TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT

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Report on Trump's Stonewall of Providing His Financial Records to Congress and the Manhattan District Attorney

Question

Must Donald Trump comply with subpoenas of his financial records? If he does, will the subpoenas ever be enforced?

Introduction

The public could learn a lot about Donald Trump from his financial records. It could learn whether he is the rich, successful businessman he says he is. It could learn whether his companies accepted loans from corrupt foreign governments and better understand the nature of his relationship with Deutsche Bank. It could learn whether Trump used any of his 500 limited liability companies to send hush money to women with whom he had affairs. It could learn whether his company accepted loans from corrupt foreign governments, and whether Trump inflated the values of his assets on loan applications to banks.

The Manhattan District Attorney, Cyrus Vance, and Congressional Democrats agree, which is why they have issued subpoenas for Trump's financial records. Trump and his lawyers have used the courts to resist these subpoenas as much as possible. They have argued, among other things, that Trump does not have to comply with the subpoenas because they amount only to political harassment, and because the President of the United States is immune to criminal investigation. Those matters culminated in *Trump v. Vance*[i] and *Trump v. Mazars*[ii] in the Supreme Court. In *Vance*, the Court ruled that President Trump was not immune from state criminal subpoenas by virtue of being President. In *Mazars*, on the other hand, the Court announced legal standards for Congressional subpoenas of the executive, and sent the case back to the appellate court to rule based on its new standards. Both cases are pending resolution, and because of Trump's tactics, the subpoenas will likely not be enforced before the presidential election.

Facts

Cyrus Vance subpoenaed the Trump Organization on August 1st, 2019 as part of a grand jury investigation targeting possible criminal conduct in New York by the Organization and its members.[iii] The subpoena sought documents and communications from the period between June 1st, 2015 and September 20th, 2018 relating to hush money payments made to two women. The Trump Organization complied with the subpoena until Trump's attorneys learned that the subpoena required production of Trump's tax returns.[iv] After that, they produced limited collections of documents but no tax returns.[v]

On August 29th, 2019, Vance subpoenaed Mazars USA, an accounting firm that possesses various financial records related to Trump's personal and business dealings.[vi] The subpoena demanded a wide range of financial records spanning back to January 1, 2011, which included Trump's tax returns.[vii] On September 19th, 2019, Trump responded by filing a complaint in the Southern District of New York.[viii] The complaint sought a declaratory judgment that the Mazars subpoena was unenforceable so long as Trump was president, as well as injunctions preventing Vance from enforcing the subpoena until Trump left office.[ix] Trump argued that, under the Article II and Supremacy Clause of the Constitution, a sitting president enjoys absolute immunity from state criminal process.[x] The Southern District and Second Circuit Court of Appeals disagreed, holding instead that presidential immunity did not bar enforcement of the Mazars subpoena.[xi] Trump appealed to the Supreme Court, which granted certiorari. It ruled in favor of Vance but remanded the case back to the district court to allow Trump to make other arguments about the subpoenas.[xii] After the Southern District rejected Trump's arguments about the subpoenas,[xiii] Trump appealed the decision to the Second Circuit. The appeals court held oral arguments on September 25th.[xiv]

In April 2019, three Democrat-lead committees of the House of Representatives issued four subpoenas seeking information about Trump's finances, his children, and his affiliated businesses.[xv] The subpoenas compelled documents from Deutsche Bank, Capital One, and Mazars USA.[xvi] The Committees claimed the documents would help Congress close money laundering loopholes in the country's financial system, investigate Russia's interference in the 2016 presidential election, and investigate possible misconduct by Trump.[xvii] Trump challenged the subpoenas in the Southern District and District Court of the District Columbia, contending that the subpoenas lacked a valid legislative purpose and violated separation of powers.[xviii] Both suits failed, as the Second and D.C. Circuits found that the subpoenas were adequately tied to legislative purposes.[xix] The Supreme Court granted certiorari to both cases.

