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Client Alert Commentary

Latham & Watkins White Collar Defense & Investigations Practice July 27, 2020 | Number 2779

US Supreme Court Decisions in Presidential Subpoena Cases: Implications for Private Parties

***The Court's recent rulings on state grand jury and congressional subpoenas identify important limitations on the purpose and scope of these investigative tools*.**

Key Points:

- In July 2020, the Court held that the President is not absolutely immune from a state grand jury subpoena, nor is a state subpoena for non-official papers of the President subject to a heightened standard.
- In a separate decision, the Court also held that congressional subpoenas for private information of the President must be subject to an analysis that appropriately accounts for separation of powers concerns.
- Although the decisions primarily concern constitutional issues involving the President, they also have direct implications for companies and individuals on the receiving end of state grand jury and congressional subpoenas. The cases reaffirm that subpoenas are searching investigative tools, but also identify a number of limitations on them. Notably, the Court suggested for the first time that recipients of congressional subpoenas retain common law and constitutional privileges that protect against the production of privileged materials.

Cases involving subpoenas for information about a sitting President do not frequently come before the Supreme Court. This Term, however, there were two of them. In *Trump v. Vance*, the Court considered for the first time the enforceability of a state grand jury subpoena seeking private information about the President. In *Trump* v. *Mazars*, the Court considered, also for the first time, the enforceability of congressional subpoenas seeking private information about the President. The cases are notable not simply because of the constitutional questions they raise. The cases have direct implications for companies and individuals on the receiving end of state grand jury and congressional subpoenas. The Court identified a number of limitations on the purposes for which these subpoenas may be issued, as well as restrictions on the types of materials they can request. And for the first time, the Court suggested that congressional subpoenas cannot be used to gain access to privileged material, including attorney-client communications.

Trump v. Vance: The State Grand Jury Subpoena Case

In August 2019, the New York County District Attorney's Office served a grand jury subpoena on Mazars, USA, LLP ("Mazars"), the President's personal accounting firm. The subpoena sought the production of

financial records, including tax returns dating back to 2011, related to the President and affiliated businesses.[1] The President filed suit in federal court in the Southern District of New York against Mazars and the district attorney, Cyrus R. Vance, to enjoin enforcement of the subpoena. The President's principal argument was that the Constitution gives him absolute immunity from a state criminal subpoena while he is in office.[2] The district court rejected the President's challenge and, on appeal, the Second Circuit did, as well.[3] The Supreme Court granted certiorari.

On July 9, 2020, the Court, by a 7-2 vote, affirmed the Second Circuit and rejected the President's claim of absolute immunity from a state criminal subpoena while serving in office. The Court emphasized that presidential compliance with criminal subpoenas has a long pedigree. Invoking the maxim that "the public has a right to every man's evidence," the Court noted that "every man" has "included the President of the United States" since the "earliest days of the Republic."[4] While prior history involved *federal* subpoenas to Presidents, the Court held that there was no reason to treat compliance with a state grand jury subpoena any differently. Specifically, the Court rejected the claim that immunity from such a subpoena is necessary to protect a President against diversion from duty, stigma, or harassment.[5] As to diversion, the Court previously refused to find that concerns over distraction justified presidential immunity from civil suits, explaining that "two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties."[6] As to stigma, the Court stated that "even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing the citizen's normal duty of furnishing information relevant to a criminal investigation."[7] And as to harassment, the Court noted that various provisions of state law and federal constitutional law already guard against vexatious or improper subpoenas. Among other things, the Court explained, "grand juries are prohibited from engaging in 'arbitrary fishing expeditions' and 'initiating investigations out of malice or an intent to harass.'" [8]

The Court also disagreed that a heightened standard should apply to a state grand jury subpoena seeking the President's private documents, because the President already has sufficient protections and "in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence."[9] For example, the Court noted that a state subpoena could be challenged on any grounds permitted by state law, which "usually include bad faith, undue burden, or breadth."[10]

