

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

**The MONTANA STATE LEGISLATURE, and the
MONTANA DEPARTMENT OF ADMINISTRATION,**

Respondents.

NOTICE OF SUPPLEMENTAL AUTHORITY

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Pursuant to M. R. App. P. 12(6), the Montana State Legislature, through counsel, provides notice to the Court of *Donald J. Trump, et al. v. Mazars USA LLP*, 19-cv-01136 (D.D.C. August 11, 2021) (“DDC Opinion”).

The federal district court appropriately cabined *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) to the Office of the President. *See* DDC Opinion at 26 (quoting *Mazars*, 140 S. Ct. at 2034, the President “alone composes a branch of government.”); *see also* DDC Opinion at 41 (“[T]he *Mazars* test was premised on separation of powers notions *inherent* to the Office of the President”) (emphasis in original). This bolsters the Legislature’s argument that a subpoena to the Montana Court Administrator does not trigger the same separation of powers concerns as a subpoena issued to the sitting President of the United States. In its Opinion, this Court quashed the legislative subpoena to the Administrator, which is all-the-more noteworthy because *Mazars* didn’t even quash the Congressional subpoena to the President.

More importantly, the district court notes that *Mazars* “was crafted against a ‘tradition of negotiation and compromise’ between co-equal branches of government.” DDC Opinion at 26 (quoting *Mazars*, 140 S.

Ct. at 2031). When a subpoenaed’s “incentives to accommodate” the legislative branch are diminished and “refusal to comply with a congressional demand is [] less consequential” then the *Mazars* framework supports “reduced judicial scrutiny” of the subpoena. DDC Opinion at 26–27. Here, the Administrator has not pursued negotiation and compromise; she has instead pursued litigation before this Court. This Court has entertained and vindicated the Administrator’s approach. The Administrator therefore has no incentive to comply with the subpoena. That is when judicial enforcement of the subpoena is particularly appropriate.

The district court’s discussion further reinforces the Legislature’s view that, at best, the instant adjudication is premature.¹ This Court’s failure to defer jurisdiction on prudential or separation of powers grounds has, itself, eliminated the Administrator’s incentives to comply with the subpoena or engage in good faith negotiations with the Legislature about the subpoena. *McLaughlin v. Mont. State Legislature*, 2021 MT 178, __ Mont. __, __ P.3d __. This is why judicial intervention in legislative

¹ In this particular case, the identity of the interbranch disputants—the Legislature and the Judiciary—make judicial resolution improper at any stage.

investigations is generally a last resort. But the Court’s Opinion reaches beyond the current dispute and purports to *permanently* declare judicial control over legislative investigations. It makes judicial intervention a strategy of first resort. The Court’s Opinion effectively applies warrant requirements to legislative investigations and eliminates the critical role of negotiation and accommodation. The DDC Opinion reaffirms traditional separation of powers principles and runs directly counter to this Court’s treatment of this dispute.

The district court opinion also contradicts this Court’s holding that legislative investigations into unlawful conduct are prohibited forays into law enforcement. Instead, the district court observed that “an interest in past illegality can be wholly consistent with an intent to enact [valid] remedial legislation.” DDC Opinion at 20 (quoting *Trump v. Mazars United States*, 940 F.3d 710, 728 (D.C. Cir. 2019)). Further, the district court states “[t]he very nature of the investigative function—like any research—is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.” DDC Opinion at 43 (quoting *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 509 (1975)).

This Court’s Opinion limits the Legislature’s investigatory reach into the Judiciary as a whole to the Judicial Standards Commission process and the Legislative Auditor. The district court disabuses this notion. “[T]he court need not closely scrutinize whether ‘other sources could reasonably provide ... the information [the Committee] needs.’” DDC Opinion at 43 (quoting *Mazars*, 140 S. Ct. at 2035–36).

Finally, the DDC Opinion provides that “conceal[ment]” to “avoid scrutiny” defeats the intent of checks and balances. *See id.* at 50. The district court was analyzing the foreign emoluments clause, but the same reasoning applies to Article VII, § 11 of the Montana Constitution, which gives the Legislature authority to determine confidentiality in judicial standards commission proceedings. Not only does this Court limit the Legislature’s authority to use of the Judicial Standards Commission process, but in concealing all judicial communications from legislative scrutiny, the Court curtails the Legislature’s constitutional authority by making it so the Legislature cannot inform itself as to whether a more open and transparent process is needed. *See* DDC Opinion at 50 (“If Congress cannot mandate disclosure pursuant to its consent authority, one wonders how it could possible exercise that authority effectively.”).

The Legislature respectfully adjures the Court to reconsider its
Opinion and Order in light of the aforementioned authority.

Respectfully submitted this 16th day of August, 2021.

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By: /s/ *Kristin Hansen*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook, 14-point font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 792 words, excluding certificate of service and certificate of compliance.

By: /s/ Kristin Hansen
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CERTIFICATE OF SERVICE

I, Kristin N. Hansen, hereby certify that I have served true and accurate copies of the foregoing Notice - Supplemental Authority to the following on 08-16-2021:

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