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*Separation of Powers — Congressional Oversight — Presidential  
Subpoenas — Trump v. Mazars USA, LLP*

President Trump has shown unprecedented resistance to congressional oversight.<sup>1</sup> Recently, he enlisted the Supreme Court as a referee.<sup>2</sup> Last Term, in *Trump v. Mazars USA, LLP*,<sup>3</sup> the Court held that congressional subpoenas of the President's private papers implicate special separation of powers concerns that must be weighed in evaluating the subpoenas' validity.<sup>4</sup> In so holding, the Court invoked the past practice of the political branches, relying on a common method of constitutional interpretation in the separation of powers sphere.<sup>5</sup> However, the attenuated relationship here between a past practice of extrajudicial negotiation and the Court's ultimate holding represents a departure from how the Court has used historical practice in prior cases. Had the Court tethered its constitutional analysis as tightly to historical practice as it usually does, it likely would have acknowledged that the countervailing legal interests driving past congressional-executive negotiations were absent here. Instead, the Court issued a standard that is arguably inapposite to this particular interbranch conflict.

In April 2019, three congressional committees subpoenaed several private actors, seeking documents including the financial records of President Trump, his family members, and affiliated businesses.<sup>6</sup> The House Committee on Financial Services stated that it sought financial records from Deutsche Bank and Capital One to inform its regulation of money laundering, financing of terrorism, and illicit funding in the real estate market.<sup>7</sup> The Permanent Select Committee on Intelligence subpoenaed Deutsche Bank for similar information, which it asserted would help efforts at preventing foreign interference in U.S. elections.<sup>8</sup> Finally, the House Committee on Oversight and Reform subpoenaed Mazars USA, LLP, the President's accounting firm, soliciting financial records that it maintained would guide possible reforms to ethics and disclosure laws.<sup>9</sup> Following the issuance of these subpoenas, the

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<sup>1</sup> See, e.g., Seung Min Kim & Rachael Bade, *Trump's Defiance of Oversight Presents New Challenge to Congress's Ability to Rein in the Executive Branch*, WASH. POST (Oct. 7, 2019, 7:31 AM), [https://www.washingtonpost.com/politics/trumps-defiance-of-oversight-presents-new-challenge-to-congress-ability-to-rein-in-the-executive-branch/2019/10/06/59fb7cco-e6c3-11e9-a331-2df12d56a80b\\_story.html](https://www.washingtonpost.com/politics/trumps-defiance-of-oversight-presents-new-challenge-to-congress-ability-to-rein-in-the-executive-branch/2019/10/06/59fb7cco-e6c3-11e9-a331-2df12d56a80b_story.html) [https://perma.cc/R6UF-ZNPC].

<sup>2</sup> See, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2028–29 (2020).

<sup>3</sup> 140 S. Ct. 2019.

<sup>4</sup> *Id.* at 2035.

<sup>5</sup> See *id.* at 2029–31, 2034.

<sup>6</sup> See *id.* at 2026.

<sup>7</sup> *Id.* at 2027.

<sup>8</sup> *Id.*

<sup>9</sup> *Trump v. Mazars USA, LLP*, 940 F.3d 710, 714, 716 (D.C. Cir. 2019).

President, in his individual capacity, as well as his family and affiliated businesses, sued to block compliance with these subpoenas, bringing claims in the Southern District of New York against Deutsche Bank and Capital One and in the District Court for the District of Columbia against Mazars.<sup>10</sup> In both cases, the congressional committees behind the subpoenas intervened as defendants.<sup>11</sup> Mazars, Deutsche Bank, and Capital One took no position on the suits.<sup>12</sup>

