

All the President's Papers

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No president has been quite like Donald Trump. No president has entered the Oval Office with the same degree of ongoing financial interests and potential entanglements.¹ No president's financial holdings have spurred as many accusations of malfeasance or provoked the same degree of hostile congressional oversight and investigation.² No president has so thoroughly resisted transparency and disentanglement with potential conflicts of interest.³ As a candidate, Donald Trump refused to release copies of his tax returns, as all major party presidential candidates had done for decades.⁴ As president, his financial holdings and business relationships raise

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¹ See "Donald Trump: A List of Potential Conflicts of Interest," BBC News, Apr. 18, 2017, <https://bbc.in/2XBHhQ7>.

² See Alex Moe, "House Investigations of Trump and His Administration: The Full List," NBC News, May 27, 2019, <https://nbcnews.to/2DGcDhd> (noting then-ongoing investigations by 14 separate House committees).

³ See, e.g., Robert Costa, et al., "Trump Says He Is Opposed to White House Aides Testifying to Congress, Deepening Power Struggle with Hill," Wash. Post, Apr. 23, 2019; Antia Kumar & Andrew Desiderio, "Trump Showdown with House Democrats Ignites into All-Out War," Politico, Apr. 23 2019, (noting White House resistance to Congressional oversight); Jennifer Wang, "Why Trump Won't Use a Blind Trust and What His Predecessors Did with Their Assets," Forbes, Nov. 15, 2016, <https://bit.ly/2XBHsef> (noting how prior presidents sought to resolve conflicts of interest).

⁴ See Daniel Hemel, "Trump Lost at the Supreme Court, But We Still Won't See His Taxes by November," Wash. Post, July 10, 2020, <https://wapo.st/33Bbv9r> ("[T]he three Republican and three Democratic presidents before Trump released their returns.").

concerns about constitutionally forbidden emoluments,⁵ foreign influence,⁶ and cronyism,⁷ all while accusations of corporate malfeasance⁸ and personal misconduct⁹ accumulate.

So perhaps it was inevitable that a Trump presidency would require the Supreme Court to consider the extent to which a president may claim immunity from investigation. This seems to be the history with scandal-ridden presidents. Just as the Watergate investigation prompted the Court to identify presidential immunity¹⁰ and clarify the limits of executive privilege,¹¹ and the Whitewater investigation and subsequent sexual misconduct allegations prompted courts to identify

⁵ See, e.g., *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 194 (D.D.C. 2018), vacated as moot, 949 F.3d 14 (D.C. Cir. 2020) (“Plaintiffs have alleged that the President has accepted a variety of Emoluments from foreign governments—intellectual property rights, payments for hotel rooms and events, payments derived from real estate holdings, licensing fees for ‘The Apprentice,’ and regulatory benefits—without seeking and obtaining the consent of Congress.”); see also Erik M. Jensen, *The Foreign Emoluments Clause*, 10 *Elon L. Rev.* 73 (2018) (advocating an expansive interpretation of the clause); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 *Minn. L. Rev.* 639, 639–41 (2017) (advocating a narrower view).

⁶ See, e.g., Michael Hirsh, “How Russian Money Helped Save Trump’s Business,” *Foreign Policy*, Dec. 21, 2018, <https://bit.ly/30DZjDf>. While most of the popular focus has been on potential connections to Russia, some have argued the Trump organization’s financial ties to Turkey may be more worrisome. See Tim Miller, “Trump’s Turkey Corruption Is Way Worse than You Realize,” *The Bulwark*, Nov. 26, 2019, <https://bit.ly/3fA9VHd>.

⁷ See Nomi Prins, “The Magnitude of Trump’s Cronyism Is Off the Charts—Even for Washington,” *The Nation*, Dec. 9, 2016, <https://bit.ly/3gPM08t>; Aaron Blake, “Ivanka Trump and Jared Kushner Are a Case Study in Why Nepotism Is Problematic,” *Wash. Post*, Mar. 12, 2019, <https://wapo.st/2DN4tDC>.

⁸ See Heather Vogell, “Never-Before-Seen Trump Tax Documents Show Major Inconsistencies,” *ProPublica*, Oct. 16, 2019, <https://bit.ly/3gCmeEz>; Doug Criss, “A Judge Has Finalized a \$25 Million Settlement for Students Who Claim They Were Defrauded by Trump University,” *CNN*, Apr. 10, 2018, <https://cnn.it/2C883bh> (regarding the settlement of Trump University litigation, “Trump repeatedly denied the fraud claims and said that he could have won at trial, but he said that as President he did not have time because he wanted to focus on the country”).

⁹ See *Zervos v. Trump*, 171 A.D.3d 110 (N.Y. App. Div. 2018); *Johnson v. Trump for President, Inc.*, No. 8:19-CV-00475-T-02SPE, 2019 WL 2492122 (M.D. Fla. 2019); Eliza Relman, “The 25 Women Who Have Accused Trump of Sexual Misconduct,” *Business Insider*, May 1, 2020, <https://bit.ly/2C5RxZ9>.

¹⁰ *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

¹¹ *United States v. Nixon*, 418 U.S. 683 (1974).

limits on presidential privilege¹² and immunity from civil litigation,¹³ the investigations into alleged financial improprieties and potential foreign influence eventually made their way in to federal court.

In a pair of cases, the Supreme Court revisited the questions of presidential immunity and susceptibility to oversight.¹⁴ In two opinions by Chief Justice John Roberts, *Trump v. Vance* and *Trump v. Mazars*, the Court reaffirmed two fundamental constitutional values: No person is above the law and the powers of Congress are limited. In the process, the Court also demonstrated an ability to resolve important constitutional questions without descending into the political polarization that engulfs the body politic in 2020.

I. The Subpoenas

For the first two years of his presidency, Donald Trump largely escaped meaningful oversight or investigation from Congress.¹⁵ That changed in 2019 as the Democratic Party regained control of the House of Representatives. Almost immediately, congressional leaders announced their intent to engage in wide-ranging oversight and investigation of the president, his administration, and his finances.¹⁶

¹² See *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (rejecting the notion that the “protective function privilege” can shield members of the Secret Service from having to testify before a federal grand jury).

¹³ *Clinton v. Jones*, 520 U.S. 681 (1997).

¹⁴ As the Supreme Court issued two opinions, this article refers to a “pair” of cases. As a technical matter, these are actually three cases, as *Trump v. Mazars* was consolidated with *Trump v. Deutsche Bank* for argument and decision.

¹⁵ The Trump campaign was, however, subject to an extensive investigation as a consequence of the May 2017 appointment of Robert Mueller as special counsel to investigate Russian interference in the 2016 presidential campaign and related matters. Special Counsel Robert S. Mueller, III, U.S. Dep’t. of Justice, Report on the Investigation into Russian Interference in the 2016 Presidential Election (2019). Trump was also the subject of multiple lawsuits alleging financial improprieties, including violations of the Emoluments Clauses and federal government rules concerning property management. *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131 (2d Cir. 2019); *In re Trump*, 958 F.3d 274 (4th Cir. 2020); *Am. Oversight v. U.S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327 (D.D.C. 2018).

¹⁶ See Jonathan Martin and Alexander Burns, “Democrats Capture Control of House; G.O.P. Holds Senate,” *N.Y. Times*, Nov. 6, 2018, <https://nyti.ms/31v3eBf>; Sonam Sheth and Joe Perticone, “Democrats Just Flipped the House of Representatives—Here’s How They Plan to Make Trump’s Life a Living Hell,” *Business Insider*, Nov. 7, 2018, <https://bit.ly/2F221di> (“Democrats plan to tighten the screws by mounting an investigative blitz against the White House and Russian interests”); see also Moe, *supra* note 2.

In April 2019, three separate House committees issued subpoenas to third parties for the financial records of the Trump family and the Trump Organization.¹⁷ On April 11, the House Committee on Financial Services and the House Permanent Select Committee on Intelligence each issued subpoenas to banks that handle financial matters for Trump and his businesses. These two committees issued identical subpoenas to Deutsche Bank, demanding “the financial information of the President, his children, their immediate family members, and several affiliated business entities,” including (but not limited to) all account activity and business statements from 2010 to the present.¹⁸ The Financial Services Committee issued a similar subpoena to Capital One, demanding equivalent information concerning numerous business entities related to the Trump Organization, from 2016 to the present.¹⁹ On April 15, the House Committee on Oversight and Reform issued a similar subpoena to Trump’s accounting firm, Mazars USA, LLP, demanding financial information concerning the president and several affiliated business entities for the period from 2011 to 2018, as well as all “engagement agreements” and contracts related to Mazars’s work for the Trumps and affiliated businesses.²⁰

As befits three committees with differing jurisdictions, each committee offered a different rationale for its subpoena. The Financial Services Committee claimed its subpoenas were authorized by its jurisdiction over existing banking regulations, as well as by House Resolution 206, which authorized committee investigations to support legislation “to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country’s financial system.”²¹ According to the committee, the Trump family and business’s

¹⁷ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). It is worth noting that the House Committee on Ways & Means separately sought to subpoena Trump’s tax returns from the Department of the Treasury and Internal Revenue Service. See Nicholas Fandos, “House Ways and Means Chairman Subpoenas Trump Tax Returns,” *N.Y. Times*, May 10, 2019, <https://nyti.ms/2XER6MZ>. This subpoena also resulted in litigation. *Comm. on Ways & Means v. Dep’t of the Treasury*, No. 1:19-CV-01974 (TNM), 2019 WL 4094563 (D.D.C. Aug. 29, 2019).

