

**TRUMP V. MAZARS USA, LLP:
THE CASE OF THE CHIEF JUSTICE AND THE
CONGRESSIONAL SUBPOENAS**

Rodger D. Citron*

INTRODUCTION	1
I. <i>Trump v. Mazars USA, LLP</i> : Setting the Stage	5
A. <i>Litigation in the Lower Courts</i>	5
1. <i>Trump v. Mazars USA, LLP</i>	5
2. <i>Trump v. Deutsche Bank AG</i>	6
B. <i>The Parties' Contentions in the Supreme Court</i>	7
C. <i>The Political Question Inquiry</i>	8
II. Oral Argument in <i>Trump v. Mazars</i>	9
A. <i>Chief Justice Roberts' Questions</i>	10
B. <i>Cards on the Table: Questioning by Justices Alito and Sotomayor</i>	10
C. <i>Cards Close to the Vest: Questioning by Justices Gorsuch and Kavanaugh</i>	12
D. <i>Performance of House Counsel</i>	14
III. The Supreme Court's Decision in <i>Mazars</i>	15
A. <i>Congressional Power to Investigate</i>	16
B. <i>Whether a Higher Standard Should Apply When Congress Seeks the President's Papers</i>	17
C. <i>The Supreme Court's Compromise & Remand</i>	19
D. <i>The Dissents</i>	20
IV. <i>Mazars</i> & the Court's Other Separation-of-Powers Cases in the 2019–2020 Term	20
CONCLUSION	22

INTRODUCTION

Since his appointment in 2005, Chief Justice John G. Roberts, Jr. has had a dual identity. There is the Chief Justice Roberts who is playing the long game with his reputation—the jurist with an eye towards history. This is the Judge Roberts who dazzled at his confirmation hearings in 2005, the Chief Justice Roberts who extolled the virtues of consensus in an

adoring profile in *The Atlantic* in 2007, and the Chief Justice who avoided a partisan ruling when he abandoned his fellow conservatives to provide the fifth vote upholding the Affordable Care Act's individual mandate in 2012.¹

There also is the Chief Justice Roberts who is determined to continue to entrench conservative legal principles as the federal law of the land. This is the Chief Justice who presides over a Supreme Court that gutted a key provision of the Voting Rights Act in 2013, invalidated campaign finance laws in a number of cases, and invoked the political question doctrine to end litigation over claims of partisan political gerrymandering.²

* Rodger D. Citron is the Associate Dean for Research & Scholarship and Professor of Law at Touro College, Jacob D. Fuchsberg Law Center. He thanks Conor Byrnes and Garrett Wakefield for their excellent research assistance and Library Director Irene McDermott and her staff, Andrea Cohen, Eileen Kaufman, Jeffrey Morris, and Bill Petersen for their time and help along the way. Parts of this article were published earlier in 2020 on *Verdict*. See Rodger Citron, *Notes on an Oral Argument: The Questions Asked, the Answers Given, and What They May Augur for the Supreme Court's Decision in the Congressional Subpoena Cases*, VERDICT (June 29, 2020), <https://verdict.justia.com/2020/06/29/notes-on-an-oral-argument>; Rodger Citron, *President Trump Clashes with Legal Oversight in Three Cases to be Argued at the Supreme Court*, VERDICT (May 11, 2020), <https://verdict.justia.com/2020/05/11/president-trump-clashes-with-legal-oversight-in-three-cases-to-be-argued-at-the-supreme-court>.

¹ See *Roberts Vote Heads to Senate*, PBS (Sept. 22, 2005), <https://www.pbs.org/newshour/show/roberts-vote-heads-to-senate> (reporting that “three Democrats” on the Senate Judiciary Committee “admitted Roberts’ performance during his confirmation hearings was impressive, as is his stellar legal record”); Jeffrey Rosen, *Roberts’s Rules*, THE ATL. (Jan. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>; Nat’l Fed’n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); see also Joan Biskupic, *‘The Chief’ John Roberts’ journey from ‘sober puss’ to the pinnacle of American law*, CNN (Mar. 27, 2019), <https://www.cnn.com/2019/03/27/politics/john-roberts-sober-puss-the-chief/index.html>.

² See *Shelby County v. Holder*, 570 U.S. 529, 532 (2013) (holding § 4 of the Voting Rights Act unconstitutional); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (holding that restrictions on corporations’ independent expenditures for campaign finance violated the First Amendment’s free speech protections); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (holding that political gerrymandering presented a political question outside the scope of the Court’s powers); see also Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 3 (2012) (stating that, as a result of the Supreme Court’s decision in *Citizens United*, “for all

The Presidency of Donald J. Trump provided both challenges and opportunities for Chief Justice Roberts. On the one hand, President Trump challenged the Supreme Court’s institutional legitimacy.³ While Roberts invoked the image of the umpire to convey judicial neutrality during his confirmation hearings, that view was repeatedly questioned by Trump.⁴ Trump, to name just one example, criticized “Obama judges”—prompting an unusual public response from Roberts.⁵

On the other hand, the retirement of Justice Anthony Kennedy in 2018 put Chief Justice Roberts in the center of the Court, making him the swing vote.⁶ In 2020, the Supreme Court decided four critical separation-of-powers cases.⁷ Roberts not only voted with the majority in every case, he also wrote the decision for the majority in each case.⁸ One of these cases, *Trump v. Mazars USA, LLP*, involved an issue of first impression.⁹ The Supreme Court addressed for the first time a congressional subpoena for the President’s information, including the tax returns he never has publicly disclosed.¹⁰ The history of the case

practical purposes campaign finance law as we knew it died”).

