Trump v. Mazars, USA, LLP

140 S. Ct. 2019 (2020)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Over the course of five 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. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here—encompassing a decade's worth of transactions by the President and his family—will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

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 earlier today we extended that ruling to state criminal proceedings, *Trump v. Vance*. Nearly fifty years ago, we held that a federal prosecutor could obtain information from a President despite assertions of executive privilege, *United States v. Nixon*, 418 U.S. 683 (1974), and more recently we 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).

This case is different. 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 set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). That distinctive aspect necessarily informs our analysis of the question before us.

I–A

Each of the three committees sought overlapping sets of financial documents, but each supplied different justifications for the requests.

The House Committee on Financial Services issued two subpoenas . . . pursuant to House Resolution 206, which called for "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." . . . .

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. According to the House, the Intelligence Committee subpoenaed Deutsche Bank as part of an investigation into foreign efforts to undermine the U. S. political process.

Four days after the Financial Services and Intelligence Committees, the House Committee on Oversight and Reform issued another subpoena, this time to the President's personal accounting firm, Mazars USA, LLP. . . .

Chairman Elijah Cummings explained the basis for the subpoena in a memorandum to the Oversight Committee. According to the chairman, recent testimony by the President's former personal attorney Michael Cohen, along with several documents prepared by Mazars and supplied by Cohen, raised questions about whether the President had accurately represented his financial affairs. . . .

B

Petitioners—the President in his personal capacity, along with his children and affiliated businesses—filed two suits challenging the subpoenas. . . . In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege. . . .

II–A

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." Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel).

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, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent." 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892).

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, 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. *Id.*, at 189–190. President Washington then dispatched Jefferson to speak to individual congressmen and "bring them by persuasion into the right channel." *Id.*, at 190. The discussions were apparently fruitful, as the House later narrowed its request

and the documents were supplied without recourse to the courts. See 3 Annals of Cong. 536 (1792). . . . .

Ever since, congressional demands for the President's information have been resolved by the political branches without involving this Court. . . .

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. *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (CADC 1974) (en banc). In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court.

This dispute therefore represents a significant departure from historical practice. Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice "is a consideration of great weight" in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on us a duty of care to ensure that we not needlessly disturb "the compromises and working arrangements that [those] branches . . . themselves have reached." *NLRB v. Noel Canning*, 573 U.S. 513, 524–526 (2014). With that in mind, we turn to the question presented.

B

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*, 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 (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.

Because this power 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; 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*).

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*, at 161. Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing." *McGrain*, at 179. Congress has no " 'general' power to inquire into private affairs and compel disclosures," *id.*, at 173–174, and "there is no congressional power to expose for the sake of exposure," *Watkins*, at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*, at 187.

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. See *id.*, at 188, 198. 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.

C

The President contends, as does the Solicitor General appearing on behalf of the United States, that the usual rules for congressional subpoenas do not govern here because the President's papers are at issue. They argue for a more demanding standard based in large part on cases involving the Nixon tapes—recordings of conversations between President Nixon and close advisers discussing the break-in at the Democratic National Committee's headquarters at the Watergate complex. The tapes were subpoenaed by a Senate committee and the Special Prosecutor investigating the break-in, prompting President Nixon to invoke executive privilege and leading to two cases addressing the showing necessary to require the President to comply with the subpoenas. See *Nixon*, 418 U.S. 683; *Senate Select Committee*, 498 F.2d 725. *[The cases required a "demonstrated need" or that the information be "demonstrably critical" to a legislative purpose.—Editors]*

We disagree that these demanding standards apply here. Unlike the cases before us, Nixon and Senate Select Committee involved Oval Office communications over which the President asserted executive privilege. . . . 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. . . .

Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to "every affair of government." *United States v. Rumely*, 345 U.S. 41, 43 (1953) (internal quotation marks omitted). Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it.