¹⁸ *Mazars*, 140 S. Ct. at 2027.

¹⁹ *Id.*

²⁰ *Id.* at 2028.

²¹ H.R. Res. 206, 116th Cong. (2019).

financial dealings could serve as a “case study” on how “illicit money, including from Russian oligarchs,” enters the United States and evades existing regulatory controls.²²

The Intelligence Committee, while issuing a Deutsche Bank subpoena identical to that of the Financial Services Committee, cited its authority to investigate “efforts by Russia and other foreign entities to influence the U.S. political process during and since the 2016 U.S. election,” and “the counterintelligence threat arising from any links or coordination between U.S. persons and the Russian government and/or other foreign entities, including any financial or other leverage such foreign actors may possess.”²³ Such an investigation, the committee’s chairman explained, required investigating potential connections to the Trump campaign and the president’s family members and business entities, so as to identify whether “President Trump, his family, or his associates are or were at any time at heightened risk of, or vulnerable to, foreign exploitation, inducement, manipulation, pressure, or coercion, or have sought to influence U.S. government policy in service of foreign interests.”²⁴ The committee further cited plans “to develop legislation and policy reforms to ensure the U.S. government is better positioned to counter future efforts to undermine our political process and national security.”²⁵

The Oversight Committee issued a memorandum citing recent testimony by Trump’s former lawyer Michael Cohen and various news reports²⁶ alleging financial irregularities by Donald Trump and his businesses, including the filing of false or misleading financial statements.²⁷ According to Cohen, Trump-related entities would alter financial statements so as to inflate or deflate valuations in an effort to

²² *Id.*

²³ Press Release, H. Permanent Select Comm. on Intelligence, “Chairman Schiff Statement on House Intelligence Committee Investigation” (Feb. 6, 2019), <https://bit.ly/2F1STp3>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Steve Benen, “Trump’s Alleged Financial Fraud Creates an Important New Vulnerability,” MSNBC, Mar. 1, 2019, <https://on.msnbc.com/3iicCyX>; David A. Fahrenthold and Jonathan O’Connell, “How Donald Trump Inflated His Net Worth to Lenders and Investors,” Wash. Post, Mar. 28, 2019, <https://wapo.st/33DCdhY>.

²⁷ Memorandum from Chairman Elijah E. Cummings to Members of the Committee on Oversight and Reform 1 (Apr. 12, 2019) [hereinafter Cummings Memo], <https://politi.co/2PxtuWb>.

mislead investors, lenders, and perhaps even government officials.²⁸ Cohen's allegations provided the House Oversight Committee with reason to demand financial records from Trump and his businesses. As the Cummings Memo explained,

The Committee has full authority to investigate whether the President may have engaged in illegal conduct before and during his tenure in office, to determine whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions, to assess whether he is complying with the Emoluments Clauses of the Constitution, and to review whether he has accurately reported his finances to the Office of Government Ethics and other federal entities.²⁹

The memo further stated that the subpoenaed information would inform the committee's "review of multiple laws and legislative proposals" within the committee's jurisdiction.³⁰

Deutsche Bank, Capital One, and Mazars USA all indicated that they would comply with the congressional subpoenas.³¹ This prompted legal action by Trump, in his personal capacity, in an effort to quash the subpoenas and prevent their enforcement.³²

²⁸ Hearing with Michael Cohen, Former Attorney to President Donald Trump, Before the H. Comm. on Oversight and Reform, 116 Cong. 13, 161 (2019), <https://bit.ly/3gHsJ8Y> ("It was my experience that Mr. Trump inflated his total assets when it served his purposes"; and explaining that, to avoid paying taxes, Trump's strategy was to "deflate the value of the asset, and then you put in a request to the tax department for a deduction.").

²⁹ Cummings Memo, *supra* note 27, at 4.

³⁰ *Id.*

³¹ See Tr. of Oral Argument at 30, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) (No. 19-715) [hereinafter *Mazars Oral Argument*] (Trump's lawyer said "the recipients of these subpoenas have indicated that they consider it to be a dispute between the President and the House of Representatives, . . . and absent some sort of court order regarding its validity, they feel obligated to comply.").

³² In *Deutsche Bank*, Trump was joined on the complaint by his three eldest children, The Trump Organization, Inc., and several related business entities: the Donald J. Trump Revocable Trust, Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, and Trump Acquisition Corp. *Trump v. Deutsche Bank AG*, 943 F.3d 627, 633 n.2 (2d Cir. 2019). In the *Mazars* case, Trump was joined by The Trump Organization, Inc., Trump Organization LLC, The Trump Corporation, DJT Holdings LLC, the Donald J. Trump Revocable Trust, and Trump Old Post Office LLC. *Trump v. Comm. on Oversight and Reform*, 380 F. Supp. 3d 76, 88 n.19 (D.D.C. 2019).

Congress was not alone in investigating potential wrongdoing by Donald Trump. In 2018, the New York County District Attorney's Office (NYCDA) began an investigation into potentially illegal activities related to the Trump Organization and affiliated individuals. Although the precise scope of these investigations remains unclear,³³ one subject of investigation was the alleged "hush money" payments made to two women, Stormy Daniels and Karen McDougal, with whom Trump is alleged to have had extramarital affairs.³⁴ According to various news reports, the release of the infamous *Access Hollywood* tape in the midst of the 2016 presidential campaign prompted an effort by Michael Cohen to pay Daniels and McDougal to keep quiet about their relations with Trump.³⁵ Cohen subsequently pleaded guilty to campaign finance violations related to these payments, alleging that he made the payments at Trump's behest, as well as to making false statements to Congress.³⁶

According to the NYCDA, local prosecutors agreed to forestall further investigation of Cohen's allegations and the potential involvement of other individuals related to the Trump Organization until the completion of any federal investigation. This investigation concluded in July 2019, prompting the NYCDA to renew its own investigations into the alleged hush money payments and financial improprieties related to the Trump Organization and affiliated individuals. As part of the investigation, the NYCDA obtained a grand jury subpoena seeking financial records and related communications from the Trump Organization, including tax returns.³⁷ The Trump Organization provided the grand jury with some of the

³³ According to the briefs filed by NYCDA, the investigations are detailed in a redacted declaration filed under seal. See, e.g., Brief of Respondent at 2 n.2, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635) [hereinafter Brief of Respondent].

³⁴ See William K. Rashbaum & Ben Protess, "8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.," *N.Y. Times*, Sept. 16, 2019, <https://nyti.ms/3gEPOZT>.

³⁵ See Kristine Phillips et al., "FBI Tied Donald Trump and Top Aides to 2016 Effort to Silence a Porn Star, New Court Files Show," *USA Today*, July 18, 2019, <https://bit.ly/30BnFNN>.

³⁶ Press Release, U.S. Att'y Off., S.D.N.Y., "Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations" (Aug. 21, 2018), <https://bit.ly/31n6WwI>.

³⁷ See *Trump v. Vance*, 395 F. Supp. 3d 283, 291 (S.D.N.Y. 2019).

relevant materials, but did not turn over tax returns, prompting the NYCDA to change its strategy.³⁸

On August 29, 2019, the NYCDA served a grand jury subpoena on Mazars, seeking various financial records of the Trump Organization and related individuals, including relevant tax returns, from January 2011 to the present.³⁹ As the NYCDA acknowledges, this subpoena was “largely patterned” on the Mazars subpoena issued by the House Oversight Committee.⁴⁰ Although this subpoena was not served directly on the Trump Organization, as with the congressional subpoenas, Trump sought to block its enforcement and the production of any responsive documents.

II. The Proceedings Below

President Trump, in his personal capacity, filed legal actions in federal district court to enjoin each of the subpoenas for financial records.⁴¹ Suits against the NYCDA grand jury subpoena and the House Financial Services and Intelligence subpoenas were filed in New York. A suit seeking to enjoin the House Oversight Committee was filed in the District of Columbia.

In challenging the House committees’ extensive document demands, Trump argued that the subpoenas violated separation-of-powers principles and lacked legitimate legislative purposes. No court below was persuaded by any of these arguments. Neither the U.S. District Court for the District of Columbia nor the U.S. District Court for the Southern District of New York found Trump’s concerns remotely persuasive.⁴² In the U.S. Courts of Appeals, however, both cases produced divisions of opinion.

³⁸ Brief of Respondent, *supra* note 33, at 4.

³⁹ Vance, 395 F. Supp. 3d at 291.

⁴⁰ Brief of Respondent, *supra* note 33, at 4. The NYCDA copied the Oversight Committee’s subpoena “with the aim of minimizing the burden on Mazars and facilitating expeditious production of responsive documents.” *Id.* See also Tr. of Oral Argument at 82, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635) (“[O]nce the House subpoena became public, it’s not unusual for an office like ours to model our subpoena language on that which has already been made public from a different source, when it’s going to the same recipient. It makes it easier on the recipient in the process.”).

⁴¹ In the cases involving congressional subpoenas, Trump was also joined by various business enterprises and, in one of the suits, by his oldest children. See *supra* note 32.