³ Noah Feldman, *Can Judicial Independence Outlast Four More Years of Trump?*, BLOOMBERG OPINION (Aug. 3, 2020), <https://www.bloomberg.com/opinion/articles/2020-08-03/four-more-years-of-trump-would-be-rough-on-judicial-independence>.

⁴ Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005); *see* Feldman, *supra* note 3.

⁵ Katie Reilly, *President Trump Escalates Attacks on ‘Obama Judges’ After Rare Rebuke From Chief Justice*, TIME (Nov. 21, 2018), <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/>.

⁶ *See* Jessica Gresko & Mark Sherman, *Roberts Becomes the Supreme Court’s Swing Vote*, COURTHOUSE NEWS SERVICE (June 30, 2020), <https://www.courthousenews.com/roberts-becomes-the-supreme-courts-swing-vote> (“Since the retirement of Justice Anthony Kennedy in 2018, Roberts has played a pivotal role in determining how far the court will go in cases where the court’s four liberals and four conservatives are closely divided.”).

⁷ *Trump v. Mazars*, 140 S. Ct. 2019 (2020); *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Seila Law, LLC v. Consumer Prot. Fin. Bureau*, 140 S. Ct. 2183 (2020); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *see infra* Part IV.

⁸ *See infra* Part V and accompanying discussion.

⁹ *Mazars*, 140 S. Ct. at 2036.

¹⁰ *Id.* at 2027.

illustrates our current divided political landscape.

After Trump was elected in 2016, Democrats secured a majority of the House of Representatives in 2018.¹¹ It was hardly surprising, then, that one year later three House committees served subpoenas on an accounting firm and two banks seeking financial records of the President, his family, and certain business entities.¹² Nor was President Trump's response to the subpoenas surprising. He neither provided the requested documents nor negotiated with the committees about responding.¹³ Instead Trump sued, bringing two different cases that ultimately ended up consolidated at the Supreme Court.¹⁴

In a term with a number of critical separation-of-powers cases, the congressional subpoena cases posed a special challenge for the Supreme Court, especially for Chief Justice Roberts. Against the backdrop of a Court increasingly subject to political pressure, the cases pitted the political branches against each other.¹⁵ Furthermore, they thrust the Court into previously uncharted territory.

How could the Court decide the case without appearing to take sides in a political dispute, thereby diminishing its institutional claim to be more than an umpire? Chief Justice Roberts found a middle ground and steered the Court through the minefield presented by *Mazars*.¹⁶ He wrote the decision for a 7–2 majority that established “special considerations” courts should consider when adjudicating disputes between congressional investigators and the President.¹⁷

This article explores *Mazars* in detail. Part I sets the stage for the Supreme Court's decision by describing the history of the

¹¹ Andrew Briz et al., *House Election Results 2018*, POLITICO, <https://www.politico.com/election-results/2018/house> (last updated Oct. 16, 2018).

¹² See *infra* Part I. The congressional subpoenas were followed by a grand jury subpoena seeking many of the same records issued by the New York District Attorney and served on President Trump's personal accounting firm. This subpoena was part of the District Attorney's investigation into whether state criminal laws were violated. Litigation over that subpoena culminated in a separate case argued the same day as *Mazars*. See also *Trump v. Vance*, 140 S. Ct. at 2420.

¹³ See *infra* Part III.

¹⁴ *Id.*

¹⁵ See *infra* Part IV.

¹⁶ *Id.*

¹⁷ *Trump v. Mazars*, 140 S. Ct. 2019, 2035 (2020).

congressional subpoena cases in the lower courts and the parties' contentions in their briefs to the Supreme Court. Part II examines the oral argument before the Court. Significantly, oral argument seems to have made a difference in the outcome of the case.¹⁸ Part III summarizes the Court's decision in *Mazars*. Part IV situates *Mazars* in the context of the separation-of-powers issues addressed by the Supreme Court during the same term. The article concludes with some thoughts on the significance of *Mazars* for the Supreme Court in general and Chief Justice Roberts in particular.

I. *TRUMP V. MAZARS USA, LLP*: SETTING THE STAGE

A. *Litigation in the Lower Courts*

The litigation in *Mazars* began with lawsuits filed by President Trump in two different federal district courts.

1. *Trump v. Mazars USA, LLP*

The first case, *Trump v. Mazars USA, LLP*, arose out of a dispute over a subpoena issued by a House of Representatives committee to Mazars, an accounting firm, "for records related to work performed for President Trump and several of his business entities both before and after he took office," according to the U.S. Court of Appeals for the D.C. Circuit.¹⁹ The House Committee on Oversight and Reform contended that the documents were relevant to its investigation into whether Congress should revise its ethics-in-

¹⁸ *See id.* at 2034 ("The President's financial records could relate to economic reform, medical records to health reform, school transcripts to education reform, and so on. Indeed, at argument, the House was unable to identify *any* type of information that lacks some relation to potential legislation.").