Supreme Court Cases and Legal Background

A. *Vance*

Chief Justice Roberts began *Trump v. Vance* with a history lesson. In 1807, John Marshall, then a Circuit Justice for Virginia, granted Aaron Burr's subpoena directed at President Thomas Jefferson during Burr's trial for treason.[xx] Marshall held that a President does not "stand exempt" from the Sixth Amendment's guarantee that the accused have processes for seeking witnesses for their defense.[xxi] Jefferson's strongest argument was that his presidential duties made him too busy to comply with the subpoena.[xxii] Marshall, however, assessed that presidential duties were "not unremitting," and ordered that Jefferson follow the subpoena.[xxiii]

This case, according to Roberts, spawned 200 years of historical precedent that Presidents comply with subpoenas and testify in criminal cases when called to.[xxiv] The Supreme Court reinforced this precedent in *United States v. Nixon*, in which it held that President Nixon's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence pending criminal trial."[xxv]

This precedent dealt only with federal cases, however, and the case before the Court dealt with a state criminal proceeding. Trump argued that subpoenas in state criminal cases would be uniquely burdensome to presidents.[xxvi] He contended that complying with these subpoenas would distract him from his duties, create a stigma that would undermine his leadership at home and abroad, and that subject future presidents to political harassment.[xxvii] These concerns, he asserted, should make the President immune to state criminal subpoenas.[xxviii]

Roberts rejected each of these arguments. Regarding presidential distractions, Roberts noted that Court precedent stated that the potential that the President is "preoccupied by pending litigation" did not typically raise constitutional concerns, and that 200 years of historical precedent demonstrated that presidents could comply with subpoenas and still serve effectively.[xxix] Roberts rejected outright Trump's notion that complying with a subpoena was stigmatizing, instead characterizing compliance as "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation.[xxx] The risk of being associated with criminal activities could not outweigh such an important public duty, and the secrecy of grand jury process would prevent the embarrassment that Trump was predicting.[xxxi] Last, Roberts pointed out that the law already prevented criminal subpoenas from harassing presidents.[xxxii] Grand juries cannot launch arbitrary fishing expeditions or investigations intended to harass, and the Supremacy Clause prohibits state actors from interfering with presidential official duties.[xxxiii] For these reasons, the Roberts declined to hold that the presidents were absolutely immune.

Roberts also declined to create a heightened standard for state criminal subpoenas. The Solicitor General argued as *amicus curiae* that the Supremacy Clause required that state grand juries satisfy a higher showing of need than they would otherwise when subpoenaing the President.[xxxiv] Roberts gave three reason why this argument fails. First, while the President should not be treated as an ordinary citizen when his communications are sought, *Burr* held that the President stands "in nearly the same situation as any other individual" with respect to his private papers.[xxxv] Second, the no one could demonstrate that a heightened standard was necessary for the President to carry out his Article II duties.[xxxvi] Without this need to protect the executive, Roberts thought that the public interest in fair and effective law enforcement weighed in favor of allowing wide access to evidence.[xxxvii]

B. *Mazars*

Just as he did in *Vance*, Chief Justice Roberts began his analysis in *Mazars* with historical precedent. Roberts observed that disputes over congressional demands for presidential documents historically never wound up in court.[xxxviii] Instead, lawmakers and the executive fought these battles through political channels. This tradition spanned all the way back to 1792, when Congress requested documents on a military campaign against Native Americans in the Northwest Territory.[xxxix] President Washington negotiated with Congress until it narrowed its request, with which he complied.[xl] Since then, Presidents up to Ronald Reagan and Bill Clinton have resolved these disputes with Congress outside the court system.[xli] The dispute before the Court in *Mazars*, then, represented a serious departure from historical practice.