⁴² See *Trump v. Mazars USA, LLP*, 380 F. Supp. 3d 76 (D.D.C. 2019); *Trump v. Deutsche Bank AG*, 2019 WL 2204898 (S.D.N.Y. May 22, 2019).

The U.S. Court of Appeals for the D.C. Circuit was the first to rule on the propriety of congressional subpoenas to third parties seeking the financial records of President Trump, his family, and their businesses.⁴³ In a 2-1 decision, the court concluded that the House had broad and expansive constitutional authority to investigate “topics on which it could legislate,” and that such authority readily encompassed the subpoena to Mazars.⁴⁴ The court’s majority found little merit in the arguments raised by Trump as well as those made by the U.S. Department of Justice, which had filed an amicus brief at the invitation of the court.⁴⁵

In the court’s view, the subpoena presented “no direct inter-branch dispute,” because it was served upon a third-party custodian, rather than the president himself.⁴⁶ Although “separation-of-powers concerns still linger in the air,” the court concluded that the subpoena served a valid legislative purpose, even though the committee acknowledged a particular interest in uncovering potentially illegal activity.⁴⁷ As Judge David Tatel explained in his opinion (joined by Judge Patricia Millett), the committee’s “interest in past illegality can be wholly consistent with an intent to enact remedial legislation.”⁴⁸ By identifying past illegal conduct, the committee could determine how to revise and reform existing statutes and develop new legislative proposals.

Judge Neomi Rao dissented at length, arguing the committee’s focus on identifying and uncovering illegal conduct disqualified any reliance upon legislative power. According to Judge Rao, the Constitution’s text and structure provided only one mechanism through which to investigate presidential misconduct: impeachment. “Investigations of impeachable offenses simply are not, and never have been, within Congress’s legislative power,” she wrote, citing historical practice dating back to the Founding period.⁴⁹

⁴³ *Trump v. Mazars USA, LLP*, 940 F.3d 710, 748 (D.C. Cir. 2019).

⁴⁴ *Id.* at 723.

⁴⁵ *Id.* at 718 (“After oral argument, and at the court’s invitation, the Department of Justice filed an amicus brief.”).

⁴⁶ *Id.* at 726.

⁴⁷ *Id.*

⁴⁸ *Id.* at 728.

⁴⁹ *Id.* at 784 (Rao, J., dissenting).

“Allowing Congress to investigate impeachable officials for suspicions of criminality pursuant to the legislative power has serious consequences for the separation of powers because it allows Congress to escape the responsibility and accountability inherent in impeachment proceedings,” Judge Rao warned.⁵⁰

Trump filed a petition for rehearing en banc, which was promptly denied.⁵¹ Three judges noted their dissent: Judges Karen Henderson, Gregory Katsas, and Rao. Judges Katsas and Rao published dissents from the denial, emphasizing the important and under-explored issues raised by the case. *Mazars* was only the second time “an Article III court has undertaken to enforce a congressional subpoena for the records of a sitting president,” Katsas noted.⁵² The first was *Senate Select Committee on Presidential Campaign Activities v. Nixon*, in which the D.C. Circuit, sitting en banc, had declined to enforce a committee subpoena for presidential records.⁵³ That fact alone would have seemed to make *Mazars* en banc-worthy, though additional review would have further delayed Congress’s ability to obtain Trump’s financial records. Katsas also emphasized the inherent conflict between the congressional and executive interests. Failing to consider the threat that extensive document demands could pose to “presidential autonomy and independence,” Katsas warned, would subject presidential disclosure to “the whim of Congress—the President’s constitutional rival for political power.”⁵⁴ Judge Rao also dissented, reiterating the points of her panel dissent and noting that, although the House had finally authorized the opening of an impeachment inquiry, House Resolution 660 did “not even purport to ratify previously issued subpoenas,” and the House Oversight Committee “relied consistently and exclusively on the legislative power to justify this subpoena.”⁵⁵

At the other end of the Acela corridor, the U.S. Court of Appeals for the Second Circuit split over the propriety of the other House

⁵⁰ *Id.* at 783.

⁵¹ *Trump v. Mazars USA, LLP*, 941 F.3d 1180 (D.C. Cir. 2019) (denying petition for reh’g en banc).

⁵² *Id.* at 1180 (Katsas, J., dissenting from denial of reh’g en banc).

⁵³ 498 F.2d 725, 731–33 (D.C. Cir. 1974) (en banc).

⁵⁴ *Mazars*, 941 F.3d at 1181.

⁵⁵ *Id.* at 1182 (Rao, J., dissenting from denial of reh’g en banc).

committee subpoenas. The majority opinion, by Judge Jon Newman (joined by Judge Peter Hall), concluded that both the Intelligence Committee and the Financial Services Committee subpoenas were sufficiently related to valid legislative purposes within their respective jurisdictions.⁵⁶ It was perfectly appropriate, according to the court, for Congress to use the president and his family as a “case study” of financial improprieties and foreign influence that could inform remedial legislation.⁵⁷ While instructing the district court to protect against the disclosure of “sensitive personal details (such as payments for medical procedures and the like),⁵⁸ the Second Circuit disclaimed any separation-of-powers concerns at all.⁵⁹

Judge Debra Ann Livingston wrote separately, concurring in part and dissenting in part, expressing her disagreement with the panel’s resolution of the constitutional questions.⁶⁰ Judge Livingston could not accept the majority’s conclusions that ““this case does not concern separation of powers,”” and rejected its assumption that allowing Congress to issue broad subpoenas for a president’s records posed no threat to a president’s ability to discharge his constitutional duties.⁶¹ Previewing how these cases would be viewed on One First Street, Judge Livingston urged a remand for the committees to “clearly articulate . . . the legislative purpose that supports disclosure *and* the pertinence of such information to that purpose.”⁶²

Trump’s attempts to quash the NYCDA grand jury subpoena were no more successful in the lower courts than his attempts to block the congressional subpoenas. In September 2019, Trump filed suit in the Southern District of New York seeking to enjoin enforcement of the grand jury subpoena on the grounds that the president enjoys a temporary absolute immunity from all state court criminal proceedings while in office, even insofar as state criminal proceedings seek the production of personal documents from third-party custodians

⁵⁶ *Deutsche Bank AG*, 943 F.3d 627.

⁵⁷ *Id.* at 662–63 n.67.

⁵⁸ *Id.* at 632.

⁵⁹ *Id.* at 669.

⁶⁰ *Id.* at 676 (Livingston, J., concurring in part and dissenting in part).

⁶¹ *Id.* at 678.

⁶² *Id.* at 679.

to a grand jury.⁶³ He argued further that allowing state or local prosecutors to investigate the president would interfere with federal supremacy. Unlike in the congressional subpoena cases, where the Department of Justice filed *amicus curiae* briefs at the invitation of the circuit court panels, the department was involved in this litigation from the start, largely supporting Trump's efforts to have the subpoenas quashed.⁶⁴

The district court was reluctant to rule on the president's motion, concluding that the doctrine of "*Younger* abstention" counseled refraining from exercising jurisdiction over the dispute and allowing the state proceedings to continue without federal court interference.⁶⁵ In the alternative, the district court rejected the president's arguments of immunity, finding them "repugnant to the nation's governmental structure and constitutional values."⁶⁶ As the district court noted, such "special dispensation from the criminal law's purview and judicial inquiry" would, in effect, erect a protective shield around not only the president, but also his family members and business associates, and compromise the "fair and effective administration of justice."⁶⁷ While acknowledging the possibility that some criminal proceedings could "impermissibly interfere" with the president's ability to discharge his constitutional obligations, third-party compliance with a grand jury subpoena for personal financial records posed no such risk.⁶⁸ On this basis the district court rejected any claim of absolute immunity in favor of a "case-by-case" evaluation of specific objections to specific document requests.⁶⁹

The Second Circuit reversed the district court on *Younger* abstention but affirmed the district court's refusal to grant an injunction

⁶³ See *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019).

⁶⁴ *Id.* at 291–92 (noting department filings).

⁶⁵ *Id.* at 301. *Younger* abstention is based upon *Younger v. Harris*, 401 U.S. 37 (1971); see also *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (identifying a set of conditions for the application of *Younger* abstention).

⁶⁶ *Vance*, 395 F. Supp. 3d at 290.

⁶⁷ *Id.* at 288–89, 311.

⁶⁸ *Id.* at 289. The court also rejected the argument that the NYCDA grand jury subpoena was pursued in bad faith or constituted "harassment" of the president. *Id.* at 298–99.

⁶⁹ *Id.* at 315.

against the subpoena.⁷⁰ Relying on *United States v. Nixon*⁷¹ and *Clinton v. Jones*,⁷² the Second Circuit recognized it was “long-settled” that “the President is subject to judicial process in appropriate circumstances.”⁷³ If, as Judge Robert Katzmann explained, “documents exposing the President’s confidential, official conversations may properly be obtained by subpoena” under the right circumstances, there is no argument that “a President’s *private* and *non-privileged* documents may be absolutely shielded from judicial scrutiny.”⁷⁴ On this basis, the Second Circuit rejected the president’s claim of immunity and remanded the case back to the district court.