¹⁹ *Trump v. Mazars*, 940 F.3d 710, 714 (D.C. Cir. 2019). As the Supreme Court later detailed, "The subpoena demanded information related to the President and several affiliated business entities from 2011 through 2018" and "statements of financial condition, independent auditors' reports, financial reports, underlying source documents, and communications between Mazars and the President or his businesses. . . . The subpoena also requested all engagement agreements and contracts '[w]ithout regard to time.'" *Mazars*, 140 S. Ct. at 2027–28.

government laws.²⁰

President Trump, asserting that the demand for his records did not serve any legitimate legislative purpose, filed suit in federal district court to prevent Mazars from complying with the subpoena. The district court ruled against the President, a decision affirmed by the D.C. Circuit.²¹

2. *Trump v. Deutsche Bank AG*

The second case, *Trump v. Deutsche Bank AG*, involved subpoenas issued by two House committees seeking financial records from two banks.²² The subpoenas served on Deutsche Bank sought the records of President Trump, members of his family, the Trump Organization, Inc., and several affiliated entities, while the subpoena served on Capital One Financial Corp. sought records only of the Trump Organization and affiliated entities.²³ The House committees said they were seeking the records as part of investigations into foreign money laundering and possible foreign electoral interference.²⁴

President Trump and others sued the banks in the U.S. District Court for the Southern District of New York, asserting that the subpoenas were not valid and should be quashed.²⁵ The district court ruled against the plaintiffs and in favor of the House committees.²⁶ The

²⁰ *Mazars*, 140 S. Ct. at 2027–28

²¹ *Trump v. Comm. on Oversight and Reform U.S. House of Representatives*, 380 F. Supp. 3d 76, 82–105 (D.D.C. 2019), *aff'd*, 940 F.3d 710, 714 (D.C. Cir. 2019); *see Mazars*, 140 S. Ct. at 2028 (summarizing Mazars’ litigation in the lower courts).

²² *Trump v. Deutsche Bank AG*, No. 19 Civ. 3826, 2019 WL 2204898 (S.D.N.Y. May 22, 2019), *aff'd*, 943 F.3d 627, 676 (2d Cir. 2019).

²³ *Mazars*, 140 S. Ct. at 2027. The House Financial Services Committee’s “first [subpoena], issued to Deutsche Bank, [sought] the financial information of the President, his children, their immediate family members, and several affiliated business entities.” *Id.* The second subpoena “issued to Capital One, demand[ed] similar financial information with respect to more than a dozen business entities associated with the President.” *Id.* In addition, the Court noted, “On the same day as the Financial Services Committee, the Permanent Select Committee on Intelligence issued an identical subpoena to Deutsche Bank—albeit for different reasons.” *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2028.

²⁶ *Id.*

Second Circuit essentially affirmed the district court.²⁷

The D.C. Circuit and the Second Circuit rejected Trump’s arguments because, under then-applicable precedent, the low bar for Congress to show a legitimate legislative purpose was cleared.²⁸ The D.C. Circuit upheld the subpoena on Mazars because it served a “valid legislative purpose” as the requested information was relevant to reforming financial disclosure requirements for Presidents and presidential candidates.²⁹ The Second Circuit applied similar reasoning in its decision upholding the subpoenas on the banks.³⁰ In fact, the court noted, “the President’s financial dealings with Deutsche Bank made it ‘appropriate’ for the House to use him as a ‘case study’ to determine ‘whether new legislation is needed.’”³¹

The plaintiffs appealed the appeals courts’ adverse decisions to the Supreme Court, which granted certiorari and consolidated the cases.³²

B. The Parties’ Contentions in the Supreme Court

Trump’s lawyers, supported by the Justice Department—which participated in both cases as amicus curiae³³—argued for broad protection of the President.³⁴ They asserted that the congressional subpoenas were unprecedented, lacked a legitimate legislative purpose, and were issued as part of an improper law-enforcement

²⁷ *Trump v. Deutsche Bank AG*, No. 19 Civ. 3826, 2019 WL 2204898, at *1 (S.D.N.Y. May 22, 2019), *aff’d*, 943 F.3d 627, 676 (2d Cir. 2019).

²⁸ *Mazars*, 140 S. Ct. at 2033.

²⁹ *Id.* at 2028 (citing *Trump v. Mazars*, 940 F.3d at 737).

³⁰ *Id.* at 2028–29 (citing *Trump v. Deutsche Bank*, 943 F.3d at 650, 658–59).

³¹ *Id.* at 2029 (quoting *Trump v. Deutsche Bank*, 943 F.3d at 662–63 n. 67).

³² *Id.*

³³ See SCOTUSBLOG, *Trump v. Mazars USA, LLP*, <https://www.scotusblog.com/case-files/cases/trump-v-mazars/> [hereinafter SCOTUSBLOG] (last visited Dec. 21, 2021) (detailing the proceedings and orders of *Trump v. Mazars USA, LLP*).

³⁴ Brief for the United States as Amicus Curiae Supporting Appellant at 9, *Trump v. Deutsche Bank*, 943 F.3d 627 (No. 19-1540); Brief for the United States as Amicus Curiae Supporting Appellant at 10, *Trump v. Mazars*, 940 F.3d 710 (No. 19-5142); Brief for the United States as Amicus Curiae Supporting Petitioners at 11–14, *Mazars*, 140 S. Ct. 2019 (Nos. 19-715 and 19-760).

investigation.³⁵

The House committees framed the case as ordinary, not extraordinary. They noted that the subpoenas did not seek records relating to Trump's actions as President.³⁶ Rather, they asserted, the subpoenas pertained to actions taken by Trump and others in their individual (or personal) capacity.³⁷ Furthermore, they argued that congressional committees routinely seek and receive records from individuals while performing legislative actions, such as determining whether existing laws are effective or should be revised.³⁸

Broadly speaking, the issue raised by the subpoenas—legal access to the President's records—had been previously addressed by the Supreme Court in two cases. In 1974, President Nixon lost his appeal to the Supreme Court when he resisted a subpoena issued during the criminal investigation of the Watergate break-in.³⁹ In 1997, President Clinton lost his appeal to the Supreme Court to avoid a pretrial deposition in the civil case brought against him by Paula Jones.⁴⁰ However, neither case was squarely on point here, as neither involved subpoenas issued by congressional committees.

