3 Reasons Why Congress Should Stay Out Of NY Trump Probe

By **Kenyen Brown and Kevin Carroll** (April 7, 2023)

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Donald Trump is now the first former president in U.S. history to face criminal indictment.

Presumptions that the indictment would be forthcoming sparked unprecedented congressional action: demands for Manhattan District Attorney Alvin Bragg to testify before a congressional committee and to provide a trove of documents related to an ongoing criminal investigation.[1]

Republicans in the U.S. House of Representatives even suggested the possibility of using a congressional subpoena to obtain such evidence if necessary.[2]

On April 6, they did so: The House Judiciary Committee subpoenaed former Special Assistant District Attorney Mark Pomerantz, who helped lead the office's investigation of Trump before resigning in protest at Bragg's refusal to bring a wider bank, insurance and tax fraud case against the former president.[3]

Bragg refuses to comply with these unprecedented requests.[4]

Congress' actions are likely inconsistent with existing rules in the House and U.S. Senate. To begin with, House Advisory Opinion No. 1 generally prohibits House members or their staff from contacting executive branch officials on behalf of constituents, or at their own initiative, except under a fairly narrow set of circumstances arguably raised by the case of People v. Trump.

Senate Rule 43, adopted after the Keating Five scandal of the late 1980s and early 1990s, largely mirrors House Advisory Opinion No. 1.

The scandal involved five U.S. senators accused of improperly pressuring the Federal Home Loan Bank Board to expedite the case of Charles Keating Jr., allegedly because of his significant campaign contributions. Keating ran the California-based Lincoln Savings and Loan Association.

The Senate Select Committee on Ethics ultimately determined that three of the five senators substantially and improperly interfered with the board's investigation of Lincoln Savings. One senator, Alan Cranston, received a formal reprimand.

Senate Rule 43 limiting senators' contact with executive branch agencies was adopted by the Senate in the wake of the scandal.

As interpreted over time and through application, Rule 43 more clearly articulates that senators are prohibited from intervening in any quasi-judicial, adjudicative or ongoing enforcement or investigative agency function. The Senate Ethics Manual reads,

> The general advice of the Ethics Committee concerning pending court actions is that Senate offices should refrain from intervening in such legal actions. ... The principle

> behind such advice is that the judicial system is the appropriate forum for the resolution of legal disputes and, therefore, the system should be allowed to function without interference from outside sources.[5]

These restrictions similarly apply to Senate office contacts with state and local executive branch agencies, such as a district attorney's office.

The Senate's rule is a wise one. Too often as of late, elected officials fail to consider what may happen when the shoe is on the other foot.

Perhaps the best-known recent example of this is when former Senate Majority Leader Harry Reid, D-Nev., invoked the so-called nuclear option and suspended the filibuster rule to confirm President Barack Obama's nominees for U.S. courts of appeal by simple majorities in 2013.

What's sauce for the goose is sauce for the gander, and Senate Majority Leader Mitch McConnell, R-Ky., later used that procedure to confirm U.S. Supreme Court nominees Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett for Trump between 2017 and 2020.

House Republicans should bear Reid's hard lesson in mind prior to taking the momentous step of formally sending a subpoena to Bragg relating to an ongoing criminal prosecution, for three good reasons.

One, turnabout is fair play, and a future Democratic Congress could attempt to use its subpoena power to reveal embarrassing private information about GOP members in the confidential files of local prosecutors.

Two, an unscrupulous committee could misuse Congress' power to grant immunity to thwart a district attorney's investigation for improper reasons.

And three, such a subpoena may turn out to be a dud, unenforced by the courts.

To understand why, some context may be helpful.

The most recent investigations of Trump by the Manhattan district attorney's office, as we currently understand them, involve allegations that his 2016 campaign falsified business records pertaining to a hush money payment to pornographic film actress Stephanie Clifford, aka Stormy Daniels, with the intent to commit another crime, such as a federal campaign finance violation.[6]

Bragg's investigation of a former president is certainly unusual, but not completely unprecedented. Since the Republic's early days, presidential candidates, as well as sitting and former vice presidents and presidents, have been investigated and sometimes even tried for alleged crimes, as well as forced to testify in civil and criminal proceedings.

In the 19th century, former Vice President Aaron Burr stood trial for treason and was acquitted in 1807, just two years after he left office, regarding an alleged plot to establish an independent country in the southwestern U.S.

The House impeached, and the Senate acquitted, President Andrew Johnson regarding his violation of the almost certainly unconstitutional Tenure of Office Act in 1868.

In 1872, Washington, D.C., police arrested President Ulysses Grant for a misdemeanor

charge of speeding in his horse-drawn carriage. The police released Grant after he put up $20 as a bond to show up the next day and adjudicate his citation. The president did not show up, and forfeited his $20.