D

The House meanwhile would have us ignore that these suits involve the President. Invoking our precedents concerning investigations that did not target the President's papers, the House urges us to uphold its subpoenas because they "relate to a valid legislative purpose" or "concern a subject on which legislation

could be had." Brief for Respondent 46 (quoting *Barenblatt v. United States*, 360 U.S. 109, 127 (1959), and *Eastland*, at 506). . . .

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. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, see *Vance*, —— U.S. ——. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another.

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. Brief for Respondent 46. 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. . . .

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." The Federalist No. 51, at 349. Given the close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. . . .

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. Cf. *Carpenter v. United States*, 585 U. S. —— (2018). Indeed, Congress could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it "deals with substance, not shadows." *Cummings v. Missouri*, 4 Wall. 277, 325 (1867).

E

Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers. Neither side, however,

identifies an approach that accounts for these concerns. For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a "[d]eeply embedded traditional way[ ] of conducting government." *Youngstown Sheet & Tube Co.*, at 610 (Frankfurter, J., concurring).

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); 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). 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," *Watkins*, 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*, at 698. 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.

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. The more detailed and substantial the evidence of Congress's legislative purpose, the better. That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation.

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. See *Vance*,—— U.S.——; *Clinton*, at 704–705. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

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*, at 187. 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. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

■ JUSTICE THOMAS, dissenting.

Three Committees of the U. S. House of Representatives issued subpoenas to several accounting and financial firms to obtain the personal financial records of the President, his family, and several of his business entities. The Committees do not argue that these subpoenas were issued pursuant to the House's impeachment power. Instead, they argue that the subpoenas are a valid exercise of their legislative powers.

Petitioners challenge the validity of these subpoenas. In doing so, they call into question our precedents to the extent that they allow Congress to issue legislative subpoenas for the President's private, nonofficial documents. I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power. Accordingly, I would reverse the judgments of the Courts of Appeals.

I

I begin with the Committees' claim that the House's legislative powers include the implied power to issue legislative subpoenas. Although the Founders understood that the enumerated powers in the Constitution included implied powers, the Committees' test for the scope of those powers is too broad.

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803). The structure of limited and enumerated powers in our Constitution denotes that "[o]ur system of government rests on one overriding principle: All power stems from the consent of the people." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). As a result, Congress may exercise only those powers given by the people of the States through the Constitution.

The Founders nevertheless understood that an enumerated power could necessarily bring with it implied powers. The idea of implied powers usually arises in the context of the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or

Officer thereof." Art. I, § 8, cl. 18. As I have previously explained, the Necessary and Proper Clause simply "made explicit what was already implicit in the grant of each enumerated power." *United States v. Comstock*, 560 U.S. 126, 161 (2010) (dissenting opinion). That is, "the grant of a general power includes the grant of incidental powers for carrying it out." Bray, "Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution, 102 Va. L. Rev. 687, 741 (2016).

The scope of these implied powers is very limited. The Constitution does not sweep in powers "of inferior importance, merely because they are inferior." *McCulloch v. Maryland*, 4 Wheat. 316, 408 (1819). Instead, Congress "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816). In sum, while the Committees' theory of an implied power is not categorically wrong, that power must be necessarily implied from an enumerated power.

II

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*, 103 U.S. 168 (1881). The test that this Court created in *McGrain v. Daugherty*, 273 U.S. 135 (1927), and the majority's variation on that standard today, are without support as applied to private, nonofficial documents.

A

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. . . .

B

The subpoenas in these cases also cannot be justified based on the practices of 18th-century American legislatures. *Amici* supporting the Committees resist this conclusion, but the examples they cite materially differ from the legislative subpoenas at issue here. . . . *[Justice Thomas recounted various investigations as compelling government testimony or invoking nonlegislative powers.—Editors]*

C

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. . . .