C. The Political Question Inquiry

Before oral argument, the Supreme Court asked for supplemental briefing that suggested it was considering whether it should adjudicate the case. In late April, the Supreme Court directed the parties and the Solicitor General in the congressional oversight cases to file supplemental letter briefs “addressing whether the political question doctrine or related justiciability principles bear on the Court's adjudication of” the congressional oversight cases.⁴¹

³⁵ *Mazars*, 140 S. Ct. at 2032–34.

³⁶ *Id.* at 2033.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *United States v. Nixon*, 418 U.S. 683, 716 (1974) (enforcing a subpoena over President Nixon's objections).

⁴⁰ *Clinton v. Jones*, 520 U.S. 681, 684 (1997).

⁴¹ The Supreme Court issued its order on April 27, 2020. See SCOTUSBLOG, *supra* note 33 (“The parties and the Solicitor General are directed to file supplemental letter briefs addressing whether the political question doctrine or related justiciability

Although they fundamentally disagreed on the merits, the lawyers for the parties and the Solicitor General took the same position in their supplemental briefs: the Court should not, they agreed, dismiss the cases on political question grounds.⁴²

II. ORAL ARGUMENT IN *TRUMP V. MAZARS*

In May, the Supreme Court heard oral argument in *Mazars*. Due to the pandemic, the Supreme Court heard argument by phone.⁴³ The oral argument lasted about an hour-and-a-half—longer than usual for argument.

Because the Court conducted oral argument by phone, the justices asked questions in order of seniority. Chief Justice Roberts allowed each lawyer to make a brief opening statement and then asked the first question.⁴⁴ The associate justices then asked questions in the following sequence: Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh.

Sometimes this format promoted continuity, other times it disrupted the flow of the argument. As to the former point, for example, Justice Breyer was able to follow up on questions about Watergate asked by Justice Ginsburg of President Trump's lawyer,

principles bear on the Court's adjudication of these cases.”). As noted earlier, the Court invoked the political question doctrine in *Rucho v. Common Cause* to end judicial review of partisan gerrymandering claims. *See* text accompanying *supra* note 2; 139 S. Ct. 2484, 2507 (2019). Chief Justice Roberts wrote the majority opinion; the case was decided by a 5–4 vote.

⁴² *See* Steven Mazie (@stevenmazie), TWITTER (May 8, 2020, 5:20 PM), <https://twitter.com/stevenmazie/status/1258869466756251648?lang=en>; *see also* Jacqueline Thomsen, *In Rare Unity, Trump, DOJ and House All Urge Justices to Resolve Subpoena Fights*, NAT'L L. J. (May 8, 2020), <https://www.law.com/nationallawjournal/2020/05/08/in-rare-unity-trump-doj-and-house-all-urge-justices-to-resolve-subpoena-fights/>.

⁴³ Transcript of Oral Argument, *Trump v. Mazars*, 140 S. Ct. 2019 (2020) (No. 19-715) [hereinafter Transcript of Oral Argument]; Nina Totenberg, *Supreme Court to Hear Arguments By Telephone Including On Trump's Financial Records*, NPR (Apr. 13, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/13/833292153/supreme-court-to-hear-arguments-by-telephone-including-on-trumps-financial-recor>.

⁴⁴ Transcript of Oral Argument, *supra* note 43, at 4–7, 31–33, 50–54.

Patrick Strawbridge.⁴⁵ As to the latter, even though Strawbridge did not clearly answer Justice Breyer’s question, the argument changed course when Chief Justice Roberts moved from Justice Breyer to Justice Alito.⁴⁶

This Part examines the oral argument in detail. While oral argument is not predictive of the outcome, it provides a sense of the key issues for the justices and may suggest how a justice is likely to vote.

A. Chief Justice Roberts’ Questions

In his opening exchange with Strawbridge, Chief Justice Roberts zeroed in on whether Trump conceded that the House has “any power” to subpoena the President’s personal papers.⁴⁷ Strawbridge acknowledged that the House did have some power or authority in this context.⁴⁸ Having secured that concession, Roberts stated: “So it sounds like at the end of the day this is just another case where the courts are balancing the competing interests on either side.”⁴⁹ Strawbridge essentially agreed.⁵⁰

Later, when questioning House Counsel Douglas Letter, Chief Justice Roberts did not seem to be persuaded by Letter’s answers regarding the presidential harassment that could follow from allowing congressional subpoenas under the standard applied by the appellate courts, commenting at one point, “[Y]our test is not really much of a test. It’s not a limitation.”⁵¹

B. Cards on the Table: Questioning by Justices Alito and Sotomayor

During oral argument, a justice may probe a position by asking

⁴⁵ *Id.* at 13.

⁴⁶ *Id.* at 15–16. It must be noted that Strawbridge came back to Breyer’s question and clarified his answer at the very end of the argument, during his rebuttal. *Id.* at 95–96.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 7–8.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.*

⁵¹ *Id.* at 53. *Trump v. Mazars*, 140 S. Ct. 2019, 2034 (2020).

an advocate to elaborate or pressing on vulnerable points. Other times a justice may appear to become an advocate, asking questions that reiterate the position advanced by one of the parties. This argument included both types of queries.

Justice Alito dropped a marker for the conservative justices when he asked Strawbridge whether a congressional subpoena may be justified on the grounds that one House of Congress “wants to use the President as a case study for possible broad regulatory legislation?”⁵² Alito’s question about using the President as a case study for legislation put Trump’s position in the best possible light, suggesting that Congress was singling out the President for scrutiny without any justification for doing so.