In the 20th century, over the course of two days in 1973, Vice President Spiro Agnew resigned his office and pleaded no contest to tax evasion regarding his receipt of bribes.

The House Judiciary Committee passed three articles of impeachment against President Richard Nixon in 1974, regarding obstruction of justice and contempt of Congress pertaining to the 1972 burglary of Democratic National Committee headquarters in the Watergate hotel, and the FBI and congressional investigations into the incident, as well as abuse of power regarding harassment and surveillance of domestic political opponents.

President Gerald Ford pardoned Nixon just one month after his 1974 resignation, in part because Ford feared that federal prosecutors might well criminally charge Nixon with obstruction of justice.

Nixon and President Ronald Reagan testified in subordinates' criminal trials. In 1990, Reagan testified as a defense witness for U.S. Navy Vice Admiral John Poindexter regarding the Iran-Contra affair. In 1980, Nixon testified as a prosecution witness in the trial of two retired FBI officials regarding warrantless searches during the bureau's campaign against the Weather Underground.[7] The bureau officials were convicted, but then later pardoned by Reagan.

President Bill Clinton faced grand jury questioning by Independent Counsel Kenneth Starr regarding romantic liaisons with intern Monica Lewinsky. This relationship became an issue in Clinton's deposition in a suit by former Arkansas state employee Paula Jones, charging intentional infliction of emotional distress regarding his alleged solicitation of a sexual favor when he was a governor.

Starr concluded that Clinton perjured himself at his deposition, which led to his 1998 impeachment by the House and 1999 acquittal by the Senate; a federal judge held Clinton in civil contempt for his untruthful deposition testimony later that year, and Clinton agreed to temporarily surrender his law license in 2001.

In this century, the House twice impeached Trump, and the Senate twice acquitted him.

First, he was impeached for abuse of power and obstruction of Congress related to his efforts to condition the transfer of weapons to Ukraine for that government's announcement of a criminal investigation into former Vice President Joe Biden and his family. The second time, he was impeached for incitement of insurrection on Jan. 6, 2021. Trump's trial and acquittal on the latter charge took place after he left office.

Inasmuch as Bragg's investigation of a declared candidate in the 2024 presidential race is an issue, throughout much of the 2016 campaign, Trump was under a counterintelligence investigation regarding his campaign's contacts with Russian officials, while his opponent, former Secretary of State Hillary Clinton, was under criminal investigation for alleged mishandling of classified information.

George H.W. Bush ran for president twice with Independent Counsel Lawrence Walsh investigating his role in Iran-Contra; Clinton ran for reelection with Starr investigating, at that time, his role in the Madison Guaranty Savings and Loan Association and Whitewater banking and real estate matter; and George W. Bush ran for reelection with special counsel

Patrick Fitzgerald investigating whether any member of his administration deliberately revealed Valerie Plame's cover as a CIA officer.

Socialist Eugene Debs even ran for president from prison in 1920.

Examples such as Bush's 1988 campaign, Clinton's 1996 campaign, Bush's 2004 campaign and Trump's own 2016 campaign show that Bragg's investigation need not be fatal to Trump's current prospects — although a prosecution may be a horse of a different color.

For additional context, House Judiciary Committee members from both parties are usually picked by the speaker of the House and the House minority leader, respectively, for being ideologically reliable representatives from safe districts — these Congress members are typically the reddest of the red, and the bluest of the blue, in an already polarized chamber.

If the Judiciary Committee under Republican control demands testimony from an elected Democratic district attorney such as Bragg, surely the committee, when it inevitably reverts to Democratic control at some point in our closely divided country, will similarly probe an elected Republican prosecutor.

Therefore, the GOP should measure twice and cut once regarding any investigation of Bragg, for the following three reasons.

First, anyone who serves as a member or staffer on one of the congressional ethics committees; as a senator or in a Senate personal office or committee staff handling nominations; as an FBI agent conducting full field investigations of nominees; or in the U.S. Department of Justice's Public Integrity Section and its correlative sections at U.S. attorney's offices, can confirm that salacious allegations are made against prominent people from both parties on a routine basis.

Not all such charges are provably true, and the same is the case of the investigations conducted by district attorneys' offices, especially in large jurisdictions such as Bragg's New York County, which regularly investigate claims made against bold-faced names without ultimately charging them.[8]

As Justice Robert Jackson once said, a "prosecutor has more control over … reputation than any other person in America," and good prosecutors do not allow poorly evidenced allegations to see the light of day.[9]

Ethics committee decisions, raw FBI reports on nominees and the files of cases declined for federal prosecution are rife with derogatory personal information, and shielded from public disclosure for that very same reason.

Prominent people suffer from spurned lovers, jealous ex-business partners and disputatious neighbors just like anyone else. If congressional committees demand and receive the files of a state or local prosecutor's grand jury investigation, elected officials and their families from both parties will unfairly suffer from the public disclosure of embarrassing private facts — or worse, false allegations.

