatory power was most permissibly exercised when tethered to impeachments, elections, and member conduct; the body’s investigatory power was perhaps weaker when used by the legislative body to protect itself.⁸⁰ In any case, compelling private people to participate in investigations for purposes unrelated to those described above was, to Sumner, unconstitutional and unprecedented.⁸¹ Senator John Hale agreed, summarily concluding that the body entirely lacked “power . . . to summon witnesses[.]”⁸²

D. Judicial Response

While the Supreme Court had addressed the contempt power’s legality in 1821,⁸³ the Court first addressed the propriety of Congressional investigatory power nearly sixty years later in *Kilbourn v. Thompson*.⁸⁴ *Kilbourn* raised what was,

77. Letter from Thaddeus Hyatt to Investigating Committee (Jan. 28, 1860), https://glassian.org/Prism/Hyatt/thaddeus_hyatt_senate_letter_1860.html [<https://perma.cc/H9V4-QU3Y>], in Bruns, *supra* note 74, at 134.

78. See Bruns, *supra* note 74, at 134.

79. Charles Sumner, *Senate Debate Over Witness Thaddeus Hyatt*, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 143.

80. See *id.*

81. See *id.* at 144.

82. See *id.* at 148–49.

83. *Anderson v. Dunn*, 19 U.S. 204, 205 (1821).

84. *Kilbourn v. Thompson*, 103 U.S. 168, 181 (1880).

by then, a perennial issue regarding whether and to what extent Congress could compel people to participate in investigations, “resurrect[ing]” Adams’s contention “that the non-official conduct of a citizen [wa]s immune from Congressional scrutiny[.]”⁸⁵ The *Kilbourn* court recognized that Congress lacked express authority to hold recalcitrant witnesses in contempt.⁸⁶ After examining Parliamentary practices,⁸⁷ the Court suggested that contempt was unlikely an inherited device; namely, unlike its English predecessor, Congress was not “a court” and Congress’s contempt powers were expressly reserved for their “own members” in cases concerning elections, Congressional misbehavior, and impeachment proceedings.⁸⁸

To the extent that Congress’s inquiry “could result in no valid legislation on the subject to which the inquiry referred[,]” Congress could not pry into any person’s private life.⁸⁹ Reasoning that Congress would unlikely be able to act on the information they received, the Court held that Congress lacked authority to compel the witness to participate.⁹⁰

In *McGrain v. Daugherty*, however, the Court clarified that Congress possessed a wide investigatory power.⁹¹ *McGrain* arose out of a probe into the Department of Justice and its activity concerning Teapot Dome,⁹² an affair related to the Harding presidency’s dealings.⁹³ Mally Daugherty, the AG’s

85. Landis, *supra* note 28, at 219.

86. *Kilbourn*, 103 U.S. at 182.

87. *See id.* at 183–84.

88. *See id.* at 189–91.

89. *See id.* at 190, 195.

90. *See id.* at 195–96.

91. *McGrain v. Daugherty*, 273 U.S. 135, 150 (1927).

92. *See id.* at 151–52.

93. Marshall, *supra* note 9, at 792; Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1389 (2002).

brother, refused to answer two Congressional subpoenas,⁹⁴ prompting the committee to order Daugherty's arrest for contempt.⁹⁵ The Court inquired whether Congress could permissibly "compel a private individual to appear before it" and testify for legislative purposes.⁹⁶

The Court first explained that, although Article I lacked explicit language conferring investigatory powers, such investigatory authority was historically accepted in both Congress and state legislatures "as an attribute of the power to legislate."⁹⁷ Drawing on *Kilbourn* and prior cases, the Court concluded that Congress possessed an "auxiliary" investigatory power "with process[es] to enforce it[.]"⁹⁸ The Court appeared to recognize that an investigatory power was necessary because it allowed Congress to obtain "information respecting the conditions which the legislation [wa]s intended[.]"⁹⁹ Furthermore, compulsory processes necessarily accompanied the investigatory power to allow Congress to forcibly obtain information from persons who might otherwise refuse to comply.¹⁰⁰ Notably, the Court dispensed with the challenger's concerns that the power "may be abusively and oppressively exerted" on the grounds that the potential for abuse was no greater than that presented by ordinary legislation.¹⁰¹ Witnesses could also rely on safeguards articulated in *Kilbourn*

94. *McGrain*, 273 U.S. at 152.

95. *See id.* at 153–54.

96. *See id.* at 160.

97. *See id.* at 161–65.

98. *See id.* at 174.

99. *See id.* at 175.

100. *See id.*

101. *Id.* Indeed, the Court "assume[d] . . . that neither houses will be disposed to exert the power beyond its proper bounds, or with out due regard to the rights of witnesses." *See id.* at 175–76; *see also* *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938).

and other cases should Congress overreach.¹⁰² And, at the end of the day, Congress only had power to compel “testimony . . . to obtain information in aid of the legislative function[.]”¹⁰³ or “on which legislation could be had[.]”¹⁰⁴

Sinclair v. United States also arose out of the Teapot Dome scandal. A Congressional committee sought testimony from Harry F. Sinclair, an oil executive.¹⁰⁵ Sinclair refused to testify before a committee on the grounds that the committee had unnecessarily probed into “his private affairs[.]” which was not information “in aid of legislation.”¹⁰⁶ The Court acknowledged that Congress could not needlessly probe into Americans’ “personal and private affairs.”¹⁰⁷ However, the Court appeared to reason that the information sought was not “merely . . . private or personal[.]”¹⁰⁸ Rather, Congress had power to regulate “naval oil reserves” and “public lands[.]”¹⁰⁹ Because Sinclair possessed information that was conceivably related to an oil company’s federal lease, Sinclair held information that could have plausibly led to future legislation.¹¹⁰ Thus, the Court upheld Sinclair’s contempt conviction.¹¹¹

102. *McGrain*, 273 U.S. at 176.

103. *See id.*

104. *See id.* at 177.

105. Robert Curley, *Harry F. Sinclair*, BRITANNICA, <https://www.britannica.com/biography/Harry-F-Sinclair> [<https://perma.cc/6DRB-YNDZ>].

106. *Sinclair v. U.S.*, 49 S. Ct. 268, 290–91 (1929), *overruled by* *U.S. v. Gaudin*, 115 S. Ct. 2310 (1995).

107. *See id.* at 292.

108. *See id.* at 294.

109. *See id.*

110. *See id.*

111. *See id.* at 299.

In the late 1930s, Congress created the House Un-American Affairs Committee (“HUAC”), which investigated Communist involvement in different areas of American society.¹¹² Although prior committees had exercised compulsive power over private individuals, HUAC marked a “new phase of legislative inquiry”¹¹³ that instigated a spate of landmark Supreme Court decisions further defining the relationship between Congress and private Americans.¹¹⁴

In *Quinn v. United States*, Congress held the petitioner in contempt for refusing to answer HUAC’s “questions concerning alleged membership in the Communist Party.”¹¹⁵ The Court recognized various constraints on Congress’s investigatory power, like the Bill of Rights.¹¹⁶ Reasoning in part that the privilege against self-incrimination should be broadly construed, and that “a claim of the privilege d[id] not require any special combination of words[,]” the Court held that the witness was entitled to exercise “the privilege[.]”¹¹⁷

Watkins v. United States involved a challenge against a contempt conviction.¹¹⁸ The Court acknowledged that although Congress could investigate a wide variety of issues,¹¹⁹ Congress could not “expose the private affairs of individuals” for

112. Geoffrey R. Stone, *Free Speech in the Age of Mccarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1389, 1400 (2005); *House Un-American Affairs Committee*, HARRY S. TRUMAN LIB., <https://www.trumanlibrary.gov/education/presidential-inquiries/house-un-american-activities-committee#:~:text=HUAC%20was%20created%20in%201938,in%20a%20court%20of%20law>.

113. *Watkins v. United States*, 354 U.S. 178, 195 (1957).

114. *See also Tenny v. Brandhove*, 341 U.S. 367, 369 (1951).

115. *Quinn v. United States*, 349 U.S. 155, 157 (1955).

116. *See id.* at 161.

117. *See id.* at 162–63. The Court found similarly in *Emspak v. United States*, 349 U.S. 190, 202 (1955).

118. *Watkins*, 354 U.S. at 185.

119. *See id.* at 187.

its own sake.¹²⁰ Namely, the Court clarified that a Congressional “investigation[] conducted *solely* for the personal aggrandizement of the investigators or to ‘punish’ those investigated [we]re indefensible.”¹²¹ Although the Court recognized that HUAC’s resolution was ambiguous and far-reaching, it declined to invalidate it,¹²² examining whether the question put to the witness offered him sufficient information to determine whether to invoke the privilege against self-incrimination.¹²³ Finding the question vague and potentially irrelevant, the Court invalidated the witness’s contempt conviction.¹²⁴

Two years later, the Court found differently in *Barenblatt v. United States*. In *Barenblatt*, the witness, a college professor, declined to answer a HUAC subcommittee’s probes into alleged Communist Party associations.¹²⁵ The Court ultimately found HUAC’s authorizing resolution concrete and legitimate, and that the inquiry into the witness’s associations was tethered to HUAC’s authorizing resolution.¹²⁶ Moving to the pertinence of the question in connection with “the [investigation’s] subject matter[,]” the Court concluded that the witness lacked grounds to refuse to answer principally because he “was well aware of the Subcommittee’s authority and purpose to question him[.]”¹²⁷ Finally, the Court addressed whether the inquiry was barred on First Amendment

120. *Id.*

121. *Id.* (emphasis added).

122. *See id.* at 209.

123. *See id.* at 214.

124. *See id.* at 215.

125. *Barenblatt v. United States*, 360 U.S. 109, 114 (1959).

126. *See id.* at 116–21.

127. *See id.* at 123–24.

grounds.¹²⁸ Balancing the individual right against governmental need, the Court reasoned that the circumstances presented in the case weighed heavily in favor of Congress.¹²⁹ Indeed, the investigation was motivated by “valid legislative purpose[s]”—addressing Communism’s proliferation and preventing the “overthrow of the Government of the United States by force and violence[.]”¹³⁰ To determine whether subversive activities were afoot, the Court held that Congress was entitled to require witnesses to divulge their associations.¹³¹ Thus, for the foregoing reasons, *inter alia*, the Court upheld the contempt conviction.¹³²

Wilkinson v. United States similarly upheld a witness’s contempt conviction for refusing to answer questions related to Communist Party affiliations.¹³³ As in *Barenblatt*, the Court found that a HUAC subcommittee had acted within the scope of its authorizing resolution when it questioned the witness.¹³⁴ Furthermore, the Court rejected the witness’s argument that the committee had specifically targeted him based on “his opposition to the existence of the Un-American Activities Committee[.]”¹³⁵ Although the “subcommittee[] [was] aware[] of the petitioner’s opposition to the hearings, and” was specifically targeted by the committee once the witness “arrived in Atlanta as the representative of a group carrying on a public campaign to abolish” HUAC, the Court found that the committee had acted in furtherance of a legitimate public purpose

128. *See id.* at 126–27.

129. *See id.* at 134.

130. *See id.* at 127–28.

131. *See id.* at 130–32.

132. *See id.* at 134.

133. *Wilkinson v. United States*, 365 U.S. 399, 403–05 (1961).

134. *See id.* at 408.

135. *See id.* at 409.

by “investigat[ing] Communist propaganda activities in the South.”¹³⁶ In other words, the Committee had acted in furtherance of a valid purpose precisely because the committee had targeted a witness that was ostensibly affiliated with the Communist Party.¹³⁷ Thus, the Court upheld the witness’s contempt conviction.¹³⁸

E. Modern Doctrinal Developments

The Court re-affirmed Congress’s broad investigatory power in *Eastland v. U.S. Servicemen’s Fund*. In *Eastland*, a Senate subcommittee sought to subpoena a bank for records belonging to U.S. Servicemen’s Fund (“USSF”) members for the purpose of uncovering subversive activity,¹³⁹ prompting USSF to seek injunctive relief.¹⁴⁰ USSF and its members alleged, in part, that the subcommittee sought the information to embarrass and punish them, which USSF protested would chill private association.¹⁴¹ Analyzing the challenger’s claims, the Court explained that the Speech or Debate Clause effectively insulated subpoenas from judicial scrutiny.¹⁴² The Court then turned to evaluate whether the committee’s prospective subpoenas fell within Congress’s permissible bounds.¹⁴³ The Court found that investigatory activities and compulsory subpoenas were part and parcel of the “legisla-

136. *Id.* at 411.

137. *See id.*

138. *See id.* at 414–15.

139. *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 493 (1975).

140. *See id.* at 495.

141. *See id.*

142. *See id.* at 502.

143. *See id.* at 503.

tive sphere[,]" and that the specific disputed inquiry involving USSF members' records was plainly permissible.¹⁴⁴ Furthermore, the Court rejected arguments that the subpoenas were issued to harass on the grounds that the inquiry nevertheless sought to obtain "information about a subject on which legislation may be had[,]" and that the Speech or Debate Clause precluded the Court from "look[ing] [in]to the motives alleged to have prompted" disputed Congressional actions or the plaintiffs' First Amendment claims.¹⁴⁵ The Court emphasized that "unworthy purpose[s]" and fruitless endeavors did not invalidate otherwise legitimate Congressional inquiries.¹⁴⁶ Although the Court recognized that a broad interpretation of the Speech or Debate Clause might permit Congress to abuse its authority, the Framers had contemplated and accepted such a consequence.¹⁴⁷

The Court's most recent doctrinal addition came in *Trump v. Mazars USA, LLP*, which involved President Trump's challenge against Congressional subpoenas seeking private financial information.¹⁴⁸ Trump contested that the subpoenas were invalid because they sought information beyond Congress's purview, in part, because of the information's private nature and because Congress sought the information to expose him.¹⁴⁹

The Court ultimately declined to extend its deferential approach to private Presidential documents on the grounds that existing standards would have left the most sensitive Presi-

144. *See id.* at 504–06.

145. *See id.* at 508–10.

146. *See id.* at 509.

147. *See id.* at 510.

148. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2026 (2020).

149. *See id.*

dential information unprotected, disturbing the calibrated relationship between branches.¹⁵⁰ To determine the validity of a Congressional subpoena, the Court set forth a multi-part standard.¹⁵¹ The majority suggested that courts should consider whether: (1) “the asserted legislative purpose warrants the significant step of involving the President and his papers[;]” (2) the request for information is “broader than reasonably necessary to support Congress’s legislative objective[;]” (3) Congress has sufficiently demonstrated that its demand “advances a valid legislative purpose[;]” and (4) “burdens imposed on the President by” a Congressional request weigh against compliance.¹⁵²

Justice Thomas dissented on the grounds that the majority had not gone far enough to circumscribe the subpoena power with respect to private documents.¹⁵³ Indeed, Thomas suggested that *McGrain* was over-inclusive because it permitted Congress to forcibly obtain “private, nonofficial documents[,]” a power Congress may have lacked in the Founding era.¹⁵⁴ Thomas further noted that: (1) Congress lacked as much power as Parliament; and (2) at least some early legislative investigations sought only to obtain information “from government officials on government matters[.]”¹⁵⁵ Thus, Thomas concluded that the majority had erred by incompletely circumscribing the power with respect to private documents.¹⁵⁶

150. *See id.* at 2034.