Disappointed in all of the rulings below, Trump filed petitions for certiorari which the Supreme Court granted in December 2019. All three cases—the two consolidated congressional subpoena cases and the NYCDA grand jury subpoena case—were scheduled for argument in March, but that was not to be. Due to the COVID-19 pandemic, the Supreme Court temporarily suspended oral arguments.⁷⁵ Consequently, *Trump v. Mazars* and *Trump v. Vance* had to be argued via teleconference in May and would not be decided before the end of June, when the Court’s term traditionally ends. The two opinions would be handed down on July 9, the last opinions to be issued on the last day of the term.

III. *Trump v. Vance*

In *Trump v. Vance*, the Supreme Court ruled in favor of the NYCDA, resoundingly rejecting the claims of presidential immunity from state investigation.⁷⁶ The Court was unanimous in rejecting Trump’s claim of even temporary absolute immunity from state criminal process and voted 7-2 to affirm the judgment of the Second Circuit. Chief Justice Roberts wrote the opinion for the Court, joined by the Court’s liberals, Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia

⁷⁰ *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019).

⁷¹ 418 U.S. 683 (1974).

⁷² 520 U.S. 681 (1997).

⁷³ *Vance*, 941 F.3d at 640 (quoting *Jones*, 520 U.S. at 703).

⁷⁴ *Id.* at 641 (citing *Jones*, 520 U.S. at 693–94).

⁷⁵ Press Release, U.S. Sup. Ct., “Postponement of March Oral Arguments” (Mar. 16, 2020), <https://bit.ly/2Dl81xp>.

⁷⁶ *Trump v. Vance*, 140 S. Ct. 2412 (2020).

Sotomayor, and Elena Kagan. Justice Brett Kavanaugh concurred in the judgment, joined by the Court's other Trump appointee, Justice Neil Gorsuch. Justices Clarence Thomas and Samuel Alito each filed a dissenting opinion.

The case's outcome was clear from the opening lines of Chief Justice Roberts's opinion for the Court: "In our judicial system, 'the public has a right to every man's evidence.' Since the earliest days of the Republic 'every man' has included the President of the United States."⁷⁷ Resting on this principle, and its historical application in the United States, the chief justice concluded that neither Article II nor the Supremacy Clause barred a state grand jury from issuing a subpoena "to a sitting President," nor did either require the application of a heightened standard of review.⁷⁸ Justices Kavanaugh and Gorsuch agreed with the chief justice's bottom line, voting to affirm the Second Circuit, albeit advocating a more protective standard for review of subpoenas for a president's documents.

The chief justice grounded his decision on the 200-year history of presidents complying with demands for documents in criminal proceedings,⁷⁹ with a heavy emphasis on Chief Justice John Marshall's handling of the Burr trial while sitting as a circuit justice for Virginia.⁸⁰ As Roberts recounted, Aaron Burr sought to subpoena documents from President Thomas Jefferson.⁸¹ Although the prosecution resisted these efforts, Marshall concluded that presidential prerogative could not stand in the way of a criminal defendant's right to obtain potentially exculpatory evidence.⁸²

⁷⁷ *Id.* at 2420. The Court attributes the maxim "the public has a right to every man's evidence" to Lord High Chancellor Hardwicke in 1742. See *id.* (citing 12 Parliamentary History of England 693 (1812)).

⁷⁸ Vance, 1405. Ct. at 2420.

⁷⁹ *Id.* ("Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts."); *id.* at 2423 ("In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena.").

⁸⁰ See Josh Blackman, "Symposium: It Must Be Nice to Have John Marshall on Your Side," SCOTUSblog, July 10, 2020, <https://bit.ly/3gCezWx>.

⁸¹ Vance, 140 S. Ct. at 2422–23. For a more detailed discussion of the haggling over documents at the Burr trial, see Josh Blackman, Presidential Subpoenas during the Burr Trials, SSRN, July 9, 2020, <https://bit.ly/3kiILbL>.

⁸² Vance, 140 S. Ct. at 2422 (citing *United States v. Burr*, 25 F. Cas. 30, 33–34 (C.C. Va. 1807)).

At common law, only the king was exempt from a duty to provide evidence, and the president was “of the people,” not a member of royalty.⁸³ Unless the president could identify how compliance with an evidentiary demand would interfere with his constitutional duties, he was as subject to the demands of the law as anyone else.⁸⁴ The demands of public safety or national security—concerns at the heart of executive privilege—could justify withholding documents. The president’s status as head of the executive branch, standing alone, could not. Roberts noted that Marshall’s conclusions in the Burr trial have been followed for centuries, most notably in *United States v. Nixon*, where the Court “unequivocally and emphatically” endorsed the conclusion that presidents are subject to subpoena.⁸⁵

The additional wrinkle in *Vance* was that the proceedings arose in state court, whereas all of the relevant precedents involved federal proceedings. Even *Clinton v. Jones*, in which then-president Bill Clinton was sued by Paula Jones alleging sexual harassment while he was the governor of Arkansas, was brought in federal court. “Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of state courts,” Roberts observed.⁸⁶ This presented at least the possibility of state interference with federal supremacy, as the *Jones* Court had acknowledged, expressly reserving the question whether a president would have a stronger claim for immunity in the case of state-court proceedings.⁸⁷

In *McCulloch v. Maryland*, the Court concluded that allowing a state to levy and collect taxes on a federally chartered bank risked allowing a state to “defeat the legitimate operations” of the federal government.⁸⁸ By extension, Trump’s attorneys argued, allowing state criminal proceedings to ensnare the president could interfere

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Jones*, 520 U.S. at 704 (citing *Nixon*, 418 U.S. 683).

⁸⁶ *Vance*, 140 S. Ct. at 2425.

⁸⁷ *Jones*, 520 U.S. at 691 (“[B]ecause the claim of immunity is asserted in a federal court and relies heavily on the doctrine of separation of powers that restrains each of the three branches of the Federal Government from encroaching on the domain of the other two, it is not necessary to consider or decide whether a comparable claim might succeed in a state tribunal.”) (citation omitted).

⁸⁸ 17 U.S. (4 Wheat.) 316, 427 (1819).

with Article II.⁸⁹ If, as *McCulloch* counseled, “the States have no power” to “retard, impede, burden, or in any manner control” the operations of the federal government,⁹⁰ how could states subject a president to criminal process?

Accepting the possibility that state criminal process could conceivably interfere with the performance of some presidential duties, at least in some instances, Roberts explained that such concerns could, at most, justify limitations on state proceedings, such as the tailoring of document demands, but could not justify absolute immunity. As Roberts noted, Trump’s attorneys made no argument that this particular subpoena was unduly burdensome. They rather sought to claim that *any* such subpoena impermissibly interferes with the president’s work. That was a bridge too far for the Court to cross.

Chief Justice Roberts examined the premises of Trump’s claims and found them wanting. Insofar as a subpoena might be distracting, the Court had already rejected such a basis for immunity in *Clinton v. Jones*, a civil case, where the equities in favor of evidence production are less pronounced. If a “properly managed” civil suit could proceed without interfering with a president’s ability to perform his duties, “a properly tailored criminal subpoena” would not interfere either.⁹¹ Nor could claims of reputational harms justify preventing properly founded legal investigations from proceeding.⁹² If the speculative threat of harassing litigation was no basis for providing immunity in *Clinton v. Jones*, the prospect of local prosecutors attempting to target a sitting president could not justify immunity here.⁹³ Indeed, as the chief justice noted, not a single justice accepted claims of absolute immunity on these bases.⁹⁴

Although the precise question presented to the Court was whether a state grand jury could issue a criminal subpoena for a president’s personal financial records from third parties, the language of the

⁸⁹ Brief for Petitioner at 23–24, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635); accord Brief for the United States as Amicus Curiae Supporting Petitioner at 12, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635).

⁹⁰ *McCulloch*, 17 U.S. at 426, 436.

⁹¹ *Vance*, 140 S. Ct. at 2426.

⁹² *Id.* at 2427.

⁹³ *Id.*

⁹⁴ *Id.* at 2429 (“Our dissenting colleagues agree.”).

Court's opinion spoke more broadly. As framed by the chief justice, the question was simply whether the Constitution precludes, or requires a heightened standard for, "the issuance of a state criminal subpoena to a sitting President."⁹⁵ As in *Mazars*, the Court did not place significant weight on the fact that another entity, in this case an accounting firm, has possession of the documents sought, for they were still the president's documents and "Mazars is merely the custodian."⁹⁶ In this respect, the Court's conclusion is broader than might have been necessary to resolve the case, and certainly broader than we have come to expect in the chief justice's opinions.⁹⁷ It nonetheless recognized that a consequence of accepting Trump's argument for immunity would erect a protective shield around all those covered by the subpoena, not merely the president, and could thereby compromise the administration of justice in criminal matters beyond those involving the president himself, a concern the Court had found particularly compelling in *United States v. Nixon*.⁹⁸

The Court also rejected the solicitor general's argument that a state grand jury subpoena seeking the president's private financial records must satisfy a "heightened need" standard. Such a standard, Chief Justice Roberts noted, was appropriate for official documents, particularly those potentially covered by executive privilege, as such documents relate to the president's ability to perform his official duties. No such argument could be made about personal documents with no relation to the president's office. As Marshall noted in the *Burr* case, "If there be a paper in the possession of the executive,

⁹⁵ *Id.* at 2420.