As late as 1827, a majority of the House declined to authorize the Committee on Manufactures to subpoena documents, amid concerns that it was

unprecedented. During the debate over the resolution, one opponent remarked that "[t]here is no instance under this Government, within my recollection, where this power has been given for the mere purpose of enabling a committee of this House to adjust the details of an ordinary bill." 4 Cong. Deb. 865–866 (Rep. Strong); see also *id.*, at 862 (referring to "authority to bring any citizens of the United States . . . whom they might choose to send for, and compel them to give answers to every inquiry which should be addressed to them" as "very extraordinary"). Another opponent stated that the Committee had requested a power that had "not heretofore been thought necessary to enable that Committee to acquire correct information." *Id.*, at 866 (Rep. Storrs). A third called it "not only novel and extraordinary, but wholly unnecessary." *Id.*, at 874 (Rep. Stewart); see also *id.*, at 884–885 (Rep. Wright). No supporter of the resolution offered a specific precedent for doing so, and the House ultimately authorized the Committee to send for persons only. *Id.*, at 889–890.

This debate is particularly significant because of the arguments made by both sides. Proponents made essentially the same arguments the Committees raise here—that the power to send for persons and papers was necessary to inform Congress as it legislated. Opponents argued that this power was not part of any legislative function. They also argued that the House of Commons provided no precedent because Congress was a body of limited and enumerated powers. And in the end, the opponents prevailed. Thus, through 1827, the idea that Congress had the implied power to issue subpoenas for private documents was considered "novel," "extraordinary," and "unnecessary." *Id.*, at 874 [Rep. Stewart]. . . .

By the end of the 1830s, Congress began issuing legislative subpoenas for private, nonofficial documents. Still, the power to demand information from private parties during legislative investigations remained controversial. . . .

An 1859 Senate investigation, which the Court of Appeals cited as precedent, underscores that legislative subpoenas to private parties were a 19th-century innovation. Following abolitionist John Brown's raid at Harper's Ferry, Senate Democrats opened an investigation apparently designed to embarrass opponents of slavery. As part of the investigation, they called private individuals to testify. Senator Charles Sumner, a leading opponent of slavery, railed against the proceedings:

> "I know it is said that this power is necessary *in aid of legislation*. I deny the necessity. *Convenient*, at times, it may be; but *necessary*, *never*. We do not drag the members of the Cabinet or the President to testify before a committee *in aid of legislation*; but I say, without hesitation, they can claim no immunity which does not belong equally to the humblest citizen." Cong. Globe, 36th Cong., 1st Sess., 3007 (1860).

Sumner also addressed the matter of Parliament's powers, calling them "more or less inapplicable" because "[w]e live under a written Constitution, with certain specified powers; and all these are restrained by the tenth amendment." *Ibid.* For Sumner, as for Adams, the power to issue legislative subpoenas to private parties was a "dangerous absurdity" with no basis in the text or history of the Constitution. *Ibid.* . . .

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*, 103 U.S. 168, held that the subpoena at issue was unlawful because it sought to investigate private conduct. …

The Court discussed the arguments for an "impli[ed]" power to issue legislative subpoenas. *Id.*, at 183. As the Court saw it, there were two arguments: "1, its exercise by the House of Commons of England . . . and, 2d, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them." *Ibid.*

The Court rejected the first argument. . . .

The Court did not reach a conclusion on the second theory that a legislative subpoena power was necessary for Congress to carry out its legislative duties. But it observed that, based on British judicial opinions, not "much aid [is] given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation." *Ibid* . . . . Although the Court did not have occasion to decide whether the legislative subpoena in that case was necessary to the exercise of Congress' legislative powers, its discussion strongly suggests the subpoena was unconstitutional.[4]

The Court instead based its decision on the fact that the subpoena at issue "ma[de] inquiry into the private affairs of the citizen." *Id.*, at 190. Such a power, the Court reasoned, "is judicial and not legislative," *id.*, at 193, and "no judicial power is vested in the Congress or either branch of it, save in the cases" of punishing Members, compelling Members' attendance, judging elections and qualifications, and impeachment and trial, *id.*, at 192–193. Notably, the Court found no indication that the House "avowed to impeach the secretary," or else "the whole aspect of the case would have been changed." *Id.*, at 193. Even though the Court decided *Kilbourn* narrowly, it clearly entertained substantial doubts about the constitutionality of legislative subpoenas for private documents.