151. *See id.* at 2035–36.

152. *See id.*

153. *See id.* at 2037 (Thomas, J., dissenting).

154. *See id.* at 2038.

155. *See id.* at 2038–42.

156. *See id.* at 2047.

II. UNDERSTANDING INVESTIGATORY COSTS

Congress has utilized its investigatory power in many cases to further the public interest.¹⁵⁷ Inquiries have helped Congress understand and make informed decisions about pressing issues, including Watergate, the Iran-Contra Affair, the attack on Pearl Harbor, “organized crime, anti-union activity, the sale of cotton, and the Vietnam War.”¹⁵⁸ Furthermore, the inquiry power is an invaluable oversight tool, allowing Congress to stymie wasteful spending and executive branch misconduct.¹⁵⁹ Whatever the scope of the investigatory power, it seems undeniable that Congress has, in many cases, put it to good and productive use.

At the same time, however, lawful and beneficial Congressional inquiries impede “the rights of . . . individual[s] to conduct . . . affairs free from governmental interference.”¹⁶⁰ In other words, no matter the reason for interference, compulsory process entails some loss of liberty. And in some cases,

157. See *About Investigations*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/investigations/overview.htm> [<https://perma.cc/EU43-XABK>]; James F. Fitzpatrick, *Enduring a Congressional Investigation*, LITIGATION, Summer 1992, at 16.

158. See *About Investigations*, *supra* note 157; PAUL C. LIGHT, INVESTIGATIONS DONE RIGHT AND WRONG: GOVERNMENT BY INVESTIGATION, 1945-2012 5–6, 12 (2013), <https://www.brookings.edu/wp-content/uploads/2016/06/LightPaperDec2013.pdf> [<https://perma.cc/T44H-X4CJ>]; Elaine Kamarck, *Congress in 2019: A Brief History of Congressional Investigations*, BROOKINGS (Jan. 2, 2019), <https://www.brookings.edu/blog/fixgov/2019/01/02/congress-in-2019-a-brief-history-of-congressional-investigations/> [<https://perma.cc/7JQP-AU6Q>]; see generally Kalah Auchincloss, *Congressional Investigations and the Role of Privilege*, 43 AM. CRIM. L. REV. 165, 177 (2006) (“The exposure of Watergate . . . restored minimal faith in the value of congressional inquiry[.]”).

159. Marshall, *supra* note 9, at 800; Landis, *supra* note 28, at 194–202; Wright, *supra* note 5, at 404; Smith & Wehbé, *supra* note 5, at 244.

160. Comment, *Congress v. The Courts: Limitations on Congressional Investigation*, 24 U. CHI. L. REV. 740, 742–43 (1957); *Watkins v. United States*, 354 U.S. 178, 206 (1957).

the costs of Congressional interference extend beyond the individual interest in avoiding participation. Some witnesses have been needlessly humiliated and maimed, have had their private information unnecessarily exposed, and have been called to testify for no legitimate reason.¹⁶¹ Also, in general, Congressional inquiries can be politically motivated and bitterly partisan endeavors,¹⁶² making it possible for Congress to occasionally run roughshod over witnesses who might be treated as means to greater political ends.¹⁶³

To reiterate, Congressional investigatory power is not boundless.¹⁶⁴ But the Court's approach is very permissive.¹⁶⁵ One author has suggested that "courts are loath to question the legislative motives of Congress[.]"¹⁶⁶ And, in practice, "[f]ew courts have actually ruled that an investigation has been impermissibly extended beyond the scope of Congress's legitimate purposes."¹⁶⁷ The bottom line is, while witnesses

161. See Gary B. Lovell, *Scope of the Legislative Investigational Power and Redress for Its Abuse*, 8 HASTINGS L.J. 276, 277 (1957); LIGHT, *supra* note 158, at 9; John W. Gilligan, *Congressional Investigations*, 41 J. CRIM. L. & CRIMINOLOGY 618, 619 n.7, 634 (1951); Hans Zeisel & Rose Stampler, *The Evidence: A Content Analysis of the HUAC Record, The Case against HUA*, 11 HARV. C.R.-C.L. L. REV. 263, 263, 296, 297 (1976).

162. Wright, *supra* note 5, at 415; Auchincloss, *supra* note 158, at 177; Fuess, *supra* note 4, at 151-52; Harrison & McCoy, *supra* note 6, at 373; Will Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 COLUM. L. REV. 839, 840 (1954); William C. Warren, *Congressional Investigations: Some Observations*, 21 FOOD DRUG COSMETIC L. J. 40, 44 (1966).

163. See Warren, *supra* note 162, at 44, 46; Fuess, *supra* note 4, at 151-52.

164. *Current Documents*, *supra* note 17, at 105.

165. See HAMILTON, *supra* note 5, at 116-17; Fitzpatrick, *supra* note 157, at 17; Shapiro, *supra* note 4, at 535, 553; Avrum M. Gross, Comment, *Constitutional Law: Congressional Investigation of Political Activity: Watkins v. United States Re-Examined*, 58 MICH. L. REV. 406, 409 (1960). It could be argued that the investigatory power is almost boundless. Warren, *supra* note 162, at 43-44; ROSENBERG, *supra* note 4, at 13 ("virtually plenary power").

166. Wright, *supra* note 5, at 415.

167. Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 146 (1988).

have rights in the investigatory process,¹⁶⁸ it is not very difficult to lawfully connect witnesses to the Congressional forum. Put differently, a permissive doctrine may make it easier for Congress to, at a minimum, interfere with individual liberty interests. And, as suggested above, compliance may come with additional costs.¹⁶⁹

The phenomena described above raise the following question: are the foregoing costs inevitable? In Part III, this Note contends that, at least in some cases, they may not be.

III. UNDERSTANDING THE IMPLIED INVESTIGATORY POWER

Congress has finite powers.¹⁷⁰ Congress may, through Article I, Section 8's Necessary and Proper Clause, draw on non-enumerated powers to implement its enumerated powers.¹⁷¹ Thus, the investigatory power, which is not enumerated, must meet the Necessary and Proper Clause's commands.¹⁷² This Part argues that the investigatory power may not be, at least in some cases, "Necessary and Proper[.]"¹⁷³ meaning that

168. Smith & Wehbé, *supra* note 5, at 245; *United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970).

169. While witnesses retain their rights, publicly exercising them can sometimes present a Hobson's choice: a witness who invokes the Fifth Amendment may protect private information from reaching the public domain, but the witness who remains silent may also be held in contempt should he withhold unprivileged information. BARTH, *supra* note 6, at 115.

170. *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 533-34, 559 (2012); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 890 (4th Cir. 1999) (Wilkinson, J., concurring).

171. *See United States v. Kebodeaux*, 570 U.S. 387, 409 (2013) (Thomas, J., dissenting).

172. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2037-38 (2020) (Thomas, J., dissenting); Monica M. Clark, *Challenging Privilege Claims in Congressional Inquiries*, 23 *GEO. J. LEGAL ETHICS* 539, 542 (2010).

173. U.S. CONST. art. 1, § 8.

Congress might lack power to reach certain people and objects for purposes that may be advanced under the Court's controlling characterization.

A. *The Necessary and Proper Clause*

Article 1, Section 8's terminal provision, the Necessary and Proper Clause, provides that "Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers[.]"¹⁷⁴ The Necessary and Proper Clause lacks a single, accepted meaning,¹⁷⁵ an issue that has drawn diverse scholarly debate.¹⁷⁶ Instead of offering a uniform interpretation, this Note presents some of the key events that are germane to the Clause's meaning. Specifically, this Note draws the reader's attention toward Madison and Hamilton's competing understandings of the Clause,¹⁷⁷ a debate the Court might be most receptive to following its less-than-deferential Necessary and Proper Clause analysis in *NFIB v. Sebelius*.¹⁷⁸

1. Early Events

As discussed in Part I, some Framers were highly skeptical of concentrated legislative power.¹⁷⁹ Anti-Federalists were some of the most vocal opponents of the Necessary and

174. *Id.*

175. John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773, 775 (2013).

176. See generally Samuel L. Bray, "Necessary and Proper" and "Cruel and Unusual": *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1046 (2014).

177. Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 188–202 (2003).

178. See *NFIB*, 567 U.S. at 559–61.

179. See BARTH, *supra* note 6, at 4–8; Judith A. Best, *Legislative Tyranny and The Liberation of the Executive: A View from the Founding*, 17 PRESIDENTIAL STUDIES Q. 697, 697 (1987).

Proper Clause's sweeping language, believing that the Clause would allow Congress to grow its institutional ambit.¹⁸⁰ The Federalists sought to assuage concerns by narrowly characterizing and framing Congressional power.¹⁸¹ Ultimately, however, Madison's and Hamilton's understandings of the Clause diverged.¹⁸²

i. The Narrow View

Madison, among others, narrowly construed the Clause.¹⁸³ In connection with the Second Bank's authorization, Madison remarked that "[w]hatever meaning th[e Necessary and Proper] clause may have, none can be admitted, that would give an unlimited discretion to Congress."¹⁸⁴ To Madison, the Clause authorized powers that: (1) were "means *necessary* to the *end*[";]" and (2) "would have resulted, by unavoidable implication[.]"¹⁸⁵ In other words, necessary "mean[t] *really* necessary in the sense that the end cannot be performed in some manner that does not infringe the retained liberties of the people."¹⁸⁶ Because the Second Bank of the United States was not

180. See BRUTUS NO. 1, in THE ANTI-FEDERALIST PAPERS, *supra* note 46, at 286; United States v. Comstock, 560 U.S. 126, 161 (2010) (Thomas, J., dissenting).

181. Barnett, *supra* note 177, at 185; *Comstock*, 560 U.S. at 161 (Thomas, J., dissenting); Gonzales v. Raich, 545 U.S. 1, 66 n.5 (2005) (Thomas, J., dissenting); Michael Parsons, *The Future of Federalism: A Uniform Theory of Rights and Powers for the Necessary and Proper Clause*, 11 GEO. J.L. & PUB. POL'Y 177, 182–83 (2013); Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL'Y 1005, 1008 (2008).

182. Barnett, *supra* note 177, at 188–97.

183. Barnett, *supra* note 177, at 193–96; *Historical Background on Necessary and Proper Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C18-2/ALDE_00001237/ [<https://perma.cc/76GP-JSGG>].

184. Statement of James Madison (Feb. 2, 1791), *reprinted* in M. ST. CLAIR CLARKE & D.A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 41 (1832), *quoted* in Barnett, *supra* note 177, at 190.

185. See Statement of James Madison, *reprinted* in CLARKE & HALL, *supra* note 184, at 42.

186. Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 751 (1997).

“necessary to the Government” and only a “convenient” exercise of authority, it failed in Madison’s eyes to meet the Clause’s high bar.¹⁸⁷

Others agreed with Madison, and some went further.¹⁸⁸ Representative Wright remarked that the Necessary and Proper Clause forbade Congress from “creat[ing] constructive powers[.]”¹⁸⁹ Although inexplicit, Wright appeared to suggest that Congress had impermissibly flexed an *additional* power by creating a national bank.¹⁹⁰ Representative Stone recognized that “necessity was the most plausible pretext for breaking the spirit of the social compact” and, like Madison, rejected convenience as a plausible basis for exercising implied powers.¹⁹¹ Representative Giles agreed and argued that “the true exposition of a necessary mean to produce a given end, was that mean without which the end could not be produced.”¹⁹² Like Madison and Stone, Giles rejected “expediency” or convenience as a valid justification for action.¹⁹³

Jefferson appeared to take Madison’s view.¹⁹⁴ In a 1791 opinion, he acknowledged that while the creation of a federal bank may have helped Congress conveniently collect taxes, the Sweeping Clause only “allow[ed] . . . the means which [we]re

187. See Statement of James Madison, *reprinted in* CLARKE & HALL, *supra* note 184, at 44–45.

188. Barnett, *supra* note 177, at 194–95.

189. Statement of Robert Wright (Jan. 21, 1811), *reprinted in* CLARKE & HALL, *supra* note 184, at 198.

190. See *id.*

191. Statement of Michael Stone, *reprinted in* CLARKE & HALL, *supra* note 184, at 65–66; see generally Barnett, *supra* note 177, at 194.

192. Statement of William Giles, *reprinted in* CLARKE & HALL, *supra* note 184, at 72, *quoted in* Barnett, *supra* note 177, at 195.

193. See Statement of William Giles, *reprinted in* CLARKE & HALL, *supra* note 184, at 72.

194. Barnett, *supra* note 177, at 195–96; *Historical Background on Necessary and Proper Clause*, *supra* note 183.

'necessary,' not those which [we]re merely 'convenient' for effecting the enumerated powers."¹⁹⁵ Jefferson appeared to interpret the Clause to apply as a practical last resort; if Congress did not exercise the power, "the grant of [express] power would be nugatory[.]"¹⁹⁶

ii. The Broader View

Hamilton offered a much broader view of the Clause.¹⁹⁷ He contended that "necessary mean[t] no more than needful, requisite, incidental, useful, or conducive to."¹⁹⁸ However, Hamilton made clear that even if the Clause was "construed liberally[.]" it could only be used "in advancement of the public good."¹⁹⁹

Justice John Marshall, writing for the *M'Culloch v. Maryland* majority, understood the Clause like Hamilton.²⁰⁰ Marshall opined that the Necessary and Proper Clause provided Congress wide discretion, remarking that all Congress needed were "legitimate" ends and "means" that were "plainly adapted to th[ose] end[s], which . . . consist with the letter and

195. Thomas Jefferson, Jefferson's Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), reprinted in PAUL LEICESTER FORD, THE FEDERALIST (1898), online at https://avalon.law.yale.edu/18th_century/bank-tj.asp [<https://perma.cc/37KU-QE3R>].

196. See *id.* In addition to debate surrounding the creation of the Second Bank, early American dictionaries support a narrower interpretation. Lawson & Granger, *supra* note 15, at 286.

197. Barnett, *supra* note 177, at 196–97; *Historical Background on Necessary and Proper Clause*, *supra* note 183.

198. Alexander Hamilton, Opinion on Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), reprinted in CHRISTINA G. VILLEGAS, ALEXANDER HAMILTON: DOCUMENTS DECODED 188, 192 (2018), quoted in Barnett, *supra* note 177, at 196 (emphasis omitted).