⁹⁶ *Id.* at 2425 n.5.

⁹⁷ See Jonathan H. Adler, "This Is the Real John Roberts," *N.Y. Times*, July 7, 2020, <https://nyti.ms/3gCnUxR> (discussing the chief justice's minimalist jurisprudence).

⁹⁸ *Nixon*, 418 U.S. at 707 ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III."); *Vance*, 140 S. Ct. at 2430 ("[E]ven assuming the evidence withheld under that standard were preserved until the conclusion of a President's term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the *innocent* by depriving the grand jury of exculpatory evidence.") (emphasis original).

which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual.”⁹⁹

While rejecting the arguments for immunity or a “heightened need” to obtain a president’s personal financial records, the Court emphasized that “grand juries are prohibited from engaging in ‘arbitrary fishing expeditions.’”¹⁰⁰ Nothing in the opinion could be read to excuse the issuance of truly “harassing” subpoenas, or to bar a president from seeking relief from such harassment.¹⁰¹ To the contrary, Chief Justice Roberts noted, “a President would be entitled to the protection of federal courts” in the case of actual harassment that meaningfully threatened “the independence or effectiveness of the Executive.”¹⁰² Indeed, the existence of such “safeguards” made any grant of immunity unnecessary.¹⁰³

Justices Kavanaugh and Gorsuch likewise rejected the claims of absolute immunity, but only concurred in the judgment as they concluded that criminal subpoenas for a president’s records should be subject to a higher standard—the “demonstrated, specific need” standard of *United States v. Nixon*—even where the documents sought are of an unofficial nature.¹⁰⁴ The Court’s newest justices were not as quick to dismiss concerns about “harassment or diversion” that could interfere with the president’s duties.¹⁰⁵ Stressing the qualifications in the language of the majority opinion, such as the need for “high respect” of the president’s office and a “particularly meticulous” review of document requests, Kavanaugh predicted lower courts would still need to “delv[e] into why the State wants the information,” how much it is needed, and whether it could be obtained in other ways.¹⁰⁶

Justice Alito agreed with Kavanaugh and Gorsuch that a higher standard should apply to subpoenas for a president’s records, but concluded this required reversing the Second Circuit’s decision.

⁹⁹ Burr, 25 F. Cas. at 191.

¹⁰⁰ Vance, 140 S. Ct. at 2428.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 2429.

¹⁰⁴ *Id.* at 2432 (Kavanaugh, J., concurring in the judgment).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2433.

Though joining the rest of the Court in rejecting Trump's plea for immunity, Justice Alito largely accepted the more modest position urged by the solicitor general. Relying heavily on *McCulloch*, Alito argued for greater vigilance in protecting the president from state interference, lest he be besieged by demands from hundreds of local prosecutors itching to sink their teeth into the president's hide.¹⁰⁷ Accordingly, Alito argued for a more demanding test before a subpoena for the president's records could be enforced, placing the burden squarely on the NYCDA to meet a "heightened standard" of need.¹⁰⁸ Among other things, Justice Alito would have required the NYCDA to provide greater detail about the offenses under investigation, why the documents were necessary for such an investigation, and why production could not be postponed until the president leaves office,¹⁰⁹ but no other justice joined in this approach. "For all practical purposes," Justice Alito warned, "the Court's decision places a sitting President in the same unenviable position as any other person whose records are subpoenaed by a grand jury."¹¹⁰ Indeed, the majority could well have responded, that is precisely the point.

Justice Thomas agreed with the majority that the president lacks absolute immunity and that a subpoena for his financial records may issue, though he based this conclusion on the Constitution's text and Founding era materials rather than the history of proceedings since.¹¹¹ Despite this conclusion, and despite his rejection of any claim that the NYCDA had to make a showing of heightened need,¹¹² Justice Thomas concluded the president "may be entitled to relief against [the subpoena's] enforcement."¹¹³

¹⁰⁷ *Id.* at 2452 (Alito, J., dissenting) ("the Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors").

¹⁰⁸ *Id.* at 2448.

¹⁰⁹ *Id.* at 2449.

¹¹⁰ *Id.* at 2451.

¹¹¹ *Id.* at 2434 (Thomas, J., dissenting) ("Unlike the majority, however, I do not reach this conclusion based on a primarily functionalist analysis. Instead, I reach it based on the text of the Constitution, which, as understood by the ratifying public and incorporated into an early circuit opinion by Chief Justice Marshall, does not support the President's claim of absolute immunity.").

¹¹² *Id.* at 2439 n.3.

¹¹³ *Id.* at 2434 (emphasis original).

Although the Constitution expressly provides for legislative immunity, Justice Thomas noted, there is nothing in the text suggesting executive immunity.¹¹⁴ Nor is there much evidence for any such doctrine in Founding era materials. Nonetheless, Thomas dissented on the grounds that the judiciary is obligated to be particularly deferential to the executive branch's claims of interference. While Thomas would apply the standard articulated by Marshall in *Burr*—a president must produce evidence unless it interferes with his official duties—he would also “take pains to respect the demands on the President’s time.”¹¹⁵ And should a president claim that enforcement of a subpoena would compromise his ability to perform his duties, even if only due to “mental burden,” courts should “recognize their own limitations” and be hesitant to overrule that determination.¹¹⁶ On this basis, Justice Thomas would have vacated the Second Circuit’s decision and remanded the case to the district court to consider whether “the President’s ‘duties as chief magistrate demand his whole time for national objects.’”¹¹⁷ Though Justice Thomas’s formulation is exceedingly deferential, it is not entirely clear why the test he proposes would be of particular help to this president given the apparent lax demands on his time.¹¹⁸

The *Vance* decision did not end legal wrangling over the NYCDA grand jury subpoena, as the Court remanded the case to the lower

¹¹⁴ *Id.* As Justice Thomas noted in a footnote, this view could call *Nixon v. Fitzgerald* into question. *Id.* at n.1. This is consistent with Justice Thomas’s desire to reconsider the doctrine of qualified immunity. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting “[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence”); *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari) (“I have previously expressed my doubts about our qualified immunity jurisprudence. Because our §1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.”) (citation omitted).

¹¹⁵ *Vance*, 140 S. Ct. at 2437.

¹¹⁶ *Id.* at 2438.

¹¹⁷ *Id.* at 2439 (quoting *Burr*, 25 F. Cas. at 34).

¹¹⁸ See, e.g., Maggie Haberman et al., “Inside Trump’s Hour-by-Hour Battle for Self-Preservation,” *N.Y. Times*, Dec. 9, 2017, <https://nyti.ms/3kn4vmQ> (reporting that Trump watches between four and eight hours of television every day); Daniel Dale & Holmes Lybrand, “Fact Check: Trump Has Spent Far More Time at Golf Clubs than Obama Had at Same Point,” *CNN*, May 25, 2020, <https://cnn.it/33AS1BW> (reporting that, as of May 2020, Trump had spent all or part of over 200 days golfing during his presidency).

courts for further proceedings, including the consideration of specific objections Trump may have to aspects of the subpoena.¹¹⁹ As noted above, the Court emphasized that such subpoenas could not be allowed to interfere with the president's performance of his constitutional duties, and that a president is entitled to raise the same constitutional and state law objections to a subpoena's breadth or intrusiveness as any other person.¹²⁰ Further, the president remains able to "raise subpoena-specific constitutional challenges, in either a state or federal forum."¹²¹ The Court also declined to address whether local prosecutors could do more than investigate a president through a grand jury. *Vance* should not be read to support the proposition that state officials may indict or attempt to prosecute a sitting president, and there are serious arguments that no such prosecution could be had until a president leaves office.¹²²

While the federal district court already rejected any claims of bad faith or presidential harassment on the part of the NYCDA,¹²³ it is possible that Trump could successfully oppose the production of particular documents or materials in further proceedings. Such objections are likely to be considered quickly. On July 17, Chief Justice Roberts granted the NYCDA's unopposed request for immediate issuance of the Court's judgment, forgoing the traditional 25-day period specified in the Supreme Court's rules.¹²⁴ As of this writing, renewed proceedings in the district court are already underway.¹²⁵

¹¹⁹ *Vance*, 140 S. Ct. at 2431 n.6 (majority op.); *id.* at 2433 (Kavanaugh, J., concurring in the judgment).

¹²⁰ *Id.* at 2430–31 (majority op.).

¹²¹ *Id.* at 2430.

¹²² See A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. Off. Leg. Couns. 236–37 (2000), <https://bit.ly/2XCMYXk> ("[T]he constitutional structure permits a sitting President to be subject to criminal process only after he leaves office or is removed therefrom through the impeachment process.").

¹²³ See *Vance*, 395 F. Supp. 3d. at 298–300.

¹²⁴ See *Vance v. Trump*, 2020 U.S. LEXIS 3581 (July 17, 2020) (order to issue the judgment forthwith to the U.S. Court of Appeals for the Second Circuit). President Trump consented to this motion.

¹²⁵ See Adam Klasfeld, "Trump and Vance Face Off in First Court Hearing since SCOTUS Ruling," Courthouse News Service, July 16, 2020, <https://bit.ly/2PuNCIw>.