Strawbridge reiterated certain points from his argument and then hit the softball question out of the park:

[T]o directly answer the question, no, the President’s personal papers are not related to anything having to do with the workings of government. . . . You could have subpoenas directed seeking all of Jimmy Carter’s financial history simply because he used to be a peanut farmer and they want a case study on agriculture. You could have all sorts of requests for medical records, for educational records, any imaginable detailed personal records because Congress does have the general power to legislate in lots of areas.⁵³

Justice Sotomayor did not allow Strawbridge’s answer to go unchecked. In this case she served as Justice Alito’s counterpart on the left, a role heightened by the fact that her turn to ask questions came right after his. Sotomayor’s question noted the: (1) long history of Congress seeking records from the President; (2) prior Supreme Court cases articulating the broad “conceivable legislative purpose” standard to justify a congressional request; and (3) “a tremendous separation of powers problem” raised by a more demanding standard.⁵⁴ Then she

⁵² Transcript of Oral Argument, *supra* note 43, at 16.

⁵³ *Id.* at 16–17.

⁵⁴ *Id.* at 18.

challenged Strawbridge's claim that the records sought are not related to the "workings of government":

[A]re you disputing that the stated purpose of the Intelligence Committee subpoena at issue, investigation [of] efforts by foreign entities to influence the U.S. political process[,] . . . [that] the financial records . . . were irrelevant to that purpose and that's an illegitimate purpose by the . . . Intelligence Committee?⁵⁵

Strawbridge essentially answered yes: the records were not relevant.⁵⁶ It was a bit hard to follow his explanation as he mentioned "presidential finances" in his answer, and Justice Sotomayor interrupted to point out that the subpoena sought records prior to Trump becoming President.⁵⁷ The colloquy became tangled and ultimately Strawbridge argued that the case law did not support putting "any finger on the scale for Congress's asserted legislative power in this case."⁵⁸ Chief Justice Roberts then moved on to Justice Kagan.

C. Cards Close to the Vest: Questioning by Justices Gorsuch and Kavanaugh

Prior to oral argument, much was made of the fact that President Trump's appointees, Justice Gorsuch and Justice Kavanaugh, had disagreed in *Bostock v. Clayton County*, the Court's recent decision holding that the federal law prohibiting employment discrimination applies to gay, lesbian, and transgender employees.⁵⁹ Gorsuch wrote the majority decision, joined by five other justices, while Kavanaugh and two other justices dissented.⁶⁰ Nonetheless, Justices Gorsuch and Kavanaugh vote together far more

⁵⁵ *Id.* at 19.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 21.

⁵⁹ 140 S. Ct. 1731, 1754 (2020).

⁶⁰ *Id.* at 1736–37.

often than they disagree.⁶¹ They took a similar approach at this oral argument: both asked straightforward probing questions of each attorney.⁶²

Justice Gorsuch questioned both sides on the appropriate standard for a court to apply when reviewing a challenge to a legislative subpoena.⁶³ He questioned the attorneys supporting Trump’s position—Strawbridge and Wall—on why the record did not establish a sufficient “legislative need” to enforce the subpoenas.⁶⁴

When House Counsel Douglas Letter presented argument, Justice Gorsuch pressed him on whether the “legislative purpose” standard applied by the appeals courts was too lenient, expressing concern that it was “very broad . . . maybe limitless.”⁶⁵ Letter’s answers to questions about this concern are discussed further below.

Justice Kavanaugh, meanwhile, asked practical questions of both sides. For example, the justice asked Strawbridge how the more demanding “demonstrably critical [need] standard” he advocated “would play out in practice in a case like this.”⁶⁶

With Letter, Justice Kavanaugh returned to concerns that the “legislative purpose” standard was too deferential to Congress.⁶⁷

⁶¹ See Richard Wolf, *Supreme Court Justices Gorsuch, Kavanaugh display independent streaks*, USA TODAY (June 15, 2020), <https://www.usatoday.com/story/news/politics/2020/07/17/brett-kavanaugh-neil-gorsuch-trumps-justices-show-independence/5437009002/> (Justices Gorsuch and Kavanaugh “have voted with the court’s conservative majority far more often than not”).

⁶² Transcript of Oral Argument, *supra* note 43 at 28 (questioning Strawbridge on standards, Justice Kavanaugh asked, “On your argument that the Nixon demonstrated specific need standard should apply or the demonstrably critical standard, explain for me how that would play out in practice in a case like this.”); *id.* at 46 (questioning Wall, Justice Gorsuch asked “[Y]ou indicated that Congress might be able to regulate in the area of financial disclosures of the President, and that is one of the interests the House has asserted here. What more would you require the House to do to assert that interest?”).

⁶³ *Id.* at 25–26 (questioning Strawbridge); *id.* at 71 (questioning Letter).

⁶⁴ See *id.* at 25.

⁶⁵ *Id.* at 71.

⁶⁶ *Id.* at 28. Justice Kavanaugh also questioned Strawbridge about the responses of the private custodians—the accounting firm and banks—in possession of the records sought by Congress through congressional subpoenas. *Id.* at 29–30.

⁶⁷ *Id.* at 74.