199. Hamilton, reprinted in VILLEGAS, *supra* note 198, at 193.

200. Barnett, *supra* note 177, at 199; *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

spirit of the constitution[.]”²⁰¹ However, Marshall also recognized that a law may conflict with the Clause where it was meant to achieve “objects not intrusted to the government[.]”²⁰²

2. Modern Jurisprudence

The Necessary and Proper Clause’s contemporary meaning largely tracks Justice Marshall’s reasoning in *M’Culloch*. In *United States v. Comstock*, the Court explained that “the Necessary and Proper Clause grant[ed] Congress broad authority to enact federal legislation.”²⁰³ Relying on *M’Culloch*, the *Comstock* majority noted that the appropriate inquiry was “whether the . . . [disputed exercise] constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”²⁰⁴ To determine whether means were sufficiently connected to ends, the *Comstock* court examined whether: (1) the disputed law was tethered to an enumerated power;²⁰⁵ (2) the power or law was supported by “longstanding” congressional practice;²⁰⁶ (3) Congressional action was sufficiently tethered to Congress’s stated objective;²⁰⁷ (4) Congressional action subverted “state interests[;]”²⁰⁸ and (5) the enumerated power was adequately tethered to the disputed Congressional action.²⁰⁹

201. See *M’Culloch*, 17 U.S. at 421.

202. See *id.* at 423.

203. *United States v. Comstock*, 560 U.S. 126, 133 (2010).

204. See *id.* at 134.

205. See *id.* at 136–37.

206. See *id.* at 137.

207. See *id.* at 143.

208. See *id.*; cf. *Louisiana v. Becerra*, 577 F.Supp.3d 483, 501 (W.D. La. 2022).

209. *Comstock*, 560 U.S. at 146; see also *id.* at 149 (providing an overview of the Court’s five considerations).

The Court further addressed the scope of the Necessary and Proper Clause in *NFIB v. Sebelius*, which found that an individual healthcare mandate failed to comport with the Necessary and Proper Clause's commands.²¹⁰ As in *Comstock*, the Court reiterated that the Necessary and Proper Clause demanded deference to Congressional prerogative.²¹¹ However, "laws that undermine[d] the structure of government established by the Constitution" fell beyond the Clause's ambit.²¹² The *NFIB* court ultimately found that Congress had exceeded its Article I authority, reasoning that the individual mandate was broad and untethered to Congress's enumerated "commerce power[.]"²¹³ In other words, the individual mandate was so expansive that it had effectively become a separate power—one not merely implemented in service of another enumerated power.²¹⁴ Thus, the Court found the individual mandate impermissible as an implied authority.²¹⁵

B. Characterizing the Implied Investigatory Power

McGrain remains good law.²¹⁶ In assessing whether the "power to make investigations and exact testimony" was "so far incidental to the legislative function [enumerated in Article I, Section 1] as to be implied" through the Necessary and Proper Clause,²¹⁷ the *McGrain* court opined that "there [wa]s no [Constitutional] provision expressly investing either house

210. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559–60 (2012).

211. *See id.* at 559.

212. *See id.*

213. *See id.* at 560 (citations omitted).

214. *See id.*

215. *See id.* The Court reaffirmed broad Congressional prerogative under the Necessary and Proper Clause in *U.S. v. Kebodeaux*, 570 U.S. 387, 394 (2013).

216. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020); *see also id.* at 2045 (Thomas, J., dissenting).

217. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

[of Congress] with power to make investigations and exact testimony[.]”²¹⁸ By examining Founding-era Congressional and state investigatory practices and Supreme Court precedent, the Court ultimately found that Congress possessed an implied investigatory power that included compulsory enforcement processes.²¹⁹ The Court’s characterization of Congressional investigatory power left much to be desired: namely, what does the “power to make investigations and exact testimony” include?²²⁰

1. Understanding *McGrain*

The Court contemplated the implied power’s boundaries in *McGrain*, and ultimately codified the power (1) to procure information (2) for the purpose of supporting the lawmaking process.²²¹ As suggested in Part I, there has not been a re-examination whether *McGrain* correctly characterized the investigatory power in connection with the Necessary and Proper Clause; instead, the doctrine has functionally limited the power without disturbing *McGrain*’s foundational premise that procuring information is Necessary and Proper.²²² For example, the Court has held that Congress may not: (1) acquire power wholly allocated to other branches; (2) “expose for the sake of exposure[;]” (3) obtain Constitutionally protected information from recalcitrant witnesses;²²³ and (4) obtain *some* private information from the President.²²⁴

218. *Id.*

219. *See id.* at 160–77.

220. *See id.* at 161.

221. *See id.* at 161, 165, 171, 175.

222. *See Mazars USA, LLP*, 140 S. Ct. at 2045 (Thomas, J., dissenting).

223. *Watkins v. United States*, 354 U.S. 178, 187, 197–200 (1957); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959); *Smith & Wehbe*, *supra* note 5, at 245.

224. *Mazars USA, LLP*, 140 S. Ct. at 2035–37.

Of all the foregoing limitations, only the third and fourth limitations—prohibitions on unconstitutional conduct and obtaining the President’s private records—substantively circumscribe the investigatory power’s ambit by delineating who and what may lie beyond a Congressional subpoena’s reach. The first two limitations—prohibitions on some investigatory purposes—are consistent with *McGrain* because they describe conduct that is categorically untethered to the lawmaking power. In other words, purposefully exposing information for its own sake or punishing witnesses are disconnected from Congress’s lawmaking functionality. Thus, such exercises lie beyond *McGrain*’s ambit and Congressional reach.

2. Re-characterizing the Investigatory Power

McGrain broadly characterized the implied investigatory power,²²⁵ capturing many inferior characterizations, or those that describe or characterize the power with greater specificity than the power to procure information for the purpose of supporting the lawmaking process.²²⁶ This section lays the foundation for the Necessary and Proper Clause analysis detailed below by describing *McGrain*’s subordinate or inferior characterizations.

225. *Trump v. Thompson*, 20 F.4th 10, 24 (D.C. Cir. 2021); cf. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

226. *McGrain*, 273 U.S. at 161. See *supra* note 9 for a discussion on how Justice Thomas characterized powers in *Mazars*.

i. Status

By declining to specify *who* Congress may obtain information from,²²⁷ *McGrain* brought many under the investigatory power's ambit.²²⁸ The Court's characterization declined to specify who in American society Congress *may not* reach,²²⁹ sweeping up many, regardless of status.²³⁰ Thus, Congress has looked to a variety of people for information, including local,²³¹ state,²³² and federal public officials,²³³ private persons

227. *See id.*

228. *See generally* TODD GARVEY, CONG. RSCH. SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 1 n.2, 1–2 (Mar. 27, 2019) (explaining that “member[s] of the public” and officials have to obey a “valid congressional subpoena”); TODD GARVEY, CONG. RSCH. SERV., RESOLVING SUBPOENA DISPUTES IN THE JANUARY 6 INVESTIGATION 2 (Oct. 21, 2021).

229. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

230. *See* 1 Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, 83rd Cong., at XXIII (2003), <https://www.senate.gov/about/resources/pdf/mccarthy-hearings-volume1.pdf> [<https://perma.cc/4ZfV-HQSM>].

231. *See* Gilbert King, *The Senator and the Gangsters*, SMITHSONIAN MAG. (Apr. 18, 2012), <https://www.smithsonianmag.com/history/the-senator-and-the-gangsters-69770823/> [<https://perma.cc/7U2G-VS65>].

232. *See* Jon Ward, *Jan. 6 Committee Subpoenas State Officials Involved in Trying to Overturn 2020 Election*, YAHOO! NEWS (Feb. 15, 2022), <https://news.yahoo.com/jan-6-committee-subpoenas-state-officials-involved-in-trying-to-overturn-2020-election-224558652.html> [<https://perma.cc/6KBL-DXK9>]; Annie Grayer & Paul LeBlanc, *A Running List of Who the January 6 Committee Has Subpoenaed or Requested to Appear*, CNN POLITICS (Feb. 21, 2022), <https://edition.cnn.com/2021/11/10/politics/list-january-6-subpoenas/index.html> [<https://perma.cc/8SBG-Y2YR>].

233. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 228, at 1–3. This Note considers executive privilege a defense to compliance. *See* Jonathan Shaub, *Executive Privilege and the Jan. 6 Investigation*, LAWFARE (Sept. 29, 2021), <https://www.lawfareblog.com/executive-privilege-and-jan-6-investigation> [<https://perma.cc/Y9EX-B8FP>].

who propelled themselves²³⁴ into the “public spotlight[,]”²³⁵ private persons involved in public controversies or those related to alleged government misconduct,²³⁶ and quintessentially private people.²³⁷ Overall, Congress has sought information from, among others, organizational leaders,²³⁸

234. See Andrew Glass, *Arthur Miller Testifies Before HUAC, June 21, 1956*, POLITICO (June 21, 2013), <https://www.politico.com/story/2013/06/this-day-in-politics-093127> [<https://perma.cc/5XTH-FP7M>]; Claudia Grisales, *Roger Stone, Alex Jones Among New Subpoenas Issued by Jan. 6 Panel*, NPR (Nov. 23, 2021), <https://www.npr.org/2021/11/22/1057038176/roger-stone-alex-jones-subpoenas-jan-6-panel-capitol?t=1647871272759> [<https://perma.cc/5DDY-B28K>]; June 12, 1956: *Paul Robeson Testifies Before HUAC*, ZINN ED. PROJ., <https://www.zinnedproject.org/news/tdih/paul-roberson-testifies-before-huac/> [<https://perma.cc/8M4Y-QM49>]. To some extent, private companies imbued in public controversies fall within this category. See Yoni Bard et al., *Looking at the Landscape of Congressional Investigations in 2022*, JDSUPRA (Mar. 17, 2022), <https://www.jdsupra.com/legalnews/looking-at-the-landscape-of-1249363/> [<https://perma.cc/P52Q-XKR6>].

235. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

236. See Patricia Zengerle & Jan Wolfe, *U.S. House Panel Hits Pro-Trump Lawyers with Subpoenas Over U.S. Capitol Riot*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/world/us/committee-probing-us-capitol-attack-subpoena-six-over-false-election-claims-2022-03-01/> [<https://perma.cc/P6JT-AVPH>].

237. Christine Blackerby, *Pleading the Fifth: Lillian Hellman and the HUAC Investigation of Hollywood*, SOCIAL ED., 2016, at 319, https://www.socialstudies.org/system/files/publications/articles/se_8006316.pdf [<https://perma.cc/Q4YM-B9D7>]; see generally Mazars, 140 S. Ct. at 2039 (Thomas, J., dissenting) (discussing a putative claim of authority over “private parties”).

238. See Ashley Gold, *Senate Panel Votes to Subpoena Big Tech CEOs*, AXIOS (Oct. 1, 2020), <https://www.axios.com/senate-panel-votes-to-subpoena-big-tech-ceos-24523011-c411-49d7-b90f-673783b7bff3.html> [<https://perma.cc/X96C-FD5K>]; Nick Sobczyk, *Oil Companies Will Be Subpoenaed After Historic Congressional Hearing*, SCI. AM.: E&E NEWS (Oct. 29, 2021), <https://www.scientificamerican.com/article/oil-companies-will-be-subpoenaed-after-historic-congressional-hearing/> [<https://perma.cc/B89F-WUP6>].

lawyers,²³⁹ teachers,²⁴⁰ persons employed in the motion picture industry,²⁴¹ over thirty members of the Titanic crew following the ship's wreck,²⁴² and mobsters.²⁴³

The foregoing illustrates that *McGrain* may capture several inferior characterizations of Congressional investigatory power. Below, this Note distills one important layer of specificity that might be added to the *McGrain* characterization:²⁴⁴ *status*. Indeed, the power to procure information includes an ability to acquire information from *people*. Thus, the general power to procure information can be re-characterized as:

- *the power to procure information from government (federal, state, and local) officials*
- *the power to procure information from private persons*
 - *quintessentially private persons*
 - *private persons who occupy prominent roles in society*
 - *private persons tethered to public controversies*
 - *private persons tethered to governmental conduct*

239. See Hugo Lowell, *US Capitol Attack Committee Subpoenas Rudy Giuliani and Other Trump Lawyers*, *GUARDIAN* (Jan. 18, 2022), <https://www.theguardian.com/us-news/2022/jan/18/us-capitol-attack-committee-subpoenas-rudy-giuliani-and-other-trump-lawyers> [<https://perma.cc/4M5D-LE5E>].

240. Livia Gershon, *How One Group of Teachers Defended Academic Freedom*, *JSTOR Daily* (Dec. 29, 2016), <https://daily.jstor.org/how-one-group-of-teachers-defended-academic-freedom/> [<https://perma.cc/S3P7-AB9A>].

241. Blackerby, *supra* note 237, at 319.

242. "TITANIC" DISASTER, S. REP. NO. 62-806, at 2 (1912), <https://www.senate.gov/about/resources/pdf/TitanicReport.pdf> [<https://perma.cc/J6A2-NFUK>].

243. Paul Camacho, *The Kefauver Hearings: A Window into the Evolution of Money Laundering and Financial Sleuthing*, *LINKEDIN* (June 30, 2017), <https://www.linkedin.com/pulse/kefauver-hearings-window-evolution-money-laundering-paul-camacho/> [<https://perma.cc/A5EN-WSLU>].

244. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

ii. Attenuation

Status aside, Congress may compel many to participate, without great sensitivity toward how closely connected a person is to the matter of an investigation.²⁴⁵ Understood one way, *Eastland* suggests that as long as the witness might have some information in his possession tethered to an investigation's subject matter, it may be said that compulsory process is being used to support legislation.²⁴⁶ Indeed, *Eastland* pointed to a few facts suggesting that the entity could have information connected to an inquiry.²⁴⁷ Ultimately, though, *Eastland* does not appear to require a witness to have actually been involved in the controversy, only that they could have information that could further the legislative mission. And there is, of course, no requirement that the witness actually possess the information sought.

Wilkinson may illustrate just how loosely connected a witness might be to a pending investigation. In 1958, HUAC conducted hearings in Atlanta, which "were meant to investigate Communist 'colonization' of the textile industry, Communist Party activity in the South, and the distribution of 'foreign' Communist propaganda[.]"²⁴⁸ Frank Wilkinson was a "nationally known opponent of HUAC" and traveled "to Atlanta to support" two HUAC opponents who had been compelled

245. This Note comments on initial compulsion to participate, not subsequent questions posed to a witness.

246. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975).

247. *See id.* (subpoena legitimate where Congress examined funding of activities that could "undermin[e]" troops' morale, and where USSF "operated on or near military and naval bases, . . . its facilities became 'the focus of dissent' to declared national policy[.]" and where USSF's funding source was unknown).

