AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Legislative Investigation Powers

**Trump v. Mazars USA, LLP, \_\_\_ U.S. \_\_\_** (2020)

*Breaking from modern tradition, Donald Trump did not release his tax returns to the public when he was running for president. Once he assumed office, the lack of transparency into his personal finances took on additional importance as critics questioned whether he was running afoul of the emoluments clause of the Constitution by continuing to run a profitable hotel business that sometimes catered to foreign government officials. Additional scrutiny of Trump also raised questions about whether his charitable foundation was complying with tax laws. As Democrats were poised to take over the U.S. House of Representatives in the 2018 midterm elections and special counsel Robert Mueller’s federal investigations were coming to a conclusion, the New York County district attorney Cyrus Vance Jr. announced that his office was pursuing criminal investigations of Trump associates. In 2019, Vance issued a subpoena to Mazars USA, LLP, the personal accounting firm of President Trump, seeking various financial records relating to the president and his business organizations. At about the same time in 2019, three House committees likewise sought financial documents from Mazars and other financial institutions relating to the president, his businesses, and his children. The House Financial Services Committee claimed it needed the documents as part of its investigation into the need for further banking regulations. The House Intelligence Committee claimed it needed the documents as part of its investigation into the efforts of foreign actors to influence American elections and potential statutory responses to such threats. The House Oversight and Reform Committee claimed it needed the documents as part of its investigation into possible emoluments clause violations by the president and whether the president had engaged in illegal conduct or had conflicts of interest.*

*Trump, in his personal capacity, filed two lawsuits in federal district courts seeking injunctions against the enforcement of subpoenas from the three House committees and the grounds that the committees lacked a legitimate legislative purpose for accessing such documents. The trial courts declined to issue those injunctions, and the circuit courts affirmed those rulings. The U.S. Supreme Court in a 7-2 decision vacated those rulings and remanded the cases for further proceedings. The Court accepted that Congress might have a legitimate legislative interest in accessing such personal documents of a sitting president, but it emphasized that there were distinct separation of powers concerns in such a probe that required careful scrutiny by the courts when they are asked to enforce such a subpoena.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the “hurly-burly, the give-and-take of the political process between the legislative and the executive.”

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair’s campaign against the Indians in the Northwest Territory. . . .

[A Cabinet meeting called by President Washington] ended with the Cabinet of “one mind”: The House had authority to “institute inquiries” and “call for papers” but the President could “exercise a discretion” over disclosures, “communicat[ing] such papers as the public good would permit” and “refus[ing]” the rest. President Washington then dispatched Jefferson to speak to individual congressmen and “bring them by persuasion into the right channel.” The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts.

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Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute. Indeed, from President Washington until now, we have never considered a dispute over a congressional subpoena for the President’s records. And, according to the parties, the appellate courts have addressed such a subpoena only once, when a Senate committee subpoenaed President Nixon during the Watergate scandal. In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court.

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Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power “to secure needed information” in order to legislate. *McGrain v. Daugherty* (1927). . . .

Because this power is “justified solely as an adjunct to the legislative process,” it is subject to several limitations. Most importantly, a congressional subpoena is valid only if it is “related to, and in furtherance of, a legitimate task of the Congress.” *Watkins v. United States* (1957). . . .

Furthermore, Congress may not issue a subpoena for the purpose of “law enforcement,” because “those powers are assigned under our Constitution to the Executive and the Judiciary.” *Quinn v. United States* (1955). . . . Congress has no “‘general’ power to inquire into private affairs and compel disclosures,” and “there is no congressional power to expose for the sake of exposure.” . . .

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. . . .

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. . . . Unlike the cases before us, *United States v. Nixon* (1974) and *Senate Select Committee on Presidential Campaign Activities v. Nixon* (Cir. D.C. 1974*)* involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is “fundamental to the operation of Government.” As a result, information subject to executive privilege deserves “the greatest protection consistent with the fair administration of justice.” We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to *all* subpoenas for the President’s information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress’s important interests in conducting inquiries to obtain the information it needs to legislate effectively. . . .

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Largely following the House’s lead, the courts below treated these cases much like any other, applying precedents that do not involve the President’s papers. . . .

The House’s approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President’s information. Congress and the President have an ongoing institutional relationship as the “opposite and rival” political branches established by the Constitution. . . .