Noting hypothetical questions posed during oral argument about whether, for example, congressional committees could serve subpoenas for personal records on members of Congress, he asked, “[I]sn’t the whole point that once you start down this road and this Court articulates too low a standard, that something like that will start happening?”⁶⁸

D. Performance of House Counsel

After oral argument, many commentators also were critical of House counsel for failing to adequately address these concerns during oral argument.⁶⁹ There is some merit to this criticism. Ironically, Letter stumbled just as much when he was asked friendly questions as hostile ones.⁷⁰ After Justice Alito aggressively questioned Letter about the lack of protection for the President, both Justices Sotomayor and Kagan gave him a chance to address this concern.

Letter’s answers to these friendly questions came across as rote and flat. He reiterated the “valid legislative purpose” standard and indicated that courts should defer to Congress’s judgments about its legislative priorities.⁷¹

Letter avoided making an aggressive factual defense of the subpoenas. Hindsight is 20–20, of course, but it seems that more could have been made of the need for Congress to consider additional legislation in the areas of governmental ethics and foreign electoral

⁶⁸ *Id.* at 90–91.

⁶⁹ Jonathan H. Adler, *Is There Any Limit on the Congressional Subpoena Power?*, REASON (May 12, 2020), <https://reason.com/volokh/2020/05/12/is-there-any-limit-on-the-congressional-subpoena-power/>; Michael C. Dorf, *Lawyer Highlights and (Mostly) Lowlights in the Congressional & Grand Jury Subpoena Oral Arguments*, DORF ON L. (May 12, 2020), <http://www.dorfonlaw.org/2020/05/lawyer-highlights-and-mostly-lowlights.html>; see also Josh Blackman, *Was the House Lawyer Unable or Unwilling to Provide a Limiting Principle in the Tax Return Cases?*, REASON (May 12, 2020), <https://reason.com/volokh/2020/05/12/was-the-house-lawyer-unable-or-unwilling-to-provide-a-limiting-principle-in-the-tax-return-cases/>.

⁷⁰ Transcript of Oral Argument, *supra* note 43, at 62 (questioning by Justice Alito); *id.* at 66 (questioning by Justice Sotomayor); *id.* at 69 (questioning by Justice Kagan).

⁷¹ *Id.* at 61 (responding to questioning by Justice Alito); *id.* at 66 (responding to questioning by Justice Sotomayor).

interference given President Trump’s record in these areas.

Finally, again with the benefit of hindsight, it seems that a number of the justices—including Chief Justice Roberts—were looking for Letter to make a concession that would acknowledge the reasonableness of their concerns about harassment. Yet, he steadfastly refused to negotiate against himself and maintained that the appeals courts applied the correct legal standard and reached the correct results in upholding the subpoenas.⁷² Letter apparently made the strategic decision to maintain his position rather than make a concession at oral argument.

After oral argument, the conventional wisdom was that the Supreme Court would reverse the federal appeals court’s decisions refusing to quash the House Committee subpoenas.⁷³ All of the conservative justices (Roberts, Thomas, Alito, Gorsuch, and Kavanaugh) seemed skeptical of the House committees’ position. I predicted, in accordance with this view, that the Court would vote to reverse the judgments below in a 5–4 vote along ideological lines.⁷⁴ I added: “If the Court does reverse, the challenge for the majority will be to articulate a more demanding standard that does not impermissibly intrude on how Congress develops and considers possible legislation.”⁷⁵

III. THE SUPREME COURT’S DECISION IN *MAZARS*

The Supreme Court decided *Mazars* and *Vance*, the New York District Attorney criminal subpoena case, on July 9, effectively the last day of the 2019–20 term.⁷⁶ Chief Justice Roberts wrote the decision

⁷² *Id.* at 54; see also text accompanying *supra* note 18.

⁷³ See, e.g., Adam Liptak, *Supreme Court Hints at Split Decision on Obtaining Trump’s Tax Returns*, N.Y. TIMES, <https://www.nytimes.com/2020/05/12/us/supreme-court-trump-tax-returns.html> (last updated Feb. 22, 2021).

⁷⁴ See Rodger Citron, *Notes on an Oral Argument: The Questions Asked, the Answers Given, and What They May Augur for the Supreme Court’s Decision in the Congressional Subpoena Case*, VERDICT (June 29, 2020), <https://verdict.justia.com/2020/06/29/notes-on-an-oral-argument>.

⁷⁵ *Id.*

⁷⁶ *Mazars* and *Vance* were among the Court’s last decisions with respect to cases in which oral argument was held for the term. On July 14, the Court decided *Barr v.*

for a 7–2 majority in each case.⁷⁷ In *Mazars*, the Court arrived at a compromise that brought together the four liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan) and three conservative justices, with Gorsuch and Kavanaugh joining Roberts.⁷⁸ Justice Clarence Thomas wrote a dissent, as did Justice Alito.⁷⁹ As discussed below, the Court affirmed Congress’s power to investigate but also recognized the President’s unique position as “the only person who . . . composes a branch of government.”⁸⁰

As Chief Justice Roberts set out in his opinion for the Court, “[t]he question presented is whether the subpoenas exceed the authority of the House under the Constitution.”⁸¹ In answering this question, the Court initially noted that it never has “addressed a congressional subpoena for the President’s information.”⁸² That is because “[h]istorically, 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.’”⁸³ The Court briefly traced this history from a House committee inquiry in 1792 when George Washington was President through the modern era, discussing examples from the Reagan and Clinton Presidencies.⁸⁴

A. Congressional Power to Investigate

Starting with Congress’s power to investigate, the Court initially noted that although “Congress has no enumerated constitutional power to conduct investigations or issue subpoenas,” the

Lee, the last case of the term. 140 S. Ct. 2590, 2591–92 (2020).