248. *When HUAC Investigated its Critics*, DEFENDING RIGHTS AND DISSENT, <https://www.rightsanddissent.org/news/when-huac-investigated-its-critics/> [<https://perma.cc/B3TN-XLXY>].

to testify.²⁴⁹ After Wilkinson's arrival, HUAC subpoenaed Wilkinson to testify, even though Wilkinson was not and "had never been a textile worker and who had never . . . been to the South[.]"²⁵⁰ Despite Wilkinson's attenuated relationship to the inquiry, the Court ultimately upheld Wilkinson's contempt conviction.²⁵¹

The foregoing analysis adds another layer: status *in relation to the subject under inquiry*. Put differently, Congressional investigatory power not only includes an ability to reach people of different social or public statuses, as described above, but people who are more or less connected to the subject under inquiry. Thus, the investigatory power is:

- *the power to compel participation from witnesses (all or, specified above, status-specific)*
 - *who may or may not have been involved in the controversy*
 - *who may possess relevant information*
 - *whose connection to the topic area is more or less attenuated*

iii. The Nature of the Requested Information

McGrain did not expressly limit *what* information Congress may obtain.²⁵² Thus, *McGrain* may capture the power to procure most kinds of information, whether public or private, from witnesses.²⁵³ While *Watkins* clarified that Congress lacked "general authority to expose the private affairs of individuals[,]" *Watkins* appeared to inexplicitly stipulate that demanding private information was permissible as long as it

249. *Id.*

250. *Id.*

251. *Wilkinson v. United States*, 365 U.S. 399, 401–05 (1961).

252. *McGrain*, 273 U.S. at 161.

253. ROSENBERG, *supra* note 26, at 1 ("all sources of information"); Milikan, *supra* note 3, at 632; *Mazars*, 140 S. Ct. at 2044 (Thomas, J., dissenting).

was tethered to a legitimate investigatory exercise.²⁵⁴ Therefore, although “[t]here is . . . no general power to inquire into the private affairs of individuals[,]”²⁵⁵ little information is practically off-limits.²⁵⁶ The Court made this principle—the notion that Congress may obtain most kinds of information—clear in *Eastland* by expressly rejecting a challenge against a subpoena on the grounds that the subpoena sought information related to private parties’ “beliefs” and “associations[.]”²⁵⁷ Although some private Presidential information is off-limits after *Mazars*, *Mazars* “[le]ft the core of” Congressional investigatory “power untouched.”²⁵⁸

Couched within this Note’s re-characterization framework, *McGrain* may include:

- *the power to procure quintessentially private information (associations, beliefs, etc.) from various witnesses (see layers 1 and 2)*
- *the power to procure information that is in the public record from various witnesses (see layers 1 and 2)*

iv. The Investigatory Purpose

Finally, *McGrain* authorized investigations if they have a legislative tether.²⁵⁹ The Court has added boundaries, suggesting that Congress cannot acquire power wholly allocated to other branches.²⁶⁰ Indeed, Congress is not “a law enforcement or trial agency[;]” it may not investigate exclusively to expose or support

254. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

255. *First Amendment Does Not Justify Refusal to Answer Pertinent Question of Congressional Committee*, 56 COLUM. L. REV. 798, 799 (1956).

256. See ROSENBERG, *supra* note 26, at 1.

257. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 508 (1975).

258. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2045 (2020) (Thomas, J., dissenting).

259. *McGrain*, 273 U.S. at 161.

260. *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

legislators' "personal aggrandizement[.]"²⁶¹ Beyond these limitations, mixed purposes may still be fair game; in compelling a witness to participate, Congress may have a legitimate legislative objective, but it may also have other objectives,²⁶² like spotlighting an issue or political gain.²⁶³

Placed within the framework detailed above, the *McGrain* characterization may include: *the power to procure [layer 3: any] information from [layers 1 and 2: any] witnesses for lawmaking purposes and other purposes [layer 4].*

v. Summary

The analysis detailed above suggests that numerous permutations and characterizations of the investigatory power necessarily fall within *McGrain's* broad ambit. This Note addresses below whether the inferior characterizations detailed above, and the *McGrain* characterization as a whole, are Necessary and Proper.

C. *The Necessary and Proper Investigatory Power*

As suggested in *McGrain*, Article I does not expressly vest Congress with an investigatory power.²⁶⁴ However, a power may be implied as long as it is "necessary and proper for carrying into Execution" other "Powers[.]"²⁶⁵ This Section addresses how *McGrain* and some inferior characterizations may be inconsistent with the Necessary and Proper Clause's commands.

261. *Watkins v. United States*, 354 U.S. 178, 187, 200 (1957).

262. One author has emphasized that "investigation is a multi-purpose congressional tool." Shapiro, *supra* note 4, at 542.

263. *See id.* at 542-47; Gilligan, *supra* note 161, at 619 n.7; Gross, *supra* note 165, at 409, 413; Warren, *supra* note 162, at 43-44; Fuess, *supra* note 4, at 151.

264. *Mazars*, 140 S. Ct. at 2031.

265. U.S. CONST. art. 1, § 8.

1. An Attenuated Investigatory Power

Despite conflicted understandings of the Necessary and Proper Clause's meaning, it was generally understood that the Clause did not vest Congress with *new* authority; rather, it provided Congress with un-enumerated authority connected to enumerated powers.²⁶⁶ For example, Hamilton remarked in *Federalist* 33 that the Necessary and Proper Clause was "perfectly harmless[,] in part, because it "must be sought for in the specific powers upon which th[e Clause wa]s predicated."²⁶⁷ In other words, implied powers accompanied express powers.²⁶⁸ Modern Necessary and Proper Clause jurisprudence tracks the Clause's original understanding to the extent that the Court has affirmed that implied power must be tethered to enumerated power.²⁶⁹ Ultimately, an implied authority should be "'narrow in scope'"²⁷⁰ and "'incidental' to the exercise of" enumerated power;²⁷¹ it should not, if permitted, "work a substantial expansion of federal authority."²⁷² This section examines the investigatory power's growth and the ways in which it may generally expand power.

266. See Barnett, *supra* note 177, at 185–86, 192, 194, 196, 200; *Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting); see also *M'Culloch v. State*, 17 U.S. 316, 411, 420–21, 423 (1819); *Historical Background on Necessary and Proper Clause*, *supra* note 183.

267. THE FEDERALIST NO. 33, *supra* note 32, at 203 (Alexander Hamilton).

268. *Id.*; see also THE FEDERALIST NO. 44 (James Madison); see generally *Mazars*, 140 S. Ct. at 2037.

269. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012).

270. See *id.* (quoting *United States v. Comstock*, 560 U.S. 126, 148 (2010)).

271. See *id.* (quoting *M'Culloch*, 17 U.S. at 418).

272. See *id.*

i. The Growth of Power

To assess expansion and attenuation, a court could compare the implied power's present ambit to the power's original ambit.²⁷³ Using early Congressional actions as interpretive guides,²⁷⁴ this Note concludes that the implied power to exercise compulsory power over witnesses for lawmaking purposes likely departs from Congress's early investigatory power, suggesting that the modern power grows authority.²⁷⁵

First, the earliest Congressional investigations did not entail the exercise of compulsory power over any individual, private or public, for regular lawmaking purposes.²⁷⁶ For example, in 1790, at Robert Morris's insistence,²⁷⁷ the House sought to "inquire into the receipts and expenditures of public monies during" Morris's tenure as a federal finance official.²⁷⁸ The 1792 St. Clair investigation also principally involved governmental subject matter: it inquired into a military operation.²⁷⁹

273. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2040 (Thomas, J., dissenting).

274. *See id.*; *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991), *cited in* *Gall v. United States*, 552 U.S. 38, 65 n.2 (2007) (Alito, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986).

275. In this section, this Note highlights some of the same historical events as Justice Thomas in his *Mazars* dissent, including, but limited to, St. Clair and the 1827 Committee on Manufacturers. *See generally Mazars USA, LLP*, 140 S. Ct. at 2038–42. However, the reader will find this Note's analysis different than Justice Thomas's dissent, which focused heavily on Congress's ability to obtain private documents. *See id.* at 2037, 2038 n.1, 2045, 2047.

276. *See* ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS 93–94 (1928); *Mazars USA, LLP*, 140 S. Ct. at 2040–41 (Thomas, J., dissenting) (debate over the 1827 Committee's authority).

277. *See* Michael S. Rosenwald, 'Grand Inquisitors of the Realm': How Congress Got Its Power to Investigate and Subpoena, WASH. POST (Mar. 11, 2019), <https://www.washingtonpost.com/history/2019/03/11/grand-inquisitors-realm-how-congress-got-its-power-investigate-subpoena/> [<https://perma.cc/3NAC-UVQA>].

278. *See* 2 Annals of Cong. 1514 (1790).

279. Currie, *supra* note 60, at 96–99; Chalou, General St. Clair's Defeat, 1792–93, in 1 CONGRESS INVESTIGATES, *supra* note 51, at 10–14; *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2040 (Thomas, J., dissenting).

All told, it would be over thirty years after Article I's ratification and the St. Clair investigation until the House seriously considered compulsory process for regular lawmaking purposes.²⁸⁰ And, at the time, the power's putative use was greatly contested.²⁸¹ Further, it would be over thirty more years until the Senate first harnessed compulsory power for regular lawmaking purposes.²⁸² Thus, the addition of compulsory processes for ordinary lawmaking purposes, in light of its long absence in both chambers, evinces growth.²⁸³ Of course, one should be cautious here not to overstep. Early Congressional practice suggests that it may have been understood that Congress had some power to probe (at least in the oversight context). But the introduction of a new purpose may signal broadening and expansion.

Second, and relatedly, the scope of the investigatory power must be viewed in light of Congress's changing legislative authority.²⁸⁴ Up until 1937, a period that covered *McGrain*, the Court "fairly narrowly" construed Congress's commerce powers,²⁸⁵ limiting Congress's legislative authority. During the New Deal, however, the Court's understanding of the

280. See EBERLING, *supra* note 276, at 93–94.

281. See *Mazars USA, LLP*, 140 S. Ct. at 2041; M. Nelson McGeary, *Congressional Investigations: Historical Development*, U. CHI L. REV. 425, 426–27, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2662&context=uclev> [<https://perma.cc/95W6-36Z2>].

282. See McGeary, *supra* note 281, at 427; *Mazars USA, LLP*, 140 S. Ct. at 2042.

283. Cf. *Mazars USA, LLP*, 140 S. Ct. at 2042 (suggesting that Harper's Ferry investigation supports idea that "legislative subpoenas to private parties were a 19th century innovation"); *id.* at 2041 (noting that 1827 Committee "debate [wa]s particularly significant because of the arguments made by both sides" and previewing that "[o]pponents argued that this power was not part of any legislative function").

284. The author greatly thanks Professor Gary Lawson for his observation that *McGrain* was decided before federal power significantly expanded.

285. Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301, 308–09 (2006).

commerce power greatly changed, and Congress was eventually vested with wide, almost plenary authority.²⁸⁶ While the Court has clawed back its expansive interpretation, it has not returned to its *McGrain*-era understanding of the commerce power.²⁸⁷ As Congress's legislative authority expanded, so did the putative scope of investigatory power: an increase in the number and variety of areas subject to federal legislation²⁸⁸ ostensibly expanded the number and variety of people subject to compulsory process to support legislation.²⁸⁹ In other words, there may have been growth of federal investigatory power since the Framing and *McGrain* due, in part, to the growth of Congressional regulatory power more generally.

A different dimension of the foregoing proposition concerns legislative output. For its first seventy years, Congress passed about 150 public acts per session.²⁹⁰ In the post-New Deal era, Congressional output, in some sessions, exceeded 1,000 public acts.²⁹¹ The number of public acts does not necessarily equate to an increase in the use of compulsory process. But as

286. See *id.* at 309-10; RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 315-17 (2004); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

287. See Ilya Somin, THE IMPACT OF JUDICIAL REVIEW ON AMERICAN FEDERALISM 2, 24 (2013), https://www.law.gmu.edu/assets/files/publications/working_papers/1345JudicialReviewonAmericanFederalism.pdf [<https://perma.cc/R7Y7L-Y4JB>]; Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Commerce*, in CONSTITUTIONAL LAW STORIES 3, 22-24, 26-28 (Michael C. Dorf ed., 2d ed. 2009), <http://osaka.law.miami.edu/~schnably/Chen,Filburn.pdf> [<https://perma.cc/7QG5-2NBN>].

288. See Chen, *supra* note 287, at 3.

289. See generally HAMILTON, *supra* note 5, at 116 (noting the private areas that may now be regulated).

290. See Stephen Ansolabehere et al., *Divided Government and Significant Legislation: A History of Congress from 1789 to 2010*, 42 SOC. SCI. HIST. 81, 89-90 (2017).

291. See *id.*

legislative productivity increases, the number of potential opportunities to exercise compulsory power to support the legislative process might increase, potentially expanding the power's putative scope.

Third, some modern investigations deviate from early ones in character.²⁹² Early Congressional investigatory power appeared largely confined to subject matter concerning public expenditures, the use and misuse of resources or public office, or activity affecting the Congressional body.²⁹³ Many investigations were plausibly tethered to the public purse—Congress's appropriation powers²⁹⁴—like the St. Clair investigation,²⁹⁵ the 1800 investigation into Treasury Secretary Oliver Wolcott,²⁹⁶ the 1809 investigation into War Department expenditures,²⁹⁷ the 1810 investigation into various executive departments,²⁹⁸ the 1810 investigation into Brigadier General James Wilkinson,²⁹⁹ the 1820 and 1822 Post Office investigations,³⁰⁰ and the 1824 investigation into the Treasury secretary.³⁰¹ Some early investigations may have also probed other governmental activity or activity connected to the federal

292. In his dissent, Justice Thomas made an observation regarding eighteenth century legislative investigations cited by *Mazars amici*, explaining that they “sought to compel testimony from government officials on government matters.” *Mazars USA, LLP*, 140 S. Ct. at 2039–41 (Thomas, J., dissenting). This Note understands this observation as commentary on the character of those investigations.

293. Landis, *supra* note 28, at 170–71; EBERLING, *supra* note 276, at 37–38, 42, 53, 93; TAYLOR, *supra* note 29, at 33–34.

294. See generally *Overview of the Appropriations Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S9-C7-1/ALDE_00001095/ [<https://perma.cc/K7PJ-7B88>] (last visited Jan. 28, 2023).

295. See Landis, *supra* note 28, at 170–71, 171 n.68.

296. *Id.* at 171.

297. *Id.* at 172–73, 173 n.81; EBERLING, *supra* note 276, at 63.

298. Landis, *supra* note 28, at 173.

299. *Id.* at 173–74, 174 n.88.

300. *Id.* at 176–77.