Second, by misusing its existing power to grant congressional witnesses testimonial immunity, as well as its newly claimed power to divine the entrails of local DAs' ongoing investigations, Congress could, for either corrupt or partisan reasons, torpedo those prosecutors' legitimate investigations.

A committee could simply request that key witnesses in the district attorney's case testify to Congress about the matter under investigation, and immunize their testimony, making it impossible to use that testimony against them.

Subsequent attempts by the district attorney to squeeze a witness before a grand jury, or to turn the subject or target of an investigation into a cooperative witness, would be futile.

This is not an idle prospect. The Iran-Contra committee, for valid congressional oversight reasons, obtained the immunized testimony of two of the key actors in that affair, Lt. Col. Oliver North and Poindexter of the National Security Council staff.

Their historic testimony in 1987 made for powerful television: North in his Marine Corps. Service Alpha uniform, sparring with the committee's Democrats, and Poindexter coolly smoking his pipe while explaining the concept of plausible deniability.

The immunized nature of their testimony also sank the criminal cases Walsh brought against both men in the U.S. District Court for the District of Columbia, when the U.S. Court of Appeals for the District of Columbia Circuit overturned their guilty verdicts based on Walsh's reliance on immunized testimony.[10]

Indeed, the general practice of both the House and Senate Ethics Committees is to suspend investigations into alleged wrongdoing by sitting members if the DOJ notifies them that a parallel criminal investigation is ongoing into the same conduct, precisely to avoid this exact scenario.

Certainly some conceivable prosecution by a district attorney of a former president might be unjust, and properly condemned as such. But it is just as possible that a former president could commit a serious state crime that cried out for justice.

If, as is inscribed on the pediment of the U.S. Supreme Court, every person is to receive equal justice under the law, former presidents ought not have immunity from prosecution after they leave office.

Since 1776, the U.S. has diverged from Great Britain, which has traditionally held that the sovereign embodies the state and cannot commit a crime — with the significant exception of King Charles I's execution by Oliver Cromwell and Parliament for treason in 1649.

A sitting president's immunity from federal and presumably also state criminal prosecution while in office, as set forth in an opinion by DOJ's Office of Legal Counsel in 1973, is as far as the inviolability of that office should go — and even that shield is properly limited by the sword of Congress' power to impeach, convict and remove a president for high crimes and misdemeanors.

Third, House Republicans may be embarrassed to find that federal courts may not uphold any subpoenas they issue to Bragg and the Manhattan district attorney's Office.

While Congress' investigative powers have long been described by the Supreme Court as broad, essential, penetrating, far-reaching and indispensable,[11] the subject matter of any congressional investigation must properly be within scope of jurisdiction clearly delegated to a committee, and in furtherance of a valid legislative purpose.[12]

While federal courts define a valid legislative purpose quite broadly, House Republicans' stated purposes may not be enough to sustain a congressional subpoena.

House Republicans justified the investigation to scrutinize "how public safety funds appropriated by Congress are implemented by local law-enforcement agencies," and "to inform potential legislative reforms about the delineation of prosecutorial authority between federal and local officials."[13]

The Manhattan district attorney's office has received federal grants for public safety,[14] and House Republicans could argue that money is fungible, and therefore federal dollars spent on one project by the Manhattan district attorney free up other funds to be spent on Bragg's investigation of Trump.

However, federal courts would likely also consider that the allocation of funding and delineation of federal and state authority involve significant executive discretion.

Under the U.S. Constitution, Congress cannot use its investigative power as a de facto law enforcement power.[15] Nor may congressional committees inquire into powers that are reserved to the states, such as the police power to punish local criminal activity, which the Supreme Court identified in its 2014 Bond v. U.S. decision as "[p]erhaps the clearest example of traditional state authority."[16]

Moreover, if House Republicans' formally subpoena Bragg, their actions may substantively amount to obstruction of governmental administration in the second degree under New York law.[17]

Nonetheless, any criminal charges brought against House Republicans under this statute would likely be overcome by their assertion of legislative immunity, the doctrine that protects members of Congress from legal liability for all actions taken in the sphere of legislative activity.

The subpoena to former assistant district attorney Pomerantz adds a new wrinkle. From a review of the law and historical congressional actions, there is no precedent for this attempt by Republicans.

Bragg would be wise to seek to quash the subpoena, as this former assistant district attorney was part of the prosecution team to an ongoing case, and his testimony could forfeit the privileges and secrets typically held by persons engaging in executive branch enforcement actions.

Arguably, comparisons to parallel circumstances where former corporate employees can be subpoenaed by opposing counsel are non sequiturs, because corporate witnesses were not engaged in executive branch enforcement actions, and cannot assert similar privileges or public policy concerns to thwart enforcement of said subpoenas.