⁷⁷ In *Trump v. Vance*, the Supreme Court held that neither Article II nor the Supremacy Clause of the Constitution preclude, or require a heightened standard for, the issuance of a state criminal subpoena on a sitting President. 140 S. Ct. 2412, 2431 (2020). The case was remanded back to the district court for the President to raise further arguments as appropriate. *Id.*

⁷⁸ *Trump v. Mazars*, 140 S. Ct. 2019, 2025 (2020).

⁷⁹ *Id.* at 2037 (Thomas, J., dissenting); *id.* at 2048 (Alito, J., dissenting).

⁸⁰ *Id.* at 2034.

⁸¹ *Id.* at 2026.

⁸² *Id.*

⁸³ *Id.* at 2029.

⁸⁴ *Id.* at 2029–31.

Court has “held that each House has power ‘to secure needed information’ in order to legislate.”⁸⁵

While Congress’s power to obtain information is broad, it is subject to a number of limitations. Most importantly, the Court stated, “a congressional subpoena is valid only if it is ‘related to, and in furtherance of, a legitimate task of the Congress’”—that is, “[t]he subpoena must serve a ‘valid legislative purpose.’”⁸⁶ Furthermore, the Court noted, “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.’”⁸⁷ Finally, the Court said, “recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.”⁸⁸

B. Whether a Higher Standard Should Apply When Congress Seeks the President’s Papers

President Trump took an aggressive litigation position in resisting the congressional subpoenas. His private lawyers and the Solicitor General argued that “the usual rules for congressional subpoenas do not govern here because the President’s papers are at issue.”⁸⁹ Relying on case law involving President Nixon’s tapes, they contended “the House must establish a ‘demonstrated, specific need’ for the financial information” and that “the House must show that the financial information is ‘demonstrably critical’ to its legislative purpose.”⁹⁰

⁸⁵ *Id.* at 2031.

⁸⁶ *See id.* (quoting *Watkins v. United States*, 77 S. Ct. 1173, 1179 (1957)) (illustrating Congress’s broad power to conduct an inquiry was limited by a legitimate purpose for the inquiry).

⁸⁷ *See id.* at 2032 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)) (describing limits on Congressional subpoena powers).

⁸⁸ *Id.* (citing *Watkins v. United States*, 77 S. Ct. 1173, 1179 (1957)).

⁸⁹ *Id.*

⁹⁰ *Id.* (first quoting *United States v. Nixon*, 94 S. Ct. 3090, 3110 (1974), then quoting

The Court rejected this request for a higher standard.⁹¹ Litigation over Nixon's tapes involved claims of executive privilege. No such claim was made in *Mazars*, as the congressional subpoenas sought "nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations."⁹² The Court explained:

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.⁹³

Although the Court did not adopt a higher standard for the President, it nevertheless acknowledged the special separation-of-powers concerns raised by a congressional subpoena served on the President. These special concerns had not been considered by the appeals courts below—accordingly, reversal, not affirmance was warranted. First, the Court noted, "Congress and the President have an ongoing institutional relationship as the 'opposite and rival' political branches established by the Constitution."⁹⁴ Unlike, for example, the criminal subpoenas at issue in *Vance*, "congressional subpoenas for the President's information unavoidably pit the political branches against one another."⁹⁵

Furthermore, the Court noted, "The President is the only person

Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (1974).

⁹¹ *Id.*

⁹² *Id.* at 2033.

⁹³ *Id.*

⁹⁴ *Id.* at 2033–34 (quoting THE FEDERALIST NO. 51).

⁹⁵ *Id.* at 2034.

who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs.”⁹⁶ Even where Congress only seeks the President’s personal records, there is potential for harassment that may interfere with performance of his official duties.⁹⁷ Finally, the Court said, “separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties.”⁹⁸

C. The Supreme Court’s Compromise & Remand

In balancing the separation-of-powers interests and concerns raised by Congress and the President, the Court treaded cautiously, mindful of the long history of political resolution of prior disputes over congressional requests for the President’s information. It held:

[I]n 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 President⁹⁹

The Court elaborated on a number of “special considerations” that should inform such an analysis. “First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers.”¹⁰⁰ Second, “courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective.”¹⁰¹ Third, the Court stated, “courts should be attentive to the nature of the evidence offered by

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 2035.

⁹⁹ *Id.* (citations omitted) (first quoting *Watkins v. U.S.*, 77 S. Ct. 1173, 1179 (1957); then quoting *Clinton v. Jones*, 117 S. Ct. 1636, 1646 (1997)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2036.

Congress to establish that a subpoena advances a valid legislative purpose,” adding that “[t]he more detailed and substantial the evidence of Congress’s legislative purpose, the better.”¹⁰² Fourth, turning to the President’s concerns, “courts should be careful to assess the burdens imposed on the President by a subpoena.”¹⁰³ The Court added that “[o]ther considerations may be pertinent as well” as “one case every two centuries does not afford enough experience for an exhaustive list.”¹⁰⁴

D. The Dissents

As noted above, Justices Thomas and Alito dissented. Justice Thomas’s dissent was categorical. In his view, the case did not involve a balancing of competing interests between, on the one hand, Congress’s authority to investigate and, on the other hand, the separation-of-powers concerns raised by investigating the President. Instead, Thomas argued that Congress “has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not,” and “[Congress] must proceed under [its] impeachment power” to obtain these documents when investigating the President.¹⁰⁵

In his dissent, Justice Alito expressed great skepticism of Congress. In his view, “courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas.”¹⁰⁶ Because Justice Alito believed that the Court was not sufficiently sensitive to these issues in its remand order, he dissented.¹⁰⁷

IV. *MAZARS* & THE COURT’S OTHER SEPARATION-OF-POWERS CASES IN THE 2019–2020 TERM

In addition to *Mazars* and *Vance*, the Supreme Court decided

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2037 (Thomas, J., dissenting).