301. EBERLING, *supra* note 276, at 86–87.

government, like the 1801 inquiry into the Governor of the Mississippi Territory,³⁰² the 1818 investigation into the Bank of the United States,³⁰³ and the 1818 investigation into executive agency clerks.³⁰⁴ Others, of course, concerned the Congressional body, looking into libels, bribery, and member conduct.³⁰⁵

Unlike early uses of the investigatory power, the modern power might tether itself to a broader array of subjects, some not as closely connected to governmental conduct or activities.³⁰⁶ Indeed, some investigations have probed comic books,³⁰⁷ television violence,³⁰⁸ news documentaries,³⁰⁹ TV quiz shows,³¹⁰ content moderation,³¹¹ performance enhancing

302. 1 AMERICAN STATE PAPERS 233 (Walter Lowrie & Walter S. Franklin eds., 1834), cited in Landis, *supra* note 28, at 172 n.80.

303. Landis, *supra* note 28, at 175, 175 n.91. The Second Bank of the United States was Congressionally created and could be supervised by Congress. See *id.* at 175 n.91; *Renewal of the Second Bank of the United States Vetoed*, LIBRARY OF CONG., <https://guides.loc.gov/this-month-in-business-history/july/renewal-second-bank-united-states-vetoed>.

304. EBERLING, *supra* note 276, at 65.

305. See *id.* at 41–42, 54, 66.

306. See generally *Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting) (distinguishing *St. Clair* as "an investigation of Government affairs").

307. Amy Kiste Nyberg, *William Gaines and the Battle over EC Comics*, in *A COMICS STUDIES READER* 58, 59–60 (Jeet Heer & Kent Worcester eds., 2009).

308. William Boddy, *Senator Dodd Goes to Hollywood*, in *THE REVOLUTION WASN'T TELEVISED* 161, 162 (Lynn Spiegel & Michael Curtin eds., 1997).

309. S.L. Alexander, *CBS News and Subpoenas Duces Tecum, 1971-1987*, 10 *COMM. & L.* 3, 5 (1988).

310. KENT ANDERSON, *TELEVISION FRAUD* 140–41 (1978).

311. Zoe Richards, *House Republicans Subpoena Apple, Facebook and Google Over Content Moderation*, *NBC NEWS* (Feb. 15, 2023), <https://www.nbcnews.com/politics/congress/house-gop-subpoenas-facebook-google-content-moderation-rcna70910>.

drug use in professional baseball,³¹² the proliferation of a political ideology in different areas of American society,³¹³ banking practices,³¹⁴ organized crime,³¹⁵ corruption in organized labor,³¹⁶ and internet sex trafficking.³¹⁷

To be fair, some of these subject areas and the activities under investigation could, however remotely, involve governmental conduct, or at least conduct that involves governmental actors. For example, the investigation into labor activities was motivated by an earlier finding “that racketeers had invaded the business of supplying uniforms to the U.S. Government[.]”³¹⁸ HUAC, too, looked into “whether Communists worked in the federal government[.]”³¹⁹ Nevertheless, the conduct in these investigations was not limited to the governmental: the labor activities investigation “covered a wide range of labor unions and corporations in the United States”³²⁰ and HUAC tethered itself to “[c]ivil servants, movie stars,

312. Edward Lazarus, *Congress' Decision to Subpoena Former Baseball Players to Testify*, CNN (Mar. 29, 2005), <https://www.cnn.com/2005/LAW/03/17/lazarus.steroids/>.

313. *Barenblatt v. United States*, 360 U.S. 109, 119–21 (1959); *Wilkinson v. United States*, 365 U.S. 399, 408 (1961); Stone, *supra* note 112, at 1389; Dara L. Schottenfeld, *Witches and Communists and Internet Sex Offenders, Oh My: Why It Is Time to Call Off the Hunt*, 20 ST. THOMAS L. REV. 359, 366 (2008).

314. *Subcommittee on Senate Resolutions 84 and 234*, UNITED STATES SENATE, <https://www.senate.gov/about/powers-procedures/investigations/pecora.htm> [<https://perma.cc/KT6A-2TPN>] (last visited Jan. 28, 2023).

315. *Special Committee on Organized Crime in Interstate Commerce*, UNITED STATES SENATE, <https://www.senate.gov/about/powers-procedures/investigations/kefauver.htm> [<https://perma.cc/R8B4-YRU3>] (last visited Jan. 28, 2023).

316. *Guide to Senate Records: Chapter 18 1946-1968*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/guide/senate/chapter-18-1946-1968.html#18E-7>.

317. *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 136 (D.D.C. 2016).

318. *Guide to Senate Records*, *supra* note 316.

319. “Which Side Are You On?,” U.S. HOUSE OF REP.: HISTORY, ART & ARCHIVES (Aug. 17, 2020), https://history.house.gov/Blog/2020/August/8_17_20_Pete_Seeger/.

320. *Guide to Senate Records*, *supra* note 316.

playwrights, musicians, and teachers[.]”³²¹ All considered, the broadening of the investigatory ambit might signal growth.

Fourth, some modern investigations appear to deviate from early ones in scope. From the beginning, private people could have tethered themselves to government operations and controversies, like private contractors in the St. Clair matter, at least making it possible for them to become subjects of a Congressional inquiry.³²² Furthermore, some early investigations involving the Congressional body implicated private individuals, and at least a couple of investigations concerning governmental activities actually involved private people.³²³ Still, some modern investigations have appeared to cast comparably wider nets over the private American population.³²⁴ The

321. “Which Side Are You On?”, *supra* note 319.

322. Michael Stern, *Justice Thomas’s Dissent in Trump v. Mazars*, POINT OF ORDER (Sept. 10, 2020), <https://www.pointoforder.com/2020/09/10/justice-thomass-dissent-in-trump-v-mazars/> [<https://perma.cc/3EE3-4V4L>].

323. *Id.* The Wilkinson matter, for example, involved, among others, Daniel Clark and Daniel Coxe; Clark was engaged in business dealings with Wilkinson and Coxe was Clark’s business associate who was involved in a prior proceeding related to Wilkinson. See George C. Chalou, *James Wilkinson – The Spanish Connection*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974 116, 119 (eds. Arthur M. Schlesinger, Jr. & Roger Bruns, 1975), 1983 edition cited in Stern, *supra* note 322; Michael Wohl, *Not Yet Saint Nor Sinner: A Further Note on Daniel Clark*, LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION, vol. 24, 1983, at 195. For others included in the Wilkinson matter, see 11 ANNALS OF CONG. 2289–90.

324. *Final Report of the Select Committee on Improper Activities in the Labor or Management Field*, 86th Cong. 870-71 (1960) (numerous unions and businesses under investigation); M.J. HEALE, AMERICAN ANTICOMMUNISM 186–88 (1990) (Congress reached over 200+ film industry members, 100+ teachers, journalists, and a church official); GARY A. DONALDSON, WHEN AMERICA LIKED IKE 52 (2017) (600 witnesses called by Kefauver Committee were “mostly” criminals); Zach Schonfeld, *Here’s a List of the People Who Have Been Subpoenaed by the Jan. 6 Committee*, HILL (June 7, 2022), <https://thehill.com/homenews/house/3514712-heres-a-list-of-the-people-who-have-been-subpoenaed-by-the-jan-6-committee/>; Elizabeth Goitein, *Congressional Access to Americans’ Private Communications*, BRENNAN CTR. FOR JUSTICE (Sept. 28, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/congressional-access-americans-private-communications> [<https://perma.cc/QW5K-DJK9>]; see generally Lloyd

Court seemed to recognize this phenomenon in *Watkins*, remarking that HUAC was novel because it “involved a broad-scale intrusion into the lives and affairs of private citizens.”³²⁵ But the Court did not then appreciate the phenomenon’s potential doctrinal significance—that growth might suggest expansion and attenuation.

One critical caveat to this analysis, however, is that Congress used impressively open-textured language when authorizing some of its earliest investigations.³²⁶ It may be argued that this phenomenon counsels against the proposition that there has been growth with respect to who Congress may reach because Congress could have, at least in theory, reached anyone if it so chose.³²⁷ While this Note appreciates the foregoing, this Note assigns greater analytical weight to Congressional practice, which appears to have expanded since the Republic’s early days.

Fifth, the 1827 Committee on Manufacturer’s investigation is a highly instructive baseline from which further expansion of Congress’s ability to investigate could be measured.³²⁸ One

K. Garrison, *Congressional Investigations: Are They a Threat to Civil Liberties?*, AM. BAR ASSOC. J., vol. 40, 1954, at 125. For an overview of some of the earliest investigations, see generally EBERLING, *supra* note 276, at 36–95; Landis, *supra* note 28, at 170–81; TAYLOR, *supra* note 29, at 22–34; George C. Chalou, *St. Clair’s Defeat, 1792*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 9–17; Herman J. Viola, *The Burning of Washington 1814*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 255–59; Herman J. Viola, *Andrew Jackson’s Invasion of Florida, 1818*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 340–49; Roger A. Bruns, *John C. Calhoun-The Rip Rap Imbroglia, 1826*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 482–98. This Note acknowledges that “many” of the St. Clair investigation’s “records were not preserved[,]” Stern, *supra* note 322, and recognizes the foregoing as a limitation on the proposition that modern investigations cast comparably wider nets.

325. *Watkins v. United States*, 354 U.S. 178, 195 (1957).

326. See Stern, *supra* note 322; see, e.g., EBERLING, *supra* note 276, at 42, 54, 64.

327. See Stern, *supra* note 323.

328. See generally *Mazars*, 140 S. Ct. at 2040–41 (Thomas, J., dissenting).

key dimension of the investigation was its subject matter—it contemplated a tariff.³²⁹ Congress may “lay and collect Taxes, Duties, and Imposts[.]”³³⁰ so the legislation contemplated was ostensibly, closely tethered to Congress’s enumerated powers.³³¹ A tariff had been implemented only years earlier,³³² further supporting an inference that the object of Congressional action was under Congress’s limited legislative authority. The investigation also appeared to center around a piece of legislation “then under consideration by the House[.]”³³³ This is unlike the modern power, which does not need to tether itself to a piece of legislation being considered.³³⁴

A different noteworthy aspect of the Committee investigation concerned putative need for compulsory process. The proposed tariff of 1828 covered a highly contentious issue, which “found violent partisans within and without Congress.”³³⁵ Compulsory process was entertained after the committee “found many conflicting memorials before them, and . . . the truth could not be arrived at by oral testimony.”³³⁶ To the extent that this historical example suggests that Congress take steps to obtain information before compulsory pro-

329. Landis, *supra* note 28, at 177.

330. U.S. CONST. art. I, § 8, cl. 1.

331. See generally BRANDON MURRILL, CONG. RSCH. SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 1 (2016).

332. F.W. Taussig, *The Tariff History of the United States (Part I)*, TEACHING AMERICAN HISTORY, <https://teachingamericanhistory.org/document/the-tariff-history-of-the-united-states-part-i/> [<https://perma.cc/93FG-QFM9>] (last visited Jan. 28, 2023).

333. Landis, *supra* note 28, at 177.

334. *Watkins*, 354 U.S. at 187.

335. Landis, *supra* note 28, at 177.

336. See EBERLING, *supra* note 276, at 94–95.

cess is sought, this practice departs from the scope of the modern power, which, under *Eastland*, does not appear to require legislators to do such a thing.³³⁷

Finally, one last observation worth noting concerns the expanded use of compulsory process, sometimes with oversight by fewer people. The first part of this proposition concerns expanded use of the subpoena power, at least when measured against some accounts of its earliest exercises.³³⁸ For example, one committee “served” in excess of 8,000 subpoenas between 1957 and 1959.³³⁹ Others, in more recent years, have issued hundreds.³⁴⁰ Of course, investigations do not always involve a high volume of subpoenas. But the idea that the scope of the modern exercise may greatly dwarf the early power might signal expansion.

Relatedly, practices concerning supervision over compulsory process have ostensibly shifted.³⁴¹ Notably, “there has been a move away from formal initiations of investigations[;]” further, with increased occurrence, committees are delegated subpoena power, and that power can be, but is not always, delegated to committee chairs.³⁴² A couple of chairs have leveraged this power to unilaterally issue numerous subpoenas,

337. Under *Eastland*, “the courts [cannot] interfere with a subpoena concerning a legitimate area of congressional investigation.” *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976).

338. See *supra* note 324 (sources providing overview of some early investigations); cf. Michael Stern, *Upcoming Supreme Court Case Threatens Congressional Subpoena Power*, LAWFARE (June 20, 2023), <https://www.lawfaremedia.org/article/upcoming-supreme-court-case-threatens-congressional-subpoena-power> (“For the first century or so, Congress issued subpoenas rarely[.]”).

339. HAMILTON, *supra* note 5, at 63.

340. See *id.*; *Subpoena Precedent*, CO-EQUAL, <https://www.co-equal.org/guide-to-congressional-oversight/subpoena-precedent> [<https://perma.cc/E96L-E74U>] (last visited Jan. 28, 2023).

341. Wright, *supra* note 5, at 450.

342. See *id.*; HAMILTON, *supra* note 5, at 209.

one of them more than 1,000.³⁴³ The foregoing seems at least in tension with the notion that House investigatory power delegation occurred “[v]ery sparingly” early on and the idea that “[w]itnesses were not to be produced save where the House had previously ordered an inquiry[.]”³⁴⁴

All told, the foregoing shows a broadening of the investigatory power and, thus, ostensible growth, suggesting that the implied power may not be Necessary and Proper as presently characterized. Before proceeding, it is important to address a potential counterargument. Some may argue that using early Congressional practices as a baseline from which expansion is measured is methodologically self-serving.³⁴⁵ This author disagrees. A historical baseline set any earlier is improper, since it would not, as others have highlighted, adequately account for Article I’s departure from Parliamentary and colonial legislative practices.³⁴⁶ The Framing “represented a break with the past” and greatly shaped the way people perceived legislatures and government more generally.³⁴⁷ Thus, “[i]t is . . . risky . . . to rely upon Parliamentary practice or what occurred among colonial legislatures as a guide to understanding whether the post-1776 American government possessed authority to engage in a particular activity.”³⁴⁸ On the other hand, later dates may suffer from bootstrapping issues. If there had been an improper expansion, measuring the expanded power from a time in which power had already expanded would not recognize the initial, earlier expansion.

343. *Subpoena Precedent*, *supra* note 340.

344. EBERLING, *supra* note 276, at 34; Wright, *supra* note 5, at 450.

345. Cf. Stern, *supra* note 322.

346. EBERLING, *supra* note 276, at 97; *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2039-40 (2020) (Thomas, J., dissenting); O’Neill, *supra* note 27, at 2457.