Trump v. Mazars: The Congressional Subpoenas Case

In April 2019, three committees of the House of Representatives — the Committee on Financial Services, the Permanent Select Committee on Intelligence, and the Committee on Oversight and Reform — issued subpoenas to financial institutions and/or Mazars seeking financial information related to the President, his family, and/or their affiliated businesses. The President and others filed suits challenging the subpoenas in federal court in the District of Columbia and in the Southern District of New York. In each case, the President claimed that the subpoenas should be enjoined because they lacked a legitimate legislative purpose and violated the separation of powers. The President's requests for preliminary injunctions were ultimately denied in both courts, and those denials were upheld by the D.C. Circuit and the Second Circuit on the ground that the subpoenas served a "valid legislative purpose."[11] The Supreme Court granted certiorari.

On July 9, 2020, also by a 7-2 vote, the Supreme Court held that the lower courts failed to apply the appropriate standard when evaluating the validity of congressional subpoenas for the President's information. The Court explained that it had previously upheld the validity of congressional subpoenas in a variety of contexts, even though the Constitution does not expressly give Congress the power to investigate or issue subpoenas. As the Court explained, the "power of inquiry — with process to enforce

it — is an essential and appropriate auxiliary to the legislative function."[12] At the same time, the Court made clear that Congress's subpoena was not unlimited. For one thing, because congressional subpoenas function as an "adjunct to the legislative process," they must serve a "valid legislative purpose."[13] And such subpoenas may not be issued for "law enforcement purposes" – to "try" someone before a committee, to "expose for the sake of exposure," or for "the personal aggrandizement of the investigators or to 'punish' those investigated.'"[14]

What the Court had not previously decided is the standard to be applied to congressional subpoenas for the President's information. The House argued that the same general standard should apply to subpoenas for the President's information — that congressional subpoenas are proper if they "relate to a valid legislative purpose" or "concern a subject on which legislation could be had."[15] The Court rejected this approach, however, because it would leave "essentially no limits on the congressional power to subpoena the President's personal records," given that Congress has "broad legislative powers that touch a vast number of subjects."[16] The Court likewise rejected the President's proposal that the House meet the heightened standard applied to the Special Prosecutor's subpoena for President Nixon's tapes during Watergate because that would "risk seriously impeding Congress in carrying out its responsibilities," including the responsibility to legislate.[17] Ultimately, the Court advocated a "balanced approach" that involved consideration of a variety of factors, including Congress's ability to obtain the information from other sources, as well as the burdens on the President.[18] The Court explained that congressional subpoenas for such information — even when in the hands of third parties — "implicate weighty concerns regarding the separation of powers,"[19] and remanded the cases so the lower courts could apply a standard that sufficiently "accounts for those concerns."[20]

Implications of *Vance* and *Mazars* for Private Parties

Even though these cases primarily concerned the President, they nevertheless have significant implications for private parties because they shed further light on the power and limitations of subpoenas including as directed to private parties by Congress or state grand juries.

- **First, the Court reaffirmed that state grand jury and congressional subpoenas are powerful, searching tools.** In *Vance*, the Court stressed the grand jury's right to demand "every man's evidence," rejecting limitations that would "hobble the grand jury's ability to acquire all information that might possibly bear on its investigation" or impair "fair and effective law enforcement."[21] The Court also treated compliance with a subpoena as a "citizen's normal duty."[22] Similarly in *Mazars*, the Court emphasized the importance of ensuring that Congress have the power to "secure needed information in order to legislate,"[23] describing that power as "broad" and "indispensable."[24] Recipients of such subpoenas must understand that they are not to be ignored and that doing so could result in contempt or other sanctions.