IV. *Trump v. Mazars*

Chief Justice Roberts also wrote for the Court in *Trump v. Mazars*, and this decision was also 7-2, albeit without any concurrences.¹²⁶ The chief justice was again joined by the Court's liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan) and both of President Trump's appointees to the Court (Kavanaugh and Gorsuch). As in *Vance*, Justices Thomas and Alito both wrote dissenting opinions. Also, as in *Vance*, each accepted aspects of the majority's analysis.

In *Mazars*, the Court rejected the claims of both sides, reaffirming congressional authority to conduct oversight, but roundly rejecting the claims put forward by the House of Representatives and vacating both of the circuit court opinions. In many respects, the *Mazars* opinion evinces a skepticism of Congress evident in other Roberts Court opinions. Notably, not a single justice on the Court indicated agreement with the holdings and analyses of the circuit courts below, and not a single justice embraced the expansive conception of congressional oversight pressed by the House of Representatives and embraced by most legal commentators.¹²⁷

At the outset, Chief Justice Roberts's opinion stressed the unprecedented nature of the case. While the Court had previously considered efforts to obtain presidential documents, beginning with the Burr trial, and had considered challenges to congressional oversight, it had "never addressed a congressional subpoena for the

¹²⁶ 140 S. Ct. 2019.

¹²⁷ See, e.g., Cass Sunstein, "Trump Tax Case Is an Easy Call," *MetroWest Daily News* (Framingham, Mass.), Nov. 13, 2019 ("[T]he case is so simple and straightforward that it wouldn't be terribly surprising if the justices decline to consider it at all."); Roger Parloff, "Behind the Bitter Legal Clash between Congress and the White House. Who Might Win?" *Newsweek*, July 5, 2019 (quoting Brianne Gorod: "These should be easy cases for the courts of appeals"); Paul Waldman, "The Wall of Concealment Trump Built around His Finances Is Beginning to Crumble," *Wash. Post*, May 23, 2019, <https://wapo.st/3a94gqz> (suggesting it takes "spectacular chutzpah" to claim Congress cannot investigate alleged illegality of president's financial dealings); Marty Lederman, "Understanding the Two Mazars Subpoena Cases Pending in the Supreme Court," *Balkinization* (blog), Nov. 25, 2019, <https://bit.ly/33G2LyX> (characterizing objections to subpoenas as "so weak"); Victoria Bassetti & Tim Lau, "Trump's Troubling Rebuke of Congressional Oversight," *Brennan Center*, May 7, 2019, <https://bit.ly/3fBKXr2> ("the long line of precedent—regarding executive privilege and the scope of Congress' power to request documents and for people to appear—is largely in Congress' favor").

President's information."¹²⁸ Most prior subpoenas of presidential records concerned official documents, and most such document demands were resolved outside of court. There was more guidance to be had in the historical practice of interbranch confrontation and accommodation than in judicial precedent.

As in *Vance*, the chief justice canvassed the history of congressional efforts to obtain presidential documents, beginning with a House committee's 1792 demand for documents related to General Arthur St. Clair's campaign against Native Americans in the Northwest Territory.¹²⁹ President George Washington's cabinet concluded that Congress has the authority to "call for papers," but the president maintained the "discretion" to withhold documents where necessary to safeguard the public interest.¹³⁰ This approach was followed by Washington's successors, producing a practice of seeking to obtain documents without resorting to the courts.¹³¹ As the Court noted, the only other instance in which a dispute over a congressional subpoena directed toward the president reached an appellate court was in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,¹³² in which the D.C. Circuit denied enforcement, relying in part on claims of executive privilege, and the Senate dropped the case (assuredly because a separate impeachment inquiry had begun).¹³³ While this litigation was of limited relevance for the issues in *Mazars*, it did support the proposition that "executive privilege claims are stronger against Congress than they are against criminal process," which is hardly a ringing endorsement of Congress's legislative oversight authority.¹³⁴

For over 200 years, when Congress has sought information or materials from the president, it has pressed its claims directly, prompting negotiation between the two branches, resolving the matter through what then–assistant attorney general Antonin Scalia

¹²⁸ *Mazars*, 140 S. Ct. at 2026.

¹²⁹ *Id.* at 2029.

¹³⁰ *Id.*

¹³¹ *Id.* at 2030.

¹³² 498 F.2d 725.

¹³³ *Id.* at 732 (noting any need for information was "merely cumulative" given the House Judiciary Committee's impeachment inquiry).

¹³⁴ See Josh Chafetz, *Congress's Constitution* 183 (2017).

called the “hurly-burly, the give-and-take of the political process.”¹³⁵ There were few cases considering the scope of Congress’s subpoena power because such cases were rarely litigated. It was generally unclear whether Congress itself has standing to sue,¹³⁶ and those subject to subpoenas, or held in contempt for violating them, rarely brought challenges of their own into court.¹³⁷ Here, however, the requests were not made to the president directly, but to third parties. This both eliminated the opportunity for direct negotiation between the president and Congress, leaving Trump with no recourse other than to seek relief in federal court. Intentionally or not, the House’s strategy of bypassing the president thrust the Court into a fray of a sort that it had long been able to avoid.¹³⁸

Just because Congress had not made a practice of seeking to enforce subpoenas in court did not mean Congress lacked the power to do so.¹³⁹ To the contrary, in *Mazars* the Court reaffirmed that each House of Congress “has power ‘to secure needed information’ in order to legislate.”¹⁴⁰ Although not enumerated in Article I (or anywhere else in the Constitution), the Court reaffirmed that Congress possessed an investigative power “as an adjunct to the legislative process.”¹⁴¹ This “power of inquiry—with process to

¹³⁵ *Mazars*, 140 S. Ct. at 2029 (citing Hearings on S. 2170 et al. before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations, 94th Cong. (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel)).

¹³⁶ One of the first court decisions expressly holding that Congress had standing to enforce a subpoena arose in the George W. Bush administration. See *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). See also *Comm. on Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020), reh’g en banc granted, opinion vacated sub nom. *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. 2020), rev’d sub nom. *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, No. 19-5331, 2020 WL 4556761 (D.C. Cir. Aug. 7, 2020) (holding that the committee does have Article III standing).

¹³⁷ See generally Amandeep S. Grewal, *Congressional Subpoenas in Court*, 98 N.C. L. Rev. 1044 (2020); Louis Fisher, Cong. Res. Serv., *Congressional Investigations: Subpoenas and Contempt Power* (2003).

¹³⁸ *Mazars*, 140 S. Ct. at 2029 (“Historically, disputes over congressional demands for presidential documents have not ended up in court.”).

¹³⁹ See *McGahn*, 951 F.3d 510. Standing questions are beyond the scope of this article.

¹⁴⁰ *Mazars*, 140 S. Ct. at 2031 (citing *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)).

¹⁴¹ *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 197 (1957)).

enforce it—is an essential and appropriate auxiliary to the legislative function.”¹⁴²

While casting no doubt on the existence of Congress’s investigatory power, the Court stressed its limit as an “adjunct” or “auxiliary” power. Congress has no power to investigate for investigation’s sake, nor to conduct oversight for the purpose of public disclosure,¹⁴³ let alone to exact punishment of “‘try[ing]’ someone ‘before [a] committee for any crime or wrongdoing.’”¹⁴⁴ Rather, congressional subpoenas are valid only insofar as they are “related to, and in furtherance of, a legitimate task of the Congress.”¹⁴⁵ More generally, congressional subpoenas must serve “a valid legislative purpose.”¹⁴⁶ Further, the recipients of subpoenas retain “common law and constitutional privileges” against the disclosure of certain materials.¹⁴⁷

The Court rejected the notion that Congress has an expansive and independent investigatory power apart from what is necessary to enact and review legislation. Simultaneously, the Court rejected Trump’s efforts to erect an additional barrier to obtaining presidential documents. Although Chief Justice Roberts stressed that courts need to remain conscious of the real separation-of-powers concerns raised by congressional attempts to investigate the president (as apart from efforts to investigate executive branch agencies created and funded by Congress), his opinion also rejected the claims made by President Trump and the solicitor general that all requests for presidential records require the sort of “demonstrated, specific need” necessary to overcome assertions of executive privilege. If the position advanced by the House, and embraced by the lower courts, was insufficiently solicitous of the president’s interests, the president’s approach paid too little regard to those of Congress.

As in *Vance*, the Court was not persuaded that serving a subpoena on third-party custodians, instead of the president himself, eliminated any burden on the executive. Intrusions on the president’s

¹⁴² *Id.* (quoting *McGrain*, 273 U.S. at 174).

¹⁴³ *Id.* at 2032 (“Congress has no ‘general power to inquire into private affairs and compel disclosures.’”) (cleaned up).

¹⁴⁴ *Id.* (quoting *McGrain*, 273 U.S. at 179).

¹⁴⁵ *Watkins*, 354 U.S. at 187.

¹⁴⁶ *Quinn v. United States*, 349 U.S. 155, 161 (1955).