¹⁰⁶ *Id.* at 2048 (Alito, J., dissenting).

¹⁰⁷ *Id.* at 2048–49 (Alito, J., dissenting).

two other critical cases involving separation-of-powers issues during its 2019–2020 term: *Seila Law, LLC v. Consumer Financial Protection Bureau*¹⁰⁸ and *Department of Homeland Security v. Regents of the University of California*.¹⁰⁹ *Seila Law* concerned the President’s removal authority under Article II of the Constitution.¹¹⁰ The Court held that the structure of the Consumer Financial Protection Bureau (CFPB), with a single director who could be terminated only for cause, was an unconstitutional violation of separation-of-powers.¹¹¹ It further held that the “for cause” provision in the statute authorizing the CFPB was severable.¹¹²

Regents concerned the Department of Homeland Security’s (DHS’s) decision to rescind the Deferred Action for Childhood Arrivals (DACA) program.¹¹³ Though the case was litigated and decided as a straightforward arbitrary and capricious challenge under the Administrative Procedure Act (APA),¹¹⁴ it implicated the unilateral authority of the President to act and to undo prior executive action.¹¹⁵ The Court held that DHS’s decision to rescind the DACA program was arbitrary and capricious under the APA.¹¹⁶

The contrasts between *Mazars* and *Vance*, on the one hand, and *Seila Law* and *Regents* are instructive.¹¹⁷ As noted earlier,

¹⁰⁸ *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

¹⁰⁹ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1933 (2020).

¹¹⁰ *Seila Law*, 140 S. Ct. at 2226.

¹¹¹ *Id.* at 2192.

¹¹² *Id.*

¹¹³ *Regents*, 140 S. Ct. at 1901.

¹¹⁴ *Id.* at 1910.

¹¹⁵ *Id.* at 1918 (Thomas, J., dissenting).

¹¹⁶ *Id.* at 1915.

¹¹⁷ Alan B. Morrison, *The Bottom Lines in the Trump Subpoena Cases: More Losses Than Wins for the President, but No One Is Going to See His Tax Returns Soon*, GEO. WASH. L. REV. ON THE DOCKET (July 9, 2020), <https://www.gwlr.org/the-bottom-lines-in-the-trump-subpoena-cases-more-losses-than-wins-for-the-president-but-no-one-is-going-to-see-his-tax-returns-soon/>. Discussing *Mazars* and *Regents*, Professor Morrison commented, “Although the Court did not hold that the congressional subpoenas here failed [the four-factor] test [set out in *Mazars*], that is almost certainly what the lower courts should conclude on remand. In essence, the Court told the House to go back and do a better job if it wanted to enforce these subpoenas.” *Id.* Professor Morrison elaborated, “Although the contexts are different,

Chief Justice Roberts wrote the Court's decision in each case.¹¹⁸ The subpoena cases were decided by a 7–2 vote, however, the other two cases were decided by a 5–4 vote.¹¹⁹ *Mazars* (and *Vance*) were more directly political. *Mazars*, in particular, put the Court in the novel place of having to adjudicate for the first time a dispute between Congress and the President over a congressional subpoena—disputes that previously had been resolved through negotiation between Congress and the President.¹²⁰ The Court's decision, essentially a compromise, was careful and cautious. It was a critical institutional victory for the Court and the Chief Justice that the most political separation-of-powers cases were decided by a clear 7–2 margin rather than a single vote. In the Court's efforts to maintain its legitimacy by appearing to be neutral, the optics of the vote count matter.

CONCLUSION

During the Presidency of Donald Trump, political divisions magnified; the middle ground became more of a no man's land than ever.¹²¹ Chief Justice Roberts is to be commended for his efforts to keep the Court apart from the political fray. In steering the Court to 7–2 decisions in *Mazars* and *Vance*, Roberts and the Court seemed to win the long game of preserving the Court's institutional legitimacy. It also must be noted that in remanding both subpoena cases back to the lower courts for further proceedings, the Court ensured that the financial records sought by the congressional committees and the New York District Attorney would not be produced prior to the election in November 2020. The Court thus provided a victory for then-

the Chief Justice's insistence here in requiring the House to follow what some would call legal niceties is reminiscent of his 5-4 rulings in the census case in 2019 and the DACA case this year when he set aside agency actions of the Trump administration for failing to follow the basic requirements of administrative law." *Id.*

¹¹⁸ See text accompanying *supra* note 77.

¹¹⁹ See text accompanying *supra* notes 41, 117.

¹²⁰ *Trump v. Mazars*, 140 S. Ct. 2019, 2029 (2020).

¹²¹ Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide>.

President Trump, at least in the short term.

During the 2019–2020 term, Chief Justice Roberts steered the Court through challenging political waters. However, in law and in politics, as in life, nothing stays the same. Joe Biden became President, succeeding President Trump. On the Supreme Court, Justice Barrett has replaced Justice Ginsburg. The center of the Court has moved, and it remains to be seen whether Roberts will continue to have the same influence leading the Court that he had during the prior term.¹²²

¹²² Joan Biskupic, *Barrett will complicate John Roberts' goal of keeping the Supreme Court out of politics*, CNN, <https://www.cnn.com/2020/10/25/politics/supreme-court-roberts-barrett/index.html> (last updated Oct. 26, 2020).