Presidential Privacy

(07/20/20)

The Supreme Court has now spoken with respect to subpoenas directed to the President of the United States. Both *Trump v. Vance*, 2020 U.S. LEXIS 3552 (July 9, 2020) Roberts, C.J. and *Trump v. Mazars United States*, 2020 U.S. LEXIS 3553 (July 9, 2020) Roberts, C.J., make for interesting historical reading. They both trace the history and nature of subpoenas to the President, the purposes for which they were used, and the politics which often undergird the investigations in the presidential activity.

Trump v. Vance, wrote Chief Justice Roberts, addressed the first state criminal subpoena directed to a President. The Court granted certiorari to determine whether Article II and the Supremacy Clause "categorically preclude" or require an enhanced standard for the issuance of a state criminal subpoena issued to a sitting President.

Although the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not "relegate[d]" only to the challenges available to private citizens. Post, at 17 (opinion of ALITO, J.). A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. See supra, at 17. This avenue protects against local political machinations "interposed as an obstacle to the effective operation of a federal constitutional power." United States v. Belmont, 301 U. S. 324, 332 (1937).

The Court was somewhat surprised that the arguments presented both before the Supreme Court and the Court of Appeals were limited to absolute immunity and heightened need. The President went for a touchdown. The Court of Appeals directed that the case be returned to the trial court, where the President could raise further arguments as appropriate. The United States Supreme Court affirmed that judgment and remanded the matter for further proceedings consistent with the opinion.

The trial court will have to decide whether the subpoena is a legitimate part of a criminal investigation or rather whether it is merely an indication of "political machinations".

Trump v. Mazars United States is another opinion drafted by the new center of the United States Supreme Court, Chief Justice Roberts.

Over the course of five (5) days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. The United States Supreme Court has previously held that the House of Representatives has authority under the Constitution to issue subpoenas to assist it in carrying out legislative duties. The House, on this case before the U.S. Supreme Court, asserts that the financial information sought, encompassing a decade's worth of transactions by the President and

his family, will guide legislative reform. That reform would be in areas ranging from money laundering and terrorism to foreign involvement in United States elections. Whether this is merely an elegant fishing expedition or a legitimate inquiry based upon perception of President Trump's overreaching, was a swamp the Court chose not to enter.

The President contended before the Supreme Court that the House of Representatives lacked a valid legislative aim and instead sought the records to harass him. The President argued that the purpose of the subpoenas was to expose personal matters and conduct law enforcement activities beyond the authority of the House. The question presented to the United States Supreme Court was whether the subpoenas exceed the authority of the House of Representatives under the Constitution of the United States.

Once again, the United States Supreme Court had to acknowledge its lack of experience with the subject. "We have never addressed a congressional subpoena for the President's information." Two hundred years ago, it was established that Presidents may be subpoenaed during a federal criminal proceeding, United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, Cir. J.), and in the case of *Trump v. Vance*, the Court extended that ruling to state criminal proceedings. Nearly fifty years ago, the U.S. Supreme Court held that a federal prosecutor could obtain information from a President in spite of assertions of executive privilege, *United States v. Nixon*, 418 U. S. 683 (1974), and more recently the Court ruled that a private litigant could subject a President to a damages suit and appropriate discovery obligations in federal court, *Clinton v. Jones*, 520 U. S. 681 (1997).

The Chief Justice distinguished *Trump v. Mazars* from those prior cases. Here, the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have brought legislative agenda.

Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but the Court has held that each House has power "to secure needed information" in order to legislate. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927). This "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." Id., at 174. Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." Id., at 175. The congressional power to obtain information is "broad" and "indispensable." *Watkins v. United States*, 354 U. S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." Id., at 187.

Since the power of Congress is "justified solely as an adjunct to the legislative process," it is subject to several limitations. Id., at 197. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." Id., at 187. The subpoena must serve a "valid legislative purpose," *Quinn v. United States*, 349 U. S. 155, 161 (1955); it must "concern a subject on which legislation 'could be had,'"

Eastland v. United States Servicemen's Fund, 421 U. S. 491, 506 (1975) (quoting *McGrain*, 273 U. S., at 177).

The Court opined that a balanced approach is necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); see *Noel Canning*, 573 U. S., at 524–526, and "resist[s]" the "pressure inherent within each of the separate Branches to exceed the outer limits of its power," *INS v. Chadha*, 462 U. S. 919, 951 (1983). The United States Supreme Court concluded 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," *Watkins*, 354 U. S., at 187, 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, Clinton, 520 U. S., at 698 (internal quotation marks omitted). 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. 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. Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena.

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*, 354 U. S., at 187 (emphasis added). Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The United States Supreme Court determined that the courts below did not take adequate account of the concerns which the United States Supreme Court addressed. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit were therefore vacated, and the case remanded for further proceedings consistent with the opinion.

What is important about both of these cases is that the Court attempted to walk a narrow line, assuring that the President would not be a target solely of nasty political "machinations", but at the same time would not be above the law. The Chief Justice, therefore, writing for the majorities, directed the lower courts to make an analysis that would provide the public with vindication for improper or illegal conduct, but at the same time afford some protection to the highest official in government not to be harassed unnecessarily.

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