Far from accounting for separation of powers concerns, the House’s approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President’s personal records. Any personal paper possessed by a President could potentially “relate to” a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. . . . Indeed, at argument, the House was unable to identify any type of information that lacks some relation to potential legislation.

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The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. “The interest of the man” is often “connected with the constitutional rights of the place.” . . .

In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. 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. Were it otherwise, Congress could sidestep constitutional requirements any time a President’s information is entrusted to a third party—as occurs with rapidly increasing frequency. . . .

A balanced approach is necessary, one that takes a “considerable impression” from “the practice of the government,” and “resist[s]” the “pressure inherent within each of the separate Branches to exceed the outer limits of its power.” We therefore conclude that, in assessing whether a subpoena directed at the President’s personal information is “related to, and in furtherance of, a legitimate task of the Congress,” courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the “unique position” of the President. Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. . . . Congress may not rely on the President’s information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President’s unique constitutional position means that Congress may not look to him as a “case study” for general legislation.

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Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective. The specificity of the subpoena’s request “serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.” *Cheney v. United States District Court for D.C.* (2004).

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress’s legislative purpose, the better. . . .

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President’s time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. . . .

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

When Congress seeks information “needed for intelligent legislative action,” it “unquestionably” remains “the duty of *all* citizens to cooperate.” *Watkins*. Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. . . .

*Vacated and Remanded*.

JUSTICE THOMAS, dissenting.

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At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress’ legislative powers. This understanding persisted for decades and is consistent with the Court’s first decision addressing legislative subpoenas. *Kilbourn v. Thompson* (1881). The test that this Court created in *McGrain v. Daugherty* (1927), and the majority’s variation on that standard today, are without support as applied to private, nonofficial documents.

The Committees argue that Congress wields the same investigatory powers that the British Parliament did at the time of the founding. But this claim overlooks one of the fundamental differences between our Government and the British Government: Parliament was supreme. Congress is not.

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*Kilbourn*—this Court’s first decision on the constitutionality of legislative subpoenas—emphasized that Parliament had more powers than Congress. There, the congressional respondents relied on Parliament’s investigatory power to support a legislative subpoena for testimony and documents. The Court rejected the analogy because the judicial powers of the House of Commons—the lower house of Parliament—exceeded the judicial functions of the House of Representatives. At bottom, *Kilbourn* recognized that legislative supremacy was decisively rejected in the framing and ratification of our Constitution, which casts doubt on the Committees’ claim that they have power to issue legislative subpoenas to private parties.

The subpoenas in these cases also cannot be justified based on the practices of 18th-century American legislatures. . . .

. . . . [T]he information sought in these examples was official, not private. Underscoring this distinction, at least one revolutionary-era State Constitution permitted the legislature to “call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of their inquiries, concerning affairs relating to the public interest.”

Second, 18th-century legislatures conducted nonlegislative investigations. . . . Here, the Committees assert only a legislative purpose.

Third, colonial and state legislatures investigated and punished insults, libels, and bribery of members. . . . In short, none of the examples from 18th-century colonial and state history support a power to issue a legislative subpoena for private, non-official documents.

Given that Congress has no exact precursor in England or colonial America, founding-era congressional practice is especially informative about the scope of implied legislative powers. Thus, it is highly probative that no founding-era Congress issued a subpoena for private, nonofficial documents. Although respondents could not identify the first such legislative subpoena at oral argument, Congress began issuing them by the end of the 1830s. However, the practice remained controversial in Congress and this Court throughout the first century of the Republic.

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When this Court first addressed a legislative subpoena, it refused to uphold it. After casting doubt on legislative subpoenas generally, the Court in *Kilbourn v. Thompson*, held that the subpoena at issue was unlawful because it sought to investigate private conduct.

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Since *McGrain*, the Court has pared back Congress’ authority to compel testimony and documents. . . . Rather than continue our trend of trying to compensate for *McGrain*, I would simply decline to apply it in these cases because it is readily apparent that the Committees have no constitutional authority to subpoena private, nonofficial documents.

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I express no view today on the boundaries of the power to demand documents in connection with impeachment proceedings. But the power of impeachment provides the House with authority to investigate and hold accountable Presidents who commit high crimes or misdemeanors. That is the proper path by which the Committees should pursue their demands.

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JUSTICE ALITO, dissenting.

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Whenever such a subpoena comes before a court, Congress should be required to make more than a perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing. . . .

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. . . . I agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date.

Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court’s remand inadequate, I must respectfully dissent.