Both district courts denied the plaintiffs' motions for preliminary injunctions, and the District Court for the District of Columbia granted summary judgment for the defendants.<sup>13</sup> As the plaintiffs' challenge centered on a lack of legislative authority to issue the subpoenas,<sup>14</sup> Judge Mehta of the D.C. district court laid out first principles. First, he noted that Congress possesses investigatory powers incident to and largely co-extensive with its legislative powers, subject only to select limitations.<sup>15</sup> Most notably, Congress cannot investigate where it could not legislate, assume a law enforcement posture, frivolously inquire into private affairs, or expose for the sake of exposure.<sup>16</sup> In addition, when courts review an exercise of the investigatory power, they should avoid probing motive when there exists a facially legitimate legislative purpose.<sup>17</sup> With these principles in mind, Judge Mehta found that the legislative ends put forward by Congress to support its subpoenas were valid.<sup>18</sup> Further, the court disagreed with the President that the subpoenas served a law enforcement function, and declined to engage with arguments about improper motive given the legitimate legislative end.<sup>19</sup> Judge Mehta also rejected the plaintiffs' argument that any regulation of the President's finances or conflicts of interest would be unconstitutional.<sup>20</sup> Judge Ramos of the Southern District of New York reached substantially similar conclusions regarding the Intelligence and Financial Services subpoenas.<sup>21</sup>

<sup>10</sup> *Mazars*, 140 S. Ct. at 2028.

<sup>11</sup> See *Trump v. Deutsche Bank AG*, 943 F.3d 627, 632 (2d Cir. 2019); *Trump v. Comm. on Oversight & Reform of the U.S. House of Representatives*, 380 F. Supp. 3d 76, 88 (D.D.C. 2019).

<sup>12</sup> See *Mazars*, 140 S. Ct. at 2028.

<sup>13</sup> See *Comm. on Oversight & Reform*, 380 F. Supp. 3d at 105; Transcript of Record at 87, *Trump v. Deutsche Bank*, No. 19-cv-03826 (S.D.N.Y. May 22, 2019). In *Deutsche Bank*, the district court did not consolidate the motion for preliminary injunction with the parties' motions for summary judgment. See Transcript of Record, *supra*, at 87.

<sup>14</sup> See *Comm. on Oversight & Reform*, 380 F. Supp. 3d at 82.

<sup>15</sup> See *id.* at 90–91.

<sup>16</sup> See *id.* at 91.

<sup>17</sup> *Id.* at 91–93.

<sup>18</sup> *Id.* at 83.

<sup>19</sup> See *id.* at 98, 100.

<sup>20</sup> *Id.* at 102.

<sup>21</sup> See Transcript of Record, *supra* note 13, at 68–69. Judge Ramos also held that the Right to Financial Privacy Act, a statute restricting “government authorit[ies]” access to individual financial records held by financial institutions, did not apply to Congress. *Id.* at 56.

The plaintiffs appealed both rulings to the D.C. Circuit and Second Circuit, respectively. The D.C. Circuit affirmed.<sup>22</sup> Judge Tatel,<sup>23</sup> writing for the panel, canvassed the history of legislative subpoenas and reiterated the principles laid out by the district court.<sup>24</sup> Then, the court established that the subpoenas at issue served legislative rather than law enforcement functions.<sup>25</sup> After reaching this conclusion, the court turned to the question whether the subpoenas furthered legislation that “could be had,”<sup>26</sup> holding that possible ethics and financial disclosure laws satisfied this test without raising impermissible separation of powers concerns,<sup>27</sup> even though the inquiry might bring up evidence of criminality.<sup>28</sup> Thus, having established that the Committee had a permissible legislative aim, the court probed whether the subpoenas issued were “reasonably relevant” to this aim.<sup>29</sup> The court concluded that the requested financial records and related communications were relevant in order to assess the efficacy of existing ethics legislation and inform future reforms, especially given the President’s complex financial holdings and hesitancy to voluntarily disclose financial information.<sup>30</sup> Finally, the court held that House rules authorized the Oversight Committee to issue the subpoenas.<sup>31</sup> Judge Rao dissented from the panel ruling, arguing that the House’s impeachment power was the only mechanism through which it could investigate individualized suspicions of criminal activity or wrongdoing.<sup>32</sup>

Two months later, the Second Circuit affirmed Judge Ramos’s ruling “in substantial part.”<sup>33</sup> Judge Newman wrote for the panel,<sup>34</sup> noting at

<sup>22</sup> *Trump v. Mazars USA, LLP*, 940 F.3d 710, 714 (D.C. Cir. 2019).

<sup>23</sup> Judge Tatel was joined by Judge Millett.

<sup>24</sup> *See Mazars*, 940 F.3d at 718–24.

<sup>25</sup> *Id.* at 732; *see id.* at 723–32.

<sup>26</sup> *Id.* at 732 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)).