- **Second, although powerful, both state grand jury and congressional subpoenas have important limitations.** In *Vance*, the Court underscored that grand jury subpoenas are subject to multiple restrictions rooted in state and federal law. They cannot be used as part of "arbitrary fishing expeditions" or "out of malice or an intent to harass."[25] And citizens can challenge them on any grounds permitted by state law, which "usually include bad faith, undue burden, or breadth."[26] Congressional subpoenas, too, have meaningful constraints. The Court explained that such subpoenas: 1) must serve a "valid legislative purpose"; 2) cannot be used "for the purpose of law enforcement," i.e., to "try someone before a committee for any crime or wrongdoing"; 3) may not "inquire into private affairs and compel disclosures"; and 4) may not be used "to expose for the sake of exposure."[27] These limitations are important reminders for companies receiving such subpoenas that simply because a subpoena demands certain information does not necessarily

mean that information must be turned over without further discussions with prosecutors, court action, or, in the case of congressional subpoenas, the kind of "negotiation and compromise" that has traditionally been a feature of congressional investigations (and not only those involving the President).[28]

- **Third, the Court suggested for the first time that Congress cannot use subpoenas to gain access to privileged material, including attorney-client communications.** The Court in *Mazars* emphasized that recipients of congressional subpoenas "retain their constitutional rights throughout the course of an investigation" and "have long been understood to retain common law and constitutional privileges." Importantly, the Court declared for the first time that "attorney-client communications" are protected against disclosure, among other types of protected information. Historically, congressional staff have been quick to advise recipients of congressional subpoenas that they cannot hide behind attorney-client privilege. The *Mazars* ruling appears to give companies and individuals an avenue to argue against production of privileged documents.

- **Finally, these cases make clear that any private party receiving a subpoena for the President's information must proceed with caution.** In *Mazars* and *Vance*, the subpoenas sought information that was in the hands of third parties, and the Court nevertheless analyzed the requests as though they were subpoenas directed to the President himself. Companies or individuals receiving demands for the President's information — even requests for commonly sought business records like phone or bank records — would be well-served to consult counsel and proceed cautiously.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Michael S. Bosworth
michael.bosworth@lw.com
+1.212.906.1221
New York

Erin Brown Jones
erin.brown.jones@lw.com
+1.202.637.3325
Washington, D.C.

Steven P. Croley
steven.croley@lw.com
+1.202.637.3328
Washington, D.C.

Roman Martinez
roman.martinez@lw.com
+1.202.637.3377
Washington, D.C.

Benjamin A. Naftalis
benjamin.naftalis@lw.com
+1.212.906.1713
New York

Jonathan C. Su
jonathan.su@lw.com
+1.202.637.1049
Washington, D.C.

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Endnotes

[1] App. to Pet. for Cert. 119a.

[2] *Trump v. Vance*, 591 U.S. ___ (2020) (slip op., at 2).

[3] *Id.* at 3 (citation omitted).

[4] *Id.* at 1 (citation omitted).

[5] *Id.* at 1.

[6] *Id.* at 13 (citation and internal punctuation omitted).

[7] *Id.* at 14 (citation and internal punctuation omitted).

[8] *Vance*, slip op. at 16 (citation omitted).

[9] *Id.* at 19.

[10] *Id.* at 20.

[11] *Id.* at 6 (citation omitted); J.A. 228a.

[12] *Id.* (citation and internal punctuation omitted).

[13] *Id.* (citation and internal punctuation omitted).

[14] *Id*. (citations and internal punctuation omitted).

[15] *Id.* at 14–15 (citation and internal punctuation omitted).

[16] *Id.* at 16.

[17] *Id.*

[18] *Id.* The Court also indicated that courts should "insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective" and pay attention to the "nature of the evidence offered by Congress to establish that a subpoena advances a legislative purpose."

[19] *Mazars*, slip op., at 18.

[20] *Id.*

[21] *Vance*, slip op. at 19 (citation and quotations omitted).

[22] *Id.* at 14 (citation omitted).

[23] *Mazars*, slip op. at 11 (citation and quotations omitted).

[24] *Id.* (citation omitted).

[25] *Vance*, slip op. at 16 (citation omitted).

[26] *Id.* at 20.

[27] *Mazars*, slip op. at 12 (citations and quotations omitted).

[28] *Id.* at 10.