However, given the unprecedented nature of this congressional action, any attempt to discern how a court might resolve this dispute requires significant conjecture.

In sum, Congress could misuse its subpoena power against district attorneys to embarrass political rivals or abuse congressional grants of immunity to sabotage DAs' legitimate investigations — if the courts were even to enforce such subpoenas.

If House Republicans persist in an investigation of Bragg's investigation and prosecution, at the first opportunity, subsequent House leadership teams should adopt a more explicit rule directly prohibiting House members and committees from intervening in any federal, state

or local criminal, quasi-judicial, adjudicative or ongoing enforcement or investigative agency function.

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[1] Letter from Rep. Jim Jordan, H. Comm. on the Judiciary, et al. to Hon. Alvin L. Bragg, Jr., Dist. Att'y, New York Cnty. (March 20, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-03-20-jdj-bs-jc-to-bragg-re-trump-investigation.pdf.

[2] Letter from Rep. Jim Jordan, H. Comm. on the Judiciary, et al. to Hon. Alvin L. Bragg, Jr., Dist. Att'y, New York Cnty. (March 23, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-03-25-jdj-bs-jc-to-bragg-re-subpoena-and-response.pdf (suggesting that the Committees' requests would be legally sufficient to justify a congressional subpoena).

[3] Letter from Rep. Jim Jordan, H. Comm. on the Judiciary, et al. to Mark F. Pomerantz, Esq. (April 6, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-04-06-jdj-to-pomerantz-subpoena_0.pdf.

[4] See Letter from Leslie B. Dubeck, Gen. Couns., Dist. Att'y, New York Cnty. to Rep. Jim Jordan, H. Comm. on the Judiciary, et al. (March 31, 2023), https://www.politico.com/f/?id=00000187-37d2-dd77-a1cf-7ff7d0920000; see also A. Wang, Trump ally Jordan issues subpoena to former N.Y. prosecutor, Washington Post (April 6, 2023)

[5] Select Comm. on Ethics, United States Senate, Senate Ethics Manual 178 (2003).

[6] Under New York law, falsification of business records can be charged either as a misdemeanor, N.Y. Penal Law §175.05 (second degree violation), or as a felony, N.Y. Penal Law §175.10 (first degree violation). The misdemeanor offense only requires prosecutors to prove that Trump "ma[de] or cause[d] a false entry in the business record of an enterprise." To prove a felony violation, prosecutors must additionally prove that Trump falsified business records with "an intent to commit another crime or to aid or conceal commission thereof."

The Manhattan DA's office has likely accused Trump of falsifying business records with an intent to commit a federal campaign finance violation, although there are difficulties with using a federal campaign finance violation as the basis for a state felony charge, and other

predicate crimes are possible. See Joshua Stanton, et al., The Manhattan DA's Charges and Trump's Defenses: A Detailed Preview, Just Security (Mar. 20, 2023), https://www.justsecurity.org/85581/the-manhattan-das-charges-and-trumps-defenses-a-detailed-preview/.

[7] One of the FBI defendants, former associate director Mark Felt, was unbeknownst to Nixon and others the Washington Post's pseudonymous "Deep Throat" source regarding Watergate.

[8] For example, in a case that moved beyond investigation to indictment, the Manhattan DA's Office accused former International Monetary Fund chairman and French presidential candidate Dominique Strauss-Khan of sexual assault, before dropping the charge.

[9] Robert H. Jackson, The Second Annual Conference of United States Attorneys: The Federal Prosecutor (April 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

[10] See United States v. North, 910 F.2d 843 (D.C. Cir. 1990); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).

[11] Watkins v. United States, 354 U.S. 178, 187 (1957)(Warren, C.J.); McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (Van Devanter, J.); Barenblatt v. United States, 360 U.S. 109, 111 (1959) (Harlan, J.); and Trump v. Mazars USA LLP, 140 S. Ct. 2019, 2031 (2020) (Roberts, C.J.).

[12] See Watkins, 354 U.S. at 209; and Quinn v. United States, 349 U.S. 155, 161 (Warren, C.J.).

[13] Letter from Rep. Jim Jordan, H. Comm. on the Judiciary, et al. to Hon. Alvin L. Bragg, Jr., Dist. Att'y, New York Cnty., supra note 1.

[14] See L. McKinney, Note on the Fiscal 2022 Executive Budget for the Mayor's Office of Criminal Justice, available at https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/05/DAs-Budget-Note.pdf.

[15] See Quinn, 349 U.S. at 161 ("[T]he power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and Judiciary.").

[16] Bond v. United States, 572 U.S. 844, 858 (2014) (Roberts, C.J.).

[17] See N.Y. Penal Law § 195.05, Obstructing governmental administration in the second degree, stating that a "person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function," including by means of intimidation or interference. Section 195.05 is a Class A misdemeanor.