Although this case was the first of its kind, Roberts had plenty of legal principles to guide him. To start, Congress has the power to conduct investigations and issue subpoenas because it needs information to legislate effectively.[xlii] The powers are not spelled out in Constitution; rather, the Court has recognized them as "an essential and appropriate auxiliary to the legislative function."[xliii] While this power is broad, it must be tied to the legislative process, because it is justified only as an "auxiliary" to Congress's legislative powers. In the Court's words, the investigations must "concern[] a subject on which legislation 'could be had.'"[xliv] Congress, importantly, may not issue subpoenas for the purpose of law enforcement, because the Constitution assigns those powers only to the judicial and executive branches.[xlv]

Roberts declined to adopt the different standards urged by the House and President Trump. Trump argued that Congress must show that the information they requested is "demonstrably critical" to its legislative purpose, because cases involving President Nixon's secret oval office tapes established a heightened standard.[xlvi] Roberts, however, distinguished the Nixon cases from the present case, pointing out that those cases involved materials detailing confidential deliberations within the executive branch, whereas the case at bar involved the president's *private* materials.[xlvii] Trump's proposed standards would undermine Congress's legislative function and deviate from precedent.[xlviii]

Roberts also rejected the House's arguments. It urged the Court to ignore the fact that these suits involved the president, contending that the subpoenas raised no separation of powers concerns. Roberts saw things differently. The Constitution designated Congress and the executive branch as institutional and political rivals; therefore, information disputes like this one unavoidably affect the balance of power between Congress and executive.[xlix] Perhaps worse, the House's standard provided no limiting principle for its subpoena powers, which could allow it to aggrandize itself at the executive branch's expense.[l] For Roberts, these considerations raised separation of powers problems that the House never addressed.

Roberts articulated a legal standard that balanced Congress's need for information with the dangers to separation of powers. He instructed future courts to consider whether the asserted legislative purpose warranted access to the president's personal records, insist that the subpoena is narrowly tailored to that legislative purpose, consider how strong Congress's evidence is that the subpoena advances a legislative purpose, and consider the burden imposed on the president by a subpoena.[li] This approach, Roberts thought, would ensure proper Congressional subpoenas could go forward without upsetting separation of powers.

Application

Trump may not have winning legal arguments in the either case, but he may succeed in his ultimate objective of forestalling the release of his personal records until after the election. The *Vance* subpoenas remain stuck in the lower courts, where Trump is arguing that the subpoenas are overbroad and made in bad faith. Specifically, Trump is contending that the timing of the subpoena indicate political malice on the part of Cyrus Vance, that the timeframe of the Mazars subpoena reaches too far back because it goes beyond the statute of limitations, and that the subpoenas are incongruent with the rest of Vance's investigation because they relate to foreign business entities and not just New York entities. The district court found little factual or legal

support in any of these claims,[lii] and the Second Circuit was very skeptical of Trump's arguments on appeal during oral arguments, with one judge accusing Trump's lawyers of "asking [the court] to change the way grand juries have done their work for time immemorial just because [it's] dealing with somebody who's President of the United States[.]"[liii] But even if the Second Circuit rules against Trump and orders him to comply with the subpoena, he is free to appeal the matter to the Supreme Court, which could take months to decide whether it will hear the case. This means that Vance's subpoenas, in all likelihood, will take effect well after this year's presidential election.

The House's subpoenas face a similar situation. For one, the lower courts have yet to address the subpoenas based on the Supreme Court's new legal standards. The House's lawyers have argued that they already satisfy the Court's standards, but they await the appellate courts' rulings. And as with *Vance*, Trump is free to appeal their decisions to the Supreme Court. Maybe anticipating adverse rulings and delay, Democrats have narrowed the scope of some of the subpoenas,[liv] but Trump can always challenge them in court and delay their enforcement nevertheless. The array of legal challenges Trump can mount means that he can run out the clock on the subpoenas well past November 3rd.

Conclusion

Access to Trump's personal financial records would be a great thing for the public. It could learn whether Trump has committed any crimes before or during his Presidency, as well as the full extent of his business entanglements abroad. It would grant voters the chance to cast a fully informed vote for president.