347. See O’Neill, *supra* note 27, at 2457.

348. *Id.*

ii. The Pre-Jurisdictional Power

The juncture at which courts assess the validity of implied power exercises may raise additional concerns about expansion. When courts review the validity of Congressional subpoenas, exercises of the implied power, they must arguably draw inferences about the nature of the implied power to conclude that it is permissibly linked to Congress's limited legislative ambit.³⁴⁹ Below, this Note details how an understanding of the investigatory power that is too wide and deferential could leave room for error, permitting Congress to use the implied power to advance powers not enumerated,³⁵⁰ potentially evincing growth.

First, to validate a Congressional inquiry, a court must infer that an investigation will be generally legislatively productive.³⁵¹ As suggested in *McGrain*, Congress may compel participation only "on [subjects] which legislation could be had[.]"³⁵² In other words, courts must infer that Congress is not necessarily inquiring just to inquire or other impermissible purposes;³⁵³ its investigation should help it further the legislative mission in some conceivable manner.³⁵⁴ However, not all investigations produce legislation,³⁵⁵ nor do they need to.³⁵⁶ The Court has explained that "[t]he very nature of the investigative function—like any research—is that it takes the

349. See generally Shapiro, *supra* note 4, at 537–39, 542, 550–53.

350. Cf. *id.* at 549, 553 ("[T]he Court would have to strike down all investigations if it realistically examined them for legislative and nothing but legislative purpose.").

351. See *id.* at 535–38, 550–52.

352. *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

353. Shapiro, *supra* note 4, at 536–38, 548.

354. See *id.* at 538, 548, 550; see also Kent B. Millikan, *Limitations on the Power of Congressional Investigations*, 8 WM. & MARY L. REV. 630, 631–32 (1967).

355. HAMILTON, *supra* note 5, at 137.

356. LOUIS FISHER, CONG. RSCH. SERV., RL31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 6 (2003).

searchers up some ‘blind alleys’ and into nonproductive enterprises.”³⁵⁷ And Congress need not identify an “end result” or that any putative end result actually falls within its limited legislative authority.³⁵⁸

To the extent that Congress exclusively and uniformly acts within its granted “legislative Powers[,]”³⁵⁹ the foregoing phenomenon is not problematic because it could be said that compulsory process, the implied power, is categorically used in service of Congress’s legislative powers. In other words, there is a close connection between the implied power and legislative power more generally. A problem arises, however, to the extent Congress might use its implied power to service ends, in addition to legislative ones, that do not squarely fall within its limited legislative authority.³⁶⁰ This potential delta—the difference between implied power exercises that are exclusively connected to legislative ends and those that are not—may be attributed to permissive judicial treatment of the implied power; in some cases at least, the indicia of non-legislative purposes can be reasoned away or ignored.³⁶¹ For example, courts may not examine “the motives alleged to have prompted” a legislative exercise, notwithstanding an alleged

357. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 509 (1975). Congressional investigations need not ultimately produce legislation, and even prior evidence of a fruitless topic area does not “invalidate . . . continued authorization.” *Gross, supra* note 165, at 409.

358. *Eastland*, 421 U.S. at 509.

359. U.S. CONST. art. 1, § 1.

360. See Shapiro, *supra* note 4, at 542–48, 553–54; *Gross, supra* note 165, at 413; Gilligan, *supra* note 161, at 619 n.7; Warren, *supra* note 162, at 43–44; BARTH, *supra* note 6, at 22–23, 70–71; see generally ROBERT K. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 6–7 (1952); Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining Our Vital Institutions?*, 31 SUFFOLK U. L. REV. 825, 827–28 (1998); Reid P. F. Stuntz, *Congressional Oversight and Investigations 101*, 20 THE HEALTH LAW. 24, 25 (2008).

361. See Shapiro, *supra* note 4, at 538–39, 549, 550–53; HAMILTON, *supra* note 5, at 116–17.

“unworthy purpose[.]”³⁶² As suggested above, outcome does not matter: “the legitimacy of a congressional inquiry [is not] to be defined by what it produces.”³⁶³ And “[t]he wisdom of congressional approach or methodology is not open to judicial veto.”³⁶⁴ Again, if courts hold Congress to its legislative authority, the foregoing is unlikely an issue. But to the extent that deferential treatment of the power converts the power into something more—something that lets Congress act beyond the legislative authority, even if Congress has a legislative tether, there might be growth.

Second, even if Congress has a legislative purpose, a court must arguably infer that the ends of compulsory process will fall within Congress’s enumerated authorities. In *McGrain*, the Court tethered the investigatory power to Congress’s general legislative power,³⁶⁵ which is not an enumerated power.³⁶⁶ Article I, Section 1 provides, in relevant part, that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States[.]”³⁶⁷ Article I suggests that Congress has no

362. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 508–09 (1975).

363. *Id.* at 509.

364. *Id.*

365. *McGrain v. Daugherty*, 273 U.S. 135, 161, 174–75 (1927).

366. See Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1383 (2005).

367. U.S. CONST. art. 1, § 1.

general plenary lawmaking power,³⁶⁸ only authority “expressed in the text of the written Constitution.”³⁶⁹ Thus, Congressional action must fall “within Congress’s . . . jurisdiction”—an enumerated power—for it to comply with the Necessary and Proper Clause; otherwise, the Clause would provide an end-run around or impermissibly expand Congress’s limited legislative ambit.³⁷⁰ While *McGrain* may not have tethered the investigatory power to an enumerated power, it at least required a connection between the implied power and topics “on . . . which legislation could be had[,]”³⁷¹ ostensibly requiring courts to infer that an inquiry is tethered to legislative ends that fall under an enumerated power (e.g., an area Congress may permissibly legislate).

The dilemma here is similar to the one stated above. Courts have some tools that let them approximate whether Congress is acting within its authority. For instance, a court may look to a committee’s general mandate or prior Congressional interest in an area.³⁷² At the end of the day, though, the ultimate product of compulsory process is forthcoming and unknown. It seems contrary to the idea of implied and enumerated powers to permit Congress to exercise implied power in service of some legislative power that ultimately exceeds Congress’s

368. See *United States v. Lopez*, 514 U.S. 549, 566 (1995); William N. Eskridge, Jr. & Neomi Rao, *Article I, Section 1: General Principles*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/749> [<https://perma.cc/CWW5-JFLZ>] (last accessed Jan. 28, 2023).

369. Randy E. Barnett, *The Continuing Relevance of the Original Meaning of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 1, 4 (2017); Lawson, *supra* note 366, at 1383; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

370. See Lawson & Granger, *supra* note 15, at 271 (emphasis omitted); see also *id.* at 324; 330–31.

371. *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

372. *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 135–36 (D.D.C. 2016).

enumerated powers.³⁷³ But this Note offers two ways in which this phenomenon could arise.

The first way concerns putative error at the ‘pre-jurisdictional’³⁷⁴ juncture—on a motion to quash, when implied power exercises are evaluated. Suppose Congress uses its implied power to explore whether it can legislate in a given area and, later, ultimately concludes (or a court concludes) that it lacks power to legislate. Even if a court initially, correctly found that Congress could legislate in the investigative subject area, the implied power has perhaps, in that case, practically attached to an end that cannot be had, a non-enumerated end. In this situation, the notion that Congress could use the implied power in service of non-enumerated authority would appear to grow Congressional authority.

Separately, the phenomenon could also arise where Congress acts “in an area where legislation would apparently be unconstitutional” but where a court generously infers that Congress may act notwithstanding—for example, by reasoning that “the committee’s findings may result in repeal of unconstitutional legislation already existing[.]”³⁷⁵ To the extent that Congress is acting in area that exceeds its enumerated powers, it may be said that the implied power expands power to the extent that it is used in connection with non-enumerated authority. This notion holds true even if Congress’s objective is a laudable one, like trying to act within its powers by repealing unconstitutional legislation. The foregoing illustrates some circumstances under which the implied power may grow Congressional power.

373. See generally Lawson & Granger, *supra* note 15, at 271, 324, 331.

374. See generally *id.* at 271.

375. Gross, *supra* note 165, at 409; see also *United States v. Dennis*, 72 F. Supp. 417, 420 (D.D.C. 1947).

Finally, a court must arguably infer that a witness has actually done a thing that allows Congress to exercise authority over him. The Court clarified in *NFIB* that “[t]he individual [healthcare] mandate” was impermissible, in part, because it “vest[ed] Congress with the extraordinary ability to create the necessary predicate to the exercise of . . . [Congress’s express commerce] power.”³⁷⁶ In other words, Congress could not manufacture its own authority by forcing people to engage in an activity that had to occur before Congress could act. This phenomenon could arise in the investigations context if a witness was not actually engaged in the activity over which Congress asserts authority, but where Congress sought to compel the witness’s participation anyway. In this scenario at least, the only basis for control over the witness would be the activity that Congress has made the witness engage in. This Note understands *Eastland* to require some facts suggesting that a witness may have relevant information,³⁷⁷ which could be understood to approximate a witness’s connection to the Congressional forum (e.g., whether the witness has engaged in the activity over which Congress has authority). However, to the extent *Eastland* falls short of requiring a definite connection to the Congressional forum, it seems at least possible for Congress to achieve what *NFIB* prohibited if it brought someone within its ambit who had not first performed some activity under Congress’s powers. This Note appreciates, however, that this theory is novel and speculative.

iii. The Investigatory Power as a “Great Power”

Professor William Baude has observed that “some powers are so great, so important, or so substantive, that we should

376. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012).

377. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 506 (1975).

not assume that they were granted by implication, *even if* they might effectuate an enumerated power."³⁷⁸ The investigatory power, at least as the Court articulated in *McGrain*, may be one such "great power."³⁷⁹

First, the use of non-enumerated, auxiliary authorities³⁸⁰ suggest that the investigatory power might stand alone. Subpoenas and contempt prop up the investigatory power; if Congress cannot demand people to participate, and enforce those demands, then its power to inquire into things is effectively nullified.³⁸¹ The foregoing phenomenon is somewhat analogous to the enumerated power to "lay and collect Taxes[.]"³⁸² As Professor Baude suggests, the taxing power could have been implied to effectuate enumerated federal programs—yet, the power was so significant that it had to be enumerated.³⁸³ The investigatory power shares some similarities with the taxing power. Both powers permit the government to extract something from private people "without individualized consent[.]"³⁸⁴ So, both powers include a core power and an accompanying enforcement mechanism.³⁸⁵ Article I enumerates the power to request money from the people. With the Necessary and Proper Clause's help, Congress can, through the taxing power, implement "all known and appropriate means of effectually collecting . . . revenue[.]"³⁸⁶ But Article I does not enumerate a power to request information

378. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749 (2013).

379. *See id.*

380. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

381. *See* BARTH, *supra* note 6, at 17; GARVEY *supra* note 228, at 2.

382. U.S. CONST. art. I, § 8, cl. 1; *see generally* Baude, *supra* note 378, at 1756.

383. *See* Baude, *supra* note 378, at 1754–56.

384. *Id.* at 1757.

385. *See generally id.* at 1750

386. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281 (1856).

from people. So, compulsory power in service of the investigatory power tethers itself to non-enumerated authority. In other words, the investigatory power involves compounded implied authorities where the second order authority involves compulsory process that gives effect to the first order authority. This phenomenon could suggest that the investigatory power is, a great power, meaning it should have been enumerated.³⁸⁷

Second, the investigatory power appeared to be a fairly important parliamentary mechanism, which may suggest that it is a great power.³⁸⁸ Nearly a century before the Framing, “Parliament had numerous committees in place investigating government operations.”³⁸⁹ William Pitt famously opined that Parliament was duty-bound “to inquire into every step of public management[.]”³⁹⁰ Just before the American Founding, James Wilson famously remarked, in reference to the House of Commons, that members served as “grand inquisitors of the realm. The proudest ministers . . . have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults.”³⁹¹ By 1827, it was suggested in the House that “[t]he common law of Parliament . . . dictate[d] that the legislature *must* possess the power . . . to procure the information it needed[.]”³⁹² The foregoing pronouncements

387. Further, as Professor Gary Lawson highlights, the absence of text granting Congress compulsory power is significant and bolsters the argument above, especially since compulsory process is expressly granted elsewhere in the Constitution. See Lawson, *supra* note 366, at 1384.

388. See Baude, *supra* note 378, at 1756 (looking to parliamentary practice).

389. Marshall, *supra* note 9, at 785.

390. Pitt, *supra* note 30, at 84.

391. JAMES WILSON, 3 THE WORKS OF THE HONOURABLE JAMES WILSON 219 (1804).

392. 3 HINDS' PRECEDENTS § 1816 (1907) (emphasis added).

suggest that the inquiry power was a vital attribute of Parliament's institutional role, and it is doctrinally important that Parliament's compulsory power was not enumerated.

2. An Improper Investigatory Power

In *M'Culloch*, Justice Marshall explained that "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."³⁹³ *M'Culloch* raised what is now a perennial question: which ends are off-limits? In *Federalist* 33, Hamilton explained that laws that "usurp[]" state authority are "not granted by the Constitution."³⁹⁴ The Supreme Court appeared to inexplicitly recognize Hamilton's proposed boundary line in *Printz* and *Comstock*, evincing that modern jurisprudence is sensitive to state interests.³⁹⁵ Furthermore, it has been suggested that Congressional action may not acquire executive or judicial functions or violate rights held by the people.³⁹⁶ Indeed, as the Supreme Court succinctly stated in *NFIB*, "laws that undermine the structure of government established by the Constitution" fall beyond the Clause's ambit.³⁹⁷

393. *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

394. THE FEDERALIST NO. 33, *supra* note, 32 at 205 (Alexander Hamilton); *see generally* Lawson & Granger, *supra* note 15, at 271, 328, 330–32.

395. *Printz v. United States*, 521 U.S. 898, 924 (1997); *United States v. Comstock*, 560 U.S. 126, 144 (2010).

396. *See* Lawson & Granger, *supra* note 15, at 271, 297, 324, 328–29, 333–34; *see also* *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 96 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998); *Town of Greece v. Galloway*, 572 U.S. 565, 604–10 (2014) (Thomas, J., concurring); *cf.* *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 559 (2012).

397. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559; *see also* *United States v. DeLeon*, No. CR 15-4268 JB, 2018 WL 4100949, at *6 (D.N.M. Aug. 28, 2018).

i. Popular Sovereignty

In *Federalist* 33, Hamilton explained “that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last.”³⁹⁸ However, “[i]f the federal government” exceeds “the just bounds of its authority and make[s] a tyrannical use of its powers, the people . . . must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution[.]”³⁹⁹ In other words, the people may ultimately decide what is Necessary and Proper by electing representatives who will or will not wield their power in a manner consistent with the electorate’s views. If the people believe that Congress should not exercise their power in a certain manner, they will ostensibly elect or pressure their representatives to not act in that manner—a position most recently argued by *Mazars* amici who suggested that if “legislative abuses occur, it is up to the voters to impose their will on their elected representatives[.]”⁴⁰⁰

Modern Congressional investigatory power may upset “the structure of government established by the Constitution”⁴⁰¹ in some contexts by usurping the people’s will and voice. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴⁰² Some have suggested that “to the People” refers to

398. THE FEDERALIST NO. 33, *supra* note 32, at 203 (Alexander Hamilton).

399. *Id.*

400. Brief of Niskanen Center et al. as Amici Curiae in Support of Respondents, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2019) (Nos. 19-715, 19-760), 2020 WL 1434017, at *17.