¹⁴⁷ *Mazars*, 140 S. Ct. at 2032.

ability to perform his duties is not merely a matter of not having to produce documents himself. “Congressional demands for the President’s information present an interbranch conflict no matter where the information is held—it is, after all, the President’s information,” Roberts wrote.¹⁴⁸ Because of the rivalrous relationship between the legislative and executive branches, any effort by one to investigate the other necessarily raises separation-of-powers concerns.¹⁴⁹ Thus “congressional subpoenas for the President’s information unavoidably pit the political branches against one another.”¹⁵⁰ (Though Chief Justice Roberts wrote as if this point were obvious, it was rejected not only by majorities on each circuit court that considered the question, but also seems not to have been recognized, at first, by the Department of Justice, as it only filed briefs in the congressional subpoena cases when invited to by the appellate courts.)

Rejecting the arguments advanced by the parties, Chief Justice Roberts laid out a “balanced approach” that would require courts to “perform a careful analysis that takes adequate account of the separation of powers principles at stake” for both the president and Congress alike.¹⁵¹ Such an analysis requires consideration of at least four questions when evaluating a congressional subpoena for presidential papers, including private financial documents held by third parties:

- 1) Whether the asserted legislative purpose requires obtaining papers from the president, or whether the legislative purpose be served by obtaining other information or materials from other sources. In other words, if Congress can achieve its legitimate goals without intruding upon the president, it should be required to do so.
- 2) Whether the subpoena is “broader than reasonably necessary to support Congress’s legislative objective.”¹⁵² In other words, Congress cannot engage in fishing expeditions or broad drift-net strategies to sweep up evidence of presidential wrongdoing.

¹⁴⁸ *Id.* at 2035.

¹⁴⁹ *Id.* at 2033 (noting the legislature and executive are “‘opposite and rival’ political branches”).

¹⁵⁰ *Id.* at 2034.

¹⁵¹ *Id.* at 2035.

¹⁵² *Id.* at 2036.

- 3) Whether Congress has offered evidence “to establish that a subpoena advances a valid legislative purpose.”¹⁵³ In other words, courts need not just take Congress’s word for it but can demand evidence to support the subpoena.
- 4) Whether the subpoena imposes undue or unreasonable burdens on the president. In other words, courts should not help Congress use subpoenas to harass or debilitate a rival political branch.

The lower courts in these cases failed to consider such factors and, more broadly, did not account adequately for the separation-of-powers principles at stake, but would be required to on remand. In many respects, the Court embraced an analysis quite similar to that of Judge Livingston below.

This approach drew from the history of interbranch accommodation more than from the Court’s own precedents but seems designed to replicate the outcome that would have been achieved had Congress and the executive been forced to negotiate a resolution. It was an approach that left neither side particularly happy. Perhaps an implicit message of the Court’s test is that forcing the judiciary to intercede in such interbranch disputes is a sure way to ensure neither side gets much of what it wants.¹⁵⁴

Justice Thomas offered a narrower view of Congress’s oversight power in his separate dissent. Echoing the opinion below of Judge Rao (a former Thomas clerk), Justice Thomas concluded that Congress may not use its legislative power to investigate potential wrongdoing by impeachable officers. Rather, it must use the impeachment power. Further, Justice Thomas would have held “Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not.”¹⁵⁵ At the time of the Founding, Justice Thomas notes, such a power “was not included by necessary implication in any of Congress’ legislative powers.”¹⁵⁶

¹⁵³ *Id.*

¹⁵⁴ See Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 *Admin. L. Rev.* 31, 33 (1991) (“Excessive reliance upon the Court deceives us into thinking that these disputes are purely constitutional in nature and that only the Justices can resolve them.”).

¹⁵⁵ *Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting).

¹⁵⁶ *Id.* at 2038.

Broader conceptions of Congress's investigatory powers, such as that embraced by the Court in *McGrain v. Daugherty* and expounded upon by the majority in *Mazars*, "are without support as applied to private, nonofficial documents."¹⁵⁷

Dissenting separately, Justice Alito echoed many of the concerns he expressed in *Vance*. In his view "legislative subpoenas for a President's personal documents are inherently suspicious," and are thus deserving of careful scrutiny.¹⁵⁸ In this case, Justice Alito perceived an excessively broad demand for information and "disturbing evidence of an improper law enforcement purpose."¹⁵⁹ To overcome these concerns, he suggested the House should have to make the sort of detailed showing he would have imposed on the NYCDA in *Vance*. While agreeing with the majority's decision to remand, he found its terms "inadequate," prompting his separate dissent.¹⁶⁰

A. *The Question of Limits*

As it was ultimately decided, *Mazars* can be seen as a case about limits on legislative power. The president and Congress framed the case in separation-of-powers terms, emphasizing the need to protect or oversee the executive, respectively. Yet for many on the Court, it presented an unresolved question about the constitutional limits on Congress, and the resulting opinion expressed disquiet with the lower courts' failure to impose any meaningful constraint on the legislature's investigative appetite.

The need to identify judicially enforceable limits on legislative power is a hallmark of the Court's modern federalism jurisprudence. A theory of legislative power typically needs to have some limiting principle if it is going to convince a majority of the current Court. A pivotal moment during oral argument in *United States v. Lopez* occurred when the solicitor general was asked whether, on the government's theory defending the constitutionality of the Gun-Free School Zones Act, there was any activity beyond the scope of Congress's power "to regulate Commerce . . . among the several States,"

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 2048 (Alito, J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2049.

and he had no reply.¹⁶¹ Several years later, in *Morrison v. United States*, the solicitor general again failed to satisfy those justices interested in a clear limiting principle.¹⁶² After both arguments, the Court rejected Congress's assertions of authority, concluding the laws in question exceeded the legislature's enumerated powers.¹⁶³

Since *Lopez* and *Morrison*, government advocates in federalism cases are prepared for the limits question, as they were in *NFIB v. Sebelius*.¹⁶⁴ It does not appear the House of Representatives was prepared for this line of inquiry in *Mazars*, however. During oral argument, multiple justices pressed the House's attorney to identify documents or information that would lie beyond Congress's grasp. Each time, the attorney came up empty¹⁶⁵—a point Chief Justice Roberts highlighted in his opinion.¹⁶⁶ At one point the attorney suggested Congress might not be able to subpoena the president's private medical records, but then he recognized that such information might well be relevant, under the House's theory, to inform legislation concerning presidential succession or the operation of the Twenty-fifth Amendment.¹⁶⁷ In the House's vision, it would be open-season on a president from another political party.

This question was predictable, and the inability to provide an answer seems like an unforced error. The principle that all legislative

¹⁶¹ Tr. of Oral Argument at 5–9, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260).

¹⁶² Tr. of Oral Argument at 22–23, 26, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-5).

¹⁶³ *Lopez*, 514 U.S. at 567–68; *Morrison*, 529 U.S. at 621.

¹⁶⁴ See Josh Blackman, *Unprecedented* 159–60 (2013) (discussing how solicitor general's office was aware the lack of a limiting principle could be a vulnerability at oral argument).

¹⁶⁵ *Mazars* Oral Argument, *supra* note 31, at 62 (Justice Alito asked the House's attorney, "But you were not able to give the Chief Justice even one example of a subpoena that would be—that would not be pertinent to some conceivable legislative purpose, were you?," to which the attorney responded, "As—as I said, Your Honor, the—that—that's correct, because this Court itself has said Congress's power is—to legislate is extremely broad, especially when you take into account appropriations.").

¹⁶⁶ *Mazars*, 140 S. Ct. at 2034 ("Indeed, at argument the House was unable to identify any type of information that lacks some relation to potential legislation.").

¹⁶⁷ *Mazars* Oral Argument, *supra* note 31, at 77 (the House's attorney said, "medical records of the President would, I think, almost always be not pertinent to valid legislative purpose," but then 10 seconds later, flipped and said that under "the Twenty-fifth amendment, they would—they certainly would be pertinent").

powers must be limited matters to the Court's conservative justices, but, in this context, it appears to have mattered to the liberals as well. Justice Breyer, for example, noted his concerns at argument about the scope of the power asserted and its potential for abuse in the future. Whatever the Court rules in this case, he noted, would apply to future presidents and would empower future Congresses.¹⁶⁸ This was not a case about Trump. To the Court, it was a case about Congress and the executive.

Given the breadth of Congress's powers under existing doctrine, there is little information that could not be sought in pursuit of a "legitimate legislative purpose," particularly if, as the House and Second Circuit maintained, it was appropriate to single out the president as a "case study" to inform legislative action. If investigations into alleged wrongdoing may always be excused as legitimate efforts to inform remedial legislation, then there is no alleged misfeasance or malfeasance that is not up for grabs. And even if one were to identify a limit on Congress's enumerated powers that left some subject matter beyond the reach of Article I, Section 8, Congress could always claim the need to obtain information to inform a potential constitutional amendment to expand legislative power.

This is why, if a limit is necessary, it is not enough to rest on the constraints imposed by Congress's enumerated powers. Limits born of the Constitution's structure, grounded in the separation of powers, must also be identified. This is a trickier enterprise, due to the lack of relevant constitutional text, which may explain why the majority embraced a functional, history bound understanding of Congress's investigatory power. It may have been the best the Court could do the first time it was presented with this question. As the chief justice noted, "one case every two centuries does not afford enough experience" for a more definitive test.¹⁶⁹

¹⁶⁸ *Id.* at 84 (Justice Breyer said, "the fact that what I hold today will also apply to a future Senator McCarthy asking a future Franklin Roosevelt or Harry Truman exactly the same questions, that bothers me.").