Trump and his lawyers have all but shut down this possibility. Whether they are right on the legal merits is immaterial at this point; their appeals and challenges will abuse the slow-moving judicial system to ensure that the public never learns of any damaging financial information about Trump. It is unambiguously a good thing that the Supreme Court rejected Trump's maximalist argument that the President is immune from state criminal investigation, but it ultimately punted the subpoena question to a lower court. The same is true in the *Mazars* case, which will require further argument from each side's lawyers and will almost certainly result in more appeals to the Supreme Court.

In sum, the *Vance* and *Mazars* cases have produced some interesting law, but they are unlikely to produce the president's financial records before the election. This is a disservice to the public.

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[i] 140 S. Ct. 2412 (2020).
[ii] 140 S. Ct. 2019 (2020).
[iii] *Trump v. Vance*, 941 F.3d 631, 634 (2020)
[iv] *Id.*
[v] *Id.*
[vi] *Id.*
[vii] *Id.*
[viii] *Id.* at 636.
[ix] *Id.*

[x] *Trump v. Vance*, 140 S. Ct. 2420, 2420 (2020).
[xi] *Id.* at 2420–21.
[xii] *Id.* at 2433.
[xiii] *Trump v. Vance*, 2020 U.S. Dist. LEXIS 150786 (S.D.N.Y. Aug. 20, 2020).
[xiv] Josh Gerstein and Kyle Cheney, *Appeals court judges skeptical of Trump effort to block release of financial info*, POLITICO (Sept. 25th, 2020), https://www.politico.com/news/2020/09/25/trump-financial-records-appeals-court-421768.
[xv] *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2026 (2020).
[xvi] *Id.* at 2027–28.
[xvii] *Id.* at 2028
[xviii] *Id.*
[xix] *Id.* at 2028–29.
[xx] *Trump v. Vance*, 140 S. Ct. 2420, 2421 (2020).
[xxi] *Id.* at 2421 (quoting *United States v. Burr*, 25 F. Cas. 30, 33–24, F. Cas. No. 14692d (No. 14,692d) (CC Va. 1807).
[xxii] *Id.*
[xxiii] *Id.*
[xxiv] *Id.* at 2424.
[xxv] 418 U.S. 683, 713 (1974).
[xxvi] *Trump v. Vance*, 140 S. Ct. at 2425.
[xxvii] *Id.* at. 2425–29.
[xxviii] *Id.* at 2425.
[xxix] *Id.* at 2425–27.
[xxx] *Id.* at 2427 (quoting *Branzburg v. Hayes*, 2048 U.S. 665, 691 (1972).
[xxxi] *Id.*
[xxxii] *Id.* at 2427–29.
[xxxiii] *Id.*
[xxxiv] *Id.* at 2429–31.
[xxxv] *Id.* at 2429.
[xxxvi] *Id.* at 2429–30.
[xxxvii] *Id.* at 2430.
[xxxviii] *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029–31 (2020).
[xxxix] *Id.* at 2029–30.
[xl] *Id.* at 2030.
[xli] *Id.* at 2031.
[xlii] *Id.*
[xliii] *Id.* (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)).
[xliv] *Id.* (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975)).
[xlv] *Id.* at 2032.
[xlvi] *Id.*
[xlvii] *Id.* at 2032–33.
[xlviii] *Id.* at 2033.
[xlix] *Id.*
[l] *Id.*
[li] *Id.* at 2035–36.
[lii] *Trump v. Vance*, 2020 U.S. Dist. LEXIS 150786 (S.D.N.Y. Aug. 20, 2020).
[liii] Josh Gerstein and Kyle Cheney, *Appeals court judges skeptical of Trump effort to block release of financial info*, POLITICO (Sept. 25th, 2020), https://www.politico.com/news/2020/09/25/trump-financial-records-appeals-court-421768..
[liv] Jeremy Herb and Katelyn Polantz, *House Democrats narrow subpoena of Trump's financial documents*, CNN (Aug. 26, 2020), https://www.cnn.com/2020/08/26/politics/deutsche-bank-subpoena-supreme-court/index.html.