401. *Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 559 (2012).

402. U.S. CONST. amend. X.

popular sovereignty, or “delegations of power from the sovereign to the sovereign’s agents” — the people to their government representatives.⁴⁰³

While *McGrain* left the people’s ability to elect their representatives untouched, the mechanics of the modern power may create significant distance between the people’s voice and the exercise of power, making it difficult, at least in some contexts, to say that the people agreed to the exercise. Although members approving rules and resolutions have, in theory, tacitly consented to a committee’s future actions by investing them with subpoena powers, compulsory process may fall under the purview of single or small clusters of legislators.⁴⁰⁴ For example, in *Watkins*, the Court suggested that “committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony.”⁴⁰⁵ Indeed, even the disputed action before the Court in *Watkins* arose out of a request by only two legislators.⁴⁰⁶ Even today, not all committees demand majority approval before subpoenas are issued.⁴⁰⁷

The notion that only a few legislators may ultimately determine how Congressional power is wielded over individuals greatly distinguishes the investigatory power from other implied powers, whose exercise has been challenged only after

403. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1924, 1926 (2008).

404. *Watkins v. United States*, 354 U.S. 178, 200–01 (1957); *Subpoena Precedent*, *supra* note 340; Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 BYU J. PUB. L. 37, 38–40 (1992).

405. *Watkins*, 354 U.S. at 200–01.

406. *See id.* at 201.

407. JANE A. HUDIBURG, CONG. RSCH. SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS 5–6 (2021).

such actions have passed through the legislative process,⁴⁰⁸ involving committee deliberation, approval in both legislative chambers, and executive authorization.⁴⁰⁹ The attenuation between the people's voice and the exercise of power over them might suggest that the current structure of Congressional investigations conflicts with principles of popular sovereignty, "upset[ting] the balance of" power between the people and the federal government⁴¹⁰ and "undermin[ing] the structure of government established by the Constitution[.]"⁴¹¹

ii. Protections for the Individual

The modern power may also conflict with the Constitution's "spirit[.]"⁴¹² Anti-Federalists were deeply concerned that officials would not only abuse "power, when they ha[d] acquired it . . . [by] gratifying their own interest and ambition," but that the people would lack the political will power to stymie the abuse.⁴¹³ As suggested above, Congress may investigate any matter as long as there is some legislative tether.⁴¹⁴ Therefore, legislators may compel participation—interfere with the individual's liberty interests—even if political gain or self-interest conceivably make up a great portion of the reason for compulsion; in other words, legislators' predominating interests

408. See, e.g., *United States v. Comstock*, 560 U.S. 126, 130 (2010); *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 540 (2012); *United States v. Kebodeaux*, 570 U.S. 387 (2013).

409. *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> [<https://perma.cc/K5AX-KNVT>] (last visited Jan. 29, 2023).

410. BARTH, *supra* note 6, at 12.

411. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559.

412. *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

413. BRUTUS NO. 1, in *THE ANTI-FEDERALIST PAPERS*, *supra* note 46, at 292–93.

414. See *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

other than legislation may conceivably⁴¹⁵ subordinate the individual's liberty interests.

The phenomenon detailed above conflicts with Founding skepticism toward legislative power and the notion that the people reign supreme over their government,⁴¹⁶ suggesting that the modern power's ambit might be improper because it tips the scale too heavily in favor of the legislature.⁴¹⁷ Indeed, Hamilton suggested that the people reigned supreme over the legislature, remarking that if the people's will conflicted with legislative action, courts should prioritize "the intention of the people to the intention of their agents[,]" or the people's elected representatives.⁴¹⁸ Others agreed that the people reigned supreme,⁴¹⁹ including James Wilson who notably remarked during the Convention "that the supreme, absolute and uncontrollable authority, *remain[ed]* with the people[.]" not the legislative branch.⁴²⁰ Because the investigatory power might permit individual legislators to "substitute their *will* to

415. Shapiro, *supra* note 4, at 543, 546; Gilligan, *supra* note 161, at 619 n.7; Zeisel & Stamler, *supra* note 161, at 263, 268, 297; Maslow, *supra* note 162, at 840; Fitzpatrick, *supra* note 157, at 17; Auchincloss, *supra* note 158, at 177; Warren, *supra* note 162, at 43-44.

416. See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).

417. See BARTH, *supra* note 6, at 12.

418. THE FEDERALIST NO. 78, *supra* note, 32 at 467 (Alexander Hamilton).

419. Andrew G. I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1072-75 (2014).

420. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 456 (Jonathan Elliot 2 ed., 1901), *quoted in Mazars*, 140 S. Ct. at 2038 (Thomas, J., dissenting).

that of . . . constituents[.]”⁴²¹ the power may conflict with the Constitution’s “spirit”⁴²² and improper.⁴²³

iii. The Forgotten Executive

McGrain ignored key Necessary and Proper Clause language, which further disturbs the relationship between Congress and the people. As Professor Lawson identified, the Necessary and Proper Clause only extends to “laws[.]” meaning “Congress has power to enact *legislation* (*subject to presentment*) that is ‘necessary and proper for carrying into Execution the foregoing Powers[.]’”⁴²⁴ Yet, Congressional investigations and subpoenas can skirt presentment—they may be governed by rules and resolutions.⁴²⁵ This phenomenon is troubling to the extent that it deprives the executive of effectuating her constitutional role as a check on legislative power.⁴²⁶ Indeed, through the presentment process, the executive ordinarily gets to decide how much coercive power the federal government may permissibly exercise over people. A law imposing too harsh of a penalty may be vetoed. Distance from the executive’s voice, thus, may be a detriment to the people, who may benefit if the executive disagrees with the manner in which Congress wields its authority. And, ultimately, it may also be a detriment to the executive, who loses her say.

421. THE FEDERALIST NO. 78, *supra* note, 32 at 467 (Alexander Hamilton).

422. *M’Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

423. Justice Thomas appears to inexplicitly suggest this point when discussing the difference between Parliamentary and Congressional power. See *Mazars USA, LLP*, 140 S. Ct. at 2038 (Thomas, J., dissenting).

424. Lawson, *supra* note 366, at 1385 (emphasis added) (quoting U.S. CONST. art. 1, § 8, cl. 18).

425. HUDIBURG, *supra* note 407, at 7–11, 17–22.

426. *Cf.* Lawson, *supra* note 366, at 1385 (“The presentment power is a sensible and natural way for presidents to protect executive prerogatives against legislative overreaching.”).

3. An Unnecessary Investigatory Power

This Note does not dispute the proposition that “legislative judgment” may be “impossible without access to information.”⁴²⁷ However, compelling Congressional interests do not necessarily justify all means.⁴²⁸ “Necessary”⁴²⁹ has at least two plausible original meanings, and both govern how Congress may wield non-enumerated power to achieve its ends.

To the extent that Madison’s interpretation of the Necessary and Proper Clause is dispositive of the Clause’s original meaning, “Necessary”⁴³⁰ “means *really* necessary in the sense that the end cannot be performed in some manner that does not infringe the retained liberties of the people.”⁴³¹ Indeed, Congressional action “would have resulted by unavoidable implication” principally because acting in a certain auxiliary manner was perhaps the sole way to achieve Congress’s objective.⁴³²

In contrast, “Necessary”⁴³³ may mean “no more than that one thing is convenient, or useful, or essential to another.”⁴³⁴ Justice Marshall suggested that “employ[ing] the means necessary to an end . . . is generally understood as employing any means *calculated to produce* the end, and not as being confined to those single means, without which the end would be entirely unattainable.”⁴³⁵ The term’s contemporary meaning aligns most closely with Justice Marshall’s interpretation;

427. Marshall, *supra* note 9, at 799.

428. *Cf. Mazars*, 140 S. Ct. at 2036.

429. U.S. CONST. art. I, § 8, cl. 18.

430. *Id.*

431. Barnett, *supra* note 186, at 751.

432. See Statement of James Madison, reprinted in CLARKE & HALL, *supra* note 184, at 42.

433. U.S. CONST. art. I, § 8.

434. *M’Culloch v. State*, 17 U.S. 316, 413–14 (1819).

435. See *id.* (emphasis added).

“Necessary”⁴³⁶ action is simply that which is “really calculated to attain the end[.]”⁴³⁷ Put differently, an action is necessary and therefore valid under the modern interpretation if the means are “reasonably adapted” to fit putative Congressional ends.⁴³⁸

i. A High-Level Analysis

The Court’s current articulation may not be meaningfully conceptualized to implement Congress’s lawmaking powers due to its potential over-inclusivity. The *Barenblatt* court suggested that “[t]he scope of the power of inquiry, in short, is as penetrating and far-reaching as the *potential* power to enact and appropriate under the Constitution.”⁴³⁹ To the Court’s credit, it is not difficult to imagine a scenario where a large investigatory ambit *may* be calibrated to produce actionable information. For example, uncovering the influence of crime within different sectors might conceivably require Congress to interview many to gauge whether and to what extent such activity had pervaded institutions or organizations.⁴⁴⁰ However, it is also not difficult to imagine a scenario in which Congress need not have an ability to reach every matter it could possibly legislate on or all members of American society. For example, the 1792 St. Clair investigation sought to examine a military failure; in other words, the subject under investigation was a discrete happening that ostensibly had a finite

436. U.S. CONST. art. I, § 8.

437. *Burroughs v. United States*, 290 U.S. 534, 548 (1934), *quoted in* *United States v. Comstock*, 560 U.S. 126, 135 (2010).

438. *United States v. Darby*, 312 U.S. 100, 121 (1941), *quoted in* *Comstock*, 560 U.S. at 143.

439. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

440. *See generally* G. Robert Blakey & Ronald Goldstock, “*On the Waterfront*”; *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 341 (1980).

number of causal tethers.⁴⁴¹ Thus, it would have been odd to vest Congress with a sweeping power to reach most for that investigation. In other words, setting the power at its *most* inclusive ambit would unlikely have been meaningfully calibrated to achieve Congress's end objective.

The Court's articulation of the implied contempt power further suggests that the investigatory power need not be at its widest and most expansive ambit to be effective or necessary. Indeed, the Court emphasized in *Anderson* that the contempt power could only be exercised in "the least possible [manner] adequate to the end proposed[.]"⁴⁴² Thus, it does not follow that the investigatory power, which entails compulsory process, must also be at its widest and most permissive ambit.

ii. If not Congress, then who?

Madison's view may invalidate Congressional interference where information could be obtained through less restrictive or intrusive means.⁴⁴³ For example, Congress would unlikely be able to obtain information from a witness where Congress could obtain the same information through voluntary compliance, the collective knowledge and experience of its members,⁴⁴⁴ information obtained through public reports or litigation, and information generally within the public domain. Because Congress may achieve its ends by relying on less intrusive means, it is unlikely necessary under Madison's view,

441. SEE *PORTRAITS in Oversight: General St. Clair's Defeat*, LEVIN CTR. HOME, <https://www.levin-center.org/congress-first-investigation-general-st-clairs-defeat/>.

442. *Anderson v. Dunn*, 19 U.S. 204, 231 (1821) (emphasis omitted).

443. See generally Barnett, *supra* note 186, at 751. In some ways, the *Mazars* majority inexplicitly embraced this view by proscribing "access to the President's personal papers when other sources could provide Congress the information it needs." *Mazars*, 140 S. Ct. at 2036.

444. 4 Cong. Debates 863 (Statement of Wright) ("[P]robably some gentleman may supply" the information sought).

in many cases, to exercise compulsory power over individuals to reach the same result.

iii. If not the target, then who?

Under *Eastland*, Congress likely needs to show why it chose the witness it did, but, as suggested above, a witness's connection to an inquiry may be attenuated. As long as a witness could have relevant information in their possession, they may be compelled to participate. But this is not meaningful calibration.

First, the nature and value of the putative information in the witness's possession matters. Highly germane information may support interference more than less relevant information. New information may prove more valuable than that which is cumulative or redundant. And highly sensitive information may strengthen an opposing interest in avoiding compulsion.

Second, the witness's nexus to the inquiry matters. Because investigations involve interference with a subject's liberty interests, greater attenuation may suggest that compulsory exercise is not needed because there may be others, more closely related, who might supply Congress with the information it needs. Relatedly, a subject who Congress can show was directly involved in a controversy might expect to be the subject of compulsory exercise perhaps more than someone uninvolved, which speaks to the strength of the private interest in avoiding compulsory process.

Third, Congressional interests matter. Congressional need may not justify the intrusion or interference, especially where Congressional interests are weaker and the subject is more distantly related to the inquiry. An investigation's overall am-

bit and breadth matters here. Taking a step back from the witness before the court, it is appropriate to ask Congress why it needs to exercise compulsory power over large groups of people to obtain its ends. Weak ends may justify less interference. Put differently, the collective cost of compulsory power over many may not justify the ends sought. All things considered, *McGrain* and *Eastland* do not adequately appreciate the foregoing considerations.

4. An Inherent Investigatory Power?

Some have suggested that Congressional investigatory power “is inherent in” Congress’s general lawmaking power.⁴⁴⁵ For example, in *Watkins*, the Supreme Court stated that “[t]he power of the Congress to conduct investigations is inherent in the legislative process.”⁴⁴⁶ The distinction between inherent and implied authority is potentially significant. To the extent that the investigatory power is inherent, the power may not need to comply with the Necessary and Proper Clause’s commands.⁴⁴⁷

This Note dispenses with the inherent power argument on three related grounds. First, inherent and implied powers

445. Wright, *supra* note 5, at 414; Peterson, *supra* note 93, at 1412. Inherent powers are not necessarily tied to Constitutional text. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 6 (2002); Simon P. Hansen, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159, 1188 (2013).

446. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

447. Robert Longley, *What are Inherent Powers? Definition and Examples*, THOUGHTCO. (June 23, 2021), <https://www.thoughtco.com/inherent-powers-definition-and-examples-5184079> [<https://perma.cc/49RM-WLQG>]; WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 35:3 (3rd ed.).

may ultimately be one-and-the-same,⁴⁴⁸ meaning the analysis detailed above is undisturbed even if the investigatory power is characterized as inherent, rather than implied. Second, to the extent that implied and inherent powers are distinct, the investigatory power is presently characterized as an “auxiliary to” Congressional lawmaking power, suggesting that the Court understands that the investigatory power is implied rather than inherent.⁴⁴⁹ In other words, notwithstanding *Watkins*’ use of “inherent[,]”⁴⁵⁰ the Court nevertheless considers the investigatory power an implied power.⁴⁵¹

Finally, it is eminently unclear how the investigatory power is, as a matter of course, *inherently* as capacious as that prescribed in *McGrain*. As suggested in Part I, the investigatory power undisputedly descends from Parliamentary practice.⁴⁵² But as Justice Thomas appeared to suggest in his *Mazars* dissent, there is good reason to be skeptical of arguments tethering Congressional power to Parliamentary power because, unlike Parliament, Congress possesses limited, enumerated authority,⁴⁵³ and it would be odd to assume that Congress inherited such a consequential power.⁴⁵⁴

448. David M. Driesen & William C. Banks, *Implied Presidential and Congressional Powers*, 41 CARDOZO L. REV. 1301, 1302 n.2 (2020), Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 40 & 40 n.10 (2008), cited in Driesen & Banks, *supra*, at 1302 n.2.

449. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), quoted in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).

450. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

451. *Mazars*, 140 S. Ct. at 2031.

452. Berger, *supra* note 27, at 866.

453. *Mazars*, 140 S. Ct. at 2038 (Thomas, J., dissenting); see Lawson, *supra* note 366, at 1382.

454. See Lawson, *supra* note 366, at 1384 (“[I]t would require absurdity of a very high level to infer the existence of a power as potent as the power to issue and enforce subpoenas.”)

IV. A MAZARS-TYPE APPROACH

To stymie further abuse and restore the “balance of powers”⁴⁵⁵ between Congress and the people,⁴⁵⁶ this Note urges the Court to adopt the following three-part, *Mazars*-inspired approach⁴⁵⁷ that is administrable, tethered to Founding-era principles, and carefully balances Congressional need with individual liberty.

A. *Justification & Goals*

Any approach must be administrable, recognize Congress’s reliance interests, and appreciate the Court’s potential concerns about stifling legitimate Congressional action. First, this Note purposefully crafts the doctrine below to be easily administrable by lower courts. To its credit, the *McGrain* standard is easy to apply: if the inquiry is tethered to potential legislative action, the inquiry is generally valid.⁴⁵⁸ Thus, without an equally administrable standard, the Court might be reluctant to abandon *McGrain*.

Second, any doctrinal approach must recognize legitimate Congressional reliance interests.⁴⁵⁹ Although this Note thinks *McGrain* greatly erred, *McGrain* is longstanding, well-established precedent. Thus, the Court may be reluctant to overturn *McGrain* or completely stymie access to information and people that Congress may presently reach. Therefore, this Note accounts for Congressional reliance interests by declining to categorically abridge Congressional access to certain people or information. Furthermore, this Note recognizes

455. BARTH, *supra* note 6, at 12.

456. *Cf. Mazars*, 140 S. Ct. at 2037.

457. *See id.* at 2035.

458. *See McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

459. *Mazars*, 140 S. Ct. at 2031–33.

Congressional need. Although Part III casts doubt on whether much of *McGrain* is justifiable under the Necessary and Proper Clause, this Note does not dispute the idea that Congress has a compelling interest in obtaining information through compulsory processes in many cases.⁴⁶⁰

Finally, the Court may be concerned about stifling Congressional action, in part, because Congressional action represents the people's will.⁴⁶¹ However, any potential concern is significantly mitigated in the instant context because of the investigatory power's unique attenuation from the people's will. Still, the solution detailed below is crafted with deference in mind to alleviate concerns that the court might stymie the people's will.

B. Mazars

The solution detailed in this Note draws heavily from the doctrine recently set forth in *Mazars*. While the *Mazars* majority did not expressly couch its standard in Necessary and Proper Clause jurisprudence, the majority appeared to implement Necessary and Proper Clause concepts.⁴⁶² Because the implied investigatory power must comport with Necessary and Proper Clause jurisprudence,⁴⁶³ this Note takes some of the doctrinal principles offered in *Mazars* and couches them in Necessary and Proper Clause terms. In other words, it repurposes and synchronizes some of the doctrinal concepts offered in *Mazars* with Necessary and Proper Clause jurisprudence. Furthermore, this Note adds jurisprudential components *Mazars* may have missed, and fleshes out some of the vague and amorphous standards detailed in *Mazars*.

460. *See id.* at 2033.

461. Barnett, *supra* note 186, at 750.

462. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020).

463. Clark, *supra* note 172, at 542.

C. *The Doctrine*

Procedural Posture. Congress exercises its investigatory power by issuing subpoenas.⁴⁶⁴ Therefore, courts would most likely apply the doctrine detailed below to evaluate Congressional investigatory power on a motion to quash.⁴⁶⁵

Step 1. Once a witness has moved to quash a subpoena, a lower court reviewing the motion will apply a three-part test to determine whether an investigatory exercise is “Proper.”⁴⁶⁶ A court will ask if the subpoena (1) is tethered to actual, legitimate ends;⁴⁶⁷ (2) does not acquire powers wholly allocated to other branches and does not violate the witness’s rights;⁴⁶⁸ and (3) concerns a subject matter that is connected to a specific enumerated power.⁴⁶⁹

First, courts must ensure that Congress possesses legitimate ends.⁴⁷⁰ Ends verification in Necessary and Proper Clause jurisprudence dates back to *M’Culloch* with Justice Marshall’s pronouncement to “[l]et the end be legitimate, let it be within the scope of the constitution[.]”⁴⁷¹ Thus, consistent with Necessary and Proper Clause jurisprudence, courts should consider Congressional ends.

However, instead of broadly demanding and adjudicating legislators’ subjective intentions, which one author has noted

464. See GARVEY, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE, *supra* note 228, at 2.

465. *Mazars*, 140 S. Ct. at 2028

466. U.S. CONST. art. I, § 8.

467. See Marshall, *supra* note 9, at 815–16; *M’Culloch v. State*, 17 U.S. 316, 423 (1819).

468. See Lawson & Granger, *supra* note 15, at 271, 297, 328–29, 333–34; *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

469. See Lawson & Granger, *supra* note 15, at 271, 324, 330–31; see also *United States v. Comstock*, 560 U.S. 126, 134 (2010).

470. *M’Culloch*, 17 U.S. at 423.

471. See *id.*

“may raise more problems than . . . cure,”⁴⁷² courts might dually require legislators and witnesses to produce indicia of legitimacy and illegitimacy, respectively. As the *Mazars* court suggested, a court might first demand a “detailed . . . legislative purpose[.]”⁴⁷³ A court may then look to other indicia. For example, a court might require Congress to provide a detailed explanation why it chose to subpoena the specific witness before the court. A detailed explanation, as in the legislative purpose context, might show that Congress has not arbitrarily selected the witness. A court might also examine whether a committee has been productive.⁴⁷⁴ A committee that has not acted on the information it has received for a length of time may suggest that it is not operating within a legitimate area.⁴⁷⁵ A court might also consider the class of witnesses previously examined and the nature of the information obtained from prior witnesses. A vast probe into sensitive areas with repeating questions may suggest an impermissible dragnet.⁴⁷⁶ Similarly, witnesses of a certain class that are targeted more often than others might suggest that compulsory process is being used to arbitrarily single some out.

Moreover, a court might require legislators to offer actual, specific examples of legislation that could be conceivably sought from an investigation,⁴⁷⁷ potential questions that the investigators might ask the witness, the investigation’s anticipated completion date, and the number of potential witnesses. Courts might then analyze the foregoing inputs by applying a laugh test: is Congress *really* acting in pursuit of

472. Marshall, *supra* note 9, at 816.

473. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020).

474. *But see* Eastland v. U. S. Servicemen’s Fund, 421 U.S. 491, 509 (1975).

475. *See generally* Zeisel & Stamler, *supra* note 161, at 263, 297.

476. *See generally id.*

477. Wilkinson v. United States, 365 U.S. 399, 410 (1961).

legitimate ends? Or is Congress likely interfering with the witness for other impermissible purposes?

Second, courts should ensure that any potential legislation does not interfere with powers allocated to other branches and does not violate a witness's rights.⁴⁷⁸ Powers exercised in a manner that violates a witness' rights or acquires authority allocated to other branches is clearly "[in]consistent with the letter and spirit of the constitution[.]"⁴⁷⁹ Thus, it is vital to *continue* to apply these standards,⁴⁸⁰ notwithstanding the introduction of a more streamlined doctrine. A revised doctrine could require presentment,⁴⁸¹ or it could use presentment as a factor that might weigh in favor of a finding that Congress has not usurped executive power.

Finally, courts must ensure that investigations are tethered to specific enumerated powers, a requirement for implied powers.⁴⁸² A court might first assess the inquiry's posture: is it connected to existing or pre-existing legislation or is it tethered to prospective action? An inquiry tethered to future unexplored areas may suggest greater attenuation between the compulsory exercise and Congress's authority. Again, Congress may mitigate these concerns by producing examples of legislation connected to the inquiry's subject matter as well as specific examples of legislation it may produce.⁴⁸³ This may help a court infer with greater certainty whether the putative

478. See Lawson & Granger, *supra* note 15, at 271, 297, 328–29, 333–34; *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

479. See *M'Culloch v. State*, 17 U.S. 316, 423 (1819).

480. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020).

481. Lawson, *supra* note 366, at 1372.

482. *United States v. Comstock*, 560 U.S. 126, 134 (2010); see Lawson & Granger, *supra* note 15, at 271, 324, 330–31.

483. See *Wilkinson v. United States*, 365 U.S. 399, 410 (1961); see generally ROSENBERG, *supra* note 26, at 5.

end lies under Congress's authorities. A court might then require Congress to reveal what information it hopes to obtain from the witness before the court, and how that information relates back to the area over which Congress has authority; this would effectively move the pertinence inquiry up to stage of the initial compulsory exercise.⁴⁸⁴ Finally, a court might require Congress to show by a preponderance of the evidence that the witness has, in fact, engaged in the activity under Congress's powers.

Step 2. Assuming that Congress possesses "Proper" ends, courts should then determine whether Congressional means are "Necessary"—that is, the means are "reasonably adapted"⁴⁸⁵ to achieve the proposed legislative end.⁴⁸⁶ Here, a court might require Congress to show by a preponderance of the evidence that the witness possesses the information it suspects the witness to possess.⁴⁸⁷ Actual knowledge may be too restrictive, but modern jurisprudence is too permissive, and this standard will correct for that. A court might then require Congress to show that the information "will advance its consideration of the possible legislation."⁴⁸⁸ In other words, the information the witness possesses will further the legislative mission. A court might also examine whether Congress could obtain the information through less restrictive means.⁴⁸⁹ While compulsion need not be a last resort, Congress should be unable to exercise compulsion when "other sources could

484. See generally ROSENBERG, *supra* note 26, at 5.

485. *United States v. Darby*, 312 U.S. 100, 121 (1941).

486. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035–36 (2020).

487. *Wilkinson v. United States* offered "probable cause," which is awfully generous and leaves much room for error. 365 U.S. 399, 412 (1961).

488. See *Mazars*, 140 S. Ct. at 2036.

489. See generally *id.* at 2035–36.

[or have] reasonably provide [or provided] Congress the information it needs [or needed] in light of its particular legislative objective.”⁴⁹⁰

Step 3. Finally, courts should holistically determine whether Congressional action is “Proper” by balancing Congressional need against the private interest.⁴⁹¹ The Court appeared to recognize the appropriateness of holistic balancing in *Mazars*, suggesting that “courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers,” and that courts should exercise caution when “assess[ing] the burdens imposed on the President by a subpoena.”⁴⁹² Here, a court might determine legislative need by examining the weight behind the compulsory exercise. Congress may demonstrate a weightier need to obtain information from a particular witness if more legislators have agreed to the exercise. Congress may also identify the weight of its interests in play.⁴⁹³ The private witness may strengthen his interest against participating by pointing to evidence that participation may subject him to extraordinary costs, embarrassment, job loss, and so forth. The private witness may strengthen his interest by pointing to an investigation’s holistic reach:⁴⁹⁴ sweeping compulsory process that has produced little may suggest that further compulsory process is unnecessary in his case.

D. Speech or Debate Clause

Some might suggest that Article I’s Speech or Debate Clause bars judicial probing. Article I, Section 6 provides, in relevant

490. *See id.*

491. *See id.* at 2036.

492. *See id.*

493. *See generally id.*

494. *See generally* Zeisel & Stamler, *supra* note 161, at 263.

part, that “for any Speech or Debate in either House,” members of Congress “shall not be questioned in any other Place.”⁴⁹⁵ In *Eastland*, the Court justified its wide deference to Congressional subpoenas on the grounds that the Speech or Debate Clause proscribed a more probing evaluation of Congressional action.⁴⁹⁶ Thus, notwithstanding the analysis detailed in Part III, one could argue that the Speech or Debate Clause conceivably bars the Court from employing the doctrine detailed above. In other words, investigatory costs remain consequences of Constitutional text.⁴⁹⁷

The foregoing argument is likely misplaced for two reasons. First, *Mazars* appeared to deviate from *Eastland* to the extent that it did not appear to extend the Speech or Debate Clause’s protections to challenges brought by the President against some Congressional subpoenas.⁴⁹⁸ Indeed, nowhere in the *Mazars* opinion did the Court discuss the Speech or Debate Clause,⁴⁹⁹ despite *amici* having raised the issue.⁵⁰⁰ Thus, *Mazars* may suggest that the Speech or Debate Clause does not bar judicial probing into pre-compliance Congressional investigatory action.

Second, while this Note reserves an extended discussion of the Speech or Debate Clause’s meaning for a later work, the doctrine detailed in this Note is at least consistent with *Eastland*’s interpretation of the Speech or Debate Clause.

495. U.S. CONST. art. I, § 6.

496. *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975).

497. *See id.*

498. *Mazars*, 140 S. Ct. at 2030–36.

499. *See id.*

500. Brief of Amici Curiae the Lugar Center and the Levin Center at Wayne Law in Support of Respondents at 6, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020) (Nos. 19-715, 19-760); Brief of Boston University School of Law Professors Sean J. Kealy and James J. Wheaton as Amici Curiae in Support of Respondents at 18, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020) (Nos. 19-715, 19-760).

Eastland plainly held that if activities “fall within the sphere of legitimate legislative activity[,]” then they are “immune from judicial” probing.⁵⁰¹ The test detailed above is simply one way to determine whether activity falls within the range permissible Congressional activities. Thus, *Eastland* would unlikely bar the doctrine detailed in this Note.

CONCLUSION

Congressional investigatory power is presently inconsistent with the Necessary and Proper Clause’s commands. To prevent stymie future abuse, this Note urges the Court to adopt a *Mazars*-inspired doctrine that operationalizes the Necessary and Proper Clause’s commands.

501. *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)) (internal quotation marks omitted).