D

Nearly half a century later, in *McGrain v. Daugherty*, the Court reached the question reserved in *Kilbourn*—whether Congress has the power to issue legislative subpoenas. It rejected *Kilbourn*'s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power. Although *McGrain* involved oral testimony, the Court has since extended this test to subpoenas for private documents. The Committees rely on *McGrain*, but this line of cases misunderstands both the original meaning of Article I and the historical practice underlying it. . . .

Instead of relying on *Kilbourn*'s analysis, *McGrain* developed a test that rested heavily on functional considerations. The Court wrote that "[a] legislative body cannot legislate wisely or effectively in the absence of information

[4] According to Justice Miller's private letters, "a majority of the Court, including Miller himself, were of the opinion that neither House nor Senate had power to punish for contempt witnesses who refused to testify before investigating committees." T. Taylor, Grand Inquest: The Story of Congressional Investigations 49 (1955). Only Justice Miller's desire to " 'decid[e] no more than is necessary' " caused the Court to avoid the broader question. *Ibid.*

respecting the conditions which the legislation is intended to affect or change." 273 U.S. at 175. Because "mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete," "some means of compulsion are essential to obtain what is needed." *Ibid*.

The Court thus concluded that Congress could issue legislative subpoenas, provided that "the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function." *Id*., at 176. The majority today modifies that test for cases involving the President, but it leaves the core of the power untouched. . . .

The opinion in *McGrain* lacks any foundation in text or history with respect to subpoenas for private, nonofficial documents. It fails to recognize that Congress, unlike Parliament, is not supreme. It does not cite any specific precedent for issuing legislative subpoenas for private documents from 18th-century colonial or state practice. And it identifies no founding-era legislative subpoenas for private documents.

Since *McGrain*, the Court has pared back Congress' authority to compel testimony and documents. . . . And today, it creates a new four-part, nonexhaustive test for cases involving the President. 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.

III

If the Committees wish to investigate alleged wrongdoing by the President and obtain documents from him, the Constitution provides Congress with a special mechanism for doing so: impeachment.[7]

A

The Constitution grants the House "the sole Power of Impeachment," Art. I, § 2, cl. 5, and it specifies that the President may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4. The founding generation understood impeachment as a check on Presidential abuses. In response to charges that impeachment "confounds legislative and judiciary authorities in the same body," Alexander Hamilton called it "an essential check in the hands of [Congress] upon the encroachments of the executive." The Federalist No. 66, at 401–402. And, in the Virginia ratifying convention, James Madison identified impeachment as a check on Presidential abuse of the treaty power. 10 Documentary History 1397.

B

The power to impeach includes a power to investigate and demand documents. Impeachments in the States often involved an investigation. . . .

[7] I express no view on whether there are any limitations on the impeachment power that would prevent the House from subpoenaing the documents at issue.

Reinforcing this understanding, the founding generation repeatedly referred to impeachment as an "inquest." . . . At the time, an "inquest" referred to an "[i]nquiry, especially that made by a Jury" or "the Jury itself." N. Bailey, Universal Etymological Dictionary (22d ed. 1770).

The Founders were also aware of the contemporaneous impeachment of Warren Hastings in England, in which the House of Commons heard witnesses before voting to impeach. P. Marshall, The Impeachment of Warren Hastings 40–41, 58 (1965). In the first impeachment under the new Constitution, Congressmen cited the Hastings impeachment as precedent for several points, including the power to take testimony before impeaching. 7 Annals of Cong. 456 (1797) (Rep. Rutledge); *id.*, at 459 (Rep. Sitgreaves); *id.*, at 460 (Rep. Gallatin). . . .

This Court has also long recognized the power of the House to demand documents. Even as it questioned the power to issue legislative subpoenas, the Court in *Kilbourn* acknowledged the ability to "compel the attendance of witnesses, and their answer to proper questions" when "the question of . . . impeachment is before either body acting in its appropriate sphere on that subject." 103 U.S. at 190.

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.