<sup>27</sup> *See id.* at 737. However, the court did raise concerns about evaluating hypothetical legislation given its obligation to avoid advisory opinions. *Id.* at 732.

<sup>28</sup> *See id.* at 737–39. The majority explained that “nothing in the Constitution or case law . . . compels Congress to abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process.” *Id.* at 737.

<sup>29</sup> *Id.* at 740 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (internal quotation marks omitted)).

<sup>30</sup> *See id.* at 741.

<sup>31</sup> *See id.* at 744–47. The panel declined to require a clear statement authorizing committees to subpoena third parties for the President’s private records. *Id.* at 744.

<sup>32</sup> *See id.* at 749 (Rao, J., dissenting). The D.C. Circuit declined to rehear the case en banc. *Trump v. Mazars USA, LLP*, 941 F.3d 1180, 1180 (D.C. Cir. 2019) (per curiam). Judge Katsas, joined by Judge Henderson, dissented, emphasizing the key separation of powers issues raised by the case and the particular danger congressional subpoenas posed to presidential autonomy. *See id.* at 1180–81 (Katsas, J., dissenting). Judge Rao also dissented, joined by Judge Henderson. She reiterated her position that the subpoenas were an invalid exercise of Congress’s legislative power. *See id.* at 1181 (Rao, J., dissenting). She also rejected the Oversight Committee’s argument that the House’s subsequent impeachment inquiry limited the practical importance of the case. *Id.* at 1182.

<sup>33</sup> *Trump v. Deutsche Bank AG*, 943 F.3d 627, 632 (2d. Cir. 2019).

<sup>34</sup> Judge Newman was joined by Judge Hall.

the outset that because the President sued in his individual capacity, the case raised no separation of powers concerns.<sup>35</sup> After determining the appropriate preliminary injunction standard<sup>36</sup> and rejecting the plaintiffs' statutory challenges to the subpoenas,<sup>37</sup> the court addressed the constitutional question.<sup>38</sup> Although it reached much the same holding as the D.C. Circuit did, the court emphasized that the Financial Services and Intelligence Committee subpoenas were perhaps even less problematic than those of the Oversight Committee, as they did not search for evidence of individual wrongdoing.<sup>39</sup> The court noted, however, that compliance with some provisions of the subpoenas "might reveal sensitive personal details" unrelated to Congress's legislative goals.<sup>40</sup> The court refused to allow such disclosures without a "compelling" justification and remanded to the district court with procedures for excluding sensitive documents.<sup>41</sup> Judge Livingston concurred in part and dissented in part. Though she agreed with the majority's statutory analysis, Judge Livingston disagreed as to the appropriate preliminary injunction standard and would have remanded to further develop the record.<sup>42</sup>

The Supreme Court consolidated the two cases, then vacated and remanded. Chief Justice Roberts wrote for the Court.<sup>43</sup> The Court began by noting that the question whether a congressional subpoena for the President's private, unofficial documents exceeded constitutional authority was one of first impression.<sup>44</sup> This novelty, the Court suggested, was in part due to a long history of negotiation between the executive and legislative branches, making judicial intervention unnecessary.<sup>45</sup> This longstanding practice, the Court asserted, was especially significant in cases dealing with the separation of powers and cautioned the judiciary against "needlessly disturb[ing]" the compromises reached by the political branches.<sup>46</sup> With this in mind, the majority reiterated the precedent relied on by the lower courts, specifically noting that the Court had

<sup>35</sup> *Deutsche Bank*, 943 F.3d at 634.

<sup>36</sup> The court held that plaintiffs seeking to enjoin congressional subpoenas must demonstrate a likelihood of success on the merits, *id.* at 640, though it ultimately found that the plaintiffs also failed the circuit's more lenient serious-questions test, *see id.* at 673–74.

<sup>37</sup> Neither the Right to Financial Privacy Act nor 26 U.S.C. § 6103, an Internal Revenue Code provision regulating access to individuals' tax returns, applied. *Deutsche Bank*, 943 F.3d at 642, 649.

<sup>38</sup> *See Deutsche Bank*, 943 F.3d at 659, 673.

<sup>39</sup> *See id.* at 659.