¹⁶⁹ Mazars, 140 S. Ct. at 2036.

B. The Impotent Congress and the Impeachment Alternative

Chief Justice Roberts's *Mazars* opinion stressed the unprecedented nature of the case. What was unprecedented was not that Congress sought to investigate a president, however, or that a president did not want to release information or materials that Congress desired. What was unprecedented was that the matter made its way to the Supreme Court.

The House subpoenaed third-party custodians for the president's financial records because it had every reason to believe the president would not cooperate. Indeed, the Trump administration made clear after the 2018 election that it would resist congressional oversight across the board.¹⁷⁰ While *Mazars* and the banks said they would not turn over Trump-related records voluntarily, they also indicated to Congress that they would comply if subpoenaed.¹⁷¹ Yet, as noted above, by pursuing this course, Congress prevented any possibility of interbranch accommodation, and gave President Trump the opportunity to push these cases to federal court.

The House likely sought an alternative to direct demands for production by the president because it knew how that would end. The president would refuse, and Congress would not obtain the desired documents for an extended period of time, if at all. Congress's relative impotence at obtaining documents from the White House is not solely a function of executive intransigence. Some of the blame lies with Congress itself. The legislature's failure to engage in more frequent legislation and a more regular appropriations process has lessened its leverage against the executive branch.¹⁷² By allowing its powers to atrophy, Congress is less able to bargain or coerce executive branch cooperation. If Congress wants information, whether for a legitimate legislative purpose or otherwise, it needs to be in a position to withhold things the executive branch needs and

¹⁷⁰ See *supra* note 3.

¹⁷¹ See *supra* note 31.

¹⁷² On Congress's general failure to utilize its legislative authority to control the executive branch, and agencies in particular, see Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931 (2020).

exact concessions. A Congress that is unable to legislate is not a Congress that has such leverage.¹⁷³

Is there an alternative to relying upon legislative power? The House relied exclusively upon its legislative powers to justify the subpoenas under consideration. Even though there was palpable interest in alleged presidential wrongdoing, the House nonetheless eschewed any reliance upon the impeachment power. This was a political choice that likely made it more difficult for the House to prevail. Insofar as the committees sought information about ongoing financial relationships and activities, the documents sought would have been relevant for an impeachment inquiry. As demonstrated by historical practice dating all the way back to the Washington administration, Congress is entitled to documents sought pursuant to a valid impeachment inquiry that it could not otherwise obtain.¹⁷⁴ Though the matter was not before the Court, there is every reason to believe the justices would have been more receptive to an effort to obtain the president's personal financial documents for impeachment purposes than as an aid to legislation.¹⁷⁵

The power to investigate wrongdoing for purposes of impeachment is more penetrating than the investigatory power to support legislation. Yet it is also more politically fraught. Invoking the specter of impeachment entails political costs—costs many in Congress

¹⁷³ It is fair to note that congressional leverage is also dependent upon the executive branch valuing what Congress can withhold. So, for instance, if an administration is willing to operate without Senate-confirmed individuals in key administrative positions, this dramatically lessens the Senate's ability to use its advice-and-consent power to induce executive branch cooperation.

¹⁷⁴ See 940 F.3d at 758 (Rao, J., dissenting) (“[I]n 1796 the House requested from President George Washington documents and diplomatic correspondence related to the Jay Treaty and its ratification in order to determine whether to appropriate the funds necessary to implement the Treaty. President Washington argued that because the House could not compel him to disclose the documents through an exercise of its legislative powers, it could demand the documents only through an exercise of its impeachment power.”).

¹⁷⁵ See Michael Stern, “How Impeachment Proceedings Would Strengthen Congress’s Investigatory Powers,” *Just Security*, May 28, 2019. See also Amandeep S. Grewal, *The President’s Tax Returns*, 27 *Geo. Mason L. Rev.* 439, 477 (2020) (noting “historical practice suggests” that many “separation of powers limitations” of concern in oversight investigations “must yield”).

were not yet ready to bear.¹⁷⁶ And that is precisely the point. If Congress wants to be able to wield the more powerful investigative tool against a political rival, such as the president, it has to be willing to bear the political costs. Legislative reluctance to even consider invoking its impeachment power leaves it bereft of one of its most significant constitutional authorities.

An unresolved question is whether invoking the impeachment power requires some form of official act by the House, or whether a committee statement is enough. While the lower courts considered the intricacies of congressional committee authorizations,¹⁷⁷ the Supreme Court did not, so it remains an open question whether procedural formalities are necessary for the exercise of the legislature's investigatory power. Would it have been enough for the House Oversight Committee's memo to include a statement that it needed the financial materials from Mazars USA to help determine whether to open a formal impeachment inquiry? Would this be any different than a congressional inquiry into the nature of a problem for which proposed legislation has yet to be outlined, let alone drafted? There is little in *Mazars* to answer those questions. It is nonetheless possible to conclude that the House's unwillingness to acknowledge the need to investigate potential high crimes and misdemeanors weakened its hand in the Supreme Court.

V. Conclusion

Mazars and *Vance* reaffirmed the important principle that the president is not above the law. Article II did not create a king. Yet they also embrace the proposition that the president is special, and when the president is under investigation, the fact that it is the president is something that matters, whether that president is Donald Trump or someone else.

¹⁷⁶ Although the Founding generation may have seen impeachment as an "indispensable remedy" to executive malfeasance, in contemporary political discourse invoking the "I-word" conjures up "specters of wounded democracy and constitutional collapse." See Gene Healy, *Indispensable Remedy: The Broad Scope of the Constitution's Impeachment Power* 81–82 (2018).

¹⁷⁷ *Mazars*, 940 F.3d at 742–47 (discussing in detail House Rules X and XI, as well as various subclauses, which the court held authorizes the Oversight Committee to subpoena Trump's financial records); *Deutsche Bank AG*, 943 F.3d at 669 (discussing the "Committee's authorized investigative authority" and rejecting the United States's amicus curiae argument that such authority would upset the separations of power).

In rejecting claims of immunity from state criminal subpoenas and congressional oversight, the Supreme Court has not opened a Pandora's box of presidential harassment. *Clinton v. Jones* did not lead to a deluge of suits against Presidents George W. Bush and Barack Obama, and presidents will only be subject to potential criminal investigation when they engaged in potentially illegal activities before they were president. We need not worry about 2,300 local prosecutors running amok.¹⁷⁸

Congressional investigations will continue, though Congress will have to be more careful and less political in its efforts. Demands for presidential materials will have to be more circumscribed, and perhaps Congress will realize that some legislative purposes do not require so much information.¹⁷⁹ Indeed, if Congress wants greater financial disclosure by presidents, it could amend the Ethics in Government Act to add such requirements, producing disclosure by statutory requirement rather than by oversight subpoena. That might not produce any revelations about Donald Trump, but it would advance the asserted legislative interest going forward.

As a practical matter, the *Mazars* and *Vance* decisions mean that the legal proceedings in all of the financial records cases will continue, and any documents produced are unlikely to see the light of day before the November election. *Vance* is a more decisive loss for the president, but that case involves grand jury subpoenas, so any documents eventually turned over will be covered by grand jury secrecy rules. *Mazars* is more of a split decision that leaves Congress with options—though it may not leave Congress the time to pursue those options before the existing subpoenas expire at the end of the legislative session. Going forward, if Congress wants information from a president, even about his personal finances on private financial dealings, it will have to avoid the overly partisan, blunderbuss approach that has characterized much legislative oversight in recent years.

As already noted, it is significant that not a single justice expressed support for the lower court opinions in *Mazars*. Nor was a single

¹⁷⁸ *Vance*, 140 S. Ct. at 2452 (Alito, J., dissenting).

¹⁷⁹ For example, Congress has had no difficulty enacting legislation governing the receipt of foreign emoluments by executive branch officials without subpoenaing extensive financial records from covered officials. See Grewal, *supra* note 175, at 461.

justice willing to write in support of an unbounded legislative oversight power. The perspective presented as self-evident by many legal commentaries was wholly absent from the opinions issued by the Court. Congress's unenumerated power to investigate has limits.

Do the financial records cases matter politically? Probably not. It is unlikely there is anything in the relevant records that would influence a significant portion of the electorate. Those who oppose President Trump need no more convincing, and given all of the revelations and allegations to date, it is not clear that additional reports alleging financial improprieties of some sort would move much of the electorate.¹⁸⁰ Yet information about the president's financial entanglements might encourage a future Congress to enact additional disclosure requirements for future officeholders.

Mazars and *Vance* may still matter in a different way. By rendering 7-2 rulings in these two cases, and eschewing the partisan divisions that we see throughout our other institutions, the Court has demonstrated an ability to reach careful, balanced judgments on important separation-of-powers questions with deep political significance. That is not something to be overlooked, even if it has the potential to seduce the other branches into thinking they do not have to learn to resolve their disputes among themselves.¹⁸¹

¹⁸⁰ President Trump himself has bragged that there is almost nothing he could do to lose support. See, e.g., Jeremy Diamond, "Trump: I could 'shoot somebody and I wouldn't lose voters,'" CNN, Jan. 24, 2016, <https://cnn.it/2DGfQ0f>.

¹⁸¹ See Entin, *supra* note 154.