IV

. . . Insisting that the House proceed through its impeachment power is not a mere formality. Unlike contempt, which is governed by the rules of each chamber, impeachment and removal constitutionally requires a majority vote by the House and a two-thirds vote by the Senate. Art. I, § 2, cl. 5; § 3, cl. 6. In addition, Congress has long thought it necessary to provide certain procedural safeguards to officials facing impeachment and removal. Finally, initiating impeachment proceedings signals to the public the gravity of seeking the removal of a constitutional officer at the head of a coordinate branch. 940 F.3d 710, 776 (CADC 2019) (Rao, J., dissenting).

* * *

Congress' legislative powers do not authorize it to engage in a nationwide inquisition with whatever resources it chooses to appropriate for itself. The majority's solution—a nonexhaustive four-factor test of uncertain origin—is better than nothing. But the power that Congress seeks to exercise here has even less basis in the Constitution than the majority supposes. I would reverse in full because the power to subpoena private, nonofficial documents is not a necessary implication of Congress' legislative powers. If Congress wishes to obtain these documents, it should proceed through the impeachment power. Accordingly, I respectfully dissent.

■ [The dissenting opinion of JUSTICE ALITO is omitted.]

NOTES

1. Are *Mazars* and *Vance* consistent? In both cases, the challenged subpoena was the first of its kind in the history of the republic. In *Mazars* this lack of any precedent counted powerfully against judicial enforcement; in *Vance* it did not. In *Mazars*, the Court expatiated on all the "weighty concerns regarding the separation of powers" posed by congressional subpoenas, including the possibility that partisan opponents in Congress will use the power to harass and embarrass the president. Are these considerations less weighty in the case of elected local prosecutors? Why are they not *weightier*?

The biggest difference between *Mazars* and *Vance* is that the subpoena power of criminal grand juries is longstanding and unquestionable, while the subpoena power of congressional committees outside of the impeachment context is contested (as explained in Justice Thomas's dissent, which went unanswered). Did this difference play any part in the disposition of the two cases?

2. What was the Second Circuit's error? The majority instructed the court that on remand it should "carefully assess" various factors. Did the Second Circuit ignore those factors the first time around? Was the Second Circuit's analysis simply not "careful" enough? How careful must lower courts be in the future to avoid reversal? Is *Mazars* a wink-and-a-nod that congressional subpoenas should not ordinarily be enforced against the president?

3. The majority's list of factors that must be "carefully scrutinized" may sound wise, but where do they come from? Text? History? Precedent? Thin air?

4. As the majority notes, these kinds of executive-legislative disputes had historically not been litigated in federal court. Is that an argument for treating them as a "political question"? The parties, though, agreed that the case was justiciable. Does that matter? Isn't justiciability jurisdictional, so the Court is not bound by an agreement of the parties? Why then didn't the Court hold that this case presented a nonjusticiable political question? Is there judicially manageable law to apply? (Does the listing of various nonexclusive factors to be "carefully considered" satisfy that criterion?) Does the case raise constitutional questions that are textually committed to a coordinate branch of government? Is the relevance of a subpoena to legislative business a question that anyone other than Congress can determine? Is the impact of disclosure on executive functions entrusted to the president? Maybe there are two, not one, political questions in the case. (Or is there only one? The president here, unlike in most cases involving official conduct, did not assert executive privilege.) What would be the practical result if the Court held the case nonjusticiable?

5. Justice Thomas makes a strong argument that the original understanding of the Constitution does not support a power of legislative subpoenas for personal documents except in cases of impeachment. But by the time *Mazars* was decided, President Trump had indeed been impeached. And acquitted. Should that have been relevant? Which way?

6. Most of the Supreme Court's cases involving congressional subpoenas arose in the McCarthy period, when committees like the House Un-American Activities Committee issued subpoenas to suspected Communists precisely to subject them to public embarrassment. For the most part, the Court did little to rein in this abuse. Quite apart from separation of powers, how much power should congressional

committees, each run by one political party, have to demand that private citizens appear and answer questions about their private affairs?