<sup>40</sup> *Id.* at 667. The procedures announced by the panel also allowed the plaintiffs to identify documents covered by certain provisions of the subpoena that had "such an attenuated relationship to the Committees' legislative purposes that they need not be disclosed." *Id.*

<sup>41</sup> *Id.*; *see id.* at 667–68.

<sup>42</sup> *See id.* at 677–79 (Livingston, J., concurring in part and dissenting in part).

<sup>43</sup> Chief Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh.

<sup>44</sup> *Mazars*, 140 S. Ct. at 2026.

<sup>45</sup> *See id.* at 2029.

<sup>46</sup> *Id.* at 2031.

long held that Congress has investigatory power incident to its legislative powers.<sup>47</sup> As the lower courts had noted, investigations are valid only insofar as they are in furtherance of a legitimate act of Congress.<sup>48</sup> In addition, the Court noted that the subjects of legislative subpoenas “retain their constitutional rights,” as well as “common law and constitutional privileges with respect to certain materials.”<sup>49</sup>

The Court then considered whether “the usual rules for congressional subpoenas” change when the President’s personal documents are at stake.<sup>50</sup> The President argued that Congress needed a “demonstrated, specific need” to request information of the President, borrowing this standard from the Court’s decision addressing the Nixon tapes.<sup>51</sup> Conversely, the House would have forged ahead with the normal inquiry.<sup>52</sup> The Court rejected both approaches. The majority viewed the President’s standard as too exacting, especially as it derived from cases in which the President claimed executive privilege, which was not the case here.<sup>53</sup> Applying this standard to all congressional subpoenas of the President “would risk seriously impeding Congress in carrying out its responsibilities.”<sup>54</sup> On the other hand, the Court saw the House’s standard as not exacting enough given that the President was involved.<sup>55</sup> The Court worried that “without limits on its subpoena powers, Congress could . . . aggrandize itself at the President’s expense.”<sup>56</sup> Rather, the Court held that, when a subpoena seeks the President’s personal information, courts must specifically consider separation of powers dynamics to determine whether the subpoena furthers a legitimate legislative end.<sup>57</sup> To guide this inquiry, the Court provided a non-exhaustive list of considerations: (1) “whether the asserted legislative purpose warrants the significant step of involving the President and his papers,”<sup>58</sup> (2) whether the subpoena is “broader than reasonably necessary to support Congress’s legislative objective,” (3) the specificity of the

<sup>47</sup> See *id.* at 2031–32.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2032.

<sup>50</sup> *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 713 (1974)).

<sup>51</sup> *Id.* Drawing on a D.C. Circuit case dealing with the Nixon tapes, the President also argued that the House had to “show that the financial information [was] ‘demonstrably critical’ to its legislative purpose.” *Id.* (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)).

<sup>52</sup> *Id.* at 2033.

<sup>53</sup> See *id.* at 2032–33.

<sup>54</sup> *Id.* at 2033.

<sup>55</sup> See *id.* at 2033–34. The Court explained that “[u]nlike [other] subpoenas, congressional subpoenas for the President’s information unavoidably pit the political branches against one another,” and “the interbranch conflict [in this case] d[id] not . . . vanish” merely because the subpoenas were issued to third parties and involved the President in his personal capacity. *Id.* at 2034.

<sup>56</sup> *Id.* at 2034.

<sup>57</sup> *Id.* at 2035.

<sup>58</sup> *Id.*

evidence that the subpoenas advance a legitimate legislative aim, and (4) the burdens the subpoena imposes on the President.<sup>59</sup> Having announced this standard, the Court vacated and remanded to the lower courts to assess the subpoenas in light of it.<sup>60</sup>

Justice Thomas dissented.<sup>61</sup> He argued that Congress has no power to subpoena personal documents belonging to the President or anyone else.<sup>62</sup> While Congress retains powers incident to those enumerated in the Constitution, Justice Thomas asserted that these adjunct powers exclude the ability to subpoena private documents.<sup>63</sup> Looking to history, Justice Thomas noted that Congress did not issue this kind of subpoena for the first century of its existence, and that the Committees' comparisons to the practices of the British Parliament were irrelevant because of differences in the two bodies' authority.<sup>64</sup> Even once Congress and the Court embraced legislative subpoenas of private documents, the practice remained controversial,<sup>65</sup> and subsequent Supreme Court opinions did not fully consider its constitutional or historical justifications.<sup>66</sup> Based on this historical practice, Justice Thomas would have held that Congress "should pursue [its] demands" for documents under its impeachment power.<sup>67</sup>

Justice Alito also dissented.<sup>68</sup> He argued that "legislative subpoenas for a President's personal documents are inherently suspicious," and would have required the House to describe the legislation it was considering, "spell out its constitutional authority" to pass the legislation, "justify the scope of the subpoenas" relative to its legislative need, and explain why it needed the subpoenaed information rather than other available information.<sup>69</sup>

The Court framed its holding as informed by past practice. In doing so, it drew on an interpretive method often relied on to settle disputes between coordinate branches, wherein historical precedent guides constitutional interpretation. Here, however, the link between past practice and the Court's answer to the constitutional question posed was less substantial than is typical of past cases. Had the Court followed its own past practice and looked for more granular guidance from history, it might have noted the role countervailing legal interests, conspicuously

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<sup>59</sup> *Id.* at 2036.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2047 (Thomas, J., dissenting).

<sup>62</sup> *Id.* at 2037.

<sup>63</sup> *See id.* at 2037–38.

<sup>64</sup> *See id.* at 2038–41.

<sup>65</sup> *Id.* at 2040.

<sup>66</sup> *Id.* at 2045.

<sup>67</sup> *Id.* at 2047.

<sup>68</sup> *Id.* at 2049 (Alito, J., dissenting).

<sup>69</sup> *Id.* at 2048. While Justice Alito sympathized with Justice Thomas's dissent, he "assume[d] for the sake of argument" that legislative subpoenas for private documents "are not categorically barred." *Id.*

absent here, have played in encouraging negotiations. But the Court failed to recognize this dynamic and thus imposed a standard unmoored from its purported historical backing.

In this case, the Court relied on a historically minded approach to constitutional interpretation often used in its separation of powers jurisprudence.<sup>70</sup> As these disputes usually take place in constitutional gray areas, reference to the past practice of the two political branches can serve as guidance where the text does not.<sup>71</sup> As Justice Frankfurter expressed in *Youngstown Sheet & Tube Co. v. Sawyer*:<sup>72</sup> “Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”<sup>73</sup> At bottom, the idea is that long-held congressional-executive practices can offer hints at constitutional meaning, hints that should then be heeded by courts.<sup>74</sup>

Here, the Court invoked this interpretive method with its focus on the fact that Congress and the Executive have tended to settle their own information disputes without calling on the judiciary. To this end, the Court took several pages to canvass a centuries-long history of push and pull, concluding that the history of extrajudicial negotiation must inform its holding on the subpoenas at issue.<sup>75</sup> The Court then used this rationale to reject the Committees’ proposed standard, as granting Congress such a broad subpoena power would allow it to “simply walk away from the bargaining table and compel compliance in court.”<sup>76</sup> In the Court’s eyes, this one-sided authority would undermine a historical practice of negotiation.<sup>77</sup> Although the Court was less explicit on this point, past practice seemed to factor into its rejection of the executive branch’s preferred standard as well, as that approach would have given the Executive an overly strong bargaining position, likewise discouraging negotiation.<sup>78</sup> This emphasis on past practice demonstrates that the Court intended to cast this decision within the line of cases from *Youngstown* onward that resolve interbranch disputes with reference to history.

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<sup>70</sup> See *id.* at 2029–31, 2033, 2035 (majority opinion) (analyzing historical practice); Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 59–60 (2017); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 538 (2016).

<sup>71</sup> See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–18 (2012).

<sup>72</sup> 343 U.S. 579 (1952).

<sup>73</sup> *Id.* at 610 (Frankfurter, J., concurring).

<sup>74</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

<sup>75</sup> See *Mazars*, 140 S. Ct. at 2029–31.

<sup>76</sup> *Id.* at 2034.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 2033.

But this tack was misleading. In reality, the Court's use of history in this opinion differed considerably from the way historical practice had come into play in past cases. To put the reasoning here in perspective, consider the particular role of past practice in a decision to which *Mazars* cited: *NLRB v. Noel Canning*.<sup>79</sup> There, the Court considered for the first time whether the Recess Appointments Clause applies to intrasession recesses or solely to intersession recesses.<sup>80</sup> Although the Court looked at the text of the clause, it also referenced the repeated practice of Presidents making recess appointments during intrasession breaks and the Senate declining to contest their validity.<sup>81</sup> Given the repeated occurrence of intrasession recess appointments, the Court held the Recess Appointments Clause applicable in such instances.<sup>82</sup> *Noel Canning* thus demonstrates the particular role history plays in constitutional interpretation: when the two political branches adhere to a certain interpretation of the Constitution, the Court is inclined to take up this interpretation as well.<sup>83</sup>

But this is not the way the Court used past practice in *Mazars*. The Court focused on the history of negotiations between Congress and the Executive. However, the fact that Congress and the President have negotiated over prior information disputes does not establish a clear historical practice that sets firm bounds on the extent of Congress's subpoena power against the President. We see this in the Court's own reasoning. In *Noel Canning*, had the Court held intrasession recess appointments unconstitutional, it would have directly rejected past practice by the two political branches.<sup>84</sup> In *Mazars*, by contrast, the Court declined to adopt Congress's broader view of its own subpoena power because it might *discourage* the two political branches from continuing their past practice.<sup>85</sup> Further, in past cases, the Court's ultimate holdings preserved past practice largely because they stated legal rules anchored in that practice.<sup>86</sup> Here, whatever the future efficacy of the four-factor test in preserving extrajudicial compromise, it is unclear that any of the four factors was actually drawn from past compromises.<sup>87</sup> The

<sup>79</sup> 134 S. Ct. 2550 (2014); see *Mazars*, 140 S. Ct. at 2031, 2034–35.

<sup>80</sup> *Noel Canning*, 134 S. Ct. at 2556.

<sup>81</sup> See *id.* at 2561–64.

<sup>82</sup> *Id.* at 2567.

<sup>83</sup> Or consider *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). There, the Court relied on consistent historical practice wherein Presidents recognized foreign nations without opposition from Congress to hold that the recognition power was rightly and exclusively a power vested in the executive branch. See *id.* at 2094; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–28 (1936) (declining to strike down a congressional delegation of authority to the Executive given “[t]he result of holding that the joint resolution here under attack is void and unenforceable . . . would be to stamp [the] multitude of comparable acts . . . as likewise invalid,” *id.* at 327).

<sup>84</sup> See *Noel Canning*, 134 S. Ct. at 2577.

<sup>85</sup> See *Mazars*, 140 S. Ct. at 2033–34.

<sup>86</sup> See, e.g., *Curtiss-Wright*, 299 U.S. at 327–28.

<sup>87</sup> See *Mazars*, 140 S. Ct. at 2035–36 (failing to cite past practice in laying out four factors).

Court did not earnestly try to detail how it got from a history of negotiation to a holding that courts need to consider burdens on the President or the “specificity of the subpoena’s request.”<sup>88</sup> Instead, the Court issued a holding that was perhaps meant to further past practice but that did not meaningfully draw on past practice for how to do so.

Had the Court sought out these lessons as it usually does, a clear pattern would have emerged: In each of the four examples cited by the Court to establish a past practice of negotiation,<sup>89</sup> the negotiations hashed out a balance between Congress’s investigatory prerogatives and the Executive’s claim to some sort of legal interest or privilege.<sup>90</sup> Although the Court’s two earliest examples predate an explicit concept of executive privilege, this ethos has been read into both Washington’s and Jefferson’s invocations of the public good or justice as a justification for withholding certain documents requested by Congress.<sup>91</sup> In fact, the executive branch itself, through the Office of Legal Counsel, has referenced both Washington’s and Jefferson’s responses to congressional subpoenas as some of the first instances in which the President relied on executive privilege to push back on congressional information requests.<sup>92</sup> More recently, the Executive remained recalcitrant against the House’s request for documents from the Reagan-era Department of the Interior in substantial part because it viewed several of these documents as privileged.<sup>93</sup> At the time, Attorney General William French Smith wrote: “In cases in which the Congress has a legitimate need for information . . . and the Executive Branch has a *legitimate, constitutionally recognized need to keep information confidential*, the courts have referred to the obligation of each branch to accommodate the legitimate needs of the other.”<sup>94</sup> It was then not just the virtue of extrajudicial resolution that contributed to these negotiations but also the understanding that the Executive had a “constitutionally recognized” countervailing interest. The Clinton Administration likewise felt justified refusing Congress’s requests

<sup>88</sup> *Id.* at 2036; *see id.* at 2035–36.

<sup>89</sup> *See id.* at 2029–31.

<sup>90</sup> *See* LOUIS FISHER, CONG. RSCH. SERV., RL 31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 16–18 (2003); History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. O.L.C. 751, 752–55, 780–81 (1982).

<sup>91</sup> *See* Mark J. Rozell, Feature, *The Law: Executive Privilege: Definition and Standards of Application*, 29 PRESIDENTIAL STUD. Q. 918, 920–22 (1999). Further, members of Congress at the time seemed to acknowledge the Executive’s legitimate prerogative to withhold information to serve the public interest. *See, e.g.*, 16 ANNALS OF CONG. 334 (1807) (“So long as I was induced to believe that by withholding correct information from the Legislature, the substantial interests of the nation would be more essentially subserved, . . . I acquiesced in its being withheld.”).

<sup>92</sup> *See* History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. O.L.C. at 751–55 (listing instances of presidential invocation of executive privilege).

<sup>93</sup> *See* Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31–32 (1981).

<sup>94</sup> *Id.* at 31 (emphasis added).

for information related to the Whitewater controversy on the basis of attorney-client privilege, and ended up turning over documents in exchange for conditions that would protect this privilege in the future.<sup>95</sup>

Thus, in every instance of negotiation cited by the Court in *Mazars*, the Executive justified its reluctance to hand over information requested by Congress by reference to an articulable interest or privilege of its own. The coordinate branches, then, were at least in part motivated to negotiate by the clash of two relevant interests: Congress's investigatory and oversight power and the Executive's desire to protect privileged information. Yet here it was undisputed that no established privilege applied.<sup>96</sup> Further, in one hundred pages of briefing, the plaintiffs did not invoke any other legal interest in withholding the specific subpoenaed information.<sup>97</sup> Rather, the crux of the Executive's argument here was not that it had a legal card to play commensurate to Congress's compulsory power, but that Congress lacked this compulsory power in the first place.<sup>98</sup> President Trump's claims came down to the bounds of Congress's legislative authority, *not* the balance of legitimate legislative and executive prerogatives against each other.<sup>99</sup> Yet it is the latter that informed the historical negotiations that shaped the Court's ruling. So, while the Court here handed down a standard ostensibly meant to reproduce past practice,<sup>100</sup> it failed to reckon with the substance of that practice in order to do so.

Overall, the Court in *Mazars* departed from its own past practice, which had looked to history as a substantive interpretive aid, rather than a general practice manual.<sup>101</sup> Though the Court claimed that the tendency of Congress and the Executive to negotiate around information disputes drove its decision, the majority did not take the time to inquire more deeply into the actual constitutional prerogatives that drove these disputes. A more thorough examination shows that these negotiations were undergirded by the presence of clashing legal directives on the part of the two separate branches. By contrast, in *Mazars*, not even the Executive claimed any authority to resist legitimate exercises of Congress's compulsory power. In this light, the history of compromise between the two political branches was irrelevant to the question presented in *Mazars* and does not support the standard the Court landed on. Without history to recommend it, the constitutional basis for the Court's separation of powers analysis in this case becomes harder to justify.

<sup>95</sup> See FISHER, *supra* note 90, at 16–18.

<sup>96</sup> See *Mazars*, 140 S. Ct. at 2028, 2032–33.

<sup>97</sup> See, e.g., Brief for Petitioners at 19–24, *Mazars*, 140 S. Ct. 2019 (2020) (Nos. 19-715, 19-760) (summarizing plaintiffs' arguments).

<sup>98</sup> *Id.* The Court did note the risk of congressional harassment of the Executive via the subpoena power, but it did not base its entire holding on this factor alone. See *Mazars*, 140 S. Ct. at 2034–35.

<sup>99</sup> See Brief for Petitioners, *supra* note 97, at 19–24.

<sup>100</sup> See *Mazars*, 140 S. Ct. at 2035.

<sup>101</sup> See, e.g., Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 670–71 (2016).